



## Reports of Cases

### JUDGMENT OF THE COURT (Seventh Chamber)

11 June 2020\*

(Reference for a preliminary ruling — Taxation — Value added tax (VAT) — Directive 2006/112/EC — Articles 90 and 273 — Taxable amount — Reduction — Refusal — Non-payment — Taxable person who did not lodge a claim in insolvency proceedings commenced against the debtor — Principles of fiscal neutrality and proportionality — Direct effect)

In Case C-146/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vrhovno sodišče (Supreme Court, Slovenia), made by decision of 30 January 2019, received at the Court on 21 February 2019, in the proceedings

**SCT d.d.**, in liquidation,

v

**Republic of Slovenia,**

THE COURT (Seventh Chamber),

composed of P.G. Xuereb, President of the Chamber, T. von Danwitz and A. Kumin (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 26 February 2020,

after considering the observations submitted on behalf of:

- SCT d.d., in liquidation, by S. Pušenjak, odvetnica,
- the Slovenian Government, by T. Mihelič Žitko and V. Klemenc, acting as Agents,
- the Czech Government, by M. Smolek, O. Serdula and J. Vlácil, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and G. Galluzzo, avvocato dello Stato,
- the European Commission, by N. Gossement and M. Kocjan, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

\* Language of the case: Slovenian.

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 90 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, ‘the VAT Directive’).
- 2 The request has been made in proceedings between SCT d.d., a company in liquidation, and the Republic of Slovenia regarding the refusal to allow SCT to adjust the amount of value added tax (VAT) paid in respect of unrecovered claims, on the ground that that company failed to lodge those claims in insolvency proceedings commenced against the debtors.

### **Legal context**

#### ***EU law***

- 3 Article 90 of the VAT Directive provides:

‘1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

2. In the case of total or partial non-payment, Member States may derogate from paragraph 1.’

- 4 Article 273 of that 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.’

#### ***Slovenian law***

- 5 Article 39(2) to (4) of the Zakon o davku na dodano vrednost (Law on value added tax, ‘the ZDDV-1’) provides:

‘(2) In the case of cancellation, return of the goods or reduction of the price after the supply, the taxable amount shall be reduced accordingly. A taxable person may adjust (reduce) the amount of VAT declared if he informs the purchaser in writing of the amount of VAT in respect of which the purchaser has no right of deduction.

(3) A taxable person may also adjust (reduce) the amount of VAT declared if, on the basis of a court decision that has acquired the force of *res judicata* in insolvency proceedings which have concluded or on the basis of a procedure for reaching an arrangement with creditors brought successfully to completion, he will not be reimbursed or fully reimbursed. The taxable person may make a similar adjustment where he receives a final judicial decision suspending the enforcement proceedings or

another attestation from which it is clear that, in enforcement proceedings that have been concluded, he has not been reimbursed or fully reimbursed, or where the taxable person has not been reimbursed or has not been fully reimbursed because the debtor has been removed from the register of companies or other relevant registers or documents. Where a taxable person subsequently receives full or partial payment in respect of the supply of goods or services in relation to which he has claimed an adjustment to the taxable amount in accordance with this paragraph, he shall declare the VAT on the amount received.

(4) Notwithstanding the preceding paragraph, the taxable person may adjust (reduce) the amount of VAT declared but not paid on all admitted claims which he has lodged in a procedure for reaching an arrangement with creditors or in insolvency proceedings.'

- 6 Under Article 296 of the *Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju* (Law on financial transactions, insolvency proceedings and compulsory dissolution, 'the ZFPPIPP'):

'(1) Creditors must lodge, in the insolvency proceedings, all claims held against the insolvent debtor which arose before the commencement of those proceedings, with the exception of claims which, by law, need not be lodged.

...

(5) If the creditor does not comply with the time limit for lodging claims under ... paragraph 1, his claim against the insolvent debtor shall be extinguished and the court shall not allow the late lodging of the claim.

...'

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 7 SCT made an adjustment, in respect of the April 2014 tax year, to the VAT declared in the amount of EUR 272 471 on unpaid claims it held against two companies in respect of which insolvency proceedings had been definitively concluded in June 2013.
- 8 In the course of an inspection, the competent tax authority found that SCT had not lodged those claims in the insolvency proceedings concerned and that, under Article 296 of the ZFPPIPP, the claims had been extinguished. It concluded, on that basis, that the conditions for obtaining a VAT reduction were not satisfied.
- 9 SCT received confirmation on appeal that it follows from Article 39(3) of the ZDDV-1 that a taxable person is entitled to adjust the amount of VAT declared on the basis of a final decision concluding insolvency proceedings only if he has lodged his claim against the insolvent debtor. By lodging the claim, the taxable person also shows that the claim still exists, which is particularly important in the case of claims held against persons related to the taxable person, as is the case here.
- 10 SCT brought an action before the administrative court of first instance, which upheld the decisions of the tax authorities. That court relied on Article 90 of the VAT Directive. It stated that although paragraph 1 of that article provides that, in the case of non-payment after the supply takes place, the taxable amount is to be reduced accordingly, paragraph 2 allows Member States to derogate from paragraph 1. The Slovenian legislature made use of that derogation option.

- 11 In its appeal before the Vrhovno sodišče (Supreme Court, Slovenia), SCT submits that Article 39(3) of the ZDDV-1 does not derogate from the obligations laid down in Article 90(1) of the VAT Directive, but merely stipulates the conditions that must be satisfied in order for the taxable amount to be reduced. Thus, there is no correspondence between Article 39(3) of the ZDDV-1 and the application of Article 90(2) of the VAT Directive.
- 12 The Vrhovno sodišče (Supreme Court) states that Article 39(2) of the ZDDV-1, which lists the cases in which the taxable amount for VAT purposes is to be reduced, does not mention cases of non-payment. It is clear from this that the Slovenian legislature applied Article 90(2) of the VAT Directive and thereby laid down an exception to the right to a reduction of the taxable amount for VAT purposes in respect of such cases.
- 13 According to that court, it can, however, be inferred from Article 39(3) of the ZDDV-1 that the Slovenian legislature nevertheless established four cases, listed exhaustively, in which the taxable person is entitled to a reduction of the taxable amount even in the case of non-payment, which, in consequence, constitutes an 'exception to the exception'. Those exceptional cases arise where it is impossible for the taxable person to obtain full payment of his claim. However, in order for the right to a reduction of the taxable amount for VAT purposes to be recognised, a number of steps must be taken by the taxable person. Accordingly, the taxable person must demonstrate that it is impossible for him to recover his claim by means of official documents issued in relevant legal proceedings.
- 14 The Vrhovno sodišče (Supreme Court) considers that the limitation of the possibility of reducing the taxable amount for VAT purposes, resulting from Article 39 of the ZDDV-1, may be regarded as incompatible with Article 90(2) of the VAT Directive, since it does not permit a reduction to be applied in all cases in which non-payment of a claim has been definitively established, instead making such a reduction subject to additional conditions which must be satisfied by the taxable person.
- 15 In that context, the Vrhovno sodišče (Supreme Court) is uncertain whether, in the light of the principles governing the VAT system, it is nevertheless permissible, under the exceptions laid down in Article 90(2) of the VAT Directive, to refuse the right to a reduction of the taxable amount for VAT purposes in the case of non-payment where, although the taxable person has not participated in tax evasion or avoidance, he has not shown all due diligence in recovering his claim and ensuring payment of the VAT due to the State.
- 16 Taxable persons liable for VAT continue to be one of the cornerstones of the system for the collection of that tax, acting on behalf of the State to collect and pay over VAT received. If taxable persons were to be recognised as having the right to reduce the taxable amount for VAT purposes in all situations in which their claims are unpaid and, consequently, also where they fail to fulfil their obligations under the VAT system, the State would suffer a potential loss of revenue deriving from the declared VAT owed to it.
- 17 If it were possible to interpret the power granted to Member States by the EU legislature, under Article 90(2) of the VAT Directive, as allowing the national legislature to limit the possibility of reducing the taxable amount for VAT purposes on the ground of definitive non-payment, the referring court nevertheless wonders whether, under the VAT Directive, it is necessary to afford the taxable person the opportunity to demonstrate that his claims would not have been satisfied even if he had lodged them in insolvency proceedings or that there are other reasonable grounds for not lodging those claims.
- 18 Lastly, the Vrhovno sodišče (Supreme Court) raises the question whether Article 90(1) of the VAT Directive can be regarded as having direct effect, particularly where the national legislature has exceeded the scope of the possibilities for derogation established by Article 90(2) of the directive.

19 In those circumstances, the Vrhovno sodišče (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Is Article 90(2) of the VAT Directive to be interpreted as permitting derogation from the right to reduce the taxable amount for VAT purposes even with respect to cases of definitive non-payment, where such definitive non-payment is a consequence of a failure on the part of the taxable person liable for the VAT to take proper steps, such as lodging a claim in insolvency proceedings commenced against his debtor, as in the present case?
- (2) If such derogation from the right to reduce the taxable amount for VAT purposes is permissible, must there nevertheless be a right to reduce the taxable amount for VAT purposes on the ground of non-payment where the taxable person is able to demonstrate that, even if he had lodged a claim in the insolvency proceedings, it would not have been satisfied, or is able to demonstrate that there were reasonable grounds for not lodging a claim?
- (3) Does Article 90(1) of the VAT Directive have direct effect even if the legislature of a Member State has exceeded the scope of the possibilities for derogation established by Article 90(2)?’

## **Consideration of the questions referred**

### ***The first and second questions***

- 20 By its first and second questions, which should be considered together, the referring court asks, in essence, whether Article 90(2) of the VAT Directive must be interpreted as precluding legislation of a Member State under which a taxable person is refused the right to a reduction of the VAT paid in respect of an irrecoverable claim where he has failed to lodge that claim in insolvency proceedings commenced against the debtor, even though the taxable person has shown that, had he lodged the claim, he would not have been able to recover it, or that there were reasonable grounds for not lodging the claim concerned.
- 21 For the purpose of answering that question, it must be noted that Article 90(1) of the VAT Directive, which relates to cases of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, requires Member States to reduce the taxable amount for VAT purposes and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. That provision embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received, and the corollary of which is that the tax authorities may not collect an amount by way of VAT exceeding the tax which the taxable person received (judgment of 6 December 2018, *Tratave*, C-672/17, EU:C:2018:989, paragraph 29 and the case-law cited).
- 22 It is true that Article 90(2) of the VAT directive permits Member States to derogate from that rule in the case of total or partial non-payment of the transaction price. Thus, where the Member State concerned intended to apply that derogation, taxable persons cannot rely, under Article 90(1) of that directive, on a right to a reduction of their taxable amount for VAT purposes (see, to that effect, judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C-337/13, EU:C:2014:328, paragraph 23).
- 23 However, that option of derogation, which is strictly limited to situations of total or partial non-payment, is based on the notion that, in certain circumstances and because of the legal situation prevailing in the Member State concerned, non-payment of consideration may be difficult to establish or may only be temporary (judgment of 22 February 2018, *T-2*, C-396/16, EU:C:2018:109, paragraph 37 and the case-law cited).

- 24 Therefore, that option of derogation is intended only to enable Member States to counteract the uncertainty associated with recovery of the sums owed and does not resolve the question whether the taxable amount for VAT purposes may not be reduced in the case of definitive non-payment (order of 24 October 2019, *Porr Építési Kft.*, C-292/19, not published, EU:C:2019:901, paragraph 22 and the case-law cited).
- 25 To accept that it is possible for Member States to exclude, in such a case, any reduction of the taxable amount for VAT purposes would run counter to the principle of the neutrality of VAT, which means, inter alia, that the trader, as tax collector on behalf of the State, is entirely to be relieved of the burden of tax due or paid in the course of his economic activities which are themselves subject to VAT (order of 24 October 2019, *Porr Építési Kft.*, C-292/19, not published, EU:C:2019:901, paragraph 23 and the case-law cited).
- 26 The Court has held, in that regard, that a situation characterised by the definitive reduction of the debtor's obligations towards his creditors cannot be classified as 'non-payment' within the meaning of Article 90(2) of the VAT Directive (order of 24 October 2019, *Porr Építési Kft.*, C-292/19, not published, EU:C:2019:901, paragraph 25 and the case-law cited).
- 27 Thus, in such a situation, a Member State must allow the taxable amount for VAT purposes to be reduced where the taxable person is able to demonstrate that his claim against the debtor is definitively irrecoverable (order of 24 October 2019, *Porr Építési Kft.*, C-292/19, not published, EU:C:2019:901, paragraph 29).
- 28 It appears that the claims at issue in the main proceedings are definitively irrecoverable.
- 29 In accordance with Article 296(5) of the ZFPPIPP, those claims were extinguished because they were not lodged in the insolvency proceedings commenced against the debtors concerned. The failure to lodge the claims therefore resulted in a definitive reduction of the obligations of those debtors towards SCT. Moreover, and in any event, it is not disputed that the insolvency proceedings were definitively concluded and that SCT did not recover the claims held against its debtors at the end of those proceedings.
- 30 Therefore, a situation such as that at issue in the main proceedings cannot be classified as 'non-payment' within the meaning of Article 90(2) of the VAT Directive, but instead falls within Article 90(1) thereof, from which it follows that the Member State concerned is under an obligation to reduce the taxable amount for VAT purposes as the consideration has not been received by the taxable person.
- 31 In this instance, SCT was refused the right to a reduction of the taxable amount because it had not complied with the requirement under national law that such reduction is contingent on the taxable person having lodged his unrecovered claims in insolvency proceedings.
- 32 The Slovenian Government submits that such a requirement is based on Article 90(1) and Article 273 of the VAT Directive, which give Member States a degree of latitude in establishing the conditions and obligations which taxable persons must fulfil vis-à-vis the tax authorities in order to have the taxable amount reduced.
- 33 It should be noted that, in accordance with Article 90(1) of the VAT Directive, the taxable amount is to be reduced accordingly under conditions to be determined by the Member States.
- 34 In addition, pursuant to Article 273 of the VAT Directive, Member States may impose the obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, provided, inter alia, that that option is not relied on in order to impose additional invoicing obligations over and above those laid down in Chapter 3 of that directive.

- 35 Given that Article 90(1) and Article 273 of the VAT Directive do not, outside the limits laid down therein, specify either the conditions or the obligations which the Member States may impose, those provisions give the Member States a margin of discretion, inter alia, as to the formalities to be complied with by taxable persons vis-à-vis the tax authorities in order to ensure that the taxable amount is reduced (judgment of 6 December 2018, *Tratave*, C-672/17, EU:C:2018:989, paragraph 32 and the case-law cited).
- 36 However, measures to prevent tax evasion or avoidance may not, in principle, derogate from the rules relating to the taxable amount except within the limits strictly necessary for achieving that specific aim. They must have as little effect as possible on the objectives and principles of the VAT Directive and may not therefore be used in such a way that they would have the effect of undermining the neutrality of VAT (judgment of 6 December 2018, *Tratave*, C-672/17, EU:C:2018:989, paragraph 33 and the case-law cited).
- 37 Consequently, the formalities to be complied with by taxable persons in order to exercise, vis-à-vis the tax authorities, the right to reduce the taxable amount for VAT purposes must be limited to those which make it possible to provide proof that, after the transaction has been concluded, part or all of the consideration will definitely not be received. It is for the national courts to ascertain whether that is true of the formalities required by the Member State concerned (judgment of 6 December 2018, *Tratave*, C-672/17, EU:C:2018:989, paragraph 34 and the case-law cited).
- 38 In the present case, a requirement such as that at issue in the main proceedings — which makes the corresponding reduction of the taxable amount contingent, in the case of non-payment, on the taxable person having lodged the unpaid claim in insolvency proceedings commenced against the debtor — is, in principle, likely to contribute not only to ensuring the correct collection of VAT and the avoidance of tax evasion but also to eliminating the risk of loss of tax revenue, and thus pursues the legitimate objectives set out in Article 90(1) and Article 273 of the VAT Directive (see, to that effect, judgments of 26 January 2012, *Kraft Foods Polska*, C-588/10, EU:C:2012:40, paragraphs 32 and 33, and of 6 December 2018, *Tratave*, C-672/17, EU:C:2018:989, paragraphs 35 and 36).
- 39 As regards, in the first place, the objective of preventing tax evasion, even if a requirement such as that at issue in the main proceedings is capable of preventing detriment to the State where the inaction of the taxable person who has failed to lodge his claim in insolvency proceedings is the consequence of conduct suggesting collusion between that person and the debtor, it must be pointed out that the application of that requirement results in the systematic refusal of the right to a reduction of the taxable amount in the event of failure to lodge the claim, which is tantamount to a general presumption of tax evasion going beyond what is necessary to attain the objective of preventing tax evasion (see, by analogy, judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 31 and the case-law cited).
- 40 It should be added that, in the light of the documents before the Court, the facts in the main proceedings do not reveal any evidence of tax evasion or abuse.
- 41 As regards, in the second place, the objective of eliminating the risk of loss of tax revenue, it must be observed that, in so far as the taxable person's failure to lodge his claim in insolvency proceedings commenced against the debtor means that that claim, under Article 296(5) of the ZFPPIPP, ceases to exist in his dealings with the insolvent debtor, the taxable person necessarily loses the possibility of securing even the partial recovery of his claim, which may cause detriment to the Member State concerned.
- 42 In addition, as the Slovenian Government stated, without being challenged on this point, the mere lodging of a claim in insolvency proceedings cannot be regarded, in terms of financial and administrative burdens, as being excessively onerous.

- 43 However, where the taxable person shows that, even if he had lodged his claim, he would not have recovered it, excluding a reduction of the taxable amount and forcing the taxable person to pay an amount of VAT which he did not receive in the course of his economic activities goes beyond what is strictly necessary to achieve the objective of eliminating the risk of loss of tax revenue (see, to that effect, judgment of 8 May 2019, *A-PACK CZ*, C-127/18, EU:C:2019:377, paragraph 27). In that situation, the lodging of the claim concerned would not have avoided any additional detriment to the State.
- 44 Moreover, regarding the referring court's question as to whether the taxable person must be able to reduce the taxable amount also where there were reasonable grounds for not lodging the claim, it is not apparent from either the order for reference or the observations submitted to the Court that, in the instant case, SCT relied on such grounds in the tax procedure. Since there is no connection between that situation and the subject matter of the dispute in the main proceedings, there is no need to address it here.
- 45 In the light of all the foregoing considerations, the answer to the first and second questions is that Article 90(1) and Article 273 of the VAT Directive must be interpreted as precluding legislation of a Member State under which a taxable person is refused the right to a reduction of the VAT paid in respect of an irrecoverable claim where he has failed to lodge that claim in insolvency proceedings commenced against the debtor, even though the taxable person has shown that, had he lodged the claim, he would not have been able to recover it.

### *The third question*

- 46 By its third question, the referring court asks, in essence, what conclusions should be drawn from the situation in which a requirement that makes the corresponding reduction of the taxable amount contingent, in the case of non-payment, on the taxable person having lodged the unpaid claim in insolvency proceedings commenced against the debtor is contrary to Article 90(1) of the VAT Directive.
- 47 It should be noted that, when national courts apply domestic law, they are bound to interpret that law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and, consequently, to comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with EU law is inherent in the system of the Treaty on the Functioning of the European Union, since it enables national courts, for matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them (judgment of 6 July 2017, *Glencore Agriculture Hungary*, C-254/16, EU:C:2017:522, paragraph 34 and the case-law cited).
- 48 Where they are unable to interpret national law in compliance with the requirements of EU law, national courts, hearing a case within their jurisdiction, have, as an organ of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before them (judgment of 19 December 2019, *Deutsche Umwelthilfe*, C-752/18, EU:C:2019:1114, paragraph 42 and the case-law cited).
- 49 As pointed out in paragraph 33 above, Article 90(1) of the VAT Directive provides that, in the cases it refers to, the taxable amount is to be reduced accordingly under conditions which are to be determined by the Member States.
- 50 While that article grants the Member States a certain degree of discretion when adopting the measures to determine the amount of the reduction, the Court has held that that does not alter the precise and unconditional nature of the obligation to allow the reduction of the taxable amount in the cases

referred to by that article. It therefore fulfils the conditions for it to have direct effect (judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C-337/13, EU:C:2014:328, paragraph 34 and the case-law cited).

- 51 In the light of the foregoing considerations, the answer to the third question is that Article 90(1) of the VAT Directive must be interpreted as meaning that national courts are required, by virtue of their obligation to take all appropriate measures to ensure the implementation of that provision, to interpret national law in conformity with that provision or, if such an interpretation is not possible, to disapply any national legislation the application of which would lead to a result contrary to that provision.

### Costs

- 52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

1. **Article 90(1) and Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding legislation of a Member State under which a taxable person is refused the right to a reduction of the value added tax paid in respect of an irrecoverable claim where he has failed to lodge that claim in insolvency proceedings commenced against the debtor, even though the taxable person has shown that, had he lodged the claim, he would not have been able to recover it.**
2. **Article 90(1) of the Directive 2006/112 must be interpreted as meaning that national courts are required, by virtue of their obligation to take all appropriate measures to ensure the implementation of that provision, to interpret national law in conformity with that provision or, if such an interpretation is not possible, to disapply any national legislation the application of which would lead to a result contrary to that provision.**

[Signatures]