

Case C-282/20**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:**

26 June 2020

Referring court:

Spetsializiran nakazatelen sad (Bulgaria)

Date of the decision to refer:

22 June 2020

Other party:

Spetsializirana prokuratura

Accused person:

ZX

Subject matter of the main proceedings

The proceedings are governed by Article 485 et seq. of the Nakazatelno protsesualen kodeks (Bulgarian Code of Criminal Procedure; ‘the NPK’).

The referring court has found, on examining the bill of indictment in the main proceedings, that it is vitiated by defects in that it is unclear and incomplete. National law makes no provision for the rectification of such defects. Thus the question arises as to whether those ambiguities and shortcomings must be rectified nonetheless and, if so, in what way.

Subject matter and legal basis of the request

The request is made on the basis of heading (b) of the first paragraph of Article 267 TFEU.

Questions referred

Is a provision of national law, namely Article 248(3) of the Nakazatelno protsesualen kodeks (Bulgarian Code of Criminal Procedure), which does not provide for a procedural rule for the rectification, after completion of the first hearing in criminal proceedings (preliminary hearing), of substantive ambiguities and shortcomings in the bill of indictment which infringe the accused person's right to be informed of the accusation, compatible with Article 6(3) of Directive 2012/13 and with Article 47 of the Charter of Fundamental Rights of the European Union?

If the answer to that question is in the negative: Would an interpretation of the national provisions governing amendment of the bill of indictment that allows the prosecution service to rectify those substantive ambiguities and shortcomings in the bill of indictment at the hearing, so as to take proper and effective account of the accused person's right to be informed of the accusation, be in keeping with the aforesaid provisions and with Article 47 of the Charter, or would it be in keeping with those provisions to refrain from applying national legislation prohibiting the staying of court proceedings and referral of the case back to the public prosecution service with directions to draft a new bill of indictment?

Provisions of EU law and case-law cited

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1), Article 6(3)

Charter of Fundamental Rights of the European Union, Article 47

Judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392

Judgment of 14 May 2020, *UY*, C-615/18, EU:C:2020:376

Judgment of 12 February 2020, *Kolev and Others*, C-704/18, EU:C:2020:92

Provisions of national law cited

Nakazatelen kodeks (Bulgarian Criminal Code; 'the NK'), Article 244(2), in conjunction with Article 244(1); Article 243

Nakazatelno-protsesualen kodeks (Bulgarian Code of Criminal Procedure; 'the NPK'), Article 246(2) and (3), Article 248(5), point 1, in conjunction with Article 248(1), point 3, Article 249(2) and (4), point 1, Article 287, Article 288, Article 335(1), point 1, and Article 351(2)

Brief summary of the facts and procedure

- 1 The Spetsializirana prokuratura (Specialised Prosecution Service, Bulgaria) brought criminal charges against ZX in accordance with Article 244(2), in conjunction with Article 244(1), of the NK, for the offence of possession up to the time of 1.30 on 19 July 2015 of fake money quoted on currency markets at home and abroad, namely 88 EUR 200 banknotes which he knew to be counterfeit.
- 2 The regularity of the bill of indictment was expressly discussed at the preliminary hearing, but it was not challenged by the defence. The court found that the bill of indictment was in due and proper form.
- 3 Once all the evidence had been taken, the court found, on examining the requirements that must be satisfied in order for the court to hear the other parties and pronounce judgment, that the bill of indictment was in fact vitiated by certain ambiguities and shortcomings that had gone unnoticed at the preliminary hearing.
- 4 The period during which the accused was in possession of the 88 counterfeit banknotes was not clearly stated, as the final part states that possession lasted only 90 minutes, whereas a longer period is indicated in the statement of facts.
- 5 Inasmuch as the charge was brought under Article 244 of the NK, one of the constituent elements of the offence under Article 244 of the NK is possession of false money 'in large quantities'. That constituent element must be alleged by the prosecution service and is a prerequisite for the regularity of the bill of indictment. In this particular case, it was contended that the accused was in possession of 88 banknotes, but not that this constituted possession 'in large quantities'. This suggests that the bill of indictment was not drafted in due and proper form, as the description of the constituent elements of the punishable offence is incomplete. In other words, one constituent element of the offence ('large quantities') was not stated and this should have been stated in order for the bill of indictment to be in due and proper form.
- 6 According to the bill of indictment, the accused was in possession of 'fake money'. However, Article 244(2), in conjunction with Article 244(1), of the NK refers to 'counterfeit money'; neither paragraph refers to 'fake money'. On the other hand, Article 244 of the NK qualifies the basic offence enacted in Article 243 of the NK of 'counterfeiting of money' as 'the production of fake money' or the 'falsification of genuine' money. Consequently, 'fake money' is a subtype of 'counterfeit money'. For that reason, the bill of indictment should have referred to the money both by the more specific designation, namely 'fake', and the more general designation, namely 'counterfeit'.
- 7 The offence under Article 244 of the NK is a variation on the basic offence under Article 243 of the NK. That is why certain constituent elements of the offence under Article 244 of the NK are included in the wording of Article 243 of the NK, rather than separately in the wording of Article 244 of the NK. First, this applies to the constituent element of the offence ('counterfeit' and 'fake'), as those terms

are defined in Article 243 of the NK. Second, it applies to the additional constituent element of the offence, namely ‘quoted on currency markets at home and abroad’, which is likewise included only in Article 243 of the NK.

- 8 These constituent elements appear verbatim in the bill of indictment, but without any reference to the relevant provision containing them, as Article 243(1) of the NK is not specifically cited.
- 9 For this reason, the legal qualification is vitiated by a discrepancy between the words and the numbers, as it references constituent elements of Article 243(1) of the NK in words, but without quoting the article number. It therefore needs to be supplemented, as the charge is based not only on Article 244(2), in conjunction with Article 244(1), of the NK, but also on Article 244(2), in conjunction with Article 244(1), read in combination with Article 243(1), of the NK.
- 10 The referring court pointed out these defects in the bill of indictment at the hearing held on 12 June 2020. The public prosecutor stated that he was prepared to rectify the defects, by amending the bill of indictment and the charges so as to specify the period of possession of the 88 banknotes, whether they constituted a ‘large quantity’ and whether they were counterfeit money, and by citing the correct article numbers in the legal appraisal.
- 11 The defence stated that it agreed to amendment of the bill of indictment, if that was the only possible way to rectify its defects.
- 12 The referring court has to decide whether it is possible for the defects in the bill of indictment to be rectified by declaration of the public prosecutor at the hearing.
- 13 It is of the opinion that these defects are substantive in nature, in that they compromise due process in the criminal proceedings. In fact, these ambiguities and shortcomings in the bill of indictment prevent the court from delivering judgment, as certain constituent elements and aspects of the offence or its legal appraisal would appear for the first time in the judgment. That is unlawful, as the accused person must be informed of all the constituent elements of the charges in order to be able to defend himself; he cannot be informed for the first time by a judgment which may also amount to a conviction. Nor can the court deliver a judgment which does not reflect the full content of the bill of indictment; that would infringe the principle of legality, as the judgment (be it a conviction or an acquittal) would concern an offence with fewer constituent elements than stipulated by law.
- 14 The referring court is of the opinion that it should have identified the defects at the preliminary hearing, stayed the court proceedings and referred the case back to the public prosecutor with directions to eliminate the defects by issuing a new bill of indictment. However, that did not happen.
- 15 Due to the particularities of national law, it is no longer possible to rectify defects in the bill of indictment after the preliminary hearing. This thus raises the question

of whether the procedural way forward proposed by the prosecution service, namely of rectifying the defects by amending the bill of indictment, can be applied.

Principal arguments of the parties to the main proceedings

- 16 The prosecution service has not expressed a view on the submission of a request for a preliminary ruling.
- 17 The defence takes the view that there is no need to submit a request for a preliminary ruling, as the infringement of procedural law cannot be remedied.

Brief summary of the basis for the request

- 18 By its bill of indictment, the prosecution service has brought a certain charge before the court, which must decide on the merits whether the accused person is guilty or innocent. A bill of indictment is in proper and due form if it complies with specific requirements of the NPK.
- 19 The bill of indictment must set out all the constituent elements of the offence in full. Regard being had to the facts in the main proceedings, the bill of indictment must:
 - state clearly and consistently the period of time in which the offence was committed;
 - if the law sets out certain constituent elements that, if all present, make the act a criminal offence, they must all be stated in the bill of indictment without any omission;
 - if a provision of the Criminal Code sets out the constituent elements of a certain basic offence and the subsequent provisions set out specific constituent elements for the same offence (that is, for particular circumstances), all the constituent elements must be stated in the bill of indictment, including those of the basic offence, if they refer to the specific offence;
 - the bill of indictment must set out all the constituent elements in full; this means that they must be given in both words and figures, that is, indicating the number of the provision (article, paragraph, point, letter) in which they are set out.
- 20 The court was entitled, up to the 2017 reform, to terminate the court proceedings at any point and to refer the case back to the public prosecutor with directions to rectify substantive defects in the bill of indictment. The appellate court had similar powers, as did the court of cassation, which exercised those powers by issuing binding directions to the appellate court.

- 21 Following the 2017 reform, these powers can be exercised only during the preliminary hearing in the court of first instance. There is no provision in the law for a procedure to rectify defects of this kind once the preliminary hearing has been completed. More importantly, referral of the case back to the public prosecutor is expressly prohibited.
- 22 The first question seeks clarification as to whether national legislation which prohibits defects in the information provided on the accusation from being discussed after the preliminary hearing and hence eliminates any opportunity to rectify those defects is compatible with Article 6(3) of the Directive, which, for its part, requires national rules that ensure that ‘detailed information is provided on the accusation’; this means clear, complete and consistent information on the accusation.
- 23 National law allows objections to and discussion of the standard of information provided on the accusation, but solely at the preliminary hearing. The question concerns whether the limitation to the preliminary hearing alone is compatible with Article 6(3) of the Directive or whether that provision is to be interpreted as meaning that it also applies after the preliminary hearing, especially in subsequent court hearings once evidence has been taken but before the court has ruled on the merits.
- 24 In other words, if the right to information was not respected up to the time of the preliminary hearing and the defects were not rectified at the preliminary hearing, does this then mean that Article 6(3) of the Directive is to be interpreted as meaning that that right need no longer be respected once the preliminary hearing has been completed?
- 25 The second question need only be addressed if the Court of Justice rules that EU law precludes national legislation which does not provide for any procedural measure to remedy infringement of procedural law in connection with the accused person’s right to information on the accusation after the preliminary hearing.
- 26 This requires an interpretation of national law in conformity with EU law so that the necessary rights of defence are ultimately safeguarded. Although Article 6(3) of the Directive has direct effect, it does require national procedural legislation in order to produce that direct effect (judgment of the Court of Justice of 14 May 2020, *UY*, C-615/18, EU:C:2020:376, paragraphs 69, 72, 73 and 75).
- 27 That procedural legislation can take one of two forms.
- 28 First, the court seised of the case could take procedural steps in the court proceedings to remedy the procedural infringement and ensure that the accused person’s right to information on the accusation is fully respected. This could be done by applying national legislation governing interpretation in the event of a legal loophole whereby, in this case, the absence of legislation allowing such procedural infringements to be remedied after the preliminary hearing makes it necessary to apply the rules for amending the bill of indictment *mutatis mutandis*.

The actual steps taken by the court would be as follows: it would give the public prosecutor the opportunity to make the necessary substantive amendments and to eliminate the ambiguities and shortcomings in the bill of indictment and would then inform the defence of those amendments and give it the opportunity to request forms of order in response, including a request for new evidence to be taken.

- 29 Amendment of the bill of indictment is an instrument used to amend certain parameters of the accusation during the court proceedings. It is applied without first staying the court proceedings, referring the case back to the public prosecutor with directions to make the amendments and then starting the court proceedings anew. Amendment of the bill of indictment is admissible both in the light of new facts that make amendment necessary or, where no such facts arise, if the public prosecutor has made a mistake in drafting the bill of indictment. Amendment of the bill of indictment entails guarantees for the defence, which may request that the main proceedings be stayed so that it can prepare the defence in response to the amended accusation. In some cases, the statements made by the accused person up to that point lose their legal effect and he is allowed to make additional statements. The right of the defence to request that new evidence be taken on the amendments is recognised in case-law. On the other hand, national case-law to date has not addressed amendment of the bill of indictment as an instrument for correcting procedural errors in the bill of indictment. At the present time, as staying the court proceedings and referring the case back to the public prosecutor are expressly prohibited, the facility exists to make a new, extended interpretation of the provision governing amendment of the bill of indictment so that it also includes cases in which the bill of indictment is vitiated by certain procedural errors, including where the period of time in which the act was committed is unclear and constituent elements of the accusation and relevant provisions are missing from the legal appraisal.
- 30 The basis for this interpretation is the generally recognised rule of '*a fortiori*' interpretation. If it is permissible to insert a completely new period of time for the commission of the act, it must *a fortiori* be permissible to specify more precisely the period of time already indicated. If it is permissible to amend the legal appraisal so substantially that a charge can be brought for an entirely different and/or more serious offence, it must *a fortiori* be permissible to make an insubstantial amendment to the legal appraisal in order to eliminate shortcomings and supplement missing elements.
- 31 The second way forward would be to apply the old legal position in force up to the 2017 reform, which is expressly prohibited several times in the current version of the NPK, namely by staying the court proceedings, referring the case back to the public prosecutor with directions to draft a new bill of indictment and then starting the court proceedings anew by re-questioning all of the witnesses. In order to do that, the referring court would have to disregard that prohibition in national legislation and restore the old, pre-2017, legal position.

- 32 The second question seeks clarification as to whether the first, the second or both legal solutions are compliant with EU law.
- 33 The provisions of the first and second paragraphs of Article 47 of the Charter on the right to an effective remedy and to a fair trial are relevant to both questions. With regard to the first question: if the accused person faces an incomplete accusation and the court has no powers to rectify that shortcoming, he is exposed to the risk either of being convicted on the basis of an incomplete accusation (that is to say, for an act that does not qualify as an offence under the law) or of being convicted for an actual offence, but only being informed of the constituent elements of that offence for the first time in the judgment. In the first case, the need for the constituent elements of the offence to comply with the law is not fulfilled and, in the second case, the need for the accused to be informed of all the elements of the accusation is not fulfilled, resulting in an unfair trial.
- 34 The purpose of the second question is to establish which of the two procedural alternatives for rectifying ambiguities and shortcomings in the bill of indictment best complies with the principle of an effective remedy and a fair trial.
- 35 The provision of the second paragraph of Article 47 of the Charter on the need for a criminal case to be heard within a reasonable time is only relevant to the second question. If the Court of Justice rules that the national legislation prohibiting the case from being referred back to the public prosecutor after the preliminary hearing should not be applied, this would result in the case being referred back and would necessarily entail all the evidence being taken anew, thereby causing an inappropriate and unnecessary delay in the criminal proceedings. If, however, the Court of Justice should rule in favour of the application, *mutatis mutandis*, of Article 287 of the NPK (amendment of the bill of indictment) and find that instrument to be an acceptable procedural means of rectifying ambiguities and shortcomings in the bill of indictment, those defects could be rectified without the need for referral or for all the evidence to be taken anew. It would be possible to take additional evidence only pursuant to a corresponding request on the part of the defence.