European Union; Portugal

ECJ Advocate General Opines That Member States May Exclude Tax, Social Security Debts from Discharge of Debt (*Instituto da Segurança Social and Others* (Case C-20/23)) – Details

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Report from Carla Valério, Associate, IBFD

Advocate General Richard de la Tour of the Court of Justice of the European Union (ECJ) opined that Member States may exclude tax and social security debts from the full discharge of debt, insofar as such decision is duly justified in domestic law.

In the case of *SF v. MV, Instituto da Segurança Social IP, Autoridade Tributária e Aduaneira, Cofidis SA – Sucursal em Portugal* (Case C-20/23), Richard de la Tour considered the exclusion of specific categories of debt from debt discharge procedures in light of the Directive on restructuring and insolvency (2019/1023). Details of the opinion are summarized below.

(a) Facts. SF (the debtor) was an individual entrepreneur declared insolvent in 2018. Part of his debts were from the Instituto da Segurança Social (Social Security Institute) and from Fazenda Nacional (National Treasury).

In 2019, the debtor submitted an application for the discharge of unpaid liabilities, which was provisionally granted. In 2022, the court granted the debtor the discharge of unpaid liabilities, with the discharge of all outstanding debts. However, the decision did not include the discharge of tax and social security debts, as provided by the Portuguese Insolvency and Business Recovery Code (CIRE). The debtor appealed the decision before the referring Court, Tribunal da Relação do Porto (Court of Appeal, Porto), arguing that national law does not contain a justification for the exclusion of tax and social security debts, which is incompatible with article 23(4) of the Directive on restructuring and insolvency (2019/1023).

(b) Issue. The issue is whether an EU Member State may exclude in its domestic law specific categories of debt from the discharge of debt, in particular tax and social security debts.

(c) Advocate General's Opinion. The Advocate General divided his analysis into two main parts: the possibility of excluding a certain category of debt from the discharge of debt and the conditions for that exclusion.

With regard to the first part, it results from the wording of article 23(4) of the Directive on restructuring and insolvency (2019/1023) that the list of debt categories of debt that may be excluded from the discharge of debt is non-exhaustive, and that list may be supplemented by Member States. Recital 81 of the Directive also supports this view.

The discussions in the Council during the negotiation of the Directive on restructuring and insolvency (2019/1023) also confirm that the Member States wished to retain sufficient flexibility, notably to exclude certain types of claims. Portugal, in particular, made a statement indicating that the text was sufficiently flexible to allow the exclusion or restriction of the discharge of tax debts, and that it wished to reserve its position with regard to the regulation of access to the discharge of tax debts when transposing the directive.

Moreover, the objective of the Directive on restructuring and insolvency (2019/1023) is to achieve a minimum level of harmonization, by creating a procedure in every Member State, not to fully harmonize the procedure itself.

Concerning the second part, the Advocate General noted that even though there is no restriction on the nature of the categories of debt that may be excluded, article 23(4) provides that the exclusion must be duly justified. The justification does not have to be included in the act transposing the directive itself if it already exists in national legislation or even if it has been stated in the context of negotiating the directive. This is, however, a matter for the referring court to determine, considering the applicable legislation and its consistency.

The full text of the opinion can be read here.
