

Case C-605/23**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:**

4 October 2023

Referring court:

Administrativen sad Blagoevgrad (Bulgaria)

Date of the decision to refer:

21 September 2023

Applicant:

‘Ati-19’ EOOD

Defendant:

Nachalnik na otdel ‘Operativni deynosti’ – Sofia v Glavna direktsia ‘Fiskalen kontrol’ pri Tsentralno upravlenie na Natsionalna agentsia za prihodite (Head of the Department ‘Operational Activities’ – Sofia City for the General Directorate ‘Tax Supervision’ of the Central Administration of the National Revenue Agency, Bulgaria)

Subject matter of the main proceedings

The main proceedings were initiated following an action brought by the ‘Ati-19’ EOOD against the order of administrative enforcement measures issued by the defendant on 30 August 2023. The order required the ‘sealing’ of the business premises operated by ‘Ati-19’ EOOD for a period of 14 days and a ‘ban on access’ pursuant to Article 186(1)(1)(a) and Article 187(1) of the Zakon za danak varhu dobavenata stoinost (Law on VAT; ‘the ZDDS’).

On 19 September 2023, during the main proceedings, the company ‘Ati-19’ EOOD applied to the court pursuant to Article 166(2) of the Administrativnoprotsesualen kodeks (Code of Administrative Procedure; ‘the APK’) for the provisional enforcement of the contested order of 30 August 2023, which was authorised by administrative decision of the issuing authority, to be stayed.

Subject matter and legal basis of the request

The request is made under point (b) of the first paragraph of Article 267 TFEU.

Question referred for a preliminary ruling

Must Article 47(1) of the Charter of Fundamental Rights of the European Union be interpreted as not precluding national rules on protection against the provisional enforcement of measures introduced by the national legislature to safeguard the interest referred to in Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in the context of which the scope of judicial review is limited to the existence of damage suffered?

Provisions of European Union law and case-law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Article 273

Charter of Fundamental Rights of the European Union, Article 47(1), Article 51(1) and (2), Article 52(1)

Provisions of national law relied on

Targovski zakon (Commercial Code; ‘the TZ’)

Zakon za danaka varhu dobavenata stoynost (Law on VAT; ‘the ZDDS’)

Naredba № N-18 ot 13.12.2006 za registrirane i otchitane chrez fiskalni ustroystva na prodazhbite v targovskite objekti, iziskvaniata kam softuerite za upravlenieto im i iziskvania kam litsata, koito izvarshvat prodazhbi chrez elektronen magazin (Ordinance No N-18 of 13 December 2006 on the registration and recording of sales on business premises by means of fiscal recording devices, on the requirements for the operating software and the requirements for persons selling via online shops)

Administrativnoprotsesualen kodeks (Code of Administrative Procedure; ‘the APK’)

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant is a one-person company with limited liability that operates under the name ‘Ati-19’.
- 2 On 3 August 2023, financial inspectors from the General Directorate ‘Tax Supervision’ of the Central Administration of the National Revenue Agency

conducted an audit on business premises managed by 'Ati-19' EOOD in Blagoevgrad.

- 3 During the audit on 3 August 2023, a test purchase of goods, food and beverages with a total value of 14.80 leva (BGN), paid in cash by a tax inspector, was made. No fiscal cash receipt was issued for the cash payment of BGN 14.80 by means of a fiscal recording device registered with the tax administration, installed in the business premises and put into operation. An employee accepted the payment on the business premises.
- 4 After the tax inspectors who made the test purchase identified themselves as such, a daily statement for 3 August 2023 was prepared by the fiscal recording device in the business premises, according to which the sales turnover for the day amounted to BGN 327.80. In fact, a cash amount of BGN 573.55 was found in the cash register at the business premises; a list of the funds in the cash register was drawn up, which was included in the minutes of the audit of the business premises.
- 5 Minutes No 0127640 dated 3 August 2023 were drawn up as evidence of the results of the audit carried out on 3 August 2023 at the company's business premises.
- 6 On 8 August 2023 a notice was issued declaring that an administrative offence had been committed, under which administrative criminal proceedings were initiated against the company in accordance with the provisions of the Zakon za administrativnite narushenia i nakazania (Law on Administrative Offences and Administrative Penalties; 'the ZANN') because on 3 August 2023, during the test purchase of food and beverages by the tax authority with the total value of BGN 14.80, which was paid for in cash, on business premises in Blagoevgrad managed by 'Ati-19' EOOD, no fiscal till receipt was issued by means of a fiscal recording device installed and put into operation on the business premises. That act constitutes an administrative offence pursuant to Paragraph 118(1) of the ZDDS.
- 7 Based on the decision establishing an administrative offence, a notice imposing a fine was issued, which imposed a financial penalty against 'Ati-19' EOOD pursuant to Article 185(1) of the ZDDS for the administrative offence committed on 3 August 2023 pursuant to Article 118(1) of the ZDDS.
- 8 On 30 August 2023, the defendant issued the administrative enforcement order contested in the main proceedings ('the Order') pursuant to Article 186(1)(1)(a) and Article 187(1) of the ZDDS, by which it ordered the 'sealing' of the business premises for a period of 14 days and a 'ban on entry'.
- 9 The Order was served on the legal representative of the company on 6 September 2023; in the confirmation of receipt, the date for sealing the business premises was set as 21 September 2023.

- 10 On 14 September 2023, the company brought an action pursuant to Article 60 of the APK against the Order before the Administrative sad Blagoevgrad (Administrative Court, Blagoevgrad, Bulgaria) requesting that the administrative decision permitting its provisional enforcement be lifted.
- 11 By decision of 18 September 2023, the court did not rule on the application to lift the administrative decision to authorise provisional enforcement because the limitation period for filing the application under Article 60(5) of the APK had expired.
- 12 On 19 September 2023, the company filed an application with the court pursuant to Article 166(2) of the APK for the provisional enforcement of the Order of 30 August 2023 to be stayed. That application is the subject matter of the main proceedings.

The essential arguments of the parties in the main proceedings

- 13 The applicant claims that there are no grounds and legal bases for allowing the provisional enforcement of the Order of 30 August 2023. It argues that the sealing of the business premises operated by it caused serious material damage to its activities, and the administrative offence pursuant to Paragraph 118(1) of the ZDDS constituted an isolated case in the company's activities.
- 14 The applicant has not put forward any arguments.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 15 The ZDDS governs the imposition of VAT on any supply of goods or services in return for a payment. The ZDDS provides for the imposition of administrative enforcement measures and administrative penalties for the failure of taxable persons to fulfil their legal obligations.
- 16 In particular, the ZDDS collates different measures when penalties are imposed for the same offence.
- 17 Failure by taxable legal entities and sole traders to fulfil the obligation under Article 118(1) of the ZDDS to register and record the sales they make on the business premises by issuing a fiscal cash receipt using a fiscal recording device (fiscal receipt) or a till receipt generated by an integrated automated business management system (system receipt), regardless of whether another tax document is required, constitutes an administrative offence under Article 118(1) of the ZDDS.
- 18 The administrative offence under Article 118(1) of the ZDDS is punishable by a financial penalty imposed in administrative proceedings by the financial authority of the National Revenue Agency; at the same time, the law (ZDDS) also provides

for the imposition of an administrative enforcement measure under Article 186(1)(1)(a) of the ZDDS – ‘sealing of business premises’ – for a period of up to 30 days. In addition, the sealing of business premises in accordance with Article 187(1) of the ZDDS also prohibits access to it.

- 19 Both measures – the ‘sealing’ and the ‘financial penalty’ – are criminal in nature and their simultaneous application for the same act by the same trader in accordance with different and independent procedures, with recourse to legal action against those measures before different courts, constitutes an impermissible restriction of the right under Article 50 of the Charter to the extent that the national law does not provide for a coordination of the procedures, which would make it possible for the additional burden associated with the cumulation of the measures imposed to be reduced to what is strictly necessary, and does not make it possible to ensure that the severity of all those measures together is consistent with the offence in question (operative part of the judgment of 4 May 2023 in *MV-98*, C-97/21, ECLI:EU:C:2023:371).
- 20 The ‘sealing’ measure is implemented by the tax authority or an official authorised by that authority issuing an order in a procedure that is administrative in nature. The Order has the characteristics of an individual administrative act.
- 21 The legal action against the individual administrative act has a suspensory effect, which means that it stays the enforcement of the act until the final decision on the legitimacy of the legal dispute has been taken. Exceptions to that rule are cases in which the law provides for provisional enforcement of the act or cases in which the provisional enforcement of the act was authorised by administrative decision of the authority issuing the act.
- 22 The order to implement the ‘sealing’ measure pursuant to Article 186(1) of the ZDDS is not subject to provisional enforcement before it becomes final and absolute and thus becomes an enforceable title by operation of law. However, the legislature has authorised the tax authority to decide to authorise provisional enforcement in accordance with the procedures and conditions laid down in the law. That is precisely the position here.
- 23 By issuing the Order on 30 August 2023 for the ‘sealing’ of the business premises operated by ‘Ati-19’ EOOD, the tax authority allowed its provisional enforcement by including its administrative decision to authorise such enforcement in the Order.
- 24 The confirmation of receipt of the Order stated the date for sealing the business premises – 21 September 2023 – which, after the company exercised its right to appeal by filing the action with the court, was before the Order became final and absolute. In its statement of reasons, the authority did not state unequivocally that the Order would be enforced by sealing after the expiry of the limitation period for challenging it or, in the case of legal action, following a final court decision. Instead, the authority set a deadline for the removal of the goods from the business

premises and related storage rooms, which began on the day the Order was served. In fact, by setting the date for the sealing of the business premises as 21 September 2023, while court proceedings were pending, the tax authority issued a decision to authorise the provisional enforcement of the Order, which gave rise to the company's legal interest in bringing the proceedings before the court pursuant to Article 166(2) of the APK (stay of provisional enforcement).

- 25 Provisional enforcement that is authorised by way of an administrative decision is an exception to the rule that administrative acts are not enforced until they have become final and absolute, and overturns the prohibition of their enforcement until the expiry of the limitation period for challenging them in administrative or judicial proceedings or, in the case of an action or appeal, until the higher administrative authority or a court have reached a decision. Provisional enforcement is aimed at protecting the life or health of citizens or particularly important interests of the state or the public, ensuring a successful outcome of the enforcement proceedings or protecting a particularly important interest of a party to the proceedings for the adoption of the administrative act (Article 60(1) of the APK).
- 26 There are two ways to seek protection against the provisional enforcement of an individual administrative act – by challenging the administrative decision authorising it, by applying to the court to set it aside, and by applying for a stay of provisional enforcement after the order has become final and absolute. In the latter case, the application for a stay of enforcement is admissible at any stage of the proceedings initiated to challenge the order.
- 27 The administrative decision to authorise provisional enforcement of the Order by sealing the business premises on 21 September 2023, which is contained in the Order contested in the main proceedings, has become final and absolute. Pursuant to 60(5) of the APK, the administrative decision can be challenged within three days of its announcement; in the present case, the Order was communicated to the company's legal representative on 6 September 2023, while the legal action challenging it, which contained an application to lift the administrative decision pursuant to Article 60(5) of the APK, was filed on 14 September 2023. In its decision of 18 September 2023, the court did not rule on the application because the limitation period had expired.
- 28 After the administrative decision to authorise the sealing has become final and absolute on 21 September 2023, protection against enforcement pending court proceedings to challenge the Order itself is only possible in accordance with the procedure and under the conditions of Article 166(2) and (3) of the APK (stay of provisional enforcement).
- 29 The action filed against the Order was received on time and was brought by the company operating from the business premises, which has [legal standing]; for those reasons the application pursuant to Article 166(2) and (3) of the APK of 19 September 2023 is admissible and the court must rule on it.

- 30 It is the scope of the judicial review pursuant to Article 166(2) of the APK that raises the question of whether the application is valid within the meaning of Article 47(1) of the Charter.
- 31 There is no doubt that there is a legal basis for the administrative decision to authorise the sealing on 21 September 2023. The provision of Article 188(1) of the ZDDS permits the tax authority to authorise the provisional enforcement of the Order. It is questionable whether, with regard to the sealing, the judicial protection against such enforcement prior to the court's decision on the lawfulness of the Order itself provides sufficient guarantees against arbitrary and disproportionate intervention in the company's activities.
- 32 According to the case-law of the Court of Justice of the European Union, '... the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, constitutes a general principle of Community law' (judgment of 21 September 1989, *Hoechst v Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 19 and judgment of 22 October 2002, *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 27).
- 33 In proceedings under Article 166(2) and (3) of the APK, as in those under Article 60(5) of the APK, the facts underlying the offence pursuant to Article 118(1) of the ZDDS are deemed to have been proved by the minutes drawn up on the results of the audit carried out by the tax authorities on business premises and by the administrative decision establishing that an offence has been committed.
- 34 The minutes, drawn up in accordance with the procedure and in the form provided for by a tax authority or an official within the scope of their powers, constitute evidence of the acts and statements made by them and in their presence and of the facts and circumstances established.
- 35 In the case-law relating to the challenge of an order such as that in the main proceedings before the referring court, the administrative decision establishing that an offence has been committed pursuant to Article 118(1) of the ZDDS is regarded as an 'official declaratory document with substantive evidential value' regarding the facts underlying the offence, which reverses the burden of proof. According to case-law, the administrative decision establishing that an administrative offence has been committed has substantive evidential value and therefore leads to a reversal of the burden of proof. Until proved otherwise, it is assumed that the facts contained in its findings occurred exactly as stated therein.
- 36 Judicial review in proceedings under Article 166(2) and (3) of the APK does not extend to the conditions for issuing the order for the 'sealing' of business premises under Article 186(1)(1)(a) of the ZDDS; the court does not make any 'enquiries' into the facts that were the basis for issuing the order. According to the case-law, the court does not examine the probable merits or lack of merits of the challenge

to the order itself pursuant to Article 146 of the APK, although the provision of Article 166(2) of the APK ‘is consistent with safeguarding the right to bring a challenge’. The protection under Article 166(2) of the APK can only be based on ‘serious or irreparable damage’ that would be caused to the addressee if provisional enforcement were to take place.

- 37 Subject to the conditions of Article 60(1) of the APK, specifically in the ‘protection of an important interest of the state’ – the tax interest of the state – the conditions for issuing the administrative decision to authorise provisional enforcement pursuant to Article 188(1) of the ZDDS are not reviewed again by the court either. Moreover, any procedural errors in issuing the administrative decision are not covered by the review. After expiry of the limitation period for the application to the court for the administrative decision to be lifted, the latter is deemed to have been issued lawfully.
- 38 The scope of judicial review pursuant to Article 60(5) to (7) of the APK against the administrative decision to authorise provisional enforcement pursuant to Article 188(1) of the ZDDS does not differ significantly from that pursuant to Article 166(2) of the APK. If there are differences, those lie in the wider scope of judicial review pursuant to Article 60(5) of the APK, in the context of which the court may review the authority’s assessment of whether the conditions have been satisfied under Article 60(1) (issuing the administrative decision to authorise provisional enforcement). However, the provision of Art 188(1) of the ZDDS is not interpreted and applied uniformly.
- 39 In some of the cases, the provision of Article 188 of the ZDDS is interpreted as a presumption of a protected ‘important interest of the state’. In one decision, the Varhoven administrative sad (Supreme Administrative Court, Bulgaria; ‘the VAS’) stated that ‘... the purpose of the law providing for provisional enforcement is to protect relevant important interests of the state or the public or to prevent other consequences as specified in the scope and application of the general provision of Article 60 of the APK; that is to say in cases where provisional enforcement is authorised by law, the assessment of its necessity has been carried out by the legislature’ and is not subject to another review.
- 40 In other cases, the court held that the provision of Article 188 of the ZDDS does not contain a presumption of an ‘important interest of the state’ that requires provisional enforcement of an order such as the one at issue in the main proceedings. For example, in one decision dated 3 October 2019, the VAS stated that ‘... the provisional enforcement [...] does not exist by operation of law but is the result of a declaration of intent by the administrative authority; that is to say that, according to the law, there is no presumption that the conditions of Article 60(1) of the APK are satisfied simply because an administrative offence has been committed’. Therefore, ‘... the particularly important interest of the state and the occurrence of serious or irreparable damage must be substantiated by the authority in each individual case and it bears the burden of proof for the facts on which it relies’.

- 41 Due to the wording of Article 188(1) of the ZDDS chosen by the legislature, which is sometimes regarded as a presumption of an important interest of the state in the provisional enforcement of the ‘sealing’ measure imposed, the scope of protection against the administrative decision pursuant to Article 60(1) of the APK is also limited and restricted to ‘serious or irreparable damage’ to the addressee, same as the scope of judicial review under Article 166(2) of the APK. The difference between the procedure under Article 60(5) of the APK and that under Article 166(2) to (3) of the APK lies in the legal consequences. Lifting the administrative decision ‘restores’ the situation as it was before (second sentence of Article 60(7)), while the stay of enforcement prohibits the change of the situation for the future (Article 166(2) of the APK) until the decision on the action against the order becomes final. Thus, the procedure under Article 60(5) to (7) of the APK does not guarantee more effective protection.
- 42 The procedure under Article 166(2) to (3) of the APK is conducted *in camera* on the basis of documents and does not permit the court to examine whether the provisional enforcement of the non-final order is aimed at protecting an important interest of the state, which would be a measure against an unlawful enforcement prior to the court’s final decision on its lawfulness. In those circumstances, it cannot be ruled out that the legal consequences of an order pursuant to Article 186(1)(1)(a) of the ZDDS, the provisional enforcement of which has been authorised, may arise and the court may subsequently lift the order as unlawful. Therefore, the limited scope of judicial review under Article 166(2) of the APK casts doubt on the effectiveness of an appeal against the provisional enforcement of a non-final administrative act.
- 43 The right to an effective domestic remedy within the meaning of Article 47 of the Charter, which must be interpreted in the light of the case-law of the ECtHR on Art 6(1) ECHR requires that the body responsible for reviewing administrative acts ensures ‘sufficient control’ in the proceedings (ECtHR, judgment of 21 June 2016, *Al-Dulimi and Montana Management Inc. v. Switzerland*, application no 5809/08, ECLI:CE:ECHR:2016:0621JUD000580908, § 130).
- 44 In the written observations in *MV-98*, C-97/21 (EU:C:2023:371), the European Commission states that the control is ‘sufficient’ if the court has the power ‘... to amend the act adopted in all respects, in fact and in law’. Consequently, judicial review cannot be limited to examining the “procedural” legality of the administrative act.’ (paragraph 7 of the written statements). Even after the administrative decision has become final and absolute under Article 60(1) of the APK, the applicant must have the opportunity to ‘... carry out a certain review of both the facts and the procedure by which the factual findings [...] were arrived at’ (ECtHR, judgment of 20 October 2015, *Fazia Ali v. United Kingdom*, application no 40378/10, ECLI:CE:ECHR:2015:1020JUD004037810, §§ 83 and 84).
- 45 For those reasons, the court’s decision on the company’s application of 19 September 2023 for a stay of the provisional enforcement of the Order of

30 August 2023, which was authorised by final and absolute decision of the tax authority, requires the interpretation of the Court of Justice of the European Union as to whether a procedure such as the one at issue here pursuant to Article 166(2) and (3) of the APK, which excludes an examination of the facts and limits the scope of judicial review only to the existence of damage suffered, constitutes an effective remedy in the light of Article 47 of the Charter.

WORKING DOCUMENT