

Anonymised version

Translation

C-863/19 — 1

Case C-863/19

Request for a preliminary ruling

Date lodged:

26 November 2019

Referring court:

Apelativen sad Varna (Bulgaria)

Date of the decision to refer:

19 November 2019

Prosecuting authority:

Okrazhna prokuratura Varna

Convicted person:

TS

APELATIVEN SAD

Varna

...

REQUEST FOR A PRELIMINARY RULING

TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

...

REFERRING COURT:

Apelativen sad Varna (Court of Appeal, Varna) ...

PARTIES TO THE MAIN PROCEEDINGS:

Prosecuting authority: Okrazhna prokuratura Varna (Varna Public Prosecutor's Office) ...

In the appeal proceedings before the referring court, the Public Prosecutor's Office is represented by a public prosecutor ... of the Apelativna prokuratura — Varna (Public Prosecutor's Office attached to the Court of Appeal, Varna);

Convicted person: TS

Defence lawyers: ...

...

SUBJECT MATTER OF THE CRIMINAL PROCEEDINGS AND RELEVANT FACTS:

- (1) By final judgment, TS was found guilty of possessing, on 21 February 2019, in the city of Varna, alone and together with two other persons, DR and NM (who also reached a plea bargain agreement and were convicted), without the appropriate authorisation, for the purpose of distribution, highly dangerous narcotics: methamphetamine of a total weight of 125.61 grams and with a total value of BGN 3 140.25, 3,4- Methylenedioxyamphetamine (MDMA) of a total weight of 3.20 grams and with a total value of BGN 128.00, marijuana of a total weight of 2 072.30 grams and with a total value of BGN 12 433.80, and cocaine weighing 0.03 grams and with a total value of BGN 6.60. TS was sentenced to two years' imprisonment, suspended for four years, pursuant to Article 66(1) of the Nakazatelen kodeks (Criminal Code; 'the NK'), and a fine amounting to BGN 5 000. The judgment became final on 28 June 2019.
- (2) After TS was convicted, the Public Prosecutor's Office made an application to the Varnenski okrazhen sad (Regional Court, Varna) pursuant to Article 306(1), point 1 of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure; 'the NPK') for the confiscation for the benefit of the State of a sum of money amounting to a total of BGN 9 324.25, namely:
 - Bulgarian banknotes of a total value of BGN 7 915.55;
 - Euro banknotes of a total value of EUR 625 — or BGN 1 222;
 - Turkish lira of a total value of TRY 605 — or BGN 186.70;
- (3) The cash was found and confiscated in the prescribed manner by the competent court authorities within the context of the pre-trial stage — during a search and seizure at the home where the convicted person and his mother live.

[Or.2]

- (4) The Okrazhen sad Varna (Regional Court, Varna) examined the application at a public hearing, in which the convicted person and his two defence lawyers as well

as a prosecutor took part. Within the context of those proceedings, the convicted person claimed that the cash was the property of his mother and his sister. Documentary evidence was submitted in the case, which shows that in March 2018, Mrs SP — the mother of the convicted person — took out a consumer loan from DSK-EAD bank for the total sum of BGN 17 000; a bank statement of the account of his father, TB, was also submitted. Copies of the international passports of the mother, SP, and the sister of the convicted person, KM, were also submitted in connection with a trip to the Republic of Turkey for the period from 19 April 2019 to 21 April 2019.

- (5) Mrs SP did not take part as a party in the court proceedings at first instance, in accordance with Article 306(1), point 1 of the NPK — the procedural law does not allow that she take part as a party to the proceedings in her own right; she was examined as a witness only in relation to the monetary sums in Bulgarian leva, euros, and Turkish lira, found in her home.
- (6) The court of first instance refused to confiscate the cash, taking the view that the criminal offence for which TS was convicted was not such as to generate any economic benefits. The reasoning of the court was that, even though there is evidence — witness statements — in the case that TS was selling narcotics, since the Public Prosecutor's Office did not charge him with such an offence and the subsequent conviction did not encompass those sales, either, there are no grounds under Article 53(2) of the NK for confiscation for the benefit of the State. It was stated that '... The offence pursuant to the first alternative of Article 354a(1) of the NK is of a formal nature and is completed by establishing actual control over the narcotic substance. It is true that a specific purpose is provided in relation to the objective elements of that offence; however, in so far as that purpose was not realised, and he was not charged with distribution, it cannot be accepted that that criminal offence generated any economic benefit. In that case, if the confiscated cash found in the home of TS was obtained as a result of a criminal and unlawful activity, or its origin is uncertain, where there is a discrepancy between legal sources and those resulting from a crime, there is another means by which they may be confiscated for the benefit of the State, namely pursuant to the method provided for in the Zakon za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo (Law on combating corruption and the confiscation of illegally obtained assets).'
- (7) The matter subject to verification by the referring court is the correctness of those conclusions on the part of the Okrazhen sad Varna (Regional Court, Varna). In the appeal of the Varna Public Prosecutor's Office, it is claimed that the order of the Okrazhen sad Varna (Regional Court, Varna) is unlawful since it does not apply the provision of Article 53 of the NK 'in the light of' Directive 2014/42/EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ 2014 L 127, p. 39).

- (8) The defence lawyers of the convicted person do not share the view of the prosecution, taking the view that only such pecuniary benefit as is the direct and immediate consequence of the offence for which the person has been convicted may be subject to confiscation.

RELEVANT NATIONAL LAW

- (9) **Nakazatelen kodeks na Republika Balgariya (Criminal Code of the Republic of Bulgaria)**

Article 354a. (New — State Gazette, No 95 of 1975, amended, No 28 of 1982, No 10 of 1993, No 62 of 1997, No 21 of 2000, No 26 of 2004, No 75 of 2006) (1) A person who, without the appropriate authorisation, produces, processes, acquires or possesses narcotics or analogues thereof for the purpose of distribution, or who distributes narcotics or analogues thereof, shall be sentenced, in the case of highly dangerous narcotics or analogues thereof, to a term of imprisonment of two to eight years and a fine of BGN 5 000 [Or.3] to BGN 20 000, and, in the case of dangerous narcotics or analogues thereof — to a term of imprisonment of one to six years and a fine of BGN 2 000 to BGN 10 000. Where the offence concerns precursors or equipment or materials for the production of narcotics or analogues thereof, the sentence shall be imprisonment for three to twelve years and a fine of BGN 20 000 to BGN 100 000.

(2) (Amended — State Gazette, No 26 of 2010) Where the narcotics or the analogues thereof are in large quantities, the sentence shall be imprisonment for three to twelve years and a fine of BGN 10 000 to BGN 50 000. In the case of a person, who, without the appropriate authorisation and in a public place, acquires or possesses, for the purpose of distribution, or distributes narcotics or analogues thereof, and where the narcotics or the analogues thereof are in particularly large quantities, or where the act has been committed:

1. by a person acting on the orders or carrying out a decision of an organised criminal group;
2. by a medical doctor or a pharmacist;
3. by a trainer, teacher, head teacher of an educational establishment or a public official during or on the occasion of the performance of his duties;
4. upon repeated commission of a particularly serious offence,

the sentence shall be imprisonment for five to fifteen years and a fine of BGN 20 000 to BGN 100 000.

(3) A person who, without the appropriate authorisation, acquires or possesses narcotics or analogues thereof shall be sentenced:

1. in the case of highly dangerous narcotics or analogues thereof — to a term of imprisonment of one to six years and a fine of BGN 2 000 to BGN 10 000;

2. in the case of dangerous narcotics or analogues thereof — to a term of imprisonment of up to five years and a fine of BGN 1 000 to BGN 5 000.

(4) Anyone who infringes the applicable rules on producing, acquiring, keeping, accounting for, dispensing, transporting or carrying narcotics shall be sentenced to a term of imprisonment of up to five years and a fine of up to BGN 5 000; the court may also order a deprivation of the rights under Article 37(1), points 6 and 7.

(5) In less serious cases under Article 354a(3) and (4), the punishment shall be a fine of up to BGN 1 000.

(6) In cases under Article 354a(1) to (5), the object and instrumentalities of the offence shall be confiscated for the benefit of the State.

(10) **Article 53.** (1) Notwithstanding any criminal liability, the following shall be confiscated for the benefit of the State:

(a) (supplemented — State Gazette, No 7 of 2019) the items that belong to the guilty person and were intended or served for the perpetration of an intentional crime; where the items are not available or have been disposed of, the equivalent value shall be recovered;

(b) the items that belong to the guilty person and were the object of an intentional crime — in the cases expressly provided for in the Special Part of the present code.

(2) (New — State Gazette, No 28/1982) The following shall also be confiscated for the benefit of the State:

(a) the items that are the object or instrumentality of the crime, whose possession is prohibited, and

(b) (amended — State Gazette, No 7 of 2019) the direct or indirect proceeds derived from the criminal offence, where those do not have to be returned or restored; where the proceeds are not available or have been disposed of, the equivalent value shall be recovered.

(3) (New — State Gazette, No 7 of 2019) Within the meaning of paragraph 2(b):

1. direct proceeds shall mean any economic benefit resulting as a direct consequence of the offence;

2. indirect proceeds shall mean any economic benefit resulting from a disposal of the direct proceeds, as well as of any property acquired as a result of **[Or.4]** a subsequent transformation, in whole or in part, of direct proceeds, including where

those have been intermingled with property acquired from legitimate sources; property of a value up to that of the included direct proceeds shall be subject to confiscation, including any increases in the property, where those are directly linked to the disposal or transformation of the direct proceeds and the inclusion of the direct proceeds in the property.

Nakazatelno-protsesualen kodeks (Code of criminal procedure; ‘the NPK’)

(11) Article 306. (1) The court may also rule by way of an order on the following matters:

1. the imposition of an aggregate sentence pursuant to Articles 25 and 27 as well as the application of Article 53 of the Criminal Code;

2. (supplemented — State Gazette, No 27 of 2009, in force from 1 June 2009, amended, No 13 of 2017, in force from 7 February 2017) the initial conditions for serving the sentence of imprisonment, where it has failed to do so in the judgment;

3. (supplemented — State Gazette, No 32 of 2010, in force from 28 May 2010) whether the conditions laid down in Articles 68, 69, 69a and Article 70(7) of the Criminal Code are met, and what sentence the accused person is to serve; the court of first instance which ordered the suspension of the sentence of imprisonment shall rule on the application of Article 68(3) of the Criminal Code, and the regional court that granted the conditional early release from prison shall rule on the application of the second alternative in the first sentence of Article 70(7) of the Criminal Code;

4. the material evidence and the costs of the proceedings.

(2) In cases under Article 306(1), points 1 to 3, the court shall rule at a hearing at which the sentenced person shall be summoned to appear.

(3) An order under Article 306(1), points 1 to 3 may be appealed against in accordance with Chapter 21, and an order under Article 306(1), point 4, in accordance with Chapter 22.

RELEVANT EU LAW:

(12) Directive 2014/42/EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

Recital 11: There is a need to clarify the existing concept of proceeds of crime to include the direct proceeds from criminal activity and all indirect benefits, including subsequent reinvestment or transformation of direct proceeds. Thus proceeds can include any property including that which has been transformed or converted, fully or in part, into other property, and that which has been intermingled with property acquired from legitimate sources, up to the assessed

value of the intermingled proceeds. It can also include the income or other benefits derived from proceeds of crime, or from property into or with which such proceeds have been transformed, converted or intermingled.

Recital 20: When determining whether a criminal offence is liable to give rise to economic benefit, Member States may take into account the *modus operandi*, for example if a condition of the offence is that it was committed in the context of organised crime or with the intention of generating regular profits from criminal offences. However, this should not, in general, prejudice the possibility to resort to extended confiscation.

Recital 33: This Directive substantially affects the rights of persons, not only of suspected or accused persons, but also of third parties who are not being prosecuted. It is therefore necessary to provide for specific safeguards and judicial remedies in order to guarantee the preservation of their fundamental rights in the implementation of this Directive. This includes [Or.5] the right to be heard for third parties who claim that they are the owner of the property concerned, or who claim that they have other property rights ('real rights', 'ius in re'), such as the right of usufruct.

(13) **Article 2**

For the purpose of this Directive, the following definitions apply:

(1) 'proceeds' means any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits;

Charter of Fundamental Rights of the European Union

- (14) Article 17(1). Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
- (15) Article 47. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

NECESSITY OF THE REFERENCE

- (16) The main dispute in the national proceedings is whether the sums of money found in the home of the convicted person represent an economic benefit acquired as a result of the offence under Article 354a(1) of the NK. With the *Zakon za izmenenie i dopalnenie na Nakazatelnia kodeks* (Law amending and supplementing the Criminal Code) (State Gazette, No 7 of 2019), the provisions 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 (OJ 2014 L 127, p. 9, corrigendum OJ 2014 L 138, p. 114) were transposed. That, in accordance with the principle of procedural autonomy, requires the national courts to apply national law.
- (17) However, the referring court considers that that transposition is not complete and accurate, since, unlike Article 2(1) of the directive, the provision of Article 53 of the NK does not provide for the possibility of the confiscation, for the benefit of the State, of an ‘economic advantage derived [...] indirectly from a criminal offence’. That is because the Bulgarian legislature defines as ‘direct proceeds’ any economic benefit resulting as a direct consequence of the offence, whereas any economic benefit resulting from disposal of the direct proceeds or their subsequent transformation, in whole or in part, is defined as ‘indirect proceeds’.
- (18) The referring court is not aware of any relevant binding national case-law, in the light of the relatively short time for which the provision of Article 53 of the NK in the version currently in force has applied.
- (19) At the same time, however, the referring court has doubts as to whether it can apply the directive and interpret its national law in the light of that directive, since in the present case, there is no cross-border element present in the commission of the criminal offence, the damage to assets has occurred exclusively in the territory of the Republic of Bulgaria and is within the remit of the Bulgarian judicial authorities. At first sight, this is a purely ‘domestic situation’.

[Or.6]

- (20) On the other hand, however, one of the aims of the directive is to lead to the approximation of the laws of the Member States in the areas of freezing and confiscation and [thus] the facilitation of mutual trust and effective cross-border cooperation. For that reason, the referring court, in order to correctly rule on the dispute before it, first needs to know whether the directive is applicable to the particular case.
- (21) If the answer to the first question is in the affirmative, there is also a need to interpret the meaning of ‘economic advantage derived [...] indirectly from a criminal offence’, set out in Article 2(1) of the directive, as envisaged by the EU legislature, so that the referring court can comply with its obligation to interpret its national law in conformity with EU law. It is not clear from the wording of the provision of Article 2(1) of the directive whether indirect proceeds differ from converted or transformed direct proceeds, or whether the two concepts are

identical. The clarification provided in recital 11 of the directive does not provide a clear and definitive answer to that question, either. The Bulgarian legislature has opted for the second approach, considering indirect proceeds to be direct proceeds that have been converted or transformed.

(22) The applicability of the directive would also determine the applicability of the Charter and in particular Article 47 thereof, in a situation such as the one at issue, where it is claimed that the proceeds subject to potential confiscation belong to a third party.

(23) **QUESTIONS REFERRED**

1. Are 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 (OJ 2014 L 127, p. 39, corrigendum OJ 2014 L 138, p. 114) and the Charter of Fundamental Rights of the European Union applicable with respect to a criminal offence consisting of possession of narcotics for the purpose of distribution thereof, committed by a Bulgarian citizen in the territory of the Republic of Bulgaria, and where the potential economic proceeds are also realised and located in the Republic of Bulgaria?

2. Should the answer to the first question be in the affirmative, how should the concept of ‘economic advantage derived [...] indirectly from a criminal offence’ in Article 2(1) of the directive be understood, and can a sum of money, found in and confiscated from the home of the convicted person and his family and from a car driven by him, constitute such an advantage?

3. Is Article 2 of the directive to be interpreted as precluding a legal provision such as that of Article 53(2) of the Nakazatelen kodeks (Criminal Code) of the Republic of Bulgaria, which does not provide for the confiscation of an ‘economic advantage derived [...] indirectly from a criminal offence’?

4. Is Article 47 of the Charter of Fundamental Rights of the European Union to be interpreted as precluding a national legal provision such as that of Article 306(1), point 1 of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure) of the Republic of Bulgaria, which allows for the confiscation for the benefit of the State of a sum of money in respect of which it is claimed that it belongs to a person other than the person who committed the criminal offence, without that third party being able to take part in those proceedings in his or her own right and having direct access to the courts?