

Anonymised version

Translation

C-473/20 – 1

Case C-473/20

Request for a preliminary ruling

Date lodged:

30 September 2020

Referring court:

Sofiyski rayonen sad (Bulgaria)

Date of the decision to refer:

17 September 2020

Applicant:

INVEST FUND MANAGEMENT

Defendant:

Komisiya za finansov nadzor

ORDER

[...] 17 September 2020

THE SOFIYSKI RAYONEN SAD (District Court, Sofia), CRIMINAL DIVISION, 106th Chamber, [...]

[...] took the following into consideration in making its order:

The proceedings before the District Court, Sofia ('the SRS') were brought by application of the [asset] management company Invest Fund Management AD, a company entered in the Trade Register and Register of Non-Profit Legal Entities of the Republic of Bulgaria, represented jointly by managing director DA and member of the board of directors KU, against a penalty notice issued by MG, deputy chair of the Komisiya za finansov nadzor (Financial Supervision Commission), [on] 15 April 2020 imposing a 'financial penalty' of BGN 10 000 in accordance with Article 273(5), point 10, read in combination with

Article 273(1), point 10, of the Zakon za deynostta na kolektivnite investitsionni shemi i na drugi predpriyatiya za kolektivno investirane (Law on Collective Investment Schemes and Other Collective Investment Undertakings, ‘the ZDKISDPKI’) on the grounds of failure to comply with a legal obligation pursuant to Article 56(1) of the ZDKISDPKI.

The SRS established of its own motion during the proceedings that a question needs to be referred to the Court of Justice of the European Union pursuant to the second paragraph of Article 267 of the Treaty on the Functioning of the European Union for a preliminary ruling on the interpretation of the provisions of EU law that concern the subject matter of the case [description of the main proceedings before the referring court].

I. Parties to and subject matter of the main proceedings

1. The management company Invest Fund Management AD, registered office and branch: Sofia [...].
2. The law firm of Tokushev i sadruzhnitsi [**Or. 2**] (representing Invest Fund Management AD), registered in the R[epublic] of Bulgaria, address: Sofia [...].
3. The Financial Supervision Commission, address: Sofia [...].
4. The subject matter of the main proceedings is an administrative offence possibly committed by Invest Fund Management AD in failing to comply with the obligation, in the event of any change to the essential elements included in the prospectus of the collective investment scheme, to update the prospectus and submit it to the Financial Supervision Commission (FSC) within a period of 14 days.
5. The main proceedings are pending at first instance. The court’s decision is open to review by the Administrativen sad Sofia-Grad (Administrative Court, Sofia City) and is therefore not final.

II. Presentation of the facts

6. Management companies in the Republic of Bulgaria are subject to regulation and supervision by the FSC.
7. The management company Invest Fund Management AD is entered in the Trade Register and the Register of Non-Profit Legal Entities (‘the TRRYULNTS’) of the R[epublic] of Bulgaria and is represented jointly by managing director DA and member of the board of directors KU. It holds a licence to trade as a management company and is entered in the register held by the FSC [...].

8. Invest Fund Management AD organises and manages five different investment funds, namely ‘Invest Aktiv’, ‘Invest Klassik’, ‘Global Opportunities’, ‘Invest Konservativen Fond’ and ‘Invest Obligatsii’.
9. Officers of the FSC established during remote review of the activity of Invest Fund Management AD that a change to the composition of the board of directors had been recorded in the TRRYULNTS on 28 August 2019. Two new non-executive members to whom no management functions were delegated (SR and ND) had joined the board.
10. The officers of the FSC established that Invest Fund Management AD should have updated the prospectuses for each of the five separate investment funds within the statutory 14-day period expiring on 11 September 2019. However, they did not do so until 17 October 2019. **[Or. 3]**
11. As a result of that identified failure to act on the part of Invest Fund Management AD, five separate decisions were adopted finding that an administrative offence had been committed in respect of each of the investment funds managed, following which the Deputy Chair of the FSC issued five separate penalty notices, each imposing a ‘financial penalty’ of BGN 10 000.
12. The penalty notice [of] 15 April 2020 contested in the main proceedings [...] was issued for failure to update the prospectus of the ‘Invest Obligatsii’ investment fund in due time.

III. Provisions cited

13. National provisions

Zakon za deynostta na kolektivnite investitsionni shemi i na drugi predpriyatiya za kolektivno investirane (Law on Collective Investment Schemes and Other Collective Investment Undertakings, State Gazette No 77 of 4 October 2011, ‘the ZDKISDPKI’).

Article 1 of this Law regulates:

1. the activity of collective investment schemes and management companies;
2. the activities of other collective investment undertakings;
3. (new, State Gazette No 109/2013, effective 20 December 2013) the activities of alternative investment fund managers;
4. (renumbered from point 3, amended, State Gazette No 109/2013, effective 20 December 2013) requirements in terms of the persons managing and controlling the persons under points 1 to 3 and the persons having a qualifying holding in management companies or alternative investment fund managers;

5. (renumbered from point 4, State Gazette No 109/2013, effective 20 December 2013) the State's supervision of compliance with this Law.

Article 3 The persons ... covered by Article 1 herein shall be regulated and supervised by the Financial Supervision Commission, hereinafter referred to as 'the Commission', as well as by the Deputy Chair of the said Commission in charge of the 'Nadzor na investitsionnata deynost' division (Supervision of the Investment Activities Division), hereinafter referred to as 'the Deputy Chair'.

Article 56(1) (amended, State Gazette No 15/2018, effective 16 February 2018) In the event of any change to the essential elements included in the prospectus of the collective investment scheme, **[Or. 4]** the prospectus shall be updated and submitted to the Commission within 14 days of the change.

Article 273 (renumbered from Article 204, State Gazette No 109/2013, effective 20 December 2013) (1) (amended, State Gazette No 109/2013, effective 20 December 2013) Whoever commits or permits an infringement of:

.....

10. (new, State Gazette No 76/2016, effective 30 September 2016, renumbered from point 9, amended and supplemented, State Gazette No 102/2019) ... Article 56(1), ... shall be liable for a fine of BGN 4 000 to BGN 5 000 000;

.....

(5) For infringements under Paragraph 1 committed by legal persons or sole traders a financial penalty shall be imposed as follows:

.....

10. (new, State Gazette No 76/2016, effective in force from 30 September 2016, renumbered from point 9, amended, No 102/2019) For infringements referred to in point 10 of Paragraph 1 – of BGN 10 000 to BGN 5 000 000, and in the event of repeated infringement – of BGN 20 000 to BGN 10 000 000.

SUPPLEMENTARY PROVISIONS

Paragraph 1 For the purposes of this Law:

...

21. 'Repeated infringement' occurs where three or more administrative infringements of this Law or of the instruments for its application are committed within one year.

Paragraph 2 (amended, State Gazette No 21/2012) The Law transposes the requirements of:

1. Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32)

14. EU law:

Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32). **[Or. 5]**

Article 69(2) The prospectus shall contain at least the information provided for in Schedule A of Annex I, in so far as that information does not already appear in the fund rules or instruments of incorporation annexed to the prospectus in accordance with Article 71(1).

Article 72 The essential elements of the prospectus shall be kept up to date.

Article 99a Member States shall ensure that their laws, regulations or administrative provisions transposing this Directive provide for penalties, in particular when:

.....

(r) an investment company or, for each of the common funds that it manages, a management company, repeatedly fails to comply with obligations concerning information to be provided to investors imposed in accordance with the national provisions transposing Articles 68 to 82.

IV. Arguments of the parties to the main proceedings

15. Law firm of Tokushev i sadruzhnitsi:

15.1. Invest Fund Management AD's legal representative did not submit any express observations and allowed the time limit set for submitting additional questions that could have been included in the order for reference following examination by the SRS to lapse.

15.2. At the hearing conducted in open court on 30 July 2020, the lawyer SM referred to the view taken in the application that the change to the composition of the board of directors of the management company was not an 'essential element' that made timely updating of the prospectuses of the managed funds necessary. He also took the view that the FSC had unlawfully imposed the five separate 'financial penalties' of BGN 10 000 each, as there had been only one infringement.

16. Financial Supervision Commission

- 16.1. The authority which imposed the penalties did not submit any express observations and allowed the time limit set for submitting additional questions that could have been included in the order for reference following examination by the SRS to lapse.
- 16.2. At the hearing conducted in open court on 30 July 2020, NZ, the FSC’s legal representative, submitted written observations contending that any change to the composition of the board of directors of the management company is an ‘essential element’, as that information forms part of the minimum content [Or. 6] of the prospectus, which must therefore be updated. He referred in that connection to letter [...] ref. RG-08-00-12/21/03/2018 from the Deputy Chair of the FSC by which the supervisory authority advised all the management companies under its supervision that information identifying collective investment schemes and the persons who manage them are essential elements. He rejected lawyer SM’s contention that the five individual ‘financial penalties’ were unlawfully imposed in this case, as the failure to act was established in relation to each of the five separate investment funds managed.

IV. Summary of the basis for the reference

17. The subject matter of the main proceedings is an administrative offence possibly committed by Invest Fund Management AD in failing to comply with the obligation, in the event of any change to the essential elements included in the prospectus of the collective investment scheme, to update the prospectus and submit it to the FSC within a period of 14 days.
18. The most important question that requires clarification is the meaning of the term ‘essential elements’ of prospectuses used in Article 72 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009, as neither that secondary EU legal act nor the laws applicable in the Republic of Bulgaria contain a legal definition of the term.
19. Thus a ruling by the Court of Justice of the European Union is needed on the meaning which the European legislature intended to give to the expression ‘essential elements’ used in Article 72 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009.
20. The supervisory authority is of the opinion that any change to the minimum information required in prospectuses necessitates their being updated in due time and it would therefore welcome clarification by the Court as to whether the provision of Article 69(2) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 is to be interpreted as meaning that any change to the minimum information in prospectuses provided for in Schedule A of Annex I is covered in all cases by the term ‘essential elements’ within the meaning of Article 72 of the Directive, meaning that they must be updated in due time.

21. The legal representative of Invest Fund Management AD is of the opinion that there is no need to update the prospectuses in this case as the newly elected board members are non-executive members and would not therefore be exercising any management function. This means that, if Question 2 is answered in the negative, a ruling by the Court of Justice of the European Union is needed [**Or. 7**] as to whether information about a change in the composition of the board of directors of a particular management company that concerns non-executive directors who are not assigned any management functions is included in the term 'essential elements' within the meaning of Article 72 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009.
22. The legislation applicable in the Republic of Bulgaria provides for a separate penalty to be imposed on the management company for every failure to comply with the obligation to update essential elements. However, Article 99a(r) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 requires the Member States to ensure that their laws, regulations or administrative provisions transposing this Directive provide for penalties, in particular when, for each of the common funds that it manages, a management company repeatedly fails to comply with obligations concerning information to be provided to investors imposed in accordance with the national provisions transposing Articles 68 to 82. The Court of Justice of the European Union therefore needs to clarify whether that provision is to be interpreted as meaning that the management company can only be held liable in the event of repeated non-compliance with the obligation to update the essential elements of the prospectus, which would incur a single penalty.

On those grounds, the **District Court, Sofia** [...]

MAKES THE FOLLOWING ORDER:

The **FOLLOWING QUESTIONS ARE REFERRED TO THE COURT OF JUSTICE OF THE EUROPEAN UNION FOR A PRELIMINARY RULING** pursuant to the second paragraph of Article 267 of the Treaty on the Functioning of the European Union:

1. What meaning did the European legislature intend to give to the term 'essential elements' of the prospectus within the meaning of Article 72 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities ([...] OJ 2009 L 302, p. 32)?
2. Is Article 69(2) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 to be interpreted as meaning that any change [**Or. 8**] to the minimum information in prospectuses provided for in Schedule A of Annex I is always covered by the term 'essential elements' within the meaning of Article 72 of the Directive, so that these must be updated in due time?

3. If Question 2 is answered in the negative, is it to be assumed that information about a change in the composition of the board of directors of a particular management company that concerns non-executive members who are not assigned any management functions is included in the term ‘essential elements’ within the meaning of Article 72 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009?

4. Is Article 99a(r) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 to be interpreted as meaning that it is only permissible to impose a penalty on a management company (for each of the investment funds managed by it) in the event of repeated non-compliance with obligations concerning information to be provided to investors imposed in accordance with the national provisions transposing Articles 68 to 82 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009?

The order is final and not open to appeal.

[Formalities concerning transmission of copies of procedural documents to the Court and certified copies of the order to the parties]