Case C-369/23

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:

9 June 2023

Referring court:

Varhoven administrativen sad (Bulgaria)

Date of the decision to refer:

9 June 2023

Applicant and appellant in cassation:

‘Vivacom Bulgaria’ EAD

Defendants and respondents in cassation:

Varhoven administrativen sad

Natsionalna agentsia za prihodite

Subject matter of the main proceedings

Action against the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria; ‘the VAS’) for damages in the amount of the VAT paid

Subject matter and legal basis of the request

Compatibility with EU law of national rules on jurisdiction over actions for damages against the VAS

Article 267 TFEU

Question referred for a preliminary ruling

Do the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union preclude national legislation such as

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Article 2c(1)(1) of the ZODOV, read in conjunction with Article 203(3) and Article 128(1)(6) of the APK, under which an action for compensation for damage caused by an infringement of EU law by the VAS, in which the VAS is the defendant, must be examined by that court at last instance?

Provisions of European Union law and case-law relied on

Article 4(3) TEU, the second subparagraph of Article 19(1) TEU, Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter')

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Article 14(1), Article 24, and Article 56(1)(b)

Judgment of 3 May 2012, *Lebara*, C-520/10 P, EU:C:2012:264 ('the judgment in *Lebara*')

Provisions of national law relied on

Administrativnoprotsesualen kodeks (Bulgarian Code of Administrative Procedure; 'the APK'): Article 1(3), Article 128(1)(6), Article 203

Zakon za otgovornostta na darzhavata i obshtinite za vredi (Law on Liability of the State and of Municipalities for Damage; 'the ZODOV'): Article 2c

Zakon za danaka varhu dobavenata stoynost (Bulgarian Law on Value Added Tax; 'the ZDDS'): Articles 12(1) and 21(1) and (3)

Succinct presentation of the facts and procedure in the main proceedings

1 The main proceedings are based on an appeal in cassation brought by 'Balgarska telekomunikatsionna kompania' EAD – Sofia ('BTK') (now 'Vivacom Bulgaria' EAD) against judgment no 2565/18 April 2022 of the Administrativen Sad – Sofia grad (Administrative Court, Sofia City, Bulgaria; 'the ASSG'), which dismissed the action brought by BTK against the VAS and the Natsionalna agentsia za prihodite (National Revenue Agency; 'the NAP') based on Article 2c of the ZODOV, read in conjunction with Article 4(3) TEU. In the action, BTK claimed damages in the amount of the VAT debts that had been paid in response to tax assessment notice no 2900-1200127/20 June 2012 issued by the NAP and upheld by judgments of the ASSG and the VAS. The applicant claimed damages in the amount of the sums paid pursuant to the tax assessment notice (VAT in the amount of 760 183.15 Bulgarian leva [BGN] and interest in the amount of BGN 347 278.15), lost profits and statutory interest on those sums.

Procedure for issuing and challenging the tax assessment notice

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2 The facts relating to the previous procedure for issuing and challenging the tax assessment notice have been established by the ASSG in the main proceedings as follows.

3 'BTK Mobile' EOOD, whose legal successor is BTK, issued invoices in 2007–2008 to Alex Invest Cornert s.r.l. and Danina Comert s.r.l. ('Alex Invest' and 'Danina' respectively), companies registered in Romania, on the basis of contracts for the sale of prepaid cards and vouchers for telecommunications services, showing VAT at 0%.

4 In the course of a tax audit, it was established that the provision to the representatives of the Romanian companies and the physical receipt of the cards and vouchers by them had not been proved, with the result that the subject of the supplies were services which, however, did not come within the scope of Article 21(3)(2)(h) of the ZDDS, but had as their place of supply the place where the supplier carried out its independent economic activity, namely Bulgaria, meaning that the place of supply was determined according to the general rule of Article 21(1) of the ZDDS.

5 The NAP therefore issued tax assessment notice no 2900-1200127/20 June 2012 to BTK, establishing additional VAT liabilities totalling BGN 760 183.15 against BTK. After that notice was issued, BTK paid the amount to the tax authorities together with the interest due. Administrative and judicial actions were lodged against the notice.

6 In the administrative review proceedings, the tax assessment notice was upheld on the grounds that the recipients of the services were not taxable persons established in another Member State, as there was no evidence of the provision of the cards to the Romanian companies. The conditions of Article 21(3) of the ZDDS, under which the supply of services may be considered exempt, were therefore not considered to have been satisfied.

7 The judicial action brought before the ASSG was dismissed in part. According to that court, although the items supplied were described in the invoices as prepaid cards and vouchers for telecommunications services, a supply of goods had been agreed since the cards were moveable property – goods enabling the future use of those services. The goods had been supplied in commercial quantities for the purposes of subsequent resale, and BTK had not provided services to the Romanian companies but would have potentially provided them to the final consumers. Thus, the rules on the place of supply of goods were applicable. The cards and vouchers had not left BTK's warehouse, where they had been deposited by the Romanian companies for safekeeping, or had been handed over to the Romanian companies with receipt and handover records in that warehouse by BTK on Bulgarian territory, so that Article 17(1) of the ZDDS was applicable, according to which the place of supply of goods not dispatched or transported is the place where the goods are located at the time of transfer of ownership or actual handover. Accordingly, that place was located on Bulgarian territory and BTK

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was liable to pay the VAT in question. The ASSG therefore dismissed the action in part.

8 By judgment no 15282/16 December 2014, the VAS upheld the judgment at first instance. It fully agreed with the ASSG's conclusion that the supply was not of services but of goods. BTK could not rely on the judgment of the Court of Justice of the European Union of 9 October 2014 in Case C-492/13, *Traum*, ECLI:EU:C:2014:2267, 'in so far as, in the present case, it has been established that the cards purchased were handed over to the Romanian companies in a warehouse of "BTK Mobile" EOOD located on domestic territory and that the cards did not leave BTK's warehouse as they had been deposited for safekeeping'. The VAS did not comment on the judgment in *Lebara*. Against that background, the VAS held that Article 17(1) of the ZDDS, according to which the place of supply of goods is the place where the goods are located at the time of transfer of ownership or actual delivery, was applicable and had been correctly applied. In those proceedings, the VAS ruled as the court of last instance and its judgment is final (hereinafter, the proceedings in which the tax assessment notice was issued and the judicial proceedings challenging that notice are referred to as 'the tax dispute').

Proceedings at first instance on the claim for compensation for damage

9 The action in the present case dismissed by the court of first instance (ASSG) was brought on 12 December 2019. BTK claimed that the NAP and the VAS had infringed Article 2(1)(a) and (c), Article 14(1), Article 24 and Article 56(1)(i) of Directive 2006/112 in the version in force between December 2007 and June 2008, as interpreted by the Court of Justice in the judgment in *Lebara*.

10 According to the applicant's submissions in that action, in the tax dispute the NAP and the VAS had misapplied the abovementioned EU law provisions on telecommunications services as interpreted by the Court of Justice in the judgment in *Lebara*. According to that judgment, supplies of prepaid cards and vouchers constitute supplies of telecommunications services. Article 2(1)(a) and (c), Article 14(1), Article 24 and Article 56(1)(i) of Directive 2006/112, which had been infringed, give telecommunications operators, such as BTK, the right to treat supplies of prepaid cards and vouchers to distributors established in another Member State as supplies of telecommunications services whose place of supply is in that other Member State. The breach of EU law was sufficiently serious given that the relevant case-law of the Court of Justice had clearly been disregarded. The NAP, the ASSG and the VAS had been aware of the judgment in *Lebara* at the time the tax assessment notice had been issued as the applicant had repeatedly referred to it in the proceedings. That judgment was based on similar facts and was binding on the defendants. If the VAS had had doubts about the applicability of the judgment in *Lebara* to the facts on which the challenge to the tax assessment notice was based, it should have asked the Court of Justice for a preliminary ruling.

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11 In contrast, the NAP had stated in the tax assessment notice that the supplies of prepaid cards and vouchers were supplies of services, but the recipient of the supplies had not been determined by the contractual relationship with the Romanian companies but by the other circumstances of the supplies, that is to say, where the prepaid cards and vouchers had been handed over, whether they had been transported to Romania and whether they could be used for calls from Romania. According to the applicant, those circumstances were irrelevant for determining the place of supply of the telecommunications services.

12 The VAS, ruling on the tax dispute at last instance, had taken the view that, since the cards and vouchers sold were in commercial quantities, they were supplies of goods that had not been taken out of Bulgaria. Thus, it had been incorrectly determined that the place of supply was in Bulgaria and not in Romania, where the recipients were established, and accordingly, the VAT debts established had been upheld.

13 In the court proceedings at first instance, the ASSG found as follows:

14 The action was correctly directed against the NAP and the VAS as both institutions are obliged to apply EU law correctly. Moreover, the VAS is a legal person with jurisdiction to hear actions for infringements of EU law committed in the exercise of its judicial functions and, in the present case, it is the court of last instance for the legal dispute.

15 With regard to the conditions for triggering liability of courts for damage resulting from an infringement of EU law, the ASSG stated that it was not permissible to rule again on the merits of a legal dispute that had been concluded with a final and binding decision of the defendant court. Rather, it was necessary to examine whether the legal provisions relevant to the legal dispute had been correctly applied to the established facts of the case.

16 As regards the requirement that the provisions of EU law that have been infringed confer rights on individuals, the ASSG stated that the provisions relied on by the applicant determined the scope of the tax and the place of supply of telecommunications services and, in the present case, conferred on the applicant the right to treat the supplies as supplies to a taxable person established in another Member State without charging VAT on them.

17 As regards the requirement of a sufficiently serious breach of EU law, the ASSG found that the NAP had correctly classified the supplies as supplies of services, but had taken the view that Article 21(3)(1) and Article 21(2)(h) of the ZDDS were inapplicable as the requirement that the recipients carry out their economic activity in another Member State was not met. With regard to the conclusions of the NAP, the ASSG stated that in the case of a supply in respect of which it is provided that no VAT is to be charged on the ground that the recipient is a taxable person established in the territory of another Member State, it is necessary to verify whether the supply has actually been made to that same taxable person and

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whether it is actually established in the territory of the other Member State. Especially since it had not been proved that the prepaid cards had been received by taxable persons established in another Member State, the tax authorities had taken the view that the conditions for treating the supplies as such, where the place of supply is abroad, had not been proved, and consequently had not committed a serious breach of EU law, in particular with regard to one of the recognised and promoted objectives of Directive 2006/112, namely to combat tax evasion, tax avoidance and possible abuse.

18 With regard to the defendant VAS, the ASSG stated, with reference to the requirement of a sufficiently serious breach of EU law, that the conclusion of the VAS that the supplies were supplies of goods and not of services had been incorrect as it contradicted Articles 14 and 24 of Directive 2006/112 and their interpretation in the judgment in *Lebara*. However, the correct legal treatment of the supplies in question would not have led to a different result than the challenge to the tax assessment notice did since one of the conditions for the supplier's exemption from VAT liability had not been satisfied on the invoices, namely proof that the recipients of the supplies were taxable persons established in another Member State. Since the breach of EU law did not change the ultimate outcome of the legal dispute, it could not be regarded as serious and had no causal connection with the damage suffered by the applicant as the VAT and the corresponding interest were due under the final tax assessment notice, the issuance of which did not infringe EU law.

19 The ASSG found that the present case and the case examined in the judgment in *Lebara* were not the same, as the supplies in question, although similar in substance, also showed significant differences. Thus, the supplies to the Romanian companies were not treated as two supplies (to the distributors and to the final consumers), but only as one supply – to the distributors. The description of the facts in the judgment in *Lebara* showed that in that case neither the status of the recipients as taxable persons established in another Member State nor the actual handover of the cards had been at issue. In the case examined by the Bulgarian courts, no distribution network had been established on Romanian territory, nor had any prepaid cards been offered to consumers in Romania. In the present case, the VAS had ruled out that the two cases were identical because the requirement that the place of supply be in Romania and not in Bulgaria had not been met and had therefore ultimately come to the correct legal conclusion that there was no basis for applying the interpretation arrived at in the judgment in *Lebara*.

20 The court ruling at first instance found that the third condition for triggering liability on the part of the defendants – the existence of a direct causal link between the breach of EU law and the damage – did not have to be examined, in so far as the second condition of a sufficiently serious breach of EU law was not satisfied.

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The essential arguments of the parties in the main proceedings

21 The appellant in cassation BTK requests that the decision of the ASSG be set aside for being erroneous on the grounds that it infringes substantive law, substantially infringes procedural rules, and fails to state reasons. BTK claims that the ASSG itself infringed EU law and the case-law of the Court of Justice with regard to various aspects of the legal dispute.

22 In particular, based on the facts and the elements of liability for VAT regarded as established in the tax dispute, the court of first instance should have examined whether the conditions for State liability were satisfied, not by re-examining the legal dispute on the merits given that that had been concluded by the judgment which had become final and binding, but by examining whether the relevant provisions of EU law had been correctly applied in that legal dispute and whether their non-application or misapplication had a direct causal link with the damage suffered by the applicant.

23 The court of first instance found that there had been an infringement of a provision of EU law conferring rights on individuals. However, the other conclusions were incorrect since the breach of EU law resulting from the classification of the services at issue as goods and not as services in the judgment of the VAS was also clearly established by the Commission's infringement proceedings against Bulgaria No EU Pilot 8498/1/TAXU. The breach was sufficiently serious as the relevant case-law of the Court of Justice had evidently been disregarded as stated in the case-law of the Court of Justice (C-224/01, C-446/04, C-429/09 and C-168/15). The criteria set out in paragraph 43 of the judgment of the Court of Justice in case C-173/03, *Traghetti del Mediterraneo*, ECLI:EU:C:2006:391, were also fulfilled. The judgment in *Lebara* is clear with regard to the classification of the phonecards as telecommunications services, but was not discussed in the judgment of the VAS although it was referred to in the appeal in cassation. Moreover, the interpretation in the judgment in *Lebara* is abstract since the judgment lacks the qualification that it applies only to facts such as those in the main proceedings.

24 The appellant in cassation also challenges the findings of the court of first instance that the facts in the *Lebara* case do not correspond to the facts in the BTK case. According to the appellant in cassation, BTK is a duly authorised telecommunications operator, has the infrastructure for the provision of the services in question and a roaming contract for Romanian national territory, meaning that the case involves the supply of prepaid cards for telecommunications services to distributors established in another Member State. In another case, which involved a challenge to a tax assessment notice stating that BTK was liable to pay tax on supplies of phonecards to Danina in other tax periods, the VAS ruled the opposite way, holding that no VAT was due on those supplies in Bulgaria. However, it would not have been necessary to find the cases identical, as the VAS should have made a request for a preliminary ruling in case of doubt as to whether

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the case-law of the Court of Justice was applicable in the specific case. Otherwise, it was bound by the previous interpretation of the Court of Justice.

25 The appellant in cassation also challenges the findings of fact regarding the handover of the phonecards at BTK's warehouse, claiming that that is an established fact and that that supply had been incorrectly described by the VAS as a supply of goods. The court of first instance should therefore have assessed the conditions of non-contractual liability on the basis of the findings of fact in the proceedings on the challenge of the tax assessment notice, instead of drawing fresh conclusions about the grounds for charging VAT on the supplies to the Romanian companies, which differed from the conclusions of the NAP in the tax assessment notice, by finding that the tax assessment notice should have been upheld on other grounds.

26 The appellant in cassation asks the VAS to request a preliminary ruling from the Court of Justice. The appellant submits that the VAS was a party and already expressed its view in the proceedings at first instance that the claims against it were inadmissible and/or unfounded. In the present appeal in cassation proceedings, the VAS holds the position of a party directly affected by the outcome of the dispute and that of a court of last instance. This gives rise to doubts as to whether that position is compatible with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. The situation where the VAS, as the court of last instance, examines an appeal against a judgment dismissing an action for compensation for damage caused by the VAS's breach of EU law does not meet the requirement of a fair hearing by an independent and impartial tribunal, even if the chamber examining the appeal in cassation is different from the one which made the final decision on the tax dispute. The simultaneous role as party to the dispute and as court of last instance in the dispute, and the view of the VAS already expressed at first instance, give rise to particularly reasonable doubts as to the impartiality of each of its chambers. The appellant in cassation also asks the Court of Justice for an interpretation as to whether, in the present case, the classification of the supplies as supplies of goods and not of services constitutes a sufficiently serious breach of EU law.

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

27 The present chamber is of the view that the question of the jurisdiction of the VAS should be referred to the Court of Justice in the light of the considerations set out below, before the matters of the criteria, nature and scope of the test for the assessment as regards liability for damage arising from a sufficiently serious breach of EU law is examined in the present case.

28 The provisions of national law applicable in the main proceedings have a connection with the provisions of EU law. The main proceedings are based on an action for compensation for damage arising from a sufficiently serious breach of EU VAT law allegedly committed by the NAP and the VAS. The appellant in

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cassation relies on the right under Article 47(2) of the Charter to have its case decided by an independent and impartial tribunal. In examining whether there has been a sufficiently serious breach of EU law, the referring court must examine the application of EU law and the case-law of the Court of Justice in the field of VAT to the tax dispute.

29 Article 2c of the ZODOV governs the procedure for dealing with that type of claim against the State. In the case of damage arising from the exercise of the judicial functions of administrative courts and the VAS and damage caused in the course of or on the occasion of administrative activity, where the party to the dispute is an administrative court, the VAS or a legal person, those proceedings are subject to the APK. Pursuant to Article 128(1)(6) of the APK, actions for compensation for damage arising from unlawful acts of administrative bodies and officials and for damage arising from the exercise of the judicial functions of the administrative courts and the VAS are within the jurisdiction of the administrative courts. According to the general rule of Article 131 of the APK, judicial proceedings under that code may be heard before two instances. The VAS is the court of last instance in those proceedings. That is why the actions brought on that basis against the VAS must be examined by the VAS in the last instance.

30 The question before the referring court is whether those national provisions meet the requirements of the second subparagraph of Article 19(1) TEU for effective legal protection in the fields covered by Union law and of Article 47(2) of the Charter for an independent and impartial tribunal.

31 On the one hand, it is a choice made by the national legislature that takes into account the specifics of the administrative activity and the specialisation of case-law in administrative disputes.

32 On the other hand, the appellant in cassation does not provide any specific evidence on the existence of circumstances that raise questions as to the subjective or objective impartiality of the VAS chamber, the relevant criteria having been identified in the case-law of the Court of Justice. It deduces that the VAS is biased given its capacity as defendant and its statements on the admissibility and merits of the application in the first instance proceedings. In its view, the mere fact that the action against the VAS is being heard at last instance before the same court, albeit before a completely different chamber, is sufficient to give rise to serious doubts as to the impartiality and independence of each chamber of that court.

33 The case-law of the European Court of Human Rights (‘the ECtHR’) on the application of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘the ECHR’) in proceedings against Bulgaria does not provide a definitive answer to the question of whether a particular court may consider a claim in which it is a defendant.

34 In the judgment of 10 April 2008 in *Mihalkov v. Bulgaria* (application no 67719/01), ECLI:CE:ECHR:2008:0410JUD006771901, §§ 47-51, referred to by

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the appellant in cassation, the ECtHR held that it was a violation of Article 6(1) of the ECHR for a court to consider an action for compensation for damage arising from an unlawful conviction which it had itself pronounced. The ECtHR ruled that, even if there are no doubts as to the personal impartiality of the judges participating in the proceedings, their professional ties to one of the parties to the dispute alone can give rise to legitimate doubts on the part of the applicant as to their objective impartiality and their independence from the other party to the dispute.

35 In its judgment of 5 April 2018 in *Gospodinov v. Bulgaria* (application no 28417/2007), ECLI:CE:ECHR:2018:0405JUD002841707, §§ 55-56, the ECtHR found that there was a violation of Article 6(1) of the ECHR. The judgment was delivered in connection with a case in which a criminal chamber of a regional court had heard a second criminal case against a person who, at the same time, was pursuing a claim for damages against the same court for breaches in the first criminal case concerning the duration of detention. The ECtHR ruled that the judges' professional connection with one of the parties to the concurrently running civil proceedings, combined with the detrimental effect on the compensation proceedings of the criminal proceedings against the applicant, could, on its own, have prompted legitimate misgivings in the applicant as regards the judges' objective impartiality.

36 In both cases, the ECtHR noted that under the budgetary rules relevant to the present case, any compensation awarded to the applicant in the event of the success of his action for damages would have been paid from the budget of the court and, even though it had not been established that that fact had in any way influenced the individual situation of the court's judges, it might legitimately have intensified the applicant's doubts.

37 The ECtHR expressed the opposite view in the judgment of 18 June 2013 in *Valcheva and Abrashev v. Bulgaria* (application nos 6194/11 and 34887/11), ECLI:CE:ECHR:2013:0618DEC000619411, § 100, and in the judgment of 18 June 2013, *Balakchiev and Others v. Bulgaria* (application no 65187/10), ECLI:CE:ECHR:2013:0618DEC006518710, § 61. In those judgments the ECtHR noted that a situation where the claim is directed against the court dealing with it is by definition rare. It referred to its earlier case-law (*Mihalkov v. Bulgaria*), in which it had expressed misgivings about the objective impartiality of the courts hearing such claims. However, given that the sums to be paid out as compensation (in that case for a violation of the right to examination and determination of the case within a reasonable time pursuant to Article 6(1) of the ECHR) would come from a distinct line item in the budget of each court, the ECtHR was satisfied that that factor would not call into question the impartiality of the courts hearing such claims or the effectiveness of the remedy.

38 The budgetary rules currently in force are the same as those described in the two judgments referred to in the preceding paragraph. Although each court pays damages out of its own budget, that budget distinguishes between items for

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remuneration, for the maintenance of the court and for compensation for damage arising from the court's activities, with the result that the judges' remuneration or their working conditions do not depend on the damages that the court might owe. If there are insufficient funds in the court's budget for damages, the Vissh sadeben savet (Supreme Council of the Judiciary) will, at the court's request, increase that court's budget and make the necessary funds available in its account.

39 This requires that a preliminary question be referred to the Court of Justice on the compatibility of the national rules on jurisdiction over actions for damages brought against the VAS on the basis of Article 2c of the ZODOV in conjunction with Article 4(3) TEU, the second subparagraph of Article 19(1) TEU and Article 47(2) of the Charter.

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