

Case C-820/21**Request for a preliminary ruling****Date lodged:**

28 December 2021

Referring court:

Administrativen sad Sofia-grad (Bulgaria)

Date of the decision to refer:

9 December 2021

Applicant:

Vinal AD

Defendant:

Direktor na Agentsia 'Mitnitsi'

ORDER

[...] THE ADMINISTRATIVEN SAD SOFIA-GRAD (Administrative Court, Sofia City), First Division 64

[...] having examined case No **2001** [...] [...] and considered the following in order to reach its decision:

The proceedings in the present case were instituted by an action brought by Vinal AD [...] against decision No P-142/32-45441/11.2.2020 of the Direktor na Agentsia 'Mitnitsi' (Director of the Customs Authority) withdrawing authorisation No 128 for the operation of a tax warehouse for the production and storage of excise goods, specifying No BGNCA00046000 as the identification number of the authorised warehousekeeper, BGNCA00046001 as the identification number of the tax warehouse, and Lovech [...] as the address of the warehouse.

By an application submitted at the hearing of 23 February 2021, Vinal AD sought that a request for a preliminary ruling be made as regards the interpretation of Article 7(2) of Directive 2008/118/EC concerning the general arrangements for excise duty and as regards an interpretation, in keeping with Article 16(1) of Directive 2008/118/EC, of Article 53(3) of the Zakon za aktsizite i danachnite

skladove (Law on excise duties and tax warehouses; ‘the ZADS’), read in conjunction with Article 53(2)(1) thereof, read in conjunction with Article 53(1)(3), Article 47(1)(5) and Article 112 thereof.

The applicant submits that the resolution of the dispute in the present case requires an interpretation of Community law, in particular Article 7(2) of Directive 2008/118/EC concerning the general arrangements for excise duty and Article 16(1) and Articles 16(2)(b) and 16(2)(e) of the directive, and [clarification as to] whether Article 53(3) of the ZADS, read in conjunction with Article 53(2)(1) thereof, read in conjunction with Article 53(1)(3), Article 47(1)(5) and Article 112 thereof, are compatible with those provisions of the directive.

The defendant, the Director of the Customs Authority, contests the application. That director submits that a request for interpretation is not necessary and states that Article 7 and Article 16 of the directive are clear and unambiguous; there is no conflict with the national provisions. According to Article 15(1) of Directive 2008/118/EC, each Member State is to determine its rules concerning the production, processing and holding of excise goods, with a view also to preventing any possible evasion or abuse. Detailed rules have been adopted in exercise of that power.

The chamber of the Administrativen Sad Sofia-grad (Administrative Court, Sofia City) seised of the present case considers that the request for a preliminary ruling is well-founded in part. It therefore takes the view that it must refer the matter to the Court of Justice of the European Union for a preliminary ruling on the interpretation of the provisions of EU law relevant to the dispute.

Some of the issues raised by the applicant (paragraphs 6-9) cannot be the subject of the present proceedings, since the proceedings in which the decision imposing an administrative penalty was challenged and the procedure in which the tax assessment notice establishing the excise duty owed by the applicant was issued have already been concluded.

At the same time, however, the referring court takes the view that the other questions should be referred and considers that they must be reformulated. They are questions concerning whether the conditions for obtaining and, respectively, for withdrawing authorisation are indefinite; whether they must comply with the main objectives of the directive, in particular the objective concerning guarantees as regards the levying and collection of excise duty; and the principle of non-discrimination.

The referring court sets out the content of the request for a preliminary ruling as follows:

How is Article 16(1) of Directive 2008/118/EC to be interpreted in so far as it provides that authorisation to open and operate a tax warehouse is subject to conditions that the authorities are entitled to lay down for the purpose of

preventing any possible evasion or abuse; what content must those conditions have in order to achieve the objectives of preventing evasion or abuse?

How is the principle of non-discrimination for the purposes of recital 10 of Directive 2008/118/EC to be interpreted?

How are those provisions to be interpreted, and are they to be interpreted as precluding national legislation, such as that in Article 53(1)(3) of the ZADS, in conjunction with Article 47(1)(5) thereof, in so far as the latter provisions provide for the unconditional withdrawal of authorisation for the future, which takes place indefinitely and without any restriction as to time, in addition to a penalty already imposed for the same act?

I. Parties to the proceedings

1. Applicant: Vinal AD [...], having its registered office and administrative address in Sofia [...]
2. Defendant: Direktor na Agentsia 'Mitnitsi' (Director of the Customs Authority)

II. Subject matter of the main proceedings:

The proceedings were instituted by an action brought by Vinal AD [...] against decision No P-142/32-45441/11.2.2020 of the Director of the Customs Authority withdrawing authorisation No 128 for the operation of a tax warehouse for the production and storage of excise goods, specifying No BGNCA00046000 as the identification number of the authorised warehousekeeper, BGNCA00046001 as the identification number of the tax warehouse, and Lovech [...] as the address of the warehouse.

III. Facts and arguments of the parties in the main proceedings:

Vinal AD was an authorised warehousekeeper within the meaning of Article 4(2) of the ZADS: a person who, in accordance with the provisions of the ZADS, is authorised to produce and/or store, receive and dispatch excise goods under a duty suspension arrangement in a tax warehouse.

Under the authorisation issued, the activities permitted in the tax warehouse were as follows: the fermentation, coupage and ageing of wines from grapes and fruits, the distillation of grape must, wine and fruit puree, the production, ageing and coupage of rakia from grapes and fruits, the production of vodka and gin, the production of distillates and intermediates from wine and fruits, the production of brandies, vermouth and liqueurs, the preparation of mixtures of flavourings and fruit and herbal extracts for the production of aromatised wines: white, red and rosé wines.

By decision No P-142/32-45441/11.2.2020 of the Director of the Customs Authority, authorisation No 128 for the operation of a tax warehouse for the production and storage of excise goods, specifying No BGNCA00046000 as the identification number of the authorised warehousekeeper, BGNCA00046001 as the identification number of the tax warehouse, and Lovech [...] as the address of the warehouse, was withdrawn on the ground that a final judgment, No 37/16.1.2020, had been given by the Administrative sad Pleven (Administrative Court, Pleven).

Judgment No 37/16.1.2020 of the Administrative Court, Pleven confirmed the decision imposing an administrative penalty No 318/24.1.2018 of the Head of the Mitnitsa Svishtov (Svishtov Customs Office), by which a financial penalty of BGN 248 978 had been imposed on Vinal AD. That judicial decision is final and has the force of *res judicata*.

It was established that Vinal AD had been subjected to a tax assessment by Order No BG005800-PK24-P1/18.04.2017 of the Head of the Mitnitsa Stolichna (Sofia Customs Office). In that procedure, an inspection of the physical stocks of excise goods in the tax warehouse of VINAL AD was carried out, in the period from 3 to 10 May 2017. The results of the inspections carried out were recorded in inspection report Nos 492/03.05.2017, 503/04.05.2017, 510/05.05.2017, 516/09.05.2017 and 523/10.05.2017. The quantities of the liquids contained in those goods, the alcohol content in each case and the actual temperature were measured. The alcohol content at a temperature of 20°C was determined.

Tax assessment report No BG005800-RK24-RD/8 was issued on 24 November 2017. Tax assessment notice No BG005800-RK24-RA8 was issued on 22 December 2017; it was not challenged and became final on 5 January 2018.

Tax assessment notice No BG 005800RK-24 RA/8 established excise duty debts of BGN 4 261.89 for the period from 1 January 2012 to 3 May 2017. The inspection as a result of which the shortages were identified, in respect of which a decision establishing an administrative offence and the decision imposing an administrative penalty at issue were issued, concerns a subsequent period, namely the period from 3 to 10 May 2017. That is to say, the tax assessment procedure carried out was the basis for carrying out the inspection which identified the shortages recorded in the abovementioned reports.

A decision establishing an administrative offence No 88/26.07.2017 was issued in respect of Vinal AD for failure to comply with the obligations arising from Article 43(1)(1) of the ZADS, read in conjunction with Article 84(7) and Article 20(2)(8) thereof, namely for failure to comply with the obligation to levy the excise duty due by issuing an excise invoice as at 30 June 2017. It was established that, as at the time at which the decision was issued, the authorised warehousekeeper had not discharged the obligation under Article 84(1)(1) of the ZADS to issue excise invoices in compliance with the requirement under Article 43(1)(1) of the ZADS.

On 24 January 2018, the penalising customs authority issued decision imposing an administrative penalty No 318/2017. In that decision, it (i) adopted the facts established in the decision establishing an administrative offence No 88/26.07.2017; (ii) decided, on the basis of the evidence obtained from the inspection carried out, that Vinal AD, in its capacity as authorised warehousekeeper, had failed to discharge the obligations under Article 43(1)(1) of the ZADS, read in conjunction with Article 84(7) and Article 20(2)(8) thereof, namely: to levy the excise duty due by issuing an excise invoice as at 30 June 2017; and (iii) deemed this to be an administrative offence under Article 112(1) of the ZADS. It imposed an administrative penalty on the company in the form of a 'financial penalty' in the minimum amount provided for that offence, that is to say, twice the amount of the excise duty not levied, in this case BGN 248 978.

Decision No P-142/32-45441/11.2.2020 issued by the Director of the Customs Authority (and contested in the main proceedings) withdrew the authorisation of the warehousekeeper Vinal AD, thereby precluding it from operating a tax warehouse.

The latter brought an action against the decision of the Director of the Customs Authority before the referring court, seeking its annulment. In its action, it submits that the 'incorrect' transposition of Directive 2008/118/EC must be taken into account in the assessment as to whether the ZADS is compatible [with EU law], since the State and the administration have interfered with the activities of authorised warehousekeepers to an inordinately excessive extent. According to Vinal AD, Commission Recommendation of 29 November 2000 setting out guidelines for the authorisation of warehousekeepers under Council Directive 92/12/EEC, which was repealed by Directive 2008/118/EC, must be taken into account. Article 7 of the recommendation states that an authorisation may be suspended, or in specific cases, withdrawn: in the event of non-fulfilment of the obligations inherent in the authorisation; in the event of insufficient cover for the requisite guarantee; in the event of repeated non-compliance with the legal provisions in force; in the event of involvement in criminal activities; in the event of tax evasion or fraud.

The defendant, the Director of the Customs Authority, contests the action. That director has not submitted any specific arguments in relation to the foregoing statements of the applicant.

IV. EU law

COUNCIL DIRECTIVE 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC.

V. Law of the Republic of Bulgaria

Zakon za aktsizite i danachnite skladove (Law on excise duties and tax warehouses, Bulgaria; ‘the ZADS’):

Article 4. For the purposes of this Law:

2. (amended: Darzhaven vestnik [State Gazette; ‘DV’] No 92 of 2015, in force since 1 January 2016) An ‘authorised warehousekeeper’ means a person authorised, in accordance with the provisions of this Law, to produce and/or store, receive or dispatch excise goods under a duty suspension arrangement.

3. A ‘tax warehouse’ means a place where excise goods are produced, stored, received and dispatched under a duty suspension arrangement by an authorised warehousekeeper in accordance with the provisions of this Law.

4. A ‘duty suspension arrangement’ means a body of rules applied to the production, storage or movement of goods, where the excise duty is suspended.

17. An offence is ‘repeated’ where it is committed within one year after the decision imposing an administrative penalty by which the person has been penalised for a similar offence has become final.

18. (amended: DV No 63 of 2006, in force since 4 August 2006) An offence is ‘serious’ where it is the subject of a final decision imposing an administrative penalty of a financial penalty of more than BGN 15 000.

Article 20. (1) Excise duty shall become payable at the time when the excise goods are released for consumption.

(2) Release for consumption shall be any of the following:

.....

8. (supplemented: DV No 105 of 2006, in force since 1 January 2007, amended: DV No 54 of 2012, in force since 17 July 2012, amended: DV No 92 of 2015, in force since 1 January 2016) the establishment of a shortage of goods for which excise duty is due

Article 43. (1) (amended: DV No 105 of 2006, in force since 1 January 2007) Except in the cases referred to in Article 42, excise duty shall be levied by:

1. (amended: DV No 109 of 2007, in force since 1 January 2008, amended: DV No 95 of 2009, in force since 1 April 2010, amended: DV No 54 of 2012, in force since 17 July 2012, amended: DV No 92 of 2015, in force since 1 January 2016) the authorised warehousekeeper, the persons referred to in Article 3(1)(4) and (6) and the persons registered in accordance with Article 57, Article 57b(4), Article 57c and Article 58c, on the date on which the excise duty becomes due – by issuing an excise invoice in accordance with Article 84(1);

Article 47. (1) (in the version of Article 47 of DV No 105 of 2006, in force from 1 January 2007) Authorised warehousekeepers may be persons who:

.....

4. (amended: DV No 54 of 2012 in force since 17 July 2012, amended: DV No 101 of 2013, in force since 1 January 2014, supplemented: DV No 97 of 2016, in force since 1 January 2017) have no public-law debts with customs authorities, tax debts or debts arising from compulsory insurance contributions, with the exception of debts arising from decisions that have not become final and staggered, deferred or secured debts;

5. (amended: DV No 63 of 2006, in force since 4 August 2006, supplemented: DV No 95 of 2009, in force since 1 December 2009) have not committed a serious or repeated offence within the meaning of this Law, except for cases where the administrative penalty proceedings were terminated by the conclusion of a settlement;

Article 53. (1) The authorisation to operate a tax warehouse shall cease to be valid:

.....

3. where the authorisation is withdrawn;

.....

(2) The authorisation to operate a tax warehouse shall be withdrawn where:

1. the authorised tax warehousekeeper no longer meets the conditions of Article 47

.....

(3) (amended: DV No 30 of 2006, in force since 12 July 2006, amended: DV No 95 of 2009, in force since 1 December 2009, supplemented: DV No 98 of 2018, in force since 1 January 2019) The authorisation shall be withdrawn by decision of the Director of the Agentsia 'Mitnitsi' [(Customs Authority)], which shall be provisionally enforceable as of the date of issuance of the decision, unless the court orders otherwise.

(4) (new: DV No 95 of 2009, in force since 1 December 2009) The decision pursuant to paragraph 3 shall be subject to appeal in accordance with the provisions of Administrativnoprotsesualen kodeks (Code of Administrative Procedure; 'the APK').

Article 84(7). (amended: DV No 92 of 2015, in force since 1 January 2015, amended: DV No 98 of 2018, in force since 1 January 2019) An excise invoice shall be issued on the date on which:

1. the excise goods are released for consumption in accordance with Article 20(2), for each consignee and for each means of transport, except in the cases referred to in Article 20(2)(5) and (15) to (18);

2. in the cases referred to in Article 64(18), the absence of excise stamps is established;

.....

Article 112. (1) A person who is liable to levy excise duty but fails to levy it shall be fined twice the amount of the excise duty which was not levied; the fine may not be less than 500 leva (BGN).

.....

Zakon za administrativnite narushenia i nakazania (Law on administrative offences and penalties; ‘the ZANN’)

Article 83. (1) (supplemented: DV No 15 of 1998, amended: DV No 69 of 2006) In the cases provided for in the relevant law, by decree, by decision of the Council of Ministers or by ordinance of the Municipal Council, a financial penalty may be imposed on legal persons or sole traders for failure to discharge their obligations towards the State or the municipality in the exercise of their activities.

(2) The penalty referred to in the preceding paragraph shall be imposed in accordance with this Law, unless the relevant normative act provides otherwise.

VI. Grounds for the request for a preliminary ruling:

The provision of the second sentence of Article 16(1) of Directive 2008/118 EC provides that the authorisation for the opening and operation of a tax warehouse by the authorised warehousekeeper is to be subject to conditions that the authorities are entitled to lay down for the purpose of preventing any possible evasion or abuse.

The referring court takes the view that an interpretation of the scope of that provision is necessary, in particular as to what is to be understood by ‘possible evasion or abuse’.

In the present case, Article 53(3) of the ZADS, read in conjunction with Article 53(2)(1) thereof, read in conjunction with Article 53(1)(3) and Article 47(1)(5) thereof, provides for the withdrawal of the authorisation where there is a final act by which the person has already been penalised for not having levied the excise duty despite the obligation incumbent upon him or her, the penalty being double the amount of the excise duty that has not been levied.

In that case, the question arises as to how and in what way the objectives of preventing any possible evasion or abuse could be achieved by the unconditional and indefinite withdrawal of the authorisation.

Is it possible, in the present case, that those objectives might have already been achieved by the penalty provided for and already imposed in the amount of double the amount of the excise duty not levied? Can the withdrawal of authorisation under national law be said to constitute a disproportionate measure in the light of the objectives of the second sentence of Article 16(1) and the fact that it is not possible to apply for the reinstatement of authorisation in future, for instance where certain conditions, laid down for the purposes of meeting those objectives, are fulfilled?

In that respect, account must also be taken of the fact that the withdrawal of the authorisation is always and unconditionally provided for as a legal consequence of a decision imposing an administrative penalty that has become final, without there being any legal possibility to conduct a specific assessment, in each individual case, as to whether the objectives of Article 16(1) of Directive 2008/118/EC would thereby be achieved, and, after such assessment, to proceed with the withdrawal of the authorisation, where appropriate.

Against that, the abovementioned Commission Recommendation of 29 November 2000 setting out guidelines for the authorisation of warehousekeepers under Council Directive 92/12/EEC, repealed by Directive 2008/118/EC, provides, in Article 7, that an authorisation may be suspended, or in specific cases, withdrawn: in the event of non-fulfilment of the obligations inherent in the authorisation; in the event of insufficient cover for the requisite guarantee; in the event of repeated non-compliance with the legal provisions in force; in the event of involvement in criminal activities; in the event of tax evasion or fraud.

In the present case, could the legal consequence of withdrawal of authorisation linked to a specific offence exceeding a certain amount of excise duty that has not been levied fall within the abovementioned criteria of the recommendation? Can that legal consequence be covered by the objectives of Article 16(1) of Directive 2008/118/EC, namely the prevention of any possible evasion or abuse?

Recital 10 of Directive 2008/118/EC states the following: arrangements for the collection and reimbursement of duty have an impact on the proper functioning of the internal market and should therefore follow non-discriminatory criteria. In that sense, is the provision of Article 53(1)(3) of the ZADS, read in conjunction with Article 47(1)(5) thereof, consistent with the principles of non-discrimination provided for in recital 10 and the abovementioned principles set out in the recitals of the directive in so far as national law provides for the withdrawal of authorisation for the future, indefinitely and without any restriction as to time, in addition to a penalty already imposed for the same act? Does that provision provide for consequences of such severity that they would lead precisely to

discrimination against the Bulgarian company in relation to other companies under otherwise identical conditions?

For those reasons, and on the basis of subparagraph (b) of the first paragraph of Article 267 of the Treaty on the Functioning of the European Union, read in conjunction with Article 628 of the *Grazhdanski protsesualen kodeks* (Code of Civil Procedure; ‘the GPK’) and Article 144 of the APK, and in accordance with Article 631 of the GPK, read in conjunction with Article 144 of the APK, the Administrative Court, Sofia City makes the following

ORDER:

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

How is Article 16(1) of Directive 2008/118/EC to be interpreted in so far as it provides that authorisation to open and operate a tax warehouse is subject to conditions that the authorities are entitled to lay down for the purpose of preventing any possible evasion or abuse; what content must those conditions have in order to achieve the objectives of preventing evasion or abuse?

How is the principle of non-discrimination for the purposes of recital 10 of Directive 2008/118/EC to be interpreted?

How are those provisions to be interpreted, and are they to be interpreted as precluding national legislation, such as that in Article 53(1)(3) of the ZADS, in conjunction with Article 47(1)(5) thereof, in so far as the latter provisions provide for the unconditional withdrawal of authorisation for the future, which takes place indefinitely and without any restriction as to time, in addition to a penalty already imposed for the same act?

[...]