

Case C-477/23

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

25 July 2023

Referring court:

Varhoven administrativen sad (Bulgaria)

Date of the decision to refer:

13 July 2023

Appellant:

Obshtina Belovo

Respondent:

Rakovoditel na Upravlyavashtia organ na Operativna programa 'Okolna sreda' 2014 – 2020

Subject matter of the main proceedings

The proceedings originated in an appeal on a point of law lodged by Obshtina Belovo (municipality of Belovo) against the judgment of the administrative court of first instance dismissing its action against the decision of the Rakovoditel na Upravlyavashtia organ na Operativna programa 'Okolna sreda' 2014 – 2020 (Head of the Administrative Authority for the Operational Programme on the Environment, 2014-2020) imposing a financial correction.

Subject matter and legal basis of the request

Interpretation of EU law: first paragraph, point (b), and third paragraph of Article 267 TFEU

Questions referred for a preliminary ruling

1. Does the interpretation of Article 2(10), (36) and (37) of Regulation No 1303/2013 preclude national legislation, or an interpretation and application practice in respect of that legislation, whereby in a case such as that in the main proceedings only one of the partner municipalities (parties to the ADBFP), namely the one which signed the administrative agreement on the financial grant as the lead partner, is to be regarded as the beneficiary of the grant awarded from the European Structural and Investment Funds ('ESI Funds')? What conditions must an organisation fulfil to be classed as a beneficiary within the meaning of Article 2(10) of Regulation No 1303/2013 in a case such as the present one?
2. Does the interpretation of Article 2(10), (36) and (37) of Regulation No 1303/2013 preclude national legislation, or an interpretation and application practice in respect of that legislation, whereby in a case such as that in the main proceedings the financial correction is imposed on account of a breach by an economic operator of the public procurement provisions by means of a decision addressed to another economic operator which has not committed any breach but which is indicated as the lead partner in the contract concerning the financial grant?
3. Does Regulation No 1303/2013 preclude national legislation, or an interpretation and application practice in respect of that legislation, whereby liability for a financial correction may be contractually reassigned between project partners, or can or must each economic operator bear liability for financial corrections imposed in connection with breaches committed by it in the use of resources from ESI Funds under the contracts to which it is a party?
4. Do Articles 41 and 47 of the Charter of Fundamental Rights of the European Union, in a case such as that in the main proceedings, preclude national administrative practice and case-law according to which the municipality which is alleged to have breached the Zakon za obshtestvenite porachki (Law on public procurement) in awarding the public contract in the procedure for the use of resources from ESI Funds is granted neither the right to participate in the procedure for determining a financial correction relating to the contract it has concluded nor the right to take part in the judicial proceedings challenging that administrative act, on the grounds that civil proceedings are open to it by virtue of its partnership agreement with the lead partner?

Provisions of EU legislation relied on

Charter of Fundamental Rights of the European Union ('the Charter'): Articles 41, 47 and 51(1)

Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European

Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006: Article 2(10), (36) and (37)

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

Provisions of national law relied on

Zakon za obshtestvenite porachki (Law on public procurement; ‘the ZOP’), Articles 2(2), 5(2)(9) and 59(6), and Paragraph 3 of the Additional Provisions

Zakon za upravlenie na sredstvata ot evropeyskite fondove pri spodeleno upravlenie (Law on the management of resources from European Funds with shared management; ‘the ZUSEFSU’), in force since 1 July 2022, and its previous version entitled Zakon za upravlenie na sredstvata ot Evropeyskite strukturni i investitsionni fondove (Law on the management of resources from the European Structural and Investment Funds; ‘the ZUSESIF’): Article 70(1)(9), Article 70(2) and Article 73(1)

Zakon za upravlenie na otpadatsite (Law on waste management): Article 49(1) and (9)

Zakon za Kamarata na stroitelite (Law on the Chamber of Builders): Article 3

Naredba za posochvane na nerednosti, predstavlyavashti osnovania za izvarshvane na finansovi korektsii, i protsentnite pokazатели za opredelyane razticna finansovite korektsii po reda na Zakona za upravlenie na sredstvata ot Evropeyskite strukturni i investitsion fondniove (Regulation on the determination of irregularities which constitute grounds for making financial corrections and on the percentage indicators for determining the amount of financial corrections under the Law on the management of resources from the European Structural and Investment Funds; ‘the Regulation on the determination of irregularities’): point 11 of Annex 1 to Article 2(1)

Succinct presentation of the facts and procedure

- 1 The procedure at issue, in which resources from European Structural and Investment Funds (ESI Funds) for the period from 2014 to 2020 are being used, is procedure No BG16M1OP002-2.002 – Combined procedure for design and construction of composting installations and installations for preliminary treatment of municipal waste.

- 2 The applicants in the proceedings are a number of municipalities from the region of Pazardzhik, the focus of the dispute, including the municipalities of Pazardzhik and Belovo. All of those municipalities form part of a regional waste management association ('the Regional Association') established on the basis of the Law on waste management.
- 3 For the purposes of applying for funding, the Regional Association designated a lead municipality, while the other applicant municipalities of the Regional Association are partners of that lead municipality; a partnership agreement to this effect was concluded among all the municipalities of the Regional Association.
- 4 As a rule, in the relevant procedure for awarding a financial grant, the municipalities of a regional association may submit only one project proposal. The municipalities of the Regional Association, including the municipalities of Pazardzhik and Belovo, therefore drew up a joint project proposal.
- 5 In the procedure for awarding the grant, the municipalities signed an *Administrativen dogovor za predostavyane na bezvazmezdna finansova pomosh*t (Administrative agreement on the awarding of a financial grant; 'the ADBFP') in the framework of the Operational Programme for the Environment, 2014-2020, which is cofinanced by the European Regional Development Fund and the Cohesion Fund of the European Union.
- 6 Article 1 of the ADBFP states that all municipalities are beneficiaries under the Agreement, although alongside the name of each municipality, its capacity as a partner is also indicated.
- 7 Article 3.3 of the ADBFP explicitly states that the municipalities which are parties to that agreement designate Pazardzhik as the lead municipality. The other municipalities are partner municipalities.
- 8 Article 1(3) of the conditions for the implementation of the project approved in accordance with the procedure ('the Implementing Provisions'), which form an integral part of the ADBFP, states that the person defined in Article 2(10) of Regulation No 1303/2013 is the 'beneficiary' in the procedure.
- 9 Article 1(3) of the Implementing Provisions likewise indicates that, when the project proposal is submitted by a partnership, all partner municipalities are beneficiaries – both the lead municipality and the partners which jointly submitted the project proposal approved for funding.
- 10 The powers of the lead municipality are set out in Article 4(6) of the Implementing Provisions and consist specifically in conducting correspondence with the managing authority, receiving the funds from the ADBFP into its own bank account, distributing the funds to the partner municipalities in accordance with the provisions of the partnership agreement, etc. The lead municipality is also responsible for project management.

- 11 The powers of the partner municipalities are set out in the project proposal, although it is specifically envisaged, with regard to the public contract at issue for the construction of a composting plant for separately collected green and/or biodegradable domestic waste, that the contract will be implemented and awarded by the municipality of Belovo.
- 12 The municipality of Belovo, as the public contracting authority, implemented the procedure for the award of a public contract which ultimately resulted in a contract concluded between the municipality of Belovo and Delchev Ingenering EOOD for the construction, in the territory of the municipality of Belovo, of a composting plant for separately collected green and/or biodegradable domestic waste.
- 13 In a decision dated 21 March 2022 taken by of the head of the managing authority for the Operational Programme for the Environment, 2014-2020, amended by a decision issued by that head of authority on 15 April 2022, a financial correction was imposed, amounting to 10% of the resources allocated from the European Structural and Investment Funds (ESI Funds) to finance the contract concluded between the municipality of Belovo and Delchev Ingenering EOOD.
- 14 The financial correction was imposed on the beneficiary, the municipality of Pazardzhik, because of an irregularity under Article 70(1)(9) of the ZUSESIF, read in conjunction with point 11(a) of Annex 1 to Article 2(1) of the Regulation on the determination of irregularities. It is apparent from the decision that the irregularity was committed by the municipality of Belovo in breach of national provisions, namely Article 2(2) and Article 59(6) of the ZOP, read in conjunction with Article 3(3) of the Law on the Chamber of Builders, and in breach of EU law.
- 15 The municipality of Belovo, which was not the addressee of the decision determining the financial correction, challenged that decision before the Administrativen sad Pazardzhik (Pazardzhik Administrative Court, Bulgaria), which held the action to be admissible but dismissed it as unfounded.
- 16 The administrative court of first instance held that the ADBFP at issue was concluded with both the municipality of Pazardzhik and the other municipalities in the region, including the municipality of Belovo, as they had applied using the Combined Procedure with a joint project proposal for the planning and construction of composting installations and installations for the pre-treatment of household waste. The public contract affected by the financial correction, the court stated, had been the subject of a call for tenders issued by the municipality of Belovo and it was the municipality of Belovo which had signed the contract with Delchev Ingenering EOOD. For that reason, according to the court, regardless of the fact that the decision at issue designated only the municipality of Pazardzhik as the addressee of the decision and the beneficiary in the project framework, the municipality of Belovo had an interest in bringing proceedings against that decision.

- 17 The municipality of Belovo brought an appeal on a point of law against that judgment of the Administrativen sad Pazardzhik (Pazardzhik Administrative Court) before the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), the referring court.

The essential arguments of the parties in the main proceedings

- 18 In its appeal on a point of law, the municipality of Belovo challenges the judgment delivered at first instance by examining the applicability of Article 3(3) of the Law on the Chamber of Builders in the context of the specific public procurement procedure.
- 19 In a brief reply, the respondent, the head of the managing authority, submits that the appeal on a point of law is unfounded.

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

- 20 The financial correction imposed on the municipality and challenged in the main proceedings is based on the breach, caused by the action of another municipality, of an EU provision transposed into national law.
- 21 In proceedings concerning the legality of the use of resources from ESI Funds and in the examination of the legality of the financial corrections imposed, as in the dispute in the main proceedings, the national courts apply the concepts of ‘beneficiary’, ‘irregularity’ and ‘economic operator’ within the meaning of Article 2(10), (36) and (37) of Regulation No 1303/2013.
- 22 An analysis of national case-law shows that, in similar cases, some judicial panels consider that only the municipality which is the lead partner in the project is the ‘beneficiary’ within the meaning of Article 2(10) of Regulation No 1303/2013 and hence the sole addressee of a decision determining a financial correction, whereas the other partner municipalities, even in the case of a joint project proposal, do not have that capacity. Those panels do not admit other partner municipalities as parties to the proceedings, and they deny their right to participate in the procedure for determining a financial correction, even in cases such as the present one where those municipalities are parties to the contracts affected by the correction.
- 23 By contrast, in a judgment delivered by the Administrativen sad Sofia-Oblast (Administrative Court of the Sofia Region, Bulgaria), that court held that, in the event of a breach of the public procurement rules by the municipality which used the resources from ESI Funds, that same municipality was the right addressee of the decision determining a financial correction. Accordingly, the court ruled, that municipality should be granted the right to participate in the procedure for determining the financial correction and therefore benefit from the right to a judicial remedy against that administrative act. That judgment of the Administrativen sad Sofia-Oblast (Administrative Court of the Sofia Region),

however, was set aside by a judgment of the Varhoven administrativen sad (Supreme Administrative Court), which held that, in the procedure, the partners did not have the status of beneficiaries, were not the right addressees of the administrative act determining a financial correction and were not entitled to participate in that procedure.

- 24 In the main proceedings, the court of first instance endorsed the second opinion. It ruled that the municipality of Belovo had carried out the contract award procedure in which the irregularities had been found and that it was a beneficiary of the project and therefore had a right of judicial review.
- 25 In this sense, uncertainties can be identified in national case-law regarding the requirements which must be satisfied in order to match the definition of the term 'beneficiary' set out in Article 2(10) of Regulation No 1303/2013. These uncertainties relate to which facts are relevant to the definition of the term: the fact concerning the signing of the administrative agreement for the award of the grant or the facts relating to the receipt and use of the grant, or some other facts.
- 26 In the present proceedings, all of the municipalities in the region concerned submitted a joint project proposal for financing from ESI Funds, and all of them are parties to the ADBFP. The municipality designated as lead partner in the project has the powers defined in Article 4(6) of the Implementing Provisions to receive correspondence conducted with the managing authority in the ADBFP framework, to receive the funds from the ADBFP into its own bank account, to complete all payment requests and progress reports and submit them to the managing authority in accordance with the ADBFP and to exercise responsibility for project management.
- 27 Each partner municipality carries out the predefined project activities, while one municipality – in this case the municipality of Belovo – organises and implements the public procurement procedure for the construction of a composting plant for separately collected green and/or biodegradable domestic waste.
- 28 In those circumstances, the question arises as to who is the correct addressee of the decision imposing a financial correction in respect of the irregularity committed and, therefore, which municipality is entitled to participate in the procedure for determining a financial correction and to bring a judicial action against the decision imposing a financial correction: the municipality which is the lead partner in the project or the municipality using the resources from the ESI Funds affected by the specific irregularity.
- 29 The case-law which, in identical cases, denies the right of the partner municipality to participate in the administrative procedure and to have access to a court is based on the fact that the lead municipality indicates the bank account from which resources from the ESI Funds are received, allocates the funds and, in the event of financial corrections, offsets the financial correction applied to the partners against the eligible resources from the ESI Funds. At the same time, there is a

legal relationship of a civil nature between the lead municipality and the partner municipality.

- 30 So the question also arises as to whether Regulation No 1303/2013 precludes national legislation, as well as case-law interpreting and applying that legislation, according to which liability for the financial correction may be reassigned contractually between the partners in the procedure or whether, in fact, each individual partner must assume liability for the financial corrections in respect of infringements which it committed in connection with the use of resources from ESI Funds in the context of the contracts to which it is a party.
- 31 Furthermore, the right to good administration is a fundamental right conferred on individuals by Article 41 of the Charter. The right to good administration comprises: 1. the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; 2. the right of every person to have access to his or her file; 3. the obligation of the administration to give reasons for its decisions. According to its Article 51, the Charter applies to the Member States when they are implementing Union law. The award of a financial grant is made in direct application of Union law; this circumstance obliges the national authorities within whose competence the application of the law falls to comply with Article 41 of the Charter.
- 32 That is also the thrust of the question whether Articles 41 and 47 of the Charter preclude national case-law and administrative practice according to which a municipality which has breached the Law on public procurement when awarding a public contract in the context of the procedure for the use of resources from ESI Funds has neither the right to participate in the procedure for determining a financial correction relating to a contract which it has concluded nor the right to take part in the judicial proceedings challenging that administrative act, on the ground that civil proceedings are open to it by virtue of its partnership with the lead partner.
- 33 In the present case, if it were to be held that the municipality of Belovo was not a beneficiary within the meaning of Article 2(10) of Regulation No 1303/2013 and that it was not entitled to challenge the decision imposing a financial correction addressed to the municipality of Pazardzhik, the Varhoven administrativen sad (Supreme Administrative Court) would have to set aside the judgment of the Administrativen sad Pazardzhik (Pazardzhik Administrative Court) and terminate the proceedings. Consequently, since it is seised of a dispute the resolution of which is connected with the interpretation and application of provisions of EU law, the Varhoven administrativen sad (Supreme Administrative Court) considers that it must make the present request for a preliminary ruling of its own motion to the Court of Justice of the European Union.