

Case C-393/19**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:**

21 May 2019

Referring court:

Apelativen sad — Plovdiv (Plovdiv Court of Appeal, Bulgaria)

Date of the decision to refer:

16 May 2019

Applicant:

OM

Other parties to the proceedings:

Okrazhna prokuratura — Haskovo

Apelativna prokuratura — Plovdiv

Subject matter of the main proceedings

Appeal by the defence against the judgment in criminal matters handed down by the Okrazhen sad — Haskovo (Haskovo Regional Court) in inquisitorial proceedings No 709/18, by which the defendant OM was found guilty of aggravated smuggling, insofar as the judgment ordered the confiscation of the instrumentality for the benefit of the State.

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

Interpretation of Article 17(1) and Article 47 of the Charter of Fundamental Rights of the European Union.

The application is made on the basis of Article 267(1)(b) TFEU.

Questions referred

1. Is Article 17(1) of the Charter of Fundamental Rights of the European Union to be interpreted as meaning that a national provision such as that pursuant to Article 242(8) of the *Nakazatelen kodeks* (Criminal Code, ‘the NK’) of the Republic of Bulgaria, according to which a means of transport used to commit aggravated smuggling which belongs to a third person who neither knew nor could or should have known that its employee was committing the offence must be confiscated for the benefit of the State, is unlawful on the grounds that it undermines the fair balance between the public interest and the need to protect the right to property?

2. Is Article 47 of the Charter of Fundamental Rights of the European Union to be interpreted as meaning that a national provision such as that pursuant to Article 242(8) of the NK, according to which a means of transport owned by a person who is not the person who committed the offence can be confiscated without the owner being guaranteed direct access to the courts to state its case, is unlawful?

Legislation and case-law of the European Union

Articles 17 and 47 of the Charter of Fundamental Rights of the European Union

Recital 33 of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

National law

Articles 242, 37, 44 and 53 of the NK

Article 111(1) of the *Nakazatelno-Protsesualen kodeks* (Code of Criminal Procedure, ‘the NPK’)

Article 108 of the *Zakon za sobstvenostta* (Law on Property) of 1951

Pursuant to Article 242(8) of the NK, the means of transport or movement which has served the purpose of transporting or moving the smuggled goods is confiscated for the benefit of the State even if it is not the property of the perpetrator, unless its value clearly does not correspond to the severity of the offence.

The referring court explains that under Bulgarian law the confiscation of the instrumentality used to commit the offence of aggravated smuggling is intended to be a necessary consequence of the commission of the offence with the question of who owns the instrumentality not being taken into account. This confiscation is not a punishment but rather a consequence of the fact that the confiscated

instrumentality has served the purpose of committing the smuggling. Thus, although the confiscation is a measure that gives rise to an adverse effect, it is not a punishment according to the Bulgarian Criminal Code. It cannot be equated with the punishment of ‘confiscation where no specific danger emanates from the article in question’, which constitutes an expropriation of property belonging to the perpetrator.

In addition, it should be noted that the special provision of Article 242(8) of the NK in relation to the confiscation of the means of transport or movement is an exception to the general rule of Article 53(1) of the NK, according to which the instrumentalities are confiscated only when they belong to the perpetrator. The provision of Article 242(8) of the NK gives confiscation for the benefit of the State a substantially broader scope than the underlying provision of Article 53(1) of the NK.

The term ‘instrumentalities’ is defined in the binding case-law of the Republic of Bulgaria. According to interpretative judgment No 84/01.12.1960 of the full court of the Criminal Chamber of the Varhoven sad (Supreme Court) in criminal case No 78/1960, articles have ‘served’ the purpose of the commission of an offence when they have actually been used to commit it. The principle in question was developed in judgment No 11/1971 of the full court of the former Supreme Court in criminal case No 8/1971. According to that judgment, articles have served the purpose of the commission of the offence ‘if they have been directly and immediately used as a tool or means for realising the elements of an intentional criminal offence’. An instrumentality is thus something different from the object of an offence since the former relates to articles which, in a specific situation, serve to perform a criminal act. An article is an instrumentality only when it is directly linked with the *actus reus* of the offence, and not with other elements of the offence. This concept is primarily relevant in cases such as the present one, in which the *actus reus* itself is committed by virtue of the use of a means of transport or movement. This is the case since the *actus reus* consists in an actual movement (an actual transportation) of the goods over the border.

Brief summary of the facts and procedure

- 1 In July 2018, the defendant OM worked for the Turkish transport company ‘Plastnak Nakliat Turizam Sanayi Ve Tidzharet Anonim Shirketi’. He carried out international transportation with an articulated lorry which consisted of a tractor unit of the ‘Mertsedes’ make and a trailer of the ‘Tirsan’ make which was coupled to it.
- 2 On 11 July 2018, he was to begin his next trip from the Turkish city of Istanbul to the town of Delmenhorst in the Federal Republic of Germany, for the purpose of transporting hazelnut paste. In the days prior to his departure, an unknown person contacted him and suggested that he smuggle 2,940 antique coins to Germany in return for payment. The defendant agreed and received the coins. These coins had

a total weight of 24.850 kg and were divided between three plastic Coca-Cola bottles, each of which had a volume of 1.5 litres and had had its upper section cut off. To conceal the content of the bottles, they were wrapped in black material and adhesive tape. The defendant stowed the three bottles in the hollow space which was present as standard under the driver's seat and was intended for luggage, tools and other accessories. The hollow space was a cabinet with a door which was moved by pressing a button on the driver's seat (the button was accessible only from the interior of the driver's cabin).

- 3 The defendant hid the bottles with the coins between four plastic plates and panels for automobile glass in the hollow space, and did not inform anybody of his plan to commit a criminal offence.
- 4 On the morning of 12 June 2018, he passed the Turkish border crossing point of 'Kapakule' without any problems and entered the territory of the Republic of Bulgaria via the border crossing point of 'Kapitan Andreevo'. At the latter border crossing point, he joined the 'Incoming lorries' lane for border and customs control.
- 5 At this point, the customs officer and witness DM was working at the line check. He carried out a routine check of the articulated lorry and of the goods, during which he asked the driver to open the hollow space. The defendant did so, and the witness discovered the bottles. Upon being asked by the customs officer what the bottles contained, the defendant replied that they contained spare parts for vehicles. The customs officers decided to carry out a detailed examination of the bottles and cut one of them open. Upon doing so, he discovered the coins. He presumed that these were of cultural-historical value and asked an expert from the regional historical museum, who confirmed this presumption.
- 6 The antique coins, the tractor unit, the trailer, the ignition key and the vehicle registration document were secured and seized as evidence. The articulated lorry was properly searched, photographed, assessed by an expert for the purposes of determination of value, and then impounded.
- 7 The archaeological-numismatic expert valuation report commissioned, which is not called into question by the parties, reached the conclusion that all of the coins were genuine and constituted archaeological objects. They represented a collective discovery which was extremely valuable for the purposes of historical research, namely a hoard of coins. As the coins constituted a treasure trove, they were of high value both in academic terms and also for the purposes of exhibitions. As a consequence, each coin was estimated to be worth BGN 25; the total value of all of the coins was fixed at BGN 73,500.
- 8 In the irrefutable conclusions of the expert report relating to the goods, the value of the tractor unit of the 'Mertsedes' make, with which the coins were transported, was set at BGN 81,529.50, and that of the trailer of the 'Tirsan' make which was coupled to it was set at BGN 23,721.25.

- 9 The first-instance judicial proceedings took place in the absence of the defendant. The defence did not request that oral testimony be heard, or that documents be produced, and nor did it dispute the facts set out in the bill of indictment by which the judicial proceedings had been initiated. Those facts correspond to the facts accepted by the Court. It is not expressly stated in the bill of indictment that the company which owns the articulated lorry has no connection with the offence (this is not specified in the reasons given by the first-instance court either); however, it is evident from the statement of the accepted facts that no such connection exists.
- 10 During the pre-trial investigations, the managing director of the owner of the tractor unit that was the subject of the proceedings learned of the proceedings and granted the lawyer Dimitar Sladov a power of attorney to represent him in connection with the impounding of the articulated lorry which had been secured as evidence. In the pre-trial proceedings, the lawyer Mr Sladov requested the return of the tractor unit and the trailer. The request for the return of the articulated lorry was refused by the supervising public prosecutor and, upon appeal, by the first-instance court.
- 11 In his closing submissions before the first instance court, the lawyer Mr Ivanov did not plead that his client was innocent or that he should be acquitted. He requested that a more lenient sentence be imposed and that Article 242(8) of the NK not be applied; in doing so, he contended for the first time that this provision and the provisions described above contravened EU law.
- 12 By criminal judgment No 13/22.03.2019 of the Haskovo Regional Court in inquisitorial proceedings No 709/18, the defendant OM was found guilty of an offence under Article 242(1)(e) of the NK — aggravated smuggling of a hoard of coins, the value of which satisfied the ‘on a large scale’ element of the offence. He was sentenced to a primary penalty of three years’ deprivation of liberty and, as a secondary penalty, to a fine of BGN 20,000. The primary penalty was suspended for four years from the point at which the judgment became legally binding. The coins which were the subject of the offence were confiscated for the benefit of the State pursuant to Article 242(7) of the NK. Pursuant to Article 242(8) of the NK, the tractor unit that was the subject of the proceedings, which had served the purpose of transporting the smuggled goods, was also confiscated for the benefit of the State. The trailer, which had no direct connection with the transportation, was returned to its owner, the Turkish company.

Principal arguments of the parties in the main proceedings

- 13 In the notice of appeal it is argued that the confiscation of the tractor unit also infringed the defendant’s right of defence. There was a contravention of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), of the Additional Protocol to the Convention, of the Charter of Fundamental Rights of the European Union (hereinafter the ‘Charter of Fundamental Rights’) and of Regulation (EU) No 952/2013 of the

European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

- 14 In the main hearing, the lawyer Mr Ivanov maintained the appeal and presented new arguments in favour of the position that the confiscation of the means of transport which was owned by a person other than his client had not been lawfully ordered. He alleges that the confiscation was also contrary to the requirements of Directive 2014/42, which refers to the ECHR and the case-law of the European Court of Human Rights (ECtHR); furthermore, the confiscation also did not comply with the requirement pursuant to Article 5 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, according to which persons affected must have effective legal remedies available to them in order to preserve their rights. The lawyer Mr Ivanov further maintains his special request to the Court of Appeal that a request for a preliminary ruling be submitted to the Court of Justice of the European Union, in order for the alleged infringement of specific provisions of EU law to be examined.
- 15 The Prokuror ot Apelativna prokuratura — Plovdiv (Public Prosecutor of the Public Prosecutor's Office for Appeals of Plovdiv) requests that the special request be refused given that there was no need for an interpretation of EU law. The confiscation, ordered by the Haskovo Regional Court, of the means of transport by which the smuggled treasure trove had been transported had to be confirmed by the Court of Appeal because the application of Article 242(8) of the NK had never been the subject of dispute or divergences in the Bulgarian case-law. The public prosecutor refers to judgments of the Varhoven kasatsionen sad (Supreme Court of Cassation) of the Republic of Bulgaria, in which it was emphasised that confiscation necessarily had to take place as a consequence of the commission of smuggling, irrespective of whether the confiscated property belonged to the perpetrator or to a third party acting in good faith. The Supreme Court of Cassation of the Republic of Bulgaria had upheld a piece of case-law in relation to proceedings pertaining to offences under Article 242 of the NK in which no contravention of the principle of the fair balance between the various interests involved, which had been laid down in the EU legislation cited by the lawyer Mr Ivanov, had been found to exist. It was a legitimate and proportionate consequence of the offence that the owner of the means of transport had been deprived of its use. Every Member State had the right to order such a confiscation in the public interest.

Brief summary of the basis for the reference

- 16 An answer regarding the meaning and content of the relevant EU law is of decisive importance for the purposes of arriving at a correct decision in the pending criminal judicial proceedings. The provision of Article 242(8) of the NK is unambiguous and requires no interpretation. The Court is obliged to confiscate the means for committing aggravated smuggling, regardless of who owns the means. This provision dates from a time when Community law was not yet

binding on Bulgaria, and is probably not in accordance with a number of provisions of EU law. Specifically, it probably does not comply with Article 17(1) and Article 47 of the Charter of Fundamental Rights. The fact of the means of transport or movement which served the purpose of transporting or moving the goods smuggled within the meaning of Article 242 of the NK being, pursuant to Article 242(8) of the NK, confiscated for the benefit of the State even when it does not belong to the perpetrator, may, in the view of the Court of Appeal, result in an imbalance between the interests of a third person who was not involved in the offence in any way and has no connection with it whatsoever, and the interests of the State in confiscating this person's property since it was used to commit the offence. Since the national law does not provide any procedure for hearing the owner of the instrumentality, there may additionally be an infringement of the requirement arising from Article 47 of the Charter of Fundamental Rights (which adopts the requirement from Article 6 ECHR) according to which effective legal remedies must be guaranteed, with this necessarily encompassing direct access to the courts.

- 17 An indication that the national law of the Republic of Bulgaria is incompatible with the cited provisions of EU law is provided by the judgment of the Fourth Chamber of the ECtHR of 13 October 2015, *ÜNSPED PAKET SERVİSİ SAN. VE TİC. A. Ş. v Bulgaria* (Appeal 3503/2008). This judgment discusses a case where a lorry owned by a company registered in the Republic of Turkey was confiscated on the basis of Article 242(8) of the NK of the Republic of Bulgaria. In this judgment, it is held that the confiscation is contrary to Article 1 of the Additional Protocol to the ECHR, the content of which is consistent with that of Article 17(1) of the Charter of Fundamental Rights in relation to the right to property. It is further stated in the judgment that the owner of the lorry was denied access to the courts. Access to the courts as a means of realising effective legal protection is guaranteed in Article 47 of the Charter of Fundamental Rights. In the ECtHR's judgment it is stated that the absence of a procedure in which the person affected was able to put his case meant that the State authorities were not able to assess the proportionality of the confiscation, which in turn meant that no 'fair balance' was able to be struck between all of the interests involved. It is emphasised that this balance depends on many factors, which include the owner's behaviour. Consequently, the national authorities should have considered the degree of fault or care in relation to the confiscated property or at least the relationship between the conduct exhibited and the offence. It is held that the company concerned had to bear an individual and excessive burden; in this context, reference is made to the judgment of 23 September 1982, *Sporrong and Lönnroth v Sweden*, (§§ 69 to 73, Series A No 52).
- 18 The referring court considers that it is appropriate to cite a section of a judgment of the ECtHR of 24 October 1986, *Agosi v The United Kingdom* (Appeal 9118/80, Series A, No 108), where it is stated: 'For forfeiture to be justified under the terms of the second paragraph of Article 1 of the Additional Protocol to the ECHR, it is enough [that] the State has struck a fair balance between the interests of the State and those of the individual ... The striking of a fair balance depends on many

factors and the behaviour of the owner of the property, including the degree of fault or care which he has displayed, is one element of the entirety of circumstances which should be taken into account. Accordingly, although the second paragraph of Article 1 contains no explicit procedural requirements, the [ECtHR] must consider whether the applicable procedures in the present case were such as to enable, amongst other things, reasonable account to be taken of the degree of fault or care of the applicant company or, at least, of the relationship between the company's conduct and the breach of the law ...; and also whether the procedures in question afforded the applicant company a reasonable opportunity of putting its case to the responsible authorities'.

- 19 In addition, recital 33 of Directive 2014/42 should also be considered. According to that recital, specific safeguards and judicial remedies must be provided for in order to guarantee also the preservation of the fundamental rights of third parties who are not being prosecuted. It is further stated that these safeguards include the right to be heard for third parties who claim that they are the owner of the property confiscated.
- 20 For these reasons, the Chamber of the Court which is considering the matter is of the view that the question as to the meaning and applicability of the two provisions of the Charter of Fundamental Rights that have been discussed and as to potential non-compliance with these provisions by the national provision of Article 242(8) of the NK in relation to the confiscation of the instrumentality used to commit aggravated smuggling is of direct (prejudicial) significance for the purposes of arriving at a correct decision both in the present case and in further cases having the same subject matter.