Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 18 November 2020[1]

Case C-544/19

'ECOTEX BULGARIA' EOOD
v
Teritorialna direktsia na Natsionalna agentsia za prihodite – Sofia,
other party to the proceedings:
Prokuror ot Okrazhna prokuratura – Blagoevgrad

(Request for a preliminary ruling from the Administrativen sad Blagoevgrad (Administrative Court, Blagoevgrad, Bulgaria))

(Reference for a preliminary ruling – Article 63 TFEU – Freedom of movement of capital and payments – Directive (EU) 2015/849 – Non-Member State of the euro area – National legislation prohibiting payment in cash, within the national territory, where the amount is equal to or greater than a prescribed threshold, and requiring the use of a bank transfer or deposit into a payment account – Distribution of company dividends to a shareholder in the form of a payment in cash exceeding the threshold prescribed by national legislation – Imposition of an administrative penalty of a criminal nature – Compatibility of the national legislation with EU law – Efforts to combat tax evasion and avoidance – Proportionality)

I. Introduction

1. To what extent is it compatible with EU law for national legislation to forbid any natural or legal person from making a payment in cash, within the national territory, where the amount of the payment is equal to or greater than a prescribed threshold, and requiring them to make such a payment by other means, in default of which a penalty may be imposed?

2. That, in essence, is the question raised by the Administrativen sad Blagoevgrad (Administrative Court, Blagoevgrad, Bulgaria) in the present case.

[1] Original language: French.

3. It is a topical question, given that the Court, sitting in Grand Chamber, is shortly to rule on the circumstances in which the Union and the Member States of the euro area may, in the exercise of their respective powers, adopt regulations restricting the use of cash, or in other words banknotes and coinage issued by the central banks, as a means of payment. [2]

4. The present matter differs from the *Hessischer Rundfunk* cases (Cases C-422/19 and C-423/19), however, in that the national legislation at issue in the main proceedings relates to the Republic of Bulgaria, which is not a Member State of the euro area. The Republic of Bulgaria is a 'Member State with a derogation' under Article 139(2) TFEU, and is not bound by the provisions of EU law governing the issue and use of the single currency, and particularly the status of euro-denominated banknotes and coins as legal tender. Nonetheless, it is part of the internal market of the European Union, and as such it is required to respect the associated freedoms of movement.

5. The question referred to the Court also comes after the Commission Report to the European Parliament and the Council of 12 June 2018 on restrictions on payments in cash, [3] as well as opinions produced on that subject by the European Central Bank (ECB), [4] at the request of the Ministers of Finance of the Kingdom of Belgium, the Republic of Bulgaria and the Kingdom of the Netherlands. [5]

6. In the present case, the Court is, first of all, invited to clarify whether legislation such as that at issue in the main proceedings falls within the scope of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, [6] or whether it is to be examined from the perspective of Article 63 TFEU, which guarantees free movement of capital and payments.

7. The Court is also invited to rule on whether the system of penalties established by that legislation is compatible with, amongst other things, the principle of proportionality of penalties and the right to an effective legal remedy, as enshrined in the Charter of Fundamental Rights of the European Union ('the Charter').

[2] I refer here to Cases C-422/19 and C-423/19, *Hessischer Rundfunk*, which are pending before the Court and relate to whether it is compatible with Article 2(1) TFEU (read together with Article 3(1) TFEU), the third sentence of Article 128(1) TFEU, the first paragraph of Article 16 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank and the second sentence of Article 10 of Council Regulation (EC) No 974/98 of 3 May 1998 (OJ 1998 L 139 p. 1) for German legislation to provide that radio and television licence fees may not be paid in cash, but must be paid by means of direct debit, individual transfer or standing order.

[3] COM(2018) 483 final ('the report on restrictions on payments in cash'). In that report, the European Commission observes that numerous Member States, most of which are members of the euro area, have introduced legislation restricting payments in cash. Those measures are relatively diverse in terms both of their nature and of their scope, with the restrictions applying above a threshold which varies from EUR 500 to EUR 15 000 (section 2.2.2). See, in particular, the Ecorys impact study entitled 'Study on an EU initiative for a restriction on payments in cash' of 15 December 2017, available at: https://ec.europa.eu/info/sites/info/files/economy-finance/final_report_study_on_an_eu_initative_ecorys_180206.pdf (p. 67), to which the Commission refers.

[4] The Member States of the euro area are required to consult the ECB on any draft legislative provisions relating to means of payment, under Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ 1998 L 189, p. 42).

[5] See, in relation to the Kingdom of Belgium, opinion of the European Central Bank of 30 May 2017 on the limitation of cash payments (CON/2017/20), in relation to the Republic of Bulgaria, opinion of the European Central Bank of 11 July 2017 on limitation of cash payments (CON/2017/27), and, in relation to the Kingdom of the Netherlands, opinion of the European Central Bank of 30 December 2019 on limitation to cash payments (CON/2019/46).

[6] Directive of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ 2015 L 141, p. 73).

8. In this Opinion, I will explain why I do not consider that legislation such as that at issue in the main proceedings falls within the scope of Directive 2015/849. I will base my assessment not only on the objectives that the EU legislature is seeking to pursue through that directive, but also on the general scheme of the directive and its wording. I will accordingly suggest that the Court should examine the compatibility of such legislation from the perspective of the free movement of capital and payments enshrined in Article 63 TFEU.

9. In that regard, I will explain that the national legislation at issue constitutes, in itself, a restriction on that freedom which can be justified by the imperatives arising from efforts to combat tax evasion and avoidance. I will explain, nonetheless, that such legislation can truly achieve that objective only in so far as it is supported by measures addressing banking inclusion with regard to the most vulnerable individuals, as well as measures creating exceptions in favour of individuals who, for legitimate reasons, are unable to use the means of payment required by the national legislature. I will also set out the reasons why the system of penalties established pursuant to that legislation is liable to constitute a measure contrary to the principle of proportionality set out in Article 49(3) of the Charter.

II. Legal background

A. Directive 2015/849

10. Article 1(1) of Directive 2015/849 states that that directive aims to prevent the use of the Union's financial system for the purposes of money laundering and terrorist financing.

11. In accordance with Article 2(1)(3)(e), the directive applies to 'other persons trading in goods to the extent that payments are made or received in cash in an amount of EUR 10 000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked'.

12. Article 4(1) of the directive provides:

'Member States shall, in accordance with the risk-based approach, ensure that the scope of this Directive is extended in whole or in part to professions and to categories of undertakings, other than the obliged entities referred to in Article 2(1), which engage in activities which are particularly likely to be used for the purposes of money laundering or terrorist financing.'

13. Article 5 of Directive 2015/849 reads as follows:

'Member States may adopt or retain in force stricter provisions in the field covered by this Directive to prevent money laundering and terrorist financing, within the limits of Union law.'

B. Bulgarian law

1. The ZOPB

14. By virtue of Article 1 of the zakon za ogranichavane na plashtanyata v broy (Law on the restriction of payments in cash),[7] that law governs the restrictions on payments in cash within Bulgarian territory.[8]

15. Subject to the exceptions expressly set out in Article 2, Article 3 of the ZOPB provides:

'(1) Payments within the national territory shall only be made by transfer or deposit into a payment account where they are:

1. … in an amount of at least BGN 10 000 [10 000 Bulgarian lev, or EUR 5 113];

2. … in an amount less than BGN 10 000 [EUR 5 113], representing part of a contractual payment of an amount of at least BGN 10 000 [EUR 5 113].

(2) … Paragraph 1 applies equally to payments in foreign currency in amounts equivalent to at least BGN 10 000 [EUR 5 113]. The equivalent amount in BGN shall be calculated at the Balgarska narodna banka [Bulgarian National Bank] rate as at the day of payment.'

16. Article 5 of the ZOPB states:

'(1) Any person infringing Article 3, or permitting an infringement of that article, is liable to a fine amounting to of 25% of the total amount of the payment (in the case of a natural person) or to a financial penalty amounting to 50% of the total amount of the payment (in the case of a legal person).

(2) In the event that the infringement referred to in paragraph 1 is repeated, the fine shall amount to 50% of the amount of the payment, and the financial penalty shall amount to 100% of the amount of the payment.'

17. Article 6 of the ZOPB provides:

'(1) Findings of infringement of the present law shall be made by the Natsionalna agentsia za prihodite [national revenue agency, Bulgaria]. The administrative penalties shall be imposed by the executive director of the national revenue agency, or by members of staff authorised by him.

(2) The zakon za administrativnite narushenia i nakazania [Law on infringement and administrative penalties][9] governs the determination and adoption of administrative penalties, the routes of appeal against such penalties, and their enforcement.'

[7] DV No°16 of 22 February 2011; 'the ZOPB'.

[8] See also the instructions from the Ministerstvo na finansite (Ministry of Finance, Bulgaria) of 4 April 2011, concerning the application of the ZOPB ('the instructions concerning the application of the ZOPB'), available at: https://www.minfin.bg/upload/9272/Ukazanie.PDF.

[9] DV No 92 of 28 November 1969; 'the ZANN'.

2. The ZANN

18. Article 27 of the ZANN provides:

‘(1) Administrative penalties shall be determined in accordance with the provisions of this law, within the limits of the penalty provided for in relation to the offence.

(2) In determining the penalty, regard shall be had to the seriousness of the offence, the reasons for its commission, and other mitigating or aggravating circumstances, as well as the financial situation of the offender.

(3) Mitigating circumstances shall lead to the imposition of a more lenient penalty, and aggravating circumstances to the imposition of a more severe penalty.

…

(5) … the penalty imposed [shall not] be lower than the prescribed minimum, in relation to fines and suspension of the right to exercise a specified profession or activity.’

19. Article 28(a) of the ZANN provides that, in the case of a minor administrative offence, it is open to the authority with power to impose penalties not to do so, but in such a case it must inform the person committing the offence, either orally or in writing, that an administrative penalty will be imposed in the event of a repeat offence.

20. Under Article 63(1) of the ZANN, the Rayonen sad (District Court, Bulgaria), sitting in a composition consisting of a single judge, has jurisdiction to examine the case on the merits and deliver a judgment which may uphold, amend or overturn either the decision imposing an administrative penalty, or the electronic record. An appeal on a point of law lies from that judgment to the Administrativen sad (Administrative Court, Bulgaria), on the grounds provided for in the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure), in accordance with Chapter 12 of the Administrativnoprotsesualen kodeks (Code of Administrative Procedure).

III. The main proceedings and the questions referred for a preliminary ruling

21. ‘ECOTEX BULGARIA’ EOOD [10] is a single member company incorporated under Bulgarian law, the capital of which is held by KS, a Greek national. On 14 March 2018, at the general meeting of Ecotex, a resolution was passed for KS to receive the sum of BGN 100 000 (EUR 51 130) in the form of dividends, to be paid in cash by way of authorised withdrawals from company funds.

A. The administrative proceedings against Ecotex

22. Following an inspection ordered on 8 December 2017 by the competent revenue authority within the Teritorialna direktsia na Natsionalna agentsia za prihodite – Sofia (regional directorate of the national revenue agency – Sofia, Bulgaria), it was established that the financial transactions between the company and its clients, mainly originating from the Hellenic Republic and the Republic of Cyprus, had been carried out through the banking system. It was also

[10] Referred to below as ‘Ecotex’.

established that, under the resolution of 14 March 2018, and during the period between 14 March 2018 and 22 March 2018, a sum of BGN 95 000 (about EUR 48 573.50) had been paid to KS, in cash, by way of nine authorised withdrawals of BGN 10 000 (EUR 5 113) each, and one authorised withdrawal in an amount of BGN 5 000 (EUR 2 556.50). The regional directorate of the national revenue agency – Sofia, Blagoevgrad office, announced on 5 June 2018 that criminal proceedings of an administrative character had been instituted, and on 26 June 2018 it adopted an act by which it found that that the provisions of the ZOPB had been infringed.

23. On 10 July 2018, Ecotex lodged an objection to that act on the ground that the offence could be regarded as minor within the meaning of Article 28 of the ZANN, given that the payment of BGN 10 000 (EUR 5 113) only exceeded the restriction on payments in cash imposed by the ZOPB by BGN 0.01.

24. On 3 September 2018, the vice-director of the regional directorate of the national revenue agency – Sofia, imposed a financial penalty on Ecotex, on the basis of Article 5(1) of the ZOPB, in respect of each of the infringements found to have taken place. It is apparent from the order for reference that each of the payments of BGN 10 000 (EUR 5 113) was characterised as an 'offence' and that nine administrative penalties were accordingly imposed. In accordance with the national legislation, each penalty was in the sum of BGN 5 000 (EUR 2 556.50), or 50% of the amount paid in cash.

25. Ecotex brought an action for annulment of that decision before the Rayonen sad Petrich (District Court of Petrich, Bulgaria), which upheld the decision. Ecotex brought an appeal on a point of law before the referring court.

B. The proceedings before the referring court

26. Before the referring court, Ecotex argued once again that, as the offence in question was minor, the penalty of 50% of the total amount paid in cash was disproportionate. It also submitted that the right to company dividends did not constitute a transaction or contract, and accordingly did not fall within the concept of 'payment', for the purposes of Article 3(1)(1) of the ZOPB.

27. The regional directorate of the national revenue agency – Sofia argues, for its part, that the concept of 'payment' in Article 3(1)(1) of the ZOPB must be understood as relating to any payment or financial transaction, of any kind.

28. The referring court makes the preliminary remark that the ZOPB transposed Directive 2005/60/EC,[11] which was repealed with effect from 26 June 2017 by Directive 2015/849,[12] into domestic law. It therefore considers that Article 3(1)(1) of the ZOPB must be interpreted from the perspective of Article 63 TFEU and the relevant provisions of Directive 2015/849.

29. The referring court observes, first of all, that the concept of 'movement of capital' extends to the receipt of dividends on shares and equity interests in commercial companies. It therefore wishes to establish whether Article 63 TFEU – which prohibits, amongst other things, measures

[11] Directive of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15), as amended by Directive 2010/78/EC of the European Parliament and of the Council of 24 November 2010 (OJ 2008 L 331, p. 120).

[12] See Article 66 of Directive 2015/849.

liable to deter non-residents from investing in a Member State or retaining an investment in a Member State – precludes a provision such as Article 3(1)(1) of the ZOPB, which imposes a restriction on payments in cash.

30. Second, the referring court wishes to establish whether the restriction on payments in cash imposed by Article 3(1)(1) of the ZOPB falls within the substantive scope of Directive 2015/849, and if so, whether the Member States are free to set a cash payment threshold of less than EUR 10 000.

31. Third, the referring court wishes to establish the extent to which the detailed provisions relating to the determination of the amount of the fine to be imposed in the event of infringement of the restriction on payments in cash, and to judicial review of a decision making a finding of infringement, are incompatible with the principle of proportionality of penalties and the right to an effective judicial remedy enshrined in the Charter.

C. Questions referred

32. In the light of the matters set out above, the Administrativen sad Blagoevgrad (Administrative Court, Blagoevgrad) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 63 TFEU be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which domestic payments amounting to [BGN 10 000 (EUR 5 113)] or more are only to be made by transfer or deposit into a payment account and which restricts the cash payment of dividends from undistributed profits of [BGN 10 000 (EUR 5 113)] or more? If Article 63 TFEU does not preclude that regulation, is such a restriction justified by the aims of Directive … 2015/849?

(2) Must Article 2(1) of Directive … 2015/849, read together with Recital 6 and Articles 4 and 5 thereof, be interpreted as allowing a general national legislative provision, such as that at issue in the main proceedings, under which domestic payments of [BGN 10 000 (EUR 5 113)] or more are only to be made by transfer or deposit into a payment account, irrespective of the person or the reason for the cash payment, which covers all cash payments between natural and legal persons?

   (a) If that question is answered in the affirmative, does Article 2(1)(3)(e) of Directive … 2015/849, read together with Recital 6 and Articles 4 and 5 thereof, allow the Member States to provide for additional general restrictions of domestic cash payments in a national legislative provision such as that at issue in the main proceedings, under which domestic cash payments of [BGN 10 000 (EUR 5 113)] or more are only to be made by transfer or deposit into a payment account, if the reason for the cash payment is 'undistributed profits' (dividends)?

   (b) If that question is answered in the affirmative, does Article 2(1)(3)(e) of Directive … 2015/849, read together with Recital 6 and Article 5 thereof, allow the Member States to provide for restrictions of cash payments in a national legislative provision, such as that at issue in the main proceedings, under which domestic payments of [BGN 10 000 (EUR 5 113)] or more are only to be made by transfer or deposit into a payment account, where the threshold value is below EUR 10 000?

(3) (a) Must Article 58(1) and Article 60(4) of Directive … 2015/849, with regard to Article 49(3) of the [Charter], be interpreted as precluding a national legislative provision such as that in question in the main proceedings, which stipulates a fixed level of administrative penalties for infringements of the cash payment restrictions and does not allow any differentiating assessment taking account of the specific relevant circumstances?

(b) If the answer is that the provisions of Article 58(1) and Article 60(4) of Directive … 2015/849, with regard to Article 49(3) of the [Charter], allow a national legislative provision such as that in question in the main proceedings, which stipulates a fixed level of administrative penalties for infringements of the cash payment restrictions, must the provisions of Article 58 and Article 60(4) of Directive … 2015/849, in consideration of the principle of effectiveness and the right to an effective remedy under Article 47 of the [Charter], be interpreted as precluding a national legislative provision such as that in question in the main proceedings, which restricts judicial review, if that provision does not allow the court to determine an administrative penalty for infringements of the cash payment restrictions, in the event of an appeal, below the amount that has been set, taking account of the specific relevant circumstances?'

33. Written observations were submitted by the Bulgarian, Czech, Spanish, Italian and Hungarian Governments, and by the Commission.

34. With the agreement of the Judge-Rapporteur, it was decided to put questions to the Bulgarian Government, pursuant to Article 62(1) of the Rules of Procedure of the Court, and to request clarification from the referring court, pursuant to Article 101(1) of those rules. Both the Bulgarian Government and the referring court responded in writing within the period prescribed.

IV. Analysis

35. Before turning to the analysis of the questions referred, I think it would be helpful to make a preliminary remark about the order in which they should be examined.

36. In the present case, the first and second questions relate, respectively, to whether national legislation which, like the Bulgarian legislation, lays down a general restriction on payments in cash made within the national territory, covering distributions of dividends, complies with the provisions of the FEU Treaty concerning freedom of movement of capital and payments, and with Article 2(1) of Directive 2015/849, read together with recital 6 and Articles 4 and 5 thereof.

37. I observe that, in accordance with settled case-law, any national measure in an area which has been the subject of exhaustive harmonisation at the level of the European Union must be assessed in the light of the provisions of that harmonising measure, and not in the light of the provisions of primary law. [13]

38. In those circumstances, I propose to deal with the first and second questions in reverse order.

39. I will begin by examining the second question, and determining whether the national legislation at issue in the main proceedings does in fact fall within the area harmonised by Directive 2015/849. For the reasons I set out below, that is not the case; in my view the legislation does not fall within the scope of that directive.

[13] See judgment of 18 September 2019, *VIPA* (C-222/18, EU:C:2019:751, paragraph 52 and the case-law cited).

40. Accordingly, I go on to consider the referring court's first and third questions, which are directed towards primary law and fundamental rights.

41. By its first question, the referring court invites the Court to consider whether the national legislation at issue in the main proceedings complies with the rules concerning freedom of movement of capital and payments enshrined in Article 63 TFEU. Inasmuch as, for the reasons I develop below, the national legislation constitutes a restriction on that freedom, I will consider whether that restriction can be justified on legitimate grounds and, if so, the extent to which it is appropriate for ensuring attainment of the objectives it pursues, and is proportionate. That will provide the context for my consideration of the issue raised in the third question referred. By the third question, the referring court essentially seeks to establish whether Article 47 of the Charter, which guarantees the right to an effective judicial remedy, and Article 49(3) of the Charter, which enshrines the principle of proportionality of penalties, preclude a system of penalties such as that introduced by Article 5 of the ZOPB, given that that system does not permit either the national authority responsible for punishing the infringement (first aspect of the question) or the national court hearing an action brought against the decision adopted by that authority (second aspect of the question) to individualise the fine.

A. Consideration of the national legislation at issue in the main proceedings from the perspective of Directive 2015/849

42. By its second question, the referring court essentially seeks to establish whether, under Article 2(1)(3)(e) of Directive 2015/849, read together with recital 6 and Articles 4 and 5 thereof, it is open to a Member State, as regards all payments effected within the national territory in amounts equal to or greater than the prescribed threshold, to prohibit individuals and undertakings from paying in cash, and require them to make a transfer or a deposit into a payment account.

43. That question is referred to the Court to the extent that, pursuant to Article 2(1)(3)(e) of Directive 2015/849, that directive applies to payments made in cash either by persons trading in goods or in favour of such persons, in amounts of EUR 10 000 or more. That directive provides, moreover, in Article 4, that Member States may extend this scope to professions or categories of undertaking which engage in activities which are particularly likely to be used for the purposes of money laundering or terrorist financing. Finally, that directive provides, in Article 5, that Member States may adopt stricter provisions, in the field it covers, to prevent such criminal activity. Furthermore, it is apparent from recital 6 of Directive 2015/849 that Member States should 'be able to adopt lower thresholds, additional general limitations to the use of cash and further stricter provisions'.

44. The question to be answered by the Court, therefore, is whether the national legislation at issue in the main proceedings is capable of falling within one of those provisions.

45. I do not consider that it is, having regard to the objectives pursued by the EU legislature through Directive 2015/849, the general scheme of that directive and the wording of Articles 2, 4 and 5 of that directive, which are cited by the referring court.

46. In relation, first of all, to the objectives of Directive 2015/849, that directive seeks to counter threats to the integrity, proper functioning, reputation and stability of the financial system posed by the use of that system for the purposes of money laundering and terrorist financing. [14] To that end, the directive harmonises the measures of due diligence and monitoring which Member States are required to introduce with regard to those categories of profession which are most vulnerable to the manipulation of funds derived from serious crime and the collection of money or goods for terrorist purposes. While tax offences relating to direct and indirect taxes are among the criminal activities falling within the scope of the directive, [15] that is subject to the condition that they are punishable by deprivation of liberty or a detention order. [16] Thus, the EU legislature is seeking to prevent the commission of tax offences considerably more serious than those involved in infringement of a restriction of payments in cash.

47. As to the national legislation at issue in the main proceedings, this is intended to combat tax evasion and avoidance by requiring payments in amounts equal to or greater than BGN 10 000 (EUR 5 113) to be made by way of transfer or deposit into a payment account – and not in cash – so as to ensure that financial transactions are traceable. As the Bulgarian Government points out in its observations, the objective of the ZOPB, as set out in the draft grounds of that law, is to limit the underground economy, and particularly situations in which flows of money are not recorded in accounting documents and thus escape tax and social security contributions. In that regard, the Bulgarian Government indicates that the ZOPB does not contain any measure relating to efforts to combat money laundering or terrorist financing. It states that the ZOPB is not a measure transposing Directive 2015/849 and does not contain any reference to that directive, which was transposed into national law by the zakon za merkite sreshtu izpiraneto na pari (Law on measures to combat money laundering) [17] and the zakon za merkite sreshtu finantsiraneto na terorizma (Law on measures to combat terrorist financing). [18]

48. It is clear that the objectives pursued by the EU legislature through Directive 2015/849 are quite different from those pursued by the Bulgarian legislature through the ZOPB.

49. In relation, second, to the general scheme of Directive 2015/849, this seeks to establish measures which, considered in the light of the objective they pursue, differ in terms of their nature and their addressees from those implemented by the national legislation at issue in the main proceedings.

50. The measures adopted under that directive are based on an approach founded on the risk of money laundering and terrorist financing. [19]

[14] Article 1 and recital 5 of Directive 2015/849.

[15] The criminal activities are defined in Article 3(4) of Directive 2015/849.

[16] See Article 3(4)(f) and recital 11 of Directive 2015/849.

[17] DV No 27, of 27 March 2018.

[18] DV No 16, of 18 February 2003.

[19] See recitals 23 and 30 and Article 1 of Directive 2015/849.

51. As to the nature of those measures, they comprise obligations relating to due diligence, monitoring, information, reporting and retention of records, the content and scope of which are precisely described in Chapters II to V of Directive 2015/849. [20]

52. In contrast, the ZOPB is limited to regulating the use of means of payment by natural or legal persons within national territory. None of the measures provided for by the directive requires Member States to regulate the use of means of payment within their territory. While it is true that, under Article 5 of the directive, the Member States 'may adopt or retain in force stricter provisions … to prevent money laundering and terrorist financing', this, as the EU legislature has expressly stated in that article, is strictly limited to provisions which belong to 'the field covered by this Directive', and are 'within the limits of Union law'. However, for the reasons I set out, legislation such as that at issue, imposing a general restriction on payments in cash within the territory in order to combat tax evasion and avoidance, is not within the field covered by Directive 2015/849.

53. Turning to the ratione personae scope of the two texts, the national legislation at issue in the main proceedings is applicable to any natural or legal person, regardless of the capacity in which that person makes the payment, of whether the payment relates to a transaction, and, if it does, of the nature of that transaction.

54. In contrast, it is clear that the measures relating to due diligence, monitoring, information, reporting and retention of records contained in Directive 2015/849 are addressed to a limited range of entities, which can be identified either on the basis of the degree to which they are exposed to risks of money laundering and terrorist financing, or on the basis of the degree of vulnerability of their transactions. It is true that, by virtue of Article 2(1)(3)(e) of the directive, that range includes 'other persons trading in goods to the extent that payments are made or received in cash in an amount of EUR 10 000 or more'. It is also true that, in recital 6 of the directive, the EU legislature states that 'Member States should be able to adopt lower thresholds, additional general limitations to the use of cash and further stricter provisions'. However, that statement cannot bring legislation such as that at issue within the scope of Directive 2015/849, both because it is imprecise and because provisions contained in the recitals of a directive are not binding.

55. Furthermore, although the EU legislature, in Article 4 of Directive 2015/849, authorises the Member States to extend the scope of that directive, this – as the legislature expressly states – is only to the extent that the extension conforms to the risk-based approach, and that it relates to professions and to categories of undertakings 'which engage in activities which are particularly likely to be used for the purposes of money laundering or terrorist financing'. In other words, that provision permits a Member State to impose due diligence and monitoring measures on a broader category of undertakings, on the basis of its own risk analysis, which it may conduct under Article 7 of the directive, but in my view it does not provide a basis for legislation such as that at

[20] The Commission and the Member States are thus required to identify, evaluate and understand the threats of money laundering and financing of terrorism so as to be able to mitigate them and, if appropriate, to freeze, seize and confiscate the proceeds of crime. To that end, the Member States must require credit institutions, first, to take customer due diligence measures in accordance with their risk assessments (Chapter II), second, to communicate information concerning the actual beneficiaries of transactions (Chapter III) and third, to report suspicious transactions to a financial intelligence unit which the Member States are specifically required to establish (Chapter IV). In order to ensure compliance with those obligations, the EU legislature recognises that the competent national authorities have enhanced powers of surveillance and monitoring in relation to credit institutions, the Member States being required, moreover, to provide for sanctions in the event of breach of those obligations.

issue in the main proceedings, which regulates the use of means of payment within the national territory, with regard to all natural and legal persons, for the purposes of combating tax evasion and avoidance.

56. In the light of those considerations, therefore, I take the view that national legislation such as that at issue in the main proceedings, which, in order to combat tax evasion and avoidance, prohibits natural or legal persons from making a payment in cash, within the national territory, where the amount of the payment is equal to or greater than a prescribed threshold, and requires them to make the payment by way of a transfer or a deposit into a payment account, is not within the scope of Directive 2015/849.

57. Inasmuch as there is currently no EU legislation relating to the circumstances in which – or the arrangements by which – States which are not members of the euro area, such as the Republic of Bulgaria, may restrict payments in cash within their national territory,[21] the national legislation at issue must examined solely from the perspective of primary law, and particularly the rules relating to freedom of movement.

B. Consideration of the national legislation at issue in the main proceedings from the perspective of Article 63 TFEU

58. By its first question, the referring court asks the Court, essentially, whether Article 63 TFEU is to be interpreted as precluding legislation of a Member State which prohibits payments being made in cash, within the national territory, where the amount is equal to or greater than the prescribed threshold, and requires such payments to be made by way of a transfer or a deposit into a payment account, including where they relate to a distribution of company dividends.

59. In the absence of common or harmonised rules, States which are not members of the euro area, such as the Republic of Bulgaria, are free to restrict payments in cash within their territory. They are nevertheless required, like any Member State, to act in a manner consistent with the rules of the internal market, and particularly the Treaty rules concerning freedoms of movement.[22]

60. In the context of the main proceedings, the compatibility of the national legislation must be assessed by reference to the freedom of movement which is directly impeded.[23]

61. In the present case, it was a distribution of dividends that triggered the application of the legislation at issue by the competent national authorities. Dividends constitute capital income which, according to settled case-law, is to be dealt with in accordance with the rules concerning free movement of capital.[24] I accordingly suggest that the Court's analysis should be conducted in the light of the rules relating to freedom of movement of capital and payments set out in Article 63 TFEU.

[21] See the report on restrictions on payments in cash (section 2.2.1).

[22] See, by analogy, judgment of 22 November 2018, *Vorarlberger Landes- und Hypothekenbank* (C-625/17, EU:C:2018:939, paragraph 27 and the case-law cited).

[23] See judgment of 7 September 2017, *Eqiom and Enka* (C-6/16, EU:C:2017:641, paragraph 44 and the case-law cited).

[24] See, in that regard, judgment of 6 June 2000, *Verkooijen* (C-35/98, EU:C:2000:294, paragraph 26 et seq.), where the Court held that such an operation is indissociable from a capital movement.

62. It is thus necessary to determine (just as the referring court invites the Court to determine) whether the legislation at issue is to be analysed as a restriction on the freedom of movement of capital and payments, as provided for in Article 63 TFEU, and if so, whether such a restriction can be justified.

1. Whether there is a restriction on the freedom of movement of capital and payments

63. Article 63 TFEU prohibits all restrictions on the movement of capital and payments between Member States and between Member States and third States.

64. As is apparent from the terms of that provision, its infringement requires the existence both of movements of capital and payments with a cross-border dimension and of a restriction imposed on them.

65. First of all, I consider that the national legislation at issue in the main proceedings, being general in nature, is capable of relating to movements of capital and payments with a cross-border dimension.

66. It is true, as the Bulgarian and Czech Governments have pointed out in their observations, that the national legislation at issue in the main proceedings goes no further than to regulate the means of payment to be used in relation to payments made within the territory of a Member State. I would observe, however, that that legislation is applicable to all natural or legal persons making a payment within the territory of that Member States, regardless of their nationality, residence (in the case of a natural person), seat (in the case of a legal person) or indeed the capacity in which they are acting. Accordingly, it is applicable even where the payment is made by a natural or legal person resident or established in a Member State other than the Republic of Bulgaria, or in favour of such a person, in relation for example to a cross-border supply of services.

67. Furthermore, Article 3 of the ZOPB encompasses both payments made in Bulgarian lev and payments made in foreign currencies, and is applicable regardless of the type or nature of the transaction to which the payment relates. [25] Thus, in accordance with the instructions concerning the application of the ZOPB, [26] that legislation was applied, in the present case, to a distribution of dividends of a company legally established within national territory to the sole shareholder of that company, who, as it happens, is a Greek national. I do not think it can seriously be disputed that a distribution, made in cash, of dividends originating from an undertaking established in Bulgaria to a shareholder who is a citizen of another Member State is a movement of capital and a payment with a cross-border dimension for the purposes of Article 63 TFEU. [27]

68. Second, I think it is beyond argument that the national legislation at issue constitutes a restriction on the free movement of capital and payments, notwithstanding that it does not discriminate on the basis of the nationality of the natural or legal persons concerned.

[25] Part III, section 1, of the instructions concerning the application of the ZOPB states that the ZOPB governs the limitation of all payments entering into the civil and economic turnover of the country, which means that the type of transaction, contract or operation does not, in principle, have any relevance as regards the scope of the law, the amount of the payment provided for, ascertainable or actually made being the only relevant factor.

[26] See Part IV section 6 of the instructions.

[27] If I am not mistaken, it is not possible to identify the place of residence of KS from the documents submitted to the Court by the referring court.

69. Legislation which regulates the use of means of payment in a general manner, prohibiting individuals and undertakings from making a payment in cash where the amount is equal to or greater than BGN 10 000 (EUR 5 113), and requiring them make such a payment by one of the means prescribed by the legislature, in default of which a penalty may be imposed, constitutes in itself a restriction on the free movement of capital and payments.

70. I would observe that the status of coins and bank notes as legal tender entails, in principle, that payments in cash are required to be accepted. The use of coins and notes is thus recognised as a means of payment which is available without restriction to any person subject to a payment obligation.

71. Thus, within the euro area, under the Commission Recommendation of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins,[28] such legal tender implies, where a payment obligation exists, that the creditor cannot refuse to accept a payment in cash, and that the debtor can discharge himself from the payment obligation by tendering euro banknotes and coins.[29] The Commission accordingly states that 'acceptance of euro banknotes and coins as means of payments in retail transactions should be the rule'.[30]

72. In that regard, according to the findings of an ECB study carried out in 2016,[31] cash remains the most accessible means of payment, and also the most common, particularly in relation to certain economic sectors and many small and medium-sized enterprises.[32] In the euro area, about 79% of point-of-sale payments were made in cash, with about 21% of such payments being made by card and about 2% by other means of payment. In terms of value, cash payments had a market share of almost 54%, with card payments at 39% and other payment instruments at about 7%.[33] According to that study, 10% of the cash transactions analysed related to goods or services with a value of over EUR 100.[34]

73. I would also observe that national legislation such as that at issue in the main proceedings has the effect not only of preventing payments being made in cash or by other legal means of payment, such as bank cards, but also of requiring individuals and undertakings to effect a transfer or a deposit into a payment account.

74. It must be said that the range of payment solutions permitted by the Bulgarian legislature is not extensive, and means for example that an individual must have a bank account and use that account to make payment. However, the ceiling of BGN 10 000 (EUR 5 113) does not, in itself, rule out the possibility of an individual preferring to pay such an amount in cash or by card, for reasons connected with the immediacy or convenience of those means of payment, or because they are free of charge, rather than by way of transfer. It therefore seems to me that the national legislation at issue may dissuade an individual residing, for example, in a border area, from going

28 OJ 2010 L 83, p. 70.

29 Paragraph 1(a) and (c) of the recommendation.

30 Paragraph 2 of the recommendation.

31 Set out in the ECB report 'The use of cash by households in the euro area', available at: https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op201.en.pdf.

32 See paragraph 4 of the report on restrictions on payments in cash, which also states that 'cash remains the most common means of payment in the euro area and still represents a significant store of value' (paragraph 2.1, referring to the ECB report 'The use of cash by households in the euro area'.

33 See the ECB report 'The use of cash by households in the euro area', p. 19.

34 See the ECB report 'The use of cash by households in the euro area', p. 25.

into the neighbouring Member State in order to buy goods from traders, or obtain services from service providers, who will require payment by means of a transfer or a deposit into a payment account.

75. Similarly, from the point of view of a company I observe that, in accordance with the contractual freedom they enjoy, shareholders are, in principle, free to determine the arrangements for payment of dividends, and particularly the form they are to take. A legal rule such as Article 3 of the ZOPB has the effect of restricting the freedom of such shareholders to pay dividends in cash, as by doing so they expose the company to a fine of particular severity.

76. It is true that a bank transfer has clear advantages as regards cross-border payments in that, for example, it avoids the need for individuals and companies to carry large sums in cash. On the other hand, various bank charges may apply to payments made in that way. While the Republic of Bulgaria is presently a Member State of the Single Euro Payments Area ('SEPA'),[35] I reiterate that it is not a Member State of the euro area. In those circumstances, the advantages envisaged in the context of the SEPA, such as the completion of cross-border transfers within one working day of receipt of the transfer instruction by the payer's bank, or competitive pricing, are only applicable to payments made in euros. As regards payments denominated in Bulgarian lev, the Bulgarian legislation governing the fees attaching to cross-border transfers thus remains applicable. On that basis, it is reasonable to suppose that the legislation at issue will result in dividends distributed to shareholders who do not hold a bank account within the national territory being subject to additional fees relating to the processing of a cross-border transfer denominated in national currency.

77. Having regard to those matters, therefore, it seems to me that legislation such as that at issue in the main proceedings is such as to restrict the freedom of movement of capital and payments guaranteed by Article 63 TFEU.

78. It is apparent from settled case-law, however, that such a restriction may be compatible with that article if it is justified by a legitimate ground or an overriding reason in the public interest and, if that is the case, if it is suitable for securing the attainment of the objective it pursues, does not go beyond what is necessary in order to attain that objective, and complies with the fundamental rights,[36] which I should now turn to consider.

79. Accordingly, I will set out below the few observations I am able to make as to whether those conditions are met in the main proceedings, bearing in mind that it is for the referring court to verify those matters which require verification in this regard.

[35] See Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009 (OJ 2012 L 94, p. 22), amended by Regulation No 248/2014 of 26 February 2014 (OJ 2014 L 94, p. 1). As the Court observed in the judgment of 5 September 2019, *Verein für Konsumenteninformation* (C-28/18, EU:C:2019:673), the intention behind SEPA is to develop, for payments in euros, common Union-wide payment services to replace national payment services (paragraph 18).

[36] See judgment of 26 February 2019, *X (Controlled companies established in third countries)* (C-135/17, EU:C:2019:136, paragraph 70 and the case-law cited). See also judgment of 8 May 2019, *PI* (C-230/18, EU:C:2019:383, paragraph 64 and the case-law cited).

2. Justification of the restriction

80. It is apparent from the wording of Article 65(1)(b) TFEU,[37] and from the case-law of the Court, that the need to prevent tax evasion and avoidance is a legitimate ground capable of justifying a restriction on the free movement of capital.

81. In the judgment of 30 April 2020, *Société Générale*,[38] the Court thus held that the need to ensure effective collection of taxes is a legitimate objective capable of justifying a restriction on the fundamental freedoms. A Member State is therefore permitted, the Court held, to implement measures enabling the amount of tax due to be verified, provided that those measures are appropriate for ensuring attainment of the objective pursued, and that they do not go beyond what is necessary to attain that objective.[39]

82. In the judgment of 26 February 2019, *X (Controlled companies established in third countries)*,[40] the Court also held that a national measure restricting the free movement of capital may be justified by the need to prevent tax evasion and avoidance where it specifically targets wholly artificial arrangements which do not reflect economic reality and the purpose of which is to avoid the tax normally payable on the profits generated by activities carried out in the territory of the Member State concerned.[41]

83. In the present case, what is required of the provisions of Article 3 of the ZOPB is that they combat the underground economy by ensuring that financial transactions are traceable and thus that taxes and social security contributions can be collected. As the Bulgarian Government explains and illustrates in its observations,[42] this legislation is intended, in particular, to combat tax avoidance practices by limiting the situations in which significant cash sums are not entered in the accounting records and therefore escape personal or corporate income tax, as well as mandatory national insurance contributions. The Bulgarian Government is seeking to address situations in which the financial records of a company are falsified so as to mislead the national revenue agency, or in which the remuneration declared to the bodies responsible for collecting national insurance contributions is artificially reduced. The obligation to make a distribution of dividends by means of a bank transfer or deposit into a payment account should therefore prevent 'concealed' distributions of dividends, thereby ensuring that distributions are taxed once only and in the appropriate tax jurisdiction.

84. Having regard to those matters, I think the legislation at issue in the main proceedings can be justified by a legitimate ground, based on combating tax evasion and avoidance.

85. I should now turn to examine whether that legislation is appropriate for ensuring attainment of the objective pursued and does not go beyond what is necessary in order to attain that objective.

37 Article 65(1)(b) TFEU provides that Article 63 TFEU is without prejudice to the right of Member States 'to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security'.

38 C-565/18, EU:C:2020:318.

39 See judgment of 30 April 2020, *Société Générale* (C-565/18, EU:C:2020:318, paragraph 38 and the case-law cited). See also judgment of 23 February 1995, *Bordessa and Others* (C-338/93 and C-416/93, EU:C:1995:54, paragraphs 19 to 21).

40 C-135/17, EU:C:2019:136.

41 See judgment of 26 February 2019, *X (Controlled companies established in third countries)* (C-135/17, EU:C:2019:136, paragraph 73 and the case-law cited).

42 The grounds set out by the Bulgarian Government in paragraph 53 et seq. of its observations are identical to those put forward in the request for an opinion it submitted to the ECB (see footnote 5 of this Opinion).

3. Whether the national legislation at issue is appropriate for ensuring attainment of the objectives it pursues

86. I note that, according to settled case-law of the Court, national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. [43]

87. While there is currently no consensus as to whether restrictions on payments in cash have any real impact on the extent of tax evasion and avoidance, [44] I emphasise that the question in the present case is not whether the Bulgarian legislation is capable of eradicating these phenomena, which are multifarious in both origin and nature, but to assess whether it is apt to combat them. It seems to me that there are numerous indications that the legislation at issue has been established in such a way to as combat tax evasion and avoidance in a coherent and systematic manner, in accordance with the case-law of the Court.

88. In relation, first of all, to the scope of the legislation, it enables tax evasion to be identified and, where appropriate, penalised as widely as possible. I reiterate that, subject to the exceptions referred to in Article 2 of the ZOPB, the legislation applies uniformly to all persons and undertakings making a payment within national territory in an amount equal to or greater than BGN 10 000 (EUR 5 113). All economic actors and sectors are thus subject to the same obligations, regardless of the nature or purpose of the transaction to which the payment relates.

89. I note, furthermore, that the ceiling of BGN 10 000 (EUR 5 113) is applicable whether the transaction is carried out singly or in the form of several linked transactions. This captures attempts to avoid the applicable legislation by dividing the payment of the sum due into as many instalments as are necessary to take it out of the scope of the ZOPB. It will be recalled in this regard, in relation to the main proceedings, that Ecotex made a distribution of company dividends in a total amount of BGN 100 000 (EUR 51 130), which it divided into nine instalments of BGN 10 000 (EUR 5 113) and one of BGN 5 000 (EUR 2 556.50).

90. In relation, secondly, to the means of payment prescribed by the legislation at issue for payments in an amount equal to or greater than BGN 10 000 (EUR 5 113), these do ensure that transactions can be identified and the tax rules can be applied.

[43] See judgments of 25 April 2013, *Jyske Bank Gibraltar* (C-212/11, EU:C:2013:270, paragraph 66 and the case-law cited), and of 19 December 2018, *Stanley International Betting and Stanleybet Malta* (C-375/17, EU:C:2018:1026, paragraph 51 and the case-law cited).

[44] In its report on the restrictions on payments in cash, the Commission states that such restrictions would have only a limited impact on tax fraud (section 5.2) given that other social, economic and political factors play an important role in tax fraud, that a significant form of it is conducted through non-cash transactions, with the fraud relying on complex legal structures and operations which are often of a multinational nature, and that a restriction on payments in cash would not necessarily operate as a deterrent. In contrast, in its resolution of 26 March 2019 on financial crimes, tax evasion and tax avoidance (2018/2121/(INI)), the European Parliament stated that 'cash transactions remain a very high risk in terms of money laundering and tax evasion, including VAT fraud, despite its benefits, such as accessibility and speed' (paragraph 13). In its opinion on the 'Proposal for a regulation of the European Parliament and of the Council on information accompanying transfers of funds' and the 'Proposal for a directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing' (OJ 2013 C 271, p. 31), the European Economic and Social Committee, for its part, pointed out that it had already stated that cash facilitates the underground economy and that payments other than in cash are more transparent in fiscal and financial terms and less costly for society as a whole, as well as being practical, safe and innovative (section 4.3).

91. The Bulgarian legislature is requiring the use of means of payment which ensure that financial transactions are traceable. [45]

92. Bank transfers and deposits into a payment account remove the element of anonymity in financial transactions and ensure that such transactions are traceable, so that they can be recorded and taxed by the revenue agency of the State. Payments in cash, on the other hand, provide no means of determining the details of the transaction (the parties, amount, purpose or date). In that regard, the Bulgarian Government states that the law encourages the use of bank transfers and deposits into payment accounts because they can be monitored, and can be identified and analysed in the context of a tax inspection, but do not prevent or delay the processing of the payment transaction, given the speed and convenience with which transactions are effected within the Bulgarian banking system.

93. Furthermore, although the Bulgarian legislature has excluded other means of payment, such as cheques and bank cards, this decision can be justified given the very high percentage of fraud relating to those two means of payment. [46]

94. Against that background, the mechanism established by the legislation at issue seems to contribute to efforts to combat tax evasion and avoidance.

95. Nonetheless, such legislation can truly achieve that objective only in so far as it is possible to comply with its requirements.

96. Prohibiting payments in cash and requiring the use of bank transfers or deposits into payment accounts, in order to combat tax evasion and avoidance, presupposes that individuals have or are in a position to open a bank account. [47] I would point out that certain individuals do not have access to banking services, or do not wish to use them. [48] On that point, I can only echo what was said by Advocate General Pitruzzella in his Opinion in *Dietrich and Häring*. [49] After observing that Directive 2014/92/EU [50] recognises that anyone legally resident in the European Union has the right to open a payment account with basic features in any country of the European Union – an account that must include the execution of payment transactions such as credit transfers and direct debits within the European Union – and encourages unbanked vulnerable consumers to

[45] See, to that effect, the provisions enacted by the EU legislature in Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006 (OJ 205 L 141, p. 1). In France, according to the 2018 annual report of the Observatoire de la sécurité des moyens de paiement de la Banque de France [Centre for the monitoring of the security of means of payment] (available at: https://www.banque-france.fr/sites/default/files/medias/documents/819172_osmp2018_web_3.pdf), bank transfers remain the non-cash means of transfer which is least affected by fraud, as well as the most significant by value (p. 35).

[46] According to the 2018 annual report of the Observatoire de la sécurité des moyens de paiement de la Banque de France (see the previous footnote), there is more fraud relating to cheques than any other means of payment, followed by bank cards, which, however, are much less used (p. 33, as well as pp. 19 and 48).

[47] Any legally constituted undertaking will, in principle, have a bank account. This is a requirement for registration in the commercial registers and for VAT.

[48] Directive of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (OJ 2014 L 257, p. 214), where the EU legislature observes that some consumers do not open payment accounts, either because they are denied them or because they are not offered adequate products (recital 7). See also, by way of illustration in relation to France, the 2019 annual report of the Observatoire de l'inclusion bancaire de la Banque de France [Bank of France centre for the monitoring of banking inclusion], available at: https://publications.banque-france.fr/sites/default/files/medias/documents/oibwebvf.pdf (*L'accès au compte et à des services bancaires adaptés* [access to accounts and suitable banking services], p. 9).

[49] C-422/19 and C-423/19, EU:C:2020:756, especially paragraphs 136 to 138.

[50] See in particular Article 2(2), Article 16 and recitals 9, 46 and 48 of that directive.

participate in the retail banking market, Advocate General Pitruzzella referred to recent data showing that the number of people who do not yet have access to basic financial services in the European Union and the euro area, while being a minority, is not insignificant.

97. In those circumstances, I think it is essential for the referring court to satisfy itself that the legislation at issue in the main proceedings is supported by measures which take banking inclusion of individuals into account. In accordance with recital 46 and Article 18(4) of Directive 2014/92, that directive is intended to ensure that unbanked vulnerable consumers have access to a bank account with basic features on more advantageous conditions than other consumers, for example free of charge.[51] This is all the more important for the fact that the penalty for infringement of Article 3 is severe.

98. It also means that the legislation must have a degree of flexibility. While I note that, in Article 2 of the ZOPB, the Bulgarian legislature creates an exception for 'persons subject to a general or specific lack of capacity', I think it is also necessary to establish whether there are special measures or exceptions which can be relied on by those who, for other legitimate reasons, connected for example with poverty or status (as in the case of an applicant for international protection), cannot make a bank transfer or a deposit into a payment account. In those circumstances, taken case by case, I do not think it would be impossible to ensure that a cash payment could be traced by identifying the amount, the purpose of the transaction and the parties involved (by requiring proof of identity, for example).

99. In relation, thirdly (and finally), to the system of penalties provided for in Article 5 of the ZOPB, it has to be said that the penalties for infringement of the restrictions on payments in cash enacted by Article 3 of the ZOPB are particularly severe. It is apparent from the indications given by the referring court that the fine liable to be imposed is an administrative penalty of a criminal nature.[52] There is no doubt that this system of penalties is designed to counter the risk of tax evasion and avoidance, through prevention and deterrence. I note that, in the judgment of 19 July 2012, *Rēdlihs*,[53] the Court held that it was entirely legitimate for the Member States to provide in national law for appropriate penalties to sanction the failure to observe the obligation to register in the register of taxable persons for VAT, in order to ensure the correct levying and collection of the tax and to prevent fraud.[54]

100. In those circumstances, and subject to the matters to be verified by the referring court, it seems to me that national legislation such as that at issue in the main proceedings, prohibiting payments in cash and requiring payments to be made by transfer or deposit into a payment account where the amount is equal to or greater than BGN 10 000 (EUR 5 113), and imposing penalties for non-compliance, is a measure which is appropriate for attaining the objective pursued by that legislation in an effective and coherent manner.

[51] Under Article 18(4) of that directive, Member States may require credit institutions to implement various pricing schemes depending on the level of banking inclusion of the consumer, allowing for, in particular, more advantageous conditions for unbanked vulnerable consumers. In recital 46 of the directive, the EU legislature states that 'in order to ensure that payment accounts with basic features are available to the widest possible range of consumers, they should be offered free of charge or for a reasonable fee. To encourage unbanked vulnerable consumers to participate in the retail banking market, Member States should be able to provide that payment accounts with basic features are to be offered to those consumers on particularly advantageous terms, such as free of charge'.

[52] See, in that regard, judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 31).

[53] C-263/11, EU:C:2012:497.

[54] See judgment of 19 July 2012, *Rēdlihs* (C-263/11, EU:C:2012:497, paragraph 45).

4. Proportionality of the legislation at issue in the main proceedings

101. I should now turn to the issue of whether the legislation at issue goes beyond what is necessary to achieve the objectives it pursues.

102. Where national legislation is such as to obstruct one or more of the fundamental freedoms guaranteed by the Treaty and the Member State concerned relies on overriding reasons in the public interest in order to justify such an obstacle, the national legislation concerned can fall within the exceptions thereby provided for only if it complies with the fundamental rights the observance of which is ensured by the Court, one of which is the principle of proportionality. [55]

103. It seems to me that, in order to address that issue, it is necessary to consider the proportionality of the measure effectively requiring individuals and undertakings to hold bank accounts, as well as that of the system of penalties provided for in Article 5 of the ZOPB.

(a) Proportionality of the requirement to hold a bank account

104. As I have stated, in order to comply with the requirements set out in Article 3 of the ZOPB it is necessary, amongst other things, for individuals to have or open a bank account, in order to pay sums equal to or greater than BGN 10 000 (EUR 5 113) by means of transfer or deposit into a payment account. [56]

105. First of all, I consider that the proportionality of this requirement must be examined having regard to banking inclusion and the existence of the measures referred to in points 97 and 98 of this Opinion.

106. Secondly, I consider that the proportionality of the requirement must be examined having regard to the threshold of BGN 10 000 (EUR 5 113) laid down in Article 3(1)(1) of the ZOPB.

107. It does not seem to me that that threshold is excessively low, given that it does not result in a situation where an individual purchasing basic essentials or everyday items might find that payment was rejected. That might have been the position if the Republic of Bulgaria had decided to reduce the threshold to BGN 1 000 (EUR 511.30), as it proposed to do in the draft law it submitted for the opinion of the ECB on 27 June 2017. [57]

108. The threshold of BGN 10 000 (EUR 5 113) enables individuals excluded from the services offered by the banks, or to the most vulnerable individuals who do not have access to basic financial services, not only to make their everyday purchases, but also to pay for more expensive supplies of goods and services, without being required to have a bank account or risking a particularly severe fine.

[55] See judgment of 8 May 2019, *PI* (C-230/18, EU:C:2019:383, paragraph 64 and the case-law cited).

[56] As I have noted, any lawfully constituted undertaking will, in principle, have a bank account, because this is required for registration in the commercial registers and for VAT.

[57] See footnote 5 of this Opinion. The ECB considered that such a reduction would be disproportionate, given the potential negative impact on the system of payment in cash (section 2.11 of its opinion).

109. Taking that into account, and subject once again to the matters to be verified by the referring court, as regards the existence of the measures referred to in points 97 and 98 of this Opinion, the requirement, entailed by the legislation at issue, to hold a bank account in order to make payments in an amount equal to or greater than BGN 10 000 (EUR 5 113), does not seem to me to be disproportionate.

110. I reach a different conclusion, however, as regards the proportionality of the system of penalties provided for in Article 5 of the ZOPB.

(b) Proportionality of the system of penalties provided for in Article 5 of the ZOPB

111. The issue of the proportionality of the system of penalties provided for in Article 5 of the ZOPB is expressly raised by the referring court in the first part of the third question referred.

112. The referring court wishes to establish whether the requirement of proportionality of penalties set out in Article 49(3) of the Charter is to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, by way of response to an infringement of the provisions restricting payments in cash, provides for a system of penalties under which the national authority responsible for penalising such offences cannot take account of the specific circumstances of the case, the fine being expressed as a percentage of the total amount of the infringing payment.

(1) Preliminary observations

113. Like the Commission, I do not consider that Article 51(1) of the Charter prevents the Court from assessing the system of penalties at issue with regard, in particular, to Article 49(3) of the Charter.

114. While it is true that the national legislation at issue in the main proceedings does not belong to a field which has been harmonised by EU law, it is apparent from the case-law of the Court that the fundamental rights guaranteed by the Charter are applicable in all situations governed by EU law and that they must, in particular, be complied with where national legislation falls within the scope of EU law.[58] Thus, as I have already observed, where national legislation is such as to obstruct one or more of the fundamental freedoms guaranteed by the Treaty and the Member State concerned relies on overriding reasons in the public interest in order to justify such an obstacle, the national legislation concerned can, under the case-law of the Court, fall within the exceptions thereby provided for only if it complies with the fundamental rights the observance of which is ensured by the Court, one of which is the principle of proportionality.[59] It is apparent from the observations made in points 63 to 78 of this Opinion that the legislation at issue in the main proceedings constitutes a restriction on the free movement of capital and payments, within the meaning of Article 63 TFEU, which is capable of being justified by the need to combat tax evasion and avoidance.

115. Moreover, I note that the Court has held that, in the absence of harmonisation of EU legislation regarding sanctions applicable where conditions laid down by arrangements under that legislation are not complied with, Member States are empowered to choose the sanctions

[58] See judgment of 8 May 2019, *PI* (C-230/18, EU:C:2019:383, paragraph 63 and the case-law cited).

[59] See judgment of 8 May 2019, *PI* (C-230/18, EU:C:2019:383, paragraph 64 and the case-law cited).

which seem to them to be appropriate, provided that they exercise their powers in accordance with EU law and its general principles.[60] I also note that the principle of proportionality to which the national court refers is not only a general principle of EU law,[61] but also a fundamental right that is enshrined in Article 49(3) of the Charter regarding the proportionality of penalties.

116. In that regard, I think that a penalty such as that provided for in Article 5 of the ZOPB may be examined in the light of the principle of proportionality of penalties laid down in Article 49(3) of the Charter. That view is based on the three criteria that the Court has held to be relevant in determining whether a penalty is criminal in nature, which are the legal classification of the offence under national law, the intrinsic nature of the offence, and the degree of severity of the penalty that the person concerned is liable to incur.[62]

117. First of all, the fine liable to be imposed on a person infringing Article 3 of the ZOPB is an administrative penalty which, to my mind, has a distinctly criminal flavour. It is apparent from the order for reference that the administrative penalty is imposed in criminal proceedings. The referring court states that a finding of commission of the administrative offence at issue in the main proceedings leads to criminal proceedings of an administrative nature, as seems to be confirmed by the wording of Article 63 of the ZANN.[63] It also appears from the instructions concerning the application of the ZOPB that the decision by which a penalty is imposed is a criminal decision. Furthermore, the penalty imposed under Article 5 of the ZOPB is not limited to compensation for loss caused by the offence. While, as the Bulgarian Government points out in its observations, it has a dissuasive function, it seems to me that it is also intended to punish failures to comply with the general prohibition set out in Article 3 of the ZOPB. Finally, the severity of the penalty tends to confirm this. I note that, in accordance with Article 5 of the ZOPB, the administrative penalty at issue in the main proceedings takes the form of a fine in an amount equivalent, where the infringing party is a natural person, to 25% of the total amount of the payment made, or 50% in the case of a repeat infringement, or, where the infringing party is a legal person, 50% of the total amount of the payment made, or 100% in the case of a repeat infringement. It seems to me that the degree of severity of the penalty is severe or very severe – which, under the case-law of the Court, is an indication that the penalty is criminal in nature.[64]

118. Having regard to those matters, it therefore seems to me that the system of penalties introduced by Article 5 of the ZOPB can be assessed in the light of the principle of proportionality enshrined in Article 49(3) of the Charter.

(2) Consideration of the proportionality of the system of penalties

119. In the judgment of 31 May 2018, *Zheng*,[65] which concerned a penalty imposed for infringement of the control mechanisms relating to cash entering or leaving the European Union, the Court held that the principle of proportionality had to be observed not only as regards the

60 See judgment of 2 June 2016, *Kapnoviomichania Karelia* (C-81/15, EU:C:2016:398, paragraph 48 and the case-law cited).

61 See judgment of 21 February 2008, *Netto Supermarkt* (C-271/06, EU:C:2008:105, paragraph 18 and the case-law cited).

62 See, in that regard, the Court's analysis in the judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraphs 26 to 33).

63 Under that article, the Rayonen sad (District Court), sitting in a composition consisting of a single judge, has jurisdiction to examine the case on the merits and deliver a judgment which may uphold, amend or overturn either the decision imposing an administrative penalty, or the electronic record. An appeal on a point of law lies from that judgment to the Administrativen sad (Administrative Court), on the grounds laid down in the Code of Criminal Procedure and in accordance with the arrangements set out in Chapter 12 of the Code of Administrative Procedure.

64 See judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 32).

65 C-190/17, EU:C:2018:357.

determination of factors constituting an infringement, but also as regards the determination of the rules concerning the severity of fines and the assessment of the factors which may be taken into account in the fixing of those fines. [66]

120. In assessing whether the system of penalties at issue is consistent with the principle of proportionality, it is necessary to have regard, inter alia, to the nature and degree of seriousness of the infringement to which the penalties relate, and the way in which the amount of the penalty is determined.

121. In relation, first of all, to the nature and seriousness of the infringement to which a penalty imposed under Article 5 of the ZOPB relates, I note that such a penalty is only intended to penalise infringement of the regulations which restrict payments in cash, and require payment to be effected by means of a bank transfer or a deposit into a payment account, where the amount to be paid is equal to or greater than BGN 10 000 (EUR 5 113). There is nothing in the file, or in the wording of Article 5 of the ZOPB, to indicate that such a penalty is dependent on a finding of tax evasion. Neither, does it appear that the penalty at issue is intended to ensure the recovery of tax or social security contributions from the person liable to pay them, and it is not possible to determine from the file whether the imposition of that penalty has any effect on the ability of the competent authorities to recover the tax and social security contributions due.

122. Second, in relation to the method by which the amount of the penalty at issue is determined, I repeat that the penalty is a fixed percentage amounting, as regards natural persons, to 25% of the total amount of the payment made in breach of Article 3 of the ZOPB, or 50% in the case of a repeat infringement, and, as regards legal persons, to 50% of the total amount of the payment made in breach of Article 3 of the ZOPB, or 100% in the case of a repeat infringement.

123. The amount of the penalty seems to be the result of a simple calculation based on the total amount of the payment made in breach of the payment arrangements laid down in Article 3 of the ZOPB, without any opportunity to consider factors which might affect the assessment of the severity of the offence or the circumstances of the case.

124. It appears from the clarifications provided by the referring court, as well as the Bulgarian Government's responses to the Court's questions, that it is only in the context of determining whether the infringement is minor, for the purposes of Article 28(a) of the ZANN, [67] that the national authority responsible for penalising the infringement, and the judicial authority hearing an appeal against a decision making a finding of infringement, can have regard to all the matters and circumstances of the case referred to in Article 28(a), of the ZANN. [68]

[66] See judgment of 31 May 2018, *Zheng* (C-190/17, EU:C:2018:357, paragraph 40 and the case-law cited).

[67] I note that, under Article 28(a) of the ZANN, it is open to the national authority responsible for penalising the commission of the infringement not to impose a penalty where the infringement is minor, in which case it may simply issue a warning.

[68] It follows from the wording of Article 27(2) of the ZANN, as elucidated by the referring court, that the national authority responsible for penalising the commission of the infringement must have regard to the risks represented by the conduct in question (the nature, seriousness and duration of the infringement) and by the person engaging in it, to the nature of the infringement (intentional or negligent), to the reasons for its commission, and to all other mitigating or aggravating circumstances, as well as the financial situation of the person committing the infringement. In its clarifying remarks, the referring court states that the national legislation at issue does not list the mitigating and aggravating circumstances exhaustively.

125. In other words, leaving aside cases where the infringement is minor, the calculation of the fine is a purely mechanical exercise which does not allow for either the national authority responsible for penalising the commission of the infringement, or the judicial authority exercising its power of judicial review, to adjust the amount of the penalty and ensure that it is no more severe than is strictly necessary, given the seriousness of the infringement.

126. The principle of proportionality, however, dictates that penalties must be individualised and, in particular, requires an assessment of whether the fine is appropriate having regard to all the circumstances of the matter. That principle requires not only the national legislature, but all those involved in the procedure, to organise their actions in accordance with it. That follows from the judgment of 20 March 2018, *Menci*,[69] where the Court held that, although national legislation may appear, in principle, to be capable of ensuring the necessary balance between the different interests at issue, it must also be applied by the national authorities and national courts in such a way that the penalty, in the case at hand and for the person concerned, is not excessive in relation to the seriousness of the offence committed.[70]

127. Thus, the principle of proportionality set out in Article 49(3) of the Charter requires, on the one hand, that when the national legislature enacts a rule, it does not penalise a breach of that rule by a disproportionate fine and, on the other, that when the national court hears an appeal against a decision making a finding of infringement, it does not impose a penalty which is disproportionate to the infringement.

128. Finally, I consider that a fine representing 100% of the amount of the payment made in breach of Article 3 of the ZOPB is manifestly excessive. The confiscatory effect of such a fine goes well beyond what seems to me to be necessary to penalise the infringement of regulations restricting payments in cash, regardless of whether that infringement constitutes tax evasion. The penalty might even put the finances of a small undertaking at risk. In the judgment of 31 May 2008, *Zheng*,[71] the Court thus held that 'even if such a fine is calculated by taking into account certain aggravating circumstances, provided they comply with the principle of proportionality, the fact that the amount of the fine may be up to double the undeclared cash sum and that, in any event, as in the present case, the fine may be set at an amount corresponding to nearly 100% of that sum goes beyond what is necessary in order to ensure compliance with the obligation to declare'.[72]

129. Having regard to those matters, therefore, I take the view that a rule of national law that permits the imposition of a fine, calculated as a fixed percentage of the total amount of the payment made in breach of the prohibition on payments in cash, and prevents any adjustment of the amount of that fine to reflect the concrete circumstances of the case, is contrary to the principle of proportionality.

130. In the light of all of those considerations, I suggest that the Court should rule that, subject to the matters to be verified by the national court, Article 63 TFEU does not preclude national legislation such as that at issue, which is justified by the need to combat tax evasion and avoidance, if such legislation is appropriate for ensuring attainment of that objective and does not go beyond what it is necessary to do so.

69 C-524/15, EU:C:2018:197.

70 See judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 58).

71 C-190/17, EU:C:2018:357.

72 Paragraph 45 of the judgment.

131. It is for the national court to verify that those conditions are met, having regard to the following considerations:

– Such legislation can truly achieve that objective only in so far as it is supported by measures which address banking inclusion in relation to individuals. In that regard, the national court must, amongst other things, ensure that unbanked vulnerable individuals have access to a bank account with basic features, on more advantageous conditions than other consumers, in accordance with Article 18(4) of Directive 2014/92. Furthermore, the national court must verify that the legislation is supported by specific measures or exceptions for the benefit of individuals who, for legitimate reasons other than lack of capacity, cannot make bank transfers or deposits into a payment account.

– Such legislation may constitute a measure contrary to the principle of proportionality in so far as it provides that the fine liable to be imposed on natural or legal persons, in the event of infringement of the regulations restricting payment in cash, is calculated as a fixed percentage of the total amount of the payment made in breach of those regulations, and prevents any adjustment of the amount of that fine to reflect the specific circumstances of the case.

V. Conclusion

132. In the light of the considerations set out above, I suggest that the Court should answer the Administrativen sad Blagoevgrad (Administrative Court, Blagoevgrad, Bulgaria) in the following terms:

(1) National legislation such as that at issue in the main proceedings, which, in order to combat tax evasion and avoidance, prohibits natural and legal persons from making payment in cash, within national territory, where the amount of the payment is equal to or greater than the prescribed threshold, and requires them to make payment by means of a transfer or deposit into a payment account, does not fall within the scope of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

(2) Article 63 TFEU must be interpreted as not precluding national legislation such as that at issue, which is justified by the need to combat tax evasion and avoidance, if such legislation is appropriate for ensuring attainment of that objective and does not go beyond what it is necessary to do so.

It is for the national court to verify that those conditions are met, having regard to the following considerations:

– Such legislation can truly achieve that objective only in so far as it is supported by measures which address banking inclusion in relation to individuals. In that regard, the national court must, amongst other things, ensure that unbanked vulnerable individuals have access to a bank account with basic features, on more advantageous conditions than other consumers, in accordance with Article 18(4) of Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic

features. Furthermore, the national court must verify that the legislation is supported by specific measures or exceptions for the benefit of individuals who, for legitimate reasons other than lack of capacity, cannot make bank transfers or deposits into a payment account.

– Such legislation may constitute a measure contrary to the principle of proportionality in so far as it provides that the fine liable to be imposed on natural or legal persons, in the event of infringement of the regulations restricting payment in cash, is calculated as a fixed percentage of the total amount of the payment made in breach of those regulations, and prevents any adjustment of the amount of that fine to reflect the specific circumstances of the case.