Case C-569/20

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:

30 October 2020

Referring court:

Spetsializiran nakazatelen sad (Bulgaria)

Date of the decision to refer:

27 October 2020

Defendant:

IR

Subject matter of the main proceedings

Criminal proceedings in the absence of the accused person. Determination of the type of proceedings *in absentia* (Article 8(2) and (4) of Directive 2016/343). Legal remedies against conviction *in absentia* pursuant to Article 9 of Directive 2016/343.

Subject matter and legal basis of the request

Interpretation of provisions of Directive 2016/343 and Framework Decision 2009/299.

The basis for the request is Article 267 TFEU.

Questions referred

Are Article 8(2)(b) in conjunction with recitals 36 to 39 of Directive 2016/343 and Article 4a(1)(b) in conjunction with recitals 7 to 10 of Framework Decision 2009/299 to be interpreted as covering a case in which the accused person was informed of the list of charges against him, in its original version, and then, due to the fact that he has fled, objectively cannot be informed of the trial and is defended by a lawyer appointed ex officio with whom he has no contact?

If this is answered in the negative: Is a national provision (Article 423(1) and (5) of the NPK), pursuant to which no provision is made for any legal protection against investigative measures carried out *in absentia* and against a conviction handed down *in absentia* where the accused person, after having been informed of the original list of charges, is in hiding and therefore could not be informed of the date and place of the trial or of the consequences of non-appearance, consistent with Article 9 in conjunction with the second sentence of Article 8(4) of Directive 2016/343 and Article 4a(3) in conjunction with Article 4a(1)(d) of Framework Decision 2009/299?

If this is answered in the negative: Does Article 9 of Directive 2016/343 in conjunction with Article 47 of the Charter have direct effect?

Provisions of EU law and the case-law cited

Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1; 'Directive 2016/343'), in particular recitals 36 to 39 and Articles 8 to 10.

Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ 2009 L 81, p. 24; 'Framework Decision 2009/299'), in particular Article 4a(1)(d) and (3), and point 3.4 of box (d) of the form.

Charter of Fundamental Rights of the European Union (OJ 2016 C 202, p. 389; the 'Charter'), in particular Article 47.

Provisions of national law cited

Nakazatelno-protsesualen kodeks (Code of Criminal Procedure; the 'NPK'), in particular Article 423(1) and (5), Article 425(1).

Brief summary of the facts and procedure

1 IR was charged with an offence under Article 321(3) of the Nakazatelen kodeks (Criminal Code; the 'NK') because he allegedly participated, in the territory of the Republic of Bulgaria and the Hellenic Republic during the period from August 2010 to 24 February 2011, in a criminal organisation together with 11 other persons, which [was alleged to have] brought, with criminal intent, large quantities of excise goods (cigarettes) across the national borders without strip

stamps and circulated them within the country. He was also charged with a secondary offence – an offence under Article 234(2)(3) of the NK – for aiding and abetting in the import of 373 490 cigarette packets without strip stamps and having a value of 2 801 175 leva (BGN) in the period from 15 to 24 February 2011, whereby the object of the crime was of particularly high value and the seriousness of the offence was not insignificant. The first offence is punishable by a 'custodial sentence' of not less than three years and the second by a minimum penalty of a two-year 'custodial sentence'.

2 IR could not be located during the preliminary investigation and was therefore put on the wanted list; a European arrest warrant had already been issued in another case. He was subsequently located. The indictment was served on him personally, whereby he used the services of a lawyer mandated by him. IR decided not to disclose any information. He simply gave an address at which he could be found.

3 The charges were brought before the court. The court made further attempts to summon IR to the trial. He could not be located, even at the address that he had provided. His mandated lawyer ceased to defend him, owing to the lack of contact. The court first appointed a public defender and then, after he resigned, another public defender. IR and his new lawyers have never met. His last-appointed lawyer submits that she made no attempt to contact his relatives. In principle, it is unclear whether IR is aware that the charges against him are being heard in court and that he has been appointed a lawyer ex officio.

4 The court ordered that IR be remanded in custody pending trial and issued a European arrest warrant. IR was not located. That [arrest warrant] was subsequently withdrawn by the issuing court, as there were certain doubts surrounding its compatibility with Framework Decision 2002/584 and Directive 2012/13 as regards the right to information. A request for a preliminary ruling was made (C-649/19).

5 For procedural reasons (irregular bill of indictment), the trial phase was terminated. After a new bill of indictment was filed, it was resumed. Once again, IR could not be located despite intensive searches, including via his relatives, former employers and mobile phone providers. In the first trial, the question was raised as to the circumstance of whether the case should be heard in the absence of IR, in particular as to his rights in such proceedings *in absentia*, and the extent to which a possible conviction would be binding on him.

6 According to the parties' submissions, which are supported by the court, the case should be heard and decided in the absence of IR.

7 The question to be assessed is whether the adjudicating court is obliged to determine clearly the effect of such proceedings *in absentia* on the rights of IR, and, more specifically, whether IR would be able to challenge a possible conviction on the ground that it was handed down as a result of criminal proceedings conducted *in absentia*, in breach of his right to be present in person.

Principal arguments of the parties in the main proceedings

8 The defence considers that such a challenge is possible, while the public prosecutor's office has not expressed an opinion.

Brief summary of the grounds for the request

Admissibility of the questions referred

9 First, the referring court has commenced proceedings *in absentia* against IR. It has therefore applied the provisions of Article 8 of Directive 2016/343. Consequently, the court has a legal interest in knowing what type of proceedings *in absentia* it is conducting, whether it is the variant under Article 8(2) or that under the first sentence of Article 8(4) of Directive 2016/343.

10 Second, the request for a preliminary ruling is also made in the light of the referring court's responsibility under the second sentence of Article 8(4) of Directive 2016/343, namely to enable IR, in the event of his arrest for the purpose of enforcing a possible conviction, to be informed of whether he has available to him a legal remedy against that conviction.

11 The information referred to in the second sentence of Article 8(4) of Directive 2016/343 must be provided by the referring court itself, as it is the court that took the decision to conduct the criminal proceedings in the absence of IR. Accordingly, the referring court is best placed to assess the conditions under which those proceedings *in absentia* are to be conducted – whether under the conditions laid down in Article 8(2)(b) and (3) of Directive 2016/343, pursuant to which no legal remedy would be available to IR if convicted *in absentia*, or under the conditions laid down in Article 8(4) of Directive 2016/343, pursuant to which he would have a legal remedy. In order to answer those questions, the referring court needs guidance from the Court of Justice.

12 In the event of a conviction, there would be a very high probability that a European arrest warrant would be issued in order to execute the 'custodial sentence', which would probably be more than four months given the seriousness of the alleged crimes. It must clearly state which variant of proceedings *in absentia* were conducted, in point 2 of box (d) of the form. In accordance with that indication, the guarantee of a legal remedy may have to be provided in accordance with point 3.4 of box (d) of the form.

13 Under national law, a European arrest warrant for the purpose of executing a sentence is issued by the public prosecutor's office without any judicial involvement, either at the time of its issuance or its subsequent review. Thus, the public prosecutor's office decides what is to be indicated in the arrest warrant.

14 According to paragraphs 35 and 36 of the judgment of the Court of Justice of 12 December 2019, [*ZB (Office of the King's Prosecutor, Brussels*)] C-

627/19 PPU, EU:C:2019:1079, it is lawful for a court not to participate in the issuing of a European arrest warrant for the purpose of executing a sentence, since that arrest warrant is a continuation of the judgment within the framework of which the court ensured that the rights of the sentenced person were respected. From that point of view, the adjudicating court is under an obligation in the course of the proceedings *in absentia*, in particular when deciding to conduct them, to identify clearly which variant of proceedings *in absentia* it is conducting: those which provide for a subsequent legal remedy or those which do not. Thus, when issuing the European arrest warrant, the public prosecutor's office would be able to refer to the judicial finding. Otherwise, the public prosecutor's office alone would decide on that important question, which would be contrary to the principle that, under Framework Decision 2002/584, all decisions are subject to review by the courts, which must be involved in at least one of the two levels of legal protection: either when the national arrest warrant is issued or [when] the European arrest warrant is issued.

15 If it were considered that the referring court could put its questions to the Court of Justice of the European Union only after a conviction, that would mean that it could not put them at all. In accordance with the national legislation, following that conviction, a final decision would be taken on all procedural issues concerning the manner in which the parties concerned are to participate, including on the proceedings *in absentia*. The court that gave the decision on the merits would not be able to deal with those issues again. They could be discussed only by the second instance, if it is seised of an appeal brought by the defence or public prosecutor's office.

16 In practice, that would mean that the court of first instance that took the decision to conduct proceedings *in absentia* would be deprived of the possibility of seeking clarification from the Court of Justice of the European Union as to the precise provision of Article 8 of Directive 2016/343, which is applicable to the case in the main proceedings.

17 If[, on the other hand,] it were considered that the information pursuant to the second sentence of Article 8(4) of Directive 2016/343 is to be provided only when the person convicted *in absentia* is apprehended, that would mean that only the public prosecutor's office could provide that information, without any involvement of the court. At the same time, the public prosecutor's office is not, in principle, obliged to inform the person convicted *in absentia* of his rights and, moreover, since it is not a court, it does not have the possibility of referring questions on this matter to the Court of Justice.

18 All of the foregoing justifies the referring court's legal interest in referring the questions set out above to the Court of Justice of the European Union for a preliminary ruling.

Reference to Directive 2016/343 and Framework Decision 2009/299

19 If IR were convicted *in absentia*, the applicable law would depend on the place of his arrest.

20 If he were arrested on national territory, Article 9 in conjunction with Article 8 of Directive 2016/343 would be applicable.

21 If he were arrested in another Member State on the basis of a European arrest warrant, Article 4a of Framework Decision 2009/299, regarding the guarantee to be given subsequently, would be applicable.

Explanations regarding the first question

22 There is a lack of clarity as to the precise content of the requirement that the accused person be 'informed of the trial' pursuant to Article 8(2)(b) of Directive 2016/343. On the one hand, the second sentence of recital 36 states that this requirement of informing an accused person should be understood to mean 'providing that person with official information about the date and place of the trial in a manner that enables him or her to become aware of the trial'. In the main proceedings, IR permanently left the address given to the investigating authorities and the intensive search for him remained unsuccessful. He has therefore not received this information. On the other hand, recital 38 states that when considering whether the way in which the information is provided is appropriate, account should be taken of the diligence exercised by the judicial authorities and by the person concerned, whereas recital 39 refers specifically to fleeing, which is the subject matter of the main proceedings.

23 That ambiguity also applies to Article 4a(1)(b) of Framework Decision 2009/299, the content of which is identical to that of Article 8(2)(b) of the directive; recitals 7 to 9 of the Framework Decision are also identical to recitals 36 to 39 of the directive [in terms of content].

24 In the main proceedings, the judicial authorities exercised the necessary diligence to locate the accused person, whereas he himself wanted to abscond. After the original search, he was found and informed of the charge, at which time he provided a fixed address, but then he disappeared again. In those circumstances, the question arises as to whether he was duly informed of the trial within the meaning of Article 8(2)(b) of Directive 2016/343 and Article 4a(1)(b) of Framework Decision 2009/299, since the actual failure to inform him is due solely to the accused person's conscious decision to flee. On the other hand, the flight of the accused person is expressly mentioned in recital 39 and in Article 8(4), which precludes the possibility of duly informing the accused person in accordance with Article 8(2) of Directive 2016/343, although such flight is not mentioned as a criterion in Framework Decision 2009/299.

25 In short, in cases where an accused person has been informed of the original charge, if the judiciary is subsequently unable to inform him of the trial solely because he has fled, are the conditions laid down in Article 8(2)(b) of Directive

2016/343 and Article 4a(1)(b) of Framework Decision 2009/299 satisfied, such that it should be assumed that he has been 'informed of the trial'?

26 There is a lack of clarity as to the content of the requirement under Article 8(2)(b) of Directive 2016/343, pursuant to which the absent accused person 'is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State'. The wording of Article 4a(1)(b) of Framework Decision 2009/299 is similar.

27 In the main proceedings, IR chose a lawyer, but the lawyer abandoned the defence after IR fled. First, he was appointed another lawyer ex officio ('appointed … by the State', as worded in Article 8(2)(b) of Directive 2016/343) and, after he resigned, another lawyer was appointed, who is currently actually defending him in the proceedings on the merits. IR knows nothing about this lawyer and has never had contact with him. The lawyer has made no attempt to contact him, for example through his relatives. In such circumstances, can it be assumed that IR is being defended by a 'mandated lawyer'?

Explanations regarding the second question

28 The second question is asked in the alternative, should the Court answer the first question in the negative, since that would mean that Article 8(2)(b) and (3) of Directive 2016/343 were not applicable in the main proceedings, with the result that the accused person would benefit from the guarantees provided for in the second sentence of Article 8(4) and Article 9 of Directive 2016/343. In this case, it would be doubtful whether national law provides for the necessary remedies as required by EU law.

29 More specifically, if national proceedings are instituted pursuant to Article 423(1) of the NPK, according to the criteria laid down in that provision, the proceedings *in absentia* will not be resumed and the person convicted *in absentia* will not be given a remedy (and a fortiori an effective remedy). There are therefore doubts as to whether Article 423(1) of the NPK is compatible with Article 8(4) and Article 9 of the directive.

30 If a European arrest warrant is issued, a special retrial will be initiated as a result of the guarantee to be provided pursuant to point 3.4 of box (d) of the European arrest warrant form. In the present case, it is doubtful whether Article 423(5) of the NPK is compatible with Article 4a(1)(d) of Framework Decision 2009/299, since it releases the Varhoven [kasatsionen] sad (Supreme Court of Cassation, Bulgaria) from its obligation to respect the guarantee provided by the public prosecutor's office when the European arrest warrant was issued. Consequently, the Supreme Court would apply the national law, namely Article 423(1) of the NPK, and, once again, the convicted IR would not be granted a new trial on the merits.

Explanations regarding the third question

31 All of these questions have a practical objective: the referring court should be able to identify clearly what type of proceedings *in absentia* are being conducted, in order to determine whether, if convicted *in absentia*, IR will have effective remedies against the conviction *in absentia*.

32 That practical objective derives from the obligation under the second sentence of Article 8(4) of Directive 2016/343: the referring court, which has decided to conduct the proceedings in the absence of IR, must establish unequivocally whether or not he has a recognised right to protection against a possible conviction handed down in his absence; however, this also requires a clear definition of what that protection consists of.

33 At the same time, there is a link between the nature of the procedure in which the national arrest warrant was issued (namely a conviction *in absentia*) and the elements of the European arrest warrant. Depending on the type of proceedings *in absentia*, it will be determined which of the four types of guarantees under Article 4a of Framework Decision 2009/299 (box (d) of the form) is to be granted. This follows from the case-law of the Court of Justice of the European Union concerning the participation of a court in the procedure for issuing a European arrest warrant, which, under national law, is issued only by the public prosecutor's office.

34 To that end, if the referring court were to consider the proceedings *in absentia* in the main proceedings to be covered by the variant pursuant to the first sentence of Article 8(4) of Directive 2016/343, it would be necessary for it to indicate the existence and applicability of the effective remedies under the second sentence. However, it is not sufficient in that regard for the Court of Justice merely to find that Article 423(1) and (5) of the NPK are incompatible with EU law. In that case, the person convicted *in absentia* could again be deprived of any legal protection: the national legislation does not provide him with such protection, and declaring the national legislation to be incompatible with EU law would not result in the provision of legal remedies.

35 To that end, it is necessary to determine whether Article 9 of Directive 2016/343 has direct effect.

36 In the present case, an interpretation in conformity with EU law is possible only if IR is surrendered by means of a European arrest warrant for the purpose of executing the sentence imposed on him. In that case, on the basis of the answer to the second question, point 6 of Article 422(1) and Article 423(5) of the NPK could be interpreted as applying not only to persons surrendered under an extradition procedure but also to persons surrendered on the basis of a European arrest warrant, since the procedure under Framework Decision 2002/584 is by its nature a type of simplified extradition. This would mean that the Bulgarian court would be bound by the guarantee provided under Article 4a(1)(d) of Framework Decision 2009/299, a guarantee with content as determined by the Court of Justice of the European Union – and not by the Bulgarian Supreme Court.

37 If, on the other hand, IR were to be apprehended on national territory after his conviction, he would be subject to the provision in Article 423(1) of the NPK. That provision cannot be interpreted in conformity with EU law, since it defines the national standard for [proceedings in the] absence [of the accused person] and not that under Article 8 of Directive 2016/343. It cannot be interpreted *contra legem*. It can be disapplied only if the provision contrary to it (Article 9 in conjunction with Article 8(4) in conjunction with Article 8(2) of Directive 2016/343) has direct effect.

38 The Court of Justice has already held that Article 47 of the Charter has direct effect (judgment of 14 May 2020, [*Staatsanwaltschaft Offenburg*,] C-615/18, EU:C:2020:376, paragraph 72). Nevertheless, the principle of the right to an effective remedy before a court is established in a secondary provision of EU law, namely Article 9 of Directive 2016/343. This leads to the question of whether that provision has direct legal effect, in itself or in conjunction with Article 47 of the Charter.

39 There is no doubt that Article 9 of Directive 2016/343 confers on individuals a right against the criminal prosecution authorities of the State; it prescribes, in a mandatory and unequivocal manner, the conditions under which that right arises (the defendant was not present at the trial and the conditions provided for in Article 8(2) of Directive 2016/343 were not met), and 'imposes … in unequivocal terms, a precise obligation as to the result to be achieved' (judgment of 6 November 2018, [*Bauer and Willmeroth*,] C-569/16 and C-570/16, EU:C:2018:871, paragraph 72). This result is such a legal remedy 'which allows a fresh determination of the merits of the case' (Article 9 of Directive 2016/343). However, this provision provides for an alternative: '… that … suspects or accused persons … have the right to a new trial, or to another legal remedy …'.

40 The provisions of Article 9 of the directive and Article 423(1) of the NPK define the right of a person convicted *in absentia* to a new trial in the same way, in that they recognise that right without specifying precisely how it will manifest itself, that is to say whether there must be a new trial from the outset or merely an appeal. In so far as the national provision of Article 423(1) of the NPK has direct effect – in that it is applied together with Article 425 of that directive, a provision that governs the specific type of retrial – the question arises as to whether it can be assumed that Article 9 of Directive 2016/343 has direct effect, by virtue of which it can be applied instead of Article 423(1) of the NPK and together with Article 425 of the NPK.

41 More specifically, [the question arises as to] whether it is possible to recognise the right to a retrial under Article 9 of Directive 2016/343 and then to determine the type of retrial under Article 425(1) of the NPK: new proceedings from the first instance or an appeal against the decision at first or second instance.

42 In other words, and with reference to the main proceedings, if: 1. the referring court determines the type of proceedings *in absentia* against IR by stating that

they are to be conducted under the conditions laid down in the first sentence of Article 8(4) of the directive, since the conditions laid down in paragraph 2 are not satisfied; 2. the referring court specifies the legal remedy provided for in Article 9 in conjunction with the second sentence of Article 8(4) of the directive, namely that IR, convicted *in absentia*, has the right to apply for and obtain a retrial, only on application within a period of six months of being served a copy of the judgment rendered *in absentia*; 3. the specific type of retrial (new examination in full or an appeal against the conviction handed down *in absentia* at first or second instance) will be assessed by the Supreme Court, whereby that type of retrial would certainly consist of an examination of the indictment on the merits, with the effective personal involvement of IR and defence counsel chosen by him, will that guarantee have legal value in so far as it is based solely on the direct effect of Article 9 of Directive 2016/343?