

## Anonymised version

Translation

C-550/23 – 1

Case C-550/23

### Request for a preliminary ruling

**Date lodged:**

30 August 2023

**Referring court:**

Sofiyski rayonen sad (Bulgaria)

**Date of the decision to refer:**

20 August 2023

**Applicant:**

NV

**Penalising authority:**

Agentsia za darzhavna finansova inspektsia

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### ORDER

[...]

[...] **Criminal case of an administrative nature No 12337** as entered in the court register for **2022** [...]:

The proceedings before the Sofiyski rayonen sad (Sofia District Court, Bulgaria) were initiated by an action brought by NV against decision imposing a penalty No 11-01-184/25.08.2022, which was issued by [...], the director of the Agentsia za darzhavna finansova inspektsia (Public Financial Inspection Agency; ‘ADFI’) and which, on the basis of Article 265(1) of the Zakon za obshtestvenite porachki (Law on public procurement; ‘the ZOP’), read in conjunction with Article 257 thereof, imposed on NV an administrative penalty in the form of a fine of 2 140.69 Bulgarian leva (BGN) (two thousand, one hundred and forty leva and sixty-nine stotinki) for infringement of Article 17(1) of the ZOP, read in conjunction with Article 20(2)(2) thereof.

[Procedural acts in connection with the request for a preliminary ruling] [...]

**I. Parties to and subject matter of the main proceedings:**

- 1 NV, address: City of Sofia, [...]
- 2 ADFI, address: City of Sofia, [...]
- 3 The subject matter of the case is an examination of the question whether the applicant NV, in his capacity as executive director of the company ‘Montazhi’ EAD, has committed an administrative offence, specifically in relation to the expenditure of BGN 89 195.66, net of VAT, incurred within the framework of a supply contract dated 15 June 2020, concluded between ‘Montazhi’ EAD and ‘Reyr Studio BG’ EOOD without any of the procedures under Article 18(1) of the ZOP being used.
- 4 These proceedings are at first instance, and the court’s decision is open to subsequent judicial review by the Administrativen sad Sofia-Grad (Administrative Court, Sofia City, Bulgaria), meaning that it is not final.

**II. Facts:**

- 5 External monitoring of compliance with the ZOP, including monitoring of the performance of public contracts and framework agreements, is carried out by the Smetna palata (Court of Auditors, Bulgaria) and the bodies of the ADFI.
- 6 The company ‘Montazhi’ EAD is a single person joint-stock company represented by the applicant NV, in his capacity as executive director. The sole owner of the capital in ‘Montazhi’ EAD is ‘Darzhavna konsolidatsionna kompania’ EAD. The sole owner of the capital in ‘Darzhavna konsolidatsionna kompania’ EAD is the State, the rights of which are exercised by the Minister for Economy, in accordance with his or her sectoral responsibility. ‘Montazhi’ EAD comes within the scope of public financial inspection for the purposes of Article 4(4) of the Zakon za darzhavnata finansova inspektsia (Law on public financial inspection; ‘the ZDFI’), namely as a company in the capital of which a person pursuant to Article 4(3) of the ZDFI holds a blocking minority.
- 7 ‘Montazhi’ EAD is managed by the sole owner of the capital and the board of directors. The board of directors entrusts one or more executive members, chosen from among its members, with managing and representing the company, and determines their remuneration.
- 8 During a financial inspection of ‘Montazhi’ EAD concerning the lawfulness of the conclusion and performance of contracts with counterparties, including the owner of the capital, between 1 January 2017 and 30 April 2021, the supervisory bodies of the ADFI assumed that the company is a ‘body governed by public law’ within

the meaning of Paragraph 2(43) of the Additional Provisions to the ZOP and that NV, who represents it, is a public contracting entity within the meaning of Article 5(2)(14) of the ZOP on the following grounds:

8.1 it has a management or supervisory body more than half of whose members are appointed by a public contracting entity within the meaning of Article 5(2)(14) of the ZOP;

8.2 96.92% of the revenue from the company's core activity arise from contracts awarded without being put out to tender, concluded with the owner of the capital, 'Darzhavna konsolidatsionna kompania' EAD, and with a subsidiary of 'Darzhavna konsolidatsionna kompania' EAD, and, in order to be selected as a contracting party for those transactions, 'Montazhi' EAD did not operate under normal market conditions, since there was no opportunity for other economic operators to participate and free competition was not ensured;

8.3 the company is not in a position to bear the financial risk of its activity alone and functions as a going concern owing to the declared intention of the owner of the capital to support the company financially when necessary.

- 9 In view of the administrative bodies' finding that 'Montazhi' EAD is a 'body governed by public law', they issued a notice establishing an administrative offence and subsequently issued the decision imposing a penalty challenged in the present proceedings, by which the applicant NV, executive director of 'Montazhi' EAD and a public contracting entity awarding public contracts within the meaning of Article 5(2)(14) of the ZOP, was penalised for incurring expenditure on 18 August 2020 (date of expenditure based on invoice No 0000000016/23.07.2020) of BGN 89 195.66, net of VAT, within the framework of a supply contract concluded between 'Montazhi' EAD and 'Reyr Studio BG' EOOD dated 15 June 2020, by which a public contract was awarded for the 'supply of ballast, gravel and quarry rock for the following purpose: repair and rehabilitation of the dam Zlati voyvoda 3, PI 30990.50.92 (000305), village of Zlati voyvoda, municipality of Sliven, and of its facilities', without recourse to any of the procedures under Article 18(1) of the ZOP in line with the value of the contract, which exceeds the minimum threshold of BGN 70 000 laid down in Article 20(2)(2) of the ZOP.

### **III. Relevant legal provisions**

#### 10 National law

ZOP (promulgated in State Gazette No 13 of 16 February 2016)

Article 5. '(1) The contracting entities shall be responsible for the proper estimation, planning, execution, conclusion and reporting on the outcomes of public contracts. The contracting entities shall be public and sectoral.

(2) The following shall be public contracting entities:

...

14. the representatives of bodies governed by public law;'

Article 17. '(1) Contracting entities shall be obliged to use the public procurement procedure laid down by law where the grounds for so doing are in place.'

Article 18 (promulgated in State Gazette No 13 of 2016, in force since 15 April 2016). '(1) The procedures covered by the present law are:

1. open procedure;
2. restricted procedure;
3. competitive procedure with negotiation;
4. negotiated procedure with prior call for competition;
5. negotiated procedure with publication of a contract notice;
6. competitive dialogue;
7. innovation partnership;
8. negotiated procedure without prior notice;
9. negotiated procedure without prior call for competition;
10. negotiated procedure without publication of a contract notice;
11. design contest;
12. public competitive tendering;
13. direct negotiated procedure.'

Article 20. '(1) The procedures under Article 18(1)(1) to Article 18(1)(11) shall apply when:

1. public contracting entities and their consortia award public contracts with a value estimated to be equal to or greater than:

(a) (amended by State Gazette No 86 of 2018, in force since 1 March 2019) BGN 10 000 000 – for works;

(b) (amended by State Gazette No 86 of 2018, in force since 1 March 2019, and No 102 of 2019, in force since 1 January 2020) BGN 271 000 – for supplies and services;

(c) (amended by State Gazette No 86 of 2018, in force since 1 March 2019) BGN 1 000 000 – for services listed in Annex 2;

2. public contracting entities in the field of defence award public contracts with a value estimated to be equal to or greater than:

(a) (amended by State Gazette No 86 of 2018, in force since 1 March 2019) BGN 10 000 000 – for works;

(b) (amended by State Gazette No 86 of 2018, in force since 1 March 2019, and No 102 of 2019, in force since 1 January 2020) BGN 271 000 – for supplies and services that include goods listed in Annex 3;

(c) (amended by State Gazette No 86 of 2018, in force since 1 March 2019, and No 102 of 2019, in force since 1 January 2020) BGN 418 000 – for supplies that include goods not listed in Annex 3;

(d) (amended by State Gazette No 86 of 2018, in force since 1 March 2019) BGN 1 000 000 – for services listed in Annex 2;

3. sectoral contracting entities award public contracts with a value estimated to be equal to or greater than:

(a) (amended by State Gazette No 86 of 2018, in force since 1 March 2019) BGN 10 000 000 – for works;

(b) (amended by State Gazette No 86 of 2018, in force since 1 March 2019, and No 102 of 2019, in force since 1 January 2020) BGN 837 000 – for supplies and services;

(c) (amended by State Gazette No 86 of 2018, in force since 1 March 2019) BGN 1 500 000 – for services listed in Annex 2;

4. public and sectoral contracting entities award contracts in the fields of defence and security with a value estimated to be equal to or greater than:

(a) (amended by State Gazette No 86 of 2018, in force since 1 March 2019, and No 102 of 2019, in force since 1 January 2020) BGN 837 000 – for the supply of military equipment, including parts, components and/or assembly elements therefor, including equipment listed in the catalogue of defence-related products adopted on the basis of Article 2(1) of the Zakon za eksportna kontrol na produkti, svarzani s otbranata, i na izdelia i tehnologii s dvoyna upotreba (Law on export control of defence-related products and dual-use items);

(b) (amended by State Gazette No 86 of 2018, in force since 1 March 2019, and No 102 of 2019, in force since 1 January 2020) BGN 837 000 – for supplies of sensitive equipment, including parts, components and/or assembly elements therefor;

(c) (amended by State Gazette No 86 of 2018, in force since 1 March 2019, and No 102 of 2019, in force since 1 January 2020) BGN 837 000 – for services directly connected to the equipment referred to in points (a) and (b), for each and every element of its life cycle;

(d) (amended by State Gazette No 86 of 2018, in force since 1 March 2019) BGN 10 000 000 – for works directly connected to the equipment referred to in points (a) and (b) above, for each and every element of its life cycle;

(e) (amended by State Gazette No 86 of 2018, in force since 1 March 2019, and No 102 of 2019, in force since 1 January 2020) BGN 837 000 – for services for specific military purposes or for sensitive services;

(f) (amended by State Gazette No 86 of 2018, in force since 1 March 2019) BGN 10 000 000 – for works for specific military purposes or for sensitive works;

5. the contracting entities organise a design contest with a value equal to or greater than BGN 70 000.

(2) The contracting entities shall use the procedures specified in Article 18(1)(12) or Article 18(1)(13) when the public contracts are of the following estimated value:

1. (amended by State Gazette No 86 of 2018, in force since 1 March 2019) for works – between BGN 270 000 and BGN 10 000 000;

2. for supplies and services, including the services listed in Annex 2 – between BGN 70 000 and the relevant threshold specified in paragraph 1, depending on the type of contracting entity and the subject matter of the contract.’

Article 238. ‘(1) External monitoring of the implementation of the present law, including monitoring of the performance of public procurement contracts and framework agreements, shall be carried out by the Court of Auditors and the bodies of [the ADFI].

(2) Contracting entities coming within the scope of the Zakon za Smetnata palata (Law on the Court of Auditors) shall be subject to review by the Court of Auditors.

(3) Contracting entities coming within the scope of [the ZDFI] shall be reviewed in respect of their compliance with the present law within the framework of a financial inspection by the bodies of [the ADFI].’

Article 256. ‘(1) (amended by State Gazette No 86 of 2018, in force since 1 March 2019, and No 102 of 2019, in force since 1 January 2020) A contracting entity awarding a public contract by concluding an agreement or incurring expenditure or entering into an obligation to incur expenditure which is equal to or exceeds the minimum thresholds specified in Article 20(1) or (2), without conducting one of the procedures specified in Article 18(1) in line with the value of the contract where the grounds for so doing are in place, shall be penalised with a fine of 2% of the value of the contract including value-added tax and, if no written agreement is in place, of the expenditure incurred or the obligation entered into to incur expenditure, but not exceeding BGN 50 000.’

Article 257. ‘(1) (amended by State Gazette No 86 of 2018, in force since 1 March 2019) In the cases referred to in Articles 247, 249 to 255 and 256 to 256b, where no total value is indicated in the agreement or can be determined, the amount of the fine shall be determined on the basis of the estimated value indicated in the contract notice, the expenditure incurred or the obligation entered into to incur expenditure, or, in the absence of such basis, the funds set aside for the activity concerned in the budget of the contracting entity.’

#### ADDITIONAL PROVISIONS

Paragraph 2. ‘For the purposes of the present law, the following definitions shall apply:

.....

Point 43. A “body governed by public law” is a legal person which fulfils the following conditions:

- (a) it was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (b) it is financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or is subject to management supervision by those bodies or authorities; or has a managerial or supervisory board, more than half of whose members are appointed by a public contracting entity within the meaning of Article 5(2)(1) to (2)(14).

Needs in the general interest have an industrial or commercial character where the person operates under normal market conditions and aims to make a profit, while it alone bears the losses resulting from the exercise of its activity.

A medical body – a company at least two thirds of the capital of which is privately owned, which is more than 50% financed by the State, regional or local authorities, or by other bodies governed by public law or is subject to management supervision by those authorities or bodies; or which has an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public

law, and which has a commercial or industrial character although it meets needs in the general interest – is not a “body governed by public law” within the meaning and for the purposes of [the ZOP].

Paragraph 3. The present law implements the following requirements:

1. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).’

11 EU law:

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65)

Article 2(1). ‘For the purposes of this Directive, the following definitions apply:

[...]

(4) “bodies governed by public law” means bodies that have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;’

Article 4. ‘This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

[...]

(c) EUR 207 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities; that threshold shall also apply to public supply contracts awarded by central government authorities that operate in the field of defence, where those contracts involve products not covered by Annex III’.

**IV. Positions of the parties**

12 The applicant NV has not explicitly expressed a view and has not made use of the period available for submission of further questions for inclusion in the request for a preliminary ruling following assessment by the Sofia District Court.

13 ADFI:

13.1 The penalising authority, acting via its agents, has submitted written observations in which it claims that, although the legal definition of the term ‘body governed by public law’ in Article 2(1)(4) of Directive 2014/24 has been transposed in Paragraph 2(43) [of the Additional Provisions to] the ZOP, that act of secondary EU legislation is not applicable, as the value of the contract at issue in the main proceedings is below the minimum threshold of EUR 207 000 laid down in Article 4(c) of Directive 2014/24. For those reasons, it argues, the request for a preliminary ruling is inadmissible, in so far as the national legislation – Article 20(2)(2) of the ZOP – lays down a lower minimum threshold of BGN 70 000.

**IV. Grounds for the reference**

14 The subject matter of the present proceedings is an examination of the question whether the applicant NV, in his capacity as executive director of the company ‘Montazhi’ EAD, has committed an administrative offence, specifically in relation to the expenditure of BGN 89 195.66, net of VAT, incurred within the framework of a supply contract dated 15 June 2020, concluded between ‘Montazhi’ EAD and ‘Reyr Studio BG’ EOOD without any of the procedures under Article 18(1) of the ZOP being used.

15 Clarification is required in the first place as to whether the company ‘Montazhi’ EAD constituted a ‘body governed by public law’ during the review period from 1 January 2017 to 30 August 2020, particularly at the point when the expenditure was incurred, namely on 18 August 2020, which would make its representative a public contracting entity awarding public contracts within the meaning of Article 5(2)(14) of the ZOP and a person potentially liable under administrative law for non-compliance with the requirements of Article 17(1) of the ZOP, read in conjunction with Article 20(2)(2) thereof.

16 The Chamber is uncertain as to the proper transposition of the provisions of Directive 2014/24 into the national law of the Republic of Bulgaria, as the ZOP provides that the term ‘body governed by public law’ applies also in respect of public contracts which are below the minimum thresholds established in that act of secondary EU legislation, thereby extending its material scope.

17 In the light of the above, there is a need for a ruling from the Court of Justice of the European Union as to whether national legislation under which the provisions of Directive 2014/24, in particular the legal definition of ‘body governed by

public law’ under Article 2(1)(4), apply also in respect of public contracts of an estimated value, net of value-added tax (VAT), that is below the minimum thresholds laid down in Article 4 of the directive.

On those grounds, the **Sofia District Court** [...]

**MAKES THE FOLLOWING ORDER:**

**THE FOLLOWING QUESTION IS REFERRED TO THE COURT OF JUSTICE OF THE EUROPEAN UNION FOR A PRELIMINARY RULING** under the second paragraph of Article 267 of the Treaty on the Functioning of the European Union:

Is national legislation permissible under which the provisions of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ([OJ] 2014 L 94, [p.] 65), in particular the legal definition of ‘body governed by public law’ under Article 2(1)(4) thereof, apply also in respect of public contracts with a value net of value-added tax (VAT) estimated to be below the minimum thresholds laid down in Article 4 of the directive?

**[information on remedies, service of copies][...]**

[...]