https://doi.org/10.60923/issn.2036-3583/24128
ISSN 2036-3583

Second chance and tax debts*

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Submitted: June 12, 2025 – Accepted: December 24, 2025 – Published: July 15, 2026

Segunda oportunidad y deudas tributarias

This article addresses the issue of insolvency proceedings for the restructuring, liquidation, and bankruptcy of companies unable to meet their creditor obligations. Judges are responsible for deciding on payment plans that allow for the continuation of business operations or the company's final liquidation. However, in recent years, the surprising decision has been made to allow individuals without any business activity to access these proceedings. The link between these proceedings and Tax Law lies primarily in the fact that public debts, particularly those owed to the Tax Administration, were previously excluded from judicial decisions—an area that has also seen some significant legal changes.

Es un artículo ubicado en el ámbito de los procedimientos concursales de reestructuración, liquidación e insolvencia de empresas que no podían atender al pago de los créditos de sus acreedores, correspondiendo a los jueces adoptar las decisiones sobre planes de pagos que permitieran la continuidad de las actuaciones empresariales o su liquidación definitiva. Pero en los últimos años se ha generalizado la sorprendente decisión de que también las personas físicas sin ningún tipo de empresa ni de actuación empresarial alguna pueden acudir a este procedimiento. El enlace de estos procedimientos con el Derecho Tributario se basa fundamentalmente en que los créditos públicos, y en particular los procedentes de deudas a la Administración Fiscal, quedaban al margen de las decisiones judiciales, un ámbito en el que también se han producido algunas modificaciones jurídicas de interés

Keywords: Tax law; Insolvency proceedings; Business continuity; Tax debts cancellation; European conformity.

* In affectionate tribute to Adriano Di Pietro, Professor of Tax Law at the University of Bologna, which opened doors for us to European Union taxation.

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1. Introduction

These pages are caused by the reading of two judgments handed down by the European Court of Justice in 2024, the first on April 11 and the second on November 7. Spanish businessmen and individuals, who had been insolvent for non-payment of their debts, requested the exoneration of public law claims claimed by the State Tax Administration Agency, according to which the debtors' requests were inadmissible, precisely because of the nature or nature of those claims. And both cases reached the Court of Justice through the preliminary rulings that were processed by the Spanish Judges.

These are therefore matters of fiscal interest arising in the particular context of insolvency proceedings. And this has led us first of all to expose some general issues of this complex judicial field so that the reader can comfortably situate himself in such a scenario. Secondly, we will briefly comment on the most relevant legal issues of both Judgments, which were implicitly pronounced in favour of the Tax Agency without expressly saying so and wrapping some of the legal arguments in an obscure wording. Finally, the specific regulation of public law claims in our national law is summarised.

2. On the frameworks for company structuring, insolvency and debt discharge

For some time now, European Directives have been dealing with the regulation of commercial companies, protagonists of business actions, in order to protect the interests of the partners and third parties linked to them; they also address provisions that affect individual entrepreneurs. These Directives sought to harmonise the rules of the Member States in order to promote and strengthen the internal market, the basic scenario for the construction of Europe. The beginning of this regulation was the *First Council Directive 68/151/EEC of 9 March 1968*, the title of which stated that this was its purpose as regards companies as defined in Article 58(2) of the Treaty of Rome then in force:

> "Companies are understood to mean companies governed by civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, with the exception of those that do not pursue a profit-making purpose."

This objective of the European Economic Community gave rise to many subsequent Directives that expanded their content and complicated the national rules of the Member States. The harmonization of well-established legal systems in their respective territories is always difficult. The enumeration in these pages of the provisions issued would be inopportune. We limit ourselves to quoting the *Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012*, which appears to have copied its title from Directive 68/151 in that it states the purpose of protecting shareholders and third parties in respect of companies within the meaning of the second paragraph of Article 54 of the Treaty in force at the time (which retains the text of Article 58 of the Treaty of Rome).

https://doi.org/10.60923/issn.2036-3583/24128

2.1. Directive (EU) 2017/1132 of 14 June 2017

Five years later, *Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 on certain aspects of company law was approved*, the content of which is much broader and more complex than the scope of the aforementioned rules. It is an extensive document. Its explanatory memorandum has no less than 81 recitals, in which it sets out its objectives with explanations of a different nature, which are followed by 168 articles and several annexes. This new rule paid particular attention to an issue that will frame the issue that is usually designated as *a second chance* granted to bona fide entrepreneurs. We are referring to the procedures for the restructuring, liquidation or insolvency of companies and even their possible elimination from public registers. We are in the field of Bankruptcy Law, that is, before the bankruptcy proceedings that usually lead to the disappearance of these business entities because they cannot properly pay their debts with the consequent damage to the holders of their credits.

The expression *second chance* appears in our legal system in the title of Law 25/2015, of 28 July, (which was caused by the Royal Decree-Law of 2 February of the same year) *on the second chance mechanism, reduction of the financial burden and other social measures* with a broad content. The preamble to this Law explained that the exit from the previous economic crisis had been a success in our society; but that many Spaniards continued to suffer the consequences of the recession, which is why the public authorities had to offer effective solutions to all citizens, aimed at the common good, legal certainty and justice. And he added:

> "The so-called second chance legislation is framed in a very special way in this area. Its objective is none other than to allow what its name so expressively describes: that an individual, despite a business or personal economic failure, has the possibility of getting his life back on track and even of risking new initiatives, without having to drag indefinitely a slab of debt that he will never be able to satisfy.
>
> Experience has shown that when there are no second chance mechanisms, there are clear disincentives to undertake new activities and even to remain in the regular circuit of the economy. This obviously does not favor the debtor himself, but neither does it favor creditors, whether public or private. On the contrary, second-chance mechanisms are disincentives for the underground economy and favour a business culture that will always benefit employment."

It is an unexpected delimitation of its meaning. But as far as its content is concerned, this Law 25/2015 is a catch-all that preaches an ambitious political and social morality that leads us to a general welfare through economic aid to all citizens with financial problems. It begins by amending the bankruptcy law and attending to mortgage debtors without resources and ends up dictating measures in the field of the Administration of Justice. These legal claims can be placed between a moral epistle and a midsummer night's dream.

At this point, and returning to the aforementioned procedures for restructuring, insolvency and discharge of debts, we are entering a difficult economic and legal world, the main purpose of which is that creditors can see their claims fully or at least partially satisfied and the employees of these companies suffer the least possible economic damage, without forgetting that any disappearance for this reason of managers of economic activities operating in the European single market it weakens its efficiency and settlement (although to some extent it can also be interpreted that it strengthens it with the task of clearing the garden of weeds). It is therefore essential that the harmonising order of Europe seeks the uniformity of the regulations of the Member States and wants to make these procedures effective and public. Article 20 of Directive 2017/132 (supplemented later by Article 34) provides that commercial registers, through their interconnection system, must report without delay on the opening and closure of repeated proceedings, including the removal of the company from its corresponding register, which they must do free of charge and without delay.

2.2. Directive (EU) 2019/1023 of 20 June 2019

The Commission of the European Union was quick to consider Directive 2017/132 to be an insufficient provision that had quickly become obsolete. So it prepared a new proposal and accelerated the procedures before the Economic and Social Committee and, in this case, the Committee of the Regions, achieving its approval by Parliament and the Council within two years of its entry into force. We refer to the *Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on frameworks for preventive restructuring, discharge of debts and disqualifications, and on measures to increase the efficiency of restructuring, insolvency and discharge proceedings, and amending Directive (EU) 2017/1132 (Restructuring and Insolvency Directive)*. An ambitious title. In the following pages we only seek a general description of the legal scenario constructed by this European provision in which the two judgments of the Court of Justice to which we will refer below are situated.

This rule delimits in Article 1.1 the object and scope of its application, with some reiteration in the questions that appear in its own title. It reads as follows:

> "1. This Directive lays down rules on:
>
> (a) the preventive restructuring frameworks available to debtors in financial distress when insolvency is imminent, in order to prevent insolvency and ensure the viability of the debtor;
>
> (b) procedures for the discharge of debts incurred by insolvent entrepreneurs;
>
> (c) measures to increase the efficiency of restructuring, insolvency and debt discharge proceedings."

This is the key to the edifice that the European legislator intends to build: frameworks for corporate restructuring, insolvency and debt discharge and their corresponding procedures. We note that Article 1.2 lists a large group of potential debtors to whom the listed procedures will not apply, such as credit institutions, insurance and reinsurance companies, public bodies and "natural persons who do not have the status of entrepreneur". But this same article, in paragraph 4, empowers Member States to admit the application of such procedures to "insolvent natural persons who are not entrepreneurs"; which means that any individual who cannot pay their debts has the path of bankruptcy open, in which context these procedures will be applied. The explanatory memorandum of the Directive explains this decision as follows:

> "(21) Consumer over-indebtedness is a matter of great economic and social importance and is closely linked to the reduction of excess debt. Moreover, it is often not possible to draw a clear distinction between the employer's debts arising from his commercial, industrial, craft or professional activity and those incurred outside the framework of those activities. Entrepreneurs would not effectively enjoy a second chance if they had to go through different procedures, with different conditions of access and exemption periods, to obtain discharge from their business debts and their other debts outside the framework of their business activity. For these reasons, although this Directive does not contain binding rules on consumer over-indebtedness, it should be recommended that Member States also apply to consumers, as soon as possible, the provisions of this Directive on debt relief."

At first it seems a reasonable explanation. But we are not convinced of it, as we will see later.

1) Business restructuring, suspension of individual executions and exoneration of debts

With regard to *restructuring*, Article 2.1 of the Directive states:

> "(1) For the purposes of this Directive, '(1) restructuring' means measures aimed at the restructuring of the debtor's undertaking which include the modification of the composition, conditions or structure of assets and liabilities or any other part of the

> debtor's capital structure, such as the sale of assets or parts of the undertaking and, where provided for by national law, the sale of the business as a going concern, as well as any necessary operational change or a combination of these elements;"

The Dictionary of the Royal Spanish Academy defines it with maximum economy of words: "Modify the structure of a work, layout, company, project, organization, etc." There is nothing to prevent the Directive, being a legal provision, from preferring that broad and ambiguous explanation (we would like to remind you that what is defined should not be included in the definition), which only speaks of "restructuring of an undertaking", so that it does not refer to natural persons who are not entrepreneurs, whose economic problems often come from bad luck, poverty or the lack of control of the way of life.

Article 2(1) of the Directive also deals with the following concept:

> "(4) 'suspension of individual enforcement' means any temporary suspension, granted by a judicial or administrative authority or by operation of law, of a creditor's right to enforce a claim against a debtor and, where provided for by national law, also against third-party collateralists, in the context of judicial proceedings; administrative or other, or suspension of the right to seize or enforce the debtor's assets or business by extrajudicial means;"

Finally, the repeated article 2.1 defines the exoneration of debts:

> "(10) 'full discharge of debts' means the exclusion from enforcement against entrepreneurs of the payment of outstanding dischargeable debts or the cancellation of outstanding dischargeable debts as such, in the context of a procedure that could include the enforcement of assets or a payment plan, or both;"

In the aforementioned Dictionary the *action of exonerating* appears with the meaning, among others, of exempting, dispensing, unloading of weight or obligation, pardoning or forgiving. The expression of the legislator that refers to the *full exemption of debts is therefore acceptable*.

2) Objectives of the Directive

At this point we must briefly state that not all claims are eligible for exoneration, a relevant issue on which the two judgments of the Court of Justice that we will comment on later are based. Article 6.4 of Directive 2019/1023 establishes that Member States may exclude certain claims from the exoneration provided that it is duly justified and that its execution does not jeopardise business restructuring or that the suspension causes unfair damage to creditors. In due course we will deal with the list of claims that may be subject to exclusion that appears in Article 23.4 of the Directive. Limiting ourselves to the texts transcribed above, it is clear that the procedures that lead to restructuring, the suspension of individual enforcement of credits or the exoneration of debts refer to companies; and this is confirmed by the first paragraph of its explanatory memorandum, which explains the following:

> "(1) The objective of this Directive is to contribute to the proper functioning of the internal market and to remove obstacles to the exercise of freedoms, such as the free movement of capital and the freedom of establishment, resulting from differences between national rules and procedures in the areas of preventive restructuring, insolvency, discharge of debts and disqualification. This Directive aims to remove such obstacles without affecting the fundamental rights and freedoms of workers by ensuring that: viable undertakings and entrepreneurs in financial difficulties have access to effective national preventive restructuring frameworks enabling them to continue their activities; that bona fide entrepreneurs who are insolvent or over-indebted can enjoy full discharge of their debts after a reasonable period of time, which would provide them with a second chance; and that the effectiveness of restructuring, insolvency and debt discharge procedures be improved, in particular with a view to reducing their duration."

This first explanation of the main objective of the Directive only refers to "viable undertakings and entrepreneurs in financial difficulties", and in particular to "bona fide entrepreneurs who are insolvent or over-indebted". The aim is to strengthen the European internal market. If it is accepted at the same time that these procedures for helping companies and individual companies are also applicable to natural persons, outside the business world, who cannot meet the payment of their claims, this legal route and its complex mechanisms are left without internal logic. They are not one and the same thing. The effort to maintain the single market by helping protagonists *in good faith* (an indeterminate legal concept) in their activities and businesses when they are in financial difficulties is a healthy way to reinforce the security of the market and the necessary economic level. *It's the economy*, an unbeatable argument that must be taken into account by companies, their creditors and workers, the judges of the corresponding bankruptcy proceedings, the State itself and the European Union apparatus.

On the other hand, opening this path to natural persons in general who are not involved in business seems to us to be inopportune because, in most cases, they are regrettable situations that must be addressed and dealt with in a society worthy of our time by the path of beneficence, charity, the levelling of national wealth or the determination of a minimum income for citizens; although we are all aware of the difficulties of these solutions. These are problems that should not be taken to court, except in extreme cases in which the debtor, having the means to cover his claims, refuses to do so or where the onerous conditions set by the creditor have broken the natural balance of the agreement between the two parties (the strength of the internal market must also be defended from these points of view). We have been struck by the timely critique on this matter by Luis Montilla Arjona, "Perspectives on the Law of Second Chance of the Physical Person", *General Journal of Procedural Law*, no. 46, 2018.

The Directive senses the disparity between one group of second chance petitioners and makes a brief unexpected comment in the explanatory memorandum in search of a correct solution that distinguishes what should be distinguished:

> "(98) The Commission needs to carry out a study to assess the need to put forward legislative proposals to deal with the insolvency of persons who are not engaged in a commercial, industrial, craft or professional activity, and who, as consumers in good faith, do not have the means to pay debts when they fall due. This study should investigate whether their access to basic goods and services needs to be protected, in order to guarantee them decent living conditions."

We must therefore have a reasonable degree of understanding or pity with the *bona fide consumers*. This is an unsurpassed example of an indeterminate legal concept invoked by none other than the three highest institutions of the European Union.

A careful reading of recital (2) of the explanatory memorandum shows us that restructuring is a solution that aims to "allow debtors in financial difficulties to continue their business activity", which will avoid "the unnecessary liquidation of viable companies" and help to avoid the loss of jobs and knowledge. However, in the face of this constructive desire, the commentary (3) of the preamble does not hesitate to state harshly:

> "At the same time, non-viable companies with no prospects of survival must be liquidated as soon as possible. When a debtor in financial distress is not economically viable or cannot easily regain economic viability, restructuring efforts can lead to the acceleration and accumulation of losses to the detriment of creditors, workers and other stakeholders, as well as the economy as a whole."

This is therefore the difficult context in which restructuring, insolvency and exoneration proceedings must be placed in defence of the internal market. The drafters of the Directive are aware of the many problems faced by this legal route that cast doubt on its intended efficiency. Let's look at some caveats in his explanatory memorandum.

Paragraph (4) deals with the many differences in the regulation of these procedures between Member States, referring in particular to the duration of the period for discharge of debts and the conditions under which it may be granted; and in (5) it says that in many of these States "it takes more than three years for entrepreneurs who are insolvent but in good faith to obtain an exoneration of their debts and start again", which causes them to transfer their activities to another Community territory; But we wonder how many insolvent entrepreneurs in good faith can adopt and finance such a decision. Unfortunately, inefficient procedures and deficient companies appear, which leads to low percentages of business recovery. The warning in recital (7) responds to reality: small and medium-sized enterprises do not have the resources to assume the risks of cross-border activities. And (13) calls for preventive restructurings that meet minimum principles of efficiency.

We would like to transcribe paragraph (16) which contains a summary of the objectives to be achieved by the ambitious Directive 2019/1023 in the aforementioned restructuring and exoneration procedures. It requires careful reading and a certain critical spirit before European legislators.

> "(16) The removal of obstacles to the effective preventive restructuring of viable debtors in financial difficulties helps to minimise job losses and losses of value for creditors in the supply chain, allows for the preservation of know-how and skills and thus benefits the wider economy. Facilitating the discharge of debts for entrepreneurs would help to avoid their exclusion from economic activity and allow them to resume business activities, learning from their previous experience. In addition, reducing the duration of restructuring proceedings would contribute to increasing creditor recovery rates, as the passage of time usually only results in a greater loss of value for the debtor or its business. Finally, efficient precautionary restructuring, insolvency and debt discharge frameworks would allow for better assessment of the risks of lending and credit decisions, and facilitate the adaptation of insolvent or over-indebted debtors by minimising the economic and social costs of their deleveraging processes. This Directive should allow Member States flexibility to apply common principles, while respecting national legal systems. Member States should be able to maintain or introduce into their national legal systems preventive restructuring frameworks other than those provided for in this Directive."

3) Are they easy goals to achieve?

If all this could be achieved, bona fide entrepreneurs in financial difficulties, and in particular small and medium-sized enterprises, would live in a kind of economic paradise in which their problems would be solved with the consequent survival in a single European common market, the strength of which would benefit all the citizens of such an understanding and generous territory. The dream of moralists who want to live in a perfect society without economic and social upheavals, which promptly attends to the insolvent thanks to a good system of early warnings and encourages workers' representatives, as can be seen in paragraphs (22) and (23) of the preamble. The result will be a society to which we will all want to belong.

> "(35) In order to achieve a fair balance between the rights of the debtor and those of creditors, a stay of individual enforcement should apply for a maximum period of four months. However, complex restructurings may require more time. Member States should be able to provide that, in such cases, the judicial or administrative authority may agree to extensions of the initial period of suspension. Where a judicial or administrative authority does not take a decision on the extension of a suspension before it expires, the suspension must cease to have effect at the end of the suspension period. In the interests of legal certainty, the total duration of the suspension should be limited to 12 months. Member States should be able to provide for an indefinite stay where the debtor becomes insolvent under national law. Member States should be able to decide whether a short provisional suspension pending the decision of the judicial or administrative authority on access to the preventive restructuring framework should be subject to the time limits laid down in this Directive."

https://doi.org/10.60923/issn.2036-3583/24128

Those responsible for this paragraph (who insist so much on the word *Suspension* in their precarious wording) seem to be far from the usual times of judicial and administrative conflicts.

All these things have taken us back to distant moments of reading the *Moral Epistle to Fabius*, which in contrast to these European standards has the advantage that there are only 77 tercets with literary beauty, while the simple explanations of the Directive occupy no less than 101 sections, each of them with many more words and less harmony than the verses of Fernández de Andrada.

> *Fabio, courtly hopes*
> *prisons are where the ambitious dies*
> *and where the most active are born gray hair.*
> *Whoever does not file them or break them,*
> *nor has the name of a man merited,*
> *nor to rise to the honor he intends.*

Many of the *European hopes*. Before the judicial and administrative proceedings temper the above-mentioned restructuring, insolvency and exoneration proceedings, convincing legal rules will be in place to resolve the economic problems of bona fide companies and non-business persons who are insolvent or over-indebted. This generous goal is often referred to as *Second chance*. It will be very difficult for the aforementioned procedures to give satisfactory results; the Directive itself reflects this fear in the following preambular paragraph:

> "(92) It is important to collect reliable and comparable data on the results of restructuring, insolvency and debt discharge proceedings in order to monitor the implementation and application of this Directive. Member States should therefore collect and aggregate sufficiently detailed data to allow for an accurate assessment of how this Directive works in practice and should report such data to the Commission."

We refer the reader to the article by Matilde Cuena Casas "Uncertainties around the Second Chance", *General Review of Insolvencies and Restructuring*, No. 12, 2024, in which he sets out an opinion that we share: good faith must be appreciated in both the conduct of the debtor and the creditor.

Finally, we are going to refer to the following paragraph of the preamble to Directive 2019/1023 which we also allow ourselves to transcribe:

> "(100) Since the objectives of this Directive cannot be sufficiently achieved by the Member States because divergences between national restructuring and insolvency frameworks would continue to be an obstacle to the free movement of capital and freedom of establishment, but can be better achieved at Union level, the latter may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in the same Article, this Directive does not go beyond what is necessary to achieve those objectives."

In our view, these lines are final proof that the Commission, which drafted the proposal for this directive, the Parliament and the Council of the European Union, which adopted it as a legal provision, were aware that it would be very difficult to achieve their harmonising objectives because of differences in the national rules of the Member States. They therefore invoked the well-known principle of subsidiarity in order to warn that they would be obliged to adopt new measures, making it clear that that directive had complied with the principle of proportionality, in order to argue that those possible measures would not be necessary because those European institutions had lacked prudence and good sense in their decisions, but also because of the resistance of the Member States to their legal harmonisation in matters that are so sensitive to the stability and energy of the common market.

3. Judgment of the Court of Justice (Second Chamber) of 11 April 2004, Case C-687/22

A) Parties to the dispute

This judgment, which is the first of the Court on the exoneration of debts regulated in Directive 2019/1023, is the result of a conflict between two natural persons, cited as Julieta and Rogelio, against the Spanish State Tax Administration Agency. Both people declared themselves bankrupt, that is, considered debtors in an insolvency proceeding, in which they requested full exoneration of their tax debts under the rules of the European Union and Spain as a Member State, on the issue that has come to be called *second chance*. The text of that judgment says nothing about the professional nature of these two persons; but it can be deduced that they are entrepreneurs because when the Court lists the provisions of Directive 2019/1023 applicable in this case of debt exoneration, it does not cite any of those that refer to the possibility of claiming by this legal means from natural persons without business activity; that conclusion is reinforced by the fact that some of the recitals in the preamble to the explanatory memorandum (which are not strictly speaking rules of law, but must be taken into account for the purposes of interpretation) which refer only to undertakings are also cited as EU law.

Julieta and Rogelio spoke specifically of a total debt of 192,366.21 euros that they had contracted with the aforementioned State Agency, which opposed such a request because it considered itself to be the holder of a privileged public law credit unrelated to the exoneration, arising from the non-payment of taxes managed by it (which are not expressly cited).

B) The conflict

The consequence was that the aforementioned debtors filed on March 3, 2021 before the Court of First Instance of Denia (Alicante) a lawsuit for full exoneration of that debt for the aforementioned amount. Four months later, on 30 July 2021, this Court granted the exoneration of debts, from which the 192,366.21 euros were expressly excluded given their nature as a public law credit. But the debtors were not satisfied and referred the dispute to the Provincial Court of Alicante, which, in accordance with Article 267 of the Treaty on the Functioning of the European Union, submitted to the Court of Justice a request for a preliminary ruling on 12 October 2022, received by that High Court on 7 November 2022, which issued a judgment on April 11, 2024.

Prior to the latter date, a number of rules had been issued on the scope of the procedures that gave shape to the second chance for companies to continue their business and prevent their disappearance from weakening the European single market. All of them were complex provisions, both approved by the European Union and those issued by the Member States, to which these first legal norms left a wide margin for their own regulation, causing the consequent damage to the necessary European legal harmonization. Therefore, we simplify this comment by referring to the most relevant precept that appears in the first paragraph of the Judgment:

> "1. This request for a preliminary ruling concerns the interpretation of Article 23(4) of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on frameworks for preventive restructuring, discharge of debts and debarments, and on measures to increase the efficiency of restructuring proceedings, insolvency and discharge of debts, and amending Directive (EU) 2017/1132 (Structuring and Insolvency Directive) (OJ 2019 L 172, p. 18; corrigendum OJ 2022 L. 43, p. 94) ('the Restructuring and Insolvency Directive')."

Why was Article 23(4) of the Directive so important to the Court of Justice? The answer is found in the first paragraph of that provision, which in the Spanish version read as follows:

> "Member States may exclude certain specific categories of debt relief, or limit access to debt relief, or provide for a longer period for debt discharge where such exclusions, restrictions or extensions are duly justified, in the following cases:…"

The list of such cases included secured debts, debts arising from criminal sanctions, tort or family relationships, debts incurred after the application for or commencement of discharge proceedings and debts arising from the costs of such proceedings. But debts arising from non-payment of taxes were not mentioned. Consequently, in order for the decision of the Spanish Tax Agency to affirm that their claims could not be exonerated, it had to be previously substantiated that the list in said article 23.4 was not exhaustive and that the exclusion of such credits from the exoneration procedure was duly regulated and justified by our national legislation. We will deal with this case below, which was referred as the second question for a preliminary ruling.

It should be noted that Directive 2019/1023 was published in the Official Journal of the European Union on 26 June 2019 and entered into force 20 days later, i.e. on 15 July 2019. And as for the transposition of the same, according to Article 34.1 it had to be carried out by the Member States before 17 July 2021. However, this transposition was made by Law 16/2022, of 5 September, which came into force on 26 September of this year; this is the rule that the reform of the Consolidated Text of the Insolvency Law approved by Royal Legislative Decree 1/2020, of 5 May, assumed. With regard to the appellant natural persons, their first action against the negative response of the aforementioned State Agency was on 3 March 2021, after the entry into force of that Directive and before the deadline for its transposition by the Member States expired. It was necessary to take these dates into account to know whether the European and Spanish provisions were properly applied in this case, although, from our point of view, this was a question of secondary interest. If the reader is interested in this matter, they can consult the article by Carlos Gómez Asensio "Exoneration of unsatisfied liabilities and public credit", in which he comments on this first Judgment, published in the *General Journal of Insolvencies and Restructurings*, no. 13, 2024. We also refer to a brief report (easy to locate on Google) on this Judgment written by Alberto Díaz Moreno with the title of "Pronouncement of the Court of Justice of the European Union on the exclusion by the Spanish legislator of the public credit of the set of debts susceptible to exoneration".

C) Questions referred to the Court for a preliminary ruling

The commented Judgment deals with the three questions referred for a preliminary ruling by the Provincial Court of Alicante.

The first question

> "30. By its first question, the referring court asks, in essence, whether the principle of interpretation in conformity with EU law applies to a situation in which the facts occurred after the date of entry into force of the Restructuring and Insolvency Directive, but before the expiry of the period for transposition of that directive."

The *Principle of conforming interpretation* it is based on the idea that the Member States must reject any interpretation of national provisions contrary to Community law; it is therefore a question of affirming the primacy of the rules dictated by the European Union. Therefore, the Court's response was negative in line with the aforementioned dates on which the corresponding legal acts or facts took place. It was easy for him to respond in paragraph 1 of his judgement:

> "The principle of interpretation in conformity with EU law does not apply to a situation where the facts occurred after the date of entry into force of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on frameworks for preventive restructuring, discharge of debts and debarments, and on measures to increase the efficiency of restructuring procedures, insolvency and discharge of debts, and amending Directive (EU) 2017/1132 (Restructuring and Insolvency Directive), but before the expiry of the deadline for transposition of that Directive and its transposition into national law."

https://doi.org/10.60923/issn.2036-3583/24128

Second question

This second question, according to the Court, is actually the third one raised by the Provincial Court of Alicante (this alteration seems to us to be correct because it puts a more convincing logical order). The European Court summarises it in the following terms:

> "36. By its third question, which it is appropriate to examine in the second place, the referring court asks, in essence, whether Article 23(4) of the Restructuring and Insolvency Directive must be interpreted as meaning that the list of specific categories of claims contained therein is exhaustive or not and whether, in the event of a negative response, Member States have the option to exclude from the discharge of debts specific categories of claims other than those listed in this provision, provided that such exclusion is duly justified under national law."

According to the Judgment, the list of debts that can be excluded from the exoneration, according to the aforementioned article 23.4, is not exhaustive. It is true that in the first Spanish version it literally said that such a decision could be adopted "in the following cases", an expression from which it could be deduced that it was a closed list. However, in the French edition of that Directive the expression "en ce qui concerne notamment" (which the Judgment translates as "with regard in particular to…") appears; and the other language versions use words that have the same meaning. It was therefore necessary to change this erroneous translation into Spanish, as can be seen in the correction in the Official Journal of the European Union I. 172, of 26 June 2019 to introduce the expression "as in the following cases". (This problem was noticed by the Provincial Court of Alicante). The Tribunal therefore states in paragraph 2 of its Judgment:

> "Article 23(4) of Directive 2019/1023 must be interpreted as meaning that the list of specific categories of claims contained therein is not exhaustive and that Member States have the option to exclude from discharge from debt specific categories of claims other than those listed in that provision, provided that such exclusion is duly justified under national law."

This interpretation, which is based on the literal wording of the rule, seems to be well founded because it requires that the exclusion of any other claim must be *duly justified under national law*. The doubts arising from an inaccurate translation of the provision, which may lead to discussion of it in the highest judicial instances, force us to ask for greater attention in the fulfilment of their obligations to translation services. This example is proof of the difficulties inherent in the multiple versions of official documents in the languages of the Member States of our Tower of Babel.

On the other hand, we must not forget that, if so many regulatory powers are attributed to these states, particularly in the area of directives, there will be too many disparities in the laborious construction of the European Union, which can be detrimental to the vision of a united Europe. Of course, a large number of States, each with its own national rules, will be reluctant to accept harmonization; and these States and the European Union itself will find sufficient reasons to justify the differences in inter-State regulations. We must all understand these situations and facilitate their acceptance, while demanding that the need or desirability for specific national provisions be duly justified, which will facilitate the legal and political integration of Europe.

Finally, the Court has not taken the trouble to advise the judges who make the preliminary ruling or the readers in general when they should consider that *the decision of a Member State to exclude from the exoneration a certain claim which does not appear in Article 23 is* duly justified. Nor does it rule on whether this justification should appear in legal norms of the corresponding State (which is our opinion) or can be left to the interpretation of national judges or jurists in general who intervene in these matters. We believe that this omission is relevant because in the documentation consulted we have found some references that admit this second option (which we do not agree with as a general rule), as we will see below.

The third question

Let us now move on to the last question referred for a preliminary ruling (the second in the order followed by the Provincial Court). This Spanish court sets it out in the following terms in paragraph 25.2 of the Judgment:

> "Is domestic legislation, such as the Spanish one in the terms provided for in the TRLC [approved by Royal Legislative Decree 1/2020], which does not offer any justification for the exclusion of public credit from the exoneration of unsatisfied liabilities, compatible with Article 23.4 of the [Restructuring and Insolvency] Directive, and its inspiring principles relating to the exoneration of unsatisfied liabilities? Does this regulation, in so far as it excludes public credit from the exemption and lacks due justification, compromise or prejudice the achievement of the objectives set out in it?"

The first question asked by the Provincial Court is formulated clearly and appropriately: it wishes to know whether Article 23(4) of Directive 2019/1023, which grants Member States the power to exclude certain claims (not mentioned in that provision) from exoneration provided that such a decision is duly justified, is compatible with Article 489(5) of the Consolidated Text of the Insolvency Law, which excludes claims governed by public law without providing any explanation. That being the case, the Court of Justice should have clearly stated that those two provisions were not compatible, with the consequent declaration of the expulsion of that article 489.5 from our legal system; and if the Court considered them compatible, it should set out its reasons with sufficient clarity. As regards the second question on whether this specific Spanish legislation compromises or harms the objectives of Directive 2019/1023, it seems to us unnecessary and inappropriate, inappropriate for the legal approach with which a question for a preliminary ruling must be formalised. It is clear that any disobedience of a provision as relevant as the aforementioned Article 23.4 of the Directive, which grants powers to the Member States provided that they facilitate the justification of their decisions, will damage the objectives of that provision. But the Judgment commented on has moved away from this path, deviating towards the importance of the dates of the entry into force of the Directive and its transposition into our legal system. So the European High Court summarises this question referred for a preliminary ruling as follows:

> "45. By its second question, the referring court asks, in essence, whether an interpretation by national courts of national legislation applicable to events which occurred after the date of entry into force of the Restructuring and Insolvency Directive, but before the expiry of the period for transposition of the Directive, according to which the exclusion of public law claims from the exemption of debts from debts is not duly justified in the aforementioned legislation is liable to seriously jeopardise, after the expiry of that period, the attainment of the object pursued by that directive."

We dare to say that the second constitutional question raised by the Provincial Court of Alicante is written more clearly than this paragraph of the Judgment. That Court, as can be seen in paragraph 25.2 of the aforementioned Judgment, limits itself to asking whether Article 23.4 of the Directive and the principles inspiring the exoneration of debts are compatible with the Spanish rule contained in the Consolidated Text of the Insolvency Law approved by Royal Legislative Decree 1/2020, "which does not offer any justification for the exclusion of the public credit from the exoneration of the unsatisfied liability." This observation of the repeated Audiencia is absolutely accurate.

We already know that Article 23(4) of Directive 2019/1023 raised doubts as to whether or not the list of claims that could be exonerated was exhaustive; as we have just seen, the Court of Justice said that it was not, given the linguistic error committed in the Spanish version of this provision. So that the Member States could introduce new credits that would be outside this possible exemption. But in that case those States were unequivocally warned by Article 23.4 that the new specific categories of debts "are duly justified". As a result of the repeated Directive, the Spanish legislator introduced new features in the Consolidated Text of the Insolvency Law by Law 16/2022, of 5 September, in order to protect public law credits, such as tax claims managed by the State Agency, setting strict limits on the maximum amounts that could be exonerated. as can be seen in the new no. 5 of said article 23. But it did not pay due attention to the fact that this novelty had to be *duly justified* as required by Article 23.4 of the aforementioned Directive. And, consequently, he did not give any explanation or explicit justification.

The Court's answer to the question put in the question referred for a preliminary ruling is worded with restraint and a certain obscurity. The paragraph in which he sets out his conclusion reads as follows:

> "55. In the light of the foregoing considerations, the answer to the second question is that an interpretation by the national courts of national legislation applicable to events which occurred after the date of entry into force of the Restructuring and Insolvency Directive but before the expiry of the period for transposition of the Restructuring and Insolvency Directive, according to which the exclusion of public law claims from the exemption of debts from debts is not duly justified in the aforementioned legislation cannot seriously jeopardise, after the expiry of that period, the attainment of the object pursued by that directive."

Why did the European Court not pay due attention to the fact that the Spanish rules had not given due explanation or justification for the exclusion of public credits from the scope of the exoneration? It is difficult to answer such a question. The aforementioned Judgment addresses this issue with ambiguity and disorder, following the Opinion of the Advocate General. The repeated reading of these documents has led us to think that behind those pages there is a legal interpretation that seeks to convince the reader that those justifications, so clearly required by Directive 2019/1023, of the decisions of the Member States when they agree to exclude from the exoneration any type or category of claims do not need to be formulated by a legal provision as such. Perhaps the most appropriate example of these ideas is one of the paragraphs of the explanatory memorandum of Law 16/2022, already cited:

> "The exoneration is extended to all bankruptcy debts and debts against the estate. The exceptions are based, in some cases, on the special relevance of their satisfaction for a fair and supportive society, based on the rule of law (such as debts for maintenance, those under public law, debts derived from criminal offences or even debts for non-contractual liability)."

From these lines it can be deduced that the exceptions to the exoneration of credits do not have to be specifically justified by the legislator; it is sufficient that such exceptions are their own *of a fair and supportive society, based on the rule of law*. It is not easy to share this ambiguous approach, which is once again based on indeterminate legal concepts. If a law expressly states that these decisions must be explained or justified, it is necessary to ensure respect for this mandate in order to avoid the legal disorder caused by the inevitable differences in the conception of this type of society *fair and supportive* on the part of those who have to apply these legal provisions. European harmonisation could be diluted by divergence of opinions. We will dispense with other examples that may strengthen this conclusion. There are interesting comments on this issue in the article by Cayetana Lado Castro-Rial "Exonerations of unsatisfied liabilities and public credit". *General Review of Insolvencies and Restructurings,* nº 15, 2005, as well as in the aforementioned work by Alberto Díaz Moreno.

In any event, it is advisable not to adopt radical positions in relation to the obligations of the legislator to justify its decisions. For example, it may be sufficient for them to appear clearly in the explanatory memorandums of the relevant laws, since that is the function of such preambles. In addition, it is appropriate to leave a reasonable margin of interpretation to those who are responsible for its difficult application in times of rapid social change that require new legal rules, (which are not usually issued with due diligence), to reach that *Fair and supportive society*.

D) Judgment of the Court of Justice

It appears in paragraph 56 of the Judgment. In summary, it states, in the first place, that the *principle of interpretation in conformity with EU law* is not applicable to the case at issue, since the facts occurred after the entry into force of Directive 2019/1023 and before the expiry of the period for its transposition into national law.

Secondly, that the list of claims set out in Article 23(4) is not exhaustive, which is why Member States may exclude different claims, provided that this is duly justified under national law. This is undoubtedly the most relevant conclusion of this Judgment, which, despite its brevity, does not fail to insist that the exclusion from the exoneration of claims that do not appear in that provision must be admitted "provided that such exclusion is duly justified in accordance with national law." In principle, such a justification must be formulated by the legislator of each Member State.

On the last question, the Court makes the following statement:

> "3) An interpretation by the national courts of national legislation applicable to events which occurred after the date of entry into force of Directive 2019/1023 but before the expiry of the period for transposition of that directive, according to which the exclusion of public law claims from the exoneration of debts is not duly justified by that legislation cannot seriously compromise, after the expiry of that period, the attainment of the objective pursued by that directive."

We must admit that we do not understand the meaning of that last sentence. Exclusion from the debt discharge procedure not expressly justified by national law, before or after that period, will always prejudice, to a greater or lesser extent, the fulfilment of the objective of Directive 2019/1023. And in order to ascertain this objective, we refer again to recital (1) of the same. We are dealing with a secondary issue that should have been clearly resolved by the Court of Justice instead of limiting itself to transcribing the obscure final proposal of the Advocate General, which was perhaps read with the utmost attention by those responsible for our Tax Agency to temper the desire to protect their claims against insolvent taxpayers. despite the fact that the national legislature did not duly justify the exclusion of such claims. We miss more efficient legal provisions formulated with clarity, more harmonisation and more understandable answers from the European High Court, which may suffer from some fatigue in the face of the questions referred for a preliminary ruling.

And so it was that Julieta and Rogelio could not be exonerated from their tax debts. Apparently, that was the solution that corresponded to *a just and supportive society, based on the rule of law*.

4. Judgment of the Court (Second Chamber) of 7 November 2024, Cases C-289/2023 and C-305/23

A) Parties to the disputes

In this judgment, the Court is dealing with two joined cases. The first between the aforementioned State Agency and the person designated as *A* (C-289-23) [*Corván*]) and the second between the person designated as *S.E.I.* and the aforementioned Agency (C-305/23) [*Bacigán*]); There is a final note in which it is warned that the denominations are fictitious. In both cases, these are questions relating to applications for exoneration of unsatisfied liabilities, i.e. unpaid claims by both debtors in the context of the corresponding bankruptcy proceedings. As in the previous Judgment, we deduce that there are two natural persons and that one of them (the one designated as *S.E.I.*), was unrelated to business at that time.

The cases at issue in this judgment arose at the time when the Juzgado de lo Mercantil No 1 de Alicante and the Juzgado de lo Mercantil No 1 de Barcelona (Commercial Court No 1 of Barcelona) each submitted requests for a preliminary ruling to the Court of Justice, pursuant to Article 267 of the Treaty on the Functioning of the European Union, through the corresponding orders, which

https://doi.org/10.60923/issn.2036-3583/24128

were received by the Court on April 25 and May 15 respectively. Those requests concerned the interpretation of Articles 1.4 and 23(1), (2) and (4) of Directive 2019/1023 relating to applications for discharge of claims in the context of joined insolvency proceedings between *A* and *S.E.I.* to the Tax Agency.

After an extensive discussion of the framework of EU law and Spanish law, the Court proceeds to the analysis of the disputes in the main proceedings and the subsequent questions referred.

B) Case C-289/23, *Corván*

Given the clarity with which the Judgment explains the initiation of the procedure, we limit ourselves to transcribing the following paragraph:

> "16. On 7 July 2022, *A* requested to be declared bankrupt and reported debts amounting to 537,787.69 euros. Following a declaration by the referring court on 26 July 2022 that that debtor was insolvent and that the proceedings were terminated on the ground of insufficient assets, the debtor, on 28 September 2022, applied for full discharge of the unsatisfied liabilities. On 19 October 2022, that court admitted the opposition to the exemption that, based on the existence of various tax credits, under public law, was formulated by the AEAT."

The Tax Agency stated before the Commercial Court No. 1 of Alicante that, in effect, it claimed *To* a total amount of 537,787.69 euros in respect of tax debts and penalties payable by a company (whose name does not appear) of which said natural person was the administrator who was bound by derivation of liability. It warns that they are public credits that were excluded from the exoneration; and he does not hesitate to affirm that "*To* he is not a debtor in good faith." For its part, the Court recalls that the Supreme Court reasoned on the concept of *Good faith* in terms that had led to the transposition of Directive 2019/1023 giving rise to the paradox of introducing "a more restrictive regime of access to the exoneration of debts than the regime prior to the transposition itself, which, in its view, raises serious doubts as to its compatibility with EU law." And he affirms that the system is not based on the *Good faith* of the debtor; this indeterminate concept is an attractive topic for a jurist and, in particular, for a philosopher of law, but it goes beyond the limits of this commentary, focused on the regime of tax credits in bankruptcy proceedings.

We now turn to the questions referred to the Court of Justice for a preliminary ruling by the aforementioned Court of Alicante, which first sets out the doubts raised by Article 23 of Directive 2019/1023, a rule located in Title III on exceptions to the exoneration of debts and disqualifications that may be established by the Member States to refuse, restrict or extend the terms of the exoneration or the periods of disqualification when the insolvent businessman has acted with respect to creditors "dishonestly or in bad faith, according to national regulations". Specifically, Article 23.2 reads as follows:

> "2. By way of derogation from Articles 20 to 22, Member States may maintain or introduce provisions refusing or restricting access to discharge of debts or revoking a discharge or providing for longer periods for obtaining full discharge of debts or longer periods of disqualification in certain well-defined circumstances and provided that such exceptions are duly justified, as in the following cases:..."

These cases appear in no less than 6 subsections [article 23.2, subsections a) to f)], all of them linked to irregular or abusive conduct by businessmen who want to be exonerated from their debts. In addition to this, the Court also expresses before the European High Court a tight set of doubts about Article 23.4 of the same Directive, according to which Member States have the power to exclude a series of debts from the exoneration or extension of deadlines for the purposes of the same, provided that both decisions are "duly justified". And here too there are 6 other subsections that list these categories of unsatisfied credits.

It is clear that the Commercial Court No 1 of Alicante had too many doubts about Article 23 of the aforementioned Directive. Logically, we are not going to go into the exposition of them, which would force us to go far beyond the reasonable limits of these pages. It will be enough for us to summarise the Court's lengthy ruling which has tested the professionalism and patience of its Members in answering so many questions referred for a preliminary ruling.

C) Case C-305/23 *Bacigán*

Let us now move on to this second litigation joined to the previous one. *S.E.I.* had requested in its corresponding bankruptcy proceedings the total exoneration of its debts not satisfied until that moment (the amount of which does not appear in this Judgment). But the Tax Agency opposed the request because "he could not be considered a debtor in good faith", since, according to the Agency, in the previous ten years he had been sanctioned with a fine of 504.99 euros for tax infringements (an amount much lower than the damage that such conduct would cause him as a taxpayer). Upon hearing this case, the Commercial Court No. 10 of Barcelona considered that the Spanish legislator complied with Article 1.4 of Directive 2019/1023 and the Consolidated Text of the Insolvency Law, which allow the exoneration of debts "to insolvent natural persons who are not entrepreneurs." That leads it briefly to express certain doubts which have led to the suspension of the proceedings and the referral to the Court of Justice of a number of questions referred for a preliminary ruling, set out in complexity and limited content; At some point, more than preliminary rulings, they seem to be amendments to the whole. However, the members of that Court acted with industriousness and replied to all of them with specific references to the previous case C-289/23.

D) Judgment of the Court of Justice

We now turn to the complex statement of this Judgment that we intend to summarize below. The Court declares:

> 1.- Article 23.2 on the powers of Member States to deny or restrict the frameworks of restructuring, insolvency and discharge of debts contains a list of circumstances that is not exhaustive. Thus, when transposing Directive 2019/1023, "it must be interpreted as meaning that the list of circumstances contained therein is not exhaustive and that Member States are entitled, when transposing those directives into their national law, to lay down provisions restricting access to the right to discharge from debts to a greater extent than under previous national legislation, by refusing or establishing long periods for obtaining full discharge from debts or longer periods of disqualification in circumstances other than those listed in Article 23(2), provided that those circumstances are well defined and such exceptions are duly justified."
>
> The Court therefore recognises that the Member States have broad powers in the field of that provision, which will inevitably make it difficult to harmonise the provisions of those States. Directive 2019/1023 itself limits itself in a matter of such importance. Although the European legislature requires the national legislature to ensure that these new developments are *well defined and duly justified*, such a condition is inefficient, as is shown by the fact that we do not find such definitions or the corresponding justifications in our national legal system. This warning is also applicable to most of the paragraphs that follow.
>
> 2.- Article 23(1) and (2) of the Directive do not preclude rules of the Member States which, when transposing the Directive, require the payment of non-preferential claims in order to benefit from the discharge of debts. They may also exclude access to discharge if the debtor has been negligent or reckless without having acted dishonestly or in bad faith; or if in the previous 10 years you have been sanctioned for very serious tax, social security or social order infractions, or an agreement has been issued to derive liability (unless you have satisfied your tax and social debts). These exceptions must be duly justified.
>
> 3.- Article 23.2 of the Directive must be interpreted as precluding rules of the Member States that exclude the right to discharge from debts in specific unjustified cases.

https://doi.org/10.60923/issn.2036-3583/24128

> 4.- The list of claims that appears in Article 23.4 of the Directive is not exhaustive. Member States may exclude other appropriations with due justification. We already knew this from the moment the error in the Spanish version of the Directive to which we have referred was corrected.
>
> 5.- Article 23.4 of the Directive does not preclude Member States from excluding the exoneration of claims under public law, based on its special relevance “for a fair and supportive society, based on the rule of law”. On this point and in the following two we refer to the commentary of the previous Judgment.
>
> 6.- Article 23.4 of the Directive does not preclude Member States from establishing a general rule excluding the exoneration of public claims, provided that it is duly justified.
>
> 7.- Article 23.4 of the Directive does not preclude Member States from setting a limit on the exoneration of a specific category of claims, without such a limit being set according to the amount of the debt and being duly justified.
>
> 8.- Directive 2019/1023 states in its article 1.1.b) that it establishes the procedures for the exoneration of debts contracted by insolvent entrepreneurs. And this same article in paragraph 4 says that the Member States may extend the application of these procedures to insolvent natural persons who are not entrepreneurs. The rules applicable to the latter persons who are not engaged in business must therefore comply with the provisions of Title III of that directive, entitled “Discharge from debts and disqualifications” (Articles 20 to 24). It is an inevitable reasoning from the moment in which the debts of individuals without business activity were channeled through the path of bankruptcy proceedings.

Gustavo A. Martín Martín, Magistrate-Judge of Court No. 1 of Alicante, well versed in this matter, has published in the *General Journal of Insolvencies and Restructurings,* no. 15, 2025, a commentary on this Judgment with the title “The exoneration of public credit and its compatibility with European Union law”. And he comes to the following conclusion:

> “We are not unaware of the complexity for the CJEU to rule on certain issues due to the interests affected. However, it would be appreciated if the decisions did not adopt that oracular formulation, a formulation which requires the national courts to make a greater effort than that which led to the reference for a preliminary ruling in order to interpret and apply the High Court’s answer to national law.
>
> …
>
> What is clear is that if the questions referred for a preliminary ruling were complex, the CJEU’s decision is complex, which escapes any simplistic approach. We will see what happens in the coming years, in order to establish whether the State has correctly exercised its powers at the time of transposing the Second Chance Directive, a question that will be shaped as the Spanish Courts rule so that the Supreme Court can finally resolve. This can lead to years of legal uncertainty, especially if other questions are raised for a preliminary ruling. Perhaps a more decisive and clear intervention by the Court of Justice could have prevented it.”

We consider that this conclusion is also valid in relation to the first Judgment already commented on.

In the previous pages we have alluded on several occasions to the objectives of the complex regulation of the *second chance*. The Directive insists that the aim is to strengthen the internal market in order to prevent the financial difficulties of companies from leading to their disappearance or an untimely transfer of their activity to another territory. However, the fulfilment of this purpose requires harmonisation of the laws of the Member States and, consequently, strict proximity to the regulation of insolvency proceedings. The European Union has a duty to prevent the occurrence of national laws and regulations. Once the four basic freedoms of the political dream of unity, defined in Article 26 of the Treaty on the Functioning of the European Union (free movement of goods, persons, services and capital), have been approved, it is necessary for the Member States to accept the equal conditions that harmonisation implies, so that the moral and political values that must build and govern our world do not drift towards unfair competition.

And yet, we have just seen the many issues that the Community legislator has left in the hands of the Member States with regard to the *second chance*, which is a delicate area because of the damage it can cause to debtors and creditors. Directive 2019/1023, which was undoubtedly born with an honest harmonising vocation, has been forced to leave a whole series of relevant decisions in the hands of these States. The final declaration of the judgments of the Court of Justice discussed above provide a good example of these European contradictions. In the recent work by Matilde Cuena Casas on "The exoneration of unsatisfied liabilities: doubts and proposals for interpretation", published in the *General Journal of Insolvencies and Restructurings*, no. 15, 2025, she refers with a radical term to the *demonization* of the second chance and rightly denounces the following:

> "The practical application of a regulation is often complex and shows the flaws of the norm. The discrepant judicial interpretation of the bankruptcy regulations is common and frequent, to the point that to alleviate it, judicial criteria of interpretation have been approved as a result of meetings of magistrates, criteria that differ depending on the place where they are 'approved'."

To conclude the previous brief comment, we must remember that the same Directive ends its explanatory memorandum with the following warning:

> "Since the objectives of this Directive cannot be sufficiently achieved by the Member States because divergences between national restructuring and insolvency frameworks would continue to constitute an obstacle to the free movement of capital and the freedom of establishment…"

Even the hypothetical *Fabio*, the calm and silent listener of our literature, who assumes moral discourses with such patience, must have found it difficult to understand the reasons in favor of this *Second chance* in the world of business and indebted consumers. Perhaps he resigned himself to thinking that this generous aid to businessmen of good faith and poor economic results could also be a defense of patient, well-behaved creditors and proof of European goodness.

We repeat: we miss efficient legal provisions formulated with clarity, greater harmonisation and more understandable answers from the European High Court, which sometimes seems tired of so many preliminary rulings.

5. The regime of tax credits in the debt exoneration procedure

As we have seen in the two judgments commented on, the Court of Justice has ruled in favour of Member States being able to exclude certain categories of claims from the exoneration, provided that this is done, in our view, by means of a national law in which such a decision is duly justified (with the exceptions set out in the previous comments on this subject). This leads us to refer briefly to the basic regulation of tax credits.[1]

1. Those who want to delve into this issue can find a starting point in the book *El crédito tributario en el proceso concursal*, directed by professors Gemma Patón and Gabriela Ulas, published by BOSCH, 2022. Chapter I includes the work of César García Novoa, *Unavailability of the tax credit and bankruptcy and pre-bankruptcy situations*; and in chapter 3 the study by Manuel Lucas Durán, *The nature of tax credits as bankruptcy or against the estate and the legal implications of such classification*.

General Tax Law 58/2003, of 17 December, contains two key precepts:

> "Article 18. The tax credit is unavailable unless the law establishes otherwise."

> "Article 75. Tax debts may only be forgiven by virtue of the law, in the amount and with the requirements determined therein."

Both statements are unequivocal. The Tax Agency has taken advantage of them to oppose the request for exemption from its tax credits requested in the legal conflicts analysed above. But such declarations, referring to tax credits in general managed by the Public Administration in accordance with the corresponding administrative procedures, are not as strict as it seems, because the General Tax Law establishes in its article 65 that such debts, both in the voluntary and executive period, may be subject to deferral or instalment of payment, which is a way of relieving debtors; they are therefore unavailable public credits… but manageable. Hence, the legislator has decided to avoid possible problems by warning in the same article, paragraph 2, letter c), that they cannot be deferred or divided if the tax debtor has been insolvent and his debts are claims against the estate, according to the bankruptcy rules. From the General Tax Law, and its complementary provisions, we must move on to the Consolidated Text of the Insolvency Law after the reform approved by Law 16/2022, the title of which is sufficiently expressive to understand its objectives. It reads as follows:

> "Law 16/2022, of 5 September, amending the revised text of the Insolvency Law, approved by Royal Legislative Decree 1/2020, of 5 May, for the transposition of Directive (EU) 2019/1023 of the European Parliament and of the Council, of 20 June 2019, on preventive restructuring frameworks, discharge of debts and disqualifications, and on measures to increase the efficiency of restructuring, insolvency and debt discharge proceedings, and amending Directive (EU) 2017/1132 of the European Parliament and of the Council on certain aspects of company law (Restructuring and Insolvency Directive)."

This reform introduces Article 489 into the Consolidated Text, which states that the exoneration may cover all unsatisfied debts except those listed in paragraphs 1 to 8 and in paragraph 5 it establishes:

> "Debts for public law credits. However, debts for which the State Tax Administration Agency is competent to manage collection may be exonerated up to the maximum amount of ten thousand euros per debtor; For the first five thousand euros of debt, the exoneration will be in full, and from this figure the exoneration will reach fifty percent of the debt up to the maximum indicated. Likewise, debts for Social Security credits may be exonerated for the same amount and under the same conditions. The exempted amount, up to the aforementioned limit, will be applied in reverse order to the priority legally established in this law and, within each class, according to its seniority."

In truth, the Tax Agency is a *potentior personae* that knows how to defend its collection interests by benefiting from such low limits on the exoneration of tax debts set by the legislator. By way of example, we refer to the amount, cited above, of the claims not satisfied by the insolvent debtors protagonists of the first Judgment commented on; In many of these litigations, tax debts are higher. For this reason, we feel obliged to propose the revision of this precept that leaves so many private creditors unprotected and the Agency well protected, in the face of the *Second chance*, to which it is only willing to contribute insignificant amounts in relation to the high objectives predicated by its regulatory rules.

6. Brief Final Consideration

Let us return to said Law 22/2003 to make a final warning about the drift of bankruptcy legislation towards a flagrant contradiction. This provision made severe criticisms of the multiplicity of procedures; So it called for their unity to achieve "the satisfaction of creditors, an essential purpose of the bankruptcy" for whom it later claims equal treatment. The bankruptcy, in other words, was born linked to the holders of the credits and oriented, as far as possible, towards the payment of the debts of the entrepreneurs. But time passed and Directive 2019/1023 changes its perspective and focuses on bona fide entrepreneurs, close to insolvency, so that they can go ahead with the argument that the cessation of their economic activity can damage the confidence and strength of the European Union's single market. But this effect will also occur inexorably if creditors do not recover all or most of their loans. They are two almost opposing visions. We recommend reading the article by Luisa M. Esteban Ramos, whose title is sufficiently expressive: "Creditors: forgotten subjects in the second chance". *General Review of Insolvencies and Restructuring*, No. 4/2021.

When the Commission submitted the proposal for a directive to the European Committee of the Regions for its opinion, the first amendment tabled by the European Committee of the Regions issued the following warning:

> "Preventive solutions, sometimes referred to as 'pre-packs', are due to the growing trend in modern insolvency law to favour approaches which, unlike the classic approach to liquidate the company in difficulty, seek to recover the company or at least to rescue those of its units that remain economically viable."

The Consolidated Text of the Insolvency Law, approved by Royal Legislative Decree 1/2020, is right when in the first paragraph of its explanatory memorandum it says sincerely:

> "The history of the Bankruptcy Law is the history of its reforms. It is difficult to find a law that, in so few years, has undergone so many and such profound modifications. The hopes that this new law had raised, with the logical aspiration to regulatory stability, soon vanished: since the date of promulgation of this law, successive laws and decree-laws, with an accentuated pace in the tenth legislature, have replaced principles and amended legal norms, while at the same time they have constituted the channel for the inclusion of new institutions and new solutions."

> *Thus, Fabio, he shows me uncovered*
> *its essence the truth, and my agency*
> *with it he composes and agrees.*