

**Case C-471/23**

**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 Veliko Tarnovo

**Respondent:**

Rakovoditel na Upravlyavashtia organ na Operativna programa 'Regioni v rastezh' 2014 – 2020

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**Subject matter of the main proceedings**

The proceedings originated in an appeal on a point of law lodged by Obshtina Veliko Tarnovo (municipality of Veliko Tarnovo) 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 'Regioni v rastezh' 2014 – 2020 (Head of the Administrative Authority for the Operational Programme 'Regions in Growth', 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 manager of State aid in the form of resources from European Structural and Investment Funds ('ESI Funds') who is not the recipient of the aid fall into the category of a 'beneficiary' of aid in the context of State aid within the meaning of Article 2(10) of 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?
2. Can the manager of State aid in the form of resources from ESI Funds who is not the person using the aid on the basis of a public contract be the right addressee of a decision determining a financial correction to be imposed on account of a breach of national or EU law committed in connection with the awarding of the public contract?
3. With regard to the person who is the addressee of the administrative measure comprising a financial correction on account of an irregularity within the meaning of Article 2(36) of Regulation No 1303/2013, in the case of State aid in the form of resources from ESI Funds, must two cumulative conditions be satisfied, namely that the person is the recipient of the grant from the resources which are affected by the irregularity and is also the person who used the resources in question?
4. Can liability for breaches of the law in the use of State aid in the form of resources from ESI Funds be regulated or reassigned by a contract between the beneficiary and the aid manager, or does liability lie with the beneficiary of the aid who uses it unlawfully?
5. Is there joint and several liability of the aid beneficiary and the aid manager, and must such liability be prescribed in the contract awarding the aid?
6. Do Articles 41 and 47 of the Charter of Fundamental Rights of the European Union preclude a national administrative practice and case-law in a case such as that in the main proceedings, whereby a 'public service operator', such as the Organizatsia na dvizhenieto, parkingi i garazhi EOOD, which is alleged to have been found in breach, in the procedure implemented by it, of the Zakon za obshtestvenite porachki (Law on public procurement) in connection with the award of a public contract in the procedure for the use of resources from ESI Funds (which constitute State aid), is granted neither the right to participate in the procedure for determining a financial correction in respect of a contract which it has concluded nor the right to participate in the judicial proceedings challenging that administrative act, on the ground that the said operator, as a partner of the municipality, bears civil liability for redress under the partnership agreement?

**Provisions of EU legislation and EU case-law relied on**

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

Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70: Article 2

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'): Article 2(2), Article 49(1) 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 darzhavnite pomoshti (Law on State aid; 'the ZDP'): Articles 9, 12 and 20 and Paragraph 1(7) of the Additional Provisions

Naredba za posochvane na nerednosti, predstavlyavashti osnovania za izvarshvane na finansovi korektsii, i protsentnite pokazateli za opredelyane razlicna 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 10 of Annex 1 to Article 2(1)

Naredba No 2 za usloviyata i reda za utvarzhdavane na transportni shemi i za osashtestvyavaneto na obshtestveni prevozi na patnitsi s avtobusi (Regulation No. 2 on the conditions and procedure for establishing transport routes and providing public passenger transport by bus – ‘Regulation No 2’ – of 15 March 2002): Articles 2 and 16c as well as Paragraph 1, points 7, 8, 10, 12 and 13, of the Additional Provisions

### **Succinct presentation of the facts and procedure**

- 1 Procedure No BG16RFOP001-1.001-039 for the awarding of financial grants for the ‘Implementation of integrated plans for urban regeneration and development, 2014-2020’, is executed within priority axis No 1 – Sustainable and integrated urban development – of the Operational Programme ‘Regions in Growth’, 2014-2020 (‘the Operational Programme’).
- 2 Priority axis No 1 is being implemented in accordance with Article 7 of Regulation No 1301/2013.
- 3 The guidelines for the submission of applications in that procedure state that, in the context of ‘Integrated urban transport’, the investment priority which is relevant in the present case, financial aid is granted to the recipient municipalities in their capacity as managing entities and owners of the public infrastructure. It is expressly stated that support measures are generally implemented through a partnership with economic operators. In that case, the recipient municipalities act as State aid managers with regard to the resources made available to the partners. The resources made available to the partners are to be understood as part of the compensation granted for the provision of a transport service required in the general economic interest. In that case, the public service contract is signed by the economic operator which is a project partner, the procedure being carried out in accordance with Regulation No 1370/2007, which is the relevant instrument in this context.
- 4 According to point 5.4.2 of the guidelines for applicants, the authorised partners in that procedure are the municipal urban public transport companies, which are the ‘internal operators’ defined in Paragraph 1(7) of the Additional Provisions to Regulation No 2.
- 5 In the context of the procedure described above, the municipality of Veliko Tarnovo concluded with the managing authority for the Operational Programme an Administrativen dogovor za predostavyane na bezvazmezdna finansova pomosht (management contract on the award of a financial grant; ‘the ADBFP’) for the implementation of the project proposal ‘Integrated public transport for the town of Veliko Tarnovo’. Article 1 of the ADBFP designates the municipality as the ‘beneficiary’ of the grant.
- 6 Under Article 2.3 of the ADBFP, part of the amount included in the total value of the financial contribution comprises State aid to the public passenger transport

operator in the form of public service compensation within the meaning of Regulation No 1370/2007. The manager of that State aid is the municipality of Veliko Tarnovo. The municipality undertakes to ensure compliance with the applicable rules in accordance with the requirements of Regulation No 1370/2007, including the establishment and application of adequate implementation verification mechanisms.

- 7 Under Article 6(2) of the General Conditions for the ADBFP, the beneficiary is responsible to the managing authority of the Operational Programme for the actions of the partners and external contractors in the implementation of the project, with liability 'for all risks, including unjustified expenditure and financial corrections, at its own expense'.
- 8 On 24 August 2018, the municipality of Veliko Tarnovo and the Organizatsia na dvizhenieto, parkingi i garazhi EOOD (Organisation for Transport, Car Parks and Garages EOOD; 'the municipal company'), concluded a partnership agreement under which the municipality of Veliko Tarnovo is the 'lead partner' and the municipal company is the 'partner' in the project. The partnership agreement is an integral part of the ADBFP.
- 9 If, in the course of the public procurement procedure, infringements occur which warrant the imposition of a financial correction, the funds corresponding to the amount of the financial correction are charged to the contracting authority under Article 14(2) of the partnership agreement.
- 10 In its capacity as the operator of a service of general economic interest (public passenger transport) and the actual beneficiary of the State aid, the municipal company conducted a procedure for the award of a public contract for the purchase and delivery of electric buses in the context of the project 'Integrated public transport for the town of Veliko Tarnovo'.
- 11 As a result, a public procurement contract was concluded with the sole bidder, a consortium formed by Excelor Holding Group EOOD, Bulgaria, and Jiangsu Alfa Bus Co., China.
- 12 By a decision of 11 May 2022, the head of the managing authority for the Operational Programme imposed a financial correction on the municipality of Veliko Tarnovo on account of an irregularity under Article 70(1)(9) of the ZUSESIF. According to the decision, the irregularity occurred during the award of the public contract and consists in the imposition of a discriminatory condition for the performance of the contract within the meaning of point 10(a) of Annex No 1 to Article 2(1) of the Regulation on the determination of irregularities. The correction imposed amounted to 25% of the resources from the European Structural and Investment Funds (ESI Funds) allocated to finance the public procurement contract concluded by the municipal company.
- 13 The municipality of Veliko Tarnovo brought an action against that decision before the Administrativen sad Veliko Tarnovo (Veliko Tarnovo Administrative Court,

Bulgaria). That court dismissed the action, finding that the administrative authority had correctly concluded that there had been a breach of national public procurement law, a breach which constituted an irregularity within the meaning of the ZUSESIF. The court held that it was precisely the municipality, as a party to the ADBFP, which was the right addressee of the decision determining the financial correction. It dismissed the objection that the municipality itself was not the contracting authority and consequently had not committed the irregularity. The fact that the beneficiary of the financial grant had concluded partnership agreements for certain activities did not exempt it from liability as a party to the ADBFP, the court ruled. It found that the nature of the clause in the partnership agreement governing liability for breaches and risks, including financial corrections, was that of a right of redress; its purpose was only to regulate, within the internal relationship between the partners, which of them should bear the cost of the financial correction. The partner of the municipality, the court held, was neither a beneficiary within the meaning of the ADBFP, nor was it the addressee of State aid; it had no direct relationship with the managing authority of the Operational Programme and so could not be the addressee of any decisions made by that authority.

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

#### **The essential arguments of the parties in the main proceedings**

- 15 The municipality contests the findings of the court of first instance that it was the sole beneficiary of the financial grant to the project and that, as such, it had committed a breach of the public procurement rules. Relying on the legal definition of the term ‘beneficiary’ in Article 2(10) of Regulation No 1303/2013, it submits that the municipal company is the beneficiary of the aid for which the correction was determined, since it is the direct recipient of the aid and a body governed by public law which is responsible for the specific project for the acquisition of electric buses. Article 2.3 of the ADBFP, it argues, expressly provides that the municipal company receives the aid and that the municipality is merely the manager of the aid.
- 16 The municipality also challenges the finding of the court of first instance that, in the procedure for determining the financial correction, the municipality assumes liability to the managing authority for the actions of its partners by assuming the risks pertaining to the use of the grant. According to the municipality, the financial correction is an administrative measure and not a penalty, so that irregularity and correction should not be interpreted as a ‘risk associated with performance of the contract’.

- 17 According to the municipality, the fact that the grant from ESI Funds constitutes State aid and, more specifically, public service compensation within the meaning of Regulation No 1370/2007 is also relevant in the present case. The aid application guidelines, it submits, expressly state that a recipient of aid from partners, in this case the municipal urban public transport company, has the status of an 'internal operator'. It is therefore necessary, according to the municipality, to distinguish between the concepts of 'recipient of State aid from ESI Funds' and 'manager of State aid from ESI Funds'. It submits that, if the State aid consisted of resources from ESI Funds, the financial correction could only be imposed on the aid recipient. It, the municipality argues, was the economic operator which established a discriminatory selection criterion and committed the irregularity within the meaning of the Regulation on the determination of irregularities. According to the municipality, the manager of the State aid, in this case the municipality of Veliko Tarnovo, can at most be held liable for breaches of the State aid rules within the meaning of Article 107 TFEU.
- 18 The municipality also objects to the fact that the partner was not admitted as a party to the procedure for determining the financial correction.
- 19 The respondent is contesting the appeal on a point of law.

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

- 20 The basis for the financial correction imposed on the municipality, which was challenged in the main proceedings, is the breach, committed by the act of another economic operator, of an EU provision transposed into national law.
- 21 The established case-law of the Varhoven administrativen sad (Supreme Administrative Court) concerning the examination of the legality of decisions imposing a financial correction takes no account of the definition of the concept of 'beneficiary', within the meaning of Article 2(10) of Regulation No 1303/2013, in the context of State aid, or of the significance of the terms 'public passenger transport', 'public service operator', 'public service obligation', 'beneficiary of State aid from ESI Fund resources' or 'public service compensation', within the meaning of Regulation No 1370/2007.
- 22 In order to be able to answer the question whether the municipality of Veliko Tarnovo is the sole beneficiary of the financial grant in the context of the project and whether, as such, it committed a breach of national public procurement rules, it is necessary to interpret the concept of 'beneficiary' within the meaning of Article 2(10) of Regulation No 1303/2013.
- 23 According to the facts of the specific case concerning the resources used for the purchase of electric buses, the municipality of Veliko Tarnovo is the manager of the State aid from ESI Funds. So that the right decision can be reached in the dispute regarding the financial correction, it is necessary to ascertain whether the

municipality, as the aid manager, is also the beneficiary of the grant from the ESI Funds awarded to the municipal company as State aid.

- 24 The financial correction is imposed as an administrative measure on an economic operator as a result of its having committed an act or omission which was contrary to national or EU law when using resources from ESI Funds. Is it permissible that the municipality, which did not use the resources from ESI Funds in a public procurement procedure, be held liable as a legal person by means of financial corrections for infringements committed in the course of the procedure? This also raises the question whether the addressee of the administrative measure comprising a financial correction relating to State aid from ESI Funds must simultaneously fulfil both conditions of being the recipient of the grant affected by the irregularity and being the user of the resources in question.
- 25 To the extent that the clause in the partnership agreement relating to liability for financial corrections is interpreted by the courts as a redress clause which only applies within the internal relationship between the partners, it must be determined whether liability for breaches of the law in the use of State aid from ESI Funds can be regulated or reassigned by the contract between the recipient and the aid manager or whether the recipient who has used it unlawfully is fully liable.
- 26 Furthermore, the right to good administration is a fundamental right conferred on individuals by Article 41 of the Charter. The right to good administration includes: 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. Under 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.
- 27 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 public service operator, such as the municipal company in the main proceedings, 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 measure, on the ground that the operator, as a partner of the municipality, bears civil liability for redress under the partnership agreement.