

**Case C-769/19****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 October 2019

**Referring court:**

Spetsializiran nakazatelen sad (Bulgaria)

**Date of the decision to refer:**

7 October 2019

**Other parties to the proceedings:**

Spetsializirana prokuratura

**Defendants:**

UC

TD

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**Subject matter of the main proceedings**

Bill of indictment containing certain deficiencies, namely unclear, inconsistent and incomplete description of the offences for which the accused have been brought to trial. Measures for remedying these deficiencies.

**Subject matter and legal basis of the reference**

Interpretation of Article 6 of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings and compatibility of a national law with that provision.

The request is made on the basis of Article 267 of the TFEU.

### **Question referred**

**Is a national law which, in the case of a deficient bill of indictment (the content of which is unclear, incomplete or inconsistent), in no way allows the possibility of these deficiencies being remedied through corrections by the public prosecutor in the preparatory judicial hearing in which the deficiencies are established, and instead always obliges the court to discontinue the judicial proceedings and remit the matter to the public prosecutor's office for a new bill of indictment to be drawn up, compatible with Article 6 of 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), the principle of having a hearing within a reasonable time pursuant to Article 47(2) of the Charter of Fundamental Rights of the European Union, the principle of the precedence of EU law and the principle of the preservation of dignity, if this causes a considerable delay in the criminal proceedings and the deficiencies could be rectified immediately in the judicial hearing?**

### **Cited legislation and case-law of the European Union**

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; compatibility of a national law with Article 6

Judgment of 5 June 2018, *Kolev* (C-612/15, ECLI:EU:C:2018:392)

### **Cited national legislation**

Nakazatelno protsesualen kodeks (Code of Criminal Procedure, 'the NPK'), Articles 246 to 249, Article 242, Article 287, Article 55, Article 178, Article 180 and Article 348

Zakon za normativnite aktove (Law on normative legal acts), Article 46(2)

Interpretative judgment No 2 of the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria) of 7 October 2002

Interpretative judgment No 6 of the Supreme Court of Cassation of 19 February 2018

Judgment No 14 of the Konstitutsionen sad (Constitutional Court, Bulgaria) of 9 October 2018

**Brief summary of the facts and procedure**

- 1 Charges have been brought against UC and TD; the former is charged with leading a criminal organisation (jointly with other persons already convicted in the proceedings) with the purpose of jointly committing criminal offences pursuant to Article 159a of the Nakazatelen kodeks (Penal Code, 'the NK') (human trafficking, in this case of prostitutes) domestically and abroad for financial gain (liable to prosecution pursuant to Article 321 of the NK), and the latter is charged with involvement in this criminal organisation. UC is also accused of having recruited three women into prostitution by promising benefits (punishable pursuant to Article 159d in conjunction with Article 159a[2](6) in conjunction with Article 159a(1) of the NK) in three separate cases when implementing a decision of the criminal organisation and of having been in possession of a narcotic substance (punishable pursuant to Article 354a of the NK).
- 2 The bill of indictment was lodged on 18 April 2019 and the preparatory hearing successfully conducted on 27 September 2019.
- 3 After hearing the parties concerned, the court found in the preparatory hearing that the bill of indictment contains certain deficiencies, namely ambiguities, omissions and inconsistencies. These are as follows:
- 4 Inconsistent information is provided with regard to the place where the criminal offence pursuant to Article 321 of the NK had been committed. It is stated in the section dealing with the facts that the criminal organisation had been active throughout the national territory, with various cities — Sofia, Bansko, Plovdiv and others — being mentioned, whereas only Sofia is mentioned in the concluding section. There is therefore an inconsistency between the section dealing with the facts and the concluding section with regard to the location of the offence: the entire national territory or just Sofia.
- 5 Inconsistent information is provided with regard to when one of the women was recruited into prostitution. The section dealing with the facts talks of recruitment in 2016, with the recruited woman having worked as a prostitute in Sofia and Plovdiv, as well as in holiday resorts on the coast in summer 2016 and again in Sofia in December 2016; that means that the recruitment itself must have taken place before summer 2016. By contrast, it is stated in the concluding section that UC had recruited that woman in Sofia in December 2016. There is therefore an inconsistency between the section dealing with the facts and the concluding section with regard to when the offence was committed: before the summer or in December 2016.
- 6 There are no factual indications regarding the charge that the criminal organisation had decided that UC should recruit the three women into prostitution. There is a lack of completeness here.
- 7 The offence of possessing a narcotic substance is not clearly described, as it is merely stated that the narcotic substance had been found in the home of UC and it

is unclear whether it is asserted that it had been in his possession. There is a lack of clarity here.

- 8 The public prosecutor expressed his willingness to immediately remedy the deficiencies through the necessary clarifications in the preparatory hearing.
- 9 The referring court is of the opinion that the bill of indictment would be formally lawful should the public prosecutor make those clarifications. The court could then continue with the legal proceedings.
- 10 However, there is a formal obstacle to this: The national law does not permit the public prosecutor to remedy the deficiencies in the bill of indictment during the preparatory hearing. The national law requires the judicial proceedings to be discontinued and the matter remitted to the public prosecutor's office, in order for the latter to draw up a new bill of indictment and lodge this with the court for a hearing in a new session, this usually causing a delay of a few months.

### **Brief summary of the basis for the reference**

#### The deficiencies in the bill of indictment

- 11 The bill of indictment consists of a section dealing with the facts, in which the factual charges are presented, and a concluding section, in which the legal charges are presented. The most important facts, such as the time and place of the offence and the actions constituting an offence, are usually set out in the concluding section.
- 12 An inconsistency between the section dealing with the facts and the concluding section or the lack of factual indications of relevance to the legal assessment is equivalent to the lack of sufficiently clear factual indications in respect of the charges. On the basis thereof, these deficiencies are regarded as significant infringements of procedure which impair the accused's right to find out what charges he is facing. An infringement of rules of procedure is significant if it has caused a restriction of the procedural rights of the accused or other parties concerned and has not been remedied (Article 348(3)(1) of the NPK).
- 13 Pursuant to Article 55(1) of the NPK, the accused has the right to find out what criminal offence he is being accused of and what evidence is being used as a basis.
- 14 In point 4.2 of interpretative judgment No 2/02, the Supreme Court of Cassation states that 'in the section of the bill of indictment dealing with the facts, the public prosecutor absolutely must indicate the facts from which the elements of the offence and the involvement of the accused in the commission thereof are apparent ... these also include the time and place of the commission of the criminal offence .... The failure to indicate all the facts in this category constitutes a significant infringement of the rules of procedure ...'.

National legislation on remedying significant infringements of the rules of procedure in the case of an unclear, incomplete and inconsistent bill of indictment

- 15 Criminal proceedings consist of two stages: pre-trial and trial. The trial stage begins with the filing of the bill of indictment, in which the accusation is set out in detail from a factual and legal perspective.
- 16 After the bill of indictment is lodged, a preparatory hearing is arranged within two months. The purpose of this preparatory hearing is the examination of certain factors, one of which is the legality of the bill of indictment. This assessment is final (after expiry of the time limit for appeals or following confirmation of the decision at second instance). It is not permissible to raise a renewed objection against the legality of the bill of indictment at a later date.
- 17 A copy of the bill of indictment is sent to all the parties concerned (the accused and the injured parties), who are able to submit observations within seven days. The preparatory hearing is deferred for up to three months if one of the parties concerned was not found or if the seven-day period had not yet expired.
- 18 Upon initiation of the proceedings in this preparatory hearing, the court and the parties concerned discuss numerous issues, inter alia whether the bill of indictment contains deficiencies (including ambiguities, omissions and inconsistencies), as a result of which the charges are not comprehensible. After hearing all the parties concerned, the court rules on this issue.
- 19 If the court determines that the bill of indictment is deficient (contains an inconsistency, omission or ambiguity), it discontinues the judicial proceedings and remits the matter to the public prosecutor's office, indicating the infringements (Article 249(2) of the NPK).
- 20 The pre-trial proceedings are resumed. The public prosecutor's office is given a month to draw up a new bill of indictment. After this has been drawn up, it is lodged with the court. The trial stage of the proceedings is reopened and the aforementioned steps performed: Arranging of a renewed preparatory hearing within two months, summoning of the parties concerned and re-examination of the bill of indictment. Should it be found that the deficiencies have not been remedied or new deficiencies exist, the judicial proceedings are discontinued once again and the matter remitted to the public prosecutor's office.

National legislation on amendment of the charges

- 21 The accusation made with the bill of indictment may be amended by the public prosecutor's office under the following two conditions: The preparatory hearing has been conducted and the judicial investigation, namely the taking of evidence, has commenced; and new evidence has already been gathered which leads to the conclusion that the offence has other characteristics, that is to say there is a

significant change in the section of the bill of indictment dealing with the facts pursuant to Article 287(1) of the NPK.

- 22 The charges may not be amended pursuant to Article 287(1) of the NPK in order to remedy a deficiency in the bill of indictment which already existed when it was drawn up. That is regarded as a statutory violation, as the legally-prescribed procedure for remedying deficiencies in the bill of indictment is thereby circumvented.

National legislation on remedying an obvious factual error (Article 248a of the NPK)

- 23 An obvious factual error is a technical discrepancy between the formulated intention of the public prosecutor and that set out in writing, such as a misspelt name, an incorrect date or the like. In the case of an obvious factual error, the court sets a date for the main hearing in the matter and orders the public prosecutor to remedy the errors within seven days. If the public prosecutor does not remedy them within the period set, the court cancels the date and discontinues the judicial proceedings, by remitting the matter to the public prosecutor's office for a new bill of indictment to be drawn up. The procedure then continues in accordance with paragraphs 19 to 21.
- 24 In practice, these obvious factual errors are rectified by declaration of the public prosecutor in the preparatory hearing. The rectification takes place as soon as the court refers the public prosecutor to their existence and the public prosecutor verbally clarifies in the judicial hearing what he meant by that declaration. The judicial proceedings are therefore not discontinued and the matter is not remitted to the public prosecutor's office for a new bill of indictment to be drawn up.

Judgment No 14 of the Constitutional Court of 9 October 2018

- 25 This regulation on remedying obvious technical errors was introduced in 2017 and is contrary to the established national legal tradition that every individual infringement of the rules of procedure when drawing up the bill of indictment, even the most insignificant, is only to be remedied in one way, namely by discontinuing the judicial proceedings and remitting the matter to the public prosecutor's office for a new bill of indictment to be drawn up. For this reason, the new regulation was immediately contested before the Constitutional Court.
- 26 The Constitutional Court came to the conclusion that the correction of an obvious factual error in the bill of indictment was not comparable with the amendment thereof, which meant that the introduction of a special procedural regulation on the remedying thereof was justified.

- 27 At the same time, the Constitutional Court made it clear that it was not lawful to use the arrangement of remedying an obvious factual error to in reality achieve an amendment of the charges.
- 28 Nevertheless, the Constitutional Court referred, while discussing another issue (namely that it is not possible for a higher court to annul the judgment due to deficiencies in the bill of indictment after the deficiencies were expressly discussed in the preparatory hearing and a final decision in relation to it was issued), to the importance of the case being heard within a reasonable time. The Constitutional Court also assumed in the scope of this discussion that it was possible for the deficiencies in the bill of indictment pursuant to Article 249(4)(1) of the NPK (including ambiguity, incompleteness and inconsistency) to be remedied at the trial stage, namely without annulling the judgment and remitting the matter to the public prosecutor's office for a new bill of indictment to be drawn up.
- 29 The national law does not provide for such a possibility of remedying shortcomings in the bill of indictment after the preparatory hearing. The aforementioned observations of the Constitutional Court did not bring about any change in the law or the case-law.

#### Importance of the arrangement under Article 249 of the NPK for national law

- 30 Inconsistencies, ambiguities and omissions in the bill of indictment are found in the preparatory hearing in most criminal cases. This makes it necessary to discontinue the judicial proceedings and remit the matter to the public prosecutor's office, leading to several months of delay. In some cases, this procedure for correcting the deficiencies in the bill of indictment is repeated several times.
- 31 These deficiencies could usually be immediately remedied, avoiding the several months of delay.

#### Interpretation in the event of a lacuna in the law

- 32 If a normative legal act is incomplete, the cases not regulated by it are to be governed by the provisions concerning similar cases, if this corresponds to the purpose of the legal act. Where there are no such provisions, the legal relationships are to be regulated according to the fundamental principles of the law of the Republic of Bulgaria (Article 46(2) of the Law on normative legal acts).

Rules on summons

- 33 The parties involved in the proceedings, including the accused and the injured parties, are summonsed in writing. The summonses consist of a sheet of paper printed with text. The name of the person, the procedural capacity in which the person is being summonsed, namely as accused or injured party, and their rights and obligations are indicated thereon. These summonses are not placed in a non-transparent envelope and their content is in no way hidden from third persons who are not addressees. If the appropriate person is not reached at the address, the summons is served on certain third parties for subsequent forwarding to the addressees. The summons is entirely visible to those persons through whom such service is effected.

Importance of hearing the criminal case within a reasonable time

- 34 One principle for the hearing of criminal cases is the requirement to act within a reasonable time (Article 22(1) of the NPK).
- 35 Under Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the case is to be heard within a reasonable time. In a number of decisions, the European Court of Human Rights has objected to the matter being remitted to the public prosecutor's office for a new bill of indictment to be drawn up, if this happened after commencement of the hearing on the substance, including at second or third instance.

Link between the question referred and Case C-612/15

- 36 The present question is raised on the basis of arguments set out in the judgment of the Court of Justice of 5 June 2018, *Kolev* (C-612/15) and based on the referring court's assumption that the national law does not comply with EU law in so far as it provides an ineffective regulation for remedying deficiencies in the bill of indictment.
- 37 The question referred concerns the procedure for appropriately remedying the deficiencies in the bill of indictment. The national solution is a 'step backwards', namely discontinuance of the judicial proceedings and remittance of the matter to the pre-trial stage, in which a new bill of indictment is to be drawn up and lodged once again at the court, new judicial proceedings are to be initiated and a new preparatory hearing and re-examination of the bill of indictment are to be conducted, with this being repeated several times in some cases.
- 38 At the same time, it could possibly be inferred from certain considerations in the *Kolev* judgment (C-612/15) that the Court of Justice assumes it to be lawful for deficiencies to be remedied in another way, specifically 'with a step forwards', namely in that, immediately after establishing those deficiencies, during the

judicial hearing, the court gives the public prosecutor the opportunity to correct the deficiencies (see paragraphs 67, 71, 741, 94 and 95 of the judgment in *Kolev*).

- 39 Following delivery of the Advocate General's Opinion in Case C-612/15, the national law was amended to the effect that a preparatory hearing is provided for, that is to say the national court is already obliged to initiate the trial stage of the proceedings, in that it has to comprehensively establish, in that preparatory hearing, any deficiencies in the bill of indictment in consideration of the defence's objections in that respect. The first action referred to by the Court of Justice in paragraph 67 of the *Kolev* judgment (C-612/15) ('...open the trial stage of the proceedings') is already mandatory under the national law.
- 40 However, the national law does not allow the second action, namely that the court 'itself cures those irregularities'. The national law does not allow the court, after it has clearly referred the public prosecutor to the deficiencies, to give him the opportunity, in the same judicial hearing, to correct them, and then to examine, in the same judicial hearing, in consideration of the defence's observations, whether those errors have actually been corrected.

#### The application of EU law to the facts of the main proceedings

- 41 With regard to the application of the second sentence of Article 6(1) of Directive 2012/13, this provision requires 'prompt' information about the accusation. This raises the question as to whether this requirement is met if a national law artificially delays the remedying of deficiencies in the information regarding the accusation, more specifically, if the public prosecutor, as in the main proceedings, expresses willingness to remedy the deficiencies in the bill of indictment (inconsistency, lack of clarity, incompleteness), but the national law does not allow this.
- 42 Pursuant to Article 6(3) of Directive 2012/13, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation. The Court of Justice has already stated in paragraph 99 of the judgment in *Kolev* (C-612/15) that the detailed information on the charges must be disclosed, at the latest, before examination of the merits of the case. It therefore allows this information to be provided after the case has been brought before the court, more specifically in the preparatory hearing in which the issue of deficiencies in the bill of indictment is discussed. Therefore, Article 6(3) of Directive 2012/13 as interpreted by the Court of Justice in paragraph 99 of the judgment in *Kolev* (C-612/15) does not present any obstacle to remedying the deficiencies in the bill of indictment during the preparatory hearing.
- 43 The national law categorically excludes this possibility, in that it makes its own narrower and literal interpretation of the right to information about the accusation, namely that the detailed information about the accusation must be disclosed with the bill of indictment when the latter is lodged at the court; that is not possible at a later date, that is to say through correction of the bill of indictment in the

preparatory hearing. If the bill of indictment contains deficiencies, the judicial proceedings are therefore discontinued and the matter remitted to the public prosecutor's office, which draws up a new bill of indictment which it submits to the court. This guarantees the disclosure of detailed information about the accusation with the new bill of indictment, specifically with the filing of the latter at the court<sup>1</sup>.

- 44 This raises the question as to whether this narrower national interpretation of the right of the accused to information about the charges corresponds to the true meaning of Article 6(3) of Directive 2012/13.
- 45 Under Article 47(2) of the Charter of Fundamental Rights of the European Union ('the Charter'), a charge is to be heard within a reasonable time. This raises the question as to whether there is a valid reason for the delay, provided for in the national law, in correcting deficiencies in the bill of indictment, with this delay possibly lasting several months to several years. The reasons for this delay are the mandatory national requirement that the judicial proceedings can only be opened on the basis of a perfect bill of indictment, and the lack of opportunity to correct this once judicial proceedings have already been opened.
- 46 Under Article 82(2) of the TFEU, directives may be used to establish minimum rules, the adoption of which shall not prevent Member States from maintaining their higher level of protection; these directives take account of the particular features in the legal traditions of the Member States. This raises the question as to whether the national legislation does not have precedence over Directive 2012/13 as interpreted by the Court of Justice in Case C-612/15, as the national legislation provides an identical or even higher level of protection on the basis of the national legal traditions.
- 47 The accused receives the same amount and quality of information about the charges (clarification in the case of an unclear, incomplete or inconsistent bill of indictment). This clarification can be made immediately in the judicial hearing (an option allowed by Directive 2012/13 in accordance with the interpretation of the Court of Justice in Case C-612/15), but also after a delay of a few months, according to the mandatory requirement of the national procedure.
- 48 At the same time, it can be assumed that national law provides a higher level of protection because, according to the national legislation, the corrected charges are contained in a single text whereas, with a correction of the deficient charges in the judicial hearing, there are two texts, the original deficient bill of indictment and the clarifications to it. Therefore, the level of protection with regard to the right to information under the national law is identical or even higher than that pursuant to Directive 2012/13.

<sup>1</sup> There are two exceptions: the remedying of an obvious factual error and the amendment of the accusation after new evidence is taken.

- 49 Account is also to be taken of the national legal traditions pursuant to Article 82(2) TFEU. The opening of judicial proceedings on the basis of a flawless bill of indictment is of considerable significance for the national understanding of the law. Even though, on account of the need to act within a reasonable time, and due to process logic considerations, the Constitutional Court pointed out that it would not be contrary to the constitution if it were made possible to remedy deficiencies in the bill of indictment during the judicial proceedings, this interpretation was not adopted by the national legislature or by the case-law.
- 50 This raises the question as to whether, in ruling out the possibility of clarifying the charges during the judicial hearing and therefore contradicting the judgment in *Kolev* (C-612/15), the national law infringes the principle of the precedence of EU law.
- 51 With regard to the application of the principle of the preservation of dignity, this has two dimensions. Firstly, there is human dignity pursuant to Article 2 of the TEU and Article 1 of the Charter. The national legislation on summoning creates opportunities for third persons to find out that the person concerned is the accused in criminal proceedings or has been affected by a criminal offence. The likelihood of this becomes greater the more often a person is summonsed. Therefore, human dignity would be impaired less if the need to discontinue the judicial proceedings and remit the matter to the public prosecutor's office for a new bill of indictment to be drawn up is avoided. Secondly, there is professional dignity pursuant to Article 31 of the Charter, in this case the professional dignity of judges and public prosecutors. A national law which does not provide any procedural measure for promptly remedying procedural deficiencies in the bill of indictment, even though this was desired by the prosecution and the defence and found to be appropriate by the court, generates a feeling of professional helplessness. A law which obliges magistrates to meet the requirement of acting within a reasonable time and then deprives them of an obvious and normal legal instrument for doing so (the correction of a deficiency in the bill of indictment during the judicial hearing in which that deficiency was established) by instead obliging them to apply a different legal instrument which leads to a delay of several months harms their professional dignity.

#### The practical effectiveness of a preliminary ruling

- 52 Neither Article 6 of the Directive nor Article 47(2) of the Charter governs the procedure for remedying deficiencies in the content of the bill of indictment; they therefore have no direct effect. The interpretation by the Court of Justice which is being requested cannot bring about a new national legal arrangement for remedying deficiencies in the bill of indictment, namely the judgment of the Court of Justice cannot itself constitute a basis for remedying the deficiencies in the preparatory hearing.

- 53 Nevertheless, the interpretation which is being requested may allow the referring court to make an independent interpretation of national law, reaching a conclusion that is compatible with the findings of the Court of Justice regarding an appropriate procedure for remedying deficiencies in the bill of indictment. Specifically, the Court of Justice may decide that the provisions of Article 248(5)(2) in conjunction with Article 248(1)(3) in conjunction with Article 249(4)(1) of the NPK (in the case of deficiencies in the bill of indictment, there is provision for the judicial proceedings to be discontinued and the matter remitted to the public prosecutor's office for a new bill of indictment to be drawn up) do not comply with EU law if they are generally applied without exception in all cases, even if the deficiencies established could be remedied by immediate declaration of the public prosecutor in the preparatory hearing. In the present case, the referring court would be authorised to refrain from applying those provisions. According to the national rules of interpretation, the referring court would apply the closest national legal arrangement, namely that for remedying an obvious factual error pursuant to Article 248a(1) of the NPK. That would allow the public prosecutor to remedy the deficiencies without delay (if necessary, within seven days). Only if the public prosecutor cannot remedy those deficiencies would the referring court discontinue the judicial proceedings and remit the matter for a new bill of indictment to be drawn up. Such an interpretation would also correspond to the decision of the Constitutional Court in this regard.
- 54 The interpretation of the Court of Justice would also be of considerable significance for the examination, by the national courts dealing with the main proceedings at second or third instance, of whether the right of the accused to information was respected. More specifically: Should the Court of Justice decide that the right of the accused to find out which charges are being brought against him was respected with the remedying of the deficiencies in the preparatory hearing, the higher courts could not annul the referring court's decision on the merits on the ground that that right has been infringed. That right is namely infringed if the deficiencies in the bill of indictment were not remedied in accordance with the national law and the remedying is therefore ineffective. This would guarantee the application of the national law in accordance with the interpretation by the Court of Justice.
- 55 Finally, the interpretation by the Court of Justice would be an incentive for the national legislature to correspondingly amend the legislation for the remedying of deficiencies in the bill of indictment.