Delimiting the margin of maneuver of tax administrations in fighting VAT fraud

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1. Introduction

VAT fraud is as old as the VAT system itself. The amounts lost by the EU and Member States reach billions of euros. The evolution of the digital economy makes it easier to commit VAT fraud as, with the development of electronic tools, fraudsters can quickly operate before VAT administrations notice it. This situation is reinforced by the lack of an adapted legal framework. One of the main reasons for the important development of VAT fraud is indeed the VAT system itself which has allowed the fraudsters to conduct cross-border schemes impacting the economic resources of the Member States.

In order to tackle VAT fraud, the EU has developed some preventive tools through the years aiming at identifying the fraudulent behaviors as soon as possible. Member States also implemented national repressive measures to limit the economic impact of VAT fraud mostly based on Art. 273 of the VAT Directive. It provides that Member States may impose obligations that they deem necessary to prevent fraud

> 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.

EU law does not generally provide for harmonized procedural provisions,[1] and there is no clear EU competence regarding procedural matters.[2] The Court of Justice of the European Union (CJEU) has also confirmed the autonomy of the Member States to impose sanctions

> in the absence of harmonisation of European Union legislation in the field of sanctions applicable where conditions laid down by arrangements under that legislation are not complied with, Member States are empowered to choose the sanctions which seem to them to be appropriate.[3]

Member States can therefore implement procedures or measures (i) to impose additional requirements and/or (ii) to deny advantages normally granted by EU law. However, to avoid arbitrary, unnecessary, or disproportionate measures, the CJEU has developed wide case law that limits the margin of maneuver of the tax administrations. The CJEU's approach is interesting because its jurisprudence is related to proceedings and administrative sanctions, and it is applicable to all areas beyond VAT and even taxation.[4] It can therefore establish a general line of conduct for any kind of legislation.

The present paper will analyze recent case laws dealing with those questions and, most specifically: (i) the application of third-party liability; (ii) the respect of the principle of proportionality; (iii) the limitation of the ne bis in idem principle; and (iv) the use of evidence and the procedural autonomy of the Member States.

2. Third-party liability

2.1. Principle

In its combat against VAT fraud, a well-know "repressive" tool is undoubtfully the principle of third-party liability (also called joint and several liability principle).[5]

1 See M. Dassesse, *Autonomie procédurale des Etats membres et droit européen*, *R.G.F.* 2014, p. 5.

2 D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?: A Study on the "Functionalized Procedural Competence" of EU Member States*, (Berlin Heidelberg: Springer, 2010), pp. 12 and 13.

3 See, for instance, CJEU, 29 July 2010, C-188/09, *Profaktor*, EU:C:2010:454, para. 29.

4 See E. Traversa, *La giurisprudenza della Corte di giustizia UE in materia di sanzioni amministrative di diritto del lavoro: un "giacimento inesplorato" di tutele sostanziali e di garanzie procedimentali per i datori di lavoro in buona fede*, forthcoming.

5 For more information regarding this concept, see a.o. R. de la Feria, *Tax Fraud and Selective Law Enforcement*, Journal of Law and Society 2020, pp. 18-25; E. Ceci, *L'évolution dans la lutte contre les mécanismes dits de carrousels TVA*, R.G.F. 2010, pp. 16-28 ; R. de la Feria & R. Foy, *Italmoda: The Birth of the Principle of Third-Party Liability for VAT Fraud*, *British Tax Review* 2016, pp. 262-273, available on SSRN: https://ssrn.com/abstract=3372390, last accessed on 15 March 2023; R.F. van Brederode, *Countermeasures to Tax Fraud, Evasion and Avoidance: A Critical Review*, *in* R.F. van Brederode (ed) *Ethics and Taxation* (Singapore: Springer, 2020) pp. 330-333.

According to Art. 205 of the VAT Directive, Member States can decide that a person other than the person liable for the payment of VAT is to be held jointly and severally liable for its payment. Belgium, for example, had used this possibility by implementing third-party liability related to VAT fraud in the VAT Code (Arts. 51bis § 4 and 79, § 2 of the Belgian VAT Code) which provides solidarity in the payment of the VAT (Art. 51bis § 4 of the Belgian VAT Code) or a refund of deducted VAT (Art. 79, § 2 of the Belgian VAT Code) if the concerned VAT payer knew or should have known that non-payment of VAT is committed with the intention of VAT evasion.

The scope of application of this principle related to VAT fraud was developed by the CJEU playing its role to provide harmonized interpretations of the VAT Directive in order to avoid misinterpretations or multiple interpretations by the Member States. The fact that the CJEU had to deal with a third-party liability is the consequence of the way that tax administrations have decided to tackle VAT fraud. As already mentioned, tax administrations are having major difficulties in combating VAT fraud through an efficient preventive approach.[6] This situation is creating a major economic impact. In the main VAT fraud schemes (missing trader intra community (MTIC) fraud or carousel fraud), the VAT payer liable for the (unreported) VAT is often missing (because he disappeared or went bankrupt). Therefore, to limit economic losses caused by VAT fraud, the Member States have tried to recover VAT through other parties with very mixed results.[7] Tax administrations' approach took different ways by refusing the right of deductions or denying exemptions or VAT refunds.

In this context, the CJEU tried to frame the application of third-party liability allowing that VAT is supported by another party than the VAT payer liable of the concerned VAT in the case of VAT fraud. Initially developed through Optigen[8], Kittel[9], and F.T.I.[10] case laws, this principle provides the possibility to deny the right of a deduction, exemption, or refund of VAT to a VAT payer if the latter knew or should have known that he was involved in VAT fraud. The CJEU draws some (usual) guidelines mentioning that Member States can enact such third-party liability legislation, but this legislation must "*comply with the general principles of law which form part of the Community legal order and which include, in particular, the principles of legal certainty and proportionality.*"[11]

6 See a.o. M. Lamensch, E. Ceci, *VAT fraud: Economic impact, challenges and policy issues*, TAX3 Committee 2018, pp. 43-58.

7 See, for instance, R.F. van Brederode & S. Pfeiffer, *Combating Carousel Fraud: The General Reverse Charge VAT*, International VAT Monitor 2015, p. 147.

8 CJEU, 12 January 2006, C-354/03, *Optigen*, EU:C:2006:16.

9 CJEU, 6 July 2006, C-439/04, *Kittel*, EU:C:2006:446.

10 CJEU, 11 May 2006, C-384/04, *F.T.I.*, EU:C:2006:309.

11 CJEU, 11 May 2006, C-384/04, *F.T.I.*, EU:C:2006:309, para. 35.

The CJEU, however, went further regarding its concrete application. In the *Italmoda* case,[12] the Court provided the possibility to refuse the right of a deduction, exemption, or refund of VAT

> notwithstanding the fact that the evasion was carried out in a Member State other than that in which the benefit of those rights has been sought and that taxable person has, in the latter Member State, complied with the formal requirements laid down by national legislation for the purpose of benefiting from those rights.[13]

Moreover, the CJEU also mentioned that such a denial may apply

> even in the absence of provisions of national law providing for such refusal, if it is established, in the light of objective factors, that that taxable person knew, or should have known, that, by the transaction relied on as a basis for the right concerned, it was participating in VAT evasion committed in the context of a chain of supplies.[14]

This CJEU position gives an important margin of manoeuvre to tax administrations for the recovery of unreported VAT. As stated by some authors,[15] *Italmoda* significantly strengthened the possibility of actions against third parties in the case of VAT fraud, allowing to act even without national legislation providing such a principle.

2.2. Ferimet case law

Analysis of the decision

The CJEU has recently dealt with third-party liability in the *Ferimet* case.[16] The situation was the following.[17] Ferimet, Spanish company declared the acquisition of recovered materials (scrap metal) and stated that the concerned transaction was subject to a reverse charge procedure for VAT. During an audit, the Spanish tax administration discovered that the supplier that was mentioned on the invoice made by Ferimet did not, in fact, have the material and human resources required to supply the concerned goods thus concluding that the concerned invoice was false. For the Spanish tax administration, Ferimet tried to conceal the real supplier. Based on that situation, the Spanish tax administration decided to deny Ferimet the right to deduct VAT related to the concerned transaction.

Ferimet claimed that, as the purchase of the recovered materials had effectively taken place, the right to deduct VAT could not be refused. The mention of a fictitious supplier is considered by Ferimet as a "*purely formal issue.*"[18]

12 CJEU, 18 December 2014, C-131/13, *Italmoda*, EU:C:2014:2455.
13 CJEU, 18 December 2014, C-131/13, *Italmoda*, EU:C:2014:2455, para. 69.
14 CJEU, 18 December 2014, C-131/13, *Italmoda*, EU:C:2014:2455, para. 62.
15 See R. de la Feria & R. Foy, *Italmoda: The Birth of the Principle of Third-Party Liability for VAT Fraud*, *British Tax Review* 2016, pp. 262-273.
16 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910.
17 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, paras. 12 and 13.
18 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910 para. 14.

The Spanish jurisdiction followed the position of the Spanish tax administration, considering that

> the tax inspection had clearly demonstrated that the supplier was a sham, that the naming of that supplier could not be considered a purely formal matter, as it enables the lawfulness of the VAT chain to be checked, and that it therefore has an impact on the principle of tax neutrality. The court also noted that, while it is true that, under the reverse charge procedure, in principle there is no loss of tax revenue, the right to deduct VAT is nevertheless subject to material conditions being met, including a condition that the person mentioned should actually be the supplier.[19]

Ferimet lodged an appeal with the Spanish Supreme Court, and the latter decided to refer three questions to the CJEU. They were examined together by the Court and dealt with issue whether

> Directive 2006/112, read in conjunction with the principle of fiscal neutrality, must be interpreted as meaning that a taxable person must be refused the right to deduct VAT relating to the acquisition of goods supplied to that taxable person where he or she has knowingly mentioned a fictitious supplier on the invoice which that taxable person him- or herself has issued in respect of that transaction under the reverse charge procedure.[20]

As the Court stated that the raised questions are exclusively related to the exercise of the right of deduction, the CJEU had recalled several usual rules.[21] First, the CJEU confirmed that right to deduct VAT is subject to compliance with material and formal conditions. In that respect, as a valid invoice is essential to exercise the right to deduct VAT, the indication of the concerned supplier on the invoice is a formal condition for the exercise of that right where the VAT status of the supplier is a material condition. Then, regarding the fact that the true supplier was concealed by Ferimet and the consequences of that situation, the Court has recalled the importance to ensure the neutrality of taxation and that the right to deduct VAT is a fundamental principle of the common system of VAT that may, in principle, not be limited if material and formal conditions are met. Additional obligations imposed by the Member States must not go beyond what is necessary to achieve pursued objectives. Additionally, if the tax administration disposes of the information necessary to establish that the substantive requirements were met, it cannot impose additional conditions that will jeopardize the concerned right. The Court, however, highlighted that the position could be different if non-compliance with formal requirements prevents the production of conclusive evidence that the substantive requirements were satisfied. This might happen in the case of dissimulation of the identity of the true supplier. In that situation, the Court clearly insisted on the fact that the tax administration cannot limit its analysis on the invoice itself but has to take into account complementary information

19 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 15.
20 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 23.
21 See CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, paras. 25-39.

provided by the taxable person.[22] However, as the fulfillment of the condition to benefit from the right to deduct VAT is on the shoulder of the VAT payer, the tax authorities may thus require the taxable person to produce "*the evidence they consider necessary for determining whether or not the deduction requested should be granted.*"[23]

Then, regarding the burden of proof of the VAT status of the supplier, the Court mentioned that a distinction must be made between the establishment of a material condition to benefit from the right to deduct VAT and the determination of the existence of VAT fraud.[24] The Court first recalled its jurisprudence by mentioning that, to tackle VAT fraud, the tax authorities cannot, in principle, require the VAT payer wishing to deduct VAT to verify the status of taxable person of the supplier of the goods or services on the basis of which the right is exercised. However, the position is otherwise if that status is necessary for the purpose of verifying that this material condition of the right to deduct VAT is fulfilled. Therefore,

> as regards establishing the material conditions governing the right to deduct VAT, where the identity of the true supplier is not mentioned on the invoice relating to the goods or services on the basis of which the right to deduct VAT is exercised, a taxable person must be refused that right if, taking into account the factual circumstances and notwithstanding the evidence provided by that taxable person, the information necessary to verify that that supplier had the status of taxable person is lacking.[25]

Finally, the Court has provided a classical analysis of the application of third-party liability related to VAT fraud issues. The Court first recalled the importance of the objective to prevent tax evasion, avoidance, and abuse. Then, the Court insisted on the fact that, in situations when the material conditions of the right to deduct VAT are met, this right can be denied in case of fraud. That implies that the tax authorities establish the objective evidence to conclude that a VAT payer committed VAT fraud or knew or should have known that the concerned transaction was connected to such fraud (the establishment of a system of strict liability without fault going beyond what is necessary to preserve the Treasury's rights). In the case at hand, the Court stated that the fact of knowingly mentioning a fictitious supplier on an invoice is relevant information for demonstrating that a VAT payer was aware of its participation in VAT fraud (that statement having to be analyzed by national courts).[26] Regarding the denial of the right to deduct VAT, the Court confirmed that the existence or not of (i) a risk of loss of tax revenue, (ii) the benefit of a tax advantage, or (iii) the good or bad faith of the concerned taxable person is irrelevant.[27] However, the right to a deduction cannot

22 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 38.
23 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 38.
24 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, paras. 40-42.
25 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 44.
26 See CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, paras. 45-53.
27 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, paras. 56-58.

be refused on the grounds that the concealing of the true supplier's identity might jeopardize direct taxation by depriving the tax authorities of means of control. This is contrary to the fundamental principle constituted by that right and to the principle of fiscal neutrality.[28]

Based on all of these elements, the Court decided that a taxable person must be refused the right to deduct VAT when he has knowingly mentioned a fictitious supplier on the invoice that the taxable person himself has issued in two cases. First, if, taking into account the factual circumstances and the evidence provided by the VAT payer, the information necessary to verify that the true supplier had the status of taxable person lacking. Second, if it is established to the requisite legal standard that the VAT payer has committed VAT fraud or knew or ought to have known that the transaction relied on as a basis for the right of deduction was connected with such fraud.[29]

Comments

With this decision, the Court clarified the consequences of the absence of determination of the VAT status of a supplier regarding the right to deduct VAT. The Court distinguishes the fact very clearly, regarding the proof to provide, that this proof is related (i) to the establishment of a material condition governing the right to deduct VAT or (ii) to the determination of the existence of a VAT fraud.

Regarding the material conditions governing the right to deduct, the Court first insists on the importance of compliance with these conditions, allowing also (and logically) the denial of the right to deduct VAT if these conditions are not met. A taxable person cannot be required, in principle, to demonstrate that his supplier was a taxable person unless this is necessary to verify the compliance with the material conditions of the right of deduction. However, the Court highlights, as already assessed in its past jurisprudence, the importance of taking into account all of the factual circumstances and the elements provided by the concerned taxable person. The right to deduct cannot be refused if the data necessary to verify the VAT status of the supplier are available. However, in its means of action, as the compliance with the conditions for the benefit of the right to deduct VAT rests with the taxable person, the tax administration may require all of the evidence that it deems necessary to assess whether the right to deduct can be granted.

Regarding the possibility of refusing the right to deduct VAT, recalling the main criteria set out in its settled case law on the third-party liability principle, the Court confirms that it is possible to deny the right to deduct VAT even if the material conditions for this right are met if the concerned VAT payer knew or should have known that he was participating in a transaction connected to VAT

28 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 59.
29 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 60.

fraud. However, the Court recalls that the administration's powers are not unlimited (despite the wide margin of maneuver granted particularly following the *Italmoda* case). The application of the third-party liability leading to the refusal of a right (in the case at hand, the right of deduction) implies the demonstration by objective elements that the taxable person knew or should have known that he was taking part in fraud. The factual elements must be established to the requisite legal standard and not by assumptions.

This decision assesses the margin of maneuver of the tax authorities to tackle VAT fraud. In the absence of specific EU requirements, these authorities can establish any measure to combat this phenomenon even if it denies a fundamental right such as the right of deduction in the case of "involvement" in fraud. This decision, however, confirms that this wide margin of manoeuvre remains in any case subject to review by the courts. They will have to verify whether the administration's denial of a right was based on a precise and factual analysis of the situation and the demonstration that the conditions of third-party liability are indeed fulfilled. It is therefore essential for tax authorities to objectively demonstrate in the concerned cases the reasons to impose requirements or sanctions to a taxable person.

2.3. Kemwater ProChemie case law

Analysis of the decision

Another recent case where the CJEU dealt with the denial of the right to deduct VAT in the case of VAT fraud (or knowledge of participation in a fraudulent operation) is *Kemwater ProChemie*.[30] This case does not specifically deal with the third-party liability, but it is interesting to understand the balance between the conditions for the right to deduct VAT and the consequences of the presence or the absence of VAT fraud.

The factual elements can be summarized as follows.[31] Kemwater, a Czech company, deducted VAT paid to another Czech company (Viasat) regarding advertising services provided during a golf tournament. After a tax inspection, the Czech tax administration decided to refuse Kemwater the benefit to deduct the concerned VAT. It considered that the identity of the supplier and its status as a VAT payer were not established and that the scope of the concerned supplies were partially disputed. This decision was based on information received by the Czech tax administration. Viasat's managing director indeed declared that he did not know that the concerned services were provided to Kemwater and could not demonstrate that his company performed the concerned services. The Czech regional Court that dealt with the concerned case settled that

30 CJEU, 9 December 2021, C-154/20, *Kemwater ProChemie*, ECLI:EU:C:2021:989.
31 CJEU, 9 December 2021, C-154/20, *Kemwater ProChemie*, ECLI:EU:C:2021:989, paras. 13-22.

> the right of deduction is not conditional on proving that the taxable person has received the taxable supply from the supplier mentioned on the invoice relating to that supply and that the lack of evidence as to the identity of its actual supplier is decisive only if the tax authorities prove that that transaction is connected with tax fraud of which the taxable person exercising the right of deduction knew or ought to have known.[32]

The Czech court that apparently stated its reasoning in CJEU case law, therefore considered that, in the absence of a demonstration of involvement of the concerned VAT payer in a VAT fraud, he could not be denied his right to deduct VAT (even in case of lack of evidence regarding the VAT status of the supplier).

The Czech tax administration decided to bring an appeal of this decision before the Czech Supreme Administration Court which decided to refer the following questions to the CJEU:[33] (i) is it compatible with the VAT Directive to condition the right to deduct VAT on the obligation to prove that the taxable supply received was made by another specific taxable person; (ii) if the answer is positive, can the right to deduct be refused without establishing that the concerned taxable person knew or could have known that, by acquiring the goods or services in question, he was participating in tax fraud?

With the case handled by the CJEU being very similar to *Ferimet*, the CJEU referred to most of the principles mentioned in that case.[34] The Court therefore reminded that the VAT status of the supplier is a material condition for benefiting from the right to deduct VAT. The latter is a fundamental principle of the VAT system that cannot be limited with respect of the principle of VAT neutrality if the material conditions are satisfied (even if some formal conditions are lacking). As in *Ferimet*, the Court also insisted on the fact that (i) the tax administration must take into account complementary information provided by the taxable person and (ii) that the tax authorities may require the taxable person to produce evidence considered as necessary to determine if the right to deduct can be granted.[35]

Regarding the burden of proof of the VAT status of the supplier, the Court also highlighted the distinction to be made between the establishment of a material condition to benefit from the right to deduct VTA and the determination of the existence of a VAT fraud.[36] In the case at hand, however, the Court only focused on the fulfilment of the material condition. The Court confirmed that the VAT payer must establish, based on objective evidence, that its supplier has the status of taxable person "*unless the tax authorities have the information necessary to check that that material condition governing the right to deduct VAT is satisfied.*"[37]

32 CJEU, 9 December 2021, C-154/20, *Kemwater ProChemie*, ECLI:EU:C:2021:989, para. 15.
33 CJEU, 9 December 2021, C-154/20, *Kemwater ProChemie*, ECLI:EU:C:2021:989, par. 22.
34 See CJEU, 9 December 2021, C-154/20, *Kemwater ProChemie*, ECLI:EU:C:2021:989, paras. 23-41.
35 CJEU, 9 December 2021, C-154/20, *Kemwater ProChemie*, ECLI:EU:C:2021:989, para. 33.
36 CJEU, 9 December 2021, C-154/20, *Kemwater ProChemie*, ECLI:EU:C:2021:989, para. 36.
37 CJEU, 9 December 2021, C-154/20, *Kemwater ProChemie*, ECLI:EU:C:2021:989, para. 38.

The right to deduct VAT could not be denied without infringing the principle of fiscal neutrality when there is no doubt, based on factual circumstances, that the concerned supplier is necessarily a taxable person.[38] Therefore, when the supplier was not identified, the right to deduct VAT could only be denied if, based factual circumstances and notwithstanding the evidence provided by that taxable person, the information needed to verify the VAT status of the supplier is lacking.[39]

The CJEU has therefore concluded that the right to deduct VAT must be refused

> without the tax authorities having to prove that the taxable person committed VAT fraud or that he or she knew, or ought to have known, that the transaction relied on to establish the right of deduction was connected with such fraud, where, the true supplier of the goods or services concerned not having been identified, that taxable person fails to adduce proof that that supplier had the status of taxable person, provided that, taking into account the factual circumstances and the evidence produced by that taxable person, the information needed to verify that the true supplier had that status is lacking.[40]

Comments

Although this decision mainly concerns the question of compliance with material conditions to benefit from the right to deduct VAT, it is nevertheless interesting as it confirms that the tax administration may deny the application of this right even if the existence of VAT fraud (or the knowledge of "involvement" in a fraudulent operation) is not established. The lack of proof of the VAT status of the supplier as a material condition for the exercise of the right to deduct VAT may also lead to the denial of this right.

This is a confirmation of what the Court had already stated in *Ferimet*, also insisting (and this is important) on the fact that it is fundamental that, to deny the right of deduction, the factual circumstances and the evidence produced by the concerned taxable person do not allow verifying the VAT status of the supplier. It is essential to analyse the situation as a whole given that the right to deduct VAT is a fundamental right in the VAT system.

It is interesting to stress that, in the case at hand, the Czech court made an incorrect application of the CJEU case law related to the denial of the right to deduct VAT. The Czech Court had indeed considered that, based on the CJEU case law, the lack of evidence for identifying the supplier was not decisive for denying the right to deduct VAT if the tax administration did not prove that the concerned transaction was part of tax fraud (and the knowledge of the VAT payer of this fraud). The Czech court thus seemed to consider that the existence of tax fraud is the decisive condition to deny the right to deduct VAT. The Court recalled the

38 CJEU, 9 December 2021, C-154/20, *Kemwater ProChemie*, ECLI:EU:C:2021:989, para. 40.
39 CJEU, 9 December 2021, C-154/20, *Kemwater ProChemie*, ECLI:EU:C:2021:989, para. 41.
40 CJEU, 9 December 2021, C-154/20, *Kemwater ProChemie*, ECLI:EU:C:2021:989, para. 42.

principles to be applied in this case: The denial of the right to deduct VAT is not only related to the administration's demonstration of a situation of VAT fraud. The respect of the material conditions of this right to be verified in accordance with the whole situation of the case and the elements at disposal is as much fundamental in the application of this right.

2.4. HA.EN. case law

Analysis of the decision

A last recent decision by the CJEU regarding third-party liability is *HA.EN.*[41] This decision illustrates how the burden of proof as to the existence of a VAT fraud (or knowledge of participation in a fraudulent operation) lies with the tax administrations.

The factual situation can be summarized as follows.[42] In 2007, a Lithuanian vendor obtained a loan from a Lithuanian bank in order to carry out a real estate development activity. With an assignment of claim agreement concluded in 2015, HA.EN. acquired from the bank all of the monetary claims arising from the credit agreement concluded by the bank and the vendor and all of the rights established to secure the performance of obligations. In that respect, HA.EN. confirmed (i) having acknowledged the vendor's economic and financial situation and legal status and (ii) knowing that the vendor was insolvent and subject to administration proceedings. In 2016, the vendor issued an invoice transferring immovable property to HA.EN. HA.EN. entered the invoice in its accounts and deducted the input VAT set out on the invoice in its VAT declaration. In October 2016, the vendor was declared insolvent. In December 2016, HA.EN. requested the tax authority to refund excess VAT resulting from the deduction of the input VAT related to the transfer of the immovable property. After a tax inspection, the tax administration discovered that

> in entering into the transaction for acquisition of the immovable property at issue although it knew or should have known that the vendor would not pay the VAT generated by that transaction into the public purse, HA.EN. had acted in bad faith and committed an abuse of rights.[43]

The right to deduct the concerned input VAT has denied to HA.EN.

The Supreme Administration Court of Lithuania decided to refer the following question to the CJEU:[44]

41 CJEU, 15 September 2022, C-227/21, *HA.EN.*, EU:C:2022:687
42 See CJEU, 15 September 2022, C-227/21, *HA.EN*, EU:C:2022:687, paras. 10-16.
43 CJEU, 15 September 2022, C-227/21, *HA.EN*, EU:C:2022:687, para. 16.
44 CJEU, 15 September 2022, C-227/21, *HA.EN*, EU:C:2022:687, para. 23.

> is [the VAT Directive], in conjunction with the principle of fiscal neutrality, to be interpreted as prohibiting or not prohibiting a practice of national authorities under which the right of a taxable person to deduct input VAT is denied where that person, when acquiring items of immovable property, knew (or should have known) that the supplier, due to his insolvency, would not pay (or would not be able to pay) the output VAT into the public purse?

The Court had to therefore analyse if a purchaser can be denied its right to deduct VAT if he knew or should have known that its vendor was in financial difficulty/ insolvent which could imply an absence of payment of VAT by the vendor to the Member State.[45]

Recalling the fact that (i) the right to deduct VAT for taxable persons is a fundamental principle of the VAT system and that (ii) the question of whether the supplier has paid VAT to the Member State has no influence on the right of a taxable person to deduct input VAT[46], the Court first analysed the concerned situation in light of the combat against VAT fraud.[47] Being an objective encouraged by the VAT Directive, EU law cannot be relied on for abusive or fraudulent ends. The right to deduct VAT can be denied if objective evidence demonstrates that this right is relied on for fraudulent or abusive ends. The Court, however, has referred to the conclusions made in *Ferimet*.[48] The tax authorities have to establish

> the objective evidence from which it may be concluded that the taxable person committed fraud or an abuse of rights or knew or should have known that the transaction relied on as a basis for the right of deduction was connected with fraud. It is for the national courts subsequently to determine whether the tax authorities concerned have established the existence of such objective evidence.

By application of this jurisprudence, the analysis to be done, according to the Court, is the following.[49] In the case of immovable property sold by a company in financial difficulty, can the national tax authorities deny the purchaser of that property the right to deduct input VAT considering that, because of its knowledge of that financial difficulty (and the potential absence of payment of VAT to the Member State), he knew or should have known that he was participating in a transaction related to VAT fraud or was committing an abuse of rights.

Focusing only on the relevant question (for the purpose of this paper) related to VAT fraud, we can mention that the Court first recalled that "*the mere failure to pay duly declared VAT cannot constitute VAT fraud, irrespective of whether such a failure is intentional or not*".[50] Therefore, the fact that a taxable person (i) faced

45 CJEU, 15 September 2022, C-227/21, *HA.EN*, EU:C:2022:687, para. 24.
46 CJEU, 15 September 2022, C-227/21, *HA.EN*, EU:C:2022:687, paras. 25-26.
47 CJEU, 15 September 2022, C-227/21, *HA.EN*, EU:C:2022:687, para. 27.
48 CJEU, 15 September 2022, C-227/21, *HA.EN*, EU:C:2022:687, para. 28.
49 CJEU, 15 September 2022, C-227/21, *HA.EN*, EU:C:2022:687, para. 29.
50 CJEU, 15 September 2022, C-227/21, *HA.EN*, EU:C:2022:687, para. 32.

financial difficulties, (ii) sold one of its assets in a statutory compulsory sale procedure in order to settle its debts, (iii) declared VAT due on that basis but (iv) were unable to pay it because of those difficulties, cannot be considered as committing VAT fraud only on those bases. The Court then logically stated that

> consequently, the purchaser of such an asset, a fortiori, cannot be criticised in such circumstances on the basis that he or she knew or should have known that, in acquiring that asset, he or she was participating in a transaction connected with VAT fraud.[51]

Comments

Although this decision does not deal specifically with third-party liability, the analysis related to the knowledge that a taxable person must have of the situation that could grant him its right to deduct VAT is interesting to highlight.

The Court reminded of the balance to be made between two important VAT principles, i.e. the respect of the right to deduct VAT and the prevention of tax evasion, tax avoidance, and abuse. In this context, the Court clarifies once again that, when the tax administration wants to deny the right to deduct VAT in situations related to potential VAT fraud, it must analyze the factual situation as a whole to determine whether the right to deduct VAT is being relied on for fraudulent or abusive ends. To this end, the tax authorities must therefore establish in a sufficiently precise and objective manner that the taxable person committed fraud or an abuse of rights or knew or should have known that the transaction relied on for its right of deduction was connected with fraud. Applied to the case at hand, the Court analyzed whether the knowledge of a supplier's financial difficulties could imply that the taxable person knew or should have known that he was participating in a transaction involving fraud. The Court concluded in the negative considering that the supplier could not be considered in this case as a fraudster and, a fortiori, neither could the taxable person who claimed the benefit of the right to deduct. This reminds us that, in the analysis of the denial of the right to deduct VAT, the demonstration of VAT fraud of the supplier and its knowledge by the taxable person are indispensable presuppositions for the implementation of the principle of third-party liability by the tax authorities.

2.5. Aquila

Analysis of the decision

The CJEU has again recently dealt with third-party liability in the *Aquila* case.[52]

The situation was the following.[53] Aquila is active as an intermediary for the wholesale of foodstuffs, beverages, and tobacco products. After some tax controls,

51 CJEU, 15 September 2022, C-227/21, *HA.EN*, EU:C:2022:687, para. 33.
52 CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950.
53 CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950, paras. 16-23.

the Hungarian tax administration concluded that Aquila participated in VAT carrousel fraud, This was namely based on the fact that, according to the tax administration, Aquila had actively participated in a chain of invoiced transactions in order to obtain an illegal tax advantage and knowingly avoided taxation. For the tax administration, Aquila did not act with sufficient diligence. Aquila criticized this position considering that the Hungarian tax administration had a preconceived idea of the situation and invoked the absence of evidence regarding upstream fraud.

Aquila decided to refer different questions to the CJEU, some of them being related to fraud issues and third-party liability:[54]

1. If the tax administration establishes the existence of a circular invoicing chain, is this in itself sufficient objective evidence to demonstrate tax fraud, or must the tax administration in such a case also provide which member(s) of the chain committed the tax fraud and the means of that conduct?
2. If the tax administration establishes the active participation of the taxpayer in the tax fraud, is it sufficient that the gathered evidence demonstrates that the taxpayer could have known with due diligence that he was participating in the tax fraud and not that he knew that he was participating in the tax fraud because he participated in it through active behaviour?

The Court first recalled its settled case law (and the recent *Ferimet* case).[55] According to this case-law, the right to deduct should be denied not only when fraud is committed by the VAT payer itself but also when, based on objective elements and a global analysis of the concerned situation, it is established that the concerned VAT payer knew or should have known that the transaction relied on for its right of deduction was connected with fraud. The establishment of a system of strict liability without fault would go beyond what is necessary to preserve the treasury's rights. The Court therefore assessed that the tax authority that intends to deny the right to deduct VAT must establish the requisite legal standard in accordance with the rules of evidence laid down by national law and without undermining the effectiveness of Union law both (i) the objective elements establishing the existence of the VAT fraud itself and (ii) those establishing that the VAT payer committed that fraud or that he knew or should have known that he was participating in a transaction involving fraud.[56]

The Court applied those recalled principles to the case at hand.[57] The existence of a circular invoicing chain can be considered as serious evidence of fraud that has to be taken into account in the global analysis of the situation. However, to prove

54 CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950, para. 24.
55 See CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950, paras. 27-32.
56 CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950, para. 33.
57 See CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950, paras. 35-37.

the existence of tax fraud, the competent authorities cannot limit their analysis to the demonstration of the existence of a circular invoicing chain. The tax authorities must determine the concrete elements establishing the fraud and prove that the concerned tax payer committed fraud or that he knew or should have known that he was participating in a transaction involved with a fraud.

The Court also recalled what needs to be proved to establish that the VAT payer (i) knew or (ii) should have known that he was participating in a transaction involving fraud.[58] In the first situation, the only positive act that can justify the denial of the right to deduct VAT is the acquisition of the concerned goods or services related to the operation chain. In the second situation, it is the failure to act with due diligence that leads to the denial of the right to deduct. Therefore, the demonstration of active participation of the concerned VAT payer in the fraud is not compulsory. The proof of the fact that the VAT payer should have known that he was participating in VAT fraud is sufficient to establish the participation of this VAT payer in VAT fraud and therefore justify the denial of the right to deduct VAT. The Court also mentioned that the mere fact that the members of the supply chain knew each other can be taken into account in the overall assessment of all of the elements and factual circumstances of the case but that this does not constitute a sufficient element to establish the participation of the taxable person in the fraud.[59]

Finally, the Court provided that, in the case of indications of fraud, the VAT payer may be expected to exercise greater diligence. However, the VAT payer cannot be required to carry out complex and thorough verifications such as those that the tax administration has the means to carry out.[60]

Comments

With this decision, the Court made a uniform application of the principles recently recalled in the *Ferimet* case. The Court has also specifically mentioned that the mere circular nature of the invoicing chain is not sufficient to establish fraud. The tax authorities need to prove that the concerned taxpayer committed fraud or that he knew or should have known that he was participating in a transaction involving fraud.

Moreover, the Court also insisted on what is required from the tax authorities to establish that the VAT payer knew or should have known that he was participating in a transaction involving fraud. The Court recalled that the demonstration of active participation in the fraud is not compulsory to deny the right to deduct VAT. The third-party liability is also applicable when the VAT payer failed to act with due diligence. The VAT payer should have known that, if he had exercised the diligence that might be required of him, he was participating in a transaction

58 See CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950, paras. 40-43.
59 CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950, para. 44.
60 CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950, para. 52.

involving fraud. Regarding this due diligence that can be required from the VAT payer, the Court also insisted on the fact that it cannot be required to carry out complex and thorough verifications such as those carried out by the tax administration during an audit.

3. Principle of proportionality

In the margin of maneuver of tax administrations to tackle VAT fraud, the CJEU has often referred to the fact that the required measures have to respect the principle of proportionality. This principle is generally discussed by the CJEU when the implementation of national administration sanctions is discussed.[61]

As previously stated, in the application of Art. 273 of the VAT Directive, the Member States may impose requirements that they deem necessary to prevent evasion. As no conditions or obligations are specifically provided, Member States have a margin of appreciation to choose what they consider the most appropriate measures. However, the CJEU stated that Member States must exercise their power in accordance with EU law and its general principles and, in particular, in accordance with the principle of proportionality.[62] The concerned measures that are taken to effectively attain the pursued objectives and to preserve the rights of the public exchequer as effectively as possible must not go further than what is necessary for that purpose and must cause the least possible detriment to the objectives and principles laid down by the relevant EU legislation.[63] Moreover, the CJEU has clearly stated in multiple case law that measures creating a general presumption of tax evasion are going beyond what is necessary to attain the objective of preventing tax evasion.[64] This avoidance of general presumption of tax evasion could be put in parallel with the prohibition of a flat rate fine; such a measure is generally considered by the CJEU as disproportionate.[65]

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61 See E. Traversa, *La giurisprudenza della Corte di giustizia UE in materia di sanzioni amministrative di diritto del lavoro: un "giacimento inesplorato" di tutele sostanziali e di garanzie procedimentali per i datori di lavoro in buona fede*, forthcoming.

62 See a.o. CJEU, 7 December 2000, C-213/99, *Andrade*, EU:C:2000:678, para. 20; CJEU, 5 October 2016, C-576/15, *Maya Marinova*, EU:C:2016:740, para. 44; CJEU, 26 April 2017, C-564/15, *Tibor Farkas*, EU:C:2017:302, para. 59; CJEU, 21 November 2018, C-648/16, *Fortunata Silvia Fontana*, EU:C:2018:932, para. 35; CJEU, 15 April 2021, C-935/19, *Grupa Warzywna*, EU:C:2021:287, para. 26.

63 See a.o. CJEU, 11 May 2006, C-384/04, *F.T.I.*, EU:C:2006:309, para. 30; CJEU, 27 September 2007, C-409/04, *Teleos*, EU:C:2007:548, paras. 52-53; CJEU, 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij*, EU:C:2011:871, paras. 21-22.

64 See a.o. CJEU, 26 September 2000, C-478/98, *Commission/Belgique*, EU:C:2000:497, para. 45; CJEU, 12 September 2006, C-196/04, *Cadbury Schweppes*, EU:C:2006:544, para. 50; CJEU, 5 July 2012, C-318/10, *SIAT*, EU:C:2012:415, para. 38; CJEU, 7 September 2017, *Eqiom SAS and Enka SA*, C-6/16, EU:C:2017:641, para. 31; CJEU, 11 June 2020, *SCT*, C-146/19, EU:C:2020:464, para. 39; CJEU, 18 March 2021, C-49/20, *P.*, EU:C:2022:770, para. 28.

65 See E. Traversa, *La giurisprudenza della Corte di giustizia UE in materia di sanzioni amministrative di diritto del lavoro: un "giacimento inesplorato" di tutele sostanziali e di garanzie procedimentali per i datori di lavoro in buona fede*, forthcoming. See also CJEU, 9 February 2012, C-210/10, *Urban*, EU:C:2012:64, para. 41.

According to the principle of proportionality, therefore, a measure cannot exceed what is necessary to achieve the pursued objective (i.e. the combat against VAT fraud). This constitutes an important element to be kept in mind by the tax administrations for the implementation of repressive measures.

3.1. W.G. case

Analysis of the decision

The CJEU has recently dealt with those questions in *W.G.*,[66] most specifically regarding the prohibition of a general presumption of tax evasion.

The factual situation was the following.[67] W.G., rearing broiler chickens on an agricultural holding jointly owned with her spouse, gave up her previous flat-rate farmer status. Her spouse, however, did not take that step. Unfortunately, the Polish tax authorities considered that the renunciation by W.G. to the flat-rate farmer status was also applicable to her spouse. The question was therefore to know

> whether, in the context the joint agricultural holding of a married couple, one of the spouses may be taxed under the normal VAT arrangements while the other may benefit from the flat-rate scheme for farmers, or whether the giving up of the flat-rate scheme by one necessarily produces effects for the other.

It is, in essence, the question that was asked to the CJEU.

First, the CJEU confirmed that each of the spouses is considered as a taxable person based on the definition of the notion of taxable person and the settled case law.[68] The fact that the spouses manage the resources of the rearing of poultry separately, being distinct from an economic, financial, and organizational point of view, may constitute relevant evidence.[69]

Then, the CJEU had to deal with the application by the Polish Member State of a measure where the renunciation by one of the spouses to the benefit of the flat-rate scheme for farmers causes the other spouse the loss of his flat-rate farmer status.[70] The referring court stated that this measure was intended to prevent abuses that may be associated with the division of an agricultural holding into several entities (one benefiting from a specific VAT regime while the other could deduct input VAT under a normal regime). In its analysis of this situation, the Court recalled the objective to combat VAT fraud but clearly referred to its jurisprudence related to the respect of proportionality and to avoid measures that would create a disproportionate general presumption of tax evasion.

66 CJEU, 24 March 2022, C-697/20, *W.G.*, EU:C:2022:210.
67 CJEU, 24 March 2022, C-697/20, *W.G.*, EU:C:2022:210, paras. 10-21.
68 CJEU, 24 March 2022, C-697/20, *W.G.*, EU:C:2022:210, paras. 22-24.
69 CJEU, 24 March 2022, C-697/20, *W.G.*, EU:C:2022:210, para 25.
70 See CJEU, 24 March 2022, C-697/20, *W.G.*, EU:C:2022:210, paras. 30-31.

Therefore, the CJEU concluded that

> the practice at issue in the main proceedings, in so far as it has, in the case of the registration of one of the spouses under the normal VAT arrangements, in any event the consequence that the other spouse loses the status of flat-rate farmer, is ultimately tantamount to a general presumption of tax evasion which must be regarded as disproportionate for attaining the objective of preventing tax evasion.[71]

The CJEU considered that the tax administration, in such circumstances, has to determine, based on the situation at hand, if the loss of flat-rate farmer status on the part of the other spouse is necessary in order to counter risks of abuse and tax evasion. That risk could be avoidable, for instance, by allowing the spouse to produce appropriate evidence showing that each spouse carries out his activity independently.[72]

The Court therefore decided, in the case at hand, specifically regarding risks of fraud or abuse, that the VAT Directive did not preclude that the choice of one spouse to place his activity under the normal VAT arrangements results in the other spouse losing the status of flat-rate farmer. After examination of the specific situation, "*such an effect is necessary in order to counter the risk of abuse and tax evasion which cannot be addressed by the spouses' production of appropriate evidence.*"[73]

Comments

This decision is, first of all, interesting because it confirms that, when the tax administration implements measures to tackle VAT fraud, it cannot, despite the objective recognized and encouraged by the VAT Directive, create a general presumption of fraud. This would be considered as disproportionate to achieve the legitimate objective to tackle VAT fraudulent behaviors.

In the case at hand, the Court concluded that the concerned measure could be perfectly applicable as long as it does not lead to a general presumption of fraud. However, that measure was disproportionate because it led, in any case (without the fulfilment of conditions or the establishment of a fault), to the loss of the VAT status of a taxable person not directly concerned by the situation analyzed by the tax administration. However, the Court concluded that such a measure is acceptable if, after a concrete examination of the situation, it is necessary to counter risks of abuse and fraud that cannot be ruled out by other evidence. In the implementation of its anti-fraud measures, the tax authorities must avoid requirements that infringe the rights of taxable persons without leaving to the latter the possibility, depending on the situation and the elements at their disposal, to demon-

71 CJEU, 24 March 2022, C-697/20, *W.G.*, EU:C:2022:210, para. 32.
72 CJEU, 24 March 2022, C-697/20, *W.G.*, EU:C:2022:210, para. 33.
73 CJEU, 24 March 2022, C-697/20, *W.G.*, EU:C:2022:210, para. 37.

strate that the concerned right cannot be denied. However, the administration does have the possibility of implementing measures that, taking into account these considerations, allow avoiding risks of fraud.

3.2. MC case

Analysis of the decision

The *MC* case concerns the application of the principle of proportionality.[74]

The situation can be summarized as follows.[75] MC is a Bulgarian private person who was the manager of a Bulgarian commercial company. In 2015, enforcement proceedings for the recovery of debts were brought against the concerned company, namely regarding unpaid VAT. As it was assessed at some point that those debts would be difficult to recover from the company, the Bulgarian tax administration tried to establish MC's joint and several personal liability based on a specific provision of the Bulgarian legislation. The Bulgarian court questioned the compatibility of this Bulgarian system of joint and several liability and decided to refer different questions to the CJEU, including a question related to the proportionality of the concerned measure:

> Is the national legal instrument provided for in Art. 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?[76]

The Advocate General considered that the general joint and several liability applied in the case at hand did not come within the scope of EU law, and that the Court has no jurisdiction to answer to the raised questions.[77] The Court, however, decided that the concerned system of joint and several liability fell within the scope of Art. 273 of the VAT Directive and that "*the questions submitted by the referring court should be understood as seeking an interpretation of Art. 273 of the VAT Directive and of the principle of proportionality.*"[78] The Court also mentioned that the wording of Art. 273 of the VAT Directive does not provide that the obligations laid down by the Member State could only apply to persons subject to VAT (in the case at hand, the application of the joint and several liability was related to the manager who was not a VAT payer).[79] According to the Court:

74 CJEU, 13 October 2022, C-1/21, *MC*, EU:C:2022:788.
75 CJEU, 13 October 2022, C-1/21, *MC*, EU:C:2022:788, paras. 12-36.
76 CJEU, 13 October 2022, C-1/21, *MC*, EU:C:2022:788, para. 37.
77 See Opinion of Advocate General Kokott, 2 June 2022, C-1/21, *MC*, EU:C:2022:435, para. 72.
78 CJEU, 13 October 2022, C-1/21, *MC*, EU:C:2022:788, paras. 66-67.
79 CJEU, 13 October 2022, C-1/21, *MC*, EU:C:2022:788, para. 63.

> The obligation on the Member States to take all measures necessary to ensure collection of all VAT and to counter evasion, referred to in paragraph 60 above, may, in certain circumstances, require a Member State to impose penalties on non-taxable persons who take part in decision-making within a taxable legal person, otherwise the effectiveness of such measures would be undermined.[80]

Focusing on the questions related to unpaid VAT amounts,[81] the CJEU has therefore analyzed if, based on the factual circumstances, Art. 273 of the VAT Directive and the principle of proportionality preclude national legislation providing for a system of joint and several liability for a legal person's VAT debts.[82] Recalling the margin of discretion of Member States regarding measures to tackle VAT fraud, the Court confirmed that such a system of joint and several liability helps to prevent evasion. As confirmed by the CJEU's jurisprudence, in the implementation of such measures, Member States must respect EU law and its general principles which also concerns the principle of proportionality. Regarding the latter, the Court recalled its classic vision, mentioning that

> Member States must employ means which, whilst enabling them effectively to attain the objectives pursued by their domestic laws, cause the least possible detriment to the objectives and principles laid down by the relevant EU legislation. Therefore, while it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the public exchequer as effectively as possible, they must not go further than is necessary for that purpose.[83]

In accordance with those principles and the CJEU's previous jurisprudence, a system of strict joint and several liability (without any fault committed by the concerned person) go beyond what is necessary to preserve the public exchequer's rights:

> imposing responsibility for paying VAT on a person other than the person liable to pay that tax, without allowing him or her to escape liability by providing proof that he or she had nothing whatsoever to do with the acts of the person liable to pay the tax must […] be considered contrary to the principle of proportionality. It would clearly be disproportionate to hold that person unconditionally liable for the shortfall in tax caused by acts of a third party over which he or she has no influence whatsoever.[84]

The Court has provided that "guarantees" should accompany this principle:[85] (i) such a system of joint and several liability should be justified by the factual and/or legal relationship between the concerned person in light of the principles

80 CJEU, 13 October 2022, C-1/21, *MC*, EU:C:2022:788, para. 65.
81 CJEU also analyzed the respect of the principle of proportionality regarding the application of the joint and several liability to defaults interest (CJEU, 24 March 2022, C-697/20, *W.G.*, EU:C:2022:210, paras. 86-101).
82 See CJEU, 13 October 2022, C-1/21, *MC*, EU:C:2022:788, paras. 68-72.
83 CJEU, 13 October 2022, C-1/21, *MC*, EU:C:2022:788, para. 73.
84 CJEU, 13 October 2022, C-1/21, *MC*, EU:C:2022:788, para. 74.
85 See CJEU, 13 October 2022, C-1/21, *MC*, EU:C:2022:788, paras. 75-76.

of legal certainty and proportionality. Member States shall specify the particular circumstances in which a person is to be held jointly and severally liable; and (ii) the fact that the aimed person acted in good faith, took every reasonable measure, and that he does not participate in abuse or fraud are elements to be taken into account regarding the application of a joint and several liability.

Based on these considerations, the CJEU has decided that the concerned joint and several liability mechanism did not go beyond what is necessary to ensure the correct collection of VAT and to prevent evasion.[86] For the application of the concerned system, (i) the designated person must be a manager or member of an executive body of the legal person liable for unpaid VAT debts; (ii) the designated person must have acted in bad faith; (iii) a causal link must exist between the acts performed in bad faith by the designated person and the legal person's inability to pay the VAT for which it is liable; (iv) the extent of the joint and several liability is limited (in the case at hand, to the amount by which the legal person's assets have been depleted as a result of the acts committed in bad faith); and (v) liability is incurred only in the alternative when it is impossible to recover the concerned VAT amounts from the legal person. The principle of proportionality is respected in the case at hand.

Comments

The analyzed decision is an excellent example of the practical application of the principle of proportionality in VAT. The case also dealt with joint and several liability for the payment of VAT. However, in the case at hand, this liability was not the principle of third-party liability analyzed in the previous chapter since the liability to support VAT was not linked to the involvement in fraud. Moreover, in the case at hand, the liability was applied to a non-VAT payer.

This decision is interesting because it reminds that, in the implementation of its means of action to recover tax but also to prevent fraud, the tax administrations have an important freedom of action supported by the VAT Directive. Moreover, and this is essential, the Court also stated that the authorities even have the possibility to impose requirements to non-taxable persons which ultimately leaves a significant margin of maneuver. The Court held that the VAT Directive (and more precisely Art. 273) does not provide that measures may only be aimed at VAT payers and that the pursued purposes (in particular the fight against fraud) may, in certain circumstances, require a Member State to impose penalties on non-taxable persons who take part in decision-making within a taxable legal person. Otherwise, the effectiveness of such measures would be undermined.

However, this freedom of action must respect EU law and its principles, such as the principle of proportionality. Such measures must cause the least possible det-

86 See CJEU, 13 October 2022, C-1/21, *MC*, EU:C:2022:788, paras. 77-85.

riment to the objectives and principles of EU legislation and, even if it is legitimate for seeking to preserve the rights of the public exchequer as effectively as possible, the concerned measures must not go further than what is necessary for that purpose.

When the tax authorities implement measures as in the case at hand (liability mechanism), they must therefore avoid the implementation of systems that would be applicable without requirements or the existence of a committed fault. This is in line with the conclusion of the case analyzed in the previous section where the Court concluded that a general presumption of fraud must be avoided as such a measure is disproportionate.

In application of these principles, the Court thus considered that the implemented mechanism did not violate the principle of proportionality because it was surrounded by clear and precise guidelines fixing its application (link between the person designated as jointly and severally liable and the taxable person concerned by the failure to pay; bad faith of the designated person; and the use of this joint and several liability only as an alternative).

4. Ne bis in idem

In order to prosecute or sanction VAT fraud, it is quite common that tax authorities apply administration sanctions of a criminal nature (according to the ECHR case law). However, this could come up against the ne bis in idem principle.

In a nutshell, ne bis in idem provides that a person cannot be prosecuted and, a fortiori, sentenced more than once for the same acts or criminal offence.[87] This principle is present in diverse EU legal instruments such as Art. 50 of the Charter of Fundamental Rights (the Charter).

Ne bis in idem should apply when four conditions are jointly satisfied:[88] (i) the same person prosecuted, tried, or punished; (ii) the identity of the acts that are being prosecuted (identity of the facts); (iii) two sets of criminal proceedings that could result in a criminal sanction; and (iv) a final decision (*res judicata*). The interpretation of these conditions, however, led to important jurisprudence at the CJEU level but also the European Court of Human Rights.

87 For more information regarding the ne bis in idem principle, see a.o. M. Vetzo, *The Past, Present and Future of the Ne Bis In Idem Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of Menci, Garlsson and Di Puma*, Review of European Administrative Law 2018, pp. 55-84.

88 See G. Colangelo & M. Cappai, *A Unified Test for the European Ne Bis in Idem Principle: The Case Study of Digital Markets Regulation*, October 2021, p. 2, available on SSRN: https://ssrn.com/abstract=3951088 or http://dx.doi.org/10.2139/ssrn.3951088, accessed on 15 March 2023; M. Vetzo, *The Past, Present and Future of the Ne Bis In Idem Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of Menci, Garlsson and Di Puma*, Review of European Administrative Law 2018, p. 56.

At the origin of the principle, any duplication of proceedings or sanctions were strictly forbidden. However, since a multiplicity of case law exists, such duplication does not infringe the ne bis in idem principle "*where the tax and criminal proceedings at issue have a sufficiently close connection in substance and time.*"[89] In order to authorize the duplication of proceedings or sanctions, the CJEU provided some conditions:[90] (i) the duplication must be provided by legislation pursuing an objective of general interest which is, as such, to justify such a duplication of proceedings and penalties, namely combating VAT offences as is necessary for those proceedings and penalties to pursue additional objectives; (ii) the concerned legislation must contain rules ensuring coordination that limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings; (iii) the concerned rules must ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned; and (iv) the concerned legislation must be clear and precise to allow the individual to predict which acts and omissions are liable to be subject to such a duplication.

The national courts must verify the fulfilment of these conditions. This confirms that the possibility to duplicate proceedings or sanctions, which is clearly allowed for the tax administrations, is limited by the jurisprudence of the CJEU.

4.1. BV case

Analysis of the decision

The BV case concerns the concrete application of the ne bis in idem principle.[91]

The factual situation can be summarized as follows:[92] BV was an accountant in France, subject to VAT under a normal VAT regime. Following a tax audit, the French tax authorities lodged a complaint with the French public prosecutor's office in Annecy alleging irregular accounts with, among others, VAT returns concealing an important part of the income received. BV was summoned to appear before the Criminal Court of Annecy and was convicted of tax fraud. BV brought an appeal claiming that his criminal conviction was contrary to the ne bis in idem provided by Art. 50 of the Charter. According to BV, he had already been the subject of a tax adjustment procedure in respect of the same acts. The Criminal Court considered that the ne bis in idem principle was not violated in the case at hand. BV brought an appeal against this decision before the French Supreme Court considering that some of the conditions in respect the ne bis in idem were not fulfilled. The French national legislation (i) does not satisfy the requirement of clar-

89 See CJEU, 20 March 2018, C-524/15, *Menci*, EU:C:2018:197, para, 61.
90 CJEU, 20 March 2018, C-524/15, *Menci*, EU:C:2018:197, paras. 41-65.
91 CJEU, 5 May 2022, C-570/20, *BV*, EU:C:2022:348.
92 See CJEU, 5 May 2022, C-570/20, *BV*, EU:C:2022:348, paras. 11-24.

ity and foreseeability regarding the duplication of "criminal" prosecutions and penalties and (ii) does not ensure that the severity of the penalties does not exceed the seriousness of the identified offence (requirements of necessity and proportionality). The French Supreme Court decided to refer this to the CJEU to determine if the concerned French national rules are in line with the ne bis in idem principle regarding the requirements of (i) clarity and foreseeability and (ii) necessity and proportionality.

In the application of the ne bis in idem requirements, the CJEU also had to deal with a specific situation.[93] In the case at hand, the limitation of the duplication of "criminal" proceedings and penalties was only based on settled case law restrictively interpreting the legal provisions defining the conditions for a duplication. The Court had to therefore analyse if that situation violates the ne bis in idem principle.

The CJEU started by referring to the ne bis in idem principle and by assessing that, in the case at hand, BV faced a duplication of proceedings that constitutes a limitation of the ne bis in idem.[94] The Court, however, referred to its established jurisprudence regarding the application of the ne bis in idem, confirming that this limitation can be justified (limitation provided by law, complying with the essence of the rights and freedoms of the Charter, and respect of principle of proportionality).[95]

The Court made a classic application to justify the duplication.[96] The CJEU assessed that the possibility of combining criminal proceedings and penalties and administrative proceedings and penalties of a criminal nature was provided for by the French law. Moreover, the French legislation allows such a duplication of proceedings and penalties only under conditions that are exhaustively defined. The CJEU also assessed that French legislation is intended to ensure the collection of all of the VAT due. Considering the importance of the Court's case law for the purposes of achieving that objective to combat VAT offences, the limitation of the principle ne bis in idem resulting from the French legislation meets an objective of general interest.

Regarding the application of the principle of proportionality,[97] the Court first recalled that, in order to respect this principle, the duplication of proceedings and penalties provided for by the French legislation must not exceed what is appropriate and necessary for attaining the objectives legitimately pursued by that legislation. When there is a choice between several appropriate measures, recourse

93 CJEU, 5 May 2022, C-570/20, *BV*, EU:C:2022:348, para. 25.
94 CJEU, 5 May 2022, C-570/20, *BV*, EU:C:2022:348, para. 28.
95 See CJEU, 5 May 2022, C-570/20, *BV*, EU:C:2022:348, paras. 29-30.
96 See CJEU, 5 May 2022, C-570/20, *BV*, EU:C:2022:348, paras. 31-33.
97 See CJEU, 5 May 2022, C-570/20, *BV*, EU:C:2022:348, paras. 34-36.

must be made to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. Then, regarding this requirement of necessity, the Court referred to its traditional jurisprudence confirming that the national legislation

> must provide for clear and precise rules which, first of all, allow the individual to predict which acts and omissions are liable to be subject to such a duplication of proceedings and penalties, secondly, ensure the procedures are coordinated so as to reduce to what is strictly necessary the additional disadvantage associated with the duplication of proceedings of a criminal nature conducted independently, and finally, make it possible to guarantee that the severity of all of the penalties imposed corresponds with the seriousness of the offence concerned.[98]

The Court applied these principles to the specific situation related to the case at hand where the limitation of the duplication was only based on settled case law restrictively interpreting the legal provisions defining the conditions for the application of that duplication.[99] The Court first recalled the necessity that any provision authorizing double punishment must comply with the principle that offences and penalties must be defined by law (Art. 49(1) of the Charter). Regarding this principle, the condition of a clear definition of offences and penalties by the law is fulfilled when the individual can "*ascertain from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, which acts and omissions will make him or her criminally liable.*"[100] The fact that the conditions are not deriving only from the law but also from case law interpretation does not, in itself, call into question the clear and precise nature of the concerned legislation if the individual can ascertain the application of the concerned legal provisions. The Court also confirmed, based on its traditional jurisprudence, that the fact that the concerned national case law refers to broad concepts that must gradually be clarified does not necessary imply that the concerned legislation is not clear and precise. This is provided that the consequences were reasonably foreseeable at the time the offence was committed.

In the application of those principles, the Court provided indications for the referring court to determine if the concerned legislation complies with the requirements of clarity and precision:[101] (i) the French legislation lays down the conditions under which an administrative penalty of a criminal nature and a criminal fine (regardless of the applicable tax penalties) may apply; (ii) the limitation of duplication could be considered as foreseeable by the referred court based on the concrete situation (one of the elements being that the interpretation of the French case law was applied on several occasions); and (iii) the fact that BV should pro-

98 CJEU, 5 May 2022, C-570/20, *BV*, EU:C:2022:348, para. 36.
99 See CJEU, 5 May 2022, C-570/20, *BV*, EU:C:2022:348, paras 37-43.
100 CJEU, 5 May 2022, C-570/20, *BV*, EU:C:2022:348, para 38.
101 See CJEU, 5 May 2022, C-570/20, *BV*, EU:C:2022:348, paras. 44-48.

vide recourse to legal advice is not, based on the jurisprudence of the Court, as such, to call into question the clear and precise nature of the concerned national legislation.

Regarding the fact that the competent authorities must ensure, in the case of a second penalty, that the severity of the penalties does not exceed the seriousness of the identified offence (requirements of necessity and proportionality),[102] the Court referred to its jurisprudence by confirming that the requirement of proportionality is not fulfilled if the legislation provides

> in respect of the combination of a criminal fine and a financial administrative penalty of a criminal nature, that the recovery of the former is limited to the part exceeding the amount of the latter, without also providing for such a rule in respect of the combination of a financial administrative penalty of a criminal nature and a custodial sentence.[103]

However, in the case at hand, the referred court had specified that the national limitation applies only to penalties of the same kind (financial penalties).

Based on all of these elements, the Court decided that (i) the limitation of the duplication of proceedings and penalties can only be based on settled case law restrictively interpreting the legal provisions laying down the conditions for the application of that duplication. This is provided that it is reasonably foreseeable at the time when the offence is committed that that offence is liable to be the subject of a duplication. However, this legislation must ensure, "*in cases of the combination of a financial penalty and a custodial sentence, by means of clear and precise rules, where necessary as interpreted by the national courts, that all of the penalties imposed do not exceed the seriousness of the offence identified.*"[104]

Comments

This decision deals once again with elements that are widely discussed by the CJEU, i.e. the conditions to be met to satisfy the ne bis in idem principle. This decision is in line with the Court's case law regarding the application of this principle: A duplication of criminal proceedings or sanctions is possible provided that certain conditions are strictly observed.

This decision confirms the important margin of maneuver for the tax administrations in the implementation of criminal proceedings or sanctions. At the administrative level, the administration does not have limits to implement administrative sanctions of a criminal nature whereas a strict application of the ne bis in idem principle could lead, in the past, to a limitation of its margin of maneuver to

102 See CJEU, 5 May 2022, C-570/20, *BV*, EU:C:2022:348, paras. 49-54.
103 CJEU, 5 May 2022, C-570/20, *BV*, EU:C:2022:348, para. 51.
104 CJEU, 5 May 2022, C-570/20, *BV*, EU:C:2022:348, para. 55.

prosecute or sanction a VAT payer. However, it also confirms that this permitted duplication is strictly circumscribed by the compliance with certain requirements. The concerned measures need to be legally provided, clear, precise, foreseeable, necessary, and proportionate to pursue the followed objectives (related to the present paper, the combat against VAT fraud).

In this decision, the Court therefore analyses the compliance with these requirements, confirming its jurisprudence and making important reminders but also providing various essential clarifications regarding the application of the ne bis in idem principle and its possible limitations.

The Court recalls that the tax administration must ensure, in taking measures affecting the said principle, clarity and precision to enable VAT payers to understand the measures applying to them and not to be surprised by their application. In this context, the Court provides some useful clarifications in the analysis of this requirement of clarity and precision (the possibility of duplication has to be legally provided; the interpretation given to the legal provisions is not new; and the fact that the assistance of a legal advisor is required is irrelevant). The severity of the measures must also correspond to the seriousness of the offence that the tax administration wants to sanction.

The Court then had to rule on the particular situation in the case at hand. The framework for the duplication of proceedings and sanctions was based solely on the case law interpretation of the existing rules. The Court concluded that this situation was not, as such, to call into question the clear and precise nature of the concerned measures. This is provided, of course, that the application of these measures was foreseeable for the taxpayer at the time that these measures are applicable to him from the wording of the provisions and the interpretation given to them by the courts. It is interesting to note that such a position was already taken by the CJEU in a case related to labor law.[105] In this case, the CJEU clearly stated:

> The principle that offences and penalties must have a proper basis in law cannot therefore be interpreted as precluding the gradual, case-by-case clarification of the rules on criminal liability by judicial interpretation, provided that the result was reasonably foreseeable at the time the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time.[106]

This confirms the margin of action of the tax authorities. Even if the rules must be clear and precise, an interpretation (by the courts, in this case) can determine their application without this undermining, according to the Court, the ne bis in idem principle.

105 See E. Traversa, *La giurisprudenza della Corte di giustizia UE in materia di sanzioni amministrative di diritto del lavoro: un "giacimento inesplorato" di tutele sostanziali e di garanzie procedimentali per i datori di lavoro in buona fede*, forthcoming.

106 CJEU, 20 December 2017, C-102/16, *Vaditrans*, EU:C:2017:1012, para. 52.

The Court concluded by recalling, however, that compliance with the principle of proportionality implies that measures limiting the severity of the duplication of penalties must concern any duplication. In this case, however, only the duplication of financial penalties was provided for, which does not meet the requirements of the ne bis in idem principle. This is reminiscent of the importance for the tax administration to provide a complete framework of rules when it comes to the duplication of criminal sanctions.

5. The use of evidence to establish VAT fraud and the procedural autonomy of the Member States

As already mentioned, Member States dispose of a procedural autonomy in order to determine which kind of procedural provisions should be applicable and what should be the adequate measures to sanction taxpayers. The CJEU clearly confirmed this autonomy through its jurisprudence. The first case was the *Lück* case where the Court stated that national courts have the power "*to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting the individual rights conferred by Community law*".[107] This procedural autonomy grants to the Member States the use of discretionary means to ensure the respect of the EU provisions.

Despite this appearance of undisputed autonomy, the CJEU, in its role to ensure the interpretation of EU law, has circumscribed the competences of the Member States and limited this procedural autonomy.[108] The CJEU imposes two limits materialized by the principle of effectiveness and the principle of equivalence. The principle of effectiveness implies avoiding that the enforcement of the rights conferred by the EU law is rendered impossible in practice or excessively difficult by the national procedural rules. The principle of equivalence requires that the procedural obligations imposed by the Member States to ensure the respect of the EU law cannot be less favourable that the requirements settling national similar issues: Member States cannot discriminate between claims based on national law compared to claims based on EU law.[109]

In its action to prosecute or sanction taxpayers, however, the tax authorities have to demonstrate the existence of VAT fraud. In that respect, regarding the evidence to establish such fraud, it must be recalled that their gathering and their use is not without any limits. Even if the existence of fraud must be examined in accordance

107 CJEU, 4 April 1968, Case C-34/67, *Lück*, EU:C:1968:24.

108 See E. Traversa & E. Ceci, *Procedural Law and Substantive Law in the Case Law of the CJEU – Where to draw the line and what follows from this qualification*, in M. Lang et al (eds.), *CJEU – Recent Developments in Value Added Tax 2015*, (Vienna: Linde, 2016) pp. 81-100.

109 E. Traversa & E. Ceci, *Procedural Law and Substantive Law in the Case Law of the CJEU – Where to draw the line and what follows from this qualification*, in M. Lang et al (eds.), *CJEU – Recent Developments in Value Added Tax 2015*, (Vienna: Linde, 2016), p. 84.

with the rules of evidence of national law, those rules must not undermine the effectiveness of EU law, and the rights guaranteed by EU law must be observed.[110] Moreover, the means of investigations and the use of evidence gathered by these means must be legally provided and not go further than what is necessary to attain pursued objectives (a.o the combat against VAT fraud).[111] These elements are important because it means that the use by tax administrations of illegal evidence (for instance, emails seized without judicial authorization) is not per se forbidden. This is provided that concerned individuals dispose of their rights guaranteed by EU law (for instance, the observance of the rights of the defence).

5.1. Cridar case

Analysis of the decision

The *Cridar* case deals with the use of evidence to establish VAT fraud.[112]

The factual situation was the following.[113] Cridar, a Romanian company active in the building of roads and motorways, was subject to a tax audit. In 2015, a criminal case was initiated against the manager of Cridar for potential tax fraud. In 2016, the Romanian public prosecutor's office requested a new tax control of Cridar considering that some evidence of fictitious acquisitions existed. After the 2016 tax control, the Romanian tax administration decided to deny the right to deduct VAT to Cridar for specific operations made regarding some companies mentioned by the Romanian public prosecutor's office as potentially involved in fraudulent operations. In 2017, after a claim introduced by Cridar, Romanian tax authorities decided to suspend the examination of the claim. They argued that the concerned authority responsible for handling the claim cannot decide on the merits of the claim until a decision has been taken to terminate the criminal proceedings and to confirm or invalidate the suspicions of the supervisory bodies concerning the reality of the acquisitions in question. Despite Cridar’s contestation, the Romanian Court of Appeal decided that the concerned Romanian authorities have the right to assess the opportunity of handling the tax claim to avoid contradictory decisions on the same legal situation. The Romanian Supreme Court decided to refer to the CJEU the following question: Can a national legislation authorize tax authorities, after having refused the right to deduct input VAT because of the implication of the concerned taxable person into a tax fraud, suspend the examination of the tax claim until the end of a criminal case that could provide some additional objective evidence of the fraudulent involvement of the taxable person?

110 See CJEU, 17 December 2015, Case C-419/14, *WebMindLicenses*, EU:C:2015:832, paras. 65-68.
111 CJEU, 17 December 2015, Case C-419/14, *WebMindLicenses*, EU:C:2015:832, paras. 73-74.
112 CJEU, 24 February 2022, C-582/20, *Cridar,* EU:C:2022:114.
113 See CJEU, 24 February 2022, C-582/20, *Cridar*, EU:C:2022:114, paras. 18-31.

The CJEU started by recalling some usual considerations related to the denial of the right to deduct VAT in the case of VAT fraud.[114] The right to deduct VAT is a fundamental principle of the VAT system that cannot be limited if material and formal requirements are met. However, the combat against VAT fraud being an important objective at the EU level, the right to deduct cannot be used in a fraudulent way and can be denied if it is established that, based on objective evidence, this right is used in a fraudulent way. This happens when fraud is committed by a taxable person or when a taxable person knew or should have known that the concerned transaction was connected to such fraud. The Court referred to the principle of third-party liability and the objective demonstration of the involvement of the concerned taxable person.

The Court then focused its analysis on the objective elements to be established by the tax authorities to demonstrate a taxable person's involvement.[115] The Court recalled that EU law does not provide rules relating to the procedures for taking evidence in connection with VAT fraud with objective evidence having to be assessed by the tax administration in accordance with national rules. These national rules, however, must not undermine the effectiveness of EU law and must observe the rights guaranteed by EU law. The Court referred, in that respect, to the *WebMindLicenses* case where it was decided that, in the context of an administrative procedure, to establish the existence of an abusive practice concerning VAT, the tax administration can use evidence obtained in the context of a parallel criminal procedure concerning the taxable person that has not yet been concluded (with respect to the rights guaranteed by EU law). The Court also referred to Glencore case law where it provided that

> such an assessment [made in WebMindLicenses case-law] also applies to the use, for the purpose of establishing the existence of a VAT fraud, of evidence obtained in the context of criminal procedures which have not been closed and which do not involve the taxable person or obtained in related administrative procedures to which, as in the case in the main proceedings, the taxable person was not a party.[116]

Considering its jurisprudence, the Court assessed that the tax authorities could also, as in the case at hand, suspend the examination of a tax claim to obtain some additional objective evidence of the fraudulent involvement of a taxable person. This possibility avoids the adoption of contrary decisions or allows the obtainment of additional fundamental evidence. However, considering the importance of the right to deduct VAT, the CJEU provided that this right could not be denied in the presence of simple undemonstrated suspicions from the tax administration. This position is in line with its recent *Ferimet* case.[117]

114 See CJEU, 24 February 2022, C-582/20, *Cridar*, EU:C:2022:114, paras. 32-35.
115 See CJEU, 24 February 2022, C-582/20, *Cridar*, EU:C:2022:114, paras. 36-38.
116 CJEU, 16 October 2019, C-189/18, *Glencore*, EU:C:2019:861, para. 38.
117 See CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 52.

The Court also had a look at the rules governing the procedural requirements.[118] The CJEU referred to its established jurisprudence, confirming the procedural autonomy of the Member States

> provided, however, that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness).[119]

The Court concluded that, in the case at hand, these principles seemed to have been fulfilled.

The Court also recalled that the requirements pertaining to the right to sound administration, and in particular the right of every person to have his affairs handled impartially and within a reasonable period of time, are applicable in a tax inspection procedure.[120] The Court has therefore assessed that such a suspension in the case at hand does not delay the outcome of this administrative complaint procedure beyond a reasonable time[121]. The Court, however, stated that, if Cridar, as long as the suspension is applicable, cannot introduce a judicial claim regarding its denial of the right to deduct VAT, this suspension pursued a legitimate reason and does not preclude Cridar of the possibility to introduce, at some point (but within a reasonable time), a judicial procedure. Therefore, the suspension does not disproportionately affect the right of access to a court.[122] The Court also insisted on the obligation of motivation of such a suspension.[123]

Finally, the Court insisted on the fact that the potential violation of EU law at the end of the procedure should grant the possibility to the taxable person to obtain the reimbursement of the concerned amounts and, if applicable, some late payment interest.[124]

Based on all these elements, the Court concluded that it can be accepted that

> a national legislation which permits national tax authorities to suspend the examination of an administrative complaint against a notice of assessment refusing a taxable person the right to deduct input VAT on account of the involvement of that taxable person in tax evasion, with a view to securing additional objective evidence concerning that involvement, provided that, first, such suspension does not delay the outcome of that administrative complaint procedure beyond a reasonable time, second, that the decision ordering that suspension includes reasons both in law and in fact and may be

118 See CJEU, 24 February 2022, C-582/20, *Cridar*, EU:C:2022:114, paras. 42-44.
119 CJEU, 24 February 2022, C-582/20, *Cridar*, EU:C:2022:114, para. 42.
120 CJEU, 24 February 2022, C-582/20, *Cridar*, EU:C:2022:114, para. 45.
121 CJEU, 24 February 2022, C-582/20, *Cridar*, EU:C:2022:114, para. 47.
122 CJEU, 24 February 2022, C-582/20, *Cridar*, EU:C:2022:114, para. 51.
123 CJEU, 24 February 2022, C-582/20, *Cridar*, EU:C:2022:114, para. 53.
124 CJEU, 24 February 2022, C-582/20, *Cridar*, EU:C:2022:114, para. 60.

> subject to judicial review and, third, that, if it ultimately transpires that the right to deduction was refused in breach of EU law, that taxable person may secure the repayment of the corresponding amount within a reasonable time as well as, where relevant, the corresponding late payment interest. In those circumstances, it is not necessary that, during that suspension, that taxable person enjoy a suspension of enforcement of that notice, except, in case of serious doubt as to the lawfulness of that notice, if granting the suspension of enforcement of the same notice is required to avoid serious and irreparable harm to the interests of the taxable person.[125]

Comments

This decision addresses the many issues that arise in relation to the procedural requirements that may be imposed by tax administrations but also the evidence that can be used by them. The Court recalls important principles governing the means of action of tax administrations.

Regarding evidence, the Court recalls the procedural autonomy of the Member States given that there are no EU rules governing this issue. This clarification is fundamental because it leaves Member States a considerable margin of maneuver that allows them to specify the conditions for using evidence at their own discretion and even to suspend the analysis of a tax claim pending criminal evidence. This has led some Member States to grant considerable power to act for their tax administrations. The example of Belgium regarding the use of illegal evidence can be highlighted. According to the Supreme Court case law, such evidence should only be disregarded in certain very specific cases: (i) violation of a rule prescribed under nullity; (ii) obtaining evidence in a manner contrary to what is expected of a normally prudent and diligent administration; and (iii) infringement of the taxpayer's right to a fair trial. This Belgian example demonstrates the extensive possibilities for an administration to use evidence to demonstrate the existence of tax fraud. However, the Court clarifies this issue by recalling that these national rules must not undermine the effectiveness of EU law and must observe the rights guaranteed by EU law. The Court also recalls that mere suppositions cannot allow measures that infringe a fundamental right such as the right to deduct VAT.

Regarding procedural rules, the Court recalls the autonomy of the Member States and the respect of the principles of equivalence and effectiveness that must be ensured. This autonomy is not absolute and must be regulated. In this respect, it specifies that, at the procedural level, the tax administration must respect the requirements pertaining to the right to sound administration and, in particular, the right of every person to have his affairs handled impartially and within a reasonable period of time. Finally, the Court clarified that the right of access to a court is also important and that an infringement is not considered disproportionate when the taxpayer still has the possibility to defend himself.

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125 CJEU, 24 February 2022, C-582/20, *Cridar*, EU:C:2022:114, para. 62.

5.2. Hydina case

1. Analysis of the decision

Another interesting recent case is *Hydina*.[126] This case law does not specifically concern the use of evidence or the procedural autonomy of the Member States, but it is related to those questions as this case deals with the application of Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax.

Hydina, a Slovakian company, was confronted with a tax audit to determine the validity of its right to deduct input VAT.[127] In this tax audit, the Slovakian tax authorities requested some information from two Member States in accordance with the procedure provided in Regulation No 904/2010 to establish whether the goods invoiced to Hydina had actually been delivered. Because of this request, the tax audit initiated against Hydina was suspended twice. Based on these requests and the elements at its disposal, the Slovak tax authorities established a difference in VAT against Hydina. Hydina introduced a claim against this situation, namely arguing the excessive length of the overall tax audit. Based on the concerned situation and the fact that the use of Council Regulation (EU) No 904/2010 was concerned, the Slovak Supreme Court referred to the CJEU questions on the interpretation of Art. 10 of Regulation No 904/2010.

The Court started by analyzing the specific application of Council Regulation (EU) No 904/2010.[128] Art. 10 of the concerned regulation stipulates maximum time limits to provide the requested information. The requested authority must communicate as soon as possible and no later than three months from the date of receipt of the request with that period being reduced to a maximum of one month in cases when the concerned information is already at the disposal of the requested authority. However, Arts. 11 and 12 of the Council Regulation provides that different time limits can be determined between the concerned authorities and that the requested authority can (immediately) inform the requesting authority if the applied delay cannot be respected. It is therefore possible to respond to a request after the expiry of the time limits provided by Art. 10 of the Council Regulation. Moreover, there are no consequences in the case that the competent authority exceeds the time limits. Therefore,

> non-compliance with one of the time limits laid down in that article does not give the taxable person concerned any rights, or give rise to any specific consequences, including as regards the lawfulness of the suspension of the tax audit provided for by the national law of the requesting Member State pending the provision of the information requested by the requested Member State.[129]

126 CJEU, 30 September 2021, C-186/20, *Hydina,* EU:C:2021:786.
127 See CJEU, 30 September 2021, C-186/20, *Hydina*, EU:C:2021:786, paras. 13-28.
128 See CJEU, 30 September 2021, C-186/20, *Hydina*, EU:C:2021:786, paras. 30-37.
129 CJEU, 30 September 2021, C-186/20, *Hydina*, EU:C:2021:786, para. 37.

The Court also recalled several elements.[130] The Council Regulation aims to enable administrative cooperation to exchange information that may be necessary for the tax authorities. In the absence of any specific provisions, this regulation cannot be interpreted as conferring some specific rights to taxable persons. Therefore, this regulation does not govern the maximum duration of a tax audit or the conditions related to the suspension of such an audit in the case of requests of information based on the regulation. A taxable person cannot rely on this regulation to challenge the legality of the suspension of the tax audit made by a national authority.

The Court therefore concluded that Art. 10 of the Council Regulation (EU) No 904/2010

> must be interpreted as not laying down time limits, the non-compliance with which is liable to affect the lawfulness of the suspension of a tax audit provided for by the law of the requesting Member State pending the communication, by the requested Member State, of the information requested under the administrative cooperation mechanism established by that regulation.[131]

Comments

This decision does not provide new information regarding the use of evidence or the procedural autonomy of the Member States. However, it is interesting as it deals with the margin of maneuver that tax administrations have when using an EU Regulation related to cooperation in the combat against VAT fraud.

The CJEU confirms that Council Regulation (EU) No 904/2010 does not provide specific requirements that should obligate the tax authorities in their requests. Although some time limits are provided for communicating requested information, the concerned authorities have the possibilities, in some situations, to adapt the delays without being able to be challenged by the taxable person. The latter therefore has no legal basis to challenge the way the audit is handled (in the case at hand, the fact that a suspension was applied by the authorities to wait for the requested information).

This decision therefore confirms the extensive autonomy of the Member States regarding procedural requirements. Even the fact that an EU regulation provides some time limit requirements cannot be used to challenge the way that the tax authorities are implementing their own national procedures.

130 See CJEU, 30 September 2021, C-186/20, *Hydina*, EU:C:2021:786, paras. 41-43.
131 CJEU, 30 September 2021, C-186/20, *Hydina*, EU:C:2021:786, para. 44.

6. Conclusion

As mentioned in the introduction of this paper, considering the absence of a specific EU legal framework, the margin of maneuver of the tax administrations to tackle VAT fraud is important. Tax administrations can implement, on a national level, any measure considered as necessary to combat VAT fraud. This statement is hardly surprising. Considering the important cost of VAT fraud for the Member States and the poor result of preventive measures in the past years, it is essential that the tax administrations dispose of strong repressive tools in order to (at least) limit the economic damages of VAT fraud. However, even if there is no harmonized EU legislation regarding proceedings or sanctions, the jurisprudence of the CJEU draws some guidelines to avoid any abuse in that respect.

Analyzing some recent case law related to measures for tackling VAT fraud, we first focus on an important tool allowing the tax administration to require the payment of VAT to a party other than the liable person, i.e. the principle of third-party liability. The analyzed decisions dealt with the consequences of the absence of determination of the VAT status of a supplier regarding the right to deduct VAT. The CJEU confirmed, regarding the application of third-party liability, that tax administrations can deny a fundamental right such as the right to deduct VAT in a case of VAT fraud (or knowledge of participation in a fraudulent operation). However, tax administrations must analyze the factual situation to determine if the concerned transaction is related to VAT fraud and must demonstrate by objective elements (and not assumptions) that the concerned taxable person knew or should have known that he was taking part in fraud. This denial of fundamental rights is therefore framed through the jurisprudence of the CJEU.

We then focused on an important principle that always limits the margin of maneuver of tax administrations, i.e. the principle of proportionality. In their combat against VAT fraud, tax administrations cannot impose requirements that exceed what is necessary to tackle VAT fraud. The recent analyzed decision recalled that tax administrations must avoid measures leading to a general presumption of fraud or to a strict liability without taking into account the factual situation (for instance, the absence of any fault) and without leaving the possibility for the taxable person to demonstrate the regularity of his situation. The CJEU, however, assessed that it is not disproportionate to impose requirements on non-taxable persons which leaves an important margin of action to tax administrations (for instance to recover unpaid VAT by a company).

Another important principle is the ne bis in idem principle. Considering that administration sanctions can have a criminal nature, the CJEU has developed a wide jurisprudence framing the requirements to authorize a duplication of proceedings or sanctions. In the analyzed decision, the CJEU confirmed its past jurisprudence. Tax administrations may duplicate proceedings or sanctions but with clear and precise rules foreseeable for the taxable person and not going beyond what is necessary and proportionate to combat VAT fraud. The Court, however, provided that clarity and foreseeability do not mean that a measure cannot be interpreted. The fact that a measure was interpreted by the courts does not mean that it will infringe the ne bis in idem principle.

Finally, we focused on the procedural autonomy of the Member States (and tax administrations) and on the evidence to gather to establish VAT fraud. The analyzed decisions followed the settled case law of the CJEU that curtails the procedural autonomy of tax administrations by the principles of equivalence and effectiveness. However, the CJEU confirmed the importance of the margin of maneuver for tax administrations even when an EU regulation is being used for cooperation. Regarding evidence, CJEU confirmed the possibility to gather and use potential illegal evidence provided that rights guaranteed by EU law (the observance of the rights of the defense in the case at hand) were respected and that the effectiveness of EU law is not undermined. The CJEU also confirmed that, in order to gather evidence, tax administrations could even suspend administrative procedure to wait for elements related to criminal proceedings.

When it comes to analyzing the margin of maneuver of tax administrations, (apparently) conflicting principles have to be reconciled. In that respect, the CJEU's role is to establish the right balance between the legitimate aim of Member States to tackle fraud (which is also an obligation deriving from EU law) and the fundamental rights of the taxpayers. This can only be achieved through clear and precise procedural rules that equally share the burden of proof between tax authorities and taxpayers, establishing a balanced process in order to gather information, allowing the taxpayers to exercise their right to defense and, when necessary, provide proportionate sanctions.