

**Case C-602/20**

**Summary of the reference for a preliminary ruling pursuant to Article 98(1)  
of the Rules of Procedure of the Court of Justice**

**Date lodged:**

12 November 2020

**Referring court:**

Varhoven administrativen sad (Bulgaria)

**Date of the decision to refer:**

30 September 2020

**Appellant in the appeal in cassation:**

AKZ-Burgas EOOD

**Respondent in the appeal in cassation:**

Direktor na Direktsia Obzhalvane i danachno-osiguritelna praktika  
(Director of the Appeals and Tax Insurance Practice Directorate)

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**Subject matter of the main proceedings**

Appeal in cassation against an assessment notice of the revenue authorities recognising under the relevant national law a right to statutory interest on improperly paid debts (social security contributions) from the date when the improperly paid debts to the state should have been refunded rather than from the date of the improper payment. Possible lack of proportionality of the national legislation which requires an interpretation of EU law to identify any infringement of the principle of sincere cooperation and the principles of equivalence and effectiveness deriving from it.

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

Interpretation of EU law, Article 267 TFEU

## Questions referred for a preliminary ruling

1. Does EU law preclude national legislation such as that at issue in the main proceedings, which restricts statutory interest payable on refunds of social security contributions levied in breach of EU law to interest which accrues from the day after the application for a refund of the principal amount?
2. Does EU law, in particular the principles of equivalence and of effectiveness, preclude national legislation such as that at issue in the main proceedings, which restricts statutory interest payable on refunds of compulsory social security contributions levied in breach of EU law to interest which accrues from the day after the application for a refund of the improperly paid/levied amounts to the date on which they are refunded?

## Applicable provisions of EU law

Treaty on European Union, Article 4(3) and second sentence of Article 19(1)

Treaty on the Functioning of the European Union, Article 291(1) and Article 267(1)(b)

## Case-law of the Court of Justice cited

Judgments of the Court of 14 July 1977, *Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche* (8/77, EU:C:1977:131); of 9 November 1983, *Amministrazione delle Finanze dello Stato* (199/82, EU:C:1983:318); of 17 July 1997, *GT-Link A/S* (C-242/95, EU:C:1997:376); of 2 December 1997, *Fantask A/S and Others* (C-188/95, EU:C:1997:580); of 8 March 2001, *Metallgesellschaft Ltd and Others, Hoechst AG and Hoechst (UK) Ltd* (C-397/98 and C-410/98; EU:C:2001:134); of 7 September 2006, *N* (C-470/04; EU:C:2006:525); of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774); of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161); of 15 March 2007, *Reemtsma Cigarettenfabriken* (C-35/05, EU:C:2007:167); of 10 April 2008, *Marks & Spencer plc* (C-309/06, EU:C:2008:211); of 21 January 2010, *Alstom Power Hydro* (C-472/08, EU:C:2010:32); of 6 September 2011, *Lady & Kid and Others* (C-398/09, EU:C:2011:540); of 19 July 2012, *Littlewoods Retail and Others* (C-591/10, EU:C:2012:478); of 27 September 2012, *Zuckerfabrik Jülich and Others* (C-113/10, C-147/10 and C-234/10, EU:C:2012:591); and of 18 April 2013, *Mariana Irimie* (C-565/11, EU:C:2013:250)

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

Danachno-osiguriteln protsesualen kodeks (Code of Tax and Social Security Procedure, 'the DOPK'), Articles 128 to 132, Article 162(2), points 1 and 9, and Article 163(1)

Zakon za danatsite varhu dohodite na fizicheskite litsa (Law on Personal Income Tax, 'the ZDDFL'), Article 42

### **Brief summary of the facts, the arguments of the parties, and the procedure**

The facts of the dispute are common ground and may be summarised as follows:

- 1 On 30 January 2017, following an audit, the revenue authority at the Teritorialna direktsia na Natsionalna agentsia za prihodite, Burgas (Regional Directorate of the National Revenue Agency, Burgas, 'the NRA Regional Directorate, Burgas) issued AKZ-Burgas EOOD with a supplementary assessment notice for debts owed to the state in the form of a charge owed under Article 42 of the ZDDFL and outstanding social security contributions for the period from 1 January 2014 to 31 August 2014, plus the statutory interest owed.

The supplementary assessment notice was upheld in part by the competent revenue authority at next highest level following an objection procedure. Under Bulgarian law, supplementary assessment notices are provisionally enforceable, hence AKZ-Burgas EOOD paid the debts assessed before the legality of the supplementary assessment notice had been reviewed by the court.

- 2 By judgment of 10 May 2018, the Burgaski administrativen sad (Administrative Court, Burgas) annulled the supplementary assessment notice mentioned above. Following an appeal in cassation, the Varhoven administrativen sad (Supreme Administrative Court, 'the VAS') upheld the judgment at first instance.
- 3 On 13 February 2019, AKZ-Burgas EOOD applied to the NRA Regional Directorate, Burgas, for a credit or refund under Article 129 of the DOPK. An ex-post tax audit of the company was carried out, which was closed when a credit or refund decision ('APV') was issued on 5 May 2019. That decision stated that, based on Article 129(6) of the DOPK, no interest was payable on the principal amount paid by the company in the form of social security contributions further to the annulled supplementary assessment notice and that late payment interest on those debts for the period from payment thereof to the date of the APV had been assessed at a total of BGN 12 863.09.
- 4 After its objection in the administrative procedure was unsuccessful, AKZ-Burgas EOOD lodged an application with the administrative court. By judgment of 11 October 2019, the Administrativen sad Burgas (Administrative Court, Burgas)

dismissed the action contesting the APV of 5 March 2019 in so far as it denied the company statutory interest on the amount improperly levied in social security contributions for the period between payment of the improper amount and the date on which that sum should have been refunded. The court of first instance gave as its reason that sums paid improperly under Article 129(6) of the DOPK, with the exception of debts for social security contributions, are refunded with statutory interest for the period from the date on which they were paid to a revenue agency based on an assessment notice and that, in all other cases, the amounts are repaid with statutory interest from the day on which they should have been refunded to the taxpayer. In light of that national legislation, the court ruled that no interest was owed on the amounts paid improperly in social security contributions, as the legislature had expressly excluded them from the sums on which such interest is payable.

- 5 AKZ-Burgas EOOD lodged an appeal in cassation against that judgment with the VAS, which is the referring court in the present case. The appellant in cassation argues that the court of first instance dismissed its action against the APV unlawfully in so far as the company was denied statutory interest on an amount wrongfully levied in social security contributions for the period between payment of the amount paid improperly and the date on which that amount should have been refunded.

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

- 6 First, the referring court makes a brief analysis of the relevant Bulgarian legislation.
- 7 It notes that tax payments and compulsory social security contributions are debts to the State laid down in compulsory legislation, settlement of which does not depend on the will of the citizen. Tax payments and compulsory health and social security contributions differ in law. These two categories of debts to the State differ in terms of character and purpose, have different legal bases and produce different legal effects. Social security contributions are not fiscal in character. In return for their contributions, insured persons have a right to the corresponding services, whereas taxes are a debt to the State owed without any service in return.
- 8 The Bulgarian legislature has provided in the DOPK for a common assessment procedure for taxes and compulsory social security contributions (Chapter 14 of the DOPK) and a common refund or credit procedure (Articles 128 to 132 of the DOPK) for cases in which the taxpayer's right to a refund of amounts paid (levied) wrongly or improperly in charges and compulsory social security contributions levied or imposed by the revenue authorities is recognised by a final judgment or a final administrative decision.
- 9 However, according to the first sentence of Article 129(6) of the DOPK, the debts that are repaid with statutory interest for the entire period between the improper payment and the date on which they are refunded based on a decision by a

revenue authority do not include compulsory social security contributions paid or levied improperly. According to that provision, interest only accrues on debts paid improperly in relation to social security contributions from the day on which a decision in due form was adopted that they are to be refunded to the taxpayer.

- 10 Second, the referring court examines the relevant case-law of the Court, its findings on which include the following:
- 11 The referring court cites the judgments in *Metallgesellschaft and Others* (C-397/98 and C-410/98), *Test Claimants in the FII Group Litigation* (C-446/04), *Littlewoods Retail and Others* (C-591/10) and *Zuckerfabrik Jülich and Others* (C-113/10, C-147/10 and C-234/10), in which the Court found that the Member States are obliged to refund tax levied in breach of EU law with interest. The question of payment of interest on amounts levied in breach of EU law is left to the Member States to decide in application of their administrative autonomy.
- 12 The VAS notes that the Court has found in its case-law that the right to a refund of such charges, notwithstanding the lack of EU law on refunds of national taxes which are incompatible with EU law, is the consequence and complement of the rights conferred on individuals by EU law as interpreted by the Court. The Member State is required to repay charges levied in breach of EU law, whereby the right to a refund is a subjective right derived from EU law (*Littlewoods Retail and Others*, C-591/10, paragraph 24).
- 13 In the absence of EU rules on this matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing court proceedings for safeguarding rights which individuals derive from EU law in keeping with the principle of procedural autonomy, provided, first, that such rules are not less favourable than those governing similar domestic court proceedings (principle of equivalence) and, second, that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (judgments in *Metallgesellschaft and Others*, C-397/98 and C-410/98, paragraph 85, and in *Test Claimants in the FII Group Litigation*, (C-446/04, paragraph 203). Under the principle of the procedural autonomy of the Member States, it is for the domestic legal system of each Member State to lay down the procedural means to safeguard the rights which individuals derive from EU law; however, this should not result in any restriction or impairment of the substance of those rights.
- 14 Under the principle of equivalence, provisions governing the refund of amounts levied in breach of national law must also be applied to similar requests for refunds of amounts levied in breach of EU law (judgment in case C-591/10). The need to safeguard the principle of equivalence of itself suggests that the earliest possibility for determining the time when interest starts to accrue on amounts improperly levied in compulsory social security contributions should be applied, but the national legislation does not comply with that principle.

- 15 Under the equivalence principle, the earliest possible case for determining the time when interest starts to accrue on the improperly levied compulsory social security contributions must be identical to the time when interest starts to accrue on other/remaining amounts improperly paid or levied under an assessment notice issued by a revenue authority. The referring court therefore holds that the provision contained in the first sentence of Article 129(6) of the DOPK is disproportionate.
- 16 The VAS reiterates that, in the absence of a relevant EU rule on the matter, it is for the internal legal order of each Member State to lay down the interest rate and calculation method for the interest owed in accordance with the principles of equivalence and effectiveness, such that they are not less favourable than those concerning similar claims based on provisions of national law or arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible (judgment in *Littlewoods Retail and Others*, C-591/10, paragraphs 27 and 28. The Court has found that, although it is for the internal legal order of each Member State to lay down the conditions in which such interest must be paid, including the method of calculation of the interest, the national rules should not deprive the taxpayer of an adequate indemnity for the loss occasioned by the improper payment of the tax.
- 17 The VAS clarifies that the Court regards interest as offsetting the unavailability of the sums of money paid in breach of EU law (judgments in *Test Claimants in the Thin Cap Group Litigation*, C-524/04, paragraphs 112 et seq., and in *Test Claimants in the FII Group Litigation*, C-446/04, paragraphs 202 et seq. The referring court is of the opinion that the right to statutory interest to indemnify losses incurred because charges were paid improperly in breach of EU law exists alongside the right to a refund of charges paid improperly and is a subjective right derived from EU law. That subjective right includes the obligation to pay statutory interest from the time when the charge was paid. The VAS is of the opinion that it is clear that the taxpayer incurred a loss from that point rather than from a later point, because the sum of money concerned was unavailable to him.
- 18 Thus, both the improperly levied charge and the amounts paid to or retained by the State relating directly to that charge are refunded. That includes losses due to the unavailability of sums of money because the tax was levied prematurely (judgments in *Metallgesellschaft and Others* (C-397/98 and C-410/98, paragraphs 87 to 89); *Claimants in the FII Group Litigation* (C-446/04, paragraph 205; *Littlewoods Retail and Others* (C-591/10, paragraph 25); and *Zuckerfabrik Jülich and Others* (C-113/10, C-147/10 and C-234/10, paragraph 65).
- 19 As a result, the referring court has doubts with regard to the principles developed in the case-law of the Court as to whether legislation such as that at issue in the main proceedings, which restricts interest to the amount calculated from the day on which the debts improperly paid in social security contributions (under Article 129(1) to (4) of the DOPK) should have been refunded satisfies the

requirements established by the Court. The question arises as to whether the amount in interest should depend on the period of time in which the improperly paid amount was unavailable and whether that period of time also covers the period between the time when the amount in question was improperly paid and the time when it was refunded.

- 20 The referring court therefore considers that the provisions of EU law, namely Article 4(3) of the Treaty on European Union (principle of sincere cooperation and the principles of equivalence and effectiveness deriving from it), the second sentence of Article 19(1) of the Treaty on European Union and Article 291(1) of the Treaty on the Functioning of the European Union, require interpretation in order to enable it to give proper judgment in the main proceedings.

WORKING DOCUMENT