

Case C-520/20

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

Date lodged:

16 October 2020

Referring court:

Administrativen sad Silistra (Bulgaria)

Date of the decision to refer:

14 October 2020

Applicants:

DB

LY

Defendant:

Nachalnik na Rayonno upravlenie Silistra pri Oblastna direktsiya na Ministerstvoto na vatreshnite raboti

Subject matter of the main proceedings

Action contesting the legality of an order issued under Article 84(8) of the Zakon za Ministerstvoto na vatreshnite raboti (Law on the Ministry of the Interior, ‘the ZMVR’) for the surrender of a vehicle for which an alert had been entered in the second generation Schengen Information System (SIS II) and a written request made for its surrender

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of Article 39(3) of Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II). The reference is made under Article 267 TFEU.

Question referred for a preliminary ruling

Must Article 39 of Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), and in particular Article 39(3) thereof, be interpreted as meaning that it allows national rules and administrative practices under which, if the competent executing authority has valid reason to conclude that the alert entered in the SIS is not covered by the objectives for which it has been registered, and in particular the objectives laid down in Article 38(1), that authority can and must refuse to execute it?

Provisions of EU law relied on

Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), recital 5 and Articles 1, 2 and 52

Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), Articles 1, 2, 36, 38, 39 and 49

Provisions of national law relied on

Zakon za Ministerstvoto na vatreshnite raboti (Law on the Ministry of the Interior), Articles 84, 120, 121, 122 and 123

Naredba No. 8121z-465 za organizatsiyata i funktsioniraneto na Natsionalnata Shengenska informatsionna sistema na Republika Bulgaria (Ordinance No 8121h-465 on the organisation and operation of the national Schengen Information System of the Republic of Bulgaria), Articles 3 and 7

Succinct presentation of the facts and the main proceedings

- 1 On 6 March 2017, the applicant, DB, purchased a car in Varna (Bulgaria) from AB, of Varna, under a written contract of sale of a vehicle on which the signatures were notarised, in accordance with Article 144(2) of the Zakon za dvizhenieto po patishtata (Law on road traffic). On 7 March 2017, the vehicle was registered with the Road Traffic Police Department of the Oblastna direktsiya na Ministerstvoto na vatreshnite raboti, Silistra (Regional Directorate of the Ministry of the Interior, Silistra) and issued with number plates. The applicant searched various public registers for encumbrances on the vehicle prior to the purchase and, when registering the vehicle, the competent services carried out the necessary searches, namely for any alert for the car registered in connection with criminal proceedings in Bulgaria as well as searches of the Interpol and Schengen Information System

databases. The vehicle was purchased as a joint asset of the spouses. The relevant taxes, compulsory insurance premiums and other fees were paid.

- 2 On 24 May 2017, an alert from Norway was entered and registered in the national Schengen Information System ('the N.SIS'), the search parameter for which was 'Object – stolen, misappropriated or otherwise lost' and the vehicle was duly identified, including by its chassis number.
- 3 On 26 May 2017, a police inspector noticed the vehicle in a car park in Silistra (Bulgaria). The car had Bulgarian number plates and was registered to DB. It was established following a search in the 'Investigation' automated information system of the N.SIS II that the chassis number matched that of the vehicle sought, for which Norway had entered an alert. Pursuant to Article 84(3) of the ZMVR, the vehicle at issue was seized from the applicant, DB, together with Part 2 of its registration certificate, and a report was prepared by the Rayonno upravlenie na politsiyata – Silistra (District Police Department, Silistra, Bulgaria).
- 4 Form 38 (Vehicle), the form used to exchange information with the SIRENE Bureau when there is a hit on an object sought for the purposes of seizure or use as evidence in criminal proceedings, was completed and immediately submitted to the SIRENE Department of the Direktsiya Mezhdunarodno operativno satrudnichestvo pri Ministerstvoto na vatreshnite raboti (Directorate of International Operational Cooperation of the Ministry of the Interior, Bulgaria).
- 5 The information was exchanged with the Norwegian SIRENE Bureau and the head of the District Police Department, Silistra issued the contested order for the surrender of objects that had been seized and listed in the report on the seizure. It is apparent from the grounds of the order that the Norwegian SIRENE Bureau entered an alert for the car in question in connection with the crime of fraud/breach of trust, committed in Hordaland (Norway) on 23 December 2014 and reported to the police in Oslo on 20 March 2017.
- 6 Santander Consumer Bank (Norway) reported that it was interested in the surrender of the vehicle and instructed Lindorff AS (Norway), represented in Bulgaria by Plam EOOD, a company with its registered office in Dobrich, represented in turn by its CEO, CD, to take receipt of the object.
- 7 On 6 June 2017, Plam EOOD, Dobrich, acting through its CEO, CD, asked the defendant authority to take action to hand over the vehicle. The police formally requested the director of the Directorate of International Operational Cooperation of the Ministry of the Interior in Sofia to ask the State which had entered the alert to send a formal request for the surrender of the object. On 4 July 2017, the vehicle in question was handed over to CD together with a report.
- 8 DB filed charges against AB, the vendor of the vehicle, following which the Rayonna prokuratura Varna (District Public Prosecutor's Office, Varna) opened a file on the investigation ordered in accordance with Article 145(1)(3) of the Zakon za sadebnata vlast (Law on the judiciary). As of the closure of the hearing in the

main proceedings, there are no indications that a criminal offence has been committed.

- 9 On 13 August 2019, the applicants filed a request with the defendant police authority for the immediate surrender of the vehicle based on Article 84(9) of the ZMVR as, in their opinion, the vehicle had been seized forcibly and there had never been any basis in fact or in law for its seizure. They contested the express rejection of that request before the Administrativen sad Silistra (Administrative Court, Silistra), before which administrative court proceedings were initiated. Those proceedings have been stayed pending judgment in the main proceedings.
- 10 The applicants tried to bring an action against Santander Consumer Bank AS (Norway) in the ordinary courts, by which they asserted, in the alternative, civil claims under Article 108 of the Zakon za sobstvenostta (Law on property) (action *in rem*) and Article 57(2) of the Zakon za zadalzhniyata i dogovorite (Law on obligations and contracts) (for the misappropriation/loss etc. of the vehicle at issue). However, the civil proceedings initiated in the Okrazhen sad Silistra (Regional Court, Silistra) were terminated as the Bulgarian court does not have jurisdiction to examine and rule on the dispute pending before it.
- 11 The applicants are now challenging, before the referring court, the contested order requiring the vehicle seized from them to be surrendered to Norway. It follows from the communication of 20 March 2017 placed on file and from the international search request for the Volkswagen vehicle by the Regional Police of Hordaland, Kingdom of Norway, which gave rise to the alert entered in the N.SIS II for the search of the vehicle, that the Bulgarian national EF signed a credit agreement with Santander Consumer Bank AS on 23 December 2014 for a loan to finance the purchase of a 2014 Volkswagen Passat. A contract was signed and a sale plan agreed. Promissory notes were issued on 23 December 2014 and the sale (loan repayment) plan was entered in the Land Register on 6 January 2015. The loan was for the sum of NOK 421 840 and enforcement measures were taken against the debtor in respect of outstanding principal of NOK 213 679. It follows from a declaration by Santander Bank of ‘termination of the loan ... and declaration of ownership’ that the last payment was made on 26 February 2016; that the debtor ceased repayments in May 2016 and the bank passed the file to Lindorff AS to collect the debt; and that a request for voluntary payment and an enforcement warning were sent out on 13 May 2016, whereupon the debtor advised the company that the vehicle was in Bulgaria. The balance was stated and a number of concerns were raised as to criminal activity. The bank suspected that a crime had been committed. The police were therefore asked to search the Schengen, Interpol, Autosys and other international databases. The bank declared its intention of bringing a civil action in connection with any criminal proceedings and its lawyer signed a document which was submitted in the main proceedings by the attorney of record acting for Plam EOOD, Dobrich, which had taken possession in fact of the vehicle at issue. The referring court is of the opinion that the relationship between the Norwegian bank and its customer (borrower) is a typical private-law relationship and that the concerns expressed as to criminal

activity are not established by files compiled by the law enforcement or prosecution authorities. The applicant's vehicle was sold by an owner who held the due registration in Bulgaria, and not by EF, the person who contracted the loan from the Norwegian bank but stopped repaying it. The referring court is of the opinion that the finding that this case concerns a civil-law relationship in connection with a non-performing bank loan, rather than criminal proceedings, is also supported by the fact that vehicles sought in similar proceedings by credit institutions in various countries (including Norway, Iceland and Belgium) have been surrendered by the same authorised representative in Bulgaria, namely Plam EOOD of Dobrich, whose activities resemble those of a private 'debt collection service'.

- 12 During the course of the proceedings, the referring court requested that the defendant submit an official answer from the Norwegian police authorities as to whether criminal proceedings had been initiated in Norway in connection with the vehicle at issue and, if so, when and for what crime and what stage they had reached. A letter from the head of the SIRENE Department of the Directorate of International Operational Cooperation of the Ministry of the Interior was submitted at the hearing, from which it follows that 'the files and the investigation were closed on 10 July 2017, as the vehicle was found and surrendered to Norway'.

Principal arguments of the parties to the main proceedings

- 13 The applicants submit that the police acted *qua* court in this case to rule on a dispute *in rem*; that the contested order was wrongly based on Article 84(8) of the ZMVR, as the legal relationship between the Norwegian credit institution, which describes itself as the owner of the vehicle, and the borrower, who secured his debt against the vehicle purchased with the loan which he stopped servicing, does not fall under Article 100(3)(a) of the Convention implementing the Schengen Agreement of 14 June 1985 or under Decision 2007/533/JHA; that the scope of the legal framework is determined by Article 2 of that decision and is limited to cooperation in criminal matters, which, according to the applicants, do not cover the question under examination in this case; that, if the requirements for acceptance and registration of Norway's alert for the car in the N.SIS were not fulfilled, the subsequent exchange of supplementary information via the SIRENE Bureaux of the two States and the search for and surrender of the vehicle to Norway by its authorised representatives in Bulgaria was inadmissible.
- 14 The applicants argue that this is the key point of contention in this case and must be resolved in the administrative court proceedings by presenting compelling evidence that criminal proceedings are conducted in Norway in connection with the vehicle at issue; that, although the conduct of the borrower (who is unknown to the applicants) is classed as 'serious fraud', 'misappropriation', etc., such legal relationships (non-performance of a credit agreement with a bank) are not a crime under national law and are settled under civil law, that is to say, directly through

enforcement proceedings (which, according to the files, were conducted in Norway) and, where appropriate, by bringing an action under commercial or general civil law; and that, as failure to repay a loan is not a criminal offence under national law, there was no basis for the registration of the alert in question in the N.SIS II.

- 15 The applicants further submit that the order of the head of the District Police Department, Silistra for the surrender of the seized object, which is at issue in this case, was not even sent to them, and that, in the light of the applicable national law, the situation in the main proceedings, as described, is a foregone conclusion, as the police authorities' powers are circumscribed, and the protection of the rights of any owner acting in good faith, whose good faith is subject to specific examination in the main proceedings, remains wholly unregulated.
- 16 The applicants are also of the opinion that the unlawful action by the police authorities resulted in 'confiscation'; that forced seizure, which is merely 'temporary' according to Article 84(1) of the ZMVR, becomes permanent dispossession, as there is no legal remedy open to the owner of the seized vehicle; that this is why they lodged a detailed and reasoned application for the proceedings before the Administrativen sad Silistra (Administrative Court, Silistra) to be stayed and a request for a preliminary ruling to be made to the Court of Justice of the European Union.
- 17 The defendant police authority argues that it acted in accordance with the law and the facts established in this case, and that this request for a preliminary ruling by the Court is devoid of purpose, as the question referred is answered unequivocally in the relevant national and EU law as follows: whenever an alert for an object is registered in the N.SIS II and the object is identified precisely from the information in the alert, that object must be surrendered to the country which entered the alert, provided that a request is made to that effect within the procedural time limit. That authority does not state how the rights of an owner of an object at issue who acted in good faith should be addressed.

Succinct presentation of the grounds for the request for a preliminary ruling

- 18 The dispute between the parties concerns the order issued by the head of the District Police Department, Silistra for the surrender of the object seized in accordance with Article 84(1) of the ZMVR and, in particular, the question of whether the alert from the Norwegian authorities registered in the N.SIS II is covered by the purpose laid down in Article 1 of Regulation (EC) No 1987/2006 and the objectives of Decision 2007/533/JHA.
- 19 Article 100 of the Convention implementing the Schengen Agreement states that data on objects sought for the purposes of seizure or use as evidence in criminal proceedings are to be entered in the Schengen Information System, that is solely for the purpose of establishing the criminal liability of suspects, and not for the purpose of a speedy decision on private-law disputes.

- 20 Given the purpose of Form 38 (Vehicle), the form used to exchange information with the SIRENE Bureau when there is a hit on an OBJECT sought for the purposes of SEIZURE or USE AS EVIDENCE in criminal proceedings, and the powers expressly conferred on the competent national authority under Article 49 of Decision 2007/533/JHA, which was (partially) transposed into national law by Article 7(2) of Ordinance No 8121h-465 of the Ministry of the Interior, the referring court believes that the only legitimate reason for registering an alert in the SIS is in criminal proceedings to achieve the general purpose of the Schengen *acquis*, namely to ensure a high level of security within the area of freedom, security and justice of the European Union for all European citizens, including the applicants in this case. Article 38 (Objectives and conditions for issuing alerts) and Article 39 (Execution of the action based on an alert) of Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System should be applied directly in this case (given the express purpose of the form).
- 21 In that regard, the referring court is of the opinion, in the light of the letter from the head of the SIRENE Bureau of the Directorate of International Operational Cooperation of the Ministry of the Interior submitted at that court's express request, from which it follows that the Norwegian authorities closed the file following the surrender of the vehicle, that there is no conclusive and secure evidence that the alert was entered in the SIS in accordance with the purpose of the legislation as stated in Article 1 of Regulation (EC) No 1987/2006 and Articles 1 and 2 of Decision 2007/533/JHA.
- 22 The referring court is of the opinion that appropriate and sufficiently reliable evidence that criminal proceedings were even initiated in Norway has not been presented and, therefore, the alert entered in the SIS falls outside the scope established by Article 2 of Decision 2007/533/JHA. Nor was it in keeping with the purpose of establishing the SIS II, as stated in Article 1 of Regulation (EC) No 1987/2006. A case such as this, which concerns an unregulated relationship under civil or commercial law, is incompatible with the fundamental idea of police and judicial cooperation in a spirit of mutual trust. As a rule, creditors' rights are heavily protected under national legislation, in that they have the facility to quickly initiate enforcement. In cases with a foreign connection, international law contains detailed rules for the recognition and enforcement of court judgments.
- 23 The referring court notes that there is no specific case-law of the Court on the question that has arisen in this case, but considers that, applied *mutatis mutandis*, the following judgments of the Court are relevant subject to certain limitations: order of [12 November 2010], *Asparuhov Estov and Others*, C-339/10, EU:C:2010:680 (concerning admissibility); judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474; judgment of 30 May 2013, *F.*, C-168/13 PPU, EU:C:2013:358; judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, and others. However, as they concerned questions referred on

police cooperation with regard to the enforcement of the European arrest warrant, they cannot of themselves inform judgment in this case beyond all doubt.

- 24 The referring court is of the opinion that the request for a preliminary ruling is admissible, even though the Kingdom of Norway is not an EU Member State and the Republic of Bulgaria is not party to the Schengen Agreement. The Kingdom of Norway is named on the list of countries in the Schengen Area and the Schengen *acquis* has applied to Norway without restriction since 23 March 2003. That *acquis* was included in the EU legal system with the Protocol to the Treaty on European Union and the Treaty establishing the European Community ('Protocol on the Schengen *acquis*') and the acts building upon or otherwise related to it are binding on the Member States, including the Republic of Bulgaria. That follows expressly from the recitals of Commission Implementing Decision (EU) 2017/1528 of 31 August 2017 replacing the Annex to Commission Implementing Decision 2013/115/EU on the SIRENE Manual and other implementing measures for the second generation Schengen Information System (SIS II) established by Regulation (EC) No 1987/2006 and Decision 2007/533/JHA ('SIS II acts'). Those acts, which entered into force on 9 April 2013, repealed Title IV of the Convention implementing the Schengen Agreement. Schengen law is therefore integrated into the European legal system and both States involved in this dispute, namely the State which entered the alert in the SIS (Norway) and the State which executed it (Bulgaria), are generally bound by it, meaning that the Court of Justice of the European Union indisputably has jurisdiction to rule on the question referred.