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# *Third-Party Liability for the Payment of Taxes and Their Fundamental Rights*

**This article examines, from a human rights perspective, certain instances establishing the liability of third parties, other than the taxpayer himself, for the payment of taxes, such as the obligation to withhold taxes or the joint and several liability of a third party (i.e. a company's director) for the payment of taxes due by another person. Such obligations may imply a substantial liability for taxes and often are coupled with sanctions, and also a liability for the infringement of a growing number of formal obligations, including filing returns and reporting data, raising concerns of compatibility with the fundamental rights of taxpayers and private parties. The authors argue that it is doubtful whether the need to secure a more effective protection of the interest to collect taxes can justify exposing third parties to substantive obligations in connection with taxable events for which they are not directly liable or where no specific involvement of that person in a scheme of tax avoidance or evasion is established. Moreover, such compulsory involvement, which is currently imposed without remuneration and without any consideration of the additional burdens that it creates, raises some concerns from the perspective of fairness. The authors propose that a possible solution to some of these problems in the cross-border scenario could be found by amending the Recovery Directive (2010/24), so that states could rely more on mutual assistance within the European Union and less on third-party liability for the collection of taxes.**

Contents



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## 1. Introduction

The aim of this article is to examine certain instances establishing the liability of third parties, other than the taxpayer himself, for the payment of taxes from the human rights perspective. It does not aim at discussing exhaustively the particular tax provisions establishing third-party liability in all European countries; it rather examines, indicatively, certain such measures as found in the jurisdictions the authors are familiar with, without, however, limiting the discussion to those jurisdictions, as such measures, with smaller or bigger variations, are common in many systems all over the world,[1] as shown from the variety of the jurisdictions involved in the case law discussed in this article. On the other hand, the article does not discuss measures that extend the liability for tax offences committed by taxpayers to third parties, such as their advisers, tax preparers, etc., as this type of third-party liability is mostly based on the criminal law concept of accomplice to a crime.[2]

Indeed, it is a common feature of tax systems to impose various obligations on third parties with the aim of securing the collection of taxes. These measures do not constitute penalties or any form of sanction but are integrated in the design of tax systems as regular collection measures. Such obligations may, however, imply a substantial liability for taxes and are often coupled with sanctions as well as a liability for the infringement of a growing number of formal obligations, including filing returns and reporting data. While this article will focus on the former group of measures (and on the liability of third parties arising in such context), a common rationale binds all such measures, i.e. the protection of the effective collection of taxes.

This article does not discuss the effectiveness of such measures from the perspective of tax collection, but rather their consistency with the fundamental rights that require an effective protection within tax procedures. From the latter perspective, the need to protect the fundamental rights of taxpayers vis-à-vis the collective interest of the community should therefore also imply that other private parties involved in the process of tax collection enjoy similar levels of legal protection as the ones that apply to taxpayers.[3] In an EU law context,

1. *See* for example the references to withholding tax agents in R. Gordon, *Law of Tax Administration and Procedure*, in *Tax Law Design and Drafting*, pp. 101 and 133 (V. Thuronyi ed., vol. 1, IMF 1996), available at https://www.elibrary.imf.org/view/book/9781557755872/ch04.xml (accessed 24 Jan. 2023).
2. Such measures may also raise concerns regarding their compatibility with the human rights standards; one such recent example is found in the case of Brazil, where a series of state laws that extended liability for tax offences committed by taxpayers to their advisers was declared unconstitutional; the judicial declaration overturned the theory according to which liability for tax offences can be extended to third parties based on the vicariousness inherent to tort liability, a criterion followed by a few Latin American countries; *see* IBFD Observatory on the Protection of Taxpayers' Rights (OPTR), *The IBFD Yearbook on Taxpayers' Rights 2021* p. 222 (IBFD 2021), available at https://www.ibfd.org/sites/default/files/2022-05/2021%20OPTR%20Yearbook%20%28final%20version%29.pdf.
3. Considering the exponential growth of the formal and substantive tax obligations involving third parties over the past few years, J. Kokott & P. Pistone, *Taxpayers in International Law* p. 189 (Bloomsbury 2022) have concluded that the fundamental rights of taxpayers should also constitute the reference framework

the same issues are discussed under an additional and slightly different approach, the compatibility with the fundamental freedoms, on the one hand, and the compatibility with the principle of proportionality, which dominates the analysis of the ECJ in VAT cases.

Establishing an (additional) obligation to pay tax on a party other than the taxpayer certainly increases the likelihood that such tax will in fact be collected. However, the point is whether this mechanism, involving third-party liability for taxes and, in some cases, for administrative and criminal sanctions, is proportionate to the goal that it pursues.

In line with the overall research goals, the scope of this article will be limited to third-party liability in tax collection within the European Union, with the aim of putting forward some concrete proposals for a more balanced protection of the collective and individual rights in such context. Besides their common mould, the measures that establish third-party liability operate in different scenarios with different specific goals. The analysis of such differences is a necessary condition for assessing their proportionality and compatibility with fundamental rights.

## 2. Different Approaches in Establishing Third-Party Liability for the Payment of Taxes

### *2.1. General issues*

Depending on the rationale they serve and the way they operate, the measures establishing the liability of a third party can be divided into two, broad categories.

The first category includes measures that establish the burden of the collection of the tax on a person that already has (physical or legal) possession of the funds out of which the tax, due by another person, i.e. the holder of the ability to pay, will be paid. This pattern can operate differently in respect of different taxes. For direct taxes, the mechanism usually applies to taxation at source, in line with the requirements of the pay-as-you-earn (PAYE) concept.[4] For VAT, the collection of taxes operates with the involvement of different persons from those who might consume the purchased goods or services. In both scenarios, tax systems establish a specific obligation on the third party to make the actual payment of the tax, as well as to the company with ancillary formal obligations. Violation of any such obligations implies the liability for the third party for the payment of taxes due, but also an additional liability for sanctions applicable to the failure to comply with the said obligations. The different features of such scenarios will be the object of dedicated analysis, which will follow below.

The second group comprises measures that introduce joint and several liability of the third party for the tax debts of the taxpayer. In that situation, the third party may or may not have possession of funds out of which the tax is to be paid. If they do not have possession of the funds, and are liable to pay the tax, they will need to seek reimbursement from the taxpayer. They may not be able to achieve that reimbursement, in which case they alone bear the tax liability. From the perspective of fundamental rights, such measures may give rise to an objective liability of the third party, which also requires further attention in this article.

for the protection of fundamental rights of third parties involved in the process of tax collection. Both situations share the common feature of avoiding that the collective interest may undermine the fundamental rights of individuals.

4. On the pay-as-you-earn concept, *see* K. van der Heeden, *The Pay-As-You-Earn Tax on Wages*, in *Tax Law Design and Drafting* (V. Thuronyi ed., vol. 2, IMF 1998), available at https://www.imf.org/external/pubs/nft/1998/tlaw/eng/ch15.pdf.

### *2.2. Third party replaces taxpayer liability*

#### *2.2.1. Withholding agents*

The first case of third-party liability replacing that of the taxpayer is the withholding tax mechanism for the collection of taxes on income.

The core concept of withholding taxes is to allow for their collection at source, preventing the taxpayer from receiving a portion of the income that he would be entitled to and imposing the obligation on the third party making such payment to pay it to the state. Withholding taxes are a widespread practice around the world and have successfully operated for decades both in purely domestic and in cross-border situations, outsourcing tax collection to third parties. The levying of tax in the hands of the third party in fact prevents tax evasion,[5] considering that the third party has no interest to pay less tax than the amount that is due, anticipates the payment of tax to the moment in which the income is paid (in line with the PAYE concept), and facilitates tax auditing, taking into account that one withholding agent can collect the taxes due by many taxpayers. For this reason, withholding taxes significantly enhance the effectiveness of tax collection.[6]

In a domestic scenario, withholding taxes usually operate at least in connection with the payment of income from employment and from financial services. In both such cases, the third party – respectively the employer and the financial institution (e.g. bank) – are in full control of the payment of income. Consequently, it is not hard for them to deduct the taxes due by the taxpayer and pay them to the state. This is the possible reason for creating an obligation for the third party without a corresponding remuneration for the service provided to the state. In practice, the ancillary formal obligations – such as tax return filing and reporting, as well as the corresponding accounting requirements – create an additional cost for the third party.

In a cross-border scenario, withholding taxes can also simplify the collection of taxes, making it unnecessary for the non-resident recipient of income to comply with the formal requirements established by the tax law of the source country. They also solve the problem that the revenue authorities of one state might face insurmountable difficulties in collecting tax from the recipient who is a resident of another state. EU law requires that withholding taxes must apply in a non-discriminatory way. Therefore, non-residents have the same entitlement to tax collection based on tax returns as resident taxpayers who are in an equivalent situation.[7]

5. In the absence of a withholding tax mechanism, tax evasion would for instance occur if the full amount of income were paid to the taxpayer, who might then not report such amount in full or in part.
6. For an example of the impact of withholding taxes on the increase of income tax revenue, *see* S. Bagchi and L. Dušek, *The effects of introducing withholding and third-party reporting on tax collections: Evidence from the U.S. state personal income tax*, 204 Journal of Public Economics, article 104537 (2021). The authors found that introducing withholding of the personal income tax led to an immediate and permanent increase in income tax revenues by about 29%, holding tax rates constant. Moreover, they found that the result is consistent with the crucial role of withholding and third-party reporting in improving tax compliance. They argue that while several alternative explanations such as changes to the tax base and increases in enforcement activity could be put forward in order to explain this result, these explanations lack support. In addition, the authors suggest that there is some evidence that non-filing substantially decreased following the introduction of withholding.
7. DE: ECJ, 12 June 2003, Case C-234/01, *Arnoud Gerritse v. Finanzamt Neukölln-Nord*, ECLI:EU:C:2003:340, Case Law IBFD.

Another aspect of the use of the withholding tax mechanism, concerning its compatibility with the freedom to provide services, was examined by the ECJ, in the context of the *Airbnb Ireland and Airbnb Payments UK* (Case C-83/21) judgment that was delivered on 22 December 2022.[8]

The case concerns a 2017 Italian law that established a new tax regime for short-term property rentals outside a commercial activity. The law applies to Airbnb as an operator of a property intermediation platform; it applies to contracts for the rental of residential property by natural persons outside a commercial activity for a maximum period of 30 days, whether concluded directly with the tenants or through persons who pursue property intermediation activities or operators of online platforms. As from 1 June 2017, income from such rental contracts is subject to a schedular withholding tax at a rate of 21% and information relating to rental agreements must be transmitted to the tax authorities. When they receive rents, persons resident in Italy who pursue property intermediation activities as well as those who operate online platforms must, as tax collectors, withhold 21% of the amount of the rents and pay that to the tax authorities. Non-resident persons considered as not having a permanent establishment in Italy are obliged to appoint a tax representative as the taxable person.

In his Opinion,[9] Advocate General (AG) Szpunar acknowledges that the obligation to withhold tax constitutes a much greater burden than a mere obligation to provide information, not least because of the financial liability to which it gives rise, not only towards the state of taxation but also towards the customers of the online platform. He, therefore, considers its necessary to analyse the compliance of the imposition of withholding with article 56 of the Treaty on the Functioning of the European Union (TFEU)[10] and the freedom to provide services.[11]

AG Szpunar suggests that such an obligation could be considered an obstacle to the freedom to provide services as a measure likely to make the exercise of that freedom less attractive. Indeed, such an obligation requires the operators concerned to play a new role, since they will be intermediaries not only between lessors and lessees, but also between lessors and the tax authorities, which entails greater financial liability, first, towards the tax authorities for the exact payment of the tax due and, second, towards the lessors, who will be entitled to consider that they are relieved of their tax obligations as a result of the tax withheld by the intermediaries. Thus, the exercise of the freedom to provide services, in particular those relating to intermediation in the payment of rents, is accompanied by an additional risk which would not exist in the absence of the obligation to withhold tax.[12]

Having found that the withholding tax constitutes an obstacle, AG Szpunar proceeds with the examination of whether such obstacle can be justified.

It is observed that the withholding of tax (or a tax deduction) at source is a universally applied tax measure of a technical nature. It makes it possible to ensure the effective collection of tax, but also constitutes a measure enabling increased simplification and legal cer-

8. IT: ECJ, 22 Dec. 2022, Case C-83/21, *Airbnb Ireland and Airbnb Payments UK*, Case Law IBFD.
9. IT: 7 July 2022, Opinion of AG Szpunar, Case C-83/21, *Airbnb Ireland UC and Airbnb Payments UK Ltd*, ECLI:EU:C:2022:545, Case Law IBFD.
10. Treaty on the Functioning of the European Union, OJ C 115 (9 May 2008), Primary Sources IBFD.
11. AG Opinion in *Airbnb Ireland UC and Airbnb Payments UK Ltd* (C-83/21), para. 56.
12. Id., at para. 67.

tainty for taxpayers. On the other hand, for an operator which is in any event in possession of the funds that constitute the basis of the tax assessment, the obligation to transfer part of that money to the tax authorities does not present a disproportionate burden.[13]

The Court has already recognized the measure of withholding tax as justifying a restriction on a fundamental freedom in a situation involving non-resident taxpayers receiving income from domestic sources.[14] It appears that the extension of this conclusion also to cases of non-resident third parties having access to the income received by both residents and non-residents is also acceptable as a justification.[15] Indeed, the method of withholding tax at source in a situation where a single intermediary receives and pays back the income subject to the tax in question to several taxpayers, even where that entails an additional administrative burden for that intermediary, serves the purpose of the effective prevention of tax evasion by imposing on an operator, which has no personal interest in evading the tax, the liability for payment of that tax to the tax authorities. In view of the aims served, from a fundamental freedoms perspective, the use of the withholding tax mechanism is therefore in principle acceptable.

In its judgment, the ECJ agreed with the Opinion of AG Szpunar. Indeed, it held that the freedom to provide services set out in article 56 of the TFEU is not infringed by the obligation imposed by Italian law on providers of property intermediation services – irrespective of their place of establishment and the manner in which they intervene – to withhold at source the amount of tax due on the sums paid by the lessees to the lessors and to pay it to the Treasury of that Member State, where those service providers have received the corresponding rents or consideration or intervened in their collection.[16]

The outsourcing of tax collection connected with the levying of withholding taxes implies a direct obligation for the third parties to make the payment of the tax out of the withheld funds. Failure to do so results in a tax liability against that person and in the levying of sanctions.[17] Even though this liability is the natural consequence of the violation of an obligation established by law, one may wonder whether creating such obligation on someone who is totally disconnected from the measure of ability to pay is fair and proportionate. Such doubts become even stronger if the withholding agent mistakenly fails to deduct sufficient amounts in making payments to the taxpayer and is then obliged to seek reimbursement from the latter rather than the state doing so.

13. Id., at para. 69.
14. DK: ECJ, 26 Feb. 2019, C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 and Others*, ECLI:EU:C:2019:134, para. 160, Case Law IBFD.
15. AG Szpunar in his Opinion in *Airbnb Ireland UC and Airbnb Payments UK Ltd* (C-83/21) suggests that there is no reason why it cannot be applied in situations such as that at issue in the case of online platforms (*see* para. 70).
16. IT: ECJ, 22 Dec. 2022, Case C-83/21, *Airbnb Ireland and Airbnb Payments UK*, paras. 43-55, Case Law IBFD.
17. In the IBFD Yearbooks on Taxpayers' Rights for the years 2015-2020, a best practice is identified that where tax is withheld by third parties, the taxpayer should be excluded from liability in case the third party fails to pay the tax; *see* OPTR, *The IBFD Yearbook on Taxpayers' Rights 2019* p. 37 (IBFD 2019), available at https://www.ibfd.org/sites/default/files/2021-06/2019%20IBFD%20Yearbook%20on%20Taxpayers%27%20Rights%20%28final%29_0.pdf. In the 2018 Yearbook, it is reported that tax laws in Kenya also impose a liability on the third party as though the tax was due from them for failure to deduct and remit the tax OPTR, *The IBFD Yearbook on Taxpayers' Rights 2018* p. 36 (IBFD 2018), available at https://www.ibfd.org/sites/default/files/2022-05/2018%20OPTR%20General%20Report%20%28Final%29.pdf.

The withholding tax mechanism is widely used for the collection of taxes on income, but also operates in respect of other taxes, such as for instance real estate transfer tax, and in a different context.

In particular, in Italy it is the duty of a third party, i.e. the notary who registered a transaction involving the transfer of real estate, to collect the real estate transfer tax due by the buyer upon acquisition of the real property and then remit it to the state.[18] Even if such mechanism presents similar features to withholding taxes as to the goal of securing the effective collection of the tax due, the context shows a significant structural difference. Unlike the employer and the financial institution in the case of the withholding taxes, the notary is not the source of the transaction giving rise to the payment of tax. Therefore, this collection mechanism outsources tax collection in a way that creates an additional burden for the notary, subject to a direct liability in case of failure, out of the notary's own funds.

Both such cases share to a different extent the concern for the implications of the outsourcing of taxes on third parties, creating an additional cost for them in the absence of a corresponding obligation for the service that they render to the state.

#### *2.2.2. The case of VAT: Economic operators as taxpayers and not as third parties*

A distinction must be made for the case of VAT, as the context of VAT shows some further differences, which partly arise from its nature as indirect tax and partly from the tax collection mechanism.

Even if, on the one hand, VAT is levied on the consumption of goods and services, the payment of such tax to the state does not directly involve the consumers, but only the economic operators. In such context, each economic operator supplying the goods and services is liable for the tax due, has the obligation to collect it from the recipient and, after deducting input VAT, to pay it to the state. From a formal perspective, such context might indicate that the economic operators are not third parties, but rather the taxpayer for VAT purposes. From a substantive perspective, tax law makes the economic operators liable to pay a tax that relates to a different person, namely the recipient, who might be the potential consumer of the said goods and/or services.

Unlike in the other contexts seen before, in this one the need to secure the correct functioning of the right to deduct input VAT is an important element to justify the involvement of the supplier and the liability to tax of the economic operators, rather than of the consumers themselves. For this reason, it is not necessary to further enquire on the proportionality of such measures to secure the goals that they pursue.

### *2.3. Third parties jointly and severally liable for the payment of taxes*

The second category of third-party liability involves cases of joint and several liability, which are a common feature in a large number of tax systems.[19] Unlike in the first category, here

18. This situation is often known as "*responsabilità d'imposta*", i.e. liability for the tax and also applies to other situations, including within income tax (such as for instance for group taxation).
19. *See* for example the case of Spain, which is also common in other EU countries for VAT, analysed in A.B. Prósper-Almagro, *Country note: Joint and Several Liability as a Measure to Tackle VAT Fraud: The Spanish Perspective*, 47 Intertax 3, pp. 304-311 (2019); for the joint and several liability of spouses in the United States, *see* for example K.L. Tassin, *Tax Liability Issues Associated with United States Income Tax Filing Statuses for Married Taxpayers and Proposals for Enhanced Equity*, 15 The ATA Journal of Legal Tax

the third-party liability comes in addition to that of the taxpayer, without replacing it. This mechanism undoubtedly strengthens the likelihood of tax collection, but, especially when it operates on a general basis, it can raise serious concerns of fairness and proportionality.

There are two main types of joint and several liability. The first one involves cases of subsidiary liability and operates when the main debtor fails to pay the tax debt, such as for the debts of a legal entity in cases of potential insolvency. In such cases, such third parties may be the object of enforcement measures. This mechanism is in fact similar to a security. A possible specific variation of this first type of joint and several liability operates in respect of directors and managers of the company. In such cases, the common issue is that the involvement of such parties in the joint and several liability operates only at the time of tax collection. This may prevent any challenge to the validity of a tax audit and may hamper the payment of tax conforming to the rule of law.

These features give rise to a problem of objective tax liability, which is common to a second type of joint and several liability, namely that of a purchaser who is held jointly and severally liable for taxes due in respect of the purchased good, including an entire business or real estate. The rationale of joint and several liability in such cases is similar to the one that operates in order to prevent fraudulent alienations of such goods, including in cases of insolvency or in order to prevent, avoid or delay bankruptcy. It is in essence a way to protect the interest of the state as a creditor. However, unlike ordinary creditors, this joint and several liability of the third party often operates in this context on a general basis, thus exposing once more a problem of balance: the rules secure the effective collection of tax, regardless of whether they are fair or proportionate. This criticism could be easily overcome if the third-party liability operates in this case not on an objective basis, but rather in the presence of clear elements that indicate the involvement of the purchaser in a fraudulent scheme to the detriment of tax collection by the state.

### *2.4. The issues in search for possible solutions*

The analysis has indicated that the current standpoint of tax collection raises some significant problems of compatibility with the fundamental rights of taxpayers and private parties. Tax systems outsource tax collection to third parties and impose on them an obligation, usually without a remuneration. Third parties are exposed to liability for the payment of taxes, but also shoulder a considerable extra burden, including liability for sanctions in case of failure to comply with these obligations.

The complexity of such problems varies in the two categories of cases that have been outlined earlier. In particular, the issues that may arise in relation to the withholding taxes are not the same as the ones that may arise in the case of joint and several liability. On the one hand, in the latter case, the third parties are required to pay out of their own estate the tax debts of another person. On the other hand, in the former case, the third party is acting merely as a collecting agent who has possession of the funds that are due to the taxpayer and has the possibility to deduct the amount that corresponds to the tax, in order to pay it

Research 1, pp. 48-65 (2017); for the joint and several tax liability in cases of insolvency, *see* for example P.V. Nicolae, *Theoretical Considerations On Insolvency And Joint Liability On Tax Matters*, I Annals of the "Constantin Brâncusi" University of Târgu Jiu, Economy Series 1, pp. 123-127 (2015), available at https://www.utgjiu.ro/revista/ec/pdf/2015-01.Volumul%201/17_Popeanga%20Alin.pdf.

to the state. Therefore, in principle the tax liability of the taxpayer is paid out of funds that belong to that same taxpayer and not to the person that is responsible for the withholding.

Accordingly, joint and several liability displays a possible problem of interference with the peaceful enjoyment of the third party's possessions, protected under Article 1 of the First Protocol (hereinafter article P1-1) to the European Convention on Human Rights (ECHR).[20]

This problem seems more remote in the case of withholding taxes, where the withholding agent is outsourced a state function, usually without proper remuneration for this service, and is obliged to incur expenses that are not reimbursed in any way. This is linked, however, with another fundamental right; the imposition of a task on any person to withhold and remit taxes to the state might theoretically be considered as interference with the prohibition of forced labour, protected under article 4 of the ECHR.[21]

Several cases have been brought before the European Court of Human Rights (ECtHR) dealing with collection issues in general as well as more specifically with collection measures enforced against third parties. These cases will be discussed in sections 3. to 5.

Moreover, both categories raise a more general structural common issue, namely whether the collective interest to secure the effective payment of taxes justifies the involvement of third parties in the process of tax collection without any further consideration of the impact that it may have on third parties. This is a growing trend that is becoming quite far reaching, also including formal reporting obligations, in particular the ones connected with the Directive on Administrative Cooperation (DAC)[22] system.

Exposing third parties to substantive obligations in connection with taxable events for which they are not directly liable requires an assessment of the impact that such measures may have on them in order to verify their proportionality in each context. The fact that

20. *See Convention for the Protection of Human Rights and Fundamental Freedoms* (4 Nov. 1950), available at https://www.echr.coe.int/Documents/Convention_ENG.pdf [hereinafter ECHR]. The Protocol to the ECHR (also referred to as the "First Protocol", dating back to 1952) added new fundamental rights to those protected under the Convention, namely the right to peaceful enjoyment of property, the right to education and the right to free elections by secret ballot. Art. 1 of the First Protocol to the ECHR [hereinafter referred to as art. P1-1] is entitled "Protection of property" and provides that:

    Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

    The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

    According to art. 5 Protocol, the provisions of arts. 1, 2, 3 and 4 shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

21. Art. 4 ECHR is entitled "Prohibition of slavery and forced labour" and provides that:

    1. No one shall be held in slavery or servitude.

    2. No one shall be required to perform forced or compulsory labour.

    3. For the purpose of this Article the term "forced or compulsory labour" shall not include:

    (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

    (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

    (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

    (d) any work or service which forms part of normal civic obligations.

22. Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64 (11 Mar. 2011), Primary Sources IBFD [hereinafter DAC].

such compulsory involvement is currently imposed without remuneration and without any consideration of the additional burdens connected with such payment raises some concerns from the perspective of fairness.

While the following paragraphs of this article will provide a more in-depth analysis of such issues, a possible solution to some of these problems in the cross-border scenario could be found by amending the Recovery Directive (2010/24).[23]

The current wording of the Directive allows for mutual assistance in such context, but does not alter the order of priority of taxes payable to other states. This might be due to the fact that such Directive was conceived at a time when obtaining the assistance of another State in tax collection was already a remarkable achievement. A possible reform of such rules could be particularly important to increase the likelihood of collecting taxes abroad. This is especially the case for taxpayers facing insolvency, where mutual assistance can be more a theoretical than an effective exercise of enforcement.

Insofar as most states give priority to the collection of taxes over other debts domestically, we suggest that the same should also apply for taxes to be collected on behalf of other EU Member States. This development could help states to rely more on mutual assistance within the European Union and create the conditions for relying less on third-party liability for the collection of taxes.[24]

### 3. Third-Party Liability in Light of the Right to Property

Article 1 of the First Protocol is the only article in the Convention that expressly refers to taxes. The reference however is only in order to establish an exception from the protection of property that is guaranteed by article P1-1 of the ECHR. As the Court consistently holds, in principle taxation is an interference with the rights guaranteed in article P1-1 of the ECHR, but this interference is justified under the second paragraph of that article which provides expressly for an exception in respect of taxes or other contributions.[25] However, despite this, the Convention organs must in all cases ensure that article P1-1 has been correctly applied and therefore taxation issues do not escape the Court's power of review.[26] Accordingly, taxation, just as well as any other domain, is subject to the requirements of the rule of law and subject to judicial scrutiny that secure an effective protection of fundamental rights of all individuals, including taxpayers.

23. Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L 84 (31 Mar. 2010), Primary Sources IBFD.
24. For an analysis of the relevant issues under the Mutual Assistance Directive, *see* P. Pistone & I. Lazarov, *The Fundamental Right to Fair and Equitable Treatment in the Cross-border Recovery of Taxes within the EU*, 15 World Tax J. 1, sec. 2.4.1. (2022), Journal Articles & Opinion Pieces IBFD.
25. *See* for example ECnHR, 11 Nov. 1986, *Lindsay v. UK*, concerning the alleged discrimination in the taxation of income of married couples; repeated in ECnHR, 16. Jan. 1995, *Travers ao v. Italy*; *see also* ECtHR, 21 Aug. 2002, *Jokela v. Finland*, where the court stated that "it is undisputed that the tax levied in respect of the inherited real property also interfered with the applicants' rights under Article 1 of Protocol No. 1. That interference in itself falls to be considered under the second paragraph of Article 1 of Protocol No. 1" (para. 47 of the judgment). *See also*, in general, J. Kokott & P. Pistone, *Taxpayers in International Law – International Minimum Standards for the Protection of Taxpayers' Rights* secs. 8.4.1. and 8.4.2.4.1., with further references to the case law of the European Court of Human Rights (Hart 2022).
26. ECnHR, 16 Jan. 1995, *Travers ao v. Italy*. *See also* the discussion in R. Ergec, *Taxation and Property Rights under the European Convention on Human Rights*, 39 Intertax 1, pp. 2 et seq. (2011) and C. Endresen, *Taxation and the European Convention for the Protection of Human Rights: Substantive Issues*, 45 Intertax 8/9, pp. 520-521 (2017).

In this context, the second paragraph of article P1-1 of the ECHR has to be construed in the light of the general principle set out in the first sentence of that article. Any interference with the right to property should strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

This approach and the need to achieve this balance is dictated by the structure of article P1-1 of the ECHR as a whole. There must be a reasonable relationship of proportionality between the means employed and the aims sought to be realized. Consequently, the financial liability arising out of the raising of tax or contributions may adversely affect the right to property if it places an excessive burden on the person or the entity concerned or fundamentally interferes with his or its financial position.[27]

The scope of measures examined by the Court under article P1-1 of the ECHR range from issues of substantive tax burden, to procedural issues relating to the imposition of taxes, as well as enforcement measures used for the collection of tax. For the purposes of this article, the analysis will be limited to the case law relating to the enforcement measures.

There are two types of interference with property that are covered by article P1-1 of the ECHR: control of use and deprivation.[28] Deprivation may be described as dispossession of the subject of property and is, in principle, transfer of property. Control, on the other hand, involves no transfer; the owner retains his property but his use of it is restricted. Measures taken in order to secure the payment of taxes are mostly classified as measures that control the use of property.[29]

In the European Union, the provisions of article P1-1 of the ECHR correspond to the provisions of article 17 of the EU Charter of Fundamental Rights.[30] According to article 52(3) of the Charter, in so far as it contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the latter; this provision however shall not prevent EU law providing more extensive protection.

There is one difference in the way the limitations to the right to property are defined. In article P1-1 of the ECHR there is an explicit reference to the limitation of the right to property in order to secure the collection of taxes; such an explicit reference to taxation is missing from the corresponding provision of article 17 of the Charter, although the latter adopts the distinction between deprivation of possessions and regulation of the use of possessions. The Charter uses only the general term "general interest" to define the permitted limitations to the right. It provides for an exception to the deprivation of possessions when this serves the public interest, provided that the cases and relevant conditions under which this may be permitted are provided for by law and fair compensation is paid in good time for their loss. It also provides that the use of property may be regulated by law in so far as is necessary for the general interest. This lack of specific reference to taxation raises the question of whether

27. Id.
28. In a few exceptional cases, deprivation constitutes control of the use of property; *see* the analysis and classification in L. Sermet, *The European Convention on Human Rights and Property Rights* p. 23 et seq. (Council of Europe 1998).
29. Id., at p. 25 and R. Ergec, *Taxation and Property Rights under the European Convention on Human Rights*, 39 Intertax 1, p. 2 (2011).
30. Charter of Fundamental Rights of the European Union, OJ C 326, pp. 391-407 (26 Oct. 2012), Primary Sources IBFD [hereinafter the Charter].

under EU law the treatment of measures that aim at securing the collection of taxes will be treated stricter than under the ECHR.

The Explanations relating to the Charter[31] do not shed any light on this issue. These only state that in relation to its model, article P1-1 of the ECHR, the wording of the right to property has been updated, but the meaning and scope of the right are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there, as set out in article 52(3) of the Charter. Arguably, the effective protection of the right to property in the European Union may take place within a legal framework that allows for a stricter scrutiny of the prerogatives of the legislator, especially with regard to the protection of the rule of law.[32] So far, although a few tax cases have reached the ECJ, no tax case concerning the application of article 17 of the Charter has been decided by it.[33]

### *3.1. Issues arising in relation to joint and several liability*

#### *3.1.1. Deprivation of the third party of its property: Substantive rights under article P1-1 of the ECHR*

The second paragraph of article P1-1 of the ECHR refers to measures that are considered necessary to secure the payment of taxes or other contributions or penalties. This reference includes both laws that impose taxes and also laws which provide for the enforcement of taxes.[34]

The establishment of joint and several liability of third parties for the payment of tax debts cannot be considered as imposition of a tax. Indeed, the tax is often not assessed in the name of the third parties that are held jointly and severally liable for the payment of the taxes, and therefore it is not their tax obligation. This mechanism can best be viewed as a collection mechanism, a measure to enforce the collection of taxes by rendering third parties jointly and severally liable. As such, it is covered by the scope of article P1-1 of the ECHR and is subject to the scrutiny of the Court.

##### 3.1.1.1. Deprivation of property belonging to third parties

The seminal case dealing with such issues is the *Gasus Dosier* case from 1995.[35] The case concerned the seizure by the tax authorities of a concrete mixer in the hands of a Dutch company that was a tax debtor; the concrete mixer had been sold by Gasus Dosier to the Dutch company with reservation of title. At the time of the seizure, the concrete mixer was in the possession of the Dutch company but did not belong to it, as the (legal) ownership had been retained by the seller, Gasus Dosier. Gasus Dosier complained that they had been deprived of their possession, as it was impossible to retrieve the machine that had been seized in order to secure the payment of taxes of their Dutch client.

31. Explanations relating to the Charter of Fundamental Rights, OJ C 303, pp. 17-35 (14 Dec. 2007).
32. *See* on this point Kokott & Pistone, *supra* n. 3, at sec. 8.4.2b.4.2.
33. The authors have been able to identify few instances where relevant issues have arisen; *see also* the cases referred to in sec. 3.1.1. In 2018, the Administrative and Labour Tribunal of Budapest, Hungary, sent a preliminary question to the Court of Justice asking whether national legislation increasing the amount of a tax on the operation of slot machines in amusement arcades five-fold and introducing an additional tax is contrary to art. 17 Charter; the Court declared itself not competent to hear the case, as it did not identify a cross-border element in the case referred to it; *see* HU: ECJ, 4 June 2019, C-665/18, *Pólus Vegas Kft. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*.
34. P. Baker, *Taxation and the European Convention on Human Rights*, BTR, pp. 211-377.
35. ECtHR, 23 Feb. 1995, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*.

The Court observed that conferring upon a particular creditor the power to recover tax debts against goods which, although in fact in the debtor's possession, are legally owned by third parties is, in several legal systems, an accepted method of strengthening that creditor's position in enforcement proceedings. In that case, it was considered that it was aimed at "securing the payment of taxes", and that using the power conferred on the tax authorities did not constitute a "confiscation", whether "arbitrary" or not, but rather a method of recovering a tax debt.[36]

Moreover, the Court noted that granting to the tax authorities a power to recover tax debts against goods owned by certain third parties – such as a seller of goods who retains his title – does not in itself prompt the conclusion that a fair balance between the general interest and the protection of the individual's fundamental rights has not been achieved. A legislator may in principle resort to that device to ensure, in the general interest, that taxation yields as much as possible and that tax debts are recovered as expeditiously as possible. Further examination of the issue of proportionality was necessary.[37]

In order to assess the proportionality of the interference with the applicant's possessions, the Court looked at the function of the retention of title in the particular case and at whether Gasus Dosier could have taken measures to avoid being caught in such a difficult situation. Regarding the retention of title, the Court observed that it was meant as a security, because the asset was sold and the consideration was to be paid in instalments. It considered that whoever sells goods subject to retention of title is not interested so much in maintaining the link of ownership with the goods themselves as in receiving the purchase price. States may therefore legitimately, within their margin of appreciation, differentiate between retention of title and other forms of ownership.[38]

Regarding the behaviour of the applicant, the Court considered that Gasus Dosier could have eliminated their risk altogether by choosing other ways to deal with a risky client. They could have declined to extend credit to the Dutch client; they could have stipulated payment of the entire purchase price in advance or else refused to sell the concrete mixer in the first place. They might have also obtained additional security, for example in the form of insurance or a banker's guarantee, which would pass the risk on to another party.[39]

Based on the above considerations, the Court rejected the complaint, as it found that the requirement of proportionality had been satisfied.

In the European Union, the application of article 17 of the Charter in such a scenario involving taxes has not yet been judged by the ECJ. It appears, though, that under the EU Charter the good faith of the third party in a *Gasus Dosier* scenario should at least be taken into account in order to make the measure compatible with the right to property guaranteed under article 17 of the Charter.

Indeed, the ECJ has already held, in the context of a case that concerned the confiscation, following a person's conviction for aggravated smuggling, of property used to commit that infringement which belongs to a third party acting in good faith, that this is not compatible

36. Id., at para. 59.
37. Id., at para. 66.
38. Id., at para. 68.
39. Id., at para. 70.

with article 17(1) of the Charter.[40] The ECJ declared that the confiscation of property, that is to say, the definitive deprivation of the right of ownership in respect of that property, substantially affects the rights of persons. It noted that as regards a third party acting in good faith, who did not know and could not have known that their property was used to commit an offence, such confiscation constitutes, in the light of the objective pursued, a disproportionate and intolerable interference impairing the very substance of their right to property.[41] Such line of interpretation leads the authors to have serious doubts as to whether the involvement of a third party in the form of joint and several liability can be justified by the need to secure a more effective protection of the interest to collect taxes, except for cases of a specific involvement of such person in a scheme of tax avoidance or evasion.

3.1.1.2. Joint and several liability of a company's directors

Another aspect of the same issue arises in relation to the liability of directors of a company for the payment of the tax debts of the company they are connected with. The issues are illustrated in the case *Klavdianos v. Greece*.[42] Although the Court did not examine the complaint in its substance, holding the complaint inadmissible for lack of exhaustion of domestic remedies,[43] it is still useful to consider the facts of the case and the reaction of the domestic courts in the particular set of facts.

The applicant, Mr Klavdianos, was appointed as Chairman of the Board of Directors and Managing Director of a Greek construction company, in which he also held 15% of the stocks. Due to financial difficulties, the members of the board of directors resigned, as did Mr Klavdianos (the last to resign, on 12 May 1986), the creditors petitioned for bankruptcy on 9 May 1986 and the company was adjudged bankrupt. According to Greek law, managing directors of Greek limited companies are held personally responsible for the payment of taxes owed by their companies. Since the company owed income tax that had been retained from the salaries of its employees, the Tax Office issued an order to seize the applicant's house in Athens in order to satisfy the payment of the tax debt of the company. The applicant complained, among others, that the seizure of his house in order to secure the payment of a debt owed by a company from which he had resigned before its dissolution violated his right to property, in breach of article P1-1 of the ECHR.

Based on the way the Court approaches tax cases under article P1-1 of the ECHR, it seems that the complaint of the applicant might have been accepted. The suitability and effectiveness of the joint and several liability of the company's managers for the tax debts of the company is not denied. Therefore, in the reasoning of the Court, it is a measure that is in principle available to states in order to combat tax evasion or the avoidance of payment of the tax debts of companies. The issue should therefore be determined in relation to propor-

40. BG: ECJ, 14 Jan. 2021, Case C-393/19, *OM*.
41. Id., at para. 55.
42. ECtHR, 21 Sept. 1999, *Klavdianos v. Greece*, 38841/97 (admissibility).
43. Id., at para. 2. The Court observed that the object of the proceedings before the Greek Supreme Administrative Court was the interpretation of the rule providing for a manager's personal liability for corporate debts, and its application to the applicant. However, at no time did the applicant rely on the relevant provisions of the Convention, or on arguments to the same or a similar effect based on domestic law, in the courts dealing with his case. His reference to the seizure of his property was purely incidental to his main arguments relating to his economic activities in his capacity as a member of the board of the company. In so doing, the applicant cannot be considered to have formulated a complaint which was linked to the alleged violation of art. P1-1 ECHR.

tionality.[44] At what point does the burden on the individuals that are jointly and severally liable fail to serve the balance that the article requires to be respected?

In the *Klavdianos* case, and as regards article P1-1 of the ECHR, the applicant submitted that the Supreme Administrative Court applied the law establishing his joint and several liability in his case, although he had no managerial authority at all throughout his appointment. The company, as member of a joint venture, had no business activity of its own. All its activities were in tandem with the other members of the joint venture and management was without exception carried out by the joint venture's appointed directors, amongst whom was his father. They withheld the taxes due. In this respect, the Athens Court of First Instance acquitted him of all charges brought by the Industrial Companies Fiscal Service for non-payment of taxes and social security contributions, and ordered proceedings against his father, who had actually managed the company at the material time. The company's management had collapsed months before its dissolution and the applicant had formally resigned prior to the dissolution. The applicant, being a minority shareholder (15% of the shares), could only benefit from a small part of the company's positive results; his liability was confined, according to the fundamental principle of limited liability companies, to the value of his contribution to the capital of the company. He did not foresee, and did not accept, any risk related to the company's debts. The applicant alleged that in fact he was held liable for failing to secure the appointment of a successor; if he had done so, he would not have been held liable for the tax debts of the company.

The tax debts for which the applicant was held liable had been incurred in 1983-1985. According to the facts, the applicant had been appointed to the management of the company in 1984, but he was still living in Nigeria until 1985, when he returned to Greece. So, assuming that the applicant, despite having been appointed as managing director, in fact had had no involvement in the actual management of the company, one might be inclined to conclude that holding him liable for the debts that arose during that period would not be proportionate. Especially if in the course of the same set of proceedings it can be established who did in fact manage the company.[45]

44. *See also* the case ECtHR, 11 Dec. 2018, *Lekić v. Slovenia*, 36480/07, which concerned the complaint of an individual who was a minority member of a limited liability company and who was personally liable for a debt of the company (not a tax debt) after the company was struck off. The Court stated, at para. 93, that there is no dispute that the decision to hold the applicant personally liable for a debt of the company amounted to an interference with the peaceful enjoyment of his possessions under art. P1-1 ECHR. The measure at issue, taken in isolation, should be considered as a measure of control over the use of property. However, bearing in mind the wider context, including notably the strike-off of the company from the companies' register, the Court examined the case in the light of the general principle laid down in the first rule of art. P1-1 ECHR. The Court concluded that there was no interference with art. P1-1 in the particular case, Taking into account the applicant's involvement in the running of the company, the amount of the debt paid by him (a modest amount) and the national context at the relevant time (being in a period of transition from a socialist to a free-market economy), the Court concluded that the measure in the specific circumstances had not resulted in an excessive burden and therefore found no violation of art. P1-1 ECHR.

45. Compare however the considerations of the Court in the case ECtHR, 3 June 2021, *Busuttil v. Malta*, 48431/18. The case was examined under art. 6(2) and the presumption of innocence, as Maltese legislation provides for a legal presumption by which a company director is found guilty because the company in which he was a director had failed to file a tax return and pay the taxes due during the time the person was a director. The applicant claimed that he had no involvement in the management of the company. The Court found that there is no breach of the presumption of innocence; in addition, it noted, in para. 55, that it is judicious for the law to provide that an individual, in taking up their responsibilities as director, takes up the obligation to pay the relevant tax dues, in order to allow for a functional system in the interests of all those concerned, as long as some means of defence remains available to an accused person.

The question is then whether objective (i.e. automatic) liability can be tolerated and whether it can be considered as a "proportionate measure" or whether subjective elements should be taken in account when assessing the third party's liability for the tax debts of another taxpayer.[46] The case law of the ECJ in relation to the joint and several liability of third parties, including a company's directors, for the payment of VAT points to the latter.

According to ECJ case law, national measures which bring about, de facto, a system of strict joint and several liability 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 them to escape liability by providing proof that they had nothing whatsoever to do with the acts of the person liable to pay the tax must, therefore, be considered contrary to the principle of proportionality. According to the case law of the Court, 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 they have no influence whatsoever.[47]

However, the exercise of the Member States' power to designate a joint and several debtor other than the person liable for payment of the tax in order to ensure efficient collection of that tax must be justified by the factual and/or legal relationship between the two persons concerned in the light of the principles of legal certainty and of proportionality. A third party's good faith, whereby that third party has exhibited all the due diligence of a circumspect trader, having taken every reasonable measure in their power and that their participation in abuse or fraud is excluded are points to be taken into account in deciding whether that person can be obliged to account for the VAT owed.[48]

46. In a recent amendment of the Greek legislation that provides for the joint and several liability of third parties, elements of a subjective nature were introduced, aiming at rationalizing the regime of joint and several liability of third parties for tax debts. GR: Tax Procedures Code (Law 4174/2013), art. 50 was amended by Law 4646/2019 in order to provide that the joint and several liability of individuals for the tax debts of the companies they are connected with, exists if the following three conditions are met cumulatively:
    - the individuals have one of the capacities enumerated in the law (e.g. managing director, director, executive president, etc.); no other persons may be considered as jointly and severally liable;
    - those persons must have had one of the capacities enumerated in the law when the debt became due; and
    - the non-payment of the debt is due to the fault of the person held jointly and severally liable; the persons held as jointly and severally liable have the right to claim and prove that the non-payment was not in fact their fault.

    The new provisions have been in force since 12 Dec. 2019 and also apply retrospectively (covering previous tax years and all old cases, even cases pending before courts). The Independent Authority for Public Revenue (IAPR) has issued a Circular E. 2173/2020 providing guidance on the application of the new provisions; a joint decision of the Minister of Finance and the Governor of the IAPR, Decision A. 1082/2021, has also been issued, indicatively identifying cases where it is held that the individuals are not in fault, and therefore they cannot be held jointly and severally liable for the debts of the legal entity with which they are connected.
47. *See* UK: ECJ, 11 May 2006, Case C-384/04, *Federation of Technological Industries and Others,* EU:C:2006/309, para. 32, Case Law IBFD; BE: ECJ, 21 Dec. 2011, Case C-499/10, *Vlaamse Oliemaatschappij*, EU:C:2011:871, para. 24.
48. *Vlaamse Oliemaatschappij* (C-499/20), para. 26; and ECJ, 20 May 2021, Case C-4/20, *ALTI*, EU:C:2021:397, para. 37.

The conclusion from the ECJ's case law is that objective liability, that excludes the taking into account of subjective elements, is not proportionate. The recent ECJ judgment in *MC* (Case C-1/21)[49] provides a vivid illustration of these issues.

The Bulgarian legislation under scrutiny in *MC* provided that a manager or member of an executive body who, in bad faith, makes payments in kind or in cash from the assets of a legal entity which is a tax debtor constituting a hidden distribution of profits or dividends, or transfers assets of the debtor free of charge or at prices significantly lower than market prices, with the result that the assets of the debtor are reduced and therefore taxes or statutory social security contributions are not paid, shall be liable for the debt up to the amount of the payments made or the amount of the reduction in the assets.

Assessing the compatibility the system of joint and several liability provided in the Bulgarian legislation, the Court concluded that it contributes to the collection of amounts of VAT which have not been paid by a taxable legal person within the mandatory time limits laid down by the VAT Directive (2006/112).[50] In particular, the Court found that such a system helps to ensure the correct collection of VAT and/or to prevent evasion, within the meaning of article 273 of the VAT Directive (2006/112), in accordance with the obligation laid down in article 325(1) of the TFEU.[51] The fact that the persons held jointly and severally liable, namely the manager or member of an executive body of the legal person, are not, in that capacity, themselves subject to VAT, does not change that conclusion.[52]

On the contrary, the Court held that there may be an obligation of the Member States, in certain circumstances, to impose penalties on non-taxable persons who take part in decision-making within a taxable legal person, otherwise the effectiveness of measures necessary to ensure collection of all VAT and to counter evasion would be undermined. Accordingly, the Court held that a system of joint and several liability comes within the scope of article 273 of the VAT Directive (2006/112), interpreted in the light of article 325(1) of the TFEU and must be assessed as to its proportionality.[53]

The Bulgarian legislation provided for a targeted measure and presented certain characteristics that indeed took into account subjective elements of the behaviour of the third party, limiting, at the same time, the liability of the third party only to the possible benefit he may have derived from the company that has the tax debts. These characteristics led the Court to hold that the particular provision respects proportionality. Accordingly, the characteristics of the Bulgarian legislation may be taken as a best practice indication, in relation to how director's joint and several liability provisions may be drafted.

49. BG: ECJ, 13 Oct. 2022, *MC v. Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Veliko Tarnovo pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite*, ECLI:EU:C:2022:788, Case Law IBFD.
50. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347 (11 Dec. 2006), Primary Sources IBFD [hereinafter VAT Directive (2006/112)].
51. *MC* (C-1/21), para. 61.
52. Id., at para. 62. The Court referred to art. 273 VAT Directive (2006/112), stating that the wording of that article does not limit the application of the obligations laid down by the Member States pursuant to that provision only to persons subject to VAT. The Court also referred to the heading of Title XI of the VAT Directive (2006/112) which expressly refers to the "obligations of taxable persons and certain non-taxable persons".
53. *MC* (C-1/21), paras. 65-67.

In particular, the Bulgarian legislation firstly provided that the person designated as jointly and severally liable must be a manager or member of an executive body of the legal person liable for unpaid VAT debts. These persons can be regarded as participating in decision-making within that legal person and therefore they can influence the behaviour of the legal person.

Secondly, the bad faith of the person designated as jointly and severally liable must be established. This is particularly important as it imposes the burden of proof on the tax authorities to prove the bad faith of the company director who is held jointly and severally liable; it is not a burden of the third party to prove that he had acted in good faith.

Thirdly, the existence of a causal link between the bad faith acts of the company's director and the inability of the company to pay the VAT is also an element enhancing the proportionality of the measure. This element ensures that only the persons whose actions have resulted in the failure of the legal entity to honour its obligations may be held jointly and severally liable with the legal entity.

Moreover, another characteristic of a proportionate measure is the extent of the joint and several liability of the third party. Under the Bulgarian legislation assessed in the *MC* case, the liability is limited to the amount by which the legal person's assets have been depleted as a result of the acts committed in bad faith by the company's manager. Last but not least, that liability is incurred only in the alternative where it proves impossible to recover from the legal person the amounts of VAT payable. This means that the liability is not triggered automatically, and that in any case it functions as a measure of last resort.

An ancillary issue is the extent of the VAT liability that the joint and several liability of a company's directors covers: is it limited only to the amount of the VAT due, or can it be extended to default interest payable by the legal person on account of a failure to pay VAT within the mandatory time limits?

This issue was also dealt by the Court in the *MC* case. The Court discussed the extension of the joint and several liability to also cover default interest with the primary provision on establishing the joint and several liability. It held that the inclusion of the default interest related to the amount of VAT for which a third person (the company's manager in this case) may be held liable pursuant to a system that is considered as proportionate, is also proportionate.[54]

Accordingly, a general rule can be deduced, i.e. that the inclusion of default interest in a system of joint and several liability may be regarded as compatible with the principle of proportionality, as long as the interest issue is an ancillary issue in relation to a proportionate system of joint and several liability and directly linked to the amount of VAT for which the person is liable, pursuant to that proportionate system.

#### 3.1.1.3. Joint and several liability for failure of another person to pay VAT

Another relevant aspect is provided by the ECtHR's reasoning in the *Bulves v. Bulgaria* case.[55] In that case, a taxpayer was denied the deductibility of VAT that he had paid to his supplier (the input VAT), because during a tax audit it was found that his supplier had

54. Id., at para. 95.
55. ECtHR, 22 Jan. 2009, *Bulves AD v. Bulgaria*.

reported the transaction and paid the relevant VAT after the expiration of the prescribed deadline.

The Court pointed out that, according to its well-established case law, an instance of interference, including one resulting from a measure to secure payment of taxes, must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of article P1-1 of the ECHR as a whole, including the second paragraph: there must be a reasonable relationship of proportionality between the means employed and the aims pursued.[56]

The Court had no difficulty in finding that in principle the measure served the general interest of the community in preserving the financial stability of the VAT system of taxation with its complex rules regarding charges, recharges, exemptions, deductions and reimbursements. The attainment of full and timely discharge by all VAT-registered persons of their VAT reporting and payment obligations are essential elements of the preservation of that stability, as well as the prevention of any fraudulent abuse of VAT. In this respect, the Court accepts that attempts to abuse the VAT system of taxation need to be curbed and that it may be reasonable for domestic legislation to require special diligence by VAT-registered persons in order to prevent such abuse.[57]

The Court went on to assess whether a fair balance was struck between the competing interests in the particular case. It noted that the applicant company had absolutely no power to monitor, control or secure compliance by its supplier with its VAT reporting, filing and payment obligations. It was considered that the applicant company was placed in a disadvantaged position by having no certainty as to whether, in spite of its own full compliance, it would be able to deduct the input VAT it had paid to its supplier, since the recognition or otherwise of the right to deduct was also dependent on the tax authorities' assessment as to whether the latter had discharged its VAT reporting obligations in a timely fashion.[58] Consequently, if the national authorities, in the absence of any indication of direct involvement by a person in fraudulent abuse of a VAT chain of supply, or knowledge thereof, nevertheless penalize the fully compliant recipient of a VAT-taxable supply for the actions or inactions of a supplier over which it has no control and in relation to which it has no means of monitoring or securing compliance, they are going beyond what is reasonable and are upsetting the fair balance that must be maintained between the demands of the general interest of the community and the requirements of the protection of the right of property.[59]

56. Id., at para. 62.
57. Id., at para. 65.
58. Id., at para. 69. *See also* the dissenting opinion of Mr Foighel, joined by Mr Russo and Mr Jungwiert in *Gasus Dosier*, where it was argued that the requirements of fair balance and proportionality had not been satisfied because, among others, a third party should not bear the risk that the person with whom he enters into an agreement has not paid all his taxes, as normally the third party will know nothing about his business counterpart's tax status.
59. *See* the case law after *Bulves v. Bulgaria* where the ECtHR followed the same approach: ECtHR, 18 Mar. 2010, *Business Support Centre v. Bulgaria*; ECtHR, 25 Jan. 2011, *Nazarev v. Bulgaria* (dec.); ECtHR, 14 June 2018, *Euromak Metal v. Former Yugoslav Republic of Macedonia*; ECtHR, 17 Mar. 2020, *Edata-Trans SRL v. Moldova*; ECtHR, 1 Mar. 2022, *Alcaz GA v. Moldova*.
Subsequent cases to *Bulves v. Bulgaria* have held that a third party who has a right of action against the supplier who defaults on his VAT obligations may not be permitted to deduct input tax, since, as long as they have a remedy to obtain compensation for any loss they suffer, legislation denying them the right to deduct input tax is not disproportionate; *see* ECtHR, 18 Mar. 2014, *Atev v. Bulgaria* and ECtHR (dec.),

To date, the ECJ has not decided a tax case concerning such a scenario from a human rights point of view;[60] in a number of VAT cases, though, the Court uses a good faith and proportionality principle approach to address the issues.

The Court has thus ruled that article 205 of the VAT Directive (2006/112) permits measures holding a person jointly and severally liable for payment of VAT under certain conditions. This is the case where, at the time of the supply to it, that person knew or ought to have known that the tax payable in respect of that supply, or of any previous or subsequent supply, would go unpaid. In such a case, the tax authorities can rely on presumptions in that regard, provided that such presumptions are not formulated in such a way as to make it practically impossible or excessively difficult for the taxable person to rebut them with evidence to the contrary, thereby creating a system of strict liability going beyond what is necessary to preserve the public exchequer's rights. Traders who take every precaution which could reasonably be required of them to ensure that their transactions do not form part of a chain that is fraudulent or amounts to an abuse must be able to rely on the legality of those transactions without the risk of being made jointly and severally liable to pay the VAT due from another taxable person.[61]

The Court has also held that the fact that a person other than the person liable to pay the tax acted in good faith, exhibiting all the due diligence of a circumspect trader, that he took every reasonable measure in his power and that his participation in abuse or fraud is excluded are points to be taken into account in deciding whether that person can be obliged to account for the VAT owed.[62]

The line of cases on the interpretation of the tax liability of third parties in cases of VAT fraud has set some boundaries to the possible responsibility of such persons when they have no real awareness of the fraud or where tax authorities have not made any real attempt to give evidence of such awareness by the third party.[63] Accordingly, the point can be made that such evidence constitutes a necessary condition for the liability of third parties in such circumstances.

5 Feb. 2019, *Formela v. Poland*; on the contrary, in ECtHR, 28 May 2020, *Avto Atom Doo Kochani v. North Macedonia*, the Court found that the refusal to deduct input VAT constituted a breach of art. P1-1 ECHR since the supplier had been struck off the companies register and therefore a civil claim against him would not have been possible.

60. The questions were raised from a human rights point of view in request for a preliminary ruling that was lodged by a Czech court in 2019. In CZ: ECJ, 14 Nov. 2019, Case C-520/19, *ARMOSTAV MÍSTEK s.r.o. v. Odvolací finanční ředitelství*, Case Law IBFD, the referring national court asked whether the existence of express national legislation relating to joint and several liability for missing tax in a fraudulent chain precludes tax authorities from refusing the person held liable under that legislation the right to deduct VAT in accordance with the case law of the ECJ on VAT fraud and whether such a practice in that situation is precluded by arts. 17(1), 20, 52(1), 52(6) and 54 Charter. By order of the Court, the case was dismissed as manifestly inadmissible, as the referring court had failed to provide in its request the necessary information concerning the facts of the case and the link with EU law.

61. UK: ECJ, 11 May 2006, Case C-384/04, *Federation of Technological Industries and Others*, ECLI:EU:C:2006:309, paras. 32 and 33 and the case law cited, Case Law IBFD; DE: ECJ, 21 Feb. 2008, Case C-271/06, *Netto Supermarkt GmbH & Co. OHG v. Finanzamt Malchin*, EU:C:2008:105, para. 23, Case Law IBFD.

62. *Vlaamse Oliemaatschappij* (C-499/10), para. 26 and the case law cited.

63. *See* AT: ECJ, 14 Feb. 2019, Case C-531/17, *Vetsch Int. Transporte GmbH*, ECLI:EU:C:2019:114, Case Law IBFD and HU: ECJ, C-189/18, 6 Oct. 2019, *Glencore Agriculture Hungary*, ECLI:EU:C:2019:861, Case Law IBFD.

The ECJ has also decided on an ancillary issue. *Alti* (Case C-4/20)[64] concerns a case where national legislation provides that, in addition to the supplier, the recipient of a purely domestic supply is another "person liable for payment of VAT" (or, more precisely, a "person with secondary liability") and they are held liable not only for a third-party VAT liability but also for third-party default interest. Article 205 of the VAT Directive (2006/112) provides that, in certain situations, Member States may provide that another person in addition to the person liable for payment of VAT is to be held liable for payment of VAT, but does not contain any further statements regarding the extent of that liability.

In the *Alti* case, the ECJ was once again being called upon to interpret the VAT Directive (2006/112) – in the case at issue, articles 205 and 273 – by striking a balance between the effective collection of VAT by Member States and the fundamental rights of the persons concerned in conjunction with the principle of proportionality. The Member States' procedural autonomy permits liability for third-party default interest to be introduced as a kind of penalty, irrespective of article 205 of the VAT Directive (2006/112). In the *Alti* case, Bulgaria considered liability for default interest to be necessary in the light of the objective of the effective combatting of fraud.

The Court pointed out that exercise of the Member States' power to designate a joint and several debtor other than the person liable for payment of the tax in order to ensure efficient collection of that tax must be justified by the factual and/or legal relationship between the two persons concerned in the light of the principles of legal certainty and of proportionality. In particular, it is for Member States to specify the particular circumstances in which a person such as the recipient of a taxable supply is to be held jointly and severally liable for payment of the tax owed by the other party to the contract even though that person has paid that tax by paying the transaction price.[65]

The Court concluded that the VAT Directive (2006/112), read in the light of the principle of proportionality, does not preclude national legislation according to which the person held jointly and severally liable, for the purpose of that article, must pay, in addition to the VAT not paid by the person liable for payment of that tax, the default interest on that amount, due from the person liable for payment, where it is proved that, in exercising its right of deduction, the person held jointly and severally liable knew or should have known that the person liable for payment would not pay that VAT.[66]

64. BG: ECJ, 20 May 2021, Case C-4/20, *'ALTI' OOD v. Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' – Plovdiv pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite*, ECLI:EU:C:2021:397, Case Law IBFD.

65. Id., at para. 34.

66. AG Kokott in her opinion in the case (BG: Opinion of AG Kokott, 14 Jan. 2021, Case C-4/20, *'ALTI' OOD v. Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' – Plovdiv pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite*, ECLI:EU:C:2021:12, Case Law IBFD) had suggested that art. 205 VAT Directive (2006/112) is to be interpreted as precluding the inclusion of default interest which is owed by the person liable for payment of VAT by reason of late payment of VAT in the secondary liability of a third party; AG Kokott had pointed out that in that case it was unclear whether the recipient knew or should have known that the supplier paid by it duly declared its VAT liability, but did not discharge it in good time. So, arguably, the AG opinion and the ECJ judgment do not result in a different outcome.

### *3.1.2. Remedies available to the third party: Procedural guarantees under article P1-1 of the ECHR*

Article P1-1 of the ECHR does not contain any explicit procedural requirements. However, the rule of law is inherent in it, as in all articles of the ECHR. Moreover, the requirement of lawfulness of any measure that introduces restrictions to the right of property is the first and most important requirement of article P1-1.[67] Hence, this article has been construed to mean that persons affected by a measure interfering with their right to property must be granted the corollary right to effectively challenge the lawfulness of such measures. Accordingly, any interference with the peaceful enjoyment of possessions must be accompanied by procedural guarantees affording to the persons concerned a reasonable opportunity of presenting their case to the responsible authorities for the purpose of effectively challenging the measures interfering with their rights.[68] The ECtHR adopts a comprehensive view of the applicable procedures in order to ascertain whether this requirement is satisfied.[69]

The lack of procedural guarantees is one of the few instances where the ECtHR finds an infringement of article P1-1 of the ECHR in tax enforcement cases.[70]

In the case of *Rousk v. Sweden*,[71] the ECtHR had the chance to assess the compatibility of certain Swedish law provisions on the enforcement of taxes with article P1-1 of the ECHR. Rousk was the owner of a close company and was under a statutory obligation to submit a special income tax return every year. For the tax assessment year 2002 (income earned during 2001), he failed to submit the tax return in time and he did not respond to the tax authorities' orders to comply. After the tax assessment became final, and since the tax debts in Sweden are immediately enforceable, the tax authorities, after having reminded the applicant of his obligation to pay the tax debt, passed the claim for collection to the Enforcement Authority (*Kronofogdemyndigheten*) in Stockholm where it was registered in April 2003. A writ of execution was issued attaching the taxpayer's property. The taxpayer requested the tax authorities to grant him respite from the payment of his taxes until a new tax assessment had been made, as he intended to submit his tax returns shortly. The respite was granted, but in the meantime the Enforcement Authority proceeded with the auction of the taxpayer's property.

The Court noted that according to the Swedish legislation tax debts are enforceable following the tax authorities' decision on final tax even if there has been a request for reconsideration or an appeal to the administrative courts. Likewise, enforcement measures are not automatically suspended when a debtor appeals against such measures.

According to the Court, such mechanisms must be considered acceptable and falling within the state's wide margin of appreciation under the second paragraph of article P1-1

67. According to the second sentence of para. 1 art. P1-1 ECHR, no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The limitations described in the second paragraph of the article must also be prescribed by law.
68. *Jokela v. Finland*, para. 45; the case concerned the discrepancy between the assessments of the market value of expropriated property for the purposes of determining the compensation and for the purposes of inheritance tax in respect of the same property; the Court examined the combined effect of both measures and concluded that there was a violation of art. P1-1 ECHR.
69. Id.
70. *See* Kokott & Pistone, *supra* n. 3, at sec. 8.4.2.4.1 with references to the case law of the ECtHR.
71. ECtHR, 25 July 2013, *Rousk v. Sweden*, 27183/04.

of the ECHR. However, the Court also considers that it is necessary that they are accompanied by procedural safeguards to ensure that individuals are not put in a position where their appeals are effectively circumscribed and they are unable to properly protect their interests.[72]

In Spain, the Supreme Court has declared it appropriate to initiate the enforcement process for joint and several liability of third parties before the act imposing the penalties on the taxpayer becomes final. According to the court, it is permitted to transfer to the person declared jointly and severally liable a penalty, even if it has not become final yet in administrative proceedings, because it has been challenged and, therefore, automatically suspended, without prejudice to the fact that the penalty cannot be enforced and must continue to be suspended until it becomes final in administrative proceedings.[73]

Individuals that may be held jointly and severally liable for the tax debts of a legal entity they are connected with have a disadvantage in that respect. Since the tax is not assessed in their name, but in the name of the legal entity, in some cases this may be the result of a tax audit that takes place after the individual has left the company and the individual may have no way to be informed about it. Even if the individual is still with the company, for various reasons he may not be aware of the tax audit or the tax assessment. In such cases, the individual may only find out at a later stage, when the enforcement procedures for the collection of the tax debts have already been set in motion and collection measures are enforced against them. By then, it is simply too late for the third party to raise any objection and there is in fact no remedy that could be activated in order to prevent forced tax collection from adversely affecting the legal sphere of the third party.

More in general, the problem is that, from a judicial procedural aspect, these persons, as they are not the taxpayers but only have a joint liability for the payment of the tax, have access to legal remedies that provide only for limited review of the measures. If the company that has been assessed with the tax has not challenged the assessments, the individual who is jointly and severally liable may not have the opportunity to challenge them on grounds of substance. Article P1-1 of the ECHR however requires that all persons that may suffer an interference with their right to property have reasonable access to effective remedies to challenge the validity of the collection measures.

The Greek Tax Procedures Code (TPC)[74] provides for such a remedy especially for the persons that have joint and several liability for the payment of the tax debts of a legal entity. Article 50(4) of the TPC provides that these persons have the same rights as the legal entity/tax debtor and therefore they can, in their own name, have access to the remedies available for challenging the tax assessment before the tax administration. This means that these persons are entitled to file a quasi-judicial appeal in front of the Dispute Resolution Directorate of the Greek Independent Authority for Public Revenue and challenge the tax assessment on grounds of substance. There are practical problems which may render the right void. In cases where the person does not become aware of the tax assessment in time to file the quasi-judicial appeal within the time limit is one issue that may arise. Moreover, if the person is no longer with the company, it may be difficult to obtain information and documentation

72. Id., at para. 117.
73. *See* ES: Tribunal Supremo (TS), 8 Apr. 2021, STS 487/2021, available at https://www.poderjudicial.es/search/sentence.jsp?reference=9503450&optimize=20210428, reported in OPTR, *supra* n. 2, at p. 141.
74. GR: Tax Procedures Code, Law 4174/2013.

necessary in order to effectively challenge the assessment. In any case, the tax authorities are required to mention the persons who have joint and several liability in the corrective tax assessment act,[75] which must subsequently be lawfully notified to the person concerned. Still, however, this would not solve the problem of the person having no right to access the company's files in order to support his arguments.

The same approach was adopted as far as judicial remedies are concerned. The Greek Supreme Administrative Court (Symvoulio tis Epikrateias) held that the individual who is jointly and severally liable with the company for the tax debts of the latter has the right to file not only the quasi-judicial appeal before the Independent Authority for Public Revenue (IAPR), but also a judicial appeal before the administrative courts.[76] Moreover, it held that the persons who have joint and several liability for the payment of the tax debts of legal entities may challenge not only the validity of the enforcement measures that have been initiated against them but they can also challenge the validity of the tax assessment itself, without any restriction.[77] In this way, these persons are in all cases afforded an effective remedy that is capable of examining the lawfulness not only of the enforcement measures but also of the tax assessment itself. This line of interpretation goes in the right direction of securing consistency with the requirement established by the ECHR and EU law. In the absence of specific provisions, such as the Greek one in question, it is submitted that the interpretation by the Greek judiciary could be taken into account in order to preserve the consistency with ECHR and EU law.

### *3.2. Issues arising in relation to the obligation to withhold taxes: Lack of remuneration and lack of reimbursement of costs as an interference with the right to property of the withholding agents*

In as early as 1976, the European Commission of Human Rights (ECnHR or "Commission") already had the opportunity to examine this line of argumentation in *Four Companies v. Austria*.[78] According to Austrian legislation in force at that time, the companies were obliged, without any return to themselves, to calculate and withhold from the wages and salaries of their employees the tax on wages, the social security contributions and other similar contributions and to pay them to the competent authorities; to withhold from wages and salaries any sums taken in execution of a court judgment; to pay to their employees family allowances and wages and salaries in case of sickness and to claim compensation from the competent public authorities. The applicant companies claimed, among others, that the execution of these various obligations entailed an increase of general costs amounting to a deprivation of property, as they were required to perform the above duties without return for consideration and in some cases even suffer an effective loss.

Examining the complaint under article P1-1 of the ECHR, the Commission observed that under paragraph 2 of that article, states have the right to enforce such laws as they consider necessary, inter alia, to secure the payment of taxes or other contributions. The applicant companies argued that the exception contained in paragraph 2 of article P1-1 of the ECHR should be interpreted in such a way that it would only justify the actual withholding of

75. Id., at art. 35.
76. GR: Supreme Administrative Court (Symvoulio tis Epikrateias, SE), 1 Apr. 2020, decision no. 498/2020.
77. GR: SE, 31 Dec. 2020, decision no. 2816/2020.
78. ECnHR, 27 Sept. 1976, *Four Companies v. Austria* (admissibility).

taxes, social security contributions and similar charges, and not the imposition of the costs of their collection on persons who are not the tax debtors.

The Commission in 1976 did not appear to be convinced that loss of property or income suffered by the applicant companies in connection with their above obligations could indeed be regarded as deprivations of possessions within the meaning of article P1-1 of the ECHR. It held, in dismissing the complaint, that

> even assuming that losses of property or income suffered by the applicant companies in connection with their above obligations can be regarded as deprivations of possessions within the meaning of Art. 1, para. (1) of Protocol No. 1, they are covered by the exception provided for in Art. 1, para. (2) of the Protocol as being necessary to secure the payment of taxes and contributions.

In light of the subsequent case law of the Court, however, it could be argued that the provision of this service without fair remuneration as well as the non-reimbursement of the related costs indeed constitutes an interference with the right to property.

The concept of possessions in article P1-1 of the ECHR is an autonomous one, covering both "existing possessions" and assets, including claims, in respect of which it can be argued that a person has at least a "legitimate expectation".[79] "Possessions" include rights "in rem" and "in personam" and encompasses immovable and movable property and other proprietary interests.[80] Although legitimate expectations cannot be taken so far as to create a right to acquire property,[81] the Court has found that future income constitutes a "possession" when the income has been earned or where an enforceable claim to it exists.[82]

Setting up and maintaining resources to comply with the withholding requirements on the one hand, and the provision of the service itself of withholding and remitting the taxes withheld to the state on the other, amount to a service that if rendered to a private party would have been remunerated by the beneficiary. This means that the person offering the service is in possession of an existing "asset", the exploitation of which normally gives rise to an expectation of a fair remuneration.

Both the state, as well as the persons that are subject to the withholding, benefit from this arrangement. The state is relieved from the need to engage resources in auditing the recipients of the income and in enforcing collection, whereas it also benefits from the early collection of taxes. The private persons are relieved from the need to make the relevant arrangements themselves in order to notify the tax authorities of the income earned and in order to pay the taxes due.

The lack of any reimbursement of related costs for setting up and maintaining the infrastructure that is used to offer that service to the state and the lack of any fair remuneration

79. The concept of "legitimate expectation" in the context of art. P1-1 ECHR was first developed by the Court in ECtHR, 29 Nov. 1991, *Pine Valley Developments Ltd and others v. Ireland*; the Court held that an outline planning permission that had been granted, amounted to a favourable decision as to the principle of the proposed development, which could not be reopened by the planning authority and, therefore, even though it was declared by the Supreme Court as a nullity *ab initio*, it had created a legitimate expectation to the applicants that they could carry out their proposed land development and was to be regarded as a component part of the applicant companies' property; *see* para. 51 of the judgment.
80. *See* R. Ergec, *Taxation and Property Rights under the European Convention on Human Rights*, 39 Intertax 1, pp. 2-3 (2011).
81. ECtHR, 7 July 2011, *Stummer v. Austria*, para. 82.
82. *See* for example ECtHR, 11 Apr. 2006, *Levänen v. Finland* (dec.).

for rendering that service to the state could arguably be viewed as a de facto indirect expropriation.

The Court consistently holds that there is an interference with the peaceful enjoyment of possessions where there is deprivation of a possession; in particular the transfer of a property title to a public body or to another private person is included in the concept of interference.[83] The deprivation may be direct, as in the case of taxation,[84] or indirect. Indirect deprivation is difficult to define; arguably, a decisive criterion may be that the transfer or property originates in an action by the public authorities but the transfer is actually made by the owner of the asset himself.[85] This pattern might be applicable to the case of withholding taxes. The person that is burdened with the withholding suffers an interference with his possessions that arguably resembles a "de facto expropriation".

The term "de facto expropriation" was first used in the case of *Papamichalopoulos ao v. Greece*.[86] In 1967, under a law enacted by the military government of the time, the Navy Fund took possession of a large area of land which included the applicants' land; it established a naval base there and a holiday resort for officers and their families. From that date, the applicants were unable either to make use of their property or to sell, bequeath, mortgage or make a gift of it; Mr Petros Papamichalopoulos, the only one who obtained a final court decision ordering the Navy to return his property to him, was even refused access to it. The applicants were never formally expropriated as Law no. 109/1967 did not transfer ownership of the land in question to the Navy Fund. The Court concluded that the loss of all ability to dispose of the land at issue, together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants to have de facto been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions and held that there had been a breach of article P1-1 of the ECHR.[87]

Applying this reasoning to the case of withholding taxes, it could be argued that the obligation to provide certain services to the state and to other private parties amounts to a de facto expropriation of the withholding agent's property, i.e. the expected remuneration that he would receive for offering such a service and the obligation to incur certain costs that

83. Sermet, *supra* n. 28, at p. 23.

84. *See* for example *Lindsay v. UK* and also ECtHR, 29 Apr. 2008, *Burden v. the UK*, para. 59, where the Court stated that "[t]axation is in principle an interference with the right guaranteed by the first paragraph of Article 1 of Protocol No. 1, since it deprives the person concerned of a possession, namely the amount of money which must be paid. While the interference is generally justified under the second paragraph of this Article, which expressly provides for an exception as regards the payment of taxes or other contributions, the issue is nonetheless within the Court's control, since the correct application of Article 1 of Protocol No. 1 is subject to its supervision […]".

85. For the distinction between direct and indirect deprivation of property, *see* Sermet, *supra* n. 28.
An example of indirect deprivation in this context is the case of a forced sale in ECtHR, 21 Feb. 1990, *Håkansson and Sturesson v. Sweden*. The applicants had bought property in a compulsory sale by auction; the conditions of the sale provided that a purchaser would have to resell the property within two years unless he had in the meantime obtained a permit to retain it. The permit was not issued and the authorities ordered the compulsory resale of the property by auction at a price that was determined according to price-control regulations in force at that time. The Court confirmed that these measures constituted an interference with the applicants' right to the peaceful enjoyment of their possessions or that this interference amounted to a deprivation of property and thus fell to be considered under the second sentence of the first para. of art. P1-1 ECHR. The Court found no violation of art. P1-1.

86. ECtHR, 24 June 1993, *Papamichalopoulos ao v. Greece*.

87. Art. P1-1 ECHR, at paras. 45-46.

are not reimbursed. Even though such an interference is indeed provided by law and serves a legitimate aim, i.e. the effective collection of taxes, in order to be tolerated it must also be proportionate.

In general, for taxation matters the Court recognizes a wide margin of appreciation to states. It is accepted that in the field of taxation it is for the national authorities to make the initial assessment of the aims to be pursued and the means by which they are pursued and that the margin of appreciation must be wider in this area than it is in many others. Indeed, as attitudes as to the social and economic goals to be pursued by the state in its revenue policy may vary considerably from place to place and time to time, and governments often have to strike a balance between the need to raise revenue and the pursuit of other social objectives in their taxation policies, the national authorities are in a better position than the Convention organs to assess those needs and requirements.[88]

Indeed, the Court's power to review compliance with domestic law is limited. First of all, the national authorities, and notably the courts, have the authority to interpret and apply domestic law, even in those fields where the Convention "incorporates" the rules of that law, since the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection. The Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention and will only intervene in cases where the interpretation adopted by the national authorities is arbitrary or manifestly unreasonable. This principle is particularly relevant in tax cases involving a highly specialized and technical area of law.[89]

A trend can be observed towards an increase in the burden of collection of taxes that is transferred from states to private parties. This is combined with an overall increase in the compliance and reporting obligations, notably in connection with mechanisms such as the one put forward by the Amending Directive to the 2011 Directive on Administrative Cooperation [on reportable cross-border arrangements] (2018/822) (DAC6) in order to single out potential tax avoidance schemes. Even though it can hardly be argued that the level of the financial burden imposed on third parties involved in the collection of taxes reaches the level of expropriation of property, the trend should still be closely monitored and assessed on an individual basis. Individuals and small- and medium-sized enterprises are more susceptible to be considered to bear a disproportionate burden in that respect.

This problem raises a possibly more serious concern in respect of two specific situations, which have already been envisaged earlier in this article. In particular, when the mechanism of third-party liability involves persons who are not in control of the source of the payment connected with the taxable event, such as the case of the liability of the notary and, in the field of VAT, cases of the obligation to pay the tax even when the recipient of the goods or services has refused to pay it. In such circumstances, the third-party liability operates as a way of indemnifying the state of the potentially missed collection of tax, exposing the third party directly to a deprivation of his property.

88. *See* the analysis of the Commission in *Lindsay v. the UK*.
89. ECtHR, 7 Sept. 2021, *IOFIL AE v. Greece* (dec.), para. 42.

## 4. The Withholding Tax Mechanism in Light of the Prohibition of Forced Labour

The obligation to withhold tax from salaries or wages or other payments, such as dividends, interest or royalties, constitutes an administrative burden on the persons that have such an obligation. Moreover, those persons are required to undertake certain expenses in order to be able to provide that service to the state, who is the beneficiary of the service. Indeed, as the persons that act as withholding agents bear certain costs to discharge their obligation, they relieve the state from the relevant burden, usually without any remuneration. Arguably, the lack of remuneration or reimbursement of expenses could amount to forced labour under article 4 of the ECHR and therefore it is worth examining the situation in light of article 4(2)-(3) of the ECHR.

Article 4(2) of the ECHR prohibits forced or compulsory labour. The notion of "forced or compulsory labour" under article 4 aims to protect against instances of serious exploitation. The term "forced or compulsory labour" is not defined in the article. The Court has taken as a starting point for its interpretation of article 4(2) of the ECHR, the definition of the term "forced or compulsory labour" provided in article 2(1) of the ILO Forced Labour Convention concerning forced or compulsory labour, stating that article 4 of the ECHR had been based on the former Convention, which had been adopted in 1930.[90] According to that definition, the term "forced or compulsory labour" means all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

Article 4(3) of the ECHR contains a list of instances which are not to be considered "forced or compulsory labour" for the purposes of article 4.[91] It is understood that paragraph 3 does

90. ILO, *C029 – Forced Labour Convention (No. 29)* (ILO 1930), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029 (accesssed 27 Jan. 2023) [hereinafter ILO Forced Labour Convention]. *See* ECtHR, 23 Nov. 1983, *Van der Mussele v. Belgium*, para. 32. Mr. Eric van der Mussele, a Belgian pupil lawyer, complained that he was obliged to undertake pro bono work and serve as defence counsel in cases assigned by the Legal Advice and Defence Office; he received no remuneration nor was reimbursed for his expenses. The Court held that Mr. Van der Mussele did not have a disproportionate burden of work imposed on him and the amount of expenses directly occasioned by the cases in question was relatively small.

91. Art. 2(2) ILO Forced Labour Convention follows a similar approach; it provides that, for the purposes of that Convention, the term "forced or compulsory labour" shall not include :
(a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;
(b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
(c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;
(d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;
(e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

not therefore limit the exercise of the rights guaranteed by paragraph 2, but simply delimits the right[92] and serves as an aid to the interpretation of paragraph 2.

The four instances contained in paragraph 3 are developed around the governing ideas of general interest, social solidarity and what is normal in the ordinary course of affairs. In that context, work during detention or conditional release is not considered forced labour nor is military service or substitute civilian service. Similarly, service required during an emergency or calamity cannot be considered forced labour in the same way as any work or service which forms part of normal civic obligations cannot be included in the scope of forced or compulsory labour.[93]

The exception provided in article 4(3)(d) of the ECHR is particularly relevant for the current analysis, given the fact that taxation is one of the fundamental civic duties in a democratic society. However, and given that neither remuneration nor reimbursement of expenses is provided, the extent to which serving that duty is within the exception provided by article 4(3)(d) of the ECHR depends on whether the administrative burden and the expenses undertaken may be considered as "normal".

In the case of *Four Companies v. Austria*[94] (discussed in section 3.2.), the applicant companies complained that under legal regulations existing in Austria they were obliged, without any return to themselves, to calculate and withhold from the wages and salaries of their employees the tax on wages, the social security contributions and other similar contributions and to pay them to the competent authorities; to withhold from wages and salaries any sums taken in execution of a court judgment; to pay to their employees family allowances and wages and salaries in case of sickness and to claim compensation from the competent public authorities. The four applicant companies claimed that the execution of these various obligations constituted compulsory labour going beyond normal civic obligations provided for in article 4(3)(d) of the ECHR and entails an increase of general costs amounting to a deprivation of property contrary to article P1-1 of the ECHR. In addition, they argued that this duty was allegedly of a discriminatory nature (article 14 of the ECHR) to the detriment of employers.

The Commission was not persuaded that the concept of forced labour could even be applicable at all in a case where the applicants are not natural persons but corporate bodies, and where the duty to do certain work is not a personal obligation but can be carried out with the assistance of employees. Nevertheless, turning to the substance of the complaint, it held that the deduction of taxes, social security contributions, etc. from salaries and wages can-

92. *See Van der Mussele v. Belgium*, para 38. For an analysis of the structure of art. 4 ECHR as well as the principles of its interpretation followed by the Court, *see* ECtHR, *Guide on Article 4 of the Convention – Prohibition of slavery and forced labour* paras. 1-8 (updated Aug. 2022), available at https://www.echr.coe.int/documents/guide_art_4_eng.pdf.

93. *See Van der Mussele v. Belgium*, para 38.

94. *Four Companies v. Austria*. In general, besides the *Van der Mussele v. Belgium* case and the *Four Companies v. Austria* case, the Commission and the Court have also considered that "any work or service which forms part of normal civic obligations" includes: compulsory jury service (ECtHR, 20 June 2006, *Zarb Adami v. Malta*); compulsory fire service or financial contribution which is payable in lieu of service (ECtHR, 18 July 1994, *Karlheinz Schmidt v. Germany*); obligation to conduct free medical examinations (ECnHR, 28 June 1995, *Reitmayr v. Austria*, where the Commission considered that the work performed by the applicant served the general interest and given the number of examinations he actually carried out (three examinations between July 1991 and April 1992), the burden imposed on him does not appear disproportionate); the obligation to participate in the medical emergency service (ECtHR, 14 Sept. 2010, *Steindel v. Germany* (admissibility)).

not, in itself, be considered as forced or compulsory labour, as there was no evidence that the duties imposed on the applicant companies did in fact go beyond normal civic obligations within the meaning of article 4(3)(d) of the ECHR. The Commission concluded that the complaint of the applicant companies was manifestly ill-founded.

Similar issues were raised in the *Borghini v. Italy* case.[95] The applicant was an individual who exercised the profession of business consultant and had three employees. The Italian legislation required that all "tax intermediaries" (*sostituti d'imposta*),[96] such as persons exercising liberal professions like Mr Borghini, withhold income tax from salaries and wages from their employees and also, if the employees asked, prepare and submit their income tax returns. A remuneration was provided for the employer that did so, and a penalty for the employers that did not perform that obligation.

The applicant complained that he was forced to perform compulsory work due to the obligation to prepare the income tax returns for his three employees. He alleged that there was a violation of article 4(2) of the ECHR. The Commission acknowledged that, indeed, the applicant did not offer his services voluntarily and the service complained of was exacted from him under threat of a sanction. However, it went on to reject the complaint, stating, by referring to the previous case of *Four Companies v. Austria,* that there seemed to be no reason to depart from what was established in the latter case law.

The limits of the protection that may be granted under article 4 of the ECHR are yet to be explored, especially considering that the compliance and reporting obligations of third parties have exponentially grown during the past few years, including in particular in connection with DAC6.

The key to the assessment of whether performing duties that assist the state in the collection of taxes may go beyond what are normal civic obligations of the citizens, will be the volume of such obligations and the related costs incurred by the persons on whom these obligations are imposed.[97] The term "normal" is, however, difficult to define. It will depend on the economic and social circumstances that prevail at any given point in time. An increase in the volume of tax obligations, even a considerable one in relation to the past, may still be

95. ECnHR, 29 Nov. 1995, *Borghini v. Italy* (admissibility).

96. In OPTR, *2015-2017 General Report on the Protection of Taxpayers' Rights*, p. 16 (IBFD 2018), available at https://www.ibfd.org/sites/default/files/2022-05/OPTR%202017%20General%20Report.pdf, it is reported that if tax is withheld by a third party, the taxpayer shall be discharged from the liability to pay tax in order to avoid the improper enrichment of the state through the double collection of taxes. Possibly diverting from this principle, the Italian Supreme Court (ISC), in its decision in IT: ISC, Sixth Chamber, 14 May 2015, Order No. 9933, has indicated that the definition of a "tax substitute" (*sostituto d' imposta*) contained in art. 64(1) Presidential Decree no. 600/1973 is the subject that is obliged to pay taxes (also partially) in place of others through the withholding and does not exclude that the substituted taxpayer is also *ab origine* (and not only in the phase of tax collection) obliged to pay the tax jointly with the substitute.

97. As Baker observes, the possibility still remains that certain duties imposed in connection with taxation might be regarded as going beyond normal civic obligations, such as, for example, a revenue authority requiring a third party, other than the taxpayer concerned, to make significant effort and incur significant expenditure in supplying information in connection with an investigation. To require third parties to incur significant costs for the purposes of providing information, and not to reimburse those third parties, may go beyond normal civic duties. *See* P. Baker, *Taxation and the European Convention on Human Rights*, BTR, pp. 211-377 (2000). Taking into account the expansion of the scope of DAC, *supra* n. 22, this may raise issues of compatibility with art. 5 Charter and the protection against forced labour provided in it.

considered "normal" if it can be served by the technological progress that has taken place in the recent years.

An aspect that has only marginally been dealt with in the few cases that have reached the Court so far is whether these obligations must be viewed separately, or whether they must be viewed in combination with other obligations that are imposed on the same persons (such as tax obligations – obligations to withhold taxes, to submit tax returns, and to collect and provide tax information –, social security obligations, etc.). In 1976, when the complaint of the *Four Companies* reached the Court, no discussion on the aggregate burden took place. Nowadays, it appears that we have to approach the multiple obligations imposed on private parties as a whole, and not separately. The term "civic obligations" does appear to be limited to only one category of such obligations; accordingly, the term "normal civic obligations" should be construed as encompassing all the civic obligations that a person may be burdened with. Moreover, in a globalized world, what is "normal" should arguably also include similar obligations imposed not only by one state but perhaps by two or more states simultaneously.[98]

Having experienced both the dramatic increase in the tax obligations imposed on private parties in recent years, the exact limit of how far a state can go is still to be determined. In the authors' view, it is however important to understand that the need to secure an effective collection of taxes and accordingly protect the collective interest cannot be open-ended. The concurrent need to secure effective protection of third parties as to their involvement in the process of tax collection should constitute a limit to the state's interest, with a view to securing a reasonable and fair balance between such interests in line with the requirements of the principle of proportionality.

## 5. The Withholding Tax Mechanism in Light of the Principle of Non-Discrimination

The obligation to withhold taxes at source, although not generalized, may apply to large groups of persons, both individuals and companies. In certain cases, the burden that is created is not equal among the persons affected, raising issues of discrimination against those that have to bear the extra burden. This problem has to be addressed from the perspective of ECHR and EU law.

From the perspective of ECHR law, in the case of *Four Companies v. Austria*, the applicant companies complained that the duty to perform certain work imposed on them by the Austrian legislation violated the Convention, because it only applied to employers and thereby did not respect the principle of equality. The companies, as employers, indeed had a number of obligations: they had the obligation to calculate and withhold from the wages and salaries of their employees the tax on wages, the social security and other similar contributions and to pay them to the competent authorities; to withhold from wages and salaries any sums taken in execution of a court judgment; to pay to their employees family

98. *Compare also* Kokott & Pistone, *supra* n. 3, at sec. 8.4.2.4.2, where they point out that, concerning the substantive aspect of the right to property, the existence of more complex issues arising from cases of international double taxation, in which the parallel exercise of taxing rights by two or more states results in a level of taxation that, if assessed in one state, would be considered confiscatory; similar considerations should apply for the aggregate administrative burden that may be imposed by two or more jurisdictions with regard to the issues discussed in this article.

allowances and wages and salaries in case of sickness and to claim compensation from the competent public authorities.

The key to the application of article 14 of the ECHR is twofold: first, there must be a right that is covered by the scope of the Convention; and second, in order to establish discrimination, one must first establish comparability of the situations involved.

As far as the first requirement is concerned, it is clear that as long as taxation matters are included in the scope of article P1-1 of the ECHR, the principle of non-discrimination provided in article 14 of the ECHR is applicable in relation to taxation matters as well. As far as the second requirement is concerned, in the case of *Four Companies*, it was crucial that the law imposing the withholding obligation did not make a distinction between different categories of employers or companies; any person that had the quality of "employer" had the same obligations under the Austrian legislation under scrutiny.[99] In addition, the Commission concluded that the said legislation did not establish any differentiation between groups of persons that could be considered as comparable. It considered that employers that have the additional obligations described in the law in relation to the withholding and remittance of taxes are not comparable with the employees that are relieved from the obligation to file a tax return or to make the payment of the tax or to claim the allowance from the competent authorities. Accordingly, the distinctions between these two groups are not relevant. Last but not least, the Commission found no comparability either between the case of the companies having an additional burden as employers and the social security agencies that are also competent to perform similar functions. Based on these considerations, the Commission dismissed the complaint of the four companies that they had suffered discrimination.[100]

There is still, however, one question that remains open: that is whether individuals as employers and companies as employers have the same capacity to deal with the withholding tax obligations. Arguably, individuals may not always be comparable to companies in that respect. In any case, the line of comparability between individuals as employers and companies as employers cannot be drawn *in abstracto*; it will depend on the facts and circumstances and the actual burden created by the withholding obligation.

From the perspective of EU law, the starting point is that the non-discrimination principle operates on an independent basis in connection with the need to secure an effective protection of fundamental freedoms. This context is therefore only partially comparable with the one that operates under ECHR. ECJ case law on fundamental freedoms has indicated that the more burdensome conditions for cross-border situations can potentially give rise to a problem of discrimination also when it comes to tax collection. This is for instance the case of the judgments that have prevented the levying of exit taxes in connection with the transfer of residence to another EU Member State, as long as mutual assistance can keep track of all relevant matters.[101] Moreover, the levying of withholding taxes cannot operate

99. *Four Companies v. Austria*.
100. Id.
101. *See* FR: ECJ, 11 Mar. 2004, Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie*, ECLI:EU:C:2004:138, Case Law IBFD; NL: ECJ, 29 Nov. 2011, Case C-371/10, *National Grid Indus BV v. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*, ECLI:EU:C:2011:785, Case Law IBFD; DE: ECJ, 23 Jan. 2014, Case C-164/12, *DMC Beteiligungsgesellschaft mbH v. Finanzamt Hamburg-Mitte*, ECLI:EU:C:2014:20, Case Law IBFD.

on a discriminatory basis against payments made to non-residents.[102] However, no ECJ case law has yet addressed the issues involving third-party liability in the collection of taxes. Our view is that the protection of the withholding agents could also constitute the flipside of the coin related to this line of interpretation, giving rise to a possible issue that might question the reasonableness of the provisions that establish this obligation in a discriminatory manner and that create indirect repercussions on the withholding agents.

## 6. Concluding Remarks

In principle, we acknowledge that third-party liability might be a useful tool to secure the effective protection of the collection of taxes. However, the analysis that we have conducted in the framework of this article has shown various critical issues, which might require an urgent intervention, especially at the level of a possible reform of the Recovery Directive (2010/24). Based on the understanding that the collective interest to secure an effective tax collection may not go as far as justifying a possible violation of the fundamental rights of taxpayers, the authors have argued in this article that it therefore may not lead to an open-ended exposure of third parties to support the collection of taxes with their own direct financial liability for taxes due from other taxpayers. Such reading of the fundamental rights of third parties is in line with the most recent findings of academic literature and also reflects the need to secure a balanced approach, which takes into account the need to draft tax legislation in line with the principle of reasonableness and proportionality. Accordingly, third parties may not be held liable for the failure to pay taxes due by other persons, except when such third parties are directly involved in a scheme that might harm the state, or have a precise awareness of such scheme and have opted to ignore it. This line of interpretation should also lead to exclude third parties from exposure to the obligation of filing tax returns and having additional cumbersome formal obligations that in fact outsource part of the tax procedure on to them without an actual reimbursement or remuneration for their intervention.

The notable development of mutual assistance between tax authorities within the European Union has created suitable conditions to allow an effective functioning of tax collection throughout the entire European Union. This may possibly lead to a reconsideration of all forms of disproportionate exposure of third parties that were conceived many decades ago in a totally different context for the exclusive sake of protecting the effectiveness of tax collection and without any consideration for the rights of those third parties.

102. *See* NL: ECJ, 11 June 2009, Case C-521/07, *Commission v. the Netherlands*, ECLI:EU:C:2009:360, Case Law IBFD; PT: ECJ, 17 Mar. 2022, Case C-545/19, *AllianzGI-Fonds AEVN v. Autoridade Tributária e Aduaneira*, ECLI:EU:C:2022:193, Case Law IBFD.