

Case C-287/23**Request for a preliminary ruling****Date lodged:**

4 May 2023

Referring court:

Varhoven administrativen sad (Bulgaria)

Date of the decision to refer:

2 May 2023

Appellant in cassation:

‘Entain Services (Bulgaria)’ EOOD

Respondent in cassation:

Direktor na Direktsia ‘Obzhalyvane i danachno-osiguritelna praktika’
Sofia pri Tsentralno upravlenie na Natsionalnata agentsia za
prihodite

ORDER**Sofia, 2 May 2023**

[Varhoven] administrativen sad (Administrative Court) of the Republic of Bulgaria ... in administrative proceedings No 10134/2022

The proceedings were initiated by the appeal in cassation of ‘Entain Services (Bulgaria)’ EOOD ..., which is directed against judgment No 3980/14 June 2022 of the Administrativen sad Sofia-Grad (Administrative Court, Sofia, Bulgaria) rendered in the administrative court proceedings no 916/2022, by which the company’s claim was dismissed in the proceedings pursuant to Article 226 of the Administrativno protsesualen kodeks (Administrative Procedure Code, Bulgaria, ‘the APK’). This was directed against the tax audit notice no R-29002917004916-091-001/01.12.2017 of the revenue authorities at the Teritorialna direktsia na Natsionalnata agentsia za prihodite Sofia (Sofia Area Directorate of the National Revenue Agency), which was rectified by rectification notices no P-29002917210282-003-001/07.12.2017 and no P-29002917224182-003-002/22.12.2017 and confirmed by decision no 264/19.02.2018 of the Director na

Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ Sofia pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the Directorate ‘Appeals and Tax and Social Security Practice’ Sofia, within the Central Administration of the National Revenue Agency, Bulgaria) as to the part in which further tax liabilities in relation to dividends and liquidation proceeds of legal entities for the tax periods from July to September 2012; from July to September 2013; from April to July 2014; from July to September 2015 and from April to June 2016 in the total amount of 546 721.82 leva (BGN) and interest in the amount of BGN 193 721.82 were established.

The appellant in cassation challenges the judgment on the grounds that it incorrectly applied substantive law and that the judgment was rendered in substantial violation of the rules of judicial procedure and that inadequate reasons were given (grounds for cassation pursuant to Article 209 no 3 APK). The appellant in cassation seeks to set aside the judgment under appeal on the basis of detailed considerations which it sets out in support of the grounds put forward in the appeal in cassation ... [untranslated]. The appellant claims costs.

The respondent in cassation, the Director of the Directorate ‘Appeals and Tax and Social Security Practice’ Sofia, contends that the appeal in cassation is unfounded. The respondent in cassation claims costs.

The public prosecutor of the Varhovna administrativna prokuratura (Public Prosecutor’s Office at the Supreme Administrative Court) argues in his closing submissions that the appeal in cassation is unfounded.

The referring court is dealing with the case before it, which is subject to provisions of the Treaty on the Functioning of the European Union as a court or tribunal whose decision is not subject to appeal, which means that it must refer the matter to the Court of Justice of the European Union for a correct interpretation of those provisions in accordance with the obligation under Article 267 TFEU.

Parties to the main proceedings

1.1 Applicant and appellant in cassation: ‘Entain Services (Bulgaria)’ EOOD ..., formerly: ‘GVC Services (Bulgaria)’ EOOD

1.2 Defendant and respondent in cassation: Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika“ Sofia pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the Directorate ‘Appeals and Tax and Social Security Practice’, Sofia, within the Central Administration of the National Revenue Agency, Bulgaria)

1.3 Varhovna administrativna prokuratura (Public Prosecutor’s Office at the Supreme Administrative Court) Sofia

EU law

2.1 Treaty on the Functioning of the European Union

Article 49

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 63

(1) Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

(2) Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

Article 355

.....

(3) The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.

2.2. 1972 Act of Accession

Article 28

Acts of the institutions of the Community relating to the products in Annex II to the EEC Treaty and the products subject, on importation into the Community, to specific rules as a result of the implementation of the Common Agricultural Policy, as well as the acts on the harmonisation of legislation of Member States concerning turnover taxes, shall not apply to Gibraltar unless the Council, acting unanimously on a proposal from the Commission, provides otherwise.

2.3 Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

Article 2

For the purposes of this Directive, the following definitions apply:

- (a) ‘company of a Member State’ means any company which:
- (i) takes one of the forms listed in Annex I, Part A;
 - (ii) according to the tax laws of a Member State is considered to be resident in that Member State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Union;
 - (iii) moreover, is subject to one of the taxes listed in Annex I, Part B, without the possibility of an option or of being exempt, or to any other tax which may be substituted for any of those taxes;
 - (iv) ‘permanent establishment’ means a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on in so far as the profits of that place of business are subject to tax in the Member State in which it is situated by virtue of the relevant bilateral tax treaty or, in the absence of such a treaty, by virtue of national law.

Bulgarian law

3. Zakon za korporativnoto podohodno oblagane (Law on Corporation Tax, ‘the ZKPO’)

Tax on dividends and liquidation proceeds

Article 194(1) Dividends and liquidation proceeds which are distributed (personified) by domestic legal persons to the following persons shall be subject to withholding tax:

1. foreign legal persons except for the cases in which the dividends are achieved by a foreign legal person by virtue of a domestic permanent establishment;
2. domestic legal persons which are not traders, including municipalities.

(2) The tax referred to in paragraph (1) shall be final and shall be withheld by the domestic legal persons which distribute the dividends or liquidation proceeds.

(3) Paragraph (1) shall not apply where the dividends and liquidation proceeds are distributed to the following persons or institutions:

1. a domestic legal person which has a shareholding in a company as a representative of the State;

2. an investment fund;
3. ... a foreign legal person which is resident for tax purposes in a Member State of the European Union or in another Contracting State of the Agreement on the European Economic Area, with the exception of cases of hidden distribution of profits.
4. The facts and the legal arguments of the parties regarding the facts, as determined:

4.1. 'Bwin.party Services (Bulgaria)' EOOD is wholly owned by PGB Limited – Gibraltar, which in turn was owned by Bwin Digital Entertainment PLC until 1 February 2016. At that time, the group of the latter company was acquired by GVC Holding PLC, a publicly traded company incorporated in the Isle of Man. By resolution of PGB Limited – Gibraltar of 8 November 2017, 'Bwin.party Services (Bulgaria)' EOOD changed its company name from 'Bwin.party Services (Bulgaria)' to 'GVC Services (Bulgaria)' EOOD, currently: 'Entain Services (Bulgaria)' EOOD. The company provides services in connection with information technology (IT services).

4.2 For each of the years 2011 to 2016, 'Bwin.party Services (Bulgaria)' EOOD allotted dividends to the parent company PGB Limited – Gibraltar, and paid them out without paying tax thereon in accordance with Article 194 of the ZKPO because it was of the opinion that the company PGB Limited – Gibraltar could be considered to be a foreign legal person which was resident for tax purposes in a Member State of the European Union within the meaning of Article 194(3) no 3 of the ZKPO.

4.3 The tax authorities rejected the company's argument that Article 194(3) no 3 of the ZKPO was applicable and that, as a result, the dividends paid to the parent company were exempt from withholding tax, citing Directive 2011/96/EU as this was not applicable to Gibraltar and to companies incorporated in Gibraltar.

4.4 In view of the special status of Gibraltar, a reference for a preliminary ruling comprising two questions was made to the Court of Justice of the European Union at the original hearing of the dispute before the Administrative sad Sofia-grad (Administrative Court, Sofia, Bulgaria):

1. Should Article 2(a)(i) of, in conjunction with Annex I, Part A(ab), to, Directive 2011/96/EU be interpreted as meaning that the expression 'companies incorporated under the law of the United Kingdom' also covers companies incorporated in Gibraltar?

2. Should Article 2(a)(iii) of, in conjunction with Annex I, Part B, to, Directive 2011/96/EU be interpreted as meaning that the expression 'corporation tax in the United Kingdom' also covers the corporation tax that has to be paid in Gibraltar?

4.5 In its judgment of 2 April 2020 in Case C-458/18, the Court of Justice of the European Union ruled:

Article 2(a)(i) and (iii) of Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, read in conjunction with Part A(ab) and the last indent of Part B of Annex I to that directive, must be interpreted as meaning that the concepts ‘companies incorporated under United Kingdom law’ and ‘corporation tax in the United Kingdom’ in those provisions do not cover companies incorporated in Gibraltar which are subject to corporation tax there.

4.6 The decision at first instance

The Administrativen sad Sofia-grad (Administrative Court, Sofia) was of the opinion that the requirement for an exemption from withholding tax pursuant to Article 194(3) no 3 of the ZKPO was not met as the recipient of the dividend, the parent company, was a resident of Gibraltar and not a legal person resident for tax purposes in a Member State of the European Union or in another Contracting State to the Agreement on the European Economic Area. Pursuant to Article 194(1) no 1 of the ZKPO, dividends paid by a national legal person for the benefit of a Gibraltar resident, as evidenced by the certificates provided, are subject to taxation.

According to the court of first instance, Article 194(3) no 3 of the ZKPO is neither a provision that discriminates against companies incorporated in Gibraltar, nor is it applied unreasonably by the courts and the tax authorities in Bulgaria.

4.7 ‘Entain Services (Bulgaria)’ EOOD submits that the judgment of the court of first instance failed to take into account the unequivocal guidance of the Court of Justice of the European Union in Case C-458/18 (paragraph 41) on the interpretation of EU law, namely that the inapplicability of Directive 2011/96/EU to the companies incorporated in Gibraltar does not mean that dividends paid to the companies in Gibraltar are subject to withholding tax. The national court had been advised that it had to assess whether the taxation of the dividend distributed to the parent company incorporated in Gibraltar constituted a restriction on the freedom of establishment or the free movement of capital guaranteed by Articles 49 and 63 TFEU, respectively, and, if so, whether such a restriction was justified.

5. Case-law

5.1 The national courts have not yet decided the question of whether the withholding tax on dividends to a parent company incorporated in Gibraltar is compatible with EU law.

5.2 Case-law of the Court of Justice of the European Union

Order of the Court of Justice of the European Union of 12 October 2017, C-192/16, *Fisher*, paragraph 26: ‘Thirdly, Articles 49 and 63 TFEU, like Article 56 TFEU which was at issue in the case giving rise to the judgment of 13 June 2017, *The Gibraltar Betting and Gaming Association* (C-591/15, EU:C:2017:449), apply to the territory of Gibraltar by virtue of Article 355(3) TFEU. The exclusions of the territory of Gibraltar from the application of Union acts in certain areas of law, laid down in the 1972 Act of Accession, do not relate to the freedom of establishment or to free movement of capital, guaranteed by Articles 49 and 63 TFEU.’

Judgment of the Court of Justice of the European Union of 13 June 2017, C-591/15, *The Gibraltar Betting and Gaming Association*, paragraph 30: ‘By way of derogation from Article 355(3) TFEU, under the 1972 Act of Accession, EU acts do not apply to Gibraltar in certain areas of EU law. Those exceptions were introduced on account of the special legal position of that territory, in particular its status as a free port (see, in that regard, judgment of 21 July 2005, *Commission v United Kingdom*, C-349/03, EU:C:2005:488, paragraph 41). However, freedom to provide services, enshrined in Article 56 TFEU, is not one of those exceptions.’

Paragraph 31: ‘It follows from the foregoing that Article 56 TFEU is applicable, by virtue of Article 355(3) TFEU, to Gibraltar.’

Judgment of the Court of Justice of the European Union of 22 October 2014, *Blanco und Fabretti*, C-344/13 and C-367/13, paragraph 40: ‘The identification of the objectives in fact pursued by the national legislation is, in the context of a case referred to the Court under Article 267 TFEU, a matter within the jurisdiction of the referring court. It is also for the referring court, while taking account of the information provided by the Court, to determine whether the restrictions imposed by the Member State concerned satisfy the conditions laid down in the Court’s case-law as regards their proportionality (see, to that effect, judgment in *Pfleger and Others*, EU:C:2014:281, paragraphs 47 and 48 and the case-law cited).’

6. Justification of the necessity of the request for a preliminary ruling

6.1. In the Opinion of Advocate General G. HOGAN of 24 October 2019 in Case C-458/18, (points 51 to 53), it is highlighted that the introduction of national legislation imposing a withholding tax on the dividends of all companies incorporated in Gibraltar, without basing this on a specific reason, gives rise to a discriminatory restriction on the freedom establishment guaranteed by Article 49 TFEU. In the introduction to the Opinion (under point 3), Advocate General G. HOGAN makes the following observation: ‘If, however, the Court follows my interpretation of the concept of ‘company of a Member State’ within the meaning of this directive, I believe that the Court will not be able to avoid a discussion on freedom of establishment issues. Indeed, EU law does not preclude the taxation of dividend payments where the transaction does not fall within the scope of Directive 2011/96, unless the provision adopted for that purpose by a Member State is itself contrary to the free movement guaranteed by the Treaty.’

In points 56 to 66 of the Opinion the possible grounds which may justify restrictions by the Member State, namely grounds of public policy, public security and public health alone, are set out and the conclusion is drawn that a general exclusion from the group of exempt persons on the basis of a territorial criterion (e.g. in relation to Gibraltar) constitutes a breach of the freedoms guaranteed by Articles 49 and 63 TFEU.

This part of the Advocate General's Opinion was not addressed in the judgment of the Court of Justice of the European Union in Case C-458/18, which is why there is no clarity as to the Court's view on the questions raised, which are material to the main dispute.

6.2 The provision of Article 194(3) no 3 of the ZKPO, according to which dividends paid to companies resident in a Member State of the European Union are exempt from withholding tax, on the basis of draft legislation introduced by the Ministerski savet (Council of Ministers, Bulgaria) amending the Zakon za schetovodstvoto (Law on Accounting) and which, in Paragraph 6 of the Transitional and Final Provisions of that law, proposed an amendment to Article 194 of the ZKPO, was promulgated in the Darzhaven vestnik (State Gazette) No 69 of 2008 and has been in force since 1 January 2009.

The amendments to the ZKPO proposed by the Council of Ministers were made as a result of an infringement procedure (2007/4333) brought by the European Commission against Bulgaria for violation of Articles 56 and 43 of the Treaty establishing the European Community (Commission press release IP/08/712 of May 2008). In the view of the European Commission, the difference in the taxation of dividends paid to companies resident on national territory and to companies resident in Member States constitutes a restriction on the free movement of capital.

According to the explanatory memorandum of the draft legislation, the amendments to the ZKPO will introduce a uniform tax regime for the exemption of companies resident on national territory and companies in Member States from dividend taxation. The explanatory memorandum covers all companies resident in Member States without listing specific public interest reasons that would justify the need to exclude certain EU companies (such as, for example, those resident in Gibraltar) from the dividend tax exemption regime.

6.3. The referring court assesses the dispute as an instance whose decision is not subject to appeal. For that reason, the Court is of the opinion that, in view of the ambiguities and difficulties concerning the interpretation of the relevant provisions of EU law, it is obliged to use the cooperation procedure and to refer questions to the Court of Justice for a preliminary ruling in order to avoid a misapplication of EU legislation and contradictory case-law.

7. Questions referred for a preliminary ruling

7.1. Do national rules and national interpretative practice under which dividends distributed to companies resident in Gibraltar are taxed at source (whereas dividends distributed to companies resident in Bulgaria or in other Member States are exempt from withholding tax without those companies having to satisfy any requirement) constitute a discriminatory restriction on the freedom of establishment guaranteed under EU law pursuant to Article 49 and on the free movement of capital guaranteed under EU law pursuant to Article 63 TFEU?

7.2 If the first question is answered in the affirmative, is that discriminatory restriction compatible with EU law where the legislator, in enacting the relevant national legislation, has not set out any public policy, public security or public health reasons justifying the need to impose those restrictions in respect of the companies incorporated in Gibraltar?

For these reasons, the Varhoven Administrativen sad (Administrative Court) pursuant to Article 267 of the Treaty on the Functioning of the European Union ...

ORDERED:

... The following questions are REFERRED to the Court of Justice of the European Union for a preliminary ruling:

1. Do national rules and national interpretative practice under which dividends distributed to companies resident in Gibraltar are taxed at source (whereas dividends distributed to companies resident in Bulgaria or in other Member States are exempt from withholding tax without those companies having to satisfy any requirement) constitute a discriminatory restriction on the freedom of establishment guaranteed under EU law pursuant to Article 49 TFEU and on the free movement of capital guaranteed under EU law pursuant to Article 63 TFEU?

2. If the first question is answered in the affirmative, is that discriminatory restriction compatible with EU law where the legislator, in enacting the relevant national legislation, has not set out any public policy, public security or public health reasons justifying the need to impose those restrictions in respect of the companies incorporated in Gibraltar?