

**Case C-544/19****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

9 July 2019

**Referring court:**

Administrative Court of Blagoevgrad (Bulgaria)

**Date of the decision to refer:**

5 July 2019

**Appellant in the appeal in cassation:**

‘ECOTEX BULGARIA’ EOOD

**Respondent in the appeal in cassation:**

Teritorialna direktsia na Natsionalnata agentsia za prihodite, Sofia

**Subject matter of the main proceedings**

Appeal in cassation proceedings concerning an administrative penalty — financial sanction — imposed on the appellant in the appeal in cassation for an infringement of the cash payment restriction pursuant to Article 3(1) No 1 of the *Zakon za ogranichavane na plashtaniyata v broi* (Law on the restriction of cash payments).

**Subject matter and legal basis of the reference**

Legal basis of the reference: Article 267(a) and (b) TFEU.

Request for interpretation of: Article 63 TFEU; Article 49(3) of the Charter of Fundamental Rights of the European Union; Directive (EU) 2015/849: Recital 6, Article 2(1), Articles 4 and 5, Article 58(1) and Article 60(4).

## Questions referred

### Question 1:

Must Article 63 TFEU be interpreted as precluding national legislation such as that in question in the main proceedings, under which domestic payments amounting to 10 000 leva (BGN) or more are only to be made by transfer or deposit into a payment account and which restricts the cash payment of dividends from undistributed profits of BGN 10 000 or more? If Article 63 TFEU does not preclude that regulation, is such a restriction justified by the aims of Directive (EU) 2015/849?

### Question 2:

Must Article 2(1) of Directive (EU) 2015/849, in consideration of Recital 6 and Articles 4 and 5 thereof, be interpreted as not precluding a general national legislative provision such as that in question in the main proceedings, under which domestic payments of BGN 10 000 or more are only to be made by transfer or deposit into a payment account and which has no interest in the person and in the reason for the cash payment and at the same time covers all cash payments among natural and legal persons?

(1) If that question is answered in the affirmative, does Article 2(1)(3)(e) of Directive (EU) 2015/849, in consideration of Recital 6 and Articles 4 and 5 thereof, allow the Member States to provide for additional general restrictions of domestic cash payments in a national legislative provision such as that in question in the main proceedings, under which domestic cash payments of BGN 10 000 or more are only to be made by transfer or deposit into a payment account, if the reason for the cash payment is ‘undistributed profits’ (dividends)?

(2) If that question is answered in the affirmative, does Article 2(1)(3)(e) of Directive (EU) 2015/849, in consideration of Recital 6 and Article 5 thereof, allow the Member States to provide for restrictions of cash payments in a national legislative provision such as that in question in the main proceedings, under which domestic payments of BGN 10 000 or more are only to be made by transfer or deposit into a payment account, where the threshold value is below EUR 10 000?

### Question 3:

Must Article 58(1) and Article 60(4) of Directive (EU) 2015/849, with regard to Article 49(3) of the Charter of Fundamental Rights of the European Union, be interpreted as precluding a national legislative provision such as that in question in the main proceedings, which stipulates a fixed level of administrative penalties for infringements of the cash payment restrictions and does not allow any differentiating assessment taking account of the specific relevant circumstances?

(1) If the answer is that the provisions of Article 58(1) and Article 60(4) of Directive (EU) 2015/849, with regard to Article 49(3) of the Charter of

Fundamental Rights of the European Union, allow a national legislative provision such as that in question in the main proceedings, which stipulates a fixed level of administrative penalties for infringements of the cash payment restrictions, must the provisions of Article 58 and Article 60(4) of Directive (EU) 2015/849, in consideration of the principle of effectiveness and the right to an effective remedy under Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as precluding a national legislative provision such as that in question in the main proceedings, which restricts judicial review, if that provision does not allow the court to determine an administrative penalty for infringements of the cash payment restrictions, in the event of an appeal, below the amount that has been set, taking account of the specific relevant circumstances?

### **Provisions of EU law and the case-law cited**

Article 63 TFEU; Article 47 and Article 49(3) of the Charter of Fundamental Rights of the European Union; Article 1 of Council Directive 88/361/EEC for the implementation of Article 67 of the Treaty; Recitals 6, 22 and 65 and Articles 2, 4, 5, 58 and 60 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC

### **Provisions of national law cited**

Articles 113, 123, 133, 135 to 137 and 147 of the Targovski zakon (Commercial Law, TZ); Articles 1 to 3, 5 and 6 of the Zakon za ogranichavane na plashtaniyata v broi (Law on the restriction of cash payments, ZOPB); Article 27(1) and (5), Article 28(a), Article 63(1) and Article 83 of the Zakon za administrativnite narusheniya i nakazaniya (Law on administrative-law infringements and penalties, ZANN); Article 208, Article 218(2) and Article 223 of the Administrativno-protsesualen kodeks (Law on administrative proceedings, APK)

### **Brief summary of the facts and procedure**

- 1 The appellant in the appeal in cassation is a single-member company with limited liability under Bulgarian law with registered office in Petrich, Bulgaria, operating in the field of wholesale distribution. The sole shareholder and manager is a Greek citizen domiciled in Greece.
- 2 On 14 March 2018, a general meeting took place at the company's registered office, in the course of which it was resolved to distribute dividends to the sole shareholder in a total amount of BGN 100 000. The amount indicated constitutes

undistributed profits subject to corporation tax. It was resolved to pay out the amount in instalments from the company's funds in cash.

- 3 In March 2018, on the basis of that resolution, the company paid the sole shareholder the sum of BGN 95 000, divided into nine payments of BGN 10 000 each and one payment of BGN 5 000, in cash, for which the corresponding payment instructions for outgoings were issued.
- 4 One of those cash payments, which was made on 14 March 2018 and amounted to BGN 10 000, is the subject of the main proceedings. It is not disputed between the parties and, on the basis of the facts established in the proceedings, is beyond dispute that this sum consists of distributed dividends for implementing the aforementioned resolution of the company's general meeting.
- 5 During a tax audit of 'Ecotex Bulgaria' EOOD, it was found that each of those cash payments of BGN 10 000 constitutes an infringement of the prohibition under Article 3(1) No 1 of the ZOPB on making domestic cash payments 'of BGN 10 000 or more'.
- 6 The Teritorialna direksia na Nationalna agentsia za prihodite Sofia (Sofia Regional Division of the Central Administration of the National Revenue Agency) dismissed the company's objections, which were based on this being a 'minor case', and established for each of those payments the financial sanction provided for in Article 5(1) ZOPB of 50 per cent of the total value of each payment, which amounts to BGN 5 000 in the case of the payment in question in the main proceedings.
- 7 'Ecotex Bulgaria' EOOD contested the penalty notice regarding the payment in question in the main proceedings at the competent Rayonen sad, which confirmed the notice in full.
- 8 The Rayonen sad assumed that the cash payment of BGN 10 000 made on 14 March 2018, which constituted part of the distributed dividends, met the conditions for an infringement pursuant to Article 3(1) No 1 of the ZOPB. Due to the lack of a legal definition of the term 'payment' within the meaning of the ZOPB, that court assumed that it was to be understood as 'any monetary transaction', regardless of whether a counter-performance was involved.
- 9 With regard to the financial sanction imposed, the Rayonen sad assumed that there were no legal bases for changing (reducing) it. As reasoning, it stated that it was bound to the fixed level under Article 5(1) ZOPB, namely 50 per cent of the amount of the cash payment, and to the prohibition under Article 27(5) ZANN on fixing a sanction below the minimum level provided for in the special law of Article 5(1) ZOPB.
- 10 The Rayonen sad rejected the application pursuant to Article 28 ZANN to relieve the infringing party of the responsibility under administrative criminal law due to

this being a ‘minor case’, with the reasoning that the infringement under Article 3(1) No 1 ZOPB did not vary from the usual and was not ‘minor’.

- 11 ‘Ecotex Bulgaria’ EOOD contested the decision of the Rayonen sad with an appeal in cassation at the referring court, which has to issue a final decision on the dispute.

### **Principal arguments of the parties in the main proceedings**

- 12 The appellant in the appeal in cassation argues that the right to a share in the company’s profit (dividend right) was not a legal transaction or contract with a counter-performance and was not covered by the term ‘payment’ within the meaning of Article 3(1) No 1 ZOPB.
- 13 It also points out that the cash payment of BGN 10 000 made on 14 March 2018 only exceeded the restriction under Article 3(1) No 1 ZOPB by BGN 0.01, which meant that the financial sanction provided for in Article 5(1) ZOPB of 50 per cent of the total amount of the payment made, a sanction which amounted to BGN 5 000 in the present case, was disproportionate.
- 14 The respondent in the appeal in cassation is of the opinion that the provision of Article 3(1) No 1 ZOPB covered all cash payments, including the payment of a share in the undistributed profits (dividends), in so far as this did not fall under one of the statutory exceptions under Article 2 ZOPB.
- 15 It also points out that the term ‘payment’ within the meaning of Article 3(1) No 1 ZOPB was to be understood as any monetary transaction, regardless of whether it was on a contractual or non-contractual basis; a participation right relationship was also to be included.

### **Brief summary of the basis for the reference**

- 16 The *Zakon za ogranichavane na plashtaniyata v broi* (Law on the restriction of cash payments, ZOPB) was issued as a measure for implementing the repealed Directive 2005/60/EC and is mentioned as a national instrument for transposing Directive (EU) 2015/849 under No 11 in the following communication: <https://eur-lex.europa.eu/legal-content/BG/NIM/?uri=CELEX:32015L0849>.
- 17 The law to be applied to the present case is the provision of Article 3(1) No 1 ZOPB, which is to be interpreted in the spirit and within the meaning of the corresponding EU law (see judgment of 10 April 1984, *von Colson and Kamann*, 14/83, EU:C:1984:153) and specifically in the light of Article 63 of the Treaty on the Functioning of the European Union and the provisions of Directive (EU) 2015/849.

- 18 In order to discharge the duty to ensure that national legislation is interpreted in conformity with [EU] law (see judgments of 14 September 2000, *Collino and Chiappero*, C-343/98, EU:C:2000:441, paragraph 23, of 19 April 2007, *Farell*, C-356/05, EU:C:2007:229, paragraph 40, and of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 39), national courts must do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised in case-law and legal doctrine (see judgments of 4 July 2006, *Adeneler*, C-212/04, EU:C:2006:443, paragraph 111, and of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 27).
- 19 Within the meaning of EU law, the movement of capital in its basic form constitutes a financial transaction, not involving payment from another economic relationship. The Court of Justice of the European Union has found that, in contrast to current payments, which are connected to transactions in the form of performance and consideration on the basis of a legal transaction, ‘movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service’ (judgment of 31 January 1984, *Luisi and Carbone*, 286/82 and 26/83, EU:C:1984:35, paragraph 21).
- 20 In the opinion of the Court of Justice, the receipt of dividends from shares in trading companies constitutes a form of the free movement of capital (judgment of 6 June 2000, *Verkooijen*, C-35/98, EU:C:2000:294). Article 63(1) TFEU prohibits all restrictions on the movement of capital between the Member States and between the Member States and third countries, including ‘measures which are likely to discourage non-residents from making investments in a Member State or from maintaining such investments’ (see judgments of 22 January 2009, *STEKO Industriemontage*, C-377/07, EU:C:2009:29, paragraphs 23 and 24, and of 31 March 2011, *Schröder*, C-450/09, EU:C:2011:198, paragraph 30). The response to the question of whether the cash payment restriction in the national law (Article 3(1) No 1 ZOPB), if due to its indeterminacy this also covers the payment of a dividend, constitutes a disguised restriction of the free movement of capital and payments within the meaning of Article 63 TFEU is therefore important.
- 21 Directive (EU) 2015/849 aims to prevent the use of the Union’s financial system for the purpose of money laundering and terrorist financing. In order to achieve the aims of the Directive, a catalogue of occupations and activities which fall within its scope was established, with the Member States being able to expand the scope to occupations or categories of undertaking other than those mentioned in Article 2(1) and to issue lower threshold values, additional general cash payment restrictions and further more stringent provisions.
- 22 In this connection, it is to be examined, with regard to the company’s responsibility, whether a general national legislative provision which restricts cash payments, regardless of whether they constitute remuneration for a counter-performance, is admissible and whether the restriction of the cash payment of a

share in undistributed profits under Article 3(1) No 1 ZOPB is covered by the scope of Directive (EU) 2015/849; if such a provision is admissible, this raises the question of whether it is left to the Member States to fix the threshold value for cash payments at an amount below EUR 10 000.

- 23 If this is found to be the case, it is to be examined to what extent a national legislative provision such as that of Article 5(1) ZOPB, which provides for a financial sanction at the fixed level of ‘50 per cent of the total amount of the payment made’ for legal persons in respect of all financial transactions, is admissible with regard to the proportionality of the penalty pursuant to Article 58(1) and the circumstances pursuant to Article 60(4) of Directive (EU) 2015/849 and whether it does not constitute a breach of the principle of effective judicial review in light of the prohibition regulated in Article 27(5) ZANN on the court reducing the sanction below the minimum level provided for in Article 5(1) ZOPB.

WORKING DOCUMENT