

Case C-806/21

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 December 2021

Referring court:

Hoge Raad der Nederlanden (Netherlands)

Date of the decision to refer:

14 December 2021

Prosecutor:

Openbaar Ministerie

Criminal proceedings against:

TF

Subject matter of the main proceedings

Appeal in cassation after acquittal of the charge of not having complied with the obligation under Article 8(2) of Regulation (EC) No 273/2004 to notify, inter alia, the transport and possession of large quantities of drug precursors.

Subject matter and legal basis of the request

In the appeal in cassation, the question has arisen, in the context of the judicial finding of the offence charged, as to whether the concepts of ‘operator’ and ‘circumstance’ as used in Article 8(1) of Regulation No 273/2004 must be interpreted broadly or restrictively.

Questions referred for a preliminary ruling

1. Are natural and legal persons who are involved in the placing on the market of scheduled substances in such a way that that involvement constitutes an offence

punishable under Article 2(1)(d) of Framework Decision 2004/757 to be regarded as ‘operators’ for the purposes of Article 2(d) of Regulation No 273/2004?

If the answer to this first question is in the affirmative:

2a. Does the conduct of the operator referred to in Question 1 constitute a ‘circumstance’ for the purposes of Article 8(1) of Regulation No 273/2004?

2b. Does conduct such as the receipt, transport and storage of scheduled substances constitute a ‘circumstance’ for the purposes of Article 8(1) of Regulation No 273/2004 if that conduct does not take place with the intention of supplying those substances to a third party?

Provisions of EU law cited

Recitals 1, 2, 3, 6, 10, 11, 12 and 13, Articles 1 and 2, 3(1) to (4) and (6), 4(1) to (3), 5, 7, 8, 10 and 12 of Regulation (EC) No 273/2004,

Article 1(2), Article 2(1)(d) of Framework Decision 2004/757/JHA

Articles 47 and 48 of the Charter of Fundamental Rights of the European Union

Provisions of national law cited

Article 2 of the Wet voorkoming misbruik van chemicaliën (Law on the prevention of the diversion of chemical substances)

Article 1(1) of the Wet op de economische delicten (Law on economic offences)

Articles 2, 10 and 10a of the Opiumwet (Law on opium)

Brief summary of the facts and the procedure in the main proceedings

- 1 TF (‘the accused’) used a van hired in his own name to transport chemicals (including hydrochloric acid and sulphuric acid) on several trips between Liège (Belgium) and various addresses in the Netherlands. He had no plausible or verifiable explanation as to the possible lawful destination of those chemicals. Despite the fact that most of the goods were not labelled, the defendant knew that they were chemicals and he transported them as a favour without a transport contract.
- 2 It is common ground that the accused had to have known that there was a reasonable chance – and that he accepted this chance – that the chemical products at issue would be used as ‘drug precursors’ for the illicit production of synthetic drugs.

- 3 He was charged with two offences for that single conduct, namely infringement of Article 10a of the Law on opium and failure to comply with the obligation as an operator to notify circumstances laid down in Article 8(1) of Regulation (EC) No 273/2004.
- 4 On appeal, the defendant was convicted of the first offence but acquitted of the second. The appeal court gave the following reasons for that decision.
- 5 The control system established by Regulation No 273/2004 is intended to strike a balance between the unlawful use of chemical substances by drug manufacturers and their use for legal purposes by the chemicals industry.
- 6 To that end, provision is made for a notification obligation on operators, entailing that they are to notify the competent authorities of any circumstances which suggest that the substances might be diverted for the illicit manufacture of drugs.
- 7 The terms ‘operators’ and ‘circumstance’ used in the charge must be regarded as being used in the sense attributed to them in Article 8(1) of Regulation No 273/2004.
- 8 The accused can be regarded as being covered by the first term – ‘operator’ – if that concept is broadly defined. The nature of the accused’s actual conduct and the conditions under which it took place are not, however, such as to constitute, in the present case, a ‘circumstance’ that must be notified for the purposes of Article 8(1) of Regulation No 273/2004. The constituent elements of this point of the charge have therefore not been fulfilled, leading to the accused’s acquittal.
- 9 The Openbaar Ministerie (public prosecution service) brought in appeal in cassation against that acquittal.

Principal arguments of the parties in the main proceedings

- 10 In its appeal in cassation, the prosecutor essentially submits, in essence, that, in the light of the objective of Regulation No 273/2004, the concept of ‘circumstance’ as used in Article 8(1) of Regulation No 273/2004 must be interpreted broadly.

Brief summary of the basis for the reference

- 11 The starting point for the request for a preliminary ruling is that it is established that the accused prepared or facilitated offences punishable under the Opiumwet by collecting registered substances from a chemicals company in Liège and then transporting and storing them at various locations in the Netherlands. That conduct was made punishable, inter alia, in implementation of Framework Decision 2004/757, Article 2(1) of which provides that each Member State is to ensure that the manufacture, transport or distribution of precursors, knowing that

they are to be used in or for the illicit production or manufacture drugs is punishable.

- 12 The question which arises in the appeal in cassation is whether the appeal court disregarded the fact that, by its conduct, the accused is also guilty of breaching the obligation on operators to notify the competent authorities of circumstances involving scheduled substances, as laid down in Article 8(1) of Regulation No 273/2004. Infringement of that provision must, under Article 12 of that regulation, be threatened with effective, proportionate and dissuasive penalties and constitutes, under Netherlands law, an economic offence.
- 13 The question is now whether the EU legislature intended that a natural or legal person should be guilty of both of the abovementioned offences as a result of one and the same type of conduct (the transport of chemicals).
- 14 Regulation No 273/2004 seeks to prevent the conduct referred to in Framework Decision 2004/757, namely illicit drug trafficking, by imposing an obligation on operators to notify circumstances involving scheduled substances. The EU legislation can therefore be understood as envisaging a clear demarcation between the types of conduct that are to be made punishable: either the accused – as operator – is guilty of breaching the notification obligation laid down in Article 8(1) of Regulation No 273/2004 or the accused engages in one of the types of conduct punishable under the framework decision (the offences under the Opiumwet).
- 15 A possible alternative interpretation is that an accused who engages in conduct punishable under Framework Decision 2004/757 in relation to scheduled substances must also comply with the notification obligation laid down in Article 8(1) of Regulation No 273/2004.
- 16 The question, then, is what are (or might be) the consequences of this in the light of the *nemo tenetur* principle, as follows inter alia from Articles 47 and 48 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It follows from the case-law of the European Court of Human Rights and from the Charter that this principle may preclude the prosecution and punishment of the accused for offences on the basis of information provided by the accused under duress – including under threat of criminal penalties – in so far as that information relates to a statement made by him, whether or not contained in a document. It is not inconceivable that the accused, if he notifies his own criminality pursuant to the notification obligation under the regulation, could therefore avoid prosecution and punishment for an offence under the Opiumwet, or at least that complications might arise in connection with such prosecution and punishment.
- 17 Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing provides that disclosure of

information in good faith by an obliged entity does not give rise to liability of any kind. Regulation No 273/2004 does not contain a comparable clause and – unlike the abovementioned directive – therefore offers no protection against possible infringements of the *nemo tenetur* principle.

- 18 Against that background, the question arises as to the way in which the concepts ‘operator’ and ‘circumstance’ as used in Regulation No 273/2004 must be interpreted. If both concepts are interpreted broadly, meaning that the accused in this case is subject to a notification obligation, the abovementioned consequences are felt more strongly. The situation is different if a narrower interpretation is given to both or either of these concepts. The following may be noted in this regard.
- 19 Evidently, the appeal court interpreted the concept of ‘operator’ broadly in the present case, to the effect that it also covers an accused whose conduct constitutes an offence also punishable under the framework decision. That court, after all, found the accused to be an operator on the basis of the findings that the accused had collected chemicals from a chemicals company and transported and stored them at various locations in the Netherlands.
- 20 That broad interpretation implies that any person engaged in the transport and storage of scheduled substances can be regarded as an operator who, in the event of a circumstance, is obliged to notify. An argument in favour of that approach is that the regulation defines the term ‘operator’ broadly, as ‘any natural or legal person engaged in the placing on the market of scheduled substances’. This also ensures that the obligations set out in the regulation – which are intended to prevent the diversion of drug precursors – apply to the largest possible number of people. This is not only a question of the abovementioned notification obligation in Article 8(1), but also of the other provisions laid down in Regulation No 273/2004 and addressed to the operator.
- 21 A restrictive interpretation of the concept, according to which only natural and legal persons who are not engaged in the trade in scheduled substances to be criminalised on the basis of the framework decision are classified as operators, however, is closely aligned with the way in which the concept of operator is framed in the proposal for amendment of Regulation No 273/2004 (COM(2012) 548). In the explanatory memorandum to that proposal, operators are referred to as ‘manufacturers, distributors, brokers, importers, exporters and wholesalers of chemicals engaged in the legitimate trade of drug precursors’. This may be confirmation for the view that it was not the EU legislature’s intention with this regulation to regard as an ‘operator’ any person engaged in any form of trade in scheduled substances, even when it comes to unlawful conduct. That interpretation leads to a conclusive system in EU law whereby Regulation No 273/2004 and Framework Decision 2004/757 contain conduct made punishable or to be made punishable – demarcated from each other – and whereby an accused who is guilty of offences under the Opiumwet is prevented from simultaneously being in breach of the notification obligation. Under this approach,

the accused is not required to notify his own offences involving scheduled substances, which rules out complications arising from the *nemo tenetur* principle.

- 22 A proper demarcation between the conduct defined in Regulation No 273/2004 and Framework Decision 2004/757 can also be facilitated by interpreting the concept of ‘circumstance’ restrictively, in the sense that it does not cover conduct which is directly linked to criminal offences committed by the operator himself.
- 23 The wording of Article 8(1) of Regulation No 273/2004 militates against such a restrictive interpretation. The provision refers, after all, to ‘any circumstances, such as unusual orders or transactions involving scheduled substances to be placed on the market, which suggest that such substances might be diverted for the illicit manufacture of narcotic drugs or psychotropic substances’. The conduct at issue in this case – the transport and storage of scheduled substances – appears to fall within that category.
- 24 In the event that the concept of ‘circumstance’ must not be interpreted restrictively, it is also necessary, for the purposes of assessing these criminal proceedings, to ascertain whether the interpretation of that concept must also take into account the nature of the conduct, in the sense that that conduct must concern the (direct) transfer of scheduled substances to a third party. Under this approach, there would be no question of a circumstance, if the transport and storage of scheduled substances was done with the aim of committing offences under the Opiumwet, either alone or together with others.
- 25 It is clear from the foregoing that the concepts of ‘operator’ and ‘circumstance’ as used in Regulation No 273/2004 may be interpreted differently. The interpretation to be given to these concepts is important for the outcome of the present case. Finally, the scope of the notification obligation as laid down in Article 8(1) of Regulation No 273/2004 may also have consequences for the relationship with conduct punishable under Article 2(1)(d) of Framework Decision 2004/757 and the *nemo tenetur* principle.