Case C-205/21

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:

31 March 2021

Referring court or tribunal:

Spetsializiran nakazatelen sad (Bulgaria)

Date of the decision to refer:

31 March 2021

Applicant:

Ministerstvoto na vatreshnite raboti, Glavna direktsia za borba s organiziranata prestapnost (Ministry of Interior, General-Directorate for Combating Organised Crime)

Accused:

B. C.

Subject matter of the main proceedings

Mandatory creation of a criminal record of persons who are charged with a premeditated criminal offence requiring public prosecution or recording of their biometric and genetic data

Subject matter and legal basis of the request

The request for a preliminary ruling is made under Article 267(1)(b) TFEU.

Questions referred for a preliminary ruling

1. Is Article 10 of Directive 2016/680 effectively transposed into national law – Article 25(3) and Article 25a of Zakon za ministerstvo na vatreshnite raboti (Bulgarian Law on the Ministry of Interior) – by the inclusion of a reference to the similar provision in Article 9 of Regulation 2016/679?

2. Is the requirement set in Article 10(a) of Directive 2016/680 in conjunction with Article 52 and with Articles 3 and 8 of the Charter, that any limitation on integrity and protection of personal data must be provided for by law, fulfilled if contradictory national provisions exist in relation to the permissibility of processing of genetic and biometric data for the purposes of creating a police record?

3. Is a national law, namely Article 68(4) of the Bulgarian Law on the Ministry of Interior, which provides for the obligation of the court of first instance to order the forced collection of personal data (taking photographs for the file, taking fingerprints, and taking samples in order to create a DNA profile), compatible with Article 6(a) of Directive 2016/680 in conjunction with Article 48 of the Charter, if a person who is charged with a premeditated criminal offence requiring public prosecution refuses to voluntarily cooperate in the collection of these personal data, without the court being able to assess whether there are serious grounds for believing that the person has committed the criminal offence with which he or she is charged?

4. Is a national law, namely Article 68(1) to (3) of the Bulgarian Law on the Ministry of Interior, which provides, as a general rule, for the taking of photographs for the file, the taking of fingerprints, and the taking of samples in order to create a DNA profile for all persons who are charged with a premeditated criminal offence requiring public prosecution, compatible with Article 10, Article 4(1)(a) and (c), and Article 8(1) and (2) of Directive 2016/680?

Legal provisions and case-law of the European Union

Charter of Fundamental Rights of the European Union (OJ 2016 C 202, p. 389) (‘the Charter’).

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ 2016 L 119, p. 1) (Regulation 2016/679)

Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ 2016 L 119, p. 89) (Directive 2016/680)

Provisions of national law

Nakazatelen kodeks (Bulgarian Criminal Code, ‘the NK’);

Nakazatelno protsesualen kodeks (Bulgarian Code of Criminal Procedure, ‘the NPK’);

Zakon za Ministerstvoto na vatreshnite raboti (Bulgarian Law on the Ministry of Interior, ‘the ZMVR’);

Zakon za balgarskite lichni dokumenti (Bulgarian Law on national identity documents, ‘the ZBLD’);

Zakon za zashtita na lichnite danni (Bulgarian Law on data protection, ‘the ZZLD’);

Naredba za reda za izvarshvane i snemane na politseyska registratsia (Bulgarian Regulation on the particulars of creating a police record, ‘the NRISPR’).

Summary of the facts and proceedings

1 On 24 March 2021, the referring court was called upon by the Zamestnik-direktor na Glavna direktsia za borba s organiziranata prestapnost kam Ministerstvoto na vatreshnite raboti (Deputy Director of the General-Directorate in the Ministry of Interior for Combating Organised Crime) to examine an application under Article 68(5) of the ZMVR and Article 11(4) of the NRISPR. The subject of this application was the mandatory creation of a police record for the accused B.C.

2 There are criminal proceedings under way in connection with the avoidance of the setting and payment of tax obligations in accordance with the Zakon za danaka varhu dobavenata stoynost (Bulgarian Law on value-added tax) by two trading companies – a criminal offence under Article 255 of the NK.

3 On 1 March 2021, an order [of the investigative authority] was issued, which formally charged the person B.C. Her actions were classed as participation in a criminal organisation together with three other individuals, who, with the wilful intention of enrichment, intended to commit coordinated criminal offences in the sense of Article 255 of the NK within Bulgaria, which was subsumed under the qualification of Article 321(3), 2nd case, no 2 in conjunction with Article 321(2) of the NK. She was made aware of this order on 15 March 2021. B.C. chose to defend herself and did not arrange to be represented by a lawyer.

4 Immediately after she was formally charged, she was requested to cooperate in the creation of a police record, in other words, to have fingerprints taken, to be photographed, and to allow a sample to be taken for a DNA profile. As she refused, she filled in a pre-printed form on the same day, 15 March 2021, which took the form of a declaration that she had been informed of the existence of a statutory basis for the creation of her police record under the ZMVR. She declared officially therein that she did not agree to having her fingerprints taken, to being photographed, and to allowing samples to be taken from her for the DNA profile. She did not state any reasons as to why she did not agree to it.

5 She was not subjected to these actions for the purpose of creating a police record, instead the police authority called upon the referring court.

6 The application made reference to the ongoing criminal proceedings; it is claimed that there is sufficient evidence for the guilt of the accused including B.C.; it is stated that she was formally charged with committing a criminal offence in the sense of Article 321(3), 2nd case, no 2 in conjunction with Article 321(2) of the NK and that she refused to have her fingerprints taken, to be photographed, and to allow samples to be taken for the DNA profile; the legal provisions are mentioned (Article 68(1) of the ZMVR and Article 11(4) of the NPISPR); the application requests the power to force B.C. to subject herself to these actions (taking fingerprints, taking of photographs for the file, and taking of samples for the DNA profile).

7 This application includes the following documents: a photocopy of the order to formally charge B.C. and a photocopy of the declaration in which B.C. refused to give consent to having fingerprints taken, to be photographed, and to allow samples to be taken for the DNA profile. The other documents contained in the file were not provided to the referring court.

Summary of the grounds for the reference

The first question

8 The first question asks whether the nature of the wording of the national law can lead to a conclusion that is in keeping with the criteria that apply under EU law, namely that the national law in principle permits the processing of genetic and biometric data for police purposes. These doubts are based on the decision made by the national legislature in Article 25(3) and Article 25a of the ZMVR to make reference to Regulation 2016/679 and not Directive 2016/680.

9 According to Article 2(2)(d) of Regulation 2016/679, this Regulation does not apply to the processing of personal data by the competent authorities for the purpose of preventing, investigating, detecting or prosecuting criminal offences.

10 According to Article 1(1) of Directive 2016/680, the objective of this Directive is to lay down provisions on the protection of natural persons with regard to the processing of personal data for the purposes of preventing, investigating, detecting or prosecuting criminal offences. Consequently, Directive 2016/680 would actually have been the legislative act that should have been transposed in Article 22(3) and Article 25a of the ZMVR, rather than Regulation 2016/679.

11 Similarly, Article 9(1) of Regulation 2016/679 expressly prohibits the processing of genetic and biometric data for the purpose of uniquely identifying a natural person, while paragraph (2) lists specific exceptions, which do not include combating crime ([under Article 2(2)(d), the Regulation expressly does not apply to this area]).

12 Article 10 of Directive 2016/680, on the other hand, expressly permits the processing of genetic and biometric data subject to fulfilment of certain requirements.

13 In so far as the objective of Article 25(3) and Article 25a of the ZMVR is to permit, rather than prohibit, the processing of these data, this also favours the conclusion that Directive 2016/680 is the legislative act that should have been transposed in Article 22(3) and Article 25a of the ZMVR, and not Regulation 2016/679.

14 In accordance with Article 25a of the ZMVR, the processing of biometric and genetic data is only permissible under Article 9 of Regulation 2016/679 or Article 51 of the ZZLD.

15 At the same time, the regulation as a whole does not apply to prosecution of a criminal offence – see Article 2(2)(d). Independently of this, Article 9 of the regulation expressly prohibits the processing of genetic and biometric data; the exceptions in the sense of paragraph (2) do not relate to the creation of a police record.

16 In addition, Article 51 of the ZZLD by itself cannot form the basis for permissibility of the processing of genetic and biometric data. In so far as processing is allowed by this provision, it is only permissible if it is permitted under national law or EU law.

17 In respect of the question of whether it is provided for in national law, the task of the referring court is to weigh up Article 25a and Article 68 of the ZMVR against one another. To this end, it is required to first of all establish the exact meaning of Article 25a of the ZMVR – and in particular, whether it can be assumed that it does not transpose Regulation 2016/679, as it expressly states, but rather Directive 2016/680, which would actually have to be the case.

18 The question of whether it is provided for under EU law is undoubtedly to be answered in the affirmative, in view of the provision in Article 10 of Directive 2016/680; however, this provision does not have any direct effect, but must be transposed. This therefore raises the question, in turn, of whether or not it can be assumed that it has been effectively transposed by Article 25(3) and Article 25a of the ZMVR.

19 The referring court therefore requires clarification from the Court of Justice regarding the legal meaning of this incorrect citation of an EU legal act in a national transposing law. In other words, can the reference in a national law to Article 9 of Regulation 2016/679, which is not applicable to the creation of the police record and prohibits the processing of genetic and biometric data for the purposes of prosecuting a criminal offence, lead to the conclusion that such processing is nevertheless permissible, in so far as a different legislative act of EU law, specifically Article 10 of Directive 2016/680, unequivocally does permit such processing, even though this provision is not cited in the national law?

20 It must be taken into consideration that Article 10 of the Directive does not have any direct effect in so far as this provision concerns natural persons. It must be transposed in a national law. Can it be assumed that the necessary transposition has taken place if this national law makes reference to Article 9 of Regulation 2016/679 and not to Article 10 of Directive 2016/680?

21 It must be noted that it is undoubtedly the intention of the Bulgarian legislature to respect EU law. From this perspective, an accidental error has been made. In terms of content, the transposed wording actually corresponds to Article 10 of Directive 2016/680 (or would have to at least correspond to it, which is the subject of the third and fourth questions), even if this provision is not expressly cited. In view of this content, and irrespective of the reference to Article 9 of Regulation 2016/679, can it be nonetheless assumed that Article 10 of Directive 2016/680 was effectively transposed?

The second question

22 The second question is closely related to the first one. In other words, even if, following clarification from the Court of Justice on the first question, the national court interprets Article 25(3) and Article 25a of the ZMVR in such a way that the proper transposition of Article 10 of Directive 2016/680 and the existence of an effective national legal basis for the processing of genetic and biometric data can be assumed, this raises the question of whether this fulfils the requirement according to Article 10(a) of Directive 2016/680 that such processing must be permissible under the law of the Member State.

23 In accordance with Article 3(1) of Directive 2016/680, data relating to the physiological and genetic identity of a specific natural person constitute personal data. In accordance with Article 3(2) of Directive 2016/680, processing is also understood to mean the collection of data. Consequently, by taking photographs for the file, taking fingerprints, and taking a DNA sample, personal data belonging to a natural person are being processed.

24 In accordance with Article 10 of Directive 2016/680, special protection is given to a category of data that are obtained by taking photographs for the file, taking fingerprints, and taking a DNA sample, namely ‘genetic data, biometric data’. This special protection has a number of dimensions, whereby one of them, under letter (a), is a requirement that the processing is ‘authorised by […] Member State law’.

25 The nature of processing of especially sensitive personal data, such as those under Article 10 of Directive 2016/680, already constitutes an encroachment into the legal sphere of a natural person, in other words, an impingement on his or her right to integrity under Article 3 of the Charter. Consequently, forcing someone to have his or her photograph taken for the file, to have fingerprints taken, and to have DNA samples taken, violates Article 3 of the Charter. The right to protection of personal data is protected in Article 8 of the Charter. Any limitation placed on

these rights enshrined in Articles 3 and 8 of the Charter is only permitted under the conditions laid down in Article 52 of the Charter (recital 104 of Directive 2016/680), whereby certain conditions must be observed. The first of these conditions is that the limitation must be provided for by law.

26 Consequently, both Article 10(a) of Directive 2016/680 and Article 52 of the Charter require that the collection of biometric and genetic data must be provided for by law. That assumes the existence of a valid and clearly formulated national law. The question arises as to whether this requirement has been fulfilled if a contradiction exists between Article 25a of the ZMVR, which, at first glance, prohibits the collection of biometric and genetic data, in so far as it makes reference to Article 9 of Regulation 2016/679, and Article 68 of the ZMVR, which certainly permits the collection of biometric and genetic data.

27 From this perspective, even if the referring court takes the view within the scope of a corrective interpretation that the contradiction in national law could be overcome, that the conclusion is drawn that national law permits the processing of biometric and genetic data for the purposes of creating a police record, this undoubtedly changes nothing about the fact, however, that this conclusion does not arise from the clear and unequivocal legal provision, but rather from a complex corrective interpretation that was reached by means of a reference for a preliminary ruling. Does this lack of clarity in national law fulfil the requirement of Article 52 of the Charter, in accordance with which the limitation on the rights enshrined in Articles 3 and 8 of the Charter must be provided for by law?

The third question

28 In accordance with Article 6(a) of Directive 2016/680, personal data may only be processed for the purposes of combating crime in relation to persons with regard to whom there are serious grounds for believing that they have committed a criminal offence. The third sentence of recital 31 states that the processing of personal data of persons who are suspected of having committed an offence, but have not been convicted, should not prevent the application of the presumption of innocence. Consequently, Article 48 of the Charter applies, under which ‘everyone who has been charged shall be presumed innocent until proved guilty according to law’.

29 At the same time, the national law – Article 68 of the ZMVR – does not provide for the court of first instance to examine in any manner whether such serious grounds exist for believing that someone has committed a criminal offence. Rather, it is sufficient for the public prosecution service or another prosecution authority to have formally charged the person.

30 In the national law regarding formally charging a person – Article 219(1) of the NPK – this means it is necessary to collect ‘sufficient evidence for the guilt of a particular person’. It is not certain that the criterion of ‘sufficient evidence’ under Article 219(1) of the NPK corresponds to the criterion of ‘serious grounds for

believing that they have committed […] a criminal offence' under Article 6(a) of Directive 2016/680. Rather, it is to be assumed that, in order to process biometric and genetic data, more valid evidence is necessary than that which is required in order to formally charge the person – in so far as the purpose of charging this person is to inform the person of the grounds for suspecting him or her, at which point he or she is offered the opportunity to defend him or herself.

31 Similarly, in accordance with Article 68 of the ZMVR, only the public prosecutor (or the investigating authority – investigator, investigating police officer) is able to assess whether evidence ('sufficient evidence' in the sense of Article 219 of the NPK and 'serious grounds' in the sense of Article 6(a) of Directive 2016/680) actually exists. The court of first instance does not have the means to do this. This means that, in accordance with Article 68 of the ZMVR, it is sufficient for the court to establish that the person has been formally charged with a premeditated criminal offence requiring public prosecution. The court is not authorised to assess whether sufficient or valid evidence exists; it also does not have the factual means to undertake this assessment, since it actually has no access to the file – after all, it has only received a photocopy of the order formally charging the person and a declaration concerning the refusal to allow data to be collected.

32 The court's task – once it has satisfied itself that the person was formally charged with a pre-meditated criminal offence requiring public prosecution and that this person refused to voluntarily make available biometric and genetic data (to be photographed, to have fingerprints taken and to allow a DNA sample to be taken) – is to order that this person be forced to undergo these actions.

33 This raises the question of whether the national standard in accordance with Article 219(1) of the NPK for 'sufficient evidence' corresponds to the standard in accordance with Article 6(a) of Directive 2016/680, namely 'serious grounds for believing that they have committed […] a criminal offence'.

34 This raises the question of whether the referring court would observe Article 47 and 48 of the Charter, should it rule on the application made in accordance with Article 68(5) of the NPK. Put another way, the question is raised as to whether the person who refused to voluntarily make personal data available (to have photographs taken for the file, to have fingerprints taken, to allow a DNA sample to be taken), will enjoy the protection required under Article 47 of the Charter, in the form of effective legal remedies; the question is also raised as to whether the presumption of innocence in accordance with Article 48 of the Charter will continue to be preserved. These questions are raised because the court of first instance does not possess the file and is unable to assess whether 'sufficient evidence' in the sense of Article 219 of the NPK or 'serious grounds' in the sense of Article 6(a) of Directive 2016/680 exist.

The fourth question

35 In accordance with Article 4(1)(b) of Directive 2016/680, personal data must be collected for specified, explicit and legitimate purposes. Article 8(2) clearly states that the law of the Member State must specify the objectives and the purposes of the processing. The sixth sentence of recital 26 states that the special purposes for which the personal data are processed should be defined, legitimate and determined at the time of collection of the personal data.

36 Article 4(1)(c) and Article 8(1) of Directive 2016/680 stipulate that the collection of personal data must not be excessive. The eighth and ninth sentences of recital 26 also contain something similar. Article 10 of Directive 2016/680 states specifically in relation to biometric and genetic data that processing of such data is allowed only where 'strictly necessary'.

37 It may be gathered from these provisions that the requirement for a certain degree of assessment absolutely must be laid down in national law before biometric and genetic data are collected by means of taking photographs for a file, taking fingerprints, and taking a DNA sample. Such an assessment must concern itself with the questions of whether the collection is necessary and whether it extends to all of these actions. At the same time, the creation of a police record in accordance with Article 68 of the ZMVR applies mandatorily without exception for all persons who are charged with premeditated criminal offences requiring public prosecution, and all three types of personal data collection – taking of photographs for the file, taking fingerprints, taking DNA sample – are also used mandatorily.

38 Only the general purposes of this processing are mentioned – the exercise of an information activity (Article 18(1) and Article 20(1) of the ZMVR), with the objective of conducting the activities of the Bulgarian Ministry of Interior (Article 25(1) in conjunction with Article 6), including safeguarding national security, combating crime, and protecting the public order. The law does not require there to be a specific necessity for the collection of biometric and genetic data. The law does not require any assessment of whether all of these data are necessary or whether some of them would suffice.

39 It may be inferred from the provision in Article 10 of Directive 2016/680 that the collection of biometric and genetic data must be the exception, which is allowed following proper justification of the need, since the provision states that it must be 'strictly necessary'. At the same time, the national law assumes that the collection of these data forms the general rule, which applies for all persons who are charged with a premeditated criminal offence requiring public prosecution.

40 This then raises the question as to whether this requirement – being charged with a premeditated criminal offence requiring public prosecution – is sufficient in order to consider the requirements of Article 10, Article 4(1)(a) and (c), and Article 8(1) and (2) of Directive 2016/680 as being fulfilled.