

Case C-97/21**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:**

16 February 2021

Referring court:

Administrativen sad Blagoevgrad (Administrative Court, Blagoevgrad, Bulgaria)

Date of the decision to refer:

12 February 2021

Applicant:

MV – 98

Defendant:

Nachalnik na otdel 'Operativni deynosti' – grad Sofia v glavna direksia 'Fiskalen kontrol' pri Tsentralno upravlenie na Natsionalna agentsia za prihodite (Head of the Department 'Operational Activities' – City of Sofia – in the Directorate-General for 'Fiscal Supervision' within the Central Administration of the National Revenue Agency)

Subject matter of the main proceedings

Action brought against the order issued by the tax authorities pursuant to the Zakon za danaka varhu dobavenata stoynost (Law on value added tax) to impose coercive administrative measures, namely the 'sealing of business premises' managed by a trader for a period of 14 days and the 'prohibition of access thereto'

Subject matter and legal basis of the request for a preliminary ruling

Request under Article 267 TFEU for an interpretation of Articles 47(1), 49(3), 50 and 52(1) of the Charter of Fundamental Rights of the European Union and of

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

Questions referred for a preliminary ruling

1. Are Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and Article 50 of the Charter of Fundamental Rights of the European Union to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, for an act consisting in not having registered the sale of goods and not having recorded it by issuing a document evidencing the sale, administrative proceedings for the ordering of a coercive administrative measure and administrative penalty proceedings for the imposition of an assets penalty may be brought against the same person in a cumulative manner?

1.1. If that question is answered in the affirmative, must Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and Article 52(1) of the Charter of Fundamental Rights of the European Union be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, for an act consisting in not having registered the sale of goods and not having recorded it by issuing a document evidencing the sale, administrative proceedings for the ordering of a coercive administrative measure and administrative penalty proceedings for the imposition of an assets penalty may be brought against the same person in a cumulative manner, taking account of the fact that that legislation does not at the same time impose on the authorities competent for conducting the two sets of proceedings and on the courts the obligation to ensure the effective application of the principle of proportionality with regard to the overall severity of all the cumulated measures in relation to the seriousness of the specific offence?

2. If Articles 50 and 52(1) of the Charter are found not to be applicable in the present case, must Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and Article 49(3) of the Charter of Fundamental Rights of the European Union then be interpreted as precluding a national provision such as Article 186(1) of the ZDDS [Zakon za danak varhu dobavenata stoinost (Law on value added tax)], which, for an offence consisting in not having registered the sale of goods and not having recorded it by issuing a document evidencing the sale, provides for the imposition on the same person of the coercive administrative measure of ‘sealing of business premises’ for a period of up to 30 days in addition to the imposition of an assets penalty under Article 185(2) of the ZDDS?

3. Is Article 47(1) of the Charter of Fundamental Rights of the European Union to be interpreted as not precluding measures introduced by the national legislature in order to safeguard the interest under Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax,

such as the provisional enforcement of the coercive administrative measure of ‘sealing of business premises’ for a period of up to 30 days in order to protect a presumed public interest, where judicial protection against that measure is limited to an assessment of a comparable private interest opposing that public interest?

Legislation and case-law of the European Union

Charter of Fundamental Rights of the European Union – Article 47(1), Article 49(3), Article 50, Article 51(1) and (2), Article 52(1);

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax – Article 2(1) and Article 273;

Judgment of the Court of Justice of 21 September 1989, *Hoechst v Commission*, 46/87 and 227/88, EU:C:1989:337;

Judgment of the Court of Justice of 22 October 2002, *Roquette Frères*, C-94/00, EU:C:2002:603;

Judgment of the Court of Justice of 5 June 2012, *Bonda*, C-489/10, EU:C:2012:319;

Judgment of the Court of Justice of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105;

Judgment of the Court of Justice of 27 May 2014, *Spasic*, C-129/14, EU:C:2014:586;

Judgment of the Court of Justice of 5 April 2017, *Orsi and Baldetti*, C-217/15 and C-350/15, EU:C:2017:264;

Judgment of the Court of Justice of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193;

Judgment of the Court of Justice of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197;

Judgment of the Court of Justice of 31 May 2018, *Zheng*, C-190/17, EU:C:2018:357;

Judgment of the General Court of 26 October 2017, *Marine Harvest v Commission*, T-704/14, EU:T:2017:753.

Provisions of national law relied on

Administrativnoprotsesualen kodeks (Code of administrative procedure) – Article 6, Article 57(1), (4) and (5), Article 60, Article 90(1), Article 128(1)(1),

Article 132(1), Article 145(1), Article 146, Article 166(1), (2) and (3), Article 172(2), Article 268(1) and (2);

Danachno-osiguriteln protsesualen kodeks (Tax and Social Insurance Procedure Code) Article 50(1);

Targovski zakon (Law on commerce) – Article 1(1)(1), Article 56;

Zakon za administrativnite narushenia i nakazania (Law on administrative offences and penalties) – Articles 16, 22 and 27, Article 34(3), Article 36(1), Article 42, Article 44(1), Article 53(1), Article 59(1) and (2), Article 63(1);

Zakon za danak varhu dobavenata stoynost (Law on value added tax) – Article 1, Article 2(1), Article 3(1) and (2), Article 118(1), Article 185(1), (2), (4) and (5), Article 186(1)(1)(a), (3) and (4), Article 187(1), Article 188, Article 193(1) and (2), and Paragraph 1(40), and Paragraph 1a of the Dopalnitelni razporedbi (Additional provisions):

– Article 118(1), in the version applicable to the facts of the case in the main proceedings:

‘(1) Every person registered or not registered under this law is obliged to register and record the supplies/sales made by him or her on business premises by issuing a fiscal cash register receipt by means of a fiscal memory device (fiscal receipt) ...’

– Article 185(1) and (2), in the version applicable to the facts of the case in the main proceedings:

‘(1) Any person who fails to issue a document in accordance with Article 118(1) shall be subject to a fine of 100 to 500 leva (BGN) in the case of natural persons who are not traders, or an assets penalty of 500 to 2 000 leva (BGN) in the case of legal persons or sole traders.

(2) Except for the cases referred to in paragraph 1, any person who commits or permits an offence under Article 118 or a provision implementing it shall be subject to a fine of 300 to 1 000 leva (BGN) in the case of natural persons who are not traders, or an assets penalty of 3 000 to 10 000 leva (BGN) in the case of legal persons or sole traders. Where the offence does not result in failure to declare revenue, the penalties under paragraph 1 shall be imposed.’

– Article 186(1)(1)(a), in the version applicable to the facts of the case in the main proceedings:

‘(1) The coercive administrative measure of the sealing of business premises for a period of up to 30 days shall be ordered, irrespective of the fines and assets penalties provided for, against any person who:

1. fails to comply with the procedure or methodology in relation to the following:

a) the issuance of a document evidencing the sale concerned in accordance with the formalities laid down for supplies/sales;

...'

– Article 187(1), in the version applicable to the facts of the case in the main proceedings:

‘(1) Where a coercive administrative measure is ordered pursuant to Article 186(1), access to the person’s business premiss or premises shall also be prohibited ...’

– Article 188, in the version applicable to the facts of the case in the main proceedings:

‘The coercive administrative measure under Article 186(1) shall be provisionally enforceable under the conditions of the Administrativnoprotsesualen kodeks (Code of administrative procedure).’;

Naredba N° N-18 ot 13.12.2006 za registrirane i otchitane chrez fiskalni ustroystva na prodazhbite v targovskite obekti, 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 memory devices, the requirements for the operating software and the requirements for persons making sales via online shops) – Article 3(1), as well as Paragraph 1(6) of the Dopolnitelni razporedbi (Additional provisions).

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant is a sole trader registered under the Targovski zakon (Law on commerce) and entered in the Commercial Register, having his registered office in the town of Gotse Delchev, Bulgaria. His main activity is the purchase and sale of goods.
- 2 On 9 October 2019, inspectors from the Natsionalna agentsia po prihodite (National Revenue Agency) carried out an inspection at a business premises managed by the applicant.
- 3 A ‘control purchase of goods’ was performed during the inspection, that is to say, before identifying themselves, the inspectors bought a packet of cigarettes worth 5.20 Bulgarian leva (BGN) (approximately EUR 2.66), which they paid for in cash. The applicant accepted the payment but did not issue a fiscal cash register receipt by means of a fiscal memory device.

- 4 The inspectors found that the fiscal memory device recorded sales totalling BGN 141.20 (approximately EUR 72.20) that day, whereas there was actually BGN 166.40 (approximately EUR 85.08) in the cash register. According to the inspectors, the difference between those two amounts also confirms that the sale of the pack of cigarettes that they purchased was not registered and was not recorded via the issuance of a fiscal receipt using a fiscal memory device on the premises.
- 5 On the same day, a notice establishing an administrative offence was issued, by which administrative penalty proceedings were instituted against the applicant under the provisions of the Zakon za administrativnite narushenia i nakazania (Law on administrative offences and penalties; ‘the ZANN’) for an administrative offence in breach of Article 118(1) of the Zakon za danak varhu dobavenata stoynost (Law on value added tax; ‘the ZDDS’). Failure to comply with the abovementioned provision is punishable by an assets penalty pursuant to Article 185(2) of the ZDDS, whereby Article 186(1)(1)(a) of that law also provides for the ordering of a coercive administrative measure in addition to that penalty.
- 6 On 21 October 2019, the defendant ordered a coercive administrative measure pursuant to Article 186(1)(1)(a) and Article 187(1) of the ZDDS, namely the ‘sealing of business premises’ for a period of 14 days and ‘prohibition of access thereto’.
- 7 By its order, the defendant also ordered provisional enforcement, as it found that the latter was ‘necessary to protect particularly important State interests, namely the interest of the State budget in the proper registration and recording of sales by the taxpayer by means of a fiscal recording device on the business premises inspected, and in the correct determination of the revenue generated by that taxpayer and the amount of his or her debt to the State’.
- 8 The order was challenged before the referring court.

Essential arguments of the parties in the main proceedings

- 9 The applicant takes the view that the coercive administrative measure ordered is contrary to the objectives of Article 22 of the ZANN, which provides for the application of such measures in order to prevent and bring an end to administrative offences and to prevent and eliminate their harmful effects. The applicant refers to the low value of the sale in question and the fact that it is the first time that he has infringed Article 118(1) of the ZDDS.
- 10 The defendant submits that, in relation to the offence established, Article 186(1)(1)(a) of the ZDDS provides for the cumulative application of coercive administrative measures of the type specified in the contested order.

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

- 11 The referring court has doubts as to the compatibility with Articles 50 and 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter') and the principle of proportionality under Article 49(3) of the Charter of the cumulation of a coercive administrative measure with an assets penalty against the same person for the same offence.
- 12 The ZDDS expressly states that that law transposes the provisions of Directive 2006/112. Therefore, the referring court takes the view that the application of the ZDDS, including the penalty measures under the ZDDS, constitutes implementation of EU law within the meaning of Article 51(1) of the Charter, since it is recognised in the case-law of the Court of Justice that the imposition of administrative penalties by the national tax authorities in the field of VAT constitutes application of Article 2 and Article 273 of Directive 2006/112 and, therefore, of EU law, with the result that they must respect the fundamental right guaranteed by Article 50 of the Charter.
- 13 Failure to comply with the obligation under Article 118(1) of the ZDDS by legal persons and sole traders who are taxable persons is declared an administrative offence in Article 185(2) of the ZDDS and is punishable by an assets penalty under that provision.
- 14 At the same time, however, that law also provides for the ordering of a coercive administrative measure pursuant to Article 186(1)(1)(a) of the ZDDS in the event of failure to fulfil the obligation under Article 118(1) of the ZDDS, namely the 'sealing of business premises' for a period of up to 30 days. The measure is applied irrespective of the assets penalty provided for, and, where that measure is ordered, the person is also prohibited from accessing the business premises.
- 15 Both measures – the assets penalty under Article 185(2) of the ZDDS and the coercive administrative measure under Article 186(1)(1)(a) of the ZDDS – are ordered for the same factual act, namely failure to comply with the requirements in respect of the issuing a document evidencing the sale concerned in the form of a fiscal cash register receipt by means of a fiscal memory device.
- 16 Article 185(2) of the ZDDS penalises the failure to fulfil with the obligation to issue a document evidencing the sale of goods as an administrative offence and applies to all cases, irrespective of the value of the sale. Similarly, the measure under Article 186(1) of the ZDDS also applies to all cases involving an offence under Article 118(1) of the ZDDS, irrespective of the value of the sale. Their simultaneous application is provided for by law for all cases of failure to fulfil the obligation under Article 118(1) of the ZDDS.
- 17 Both proceedings, that is to say, those for imposing an assets penalty and those for ordering the coercive administrative measure of 'sealing of business premises', are conducted by bodies within the structure of the Natsionalna agentsia po prihodite (National Revenue Agency), but follow different rules of procedure.

- 18 The proceedings for establishing and penalising an infringement of Article 118(1) of the ZDDS are initiated in accordance with the Zakon za administrativnite narushenia i nakazania (Law on administrative offences and penalties). They begin with the issuance of a notice establishing an administrative offence and end with the issuance of a penalty notice imposing an assets penalty under Article 185(2) of the ZDDS.
- 19 The assets penalty under Article 185(2) of the ZDDS is imposed in criminal proceedings. In the case that is the subject matter of the main proceedings, they were instituted against the sole trader by means of the notice establishing an administrative offence that was issued. The penalty notice imposing the assets penalty under Article 185(2) of the ZDDS is a notice of a punitive nature.
- 20 The assets penalty under Article 185(2) of the ZDDS is not confined to making reparation for the damage caused by the offence (in the form of the unpaid VAT for the unrecorded sale of a pack of cigarettes worth BGN 5.20), but aims to penalise the failure to fulfil the obligation under Article 118(1) of the ZDDS, in view of the seriousness of that failure.
- 21 The coercive administrative measure under Article 186(1) of the ZDDS is applied in administrative proceedings, but is punitive in nature. The measure does not serve to secure other proceedings (for example, to establish tax debts), but penalises the failure to fulfil the obligation under Article 118(1) of the ZDDS. In view of the consequences for the economic activities of the sole trader (cessation of activities on the business premises), the measure under Article 186(1) of the ZDDS has not only a preventive but also a deterrent effect, namely that of discouraging the reduction of turnover by not issuing documents evidencing sales.
- 22 It is precisely the cumulation of various types of coercive State measures forming the subject matter of the main proceedings in the present case – which penalise the same act in fact and in law and not individual aspects thereof and which pursue common objectives as opposed to complementary objectives – that raises doubts as to the compatibility of the national law with the principles of EU law and, in particular, with Article 50 of the Charter.
- 23 In particular, the referring court has doubts as to whether the cumulation of the coercive administrative measure under Article 186(1) of the ZDDS with the assets penalty under Article 185(2) of the ZDDS comes within the scope of Article 50 of the Charter and whether it complies with the principle of proportionality under Article 52(1) of the Charter.
- 24 The Court of Justice has clarified that the duplication of penalties ... requires rules allowing it to be guaranteed that the severity of all of the penalties imposed corresponds with the seriousness of the offence concerned ... Those rules must provide for the obligation for the competent authorities, in the event of the imposition of a second penalty, to ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offence identified' (judgment of

20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 55). In addition, the administrative or punitive measures permitted under national legislation must not go beyond what is necessary in order to attain the objectives legitimately pursued by that legislation (judgment of 31 May 2018, *Zheng*, C-190/17, EU:C:2018:357, paragraphs 41 and 42 and the case-law cited).

- 25 National law does not provide for a limitation of the cumulation of an assets penalty under Article 185(2) of the ZDDS with a coercive administrative measure under Article 186(1) of the ZDDS by virtue of the value of the sale not registered by issuing a fiscal cash register receipt (BGN 5.20 in the main proceedings) and/or of the amount of unpaid VAT. The exercise of such power by the tax authorities competent for applying the two measures constitutes a non-discretionary decision. In cases where an offence under Article 118(1) of the ZDDS is established, the law obliges those authorities to order the coercive administrative measure under Article 186(1) of the ZDDS in addition to and independently of the imposition of an assets penalty under Article 185(2) of the ZDDS.
- 26 The procedural laws (the ZANN and the Administrativnoprotsesualen kodeks [Code of Administrative Procedure]) which govern the two independent proceedings – for imposing an assets penalty and for ordering a coercive administrative measure – do not provide for the possibility to suspend one of those sets of proceedings until conclusion of the other.
- 27 Under those circumstances, it is not ruled out that the order for the measure under Article 186(1) of the ZDDS is enforced before the conclusion of the administrative penalty proceedings for the imposition of an assets penalty under Article 185(2) of the ZDDS. This is due, on the one hand, to the possibility provided by law to allow the provisional enforcement of the order imposing the measure and, on the other hand, to the different durations of the two independent proceedings. Under national law, the time limit for concluding the administrative penalty proceedings with the issuance of a penalty notice is 6 months from the adoption of the administrative decision, whereas the time limit for issuing an order for a coercive administrative measure is 14 days to one month.
- 28 Furthermore, the different proceedings for issuing a decision imposing a penalty under Article 185(2) of the ZDDS (administrative penalty procedure) and a decision ordering a coercive administrative measure under Article 186(1) of the ZDDS (administrative procedure) require different procedures for legal protection against those decisions.
- 29 The Rayonen sad (District Court) has jurisdiction to rule on actions against penalty notices imposing an assets penalty under Article 185(2) of the ZDDS, whereas the Administrativen sad (Administrative Court) has jurisdiction for actions against orders imposing coercive administrative measures under Article 186(1) of the ZDDS.

- 30 Within the framework of the two separate court proceedings, the Rayonen sad (District Court) and the Administrativen sad (Administrative Court) can however assess, independently of each other, the proportionality of the assets penalty or the coercive administrative measure. In assessing the proportionality of the assets penalty under Article 185(2) of the ZDDS, the Rayonen sad is bound by the minimum amount provided for and cannot set it lower depending on the specific circumstances. The assessment of the proportionality of the coercive administrative measure under Article 186(1) of the ZDDS is possible only with regard to its duration, as its application *per se* is mandatory.
- 31 Since the two sets of court proceedings run in parallel and independently of each other and also take place at different times, it cannot be ruled out that the offence will be assessed differently. It is possible that the Administrative Court dismisses the action brought against the coercive administrative measure under Article 186(1) of the ZDDS while the District Court annuls the assets penalty under Article 185(2) of the ZDDS in the court proceedings brought to challenge to the penalty notice, as it finds that an offence under Article 118(1) of the ZDDS has not been committed or has not been proven.
- 32 The referring court therefore has doubts as to whether the simultaneous imposition of an assets penalty under Article 185(2) of the ZDDS and an order for a coercive administrative measure under Article 186(1)(1)(a) of the ZDDS for the same offence against the same person complies with the principle of proportionality under Article 52(1) of the Charter, since the review carried out by the respective courts in separate proceedings does not ensure that the overall severity of the two measures is proportionate to the seriousness of the offence concerned.
- 33 If the scope of application of Articles 50 and 52 of the Charter does not cover the cumulation of the coercive administrative measure under Article 186(1) of the ZDDS with the assets penalty under Article 185(2) of the ZDDS for the same offence (in the present case, for an offence under Article 118(1) of the ZDDS) against the same person, the referring court asks, alternatively, whether the ordering of a coercive administrative measure under Article 186(1) of the ZDDS in addition to, and independently of, the imposition of an assets penalty under Article 185(2) of the ZDDS against the same person is proportionate in the light of Article 49(3) of the Charter. In view of the broad interpretation that the Court of Justice has given to the term ‘criminal offence’ within the meaning of Article 49(3) of the Charter, that provision appears to be applicable in the main proceedings.
- 34 In the case that is the subject matter of the main proceedings, the tax authority also authorised, on the basis of Article 188 of the ZDDS, the provisional enforcement of the order for a coercive administrative measure under Article 186(1) of the ZDDS. Under national law, that order constitutes a derogation from the principle of enforcement of administrative acts only after they have become final and thereby overcomes the prohibition on their enforcement before the expiry of the period for challenging them.

- 35 Legal protection against the order can be obtained only before an administrative court by way of a separate action, combined with an application for the suspension of the provisional enforcement. In those proceedings, the administrative court does not conduct an ‘investigation’ of the facts of the case. They are deemed to have been established by the report drawn up on the inspection conducted by the tax authorities on the business premises and by the notice establishing an administrative offence that was issued.
- 36 At the same time, as regards the scope of legal protection against the provisional enforcement of the measure under Article 186(1) of the ZDDS, the provision of Article 188 of the ZDDS creates conditions for inconsistent interpretation in the case-law. In some cases, it is assumed that judicial protection against the order of provisional enforcement also includes an assessment of whether there is an ‘important State interest’, whereas in other cases an ‘important state interest’ is presumed, which must be countered by a comparable private interest that has been demonstrated.
- 37 It is not ruled out that the legal consequences of an order for a coercive administrative measure under Article 186(1)(1)(a) of the ZDDS, which has been declared provisionally enforceable, materialise and the order is subsequently annulled by the court as unlawful.
- 38 Therefore, in the view of the referring court, it is not clearly apparent whether, in the light of Article 47(1) of the Charter, the judicial remedy provided for in national law against the authorised provisional enforcement of a coercive administrative measure under Article 186(1)(1)(a) of the ZDDS constitutes an effective remedy.