

Case C-654/20**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:**

15 November 2020

Referring court:

Apelativen sad Sofia (Bulgaria)

Date of the decision to refer:

9 November 2020

Prosecuting authority:

Apelativna prokuratura Sofia (Bulgaria)

Convicted person/offender:

VD

Subject matter of the main proceedings

The main proceedings are extraordinary proceedings for the review of a final judgment. They were brought before the referring court at the request of a public prosecutor seeking to set aside a judgment delivered in the appeal proceedings and to remit the matter for a fresh examination by a different formation of the appellate court, or, in the alternative, to set aside the judgment of the appellate court and to uphold the judgment of the court of first instance by which the offender was found guilty of committing a criminal offence but was released from criminal liability. The act examined by the abovementioned courts consists in the driving of a motor vehicle while subject to an administrative penalty in the form of a suspension of the right to drive.

Subject matter and legal basis of the request

The request for a preliminary ruling is made pursuant to the second paragraph of Article 267 TFEU and concerns the interpretation of the principle of legality of criminal offences and penalties and the interpretation of Article 49(3) of the

Charter of Fundamental Rights of the European Union (‘the Charter’). The referring court seeks clarification as to whether national legislation is compatible with EU law if it provides for the possibility of imposing, for the same act, either an administrative sanction or a penalty for committing a criminal offence, without laying down criteria against which it is possible to assess whether the offender incurs administrative or criminal liability.

Questions referred for a preliminary ruling

1. Does the principle of legality of criminal offences and penalties allow national legislation which provides for both administrative and criminal liability for the same act, namely driving a motor vehicle while subject to a coercive administrative measure in the form of a driving licence suspension, in the absence of any criteria allowing for an objective distinction to be made between the two types of liability?
2. Should the Court of Justice of the European Union answer the first question in the negative, what powers does the national court have to ensure the effective application of the principles of EU law?
3. Is a penalty involving deprivation of liberty of up to three years and the imposition of a fine of 200 to 1 000 Bulgarian leva (BGN) proportionate for the purpose of Article 49(3) of the Charter of Fundamental Rights of the European Union as regards the criminal offence of driving a motor vehicle while subject to a coercive administrative measure in the form of a driving licence suspension?

EU legislation and case-law relied on

Treaty on European Union: Article 6(3)

Treaty on the Functioning of the European Union: Article 90 and Article 91(1)(c)

Charter of Fundamental Rights of the European Union: Article 49

Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences: Article 11(2)

European Convention on the Protection of Human Rights and Fundamental Freedoms: Article 5(1)

Judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, EU:C:2007:261, paragraphs 49 and 50 and the case-law cited

Judgment of 12 February 2019, *TC*, C-492/18 PPU, EU:C:2019:108, paragraphs 59 and 60 and the case-law cited

Judgment of 16 July 2015, *Chmielewski*, C-255/14, EU:C:2015:475, paragraph 21 and the case-law cited

Order of 12 July 2018, *Pinzaru and Cirstinoiu*, C-707/17, not published, EU:C:2018:574, paragraph 26

Provisions of national law relied on

Nakazatelen kodeks (Criminal Code): Article 9(2), Article 78a and 343c.

Nakazatelno-protsesualen kodeks (Code of Criminal Procedure): Article 301(1), Article 305(6), Articles 375 to 380.

Zakon za dvizhenieto po patishtata (Law on road traffic): Articles 150, 150a, 151a, 171, 177.

Naredba No 3 ot 11.5.2011 za iziskvaniata za fizicheska godnost kam vodachite na motorni prevozni sredstva i reda za izvarshvane na meditsinskite pregledi za ustanovyavane na fizicheskata godnost za vodachite ot razlichnite kategorii (Ordinance No 3 of 11 May 2011 on the requirements for the physical fitness of drivers of motor vehicles and the procedure for conducting medical examinations to establish the physical fitness of drivers of various categories), issued by the Minister for Health

Naredba No 3 ot 29.08.2011 za pridobivane na pravospobnost za provezhdane na izpiti na kandidatite za vodachi na motorni prevozni sredstva (Ordinance No 3 of 29 August 2011 on obtaining the qualification required to conduct examinations for persons applying to become drivers of motor vehicles), issued by the Minister for Education, Youth and Science

Naredba No 38 ot 16.04.2004 za usloviata i reda za provezhdaneto na izpitite na kandidati za pridobivane na pravospobnost za upravlenie na motorno prevozno sredstvo i reda za provezhdane na proverohnite izpiti (Ordinance No 38 of 16 April 2004 on the conditions and procedure for conducting examinations for persons applying for the right to drive and the procedure for conducting confirmatory examinations), issued by the Minister for Transport and Communications

Naredba No 31 ot 26.07.1999 za iziskvaniata, usloviata i reda za pridobivane na pravospobnost za upravlenie na motorno prevozno sredstvo (Ordinance No 31 of 26 July 1999 on the requirements, conditions and procedure for acquiring the right to drive), issued by the Minister for Transport and the Minister for Education and Science

Succinct presentation of the facts and procedure in the main proceedings

- 1 The accused person is entitled to drive and holds a driving licence. On 9 May 2018, his driving licence was withdrawn by an order imposing a coercive administrative measure, issued by the Oblasten Direktor (Regional Director) of the Ministerstvo na vatreshnite raboti (Ministry of the Interior, Bulgaria), on the ground that that person had not paid fines imposed on him as administrative penalties for traffic offences that he had committed. Pursuant to the order, his driving licence was to be suspended until he paid the fines owed. On 23 August 2018, when driving a passenger car on a busy boulevard in Blagoevgrad without his lights on, the accused person was stopped for a police check. The police officers found that his driving licence had been suspended. As a result, he was issued with a notice establishing an administrative offence.
- 2 On 19 March 2019, by a decision of a public prosecutor of the Rayonna prokuratura Blagoevgrad (District Public Prosecutor's Office, Blagoevgrad, Bulgaria), criminal proceedings were brought against the accused for driving a motor vehicle, on 23 August 2018, while subject to a coercive administrative measure in the form of a driving licence suspension – an act classified by the public prosecutor as a criminal offence pursuant to Article 343c(3) of the Nakazatelen kodeks (Criminal Code; 'the NK') in conjunction with Article 343c(1) thereof. Pursuant to that provision, a person who drives a motor vehicle while subject to a coercive administrative measure in the form of a driving licence suspension is to be punished by deprivation of liberty of up to three years and the imposition of a fine of 200 to 1 000 Bulgarian leva (BGN). During questioning, the accused person admitted the facts constituting the offence and explained that his work required him to drive a vehicle, that he was suffering financially because he was unable to work due to the withdrawal of his driving licence, and that on the day on which he had committed the offence, he needed to drive his vehicle in order to buy urgently needed medication for his seriously ill brother.
- 3 In the proceedings at first instance, the Rayonen sad Blagoevgrad (District Court, Blagoevgrad, Bulgaria) found that the accused person had committed a criminal offence, as he had driven the car on a busy boulevard and had thereby acted recklessly and failed to comply with the traffic rules. At the same time, that court released him from criminal liability pursuant to Article 78a(1) of the NK, as, in accordance with that provision, the offence is punishable by deprivation of liberty of up to three years and until then, the accused person had not been convicted and released from criminal liability. Pursuant to that same provision, which provides for a fine of BGN 1 000 to 5 000, a fine of BGN 1 000 was imposed on him.
- 4 Following an appeal on the merits, the Okrazhen sad Blagoevgrad (Regional Court, Blagoevgrad, Bulgaria) set aside the judgment of the district court, acquitted the accused and held that his act did not constitute a criminal offence, as it gave rise to only an insignificant degree of danger to society and therefore had to be classified as an administrative offence. That court therefore imposed an

administrative sanction of BGN 300 on him pursuant to Article 177(1)(2) of the Zakon za dvizhenieto po patishtata (Law on road traffic; 'the ZDvP'). That provision provides that a person who drives a motor vehicle after his or her driving licence has been suspended is to be punished by the imposition of a fine of BGN 100 to 300. The court ruling on the appeal on the merits found that although the accused had been repeatedly punished for administrative offences under the ZDvP, the offence that was the subject of the proceedings gave rise to only an insignificant degree of danger to society, as the accused had not been convicted or punished for criminal offences committed by him, nor had any administrative penalties been imposed on him for an offence related to the driving of a motor vehicle without a driving licence during the period in which his right to drive had been withdrawn or his driving licence had been suspended. The abovementioned court also took account of the fact that the accused person had confessed to the facts established, expressed regret for the incident and stated that the reason for driving the vehicle was that he needed to buy medication for his sick brother.

- 5 The proceedings before the referring court were brought at the request of the Apelativen prokuror (appellate public prosecutor) of the Apelativna prokuratura Sofia (Appellate Public Prosecutor's Office, Sofia) seeking to set aside the judgment of the Okrazhen sad Blagoevgrad (Regional Court, Blagoevgrad, Bulgaria) and to remit the matter for a fresh examination by a different formation of that court. In the alternative, the appellate public prosecutor requests that the judgment of the appellate court be set aside and the judgment of the Rayonen sad Blagoevgrad (District Court, Blagoevgrad, Bulgaria) be upheld.

The essential arguments of the parties in the main proceedings

- 6 The appellate public prosecutor takes the view that the Okrazhen sad Blagoevgrad (Regional Court, Blagoevgrad, Bulgaria) committed an error of substantive law in finding that the offence that is the subject of the proceedings gave rise to only an insignificant degree of danger to society. The appellate public prosecutor is of the view that the requirements for the applicability of Article 9(2) of the NK – pursuant to which an act which formally fulfils the criteria of a statutory criminal offence, but, owing to its insignificance, does not represent a danger to society or clearly gives rise to only an insignificant degree of danger to society, is not to be classified as a criminal offence – are not met because the accused person has been repeatedly punished for violations of the ZDvP. The appellate public prosecutor maintains that the act of the accused fulfils the criteria for constituting a criminal offence under Article 343c(3) of the NK in conjunction with Article 343c(1) thereof and that, for that offence, it is not necessary that the danger to society actually materialises.
- 7 The referring court does not present any arguments made by the accused person.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 8 The referring court states that Directive 2006/126 empowers Member States to adopt their own national criminal and police laws that provide for criminal or administrative measures in connection with the withdrawal or cancellation of the right to drive.
- 9 The referring court adds that, according to the Court's settled case-law, in the absence of harmonisation of EU legislation in the field of penalties applicable where conditions laid down by arrangements under such legislation are not complied with, Member States are empowered to choose the penalties which seem to them to be appropriate. They must, however, exercise that power in accordance with EU law and its general principles, and consequently in accordance with the principles of legality and proportionality (judgment of 16 July 2015, *Chmielewski*, C-255/14, EU:C:2015:475, paragraph 21 and the case-law cited, and order of 12 July 2018, *Pinzaru and Cirstinoiu*, C-707/17, not published, EU:C:2018:574, paragraph 26). In particular, the administrative or punitive measures permitted under national legislation must not go beyond what is necessary in order to attain the objectives legitimately pursued by that legislation.
- 10 The referring court takes the view that the present dispute relates to the application of EU law in the field of common transport policy and, in particular, measures to improve transport safety. It finds that the Bulgarian court, in so far as it applies EU law, may refer to Article 49 of the Charter in the present case, because, under Article 51 of the Charter, the latter is applicable in the main proceedings.
- 11 For the purpose of transposing Directive 2006/126 into national law, the Bulgarian legislature adopted amendments to the ZDvP and the abovementioned Ordinance No 3 of 11 May 2011, Ordinance No 3 of 29 August 2011 and Ordinance No 31 of 26 July 1999. On the other hand, the legislation on the sanctions laid down for failures to comply with the requirement to drive a motor vehicle with a duly issued and valid driving licence was already in force before the adoption of the directive. In particular, the criminal offences under Article 343c(1) and (2) of the NK were adopted in 1995, and the administrative offences under Article 177(1) of the ZDvP have existed since the promulgation of that law in 1999.
- 12 In 2016, a new criminal offence was introduced, namely that under Article 343c(3) of the NK, criminalising the driving of a motor vehicle while subject to a coercive administrative measure in the form of a driving licence suspension. However, a completely identical administrative offence had already been provided for by Article 177(1)(2) of the ZDvP since the promulgation of that law in 1999.
- 13 The referring court states that until the introduction of that new criminal offence under Article 343c(3) of the NK in 2016, it was clear and unambiguous from the criminal offences under Article 343c(1) and (2) of the NK that there is a

relationship of subsidiarity between criminal law and the law on administrative offences. Accordingly, pursuant to Article 343c(1) of the NK, a person who drives a motor vehicle while subject to a penalty withdrawing the right to drive, after having been punished for the same act in administrative proceedings, is to incur criminal liability. Pursuant to Article 343c(2) of the NK, a person who commits such an act within one year of having been punished for that act in administrative proceedings for driving a motor vehicle without a driving licence is to incur criminal liability. Consequently, a clear distinction between criminal and administrative liability is made for criminal offences under Article 343c(1) and (2) of the NK, since the prior imposition of an administrative penalty is a mandatory prerequisite for being prosecuted for those criminal offences. In both cases, therefore, criminal liability is subsidiary to liability for an administrative offence.

- 14 By contrast, the new criminal offence under Article 343c(3) of the NK does not require the prior imposition of an administrative penalty for criminal liability to be incurred. Under those circumstances, there is a lack of any objective criterion for distinguishing the criminal offence under Article 343c(3) of the NK from the already existing and completely identical administrative offence under Article 177(1)(2) of the ZDvP. The differences between the abovementioned criminal offences and the administrative offence lie in the sanctions provided for in each case and the procedural rules (under criminal or administrative law) for imposing them, but not in the objective constituent elements of the offences.
- 15 The referring court states that the legislature has not provided any specific justification for criminalising the driving of a motor vehicle during the period of suspension of the driving licence. In fact, the first draft law to amend and supplement the NK did not provide for either an amendment of or a supplement to Article 343c of the NK. The proposal for the adoption of a new paragraph 3 for that provision was submitted by two members of parliament only after the draft law had been adopted at first reading. The two members of parliament justified the proposal in one sentence, from which it is clear that they perceived the proposed new criminal offence as being identical to those under Article 343c(1) and (2) of the NK. Reasons for the insertion of the new paragraph 3 in that article were not discussed either in the Legal Committee or in the debates held at the first and second reading of the draft law in the plenary session of the Narodno sabranie (National Assembly).
- 16 Pursuant to Article 11(3) of the Zakon za normativnite aktove (Law on normative legal acts; 'the ZNA'), normative legal acts are repealed, amended or supplemented by an express provision of the new, amending or supplementing act. Following the supplementation of Article 343c by the new paragraph 3 in 2016, the administrative offence under Article 177(1)(2) of the ZDvP was not expressly repealed, even though the legislature had the opportunity to do so when other amendments were made to that article in 2018; thus, that administrative offence remained unchanged.

- 17 In the Bulgarian legal literature and case-law, it is uniformly assumed that the main distinction between liability under the law on administrative offences and that under criminal law is made on the basis of the degree of danger that the act poses to society. However, the legislature has not made provision for any additional objective circumstances that would establish an increased degree of danger to society on the part of the act in question and would require its criminalisation. The referring court states that the driving of a motor vehicle during the period of suspension of the driving licence poses less of a risk to society than the driving of a motor vehicle by an offender on whom a penalty withdrawing his or her right to drive has already been imposed and who has been sanctioned for that offence in administrative proceedings.
- 18 In the absence of any objective criterion for determining whether the act is a criminal offence or an administrative offence, the assessment is ultimately left entirely at the discretion of the administrative authority, which may impose an administrative penalty in the form of a fine or, alternatively, request that the public prosecutor bring criminal proceedings for a criminal offence committed. Under those circumstances, the parallel application of the criminal offence under Article 343c(3) of the NK and the administrative offence under Article 177(1)(2) of the ZDvP leads to unequal treatment of perpetrators in respect of the same act, as sanctions of varying degrees of severity may be imposed on them: deprivation of liberty of up to three years as well as a fine of BGN 200 to 1 000 if it is accepted that a criminal offence has been committed, or a fine of BGN 100 to 300 if it is accepted that an administrative offence has been committed.
- 19 The referring court observes that the difference in treatment of the same type of cases runs counter to the principle of equal treatment of citizens enshrined in Article 6 of the *Konstitutsia na Republika Bulgaria* (Constitution of the Republic of Bulgaria). The fact that citizens are unable to foresee the consequences of the act is incompatible with fundamental principles of EU law, such as the principles of legal certainty and the protection of legitimate expectations. Furthermore, the lack of correspondence, as provided by the law, between the danger posed to society and the criminal nature of the act infringes Article 49 of the Charter, which enshrines the principle of legality of criminal offences and penalties and the principle of proportionality, since, in the same circumstances, an act may be both a criminal offence and an administrative offence, resulting in a discrepancy between the seriousness of the act and the severity of the sanction provided for.
- 20 For this reason, the case-law of the Bulgarian courts is inconsistent in cases in which a motor vehicle is driven while the driver is subject to a coercive administrative measure withdrawing his or her driving licence. The referring court cites specific examples, of both judgments accepting the public prosecutor's view that the act is to be classified as a criminal offence and judgments in which the courts found that the act is an administrative offence and acquitted the accused persons of the offence they were charged with. Cases are also cited in which the public prosecutor's office terminated the criminal proceedings and an administrative penalty was imposed on the offender.

- 21 The referring court also takes account of the case-law of the Court of Justice of the European Union. It states that, according to the judgment of 3 May 2007, *Advocaten voor de Wereld* (C-303/05, EU:C:2007:261, paragraphs 49 and 50), the principle of legality of criminal offences and penalties implies that legislation must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable. The referring court also cites the judgment of 12 February 2019, *TC* (C-492/18 PPU, EU:C:2019:108, paragraphs 59 and 60), according to which the execution of a measure depriving a person of liberty requires the existence of a legal basis which justifies that deprivation of liberty and which must meet the requirements of clarity, predictability and accessibility in order to avoid any risk of arbitrariness.
- 22 The referring court also refers to the judgment of the European Court of Human Rights in *Medvedyev v. France* from 2010, which states that the standard of lawfulness requires that ‘all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail’.

WORKING DOCUMENT