Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

14 September 2023 *

(Reference for a preliminary ruling – Excise duty – Directive 2008/118/EC – Article 16 – Tax warehouse arrangements – Conditions for the grant of an authorisation for the opening and operation of a tax warehouse by an authorised warehousekeeper – Failure to satisfy those conditions – Final withdrawal of the authorisation, together with the imposition of a financial penalty – Article 50 of the Charter of Fundamental Rights of the European Union – *Ne bis in idem* principle – Proportionality)

In Case C-820/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Administrative Court, Sofia City, Bulgaria), made by decision of 9 December 2021, received at the Court on 28 December 2021, in the proceedings

'Vinal' AD

v

Direktor na Agentsia 'Mitnitsi',

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, L.S. Rossi, J.-C. Bonichot (Rapporteur), S. Rodin and O. Spineanu-Matei, Judges,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– 'Vinal' AD, by N. Boshnakova-Dimova, advokat,

– Direktor na Agentsia 'Mitnitsi', by P. Gerenski and P. Tonev,

– the Bulgarian Government, by M. Georgieva, T. Mitova, E. Petranova and L. Zaharieva, acting as Agents,

* Language of the case: Bulgarian.

– the Spanish Government, by I. Herranz Elizalde, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by A. Collabolletta, avvocato dello Stato,

– the European Commission, by M. Björkland and D. Drambozova, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the principle of equal treatment and of Article 16(1) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12).

2 The request has been made in proceedings between 'Vinal' AD, an authorised warehousekeeper, and the Direktor na Agentsia 'Mitnitsi' (Director of the Customs Agency, Bulgaria) concerning a decision by which that director withdrew the authorisation to operate a tax warehouse, within the meaning of Directive 2008/118, on account of a serious failure to comply with the excise duty arrangements, which also gave rise to a financial penalty.

Legal context

European Union law

Directive 2008/118

3 Recitals 10, 15 and 16 of Directive 2008/118 stated:

'(10) Arrangements for the collection and reimbursement of [excise] duty have an impact on the proper functioning of the internal market and should therefore follow non-discriminatory criteria.

…

(15) Since checks need to be carried out in production and storage facilities in order to ensure that the tax debt is collected, it is necessary to retain a system of warehouses, subject to authorisation by the competent authorities, for the purpose of facilitating such checks.

(16) It is also necessary to lay down requirements to be complied with by authorised warehousekeepers and traders without authorised warehousekeeper status.'

4 Article 4 of Directive 2008/118 provided:

‘For the purpose of this Directive as well as its implementing provisions, the following definitions shall apply:

1. “authorised warehousekeeper” means a natural or legal person authorised by the competent authorities of a Member State, in the course of his business, to produce, process, hold, receive or dispatch excise goods under a duty suspension arrangement in a tax warehouse;

…

11. “tax warehouse” means a place where excise goods are produced, processed, held, received or dispatched under duty suspension arrangements by an authorised warehousekeeper in the course of his business, subject to certain conditions laid down by the competent authorities of the Member State where the tax warehouse is located.’

5 Under Article 7(1) of that directive, excise duty becomes chargeable at the time, and in the Member State, of release for consumption.

6 Article 8(1)(a) of that directive provided:

‘The person liable to pay the excise duty that has become chargeable shall be:

(a) in relation to the departure of excise goods from a duty suspension arrangement as referred to in Article 7(2)(a):
   (i) the authorised warehousekeeper, the registered consignee or any other person releasing the excise goods or on whose behalf the excise goods are released from the duty suspension arrangement and, in the case of irregular departure from the tax warehouse, any other person involved in that departure;

…’

7 Article 15 of that directive was worded as follows:

‘1. Each Member State shall determine its rules concerning the production, processing and holding of excise goods, subject to this Directive.

2. The production, processing and holding of excise goods, where the excise duty has not been paid, shall take place in a tax warehouse.’

8 Article 16 of Directive 2008/118 provided:

‘1. The opening and operation of a tax warehouse by an authorised warehousekeeper shall be subject to authorisation by the competent authorities of the Member State where the tax warehouse is situated.

Such authorisation shall be subject to the conditions that the authorities are entitled to lay down for the purposes of preventing any possible evasion or abuse.

2. An authorised warehousekeeper shall be required to:

(a) provide, if necessary, a guarantee to cover the risk inherent in the production, processing and holding of excise goods;

(b) comply with the requirements laid down by the Member State within whose territory the tax warehouse is situated;

(c) keep, for each tax warehouse, accounts of stock and movements of excise goods;

(d) enter into his tax warehouse and enter in his accounts at the end of their movement all excise goods moving under a duty suspension arrangement, except where Article 17(2) applies;

(e) consent to all monitoring and stock checks.

…'

9 Article 15(1) of Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty (OJ 2020 L 58, p. 4), which repealed Directive 2008/118 with effect from 13 February 2023, lays down provisions identical to those of Article 16(1) of Directive 2008/118.

Recommendation 2000/789/EC

10 Article 2(1) of Commission Recommendation 2000/789/EC of 29 November 2000 setting out guidelines for the authorisation of warehousekeepers under Council Directive 92/12/EEC in relation to products subject to excise duty (OJ 2000 L 314, p. 29) states:

'Although Member States are invited to apply strict criteria when granting authorisation to the persons specified in Article 1, a balance should be achieved between facilitating trade and exercising effective control.'

11 Article 7 of that recommendation states:

'1. An authorisation should in principle only be cancelled or withdrawn on serious grounds, and after a Member State's competent authorities have carefully examined the warehousekeeper's situation.

2. An authorisation may, for instance, be cancelled or withdrawn in the following cases:

– non-fulfilment of the obligations inherent in the authorisation,

– insufficient cover for the requisite guarantee,

– repeated non-compliance with the legal provisions in force,

– involvement in criminal activities,

– tax evasion or fraud.'

Bulgarian law

12 Article 3(1)(1) of the Zakon za aktsizite i danachnite skladove (Law on excise duties and tax warehouses), in the version applicable to the dispute in the main proceedings ('the ZADS'), provides that authorised warehousekeepers and persons registered pursuant to that law are taxable persons within the meaning of that law.

13 Article 4(18) of the ZADS is worded as follows:

'An offence is "serious" where it is the subject of a final administrative penalty decision imposing a financial penalty of more than 15 000 [Bulgarian leva (BGN) (approximately EUR 7 600)].'

14 Article 47(1) of the ZADS provides:

'Authorised warehousekeepers may be persons who:

…

5. have not committed a serious or repeated offence within the meaning of this Law, except for cases where the administrative penalty proceedings were terminated by the conclusion of a settlement.'

15 Article 53(1) to (4) of the ZADS provides:

'(1) The authorisation to operate a tax warehouse shall cease to be valid:

…

3. where the authorisation is withdrawn;

…

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

1. the authorised tax warehousekeeper no longer satisfies the conditions of Article 47; …

…

(3) The authorisation shall be withdrawn by decision of the Director of the Customs Agency, which shall be provisionally enforceable as of the date of issuance of the decision, unless the court orders otherwise.

(4) The decision pursuant to paragraph 3 shall be subject to appeal in accordance with the provisions of Administrativnoprotsesualen kodeks [(Code of Administrative Procedure)].'

16 Under Article 107h(1) of the ZADS:

'Until the adoption of the decision imposing an administrative penalty but no later than 30 days from disclosure of the notice establishing an offence within the meaning of this Law, the authority with the power to impose administrative penalties and the offender may conclude a settlement terminating the administrative penalty proceedings, unless the act complained of constitutes a criminal offence.'

17 Article 112(1) of the ZADS provides:

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

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 Vinal is a company established in Bulgaria and holds an authorisation to operate a tax warehouse allowing it to produce, store, receive and dispatch alcoholic products subject to excise duty.

19 That company was the subject of a tax inspection in 2017.

20 On 22 December 2017, the Bulgarian customs authorities issued a tax assessment notice in the amount of BGN 4 261.89 (approximately EUR 2 180) for the period from 1 January 2012 to 3 May 2017. That decision was not challenged and became final on 5 January 2018.

21 In addition, for the period from 3 to 10 May 2017, the Bulgarian customs authorities also adopted a notice establishing an administrative offence committed by that company for failing to comply with the obligation to levy the excise duties that were chargeable.

22 On 24 January 2018, the Bulgarian customs authorities, on that ground, imposed on Vinal a financial penalty equal to twice the amount of the excise duty that was not levied, pursuant to Article 112(1) of the ZADS, namely BGN 248 978 (approximately EUR 128 000).

23 That penalty was confirmed by judgment of 16 January 2020, which has become final.

24 On 11 February 2020, the director of the Customs Agency withdrew, on account of that final judgment, the authorisation to operate the tax warehouse which had been granted to Vinal.

25 That company brought an action before the Administrativen sad Sofia-grad (Administrative Court, Sofia City, Bulgaria) for annulment of that decision.

26 That court is uncertain whether the applicable national legislation is compatible with EU law and, in particular, with Directive 2008/118.

27 In those circumstances, the Administrativen sad Sofia-grad (Administrative Court, Sofia City) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

(2) How is the principle of non-discrimination for the purposes of recital 10 of [Directive 2008/118] to be interpreted?

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

Consideration of the questions referred

The first and third questions

28 By its first and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 16(1) of Directive 2008/118 must be interpreted as precluding national legislation which provides for the withdrawal of an authorisation to operate a tax warehouse in the event of failure to comply with the excise duty arrangements that is considered to be serious by the national legislation, together with a financial penalty already imposed in respect of the same facts.

29 It must be recalled that, under Article 15(1) of Directive 2008/118, each Member State is to determine its rules concerning the production, processing and holding of excise goods, subject to that directive, while Article 15(2) states, furthermore, that the production, processing and holding of excise goods, where the excise duty has not been paid, is to take place in a tax warehouse.

30 As regards the authorisation arrangements for such a warehouse, Article 16(1) of Directive 2008/118 states, (i) in its first subparagraph, that the opening and operation of a tax warehouse by an authorised warehousekeeper is to be subject to authorisation by the competent authorities of the Member State where the tax warehouse is situated, and, (ii) in its second subparagraph, that such authorisation is to be subject to 'the conditions that the authorities are entitled to lay down for the purposes of preventing any possible evasion or abuse'.

31 Furthermore, it follows from the Court's case-law that, within the scope of Directive 2008/118, the prevention of evasion and abuse is in general terms an objective common to both EU law and the laws of the Member States. First, those Member States have a legitimate interest in taking appropriate steps to protect their financial interests, and second, the prevention of possible tax evasion, avoidance and abuse is an objective pursued by that directive, as recitals 15 and 16 and Article 16 thereof confirm (see, to that effect, judgments of 13 January 2022, *MONO*, C-326/20, EU:C:2022:7, paragraphs 28 and 32 and the case-law cited, and of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraph 25).

32 In the present case, it is apparent from the documents before the Court that both the financial penalty imposed on Vinal and the withdrawal of its authorisation to operate a tax warehouse were adopted on account of an offence committed by Vinal in respect of the excise duty arrangements that is considered to be serious by the national legislation. The prohibition on committing such an offence corresponds by its nature to one of the conditions which the authorities are entitled to lay down for the purpose of preventing any possible evasion or abuse, within the meaning of Article 16(1) of Directive 2008/118.

33 It should, moreover, be noted that it does not follow either from the wording or the objective of Article 16(1) of Directive 2008/118 or even from the other provisions of that directive that such a system of penalties would not be consistent with it.

34 Nevertheless, it is also settled case-law that, while, in the absence of harmonisation of EU legislation in the field of penalties applicable where conditions laid down by arrangements under such legislation are not complied with, Member States are empowered to choose the penalties which seem to them to be appropriate, they must exercise their powers in accordance with EU law and its general principles, which include, in particular, the *ne bis in idem* principle which is enshrined in Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter') and the principle of proportionality (see, to that effect, judgments of 13 January 2022, *MONO*, C-326/20, EU:C:2022:7, paragraph 34 and the case-law cited, and of 24 February 2022, *Agenzia delle dogane e dei monopoli and Ministero dell'Economia e delle Finanze*, C-452/20, EU:C:2022:111, paragraph 36).

35 It should, in that regard, be borne in mind that, even if formally the referring court has limited its question to the interpretation of Article 16(1) of Directive 2008/118, that does not prevent this Court from providing all the elements of interpretation of EU law that may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its question. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute (see, to that effect, judgment of 24 February 2022, *Agenzia delle dogane e dei monopoli and Ministero dell'Economia e delle Finanze*, C-452/20, EU:C:2022:111, paragraph 19).

The ne bis in idem *principle*

36 As regards the application of Article 50 of the Charter to the main proceedings, it should be borne in mind that the scope of the Charter, in so far as the action of the Member States is concerned, is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing EU law. That provision confirms the Court's settled case-law, which states that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations (judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 78 and the case-law cited).

37 In the present case, it is apparent from the request for a preliminary ruling that the two measures at issue in the main proceedings penalise failures to comply with national rules forming part of the excise duty arrangements and transposing Directive 2008/118.

38 Accordingly, when a Member State adopts such measures, it is implementing that directive and, therefore, EU law, within the meaning of Article 51(1) of the Charter. It must, consequently, comply with the provisions of the Charter (see, to that effect, judgment of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraph 26).

39 Article 50 of the Charter provides that 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the [European] Union in accordance with the law'.

40 The *ne bis in idem* principle prohibits a duplication both of proceedings and of penalties of a criminal nature for the purposes of that article for the same acts and against the same person (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 24 and the case-law cited).

41 It must be borne in mind that the application of the *ne bis in idem* principle is subject to a twofold condition, namely, first, that there must be a prior final decision (the '*bis*' condition) and, second, that the prior decision and the subsequent proceedings or decisions must concern the same facts (the '*idem*' condition) (judgments of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 28, and of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraph 51).

42 As regards the '*idem*' condition, this requires the material facts to be identical, and not merely similar. Identity of the material facts must be understood to mean a set of concrete circumstances stemming from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space (see, to that effect, judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraphs 36 and 37).

43 In the present case, it is apparent from the order for reference that the measures at issue in the main proceedings were adopted in respect of the same legal person, namely Vinal, and in respect of the same facts.

44 As regards the '*bis*' condition, it must be borne in mind that, in order for a judicial decision to be regarded as having given a final ruling on the facts subject to a second set of proceedings, that decision must not only have become final but must also have been taken after a determination has been made as to the merits of the case (see, to that effect, judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 29).

45 In the present case, it appears to emerge from the information provided by the referring court that that is indeed the case, since the decision to withdraw the authorisation to operate the tax warehouse was adopted once the decision imposing the financial penalty, taken after a determination had been made as to the merits of the case, had become final.

46 In that context, in order to establish whether Article 50 of the Charter is applicable, it is necessary to determine whether the measures at issue in the main proceedings, namely the financial penalty, imposed pursuant to Article 112(1) of the ZADS, and the withdrawal of the authorisation to operate a tax warehouse, imposed pursuant to Article 53(2)(1) of the ZADS, read in conjunction with Article 47 thereof, may be classified as 'penalties of a criminal nature' for the purposes of the Charter.

47 It follows from the Court's settled case-law that the criminal nature of penalties for the purposes of the application of the *ne bis in idem* principle depends on three criteria. The first criterion is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty that the person concerned is liable to incur (judgments of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraph 27, and of 4 May 2023, *MV – 98*, C-97/21, EU:C:2023:371, paragraph 38).

48 In the present case, as regards the first criterion, it is apparent from the information provided by the referring court that the measures at issue in the main proceedings are regarded as administrative penalties under Bulgarian law.

49 Nevertheless, the application of Article 50 of the Charter extends, irrespective of the classification of criminal proceedings and penalties under national law, to proceedings and to penalties which must be considered to have a criminal nature on the basis of the other two criteria referred to in

paragraph 47 above (see, to that effect, judgments of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraph 29, and of 4 May 2023, *MV – 98*, C-97/21, EU:C:2023:371, paragraph 41).

50 As regards the second criterion, relating to the intrinsic nature of the offence, it must be ascertained whether the measure at issue has a punitive purpose and the mere fact that it also pursues a deterrent purpose does not mean that it cannot be characterised as a criminal penalty. It is of the very nature of criminal penalties that they seek both to punish and to deter unlawful conduct. By contrast, a measure which merely repairs the damage caused by the offence at issue is not criminal in nature (judgments of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)*, C-439/19, EU:C:2021:504, paragraph 89; of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraph 30, and of 4 May 2023, *MV – 98*, C-97/21, EU:C:2023:371, paragraph 42).

51 In the present case, both the financial penalty and the decision to withdraw the authorisation to operate a tax warehouse appear to pursue purposes of both deterring and punishing offences in respect of the excise duty arrangements and are not intended to repair the damage caused by those offences.

52 That being said, it must be emphasised that the decision to withdraw the authorisation to operate a tax warehouse, as provided for in Article 53(2) of the ZADS, is specifically covered by the rules governing the movement of products subject to excise duty and under a suspension arrangement, established by Directive 2008/118, in which warehousekeepers play a central role (see, by analogy, judgment of 2 June 2016, *Kapnoviomichania Karelia*, C-81/15, EU:C:2016:398, paragraph 31). It is apparent from the order for reference that such a decision is intended to apply only to economic operators who hold an authorisation to operate as an authorised warehousekeeper for products subject to excise duty, for the purposes of that directive, temporarily depriving them of the benefits arising from such authorisation (see, by analogy, judgment of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraph 32).

53 Therefore, a decision to withdraw the authorisation to operate a tax warehouse is aimed not at the general public, but at a particular category of addressees who, because they pursue an activity specifically regulated by EU law, must satisfy the conditions required in order to obtain an authorisation issued by the Member States and conferring specific powers on them. It is thus a matter for the referring court to assess whether such a decision consists in depriving Vinal of the exercise of those prerogatives on the ground that the competent administrative authority found that the conditions for granting that authorisation were no longer satisfied, which would support the finding that that decision does not have a punitive purpose (see, to that effect, judgment of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraph 33).

54 By contrast, it is not apparent from the documents before the Court that the financial penalty imposed on Vinal is intended to apply only to economic operators who have an authorisation to operate as an authorised warehousekeeper for products subject to excise duty, with the result that the considerations set out in paragraphs 52 and 53 above cannot be applied to it.

55 As regards the third criterion, relating to the degree of severity of the penalty incurred, it is important to note that that degree of severity must be determined by reference to the maximum potential penalty for which the relevant provisions provide (judgment of 4 May 2023, *MV – 98*, C-97/21, EU:C:2023:371, paragraph 46).

56 In the present case, as regards, first, the financial penalty, the fact that its amount cannot be less than BGN 500 (approximately EUR 250), that it corresponds systematically to twice the amount that was not levied and that the national legislation at issue in the main proceedings does not provide for a maximum limit to that amount, with the result that, in the present case, a penalty equivalent to approximately EUR 128 000 was imposed, attests to the severe nature of that penalty (see, by analogy, judgment of 4 May 2023, *MV – 98*, C-97/21, EU:C:2023:371, paragraph 48), which could suffice for it to be classified as a penalty of a criminal nature.

57 In that regard, it must be borne in mind that a fine of 30% of the amount of value added tax due, added to the payment of that tax, was able to be regarded as having a high degree of severity liable to support the view that such a penalty was of a criminal nature for the purposes of Article 50 of the Charter (see, to that effect, judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 33).

58 Second, while the withdrawal of the authorisation to operate a tax warehouse admittedly has the sole effect of depriving the authorised warehousekeeper concerned of the prerogatives attached to the tax warehouse arrangements and does not prevent that warehousekeeper from continuing to pursue economic activities that do not require such an authorisation (see, to that effect, judgment of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraph 37), the consequences of such a withdrawal remain severe for that warehousekeeper since, in particular, the effects of that measure are not limited in time (see, to that effect, judgment of 4 May 2023, *MV – 98*, C-97/21, EU:C:2023:371, paragraph 47).

59 It follows from the foregoing that the two measures at issue in the main proceedings are liable to constitute penalties of a criminal nature, this, however, being a matter for the referring court to ascertain on the basis of the above information.

60 If that is the case, their combination therefore results in a limitation of the fundamental right guaranteed in Article 50 of the Charter.

61 Thus, if, following its examination of the conditions referred to above, the referring court forms the view that the combination of the two measures at issue in the main proceedings constitutes a limitation of the fundamental right guaranteed in Article 50 of the Charter, it is for that court to determine whether that limitation could nevertheless be regarded as justified on the basis of Article 52(1) thereof (see, to that effect, judgments of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 40, and of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraphs 58 and 59).

62 In accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. According to the second sentence of Article 52(1), subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

63 In the present case, as regards, first, the conditions set out in the first sentence of Article 52(1) of the Charter, it must be noted that the requirement that the possibility of combining penalties must be provided for by law appears to be satisfied since the ZADS expressly provides, in the event, inter alia, of an offence in respect of the excise duty arrangements that is considered to be serious, for the combined application of the two measures at issue in the main proceedings.

64 Furthermore, it follows also from the case-law that such a possibility of a duplication of proceedings and penalties will respect the essence of Article 50 of the Charter only on condition that the national legislation does not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but provides only for the possibility of a duplication of proceedings and penalties under different legislation (see, to that effect, judgments of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 43, and of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraph 63).

65 In the present case, that condition appears to be satisfied since the two measures at issue in the main proceedings do not have the same scope, as the withdrawal of an authorisation to operate covers only some of the offences which have been the subject of a financial penalty, and each measure pursues its own objective.

66 As regards, second, the conditions laid down in the second sentence of Article 52(1) of the Charter, including that relating to the need for a system of penalties to meet an objective of general interest, it is apparent from the documents before the Court that the arrangements at issue in the main proceedings do indeed meet such an objective, in that they seek to ensure not only the proper functioning of the special arrangements for suspension of excise duty which is based on a high level of trust between the authorities and operators but also, more generally, to combat, inter alia, tax evasion, which, moreover, is an objective pursued by Directive 2008/118 (see, to that effect, judgment of 29 June 2017, *Commission* v *Portugal*, C-126/15, EU:C:2017:504, paragraph 59).

67 In the light of the importance attached by EU law to that objective of general interest, a duplication of criminal proceedings and penalties may be justified where those proceedings and penalties pursue, for the purpose of achieving such an objective, complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue (see, by analogy, judgments of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 44; of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraph 46; of 20 March 2018, *Di Puma and Zecca*, C-596/16 and C-597/16, EU:C:2018:192, paragraph 42; and of 22 March 2022, *Nordzucker and Others*, C-151/20, EU:C:2022:203, paragraph 52).

68 That is a priori the case with regard to the national legislation at issue in the main proceedings. It appears legitimate for a Member State to seek, first, to deter and punish the failure to levy excise duties by providing for the imposition of financial penalties that are sufficiently high, and second, to deter and punish serious failures to comply with the rules governing that system by adopting an additional penalty, such as the withdrawal of the authorisation of the authorised warehousekeeper responsible for that non-compliance (see, by analogy, judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 45). As is apparent in particular from the observations submitted by the Bulgarian Government, that second measure reflects the customs authorities' loss of confidence in compliance with the rules attached to the functioning of a tax warehouse, within the meaning of Directive 2008/118, and their desire to avoid the risk of re-offending.

69 As regards, lastly, observance of the principle of proportionality, it should be borne in mind that that principle requires that the duplication of proceedings and penalties provided for by the national legislation does not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation, it being understood that, when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued (judgments of

22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 48; of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraph 66; and of 4 May 2023, *MV – 98*, C-97/21, EU:C:2023:371, paragraph 56).

70 As regards, first, the appropriateness of such duplication, it is important to note that, in order for a penalty to ensure a genuinely dissuasive effect, offenders must actually be deprived of the economic advantages resulting from offences in relation to the excise duty arrangements and the penalties must be capable of producing results proportionate to the seriousness of such offences, thereby effectively discouraging further offences of the same kind (see, by analogy, judgment of 24 February 2022, *Agenzia delle dogane e dei monopoli and Ministero dell'Economia e delle Finanze*, C-452/20, EU:C:2022:111, paragraph 44).

71 That appears to be the case in a system such as that at issue in the main proceedings, which deprives the person concerned of twice the amount of excise duty that was not levied and of the benefit of the duty suspension arrangement attached to the tax warehouse.

72 In addition, such a system makes it possible to undermine, or even eliminate, economic considerations which may lead authorised warehousekeepers to disregard the excise duty arrangements (see, by analogy, judgment of 24 February 2022, *Agenzia delle dogane e dei monopoli and Ministero dell'Economia e delle Finanze*, C-452/20, EU:C:2022:111, paragraph 45).

73 Thus, that system appears, first, to offset the financial advantage obtained as a result of the offence, and second, to encourage the authorised warehousekeepers to comply with the excise duty arrangements (see, by analogy, judgment of 24 February 2022, *Agenzia delle dogane e dei monopoli and Ministero dell'Economia e delle Finanze*, C-452/20, EU:C:2022:111, paragraph 46), but also to limit the risks of re-offending which may be considered to be more significant in the case of serious offences.

74 National legislation such as that at issue in the main proceedings therefore appears appropriate for attaining the legitimate objective of combating potential evasion and abuse (see, by analogy, judgment of 24 February 2022, *Agenzia delle dogane e dei monopoli and Ministero dell'Economia e delle Finanze*, C-452/20, EU:C:2022:111, paragraph 47).

75 As regards, second, the strict necessity of such duplication of proceedings and penalties, it is necessary to assess, more specifically, whether there are clear and precise rules making it possible for litigants to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also ensuring that there will be coordination between the different authorities, whether those two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate time frame, and whether any penalty that may have been imposed in the proceedings that were first in time was taken into account in the assessment of the second penalty, meaning that the resulting burden, for the persons concerned, of such duplication is limited to what is strictly necessary and the overall penalties imposed correspond to the seriousness of the offences committed (see, to that effect, judgments of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 51 and the case-law cited, and of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraph 67).

76 It must also be noted that the requirement that the authority must take account of the first penalty in the assessment of the second penalty applies, without exception, to all of the penalties imposed cumulatively and, therefore, to both the combination of penalties of the same kind and the

combination of penalties of a different kind, such as financial penalties and penalties limiting the right to pursue certain business activities (see, to that effect, judgment of 5 May 2022, *BV*, C-570/20, EU:C:2022:348, paragraph 50).

77 In the present case, it appears from the file before the Court that the national legislation at issue in the main proceedings provides, in a clear and precise manner, in what circumstances an offence in respect of the excise duty arrangements may be subject to a combination of a financial penalty and a withdrawal of the authorisation to operate a tax warehouse, this, however, being a matter which it is for the referring court to assess. Moreover, it does not appear from that file that those two measures were adopted by different authorities between which it is important to ensure coordination.

78 That said, it is also apparent from the file before the Court that the customs authorities are legally required to withdraw the authorisation to operate a tax warehouse where, as in the present case, the authorised warehousekeeper has been the subject of a final decision ordering it to pay a financial penalty in an amount exceeding BGN 15 000 (approximately EUR 7 600), such an amount itself being set automatically at twice the amount of the excise duty that was not levied, as noted in paragraph 56 of the present judgment.

79 It follows that, subject to verification by the referring court, legislation such as that at issue in the main proceedings does not appear to allow the severity of the first penalty to be taken into account in the assessment of the second penalty, or for an authority to assess whether the combination of those two penalties is limited, in each individual case, to what is strictly necessary.

80 It follows from the foregoing considerations that, if the financial penalty and the decision to withdraw the authorisation to operate a tax warehouse must be regarded as penalties of a criminal nature, Article 50 of the Charter is liable to preclude the decision withdrawing Vinal's authorisation to operate its tax warehouse, the legality of which is challenged before the referring court, from being applied, this being a matter which it is for that court to ascertain.

The principle of proportionality

81 Even assuming that the financial penalty or the decision to withdraw the authorisation to operate a tax warehouse does not constitute a penalty of a criminal nature, for the purposes of the application of Article 50 of the Charter, and that, accordingly, that article cannot, in any event, preclude the combination of those two measures, that withdrawal decision, which is the subject of the proceedings pending before the referring court, would still have to respect the principle of proportionality, which is a general principle of EU law.

82 That principle requires Member States to employ means which, whilst enabling them effectively to attain the objective pursued by their domestic laws, must not go beyond what is necessary and are the least detrimental to the other objectives and the principles laid down by the relevant EU legislation. The case-law of the Court states in this regard that, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (judgments of 13 November 1990, *Fédesa and Others*, C-331/88, EU:C:1990:391, paragraph 13, and of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraph 71).

83 In order to assess, in particular, whether a penalty is consistent with the principle of proportionality, account must be taken of, inter alia, the nature and the degree of seriousness of the offence which the penalty seeks to sanction (see, by analogy, judgment of 20 June 2013, *Rodopi-M 91*, C-259/12, EU:C:2013:414, paragraph 38).

84 In that regard, it is apparent from the order for reference that the withdrawal of the authorisation to operate a tax warehouse is ordered by the customs authorities in the case where the authorised warehousekeeper has not satisfied the conditions laid down by the national legislation for obtaining the authorisation to operate and that that is the case, inter alia, where, as in the present case, that warehousekeeper has committed an offence which is classified as 'serious' under national law and in respect of which a definitive financial penalty has been imposed.

85 An offence in respect of the excise duty arrangements is classified as 'serious', pursuant to Article 4(18) of the ZADS, where the failure to comply with the excise duty arrangements has given rise to a fine of more than BGN 15 000 (approximately EUR 7 600).

86 Since, pursuant to Article 112(1) of the ZADS, the financial penalty at issue in the main proceedings is always set at twice the amount of the excise duty that was not levied, it seems to follow that a failure to comply with the excise duty arrangements is considered to be 'serious' under national law, which automatically entails the withdrawal of the authorisation to operate, as soon as that failure, which has given rise to the financial penalty, concerns an amount of excise duty that was not levied exceeding BGN 7 500 (approximately EUR 3 800), which characterises evasion of a certain seriousness.

87 That being said, it is important also to take account of the possible effects of a withdrawal measure, such as that at issue in the main proceedings, on the authorised warehousekeeper's legitimate right to pursue a business activity (see, by analogy, judgment of 24 February 2022, *Agenzia delle dogane e dei monopoli and Ministero dell'Economia e delle Finanze*, C-452/20, EU:C:2022:111, paragraph 48).

88 In that regard, it should be borne in mind that, as has been pointed out in paragraph 58 above, the consequences of the withdrawal of the authorisation to operate for the authorised warehousekeeper's business activities appear severe since that withdrawal is not limited in time.

89 In addition and above all, it is apparent from the documents before the Court that the national legislation at issue in the main proceedings does not allow the person concerned subsequently to obtain a new authorisation to operate.

90 The Bulgarian Government claims in this regard that that prohibition is warranted by the need to avoid the risk of re-offending. Nevertheless, although it does not seem unwarranted for an authorised warehousekeeper who has participated, for example, in large-scale evasion to be definitively deprived of the benefit of the duty suspension arrangement attached to a tax warehouse, that is not necessarily the case for less serious offences.

91 It follows that, even if the loss of the benefit of the duty suspension arrangement attached to a tax warehouse appears to be a measure that is proportionate to the seriousness of an offence, such as that referred to in Article 53(2)(1) of the ZADS, it is nevertheless a matter for the referring court to determine whether a definitive exclusion from the benefit of such an arrangement also constitutes a proportionate measure in the light of the seriousness of that offence.

92 In the light of all of the foregoing considerations, the answer to the first and third questions, examined together, is that Article 16(1) of Directive 2008/118, read in conjunction with the principle of proportionality, must be interpreted as not precluding national legislation which provides for the withdrawal of an authorisation to operate a tax warehouse in the event of a failure to comply with the excise duty arrangements that is considered to be serious by the national legislation, together with a financial penalty already imposed in respect of the same facts, provided that that withdrawal, having regard to its definitive nature in particular, does not constitute a measure that is disproportionate to the seriousness of the offence.

93 In addition, in the event that those two penalties are criminal in nature, Article 50 of the Charter must be interpreted as not precluding such national legislation provided that:

– the possibility of combining those two penalties is provided for by law;

– the national legislation does not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but provides solely for the possibility of a duplication of proceedings and penalties under different legislative provisions;

– those proceedings and penalties pursue complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue; and

– there are clear and precise rules making it possible to predict which acts and which omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the different authorities, that those two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate time frame, and that any penalty that may have been imposed in the proceedings that were first in time was taken into account in the assessment of the second penalty, meaning that the resulting burden, for the persons concerned, of such duplication is limited to what is strictly necessary and the overall penalties imposed correspond to the seriousness of the offences committed.

The second question

94 By its second question, the referring court asks the Court to interpret the principle of non-discrimination, within the meaning of recital 10 of Directive 2008/118.

95 In that regard, it must be borne in mind that, according to that recital, arrangements for the collection and reimbursement of duty have an impact on the proper functioning of the internal market and should therefore follow non-discriminatory criteria.

96 However, it is not in any way apparent from the order for reference or from the documents before the Court that the dispute in the main proceedings concerns arrangements for the collection and reimbursement of excise duty.

97 Nor is it apparent from that decision or from that file that the Bulgarian customs authorities treated Vinal differently from other operators in a comparable situation.

98 Accordingly, it must be borne in mind that the national court is required to expand, in the order for reference itself, on its definition of the factual and legislative context of the dispute in the main proceedings and give the necessary explanations of the reasons for the choice of the EU law provisions which it seeks to have interpreted and of the link it establishes between those

provisions and the national law applicable to the proceedings pending before it (see, to that effect, judgment of 4 June 2020, *C.F. (Tax inspection)*, C-430/19, EU:C:2020:429, paragraph 23 and the case-law cited).

99 Consequently, the order for reference clearly does not meet the requirements laid down in Article 94(c) of the Rules of Procedure of the Court of Justice as regards the second question set out therein, which must be declared inadmissible.

Costs

100 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 16(1) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, read in conjunction with the principle of proportionality,

must be interpreted as not precluding national legislation which provides for the withdrawal of an authorisation to operate a tax warehouse in the event of a failure to comply with the excise duty arrangements that is considered to be serious by the national legislation, together with a financial penalty already imposed in respect of the same facts, provided that that withdrawal, having regard to its definitive nature in particular, does not constitute a measure that is disproportionate to the seriousness of the offence.

In the event that those two penalties are criminal in nature, Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding such national legislation provided that:

– **the possibility of combining those two penalties is provided for by law;**

– **the national legislation does not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but provides solely for the possibility of a duplication of proceedings and penalties under different legislative provisions;**

– **those proceedings and penalties pursue complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue; and**

– **there are clear and precise rules making it possible to predict which acts and omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the different authorities, that those two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate time frame, and that any penalty that may have been imposed in the proceedings that were first in time was taken into account in the assessment of the second penalty, meaning that the resulting burden, for the persons concerned, of such**

duplication is limited to what is strictly necessary and the overall penalties imposed correspond to the seriousness of the offences committed.

[Signatures]