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Liability of Management Board Members of Capital Companies in the Light of the Judgement of the CJEU of 27 February 2025 in Case C-277/24, Adjak[1]

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The subject matter presented in this article focuses on the interpretation of the EU law, in particular of Article 273 of the VAT Directive, which is covered by the judgement of 27 February 2025 delivered by the CJEU in case C-277/24, Adjak, in response to a question referred for preliminary ruling to the CJEU by the RAC in Wrocław. From the point of view of the principles governing liability of management board members for tax arrears of companies, this judgement can be considered a breakthrough. This is an extremely important issue for the tax practice both at a national and European level. Despite the fact that the judgement in the Adjak case is favourable for third parties, especially management board members of capital companies, the solutions it adopts raise significant doubts from the perspective of the principle of legal certainty, in particular in the context of the stability and finality of tax decisions. This judgement also poses a risk of procedural complexities arising from management board members questioning factual findings or legal classifications adopted in the tax assessment proceedings to which the taxpayer is subjected. The judgement in the Adjak case should be an incentive to amend urgently the applicable substantive and procedural regulations concerning the joint and several liability of third parties. This is because the judgement itself neither removes numerous controversies and incorrect practices derived from Article 116 of the Tax Ordinance, nor puts the discrepancies in the existing case law in order. It is merely the first serious attempt to shed light on an unclear regulation of joint and several liability of management board members for tax arrears of capital companies, which infringes the rights of an individual.

Keywords: joint and several liability, third party tax liability, right to participate in proceedings, party to proceedings, tax arrears

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[1] Judgment of the CJEU of 27 February 2025 in Case C-277/24, Adjak, ECLI:EU:C:2025:130.

Introduction

Under Article 193 of the VAT Directive,[1] payment of VAT incurred from taxable supply of goods or services is in principle the obligation of the taxable person supplying the goods or services. There are, however, derogations from this rule, which are provided for in Articles 194 to 199b and in Article 202 of the Directive. Pursuant to Article 205 of the Directive – and under the circumstances referred to in Articles 193–200 and Articles 202–204 of the VAT Directive – Member States have an option of introducing domestic regulations on value added tax, which make a person jointly and severally liable for the payment of VAT, although they have not originally been liable for it.

The essence of joint and several liability under tax law, including within the framework of value added tax, consists in ensuring – by means of appropriate provisions of the law – that tax liability be satisfied by (secondary) persons other than the entity originally obliged to do so. Such a solution allows states to keep the tax system effective by ensuring the correct collection and payment of tax, even if the entity obliged to pay cannot do it. Therefore, the revenue of the state budget is not lowered, as a third party is made to be jointly and severally obliged to satisfy the tax liability.

In principle, the VAT Directive essentially leaves it to the Member States to regulate the joint and several liability for the payment of VAT at the national level, which is taken on by a person other than the person originally liable for it. However, this freedom is limited by the first paragraph of Article 273 of the Directive, which stipulates that Member States may impose other obligations they deem necessary to ensure the correct collection of VAT and to prevent tax fraud, provided that taxpayers' domestic transactions and transactions between the Member States are treated equally and provided that such obligations in trade between Member States do not give rise to formalities related to crossing the border. Moreover, regulations on joint and several liability for VAT, which are applicable in the Member States, should be in compliance with the European Union law and its fundamental general principles. In this context, the Member States should respect particularly the rule of law, the principle of proportionality, the right to a fair trial, the right of defence, and the right to an effective remedy.

Interpretation of the EU law, especially Article 273 of the VAT Directive, was the subject matter of the judgement of 27 February 2025 delivered by the CJEU in case C-277/24, Adjak, in response to a question referred for preliminary ruling to the CJEU by the RAC in Wrocław. From the point of view of the principles governing liability of management board members for tax arrears of companies, this judgement can be considered a breakthrough and hence requires further detailed elaboration in this publication.

Facts and questions referred for a preliminary ruling in case C-277/24, Adjak

In the case in question, the applicant, M.B., was the CEO of B. (a limited company) from August 2014 until January 2018. The company was subject to proceedings conducted by the Head of the Tax Office[2] in Wrocław – Stare Miasto as regards VAT liability for the period between June and October 2016. On 22 August, 2022, the applicant submitted an application to the HoTO to be admitted as a party to the above-mentioned proceedings and to make the relevant case files available to them. The applicant based the above request on the fact that they were the CEO of the company in the period that the tax proceedings were concerned with. The HoTO rejected the applicant's request in a decision of 12 September, 2022. The applicant filed a complaint against the HoTO's decision to the Head of the Chamber of Tax Admin-

[1] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJEU L of 2006, No. 347, p. 1, as amended), hereinafter referred to as the 'VAT Directive' or 'Directive.'

[2] Hereinafter: HoTO.

istration[3] who – by way of decision of 27 October, 2022 – repealed the HoTO's decision of 12 September, 2022 in its entirety and dismissed the proceedings. In their decision, the HoCTA claimed that the status of a party to tax proceedings depends on the assessment of the competent authorities as to whether the applicant has legal standing. According to the HoCTA, the applicant fell within no category of entities listed in Article 133 of the Tax Ordinance.[4] The HoCTA also stated that in the present circumstances there was no legal ground for issuing the contested decision, because the Tax Ordinance does not provide for ruling on whether an entity should or should not be admitted as a party to ongoing proceedings.

On 6 December, 2022, the applicant appealed to the RAC in Wrocław, seeking to have the HoCTA's decision repealed. In their appeal, the applicant claimed that the HoCTA misinterpreted Article 133 of the TO by claiming that the applicant had no legal interest in being awarded the status of a party to tax proceedings against the company. The applicant stated that they were the only member of the management board of the company during the period the tax proceedings were concerned with, and, therefore, they had the best knowledge of the company's activities at that time. Although the applicant was interviewed by the HoTO once as a witness, in the applicant's opinion it was neither sufficient nor exhaustive. Furthermore, the applicant justified their request to be admitted as a party to the proceedings with the fact that any tax arrears incurred would affect them as a natural person.

[3] Hereinafter: HoCTA.

[4] Act of 29 August 1997 on Tax Ordinance (Journal of Laws of 2025, item 111, as amended), hereinafter referred to as the 'Tax Ordinance' or 'TO.'

Domestic regulation and practice of national courts in respect of joint and several liability of capital companies' board members prior to the judgement in the Adjak case

Article 107(1) of the TO provides for a general normative basis for joint and several liability of third parties, which – in cases and to the extent described in this chapter – makes third parties jointly and severally liable with all their assets for the tax arrears of the taxpayer along with them. Whereas, as far as joint and several tax liability of management board members of capital companies is concerned, *lex specialis* includes Article 116(1) of the TO, which makes the board members jointly and severally liable for the tax arrears (Babiarz et al., 2024, p. 858) of a limited company, a limited liability company being formed, a simplified limited company, a simplified limited company being formed, a public limited company, or a public limited company being formed, if enforcement against the company's assets has proved to be wholly or partly ineffective. A member of the management board may free themselves from joint and several liability by demonstrating that an application for bankruptcy has been filed in due time; restructuring proceedings have been opened; an arrangement has been approved in the Arrangement Approval Procedure; failure to file for bankruptcy has been no fault of their own; or by indicating the company's assets that could be subject to execution enabling coverage of the company's tax arrears to a significant extent.

The tax liability of board members is principally closely related to expiry of the deadline for payment of tax liability in the course of being a board member; and in cases referred to in Articles 52 and 52a of the TO, it is related to generation of tax liability of the company in the course of being a board member. Ceasing to be a member of the management board of a company does not exclude tax liability since Article 116(4) of the TO

stipulates that former board members of the company are still liable.

The tax authority issues a decision on the joint and several liability of a board member following the proceedings concerning third party liability, where, pursuant to Article 133(1) of the[5] TO, a board member is a party to these proceedings but not a party to the proceedings regarding the company's tax assessment. The liability of a member of the management board of a company results from two separate proceedings, that is, tax proceedings (concerned with tax assessment), which are conducted against the company as a taxpayer and which determine the amount of the tax liability, and proceedings on third party tax liability, which is intended to lead to declaration of joint and several tax liability pursuant to Article 116 of the TO, provided that the legal conditions set out in that Article are met.

The common practice of the tax authorities prior to the delivery of the CJEU's judgement in the *Adjak* case, which is reinforced by a relevant line of case law, came down to claiming that a former member of the management board (Olesiak, 2020, p. 111) had no standing to be a party to the company's tax proceedings aimed at determining the existence or amount of a tax liability, for which they will potentially bear tax liability, if it becomes chargeable, that is, it turns into tax arrears.[6] In effect, a board member, including a former board member, had no legally effective possibility to challenge the factual and legal findings concerning tax assessment or even the existence of a tax liability in the first place,[7] which were made in the course of the company's tax proceedings.

Thus, in the light of the then existing legal provisions and the judicial practice, a board member had no possibility to challenge the findings incorrectly made by a tax authority in regard of, among others, existence of a company's tax liability; the tax base of the company's liability; application of any possible relief; the moment of generation of the company's tax liability; the moment of generation of tax arrears, which affects the interest calculated on the arrears; or the amount of tax liability that the arrears arise from, which the board member was supposed to be held liable for.

Questions from the RAC in Wrocław and the grounds for them contained in the reference for a preliminary ruling

The RAC in Wrocław raised doubts as to the compatibility of the above-mentioned practice of the tax authorities and the courts with the law of the European Union. The referring court confirmed that the mechanism of third party joint and sev-

[5] "*The party to the tax proceedings is the taxpayer, the payer, the collector or their legal successor as well as the third party referred to in Articles 110 to 117c, who requests tax authority's action out of their legal interest, who is subjected to tax authority's action or whose legal interest tax authority's action is linked to.*"

[6] There is a prevalent view in the case law of the courts that a member of the management board of a capital company is not a party to the tax proceedings concerned with the company due to the lack of legal interest within the meaning of Article 133(1) of the TO. See judgement of the SAC of 28 November 2023, Case No. I FSK 1223/23, LEX No. 3769250, judgement of the SAC of 23 June 2022, Case No. I FSK 2049/18, LEX No. 3400705, judgement of the RAC of Warsaw of 8 February 2022, Case No. III SA/Wa 1070/21, LEX No. 3665913, judgement of the RAC of Szczecin of 2 September 2020, Case No. I SA/Sz 64/20, LEX No. 3071125. Cf. E. Michna (2021). Odpowiedzialność (byłych) członków zarządu – rozkład ciężaru dowodu przesłanek eskulpacyjnych – uwagi na tle orzecznictwa sądów administracyjnych [Liability of (Former) Members of the Management Board: Distribution of the Burden of Proof with Respect to Reasons for Limitation of Liability; Remarks Based on the Case Law of Administrative Courts]. In: B. Kucia-Guściora (Ed.), *Stanowienie i stosowanie prawa podatkowego w Polsce. Odpowiedzialność w prawie* podatkowym [Tax Law Making and Application in Poland. Liability in Tax Law]. Lublin: Wydawnictwo KUL,. p. 176.

[7] See judgement of the SAC of 23 June 2022, Case No. III FSK 295/22, LEX No. 3365833, judgement of the SAC of 22.11.2022, Case No. III FSK 1141/21, LEX No. 3450022, judgement of the SAC of 24 January 2023, Case No. III FSK 1557/21, LEX No. 3502419, judgement of the SAC of 15 March 2023, Case No. III FSK 1776/21, LEX No. 3585884.

eral liability for the company's tax liabilities contributed to ensuring the correct collection of VAT or preventing tax fraud within the meaning of Article 273 of the VAT Directive and in line with the obligation laid down in Article 325(1) of the TFEU.[8] The court also pointed out that neither the legal provisions nor the national practice provided for a possibility for a third party to challenge the amount of tax liability in the course of the proceedings concerning joint and several third party liability, which was conducted against them.

Consequently, the RAC decided to suspend the proceedings and to refer a question to the CJEU for a preliminary ruling: "*Are Articles 205 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (2) in conjunction with Article 2 of the TUE*[9] *(the rule of law, respect for human rights), as well as Article 17 of the Charter*[10] *(the right to property), Article 41 thereof (the right to good administration) and Article 47 thereof (the right to an effective remedy and the right to a fair trial), and (as guaranteed under EU law) the principle of proportionality, the right to a fair hearing and the rights of the defence, to be interpreted as precluding national legislation and the national practice based thereon which deny a natural person (a member of the Management Board of a legal person) – who may be jointly and severally liable for the VAT debt of the legal person with all his or her private assets – the right to participate actively in the procedure for determining that legal person's tax debt in the form of a final decision of the tax authority, while at the same time that natural person, in separate proceedings seeking to determine his or her joint and several liability for the legal person's VAT debt, is deprived of an adequate means of effectively challenging the findings and assessments which have been made previously concerning the existence or the amount of that legal person's tax debt and which are set out in the final decision of the tax authority issued previously without the participation of that natural person, which decision therefore constitutes a precedent in those proceedings under a national provision confirmed by national practice?*"[11]

Resolution of the Court of Justice of the European Union in the Adjak case

The Court of Justice decided to reformulate the question referred for a preliminary ruling stating that "*the referring court asks, in essence, whether Article 273 of the VAT Directive, read in conjunction with Article 325(1) TFEU,*[12] *the rights of the defence and the principle of proportionality, must be interpreted as precluding national legislation and practice under which a third party who may be held jointly and severally liable for the tax debt of a legal person cannot be a party to the tax proceedings brought against that legal person to establish the tax debt of that legal person, and is not given any adequate means of challenging the findings and assessments as to the existence or the amount of that tax debt in the context of the joint and several liability proceedings.*"

The Court responded to the question formulated in such a way by claiming that Article 273 of the VAT Directive in conjunction with Article 325(1) of the TFEU "*(the rights of the defence and the principle of proportionality) must be interpreted as not precluding national legislation and practice under which a third party who may be held jointly and severally liable for the tax debt of a legal person cannot be a party to the proceedings brought against that legal person to establish the tax debt of*

[8] Treaty on the Functioning of the European Union (OJEU C 202/93); hereinafter the 'TFEU.'

[9] Treaty on the European Union (OJEU C 202/130); hereinafter the 'TEU.'

[10] Charter of Fundamental Rights of the European Union (OJEU C 202/389); hereinafter the 'Charter.'

[11] Decision of the RAC in Wrocław of 25 January 2024, Case No. I SA/Wr 4/23, LEX No. 3702679.

[12] "*The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies*."

that legal person, without prejudice to the need for that third party, during any joint and several liability proceedings brought against that third party, to be able effectively to call into question the findings of fact and the legal classifications made by the tax authority in the context of the first set of proceedings, and to have access to the file of the tax authority, in accordance with the rights of that person or of other third parties."

Therefore, in the judgement under examination, the Court questioned the compatibility of the existing Polish domestic practice with the EU law and derived from it a Member State's obligation to provide a third party held jointly and severally liable with a legally effective possibility to challenge – in the course of a possible third party liability proceedings against them – the factual and legal findings concerning the VAT liability made in the tax proceedings against the taxpayer as well as the need to allow that third party to access the case files of the assessment procedure.

Analyzing the CJEU's judgement in question, it should be noted that although the interpretation offered in the judgement is beneficial for third parties (i.e. members of the management board of companies), the Court did not fully grasp the substance of the question referred for a preliminary ruling. The way in which the CJEU reformulated the question referred for a preliminary ruling towards the direction of interpretation of Article 325(1) of the TFEU, which covers countering financial fraud and other illegal activities affecting the financial interests of the EU, is a sign that the Court has not taken into account fully the relevant context of the case. The RAC accurately highlighted that the mechanism of third party joint and several liability for the company's tax liabilities contributed to ensuring the correct collection of VAT and the prevention of tax fraud within the meaning of Article 273 of the VAT Directive, thus, meeting the obligation laid down in Article 325(1) of the TFEU. However, it has not linked directly the mechanism of joint and several liability to fighting against financial fraud. Although it cannot be ruled out that in the event of fraud committed by a legal person, pursuant to the applicable Article 116 of the Tax Ordinance,[13] secondary tax liability for the arrears arising from such fraud may be taken on by third parties, it does not justify – as the CJEU seems to have accepted – to see the mechanism of joint and several liability as an instrument for combating tax crime as it is not its main purpose. In other words, joint and several liability provided for in Article 116 of the Tax Ordinance does not serve as a deterrent or an effective measure within the meaning of Article 325(1) of the TFEU.

The CJEU claimed that Article 205 of the VAT Directive does not apply in the case under consideration and that the purpose of the joint and several liability mechanism established by Article 116 of the Tax Ordinance is not to impose an obligation to pay tax arising from one or more specific taxable transactions within the meaning of Article 193 in conjunction with Article 205 of the Directive. According to the Court, the members or former members of the management board of a company may, under certain conditions, be held jointly and severally liable for all or part of the VAT liability of that company, however, these obligations are not related to one or more specific taxable transactions. This position should be deemed correct.

As indicated, in line with Article 205 of the VAT Directive, under circumstances provided for in Articles 193 to 200 and 202 to 204 of the Directive, Member States may decide that a person other than the person who is in principle liable for the payment of VAT will be jointly and severally liable for it. Articles 193 to 200 and 202 to 204 of the VAT Directive specify who is liable to pay tax within the meaning of Section 1, Chapter 1, of Title XI of the Directive, which is entitled: *Persons liable for payment of VAT to the tax authorities*. Article 193 of the Directive lays down a general principle that VAT is payable by a taxable person that carries out taxa-

[13] Under considerations *de lege lata* and in line with Article 116 of the TO, the national legislator does not distinguish a situation where a company's tax arrears have arisen from tax fraud committed by the company. Members of the management board of companies bear subsequent tax liability regardless of the reason for (or the source of) the tax arrears.

ble supply of goods or services. However, it also indicates that in cases set out in Articles 194 to 199b and 202 of the Directive, VAT may or must be imposed on entities other than the supplier of goods or services. Considering the provisions set out in Articles 193 to 205 of the Directive, the Court rightly points out that Article 205 of the Directive is part of a set of rules aimed at determining the person liable for the payment of VAT, depending on the type of transaction. Their common objective is to ensure that tax is collected effectively from the entity that is most appropriate in a given situation, especially if the parties to a transaction are residents of different Member States or when the character of a transaction requires that tax be imposed on an entity other than the one referred to in Article 193 of the Directive. Consequently, Article 205 of the VAT Directive offers Member States a possibility to introduce – for the purpose of ensuring effective collection of VAT – regulations that make an entity other than the one that is, in principle, liable to pay tax (in accordance with Articles 193 to 200 and 202 to 204) jointly and severally liable for its payment; just as it is the case with the Polish Article 116 of the TO.[14] However, Article 116 does not limit the scope of liability only to tax arrears arising from specific tax titles or to liabilities generated by individual taxable transactions.[15] The general structure of a board member's liability as set out in Article 116 of the TO, thus, causes them to be jointly and severally liable for all tax arrears of a company, regardless of their source. Such liabilities (or tax arrears) are not linked to one or more specific taxable transaction(s) but actually include any liability (or arrears) of the company. Therefore, Article 205 of the VAT Directive is not applicable in the case under examination.

Under these circumstances, the Court referred to the context of Article 273 of the Directive in conjunction with Article 325(1) of the TFEU, which was addressed in the question referred for a preliminary ruling, although the national court had not requested its interpretation. In accordance with the first paragraph of Article 273 of the VAT Directive, Member States may lay down obligations other than those provided for in the Directive, if they are deemed necessary to ensure the proper collection of VAT and to prevent tax fraud.[16] Whereas Article 325(1) of the TFEU requires that Member States combat financial fraud and any other illegal activity affecting the financial interests of the EU with effective deterrents, Member States are, therefore, obliged to take all legislative and administrative measures needed to ensure full collection of VAT on their territory and to combat tax crime.

The domestic provision under examination and the national practice are undoubtedly aimed at ensuring effective tax collection. First of all, it should be stressed that this provision is mandatory to follow. According to Article 116(1) of the TO, the members of the management board *are* jointly and severally liable for tax arrears of the company with all their property and not – as could be inferred from the CJEU's interpretation – *may be* liable. This is of particular importance because if a company fails to settle VAT arrears and the conditions provided for in this provision are met or exonerative reasons are not demonstrated, the members of the management board of the company bear the liability jointly and severally. In such a case, the tax authority is obliged – and not only entitled – to declare that they are jointly and severally liable pursuant to Article 116 of the TO.[17]

[14] See judgement of the CJEU of 20 May 2021, ALTI, C-4/20, EU:C:2021:397, paragraphs 27-29.

[15] See judgment of the CJEU of 13 October 2022, Direktor na Direktsia "Obzhalvane i danachno-osiguritelna praktika", C-1/21, EU:C:2022:788, paragraph 50 and the case law cited therein.

[16] Cf. judgements of the CJEU: of 19 October 2017, Paper Consult, C101/16, EU:C:2017:775, paragraph 49; of 11 January 2024, Global Ink Trade, C537/22, EU:C:2024:6, paragraph 41.

[17] In fact, tax liability of a member of the management board of a company under Article 116 of the TO is dependent on demonstrating negative conditions by a board member, which is referred to in Article 116(1)(1)(a&b) of the TO. However, the tax authority is not authorised under that provision to choose whether to initiate proceedings in respect of third party joint and several liability or not because it acts on the basis of a provision of the law and the circumstances of a case, which oblige it to take the relevant actions. Therefore, in the light of Article 116

In the judgement in Case C-1/21,[18] the Court of Justice of the European Union held that Article 273 of the VAT Directive and the principle of proportionality do not preclude domestic regulations introducing the mechanism of joint and several liability for VAT liabilities of a legal person, provided that such a mechanism meets certain conditions. The CJEU claimed that joint and several liability may be taken on by the managing director of a legal person or a member of its management body that, acting in bad faith, has led to making payments covered with the legal person's assets, which could be classified as covert distribution of profit or dividends or to free or grossly underpriced disposal of its assets. The condition for generating this liability is that such actions result in the legal person being unable to pay all or part of the VAT that is due. The Court also stressed that such joint and several liability must be limited to the amount of reduction in the legal person's assets as a result of acting in bad faith and that it can only be of a subsidiary nature, that is, it is generated only if it proves impossible to recover the amounts of VAT directly from the legal person. Importantly, the CJEU also held that Article 273 of the VAT Directive and the principle of proportionality do not preclude having such joint and several liability also cover the default interest that is chargeable to a legal person on account of non-payment of VAT within the time limits provided for in the Directive, if the non-payment results from actions in bad faith of a person identified as jointly and severally liable.

The CJEU rightly noted that, apart from some limits, Article 273 of the Directive specifies neither conditions nor obligations that Member States may implement. This does not mean, however, that Member States are free not to respect the EU law or its general principles, including the right of defence, which is applicable when an authority is about to make a decision that produces negative consequences for its addressee. The measures adopted by the Member States seek to protect the rights of the State Treasury with utmost effectiveness, however, such actions should not go beyond what is necessary to achieve this objective.[19]

In such a context, it should be noted that, according to the established line of case law of the Court of Justice of the European Union, the domestic provisions setting out a system of no-fault joint and several liability go beyond what is necessary to protect the financial interests of the State Treasury. The transfer of liability for the payment of VAT onto an entity other than the one that is originally burdened with such a tax obligation– without ensuring that such an entity is able to free themselves from that liability by demonstrating that it cannot be linked to the actions of the actual taxable person – should be considered as compromising the principle of proportionality. Indeed, unconditional burdening of an entity with the consequences of loss of tax revenue caused by the actions of third parties, which they had no impact on, would clearly violate that principle.[20]

In order to ensure effective collection of tax, Member States may use their power to appoint a joint and several debtor other than the person originally liable for payment, on condition that, in the light of the principles of legal certainty and proportionality, it is justified by the existence of an actual or legal relationship between them.[21] Being a member of the management board of a company is, in fact, a legal relationship between that board member and the company and may justify holding them liable for the company's tax obligations. Simultaneously, the Court of Justice of

of the TO, the tax authority is obliged to declare joint and several liability of a board member, if the legal conditions stipulated in this provision are met (i.e., the positive conditions) and negative conditions are not demonstrated.

[18] Cf. judgment of the CJEU of 13 October 2022, Direktor na Direktsia "Obzhalvane i danachno-osiguritelna praktika," C1/21, EU:C:2022:788, paragraph 60.

[19] Cf. judgment of the CJEU of 14 November 2024, Herdijk, C-613/23, EU:C:2024:961, paragraph 24 and the case law cited therein.

[20] Cf. judgment of the CJEU of 14 November 2024, Herdijk, C-613/23, EU:C:2024:961, paragraph 25 and the case law cited therein.

[21] Cf. judgment of the CJEU of 14 November 2024, Herdijk, C-613/23, EU:C:2024:961, paragraph 26 and the case law cited therein.

the EU stressed that when assessing the admissibility of imposing joint and several liability to pay the VAT due onto a third party, the authority must take into account the circumstances suggesting the party acted in good faith, with due diligence required of a prudent economic operator, taking all reasonable measures in their power, and also that participation in abuse or fraud is excluded. Such factors advocate against burdening them with joint and several liability.[22]

The Polish provisions stipulated in Article 116 of the TO introduce a kind of presumption that a member of the management board of a company has or should have both direct knowledge about the activities of this company and impact on it. In the Court's view, such a presumption in itself does not appear to be contrary to the principle of proportionality since it imposes no liability regardless of guilt. In this context, it should be stressed that the fault of a member or former member of the management board may take various forms; it need not be a deliberate action but it could also be a lack of due diligence or negligence in terms of supervision and control of the company's activities. The requirement to demonstrate due diligence is an inherent element of the duties of a board member and it is evaluated from the perspective of a standard of care, which is expected from a professional, prudent business entity. Consequently, failure to pay tax liability by a company may serve as a premise to assume that a member or a former member of its management board has failed to fulfill their duty of exercising due diligence and the resultant tax arrears are a consequence of their actions or failures to act. Such a situation allows us to conclude that there is an adequate causal link between the negligence in regard of management and the failure of a company to comply with its tax obligations.

Under these circumstances, the joint and several liability of a member or former member of the management board is not a consequence of a random event that is out of their control but of their own deficiencies in the performance of their management duties, which have led to the depletion of the company's assets and prevented settlement of its tax obligations. Thus, the condition concerning the member's fault may also be satisfied, if their conduct was not intentional but evident of gross negligence or a lack of due diligence resulting in violation of the company's obligations under public law. However, it is necessary that such a presumption be refutable, which means that a board member or a former board member that the presumption applies to must have an actual possibility of refuting it. In particular, it must be deemed inadmissible that proving the lack of fault or causal link between one's actions and the company's non-performance of tax obligations should be practically impossible or excessively difficult.[23] Presumption of liability cannot deprive a person of the right to effective defence, including the right to produce proof against it. To this end, a member of the management board can demonstrate that they meet one of the conditions for exemption from joint and several liability referred to in Article 116(1)(1) of the Tax Ordinance, namely, that application for bankruptcy was filed in a timely manner or that failure to file for bankruptcy was no fault of their own.

In that regard, the Court stressed that the addressees of a decision that affects their interests severely should be able to exercise effectively their rights of defence, that is, to present their position as regards the evidence that the authority intends to base their decision on.[24] The right of defence includes the right to be heard and the right to access the files.

Respecting the right of defence in related administrative proceedings means that, despite the final

[22] Cf. judgment of the CJEU of 14 November 2024, Herdijk, C-613/23, EU:C:2024:961, paragraph 26 and the case law cited therein.

[23] Cf. likewise, judgement of the CJEU of 14 November 2024, Herdijk, C-613/23, EU:C:2024:961, paragraphs 33 and 41; see an analogous judgement of the CJEU of 12 December 2024, Dranken Van Eetvelde, C-331/23, EU:C:2024:1027, paragraph 31.

[24] Cf. judgment of the CJEU of 16 October 2019, Glencore Agriculture Hungary, C-189/18, EU:C:2019:861, paragraph 39 and the case law cited therein.

character of decisions taken in related administrative proceedings, the tax authority is obliged to familiarize the taxpayer with evidence, including the evidence derived from these proceedings, on which the authority intends to base its decision, otherwise, that taxpayer would be deprived of the right to effectively challenge the factual findings and legal classifications[25] in the course of ongoing proceedings against them. In accordance with the case law of the Court of Justice, the right of access to the files results from the principle of respect for the right of defence.[26] The addressee of a decision that is unfavourable to them must be given an opportunity to submit their remarks before it is delivered so that the competent authorities can take into account all the relevant evidence and circumstances of the case. To that end, it is necessary to afford them the right of access to the files in the course of administrative proceedings as it is an essential element of the right of defence and a manifestation of following the principle of good administration. In administrative tax proceedings, the taxpayer should be able to access all the evidence collected in the case files, on which the tax authority intends to base its decision.

Therefore, if the tax authority intends to base its decision on the evidence obtained in related administrative proceedings, the taxable person should be able to access that evidence.[27] In the case under examination, this means that a member of the management board needs to be provided access to the files of the tax assessment procedure that was carried out against the company.

In addition, it should be stressed that the taxpayer – who is a member of the management board in this case – also has the right (as part of their right of defence) to challenge effectively factual findings and legal classifications made in related administrative proceedings, even if these findings arise from final decisions.[28] Finality of an administrative decision is realization of one of the general principles of the European Union law, which is the principle of legal certainty. However, as highlighted by the Court of Justice of the EU, the fact that an administrative decision has become final cannot justify restricting one's right of defence and does not exempt a tax authority from its obligation to ensure that a person subject to proceedings has a chance to familiarize themselves with the evidence that the authority intends to base its planned decision on. Adoption of a different position would lead to a situation where a third party, such as a board member, would be deprived of the right to challenge effectively factual findings and legal classifications made in other proceedings, despite the fact that they serve as a basis for making a decision concerning their liability. This would especially be the case with proceedings concerning third party liability, where – as demonstrated by the Polish domestic practice – it would lead to a significant limitation of the right of defence.

In the judgement under examination, the CJEU held that the right of defence is not absolute and may be restricted, provided that such restrictions actually correspond to the objectives of the general interest pursued by a provision in question and, from the point of view of the objective pursued, they are not a disproportionate and unacceptable interference with the very essence of the rights thus guaranteed. Considering the above, the Court pointed out that the need to ensure effectiveness of repressive measures or confidentiality and to protect professional secrecy or the private life of third parties as well as personal data – which could all be placed in jeopardy, if access to certain information and documents was granted – may be viewed as such an objective of general in-

[25] Cf. likewise, judgment of the CJEU of 16 October 2019, Glencore Agriculture Hungary, C-189/18, EU:C:2019:861, paragraphs 47 and 49.

[26] See, likewise, judgment of the CJEU of 7 January 2004, Aalborg Portland and Others v Commission, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, and C-219/00 P, EU:C:2004:6, paragraph 68.

[27] Cf. likewise, judgment of the CJEU of 16 October 2019, Glencore Agriculture Hungary, C-189/18, EU:C:2019:861, paragraph 53.

[28] Cf. likewise, judgment of the CJEU of 16 October 2019, Glencore Agriculture Hungary, C-189/18, EU:C:2019:861, paragraph 53.

terest.[29] In the judgement under consideration, the Court claimed that in that context "*granting the right to participate in tax proceedings to that third party could, in principle, jeopardize the confidentiality of certain information or prolong the duration of these proceedings, thereby undermining the public interest consisting in ensuring effective collection of VAT*."[30]

In the analysis of the scope of the right of defence, the Court of Justice of the European Union addressed the question of whether the EU law requires that Member States amend the final administrative decision which served the authority as a basis for establishing the factual or legal findings. In the reality of the case under consideration, such a question would be especially relevant in connection with the tax assessment issued for the company, which serves as a basis for the joint and several liability of a member of its management board. The Court ruled that the European Union law establishes no obligation to review or amend such a final administrative decision and the proceedings concerning joint and several liability of a board member are not intended to re-establish the amount of the tax liability. Its scope is limited to examining whether the conditions for generating liability set out in Article 116 of the Tax Ordinance are met; and so, whether there are reasons to justify holding a person liable for the company's tax arrears and not whether the arrears itself have been established correctly in terms of the amount and legal basis.[31] Therefore, Article 273 of the VAT Directive does not require that the Polish tax authorities revoke the decision as regards tax assessment of a company as a result of findings made in the proceedings concerning liability of a board member.[32] If a third party, who may be held jointly and severally liable for a tax liability of a legal person, is refused the right to participate in tax proceedings against that legal person, it does not go beyond what is necessary to protect the rights of the State Treasury as effectively as possible.

However, it should be stressed that the EU law does not prohibit Member States from using such a solution, either. In the judgement regarding Adjak, the Court only states that in the light of the above-mentioned EU standards, the Member States are not obliged to repeal the final decision regarding tax assessment.[33] The joint and several liability proceedings do not seem to allow to challenge the amount of the liability since their subject-matter, obviously, appears to be limited to establishing the conditions leading to generation of the liability for the company's arrears. In the CJEU's opinion, at the time when the tax proceedings against a company take place, there is only a hypothetical possibility that proceedings regarding joint and several liability of a board member might be initiated at a later date and that the latter proceedings will result in a decision that is unfavourable to that third party or that produces a significant impact on their interests.

The CJEU also claimed that "*granting the right to participate in tax proceedings to that third party could, in principle, jeopardize the confidentiality of certain information or prolong the duration of these proceedings, thereby undermining the public interest consisting in ensuring effective collection of VAT*."[34] Such a claim is made in previous judgements in the Glencore[35] and Ispas[36] cases as well. In proceedings aimed at ensuring tax control and determination of a VAT base, a Member State may

[29] Cf. likewise, judgment of the CJEU of 16 October 2019, Glencore Agriculture Hungary, C-189/18, EU:C:2019:861, paragraph 55.

[30] Judgment of the CJEU of 27 February 2025 in Case C-277/24, Adjak, ECLI:EU:C:2025:130, paragraph 62.

[31] Judgment of the CJEU of 27 February 2025 in Case C-277/24, Adjak, ECLI:EU:C:2025:130, paragraph 60.

[32] Cf, similar judgements of the CJEU: of 13 January 2004, Kühne & Heitz, C-453/00, EU:C:2004:17, paragraph 24; of 12 February 2008, Kempter, C-2/06, EU:C:2008:78, paragraph 37; and of 4 October 2012, Byankov, C-249/11, EU:C:2012:608, paragraph 76.

[33] Ibid.

[34] Judgment of the CJEU of 27 February 2025 in Case C-277/24, Adjak, ECLI:EU:C:2025:130, paragraph 62.

[35] Cf. likewise, judgment of the CJEU of 16 October 2019, Glencore Agriculture Hungary, C-189/18, EU:C:2019:861, paragraph 55.

[36] Cf. likewise, judgment of the CJEU of 9 November 2017, Ispas, C-298/16, EU:C:2017:843, paragraph 36.

restrict the rights of defence in order to protect the above-mentioned merits. In order to determine whether the requirements derived from the principle of effectiveness are met in a given case, it is necessary to evaluate not only the wording of the relevant national procedural regulations, but also their specific application. The CJEU states clearly that such evaluation should be carried out by the referring court, which leads to a conclusion that both revision of a tax assessment of a company and granting of the third party status in the tax assessment procedure may be provided for in the domestic law, however, respect must be paid to other merits under protection, such as the effectiveness of VAT collection (Article 273 of the VAT Directive). In the context under analysis, it should be deemed questionable that a Member State would refuse to grant the status of a party to the tax assessment procedure to a member of the management board of a company based on the need to preserve the confidentiality of certain information. Since the Court of Justice believes a third party should have access to the case files of the tax proceedings against a company at the stage of proceedings concerning their joint and several liability, the exercise of their right of defence at that stage poses a potential risk of disclosing confidential information regarding the company, which is not protected. It is not acceptable to claim that allowing a board member to be a party to proceedings conducted against the company involves a potential risk of disclosing confidential information concerning the company, but granting the board member access to the case files of the same proceedings at the stage of the proceedings concerning their joint and several liability for tax arrears of the company no longer presents such a threat. The CJEU's argument seems completely unfounded and lacking any logical basis. Moreover, since the tax proceedings against the company are concerned with the period in which the former member of the management board of the company performed their function, the risk of disclosing confidential information is purely theoretical (Olesiak, 2020, p. 112). While handling the company's affairs, a member of the management board has all the knowledge of the scope of the company's activities and affairs from that period, including of sensitive data about that company, which they cannot disclose even after they have ceased to perform their duties. In accordance with Article $209^1(2)$ of the Commercial Code and Article $377^1(2)$ of the Commercial Code, respectively, a member of the management board cannot disclose company secrets even after the expiry of their mandate.

It is also worth highlighting that allowing a third party (here, a former member of the management board of a company) to participate as a party in tax proceedings against the taxpayer (i.e. the company) promotes the objectives of the proceedings as well. The board member has the best knowledge of the information regarding the disputed period that the proceedings against the company are concerned with – that is, of the company's affairs, its financial condition, any transactions that the company was one of the parties to or the company's contracting parties' data – and, therefore, their participation in the proceedings will contribute to the realization of the principle of objective truth. The fact that although financial documentation should be kept on a regular and reliable basis but may turn out incomplete also speaks in favour of the position expressed above because deficiencies in the documentation can have a significant impact on the tax proceedings against the company. The composition of the management body of companies changes periodically so the members may not have sufficient knowledge of the bigger picture of the company as regards the period prior to them being board members. Hearing of a former management board member of a capital company as a witness provides neither sufficient nor adequate evidence in this respect since, as a human source, it will obviously not contribute to a detailed explanation of the facts of the case, especially after a few years have passed since they occurred. A witness may only testify what they have seen, heard, and known to the best of their knowledge, without using documents, in particular financial documents, which usually contain data that is the most important for tax assessment. A former management board member of a com-

pany is most often examined as a witness in the course of a tax assessment procedure against the company, if it covers the period during which the former board member was performing management functions in the company. If participation of a former member of the management board as a witness in tax proceedings concerning the company is indispensable owing to the objective of the proceedings, nothing stands in the way of the former board member taking part in these proceedings in a different procedural character, that is, as a party to the proceedings.

In such a context, allowing a former board member to participate actively in tax proceedings against the company would bring about two-dimensional benefits. Firstly, through procedural guarantees offered to parties to proceedings, the board member could, thus, challenge effectively the incorrect factual findings or legal classifications affecting the existence or assessment of tax liability, which are made by the tax authority. Participation of a member of the management board in the tax assessment procedure aimed at determining the company's tax liability eliminates the risk that circumstances that are important from the point of view of the board member's interest will not be disclosed (Olesiak, 2020, p. 111; Olesiak, Pajor, 2025 p. 42). Secondly, such a solution would also contribute to conducting and completing the company's tax proceedings efficiently, which would meet fully the demand for legal certainty in accordance with the European Union law. At a later stage of the proceedings concerned with third party tax liability, there would be no (or much less frequent) need to challenge the final decision on the tax assessment of the company, which follows from the tax proceedings.

In the judgement in the Adjak case, according to the CJEU, the argument which might justify the non-admission of a third party as a party to the tax proceedings against the company is prolongation of such proceedings, which in turn infringes the public interest of ensuring effective VAT collection. If the financial condition of a company makes it impossible for it to pay the VAT liability in due time and enforcement against the company's assets turns out to be ineffective (in part or in whole), the members of the company's management board will, as the last resort, be burdened with the tax liability under Article 116 of the TO. In case of the latter, effective payment of VAT will be postponed due to the ongoing proceedings on third party tax liability or even for a period needed to enforce the decision on joint and several third party liability, if the board member fails to pay voluntarily the company's tax arrears within the time limit specified in the law. Challenging the factual findings or legal classifications serving to issue the tax assessment, which is the key evidence in the proceedings concerning third party liability, additionally extends the time needed to issue the decision regarding the liability of a board member.

If the tax authority makes erroneous factual or legal findings, it serves as a basis for challenging the final decision determining the amount of tax liability giving rise to the tax arrears burdening the board member by way of annulment of the decision (on tax assessment) or reinstatement of the proceedings that have lead to issuing the decision. The above advocates suspending proceedings regarding the joint and several liability until a new tax decision setting the amount of the company's tax liability is issued, which further postpones payment of VAT. Such considerations lead to a conclusion that while the proceedings concerning third party liability (of a board member) and the possible payment of the company's tax arrears by way of enforcement cannot be sped up, yet withdrawal of a final tax decision can be avoided by allowing a former board member to participate in the company's tax proceedings and challenging the erroneous factual findings or legal classifications made by a tax authority already at the stage of the proceedings. A final tax decision issued in tax proceedings against a company, which indicates the amount of tax liability, would then indeed be characterized by legal certainty; otherwise, it is difficult to speak of legal certainty, if the final tax decision can be effectively challenged even outside the legally permissible special mode.

The Polish tax regulations governing the proceedings on third party tax liability do not require

that the tax authority conduct such proceedings simultaneously against all the entities that are liable pursuant to Article 116 of the TO. The case law only stresses that the *sine qua non* condition is to conduct the proceedings on third party joint and several liability and then issue an appropriate decision in this matter pertaining to all the board members who should bear such liability pursuant to Article 116 of the TO. It is irrelevant whether the tax authority will carry out one procedure against all the members of the company's management board jointly or several procedures against each of the board members separately.[37]

If separate proceedings concerning joint and several liability of board members are conducted and the factual findings or legal classifications made in the company's tax proceedings that resulted in a decision on tax assessment affecting the board members' liability are challenged, it also produces an impact on the proceedings concerning other members of the management board. It is particularly problematic, if the findings of the tax authority are challenged by a board member when a decision declaring joint and several liability of another member of the management board has already been issued, especially if it has become final. Under such circumstances, the decision taken against the member of the management board should also be challenged in a special mode.

Allowing a third party to challenge factual findings and legal classifications no sooner than at the stage of possible proceedings regarding their joint and several liability may produce negative effects conducive to evasion of joint and several liability. An example of this is third party challenging any factual or legal findings made at the previous tax proceedings concerning the company because it serves them purely as a tool to lengthen the proceedings regarding joint and several liability of the third party. Such a mechanism would contribute to expiry of the deadline for issuing a decision on third party liability referred to in Article 118(1) of the TO[38] or prescription of the tax liability of the legal person, with which the third party was supposed to be burdened.

The resulting complexities only generate complicated practical problems which delay effective collection of tax arrears and, thus, do not contribute to the prevention of infringing on the public interest of ensuring effective VAT collection. However, the above-mentioned situation can be avoided by way of allowing a third party to participate in the company's tax proceedings as a party to these proceedings. If one of the final tax decisions affecting the interests of a third party is challenged, it results in challenging the (final) decision on joint and several liability of a third party, because the decision concerning tax assessment of the taxpayer (i.e. the company) is of significant importance, in particular, as regards the substantive scope of the third party's secondary tax liability (of the management board member of the company).

In the judgement under consideration, the Court also held that the right to be heard and the right to access the case files – which form part of the right of defence, along with the well-established case law – are, therefore, not subject to examination in the light of the right enshrined in Article 41 of the Charter of Fundamental Rights, which is a perfectly accurate observation.[39] As a side note, the Court pointed out that Article 41 of the Charter would not apply in this case because it addresses the bodies of the European Union (i.e. institutions, offices, and agencies of the EU). However,

[37] See the resolution of the SAC of 9 March 2009, Case No. I FPS 4/08, ONSAiWSA 2009, No. 3, item 47, judgement of the SAC of 22 January 2019, Case No. II FSK 3318/16, LEX No. 2623595.

[38] As a rule, a decision regarding third party tax liability cannot be issued, if five years have elapsed since the end of the calendar year in which the tax arrears arose. In two cases there is an exception to the above rule provided for in the domestic regulations: – in Article 117b(1) of the TO: If three years have passed since the end of the calendar year in which the delivery of goods took place; – and in Article 117c of the TO: If three years have passed since the end of the calendar year in which the six-month period from the date of registration of the taxable person as an active VAT payer expired.

[39] Judgment of the CJEU of 17 July 2014, YS et al., C-141/12 and C-372/12, EU:C:2014:2081, paragraph 67.

the right to good administration stipulated in that provision reflects a general principle of the EU law and so individuals could invoke a general principle.[40]

Whereas Article 47 of the Charter of Fundamental Rights was rejected by the CJEU as a review model in the Adjak case under analysis, the Court stated that it applies neither in the tax proceedings of the company nor in the joint and several liability proceedings because of their administrative character. Such a statement seems to be highly controversial, because although these proceedings are indeed of an administrative character but filing a complaint with an administrative court makes the proceedings assume the character of court administrative proceedings.

Under Article 47 of the Charter of Fundamental Rights, everyone has the right to a fair and public hearing of their case within a reasonable period of time by an independent and impartial court previously established by an act of law. The type of the proceedings remains irrelevant just as the character of the case that they cover and, therefore, whether these are civil, criminal, or administrative proceedings (or cases, respectively), including tax proceedings being one of the latter, which are handled by national Administrative Courts. The standard derived from Article 47 of the Charter is relevant not only at the stage of judicial review, but it also 'permeates' into the practice of administrative bodies, necessitating that procedures be shaped in a way that makes subsequent reviews real and effective. In the Berlioz case, the CJEU clearly stated that an addressee of a restrictive measure applied as a result of failing to follow an order to provide information (within the framework of tax cooperation) must be able to challenge the legality of the order itself; otherwise, the right to appeal under Article 47 of the Charter would be illusory.[41] Therefore, ensuring that proceedings are structured in a way that allows full judicial review of facts and the law is required already at the level of administrative activity. Article 47 of the Charter requires that the Administration conduct proceedings in a way which enables subsequent effective judicial review by making it possible to access the case files and evidence; to challenge the findings transferred from other proceedings; to take matters to the court; and to have secrecy or other restrictions limited only to the extent necessary and proportionate.

If a member of the management board of a company has no legally effective way to challenge erroneous factual or legal findings regarding a tax liability that produces tax arrears they are obliged to settle, it leads to a conclusion that their case is examined in violation of Article 47 of the Charter of Fundamental Rights. Denial of the right to an effective remedy, access to an impartial court or effective judicial protection due to the administrative character of the proceedings involving an element of state authority gives an unjustified advantage to the public interest at the expense of violation of the rights guaranteed to the individual.

Effects of judgement in C-277/24 (Adjak): concluding remarks

In many respects, the tax liability of members of the management board of capital companies is controversial, which is the result of both the imprecise statutory regulation provided for in Article 116 of the TO as well as of the fact that it is misinterpreted by the tax authorities and Administrative Courts far beyond its literal wording. The judgement of the CJEU in the Adjak case (C-277/24) is a certain kind of a revolution in the understanding of the right to defence of a management board member of a company in connection with this company's tax arrears. Although the standard of the right of defence and access to the case files resulting from that judgement has been formulated in the context of the effectiveness of collecting VAT as a harmonized tax, this standard should also be applied to other proceedings relating to third par-

[40] Judgment of the CJEU of 17 July 2014, YS et al., C-141/12 and C-372/12, EU:C:2014:2081, paragraph 68.

[41] Judgment of the CJEU of 16 May 2017, Berlioz Investment Fund SA / Directeur de l'administration des contributions directes, C-682/15, ECLI:EU:C:2017:373.

ty liability for tax arrears. The Court has clearly stated that a third party – that is a member of the management board of a company in this case – cannot be held jointly and severally liable for the tax arrears of the taxpayer, unless they are provided with actual and effective defence instruments. That person must be given access to the case files of the tax assessment procedure against the taxable person as well as the possibility of challenging both the factual findings and the legal classifications made in the course of these proceedings. The CJEU stresses that a decision taken against a company cannot automatically serve as indisputable basis for a decision regarding the joint and several liability of a member of its management board, if they had no possibility to participate in the proceedings that have led to its issuance or to challenging its content.

This judgement is all the more important because the Polish Constitutional Tribunal has seen no violation of the constitutional guarantees of the rights of defence in the current model of joint and several liability and deemed the model of responsibility of a board member developed in the Tax Ordinance to be consistent with the Constitution.[42] However, the judgement in the Adjak case shows that the standard of protection of individual rights under the EU law goes beyond the domestic standard and the right of defence within the meaning of the EU law also encompasses the right to challenge effectively the basis of liability, even if that basis arises from an administrative decision issued against another entity. Therefore, this judgement changes the very logic of the domestic model of joint and several liability, which so far made the tax authority fully bound by the decision on tax assessment of the company when deciding on the responsibility of a board member and the third party had no genuine influence on this decision.[43]

It should be emphasized that the effects of the judgement in the Adjak case go far beyond the situation of the members of the management board of companies. The Court explicitly stated that the requirement to ensure effective judicial protection applies to any case where a third party is required to pay a taxable person's tax liability. Thus, this standard also encompasses other categories of third-party liability in tax law including, among others, the liability of business buyers, legal successors, or spouses of taxpayers, wherever the decision regarding their liability is based on prior determinations with respect to another entity. The EU standard of the right of defence covers not only the right to be heard and assert their views, but also the right to access evidence and to challenge the final findings made in separate administrative proceedings.

The issuance by the Minister of Finance of a General Interpretation of 29 August 2025,[44] which implements the main theses of the judgement in the Adjak case into the national practice, is an important signal that the domestic authorities recognize

[42] Cf. judgment of the Constitutional Tribunal of 26 May 2009, Case No. SK 32/07 (OTK-A 2009/5/70) where the Court ruled that Article 133(1) of the Tax Ordinance is not non-compliant with Article 45(1) and Article 77(2) as well as with Article 64 in conjunction with Article 21(1) of the Constitution of the Republic of Poland; cf. judgement of the Constitutional Tribunal of 12 April 2023, Case No. P 5/19 (Journal of Laws of 2023, item 739) where the Court ruled on an analogous institution provided for in Article 299 of the Commercial Code.

[43] See judgments: Of the Regional Administrative Court (RAC) in Warsaw of 26 March 2004, Case No. III SA 2192/02; of 13 December 2005, Case No. III SA/Wa 2138/04; of 13 December 2005, Case No. III SA/Wa 2139/04; of 22 November 2005, Case No. III SA/Wa 82/05; of the RAC in Kraków of 20 April 2006, Case No. I SA/Kr 1480/04; of the RAC in Gorzów Wielkopolski of 19 February 2008, Case No. I SA/Go 918/07; of 1 April 2008, Case No. I SA/Go 920/07; of the RAC in Lublin of 23 April 2008, Case No. I SA/Lu 789/07; of the RAC in Gliwice of 23 November 2009, Case No. III SA/Gl 926/09; and of the Supreme Administrative Court (SAC): of 4 May 2005, Case No. FSK 2163/04; of 3 February 2006, Case No. I FSK 504/05; of 15 March 2006, Case No. I FSK 1131/05; of 15 March 2006, Case No. I FSK 744/05.

[44] General Interpretation of the Minister of Finance and Economy of 29 August 2025 No. DTS2.8012.5.2025 on the Application of Article 116 of the Act on Tax Ordinance in conjunction with the judgments of the Court of Justice of the European Union of 27 February 2025 in Case C-277/24 (Adjak) and of 30 April 2025 in Case C-278/24 (Genzyński), Official Journal of the Minister of Finance of 29 August 2025, item 10/2025.

the importance of this change as well. This interpretation confirms that the tax authorities will be obliged to provide third parties with an opportunity to read the case files concerning the original debtor and to challenge the findings contained therein, whereas failure to take them into account may result in finding the decision defective and give rise to the need to repeal it. The Minister of Finance also confirms in the interpretation that Article 116 of the TO is of a general character and there are no grounds to interpret it differently depending on whether it is applied to harmonized taxes or not. Therefore, the EU standard derived from the judgement in the Adjak case applies in all cases, regardless of the type of tax that a company's tax arrears are concerned with, for which the member of the management board is to be liable.

The judgement in the Adjak case is, therefore, a landmark ruling that leads to redefining the current model of third-party liability under tax law, which dictates that it should be seen through the prism of the EU standard of protection of individual rights. This standard clearly shifts the emphasis from the protection of the fiscal interest of the state to the protection of procedural guarantees for the individual, making the right of defence a crucial criterion for the assessment of conformity of the domestic procedures with the EU law.

The judgement in the Adjak case also produces significant consequences at the procedural level as it opens up an opportunity for revision of a judgement in both tax and administrative court proceedings completed prior to its deliverance. Since the Court of Justice has ruled that a third party must be ensured a genuine right of defence, including access to case files and the possibility of challenging the factual and legal findings relevant for a decision on tax assessment issued against another party, failure to grant these rights means that the practice or interpretation existing so far has been non-compliant with the EU law, which allows for revising the judgement issued in tax proceedings in accordance with Article 240(1)(11) of the Tax Ordinance.

Similarly, in administrative court proceedings, the grounds for revision of a judgement are Article 272(2) in conjunction with Article 271(2) of the Law on Administrative Court Proceedings,[45] which provides for the revision of a final judgement, if it was issued in effect of a breach of the European Union law, which in turn has produced a significant impact on the outcome of the case.

In view of the above, the judgement of the CJEU in the Adjak case not only redefines the future standard of third parties' right of defence but also paves the way to verifying and challenging decisions that have already been made without following this standard. Both the administrative authorities and the Administrative Courts are obliged to revise final decisions and judgements as regards a board member's liability for their company's arrears and take into consideration the new EU standard. This aspect of the Court's judgement shows its major practical significance as it creates a real tool for protecting the rights of persons who have been burdened with the tax liabilities incurred by others, while having no possibility of defending themselves effectively.

It should be highlighted that since the judgement of the Court of Justice in the Adjak case serves as basis for the revision of the judgement in both tax proceedings (see Article 240[1][11] of the Tax Ordinance) and administrative court proceedings (see Article 272[2] in conjunction with Article 271(2) of the LACP) and, as part of these proceedings, it is possible to re-examine and re-assess the factual findings that the decision concerning a board member's liability for company arrears was based on, the EU standard for the right of defence resulting from that judgement must all the more be applied in the ongoing cases. The principle of effectiveness of the EU law (i.e. *effet utile*) obliges national authorities and courts to interpret and apply the domestic law in a way that ensures exerting full effect of the rules of the EU law and protects the rights conferred on an individual by that law. Therefore, the standard of protection derived from the judgement in the Adjak case cannot

[45] Act of 30 August 2002 on the Law on Proceedings Before Administrative Courts (Journal of Laws of 2024, item 935, as amended).

remain merely prospective in character; it must also affect the ongoing proceedings; otherwise, infringement of the right of defence would be perpetuated in the legal order and the EU law would lack effectiveness.

Until a judgement was passed in the Adjak *case*, there had been an established view in the Polish case law that a member of the management board is not entitled to challenge factual and legal findings relevant for decisions on tax assessment against the company and the proceedings concerning their joint and several liability do not serve to verify the amount or the existence of a company's tax liability.[46] Such a view led to a situation where a third party was completely deprived of the possibility of defending themselves: they could neither gain access to the files in the case against the company nor present evidence challenging the factual findings of the tax authority. In the judgement in the Adjak case, the Court challenged explicitly the compatibility of such a model with the EU law and found that it violated the fundamental right of defence, which is a general principle of the EU law.

Following the judgement in the Adjak case, the principle of the primacy and effectiveness of the EU law requires that national courts refuse to apply the interpretation of the domestic law which up to that moment had been prevalent but led to the deprivation of a board member of the right of defence and assure that the individual has legal protection up to the EU standard. As the Court has repeatedly stressed, national courts are obliged to apply the EU law on their own, ensuring that it produces a full effect and disregarding any conflicting domestic rules or practices. Taking these principles into account, it is impossible to support the view that if a member of the management board took no action as regards the evidence and, thus, followed confidently the uniform and established line of case law that precluded the possibility of challenging the findings made in the course of tax assessment, their right of defence has not been infringed.[47] A lack of activity as regards evidence in a situation where the right of defence is systematically and consistently denied cannot prove detrimental to the individual. Acceptance of such an interpretation would undermine the effectiveness of the EU law and render the guarantees provided for in Article 47 of the Charter of Fundamental Rights illusory. The principle of effectiveness of the EU law requires that national courts not only respect the judgement passed in the Adjak case in future cases, but also that they remedy the consequences of its infringement in the past by way of revising the judgements and repealing defective decisions as well as re-assessing factual findings in the light of the new standard of protection of the right of defence.

Despite the fact that the character of the judgement in the Adjak case is favourable for third parties, especially the members of the management board of capital companies, the solutions it adopts raise significant doubts from the perspective of the principle of legal certainty, in particular in the context of the stability and finality of tax decisions. This judgement also poses a risk of procedural complexities arising from management board members – and other third parties listed in Chapter 14 of the Tax Ordinance – questioning the factual findings or legal classifications adopted in the tax assessment proceedings against the taxable person. The judgement in the Adjak *case* should be an incentive to amend urgently the applicable substantive and procedural regulations concerning the joint and several liability of third parties. This is because the judgement itself neither removes numerous controversies and incorrect practices derived from Article 116 of the Tax Ordinance, nor puts the discrepancies in the existing case law in order. It is more of a drop in the ocean when it comes to the unclear regulation of joint and several liability of management board members for tax arrears of capital companies, which infringes the rights of an individual.

[46] See, for example, judgements of the SAC: of 11 January 2024, Case No. III FSK 4874/21; of 8 November 2023, Case No. III FSK 2704/21, judgement of the RAC in Bydgoszcz of 8 September 2020, Case No. I SA/Bd 247/20.

[47] Likewise, in the judgements of the SAC: of 12 June 2025, Case No. III FSK 605/24, of 5 March 2025, Case No. III FSK 503/24.

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