

Anonymised version

Translation

C-95/20 — 1

Case C-95/20

Request for a preliminary ruling:

Date lodged:

25 February 2020

Referring court:

Administrativen sad Varna (Bulgaria)

Date of the decision to refer:

11 February 2020

Appellant in the appeal on a point of law:

VARCHEV FINANS EOOD

Respondent in the appeal on a point of law:

Komisija za finansov nadzor

ORDER

No 343

Varna, 11 February 2020

ADMINISTRATIVEN SAD VARNA (Administrative Court, Varna), [...]

The proceedings were initiated pursuant to Article 208 of the Administrativnoprotsesualen kodeks (Code of Administrative Procedure, ‘APK’), read in combination with Article 63(1) of the Zakon za administrativnite narushenia i nakazania (Law on administrative offences and administrative penalties, ‘ZANN’).

The appeal on a point of law was lodged by VARCHEV FINANS EOOD [...] against judgment no 1465 delivered by the Rayonen sad Varna (District Court, Varna) on 18 July 2019 in administrative offence case no 2733/2019 [...]. The

contested judgment upheld penalty notice no R-10-533 issued by the deputy president of the Komisia za finansov nadzor (Financial Supervision Commission, 'KFN') on 20 May 2019 [...], imposing on the company: 1) an administrative penalty in the form of a fine of BGN 5 000 (five thousand leva) in application of Article 290(9) point 16, first alternative, of the Zakon za pazarite na finansovi instrumenti (Law on markets in financial instruments, 'ZPFI') for infringement of Article 56(2), read in combination with Article 72(2) of and Annex I to Commission Delegated Regulation (EU) 2017/565; and 2) an administrative penalty in the form of a fine of BGN 5 000 (five thousand leva) in application of Article 290(9) point 16, first alternative, of the ZPFI for infringement of Article 72(2) of Commission Delegated Regulation (EU) 2017/565, read in combination with Annex I to that Regulation.

During the proceedings, the Administrative Court, Varna, sitting as court of appeal on a point of law, found that it required an interpretation of Article 56(2) and Article 72(2) of Commission Delegated Regulation (EU) 2017/565, read in combination with Annex I to that Regulation, in order to enable it to rule on the dispute between the parties.

Wherefore, the adjudicating panel of the Administrative Court, Varna considers it appropriate to request a preliminary ruling by the Court of Justice of the European Union on the interpretation of the legislation relevant to this dispute.

For these reasons, the court sets out the substance of the request for a preliminary ruling as follows:

I. Parties:

1. Appellant in the appeal on a point of law: VARCHEV FINANS EOOD.
2. Respondent in the appeal on a point of law: Komisia za finansov nadzor, Sofia (Financial Supervision Commission, Sofia)
3. Party with supervisory powers: Varnenska okrazhna prokuratura (Regional Prosecution Service, Varna) **[Or. 2]**

II. Subject matter of the proceedings:

Judgment no 1465 delivered by the District Court, Varna on 18 July 2019 [...] in administrative offence case no 2733/2019 upholding penalty notice no R-10-533 issued on 20 May 2019 by the deputy president of the KFN and investment activity supervisor, imposing on VARCHEV FINANS EOOD [...]: 1) an administrative penalty in the form of a fine of BGN 5 000 (five thousand leva) in application of Article 290(9) point 16, first alternative, of the ZPFI for infringement of Article 56(2), read in combination with Article 72(2) of and Annex I to Commission Delegated Regulation (EU) 2017/565; and 2) an

administrative penalty in the form of a fine of BGN 5 000 (five thousand leva) in application of Article 290(9) point 16, first alternative, of the ZPFI for infringement of Article 72(2) of Commission Delegated Regulation (EU) 2017/565, read in combination with Annex I to that Regulation.

III. Facts relevant to the subject matter of the request for a preliminary ruling:

VARCHEV FINANS EOOD holds a permit issued by the KFN to provide investment services and to engage in investment activities. The company is required in the exercise of those activities to comply with all the legislation regulating those activities, including the provisions of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms ('Delegated Regulation (EU) 2017/565').

The investment firm VARCHEV FINANS EOOD was audited on 20 August 2018 further to order no 3-310 issued by the deputy president of the KFN [...]. The company was asked during the course of the audit to grant access to all statutory registers maintained by it. The registers maintained and the information contained therein were audited and the findings were set out in an audit report dated 28/29 September 2018.

It was established during the audit that VARCHEV FINANS EOOD:

- 1) does not maintain a 'register' recording information on the appropriateness assessments undertaken for its clients, as a result of which it was held to be in breach of Article 56(2), read in combination with Article 72(2) of and Annex I to Delegated Regulation (EU) 2017/565; and
- 2) does not maintain a 'register' recording the information on costs and charges provided to clients, as a result of which it was held to be in breach of Article 72(2) of Delegated Regulation (EU) 2017/565, read in combination with Annex I to that Regulation.

VARCHEV FINANS EOOD was issued with an administrative offence notice for the breaches found, further to which penalty notice no R-10-533 was issued on 20 May 2019 in application of Article 290(9) point 16, first alternative, of the ZPFI, imposing on the company a fine of BGN 5 000 for each breach. [Or. 3]

III.2. VARCHEV FINANS EOOD initiated action against that penalty notice before the District Court, Varna, which was registered as administrative offence case no 2733/2019 in the court register.

By its judgment no 1465 of 18 July 2019 in administrative offence case no 2733/2019, the District Court, Varna upheld the penalty notice. The court arrived

at that decision based on the finding that no substantial procedural errors had been committed during the administrative offence procedure. It made the findings of fact as recounted above based on oral and written evidence taken during the court proceedings. It showed that the penalty notice was also in keeping with substantive law for the following reasons:

1. Article 72(2) of Delegated Regulation (EU) 2017/565 states that investment firms shall keep at least the records [in the Bulgarian version: ‘registers’] identified in Annex I to this Regulation depending upon the nature of their activities.

Article 72(1) of Delegated Regulation (EU) 2017/565 sets out rules for the retention of records by investment firms that also apply to the registers to be maintained by the investment firm. That provision states that investment firms, in this case the appellant in the appeal on a point of law, shall retain records in a medium that allows the storage of information in a way that is accessible for future reference by the competent authority, and in such a form and manner that the following conditions are met:

- the competent authority is able to access them readily and to reconstitute each key stage of the processing of each transaction;
- it is possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained;
- it is not possible for the records otherwise to be manipulated or altered;
- it allows IT or any other efficient exploitation when the analysis of the data cannot be easily carried out due to the volume and the nature of the data; and
- the firm’s arrangements comply with the record keeping requirements irrespective of the technology used.

Article 72(2), second subparagraph, of Delegated Regulation (EU) 2017/565 states that the list of records [in the Bulgarian version: ‘registers’] identified in Annex I to this Regulation is without prejudice to any other record-keeping obligations arising from other legislation.

The ZPFI and Delegated Regulation (EU) 2017/565 require investment firms which provide investment services other than ‘portfolio management’ and ‘investment advice’ to obtain information from the client on their knowledge and experience in the investment field in connection with the specific product or service offered or demanded. Based on the information obtained, the investment firm must undertake an appropriateness assessment to determine if the investment service or product is appropriate for the client.

Article 56(2) of Delegated Regulation (EU) 2017/565 requires investment firms to maintain records of the appropriateness assessments undertaken which include the following: **[Or. 4]**

- (a) the result of the appropriateness assessment;
- (b) any warning given to the client where the investment service or product purchase was assessed as potentially inappropriate for the client, whether the client asked to proceed with the transaction despite the warning and, where applicable, whether the firm accepted the client's request to proceed with the transaction;
- (c) any warning given to the client where the client did not provide sufficient information to enable the firm to undertake an appropriateness assessment, whether the client asked to proceed with the transaction despite this warning and, where applicable, whether the firm accepted the client's request to proceed with the transaction.

The court found that it had been proven during the proceedings that the company provides the services of 'reception and transmission of order' and 'execution of orders on behalf of clients', in connection with which it undertakes an assessment to determine if the service is appropriate for the client's profile, but that the facts established from the assessment undertaken are not recorded separately [in the Bulgarian version: 'in a separate register'], as required by Article 56(2) of Delegated Regulation (EU) 2017/565.

2. Article 71(2) point 4 of the ZPFI requires investment firms to provide their clients or potential clients with information on the various costs and charges and the amount thereof promptly, in an appropriate manner and with due regard for the need to provide true, clear and non-misleading information. Article 50(2) of Delegated Regulation (EU) 2017/565 states that, for ex-ante and ex-post disclosure of information on costs and charges to clients, investment firms shall aggregate the following:

- (a) all costs and associated charges charged by the investment firm or other parties where the client has been directed to such other parties, for the investment services(s) and/or ancillary services provided to the client; and
- (b) all costs and associated charges associated with the manufacturing and managing of the financial instruments.

The costs referred to under points (a) and (b) are listed in Annex II to Delegated Regulation (EU) 2017/565.

At the same time, Annex I to Delegated Regulation (EU) 2017/565 requires investment firms to maintain registers recording the information on costs and charges provided to clients.

The District Court, Varna held that it had been proven beyond doubt in the proceedings that the company had failed to maintain the registers provided for under Article 56(2), read in combination with Article 72(2) of and Annex I to Delegated Regulation (EU) 2017/565, and under Article 72(2) of Delegated Regulation (EU) 2017/565, read in combination with Annex I to that Regulation.

III.3. The admissible appeal on a point of law lodged by VARCHEV FINANS EOOD is directed against the judgment of the District Court, Varna.

IV. Relevant legislation

A. National law

1. Procedural rules [Or. 5]

2. Substantive rules

IV.A.1. *Zakon za administrativnite narushenia i nakazania (Law on administrative offences and administrative penalties, 'ZANN')*

Article 59(1) of the ZANN [...] provides:

The penalty notice or electronic penalty notice can be contested in the district court in whose district the offence was committed or ended or, if it was committed abroad, in the Sofiyski rayonen sad (District Court, Sofia).

Article 63(1) of the ZANN [...] provides:

The district court, by a judge sitting alone, shall examine the substantive case and shall deliver judgment, by which it may confirm, amend or set aside the penalty notice or electronic penalty notice. The judgment may be appealed before the administrative court in an appeal on a point of law on the grounds provided for in the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure), in accordance with Chapter 12 of the Administrativnoprotsesualen kodeks (Code of Administrative Procedure, 'APK').

The procedure for appeals on a point of law is regulated in Chapter 12 of the APK.

According to Article 217(1) of the APK, read in combination with Article 63(1) of the ZANN, appeals on a point of law against judgments delivered by district courts are reviewed in the appropriate administrative court by a panel of three judges.

According to Article 223 of the APK, the judgment delivered on an appeal on a point of law is not open to any judicial remedy.

IV.A.2. The relevant substantive law includes the Zakon za pazarite na finansovi instrumenti (Law on markets in financial instruments, 'ZPFI'), which entered into force on 16 February 2018 on promulgation thereof in DV No 15 of 16 February 2018, with subsequent addenda and amendments).

Article 71(2) point 4 of the ZPFI requires investment firms to provide their clients or potential clients with information on the various costs and charges payable by clients and on the amount thereof promptly, in an appropriate manner and with due regard for the need to provide true, clear and non-misleading information.

According to Article 290(9) point 16, first alternative, read in combination with paragraph 1 point 16 of the ZPFI, unless otherwise provided for, a fine of between BGN 5 000 and BGN 1 000 000 shall be imposed on legal entities and sole traders for infringement of the applicable requirements of an EU Regulation, rising to between BGN 10 000 and BGN 2 000 000 in the event of a repeated offence.

B. EU law

IV.B.1. Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

Article 50(2) of Delegated Regulation (EU) 2017/565 reads: For ex-ante and ex-post disclosure of information on costs and charges to clients, investment firms shall aggregate the following: **[Or. 6]**

- (a) all costs and associated charges charged by the investment firm or other parties where the client has been directed to such other parties, for the investment services(s) and/or ancillary services provided to the client; and
- (b) all costs and associated charges associated with the manufacturing and managing of the financial instruments.

The costs referred to under points (a) and (b) are listed in Annex II to Delegated Regulation (EU) 2017/565.

Article 56(2) of Delegated Regulation (EU) 2017/565 reads: Investment firms shall maintain records of the appropriateness assessments undertaken which shall include the following:

- (a) the result of the appropriateness assessment;
- (b) any warning given to the client where the investment service or product purchase was assessed as potentially inappropriate for the client, whether the client asked to proceed with the transaction despite the warning and, where

applicable, whether the firm accepted the client's request to proceed with the transaction;

(c) any warning given to the client where the client did not provide sufficient information to enable the firm to undertake an appropriateness assessment, whether the client asked to proceed with the transaction despite this warning and, where applicable, whether the firm accepted the client's request to proceed with the transaction.

Article 72 ('Retention of records') of Delegated Regulation (EU) 2017/565 reads: 1. The records shall be retained in a medium that allows the storage of information in a way accessible for future reference by the competent authority, and in such a form and manner that the following conditions are met [inserted by Bulgarian court: 'simultaneously']:

(a) the competent authority is able to access them readily and to reconstitute each key stage of the processing of each transaction;

(b) it is possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained;

(c) it is not possible for the records otherwise to be manipulated or altered;

(d) it allows IT or any other efficient exploitation when the analysis of the data cannot be easily carried out due to the volume and the nature of the data; and

(e) the firm's arrangements comply with the record keeping requirements irrespective of the technology used.

Article 72(2) of Delegated Regulation (EU) 2017/565 reads: Investment firms shall keep at least the records identified in Annex I to this Regulation depending upon the nature of their activities. The list of records identified in Annex I to this Regulation is without prejudice to any other record-keeping obligations arising from other legislation. [Or. 7]

V. Case-law

The referring court was unable to identify any case-law on the above provisions.

VI. Arguments and legal conclusions of the parties

VI.1. One of the objections raised by VARCHEV FINANS EOOD, the appellant, against the judgment of the District Court, Varna, and on which its request that a preliminary question be referred to the Court of Justice of the European Union is based, is that the authority which identified the administrative offence interpreted and applied Delegated Regulation (EU) 2017/565 incorrectly, as the term 'records' in the phrase 'maintain records'[the Bulgarian court refers in the DDP to the English version of Article 56(2)] in Article 56(2) of Delegated Regulation

(EU) 2017/565 does not literally mean ‘registers’. The appellant argues that the Regulation refers to records, not registers, and that the company held such records, as established by the respondent.

VI.2. The respondent disagrees with the argument of the appellant and contends that the phrase ‘poddarzha registri’ in the official [Bulgarian] translation of Delegated Regulation (EU) 2017/565 (in the Bulgarian version: ‘maintain registers’; in the English version: ‘maintain records’) is not an abstract or ambiguous phrase that requires interpretation by the Court.

VII. Reasons for the order for reference

VII.1. The court is sitting as the court of appeal on a point of law in this case and its judgment is not open to any judicial remedy, including objection by the prosecution service.

The penalty notice that was the subject matter of the judgment of the District Court, Varna and which is being contested before the referring court, imposed two fines of BGN 5 000 each on VARCHIEV FINANS EOOD in application of Article 290(9) point 16 of the ZPFI, on the grounds that: 1) it does not maintain a register recording information on the appropriateness assessments undertaken for its clients, in breach of Article 56(2), read in combination with Article 72(2) of and Annex I to Delegated Regulation (EU) 2017/565; and 2) it does not maintain a register recording information on the information on costs and charges provided to clients, in breach of Article 72(2) of Delegated Regulation (EU) 2017/565, read in combination with Annex I to that Regulation.

It was found in the proceedings before the district court that the company records the information required under the abovementioned provisions, but not in separate registers.

In light of the objections raised by the respondent, the referring court directed it to submit certified translations in Bulgarian of the abovementioned provisions of the Regulation in French, German and English. It results from the translations submitted in the proceedings that the following expressions [in the English version of] Delegated Regulation (EU) 2017/565: ‘investment firms shall maintain records ... (Article 56(2)), ‘investment firms shall keep at least the [list of (added to the wording of the official translation)] records’ (Article 72(2)) and ‘minimum list of records to be kept by investment firms ...’ (Annex I) [can be] translated (into Bulgarian) as follows: ‘investment firms shall maintain archive records/keep records/maintain information’ (Article 56(2)); ‘investment firms shall keep at least the records/documents/information ...’ (Article 72(2)), and ‘records/minimum list of records/minimum information’ (Annex I).

As the above phrases correspond to the following text in the official Bulgarian translation of Delegated Regulation (EU) 2017/565: ‘Investment firms shall

maintain **registers ...**' (Article 56(2)) [**Or. 8**], 'investment firms shall keep at least the **registers ...**' (Article 72(2)) and 'list of **registers** to be maintained by investment firms ...'(Annex I) [the Bulgarian court cites the Bulgarian version of those provisions], the referring court considers that EU law requires interpretation in order to enable it to give judgment that ensures the law is applied correctly and uniformly. In particular, interpretation is required of Article 56(2), read in combination with Article 72 of and Annex I to Commission Delegated Regulation (EU) 2017/565, in order to establish whether it suffices for the purpose of those provisions that the investment firm lists the information referred to therein in each client's file or whether it must be systematically recorded in separate registers.

For those reasons [...], [basis in national procedural law], the Administrative Court, Varna [...]

MAKES THE FOLLOWING ORDER:

The Court of Justice of the European Union is requested, in accordance with subparagraph (b) of the first paragraph of Article 267 TFEU, to give a preliminary ruling on the following questions:

1. Is Article 56(2), read in combination with Article 72(2) of and Annex I to Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive to be interpreted as meaning that:

- investment firms must maintain (and keep up to date) a separate single register (in the form of a database) recording the suitability and appropriateness assessments undertaken for each client with the content provided for in Article 25(2) and (3) of Directive 2014/65/EU and Article [56] of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016?

Or does it suffice that the abovementioned data are in the possession of the investment firm and are attached to the record [in the Bulgarian version: 'file/dossier'] for each client in accordance with Article 25(5) of Directive 2014/65/EU and that that information is stored in a way accessible for future reference by the competent authority and in such a form and manner that the conditions of Article 72(1) of Delegated Regulation (EU) 2017/565 are met?

2. Is Article 72(2) of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, read in combination with Annex I to that Regulation, to be interpreted as meaning that:

- investment firms must maintain (and keep up to date) for all clients a separate single register (in the form of a database) recording the information on costs and ancillary costs provided to each client with the content provided for in Article [50] of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016? **[Or. 9]**

Or does it suffice that the abovementioned data are in the possession of the investment firm and are attached to the record [in the Bulgarian version: 'file/dossier'] for each client in accordance with Article 25(5) of Directive 2014/65/EU and that that information is stored in a way accessible for future reference by the competent authority and so that the conditions of Article 72(1) of Delegated Regulation (EU) 2017/565 are met?

[...]

WORKING DOCUMENT