

Case C-805/21

Request for a preliminary ruling

Date lodged:

20 December 2021

Referring court:

Spetsializiran nakazatelen sad (Bulgaria)

Date of the decision to refer:

20 December 2021

Defendants:

ZhU

RD

ORDER

[...] City: Sofia

Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) – 14th Chamber

[...]

[...] The proceedings are governed by Article 485 et seq. of the Nakazatelno protsesualen kodeks (Code of Criminal Procedure; the ‘NPK’) and the second paragraph of Article 267 TFEU.

1. The national law, as interpreted by the Varhoven kasatsionen sad (Supreme Court of Cassation; ‘the VKS’), does not allow the confiscation of a truck used for the transport and storage of excise goods without strip stamps as an instrumentality of crime. At the same time, there are reasons to believe that such a truck is an instrumentality of crime under EU law, and, in that case, the requirement to confiscate it must be the subject of judicial assessment.

2. Therefore, a request for a preliminary ruling must be made to determine whether a truck serving as a place of possession of cigarettes without strip stamps is an instrumentality of crime.

3. In view of the foregoing, the court makes the following

ORDER:

The following question is REFERRED to the Court of Justice of the European Union for a preliminary ruling:

4. Question referred for a preliminary ruling

Is it compatible with Article 2(3) of Directive 2014/42 or, in the alternative, with the third indent of Article 1 of Framework Decision 2005/212 to interpret national law as meaning that a motor vehicle used to store large quantities of excise goods (cigarettes) without strip stamps does not constitute an instrumentality of crime?

5. EU law

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 [...] ('Directive 2014/42')

Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property [...] ('Framework Decision 2005/212')

National law

6. Nakazatelen kodeks (Criminal Code), Darzhaven vestnik (Bulgarian Official Journal; 'DV') No 26/68, [...] ('the NK')

Zakon za aktsizite i danachnite skladove (Law on excise duties and tax warehouses), DV No 91/05, [...] ('the ZADS')

Interpretative judgment No 2 of 18 December 2013 of the VKS in interpretative case No 2/13, Criminal Division of the VKS, sitting in plenary session ('interpretative judgment No 2/13')

7. According to point 3 of Article 234(2) in conjunction with Article 234(1) of the NK, the possession of excise goods without a strip stamp is an offence if the strip stamp is required by law and the object of the offence constitutes a large quantity. The penalty is a 'custodial sentence' of 2 to 8 years and withdrawal of the right to pursue particular professions or activities.

According to Article 2(2) of the ZADS, tobacco products are subject to excise duty. According to Article 11 of the ZADS, cigarettes are tobacco products. According to Article 4(7) of the ZADS, payment of the excise duty due is made by purchasing a strip stamp. The latter is to be affixed to the excisable goods – point 6 of Article 20(2) and Article 64 of the ZADS.

Cigarettes are therefore excise goods, the possession of which requires the affixing of a strip stamp.

8. Article 53(1)(a) of the NK provides that property belonging to a person which has been used as a means of committing a deliberate criminal offence is to be confiscated for the benefit of the State. That statutory provision reads as follows:

‘Article 53(1): Irrespective of any criminal liability, the following property shall be confiscated for the benefit of the State:

(a) property belonging to the offender which was intended or served for the purpose of committing a deliberate criminal offence; where such property no longer exists or has been disposed of, the recovery of its equivalent value shall be ordered.’

In national law and in the case-law, a motor vehicle used to commit an offence is generally regarded as an instrumentality of the offence.

9. According to the national legal theory, excise goods without a strip stamp can constitute the subject of an offence under Article 234(1) of the NK. The offence is committed by exercising effective control over those goods.

In the case-law, the question has arisen as to whether motor vehicles used to transport and store such goods constitute an instrumentality of the offence – and must therefore be confiscated from a person found to be guilty.

In its interpretative judgment No 2/13, the VKS held that a vehicle in which goods without a strip stamp which are the subject of the offence under Article 234 of the NK are discovered is not an instrumentality. Therefore, it cannot be confiscated as an instrumentality under Article 53(1)(a) of the NK.

This is based on the presumption that the offence is ‘possession’ of excise goods without a strip stamp, which ‘takes place irrespective of the place where the property is located’ and ‘irrespective of the place and manner of storage, holding, etc.’.

The VKS has stated that ‘in so far as possession is effected by acting on the object of the offence, the means of transport or conveyance in which the excise goods without a strip stamp are found is to be regarded solely as the place where effective control is exercised over them’.

It concluded as follows:

‘The means of transport or conveyance in which excise goods without a strip stamp which are the subject of an offence under Article 234 of the NK are discovered is not subject to confiscation under Article 53(1)(a) of the NK.’

Facts of the case

10. The Specialised Public Prosecutor's Office has charged ten persons with running and participating in a criminal organisation which has as its object financial gain through the commission of offences under Articles 234 and 242 of the NK – namely the importation of cigarettes without strip stamps from Greece to Bulgaria and subsequent possession of the cigarettes in the country. It alleges that those acts were committed by means of trucks, some of which were purchased by the members of the organisation. According to the Specialised Public Prosecutor's Office, this is to be legally categorised under Article 321(3) of the NK.

11. Specifically, it states that GM proposed to ZhU that he join the criminal organisation, and the latter agreed to do so; he agreed to transport the cigarettes from Greece to Bulgaria. He agreed to have an Iveco truck with a semi-trailer purchased in his name, the money being provided by DB, another alleged member of the criminal organisation. An Iveco truck with a semi-trailer was purchased in implementation of those arrangements.

However, ZhU has not been charged with participating in the criminal organisation (the reasons for this are procedural).

Two of the secondary offences under Article 234(2) of the NK are as follows:

12. The public prosecutor states that the Iveco truck purchased by ZhU was loaded with cigarettes without strip stamps in Greece, those cigarettes having been acquired by the other members of the criminal organisation. Various persons made efforts to conceal the cigarettes in special caches. The truck was eventually loaded on 13 and 14 February 2011 and ZhU, under the direction and control of DG, drove it to Bulgaria on 15 February 2011. The truck subsequently broke down and was repaired by other members of the organisation. After it was repaired, it continued to its final destination.

On 24 February 2011, after ZhU had stopped the truck before reaching the final destination in order to take a break, he was arrested and the cigarettes without strip stamps were seized (a total of 373 490 packets worth BGN 2 801 175, approximately EUR 1 430 000).

ZhU was charged under Article 234(2) of the NK with being in possession of those cigarettes without strip stamps in the truck, with the assistance of six other accused persons. Before the bill of indictment was submitted to the court, ZhU entered into an agreement and pleaded guilty. He was given a custodial sentence of two and a half years, suspended for four years. That agreement was approved by the court and has the force of a final decision.

Criminal proceedings continue to be pursued against the other persons named as participants in that act.

13. The public prosecutor also stated that RD is the owner of a Mercedes truck purchased on 17 February 2011. On 25 February 2011, cigarettes without strip stamps (a total of 81 700 packets with a value of BGN 607 275, approximately

EUR 310 500) were found in that truck. RD was arrested while unloading that truck and transferring the cigarettes to a warehouse and into a car with the help of a third person.

He was charged under Article 234(2) of the NK with having those cigarettes without strip stamps in his possession in the truck, the warehouse and the car – corresponding to the place where he was at the time of his arrest. In particular, RD is charged with having 74 016 packets of cigarettes worth BGN 555 120, approximately EUR 299 000, in his possession in his truck.

No allegations have been made as to which person transported the cigarettes in RD's truck to the place where he unloaded them. No charges have been brought in connection with that transport operation.

No allegations that RD is a member of a criminal organisation have been made.

Grounds for the question referred

14. Applicable legislation

Directive 2014/42 applies only to a specific set of offences listed in Article 3 of that directive. In the main proceedings, two charges were brought – for participation in a criminal organisation which has as its object financial gain through the commission of offences under Article 234 of the NK, and for several ancillary offences under Article 234 of the NK committed by individual members of that criminal organisation.

The first act, participation in a criminal organisation, falls within the scope of Article 3(h) of Directive 2014/42, namely in that of Council Framework Decision 2008/841 of 24 October 2008 on the fight against organised crime [...].

On the one hand, the public prosecutor alleges that the Iveco truck was purchased specifically for the needs of the criminal organisation. Its acquisition could therefore be regarded as a form of participation in that criminal organisation pursuant to Article 2(a) of Framework Decision 2008/841. However, it is not clear in that respect whether that truck is an instrumentality of the participation in a criminal organisation within the meaning of Article 2(3) of Directive 2014/42.

On the other hand, both trucks were specifically used to commit the ancillary offence under Article 234(2) of the NK. It is precisely in the case of that offence that they are more likely to be regarded as a means of commission.

That ancillary offence directly affects the European Union's interests. First, it infringes Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco [...] – in so far as the commission of the offence leads to non-payment of the excise duty due. Second, it infringes Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means

of criminal law – in so far as that activity results in damage to the Union budget, which is partly financed by the excise duty charged on tobacco products.

By virtue of Article 10 of Directive 2017/1371, which refers to Directive 2014/42, the latter directive applies – last clause of Article 3 of Directive 2014/42.

In any event, if Directive 2014/42 does not apply, Framework Decision 2005/212 should apply. As is apparent from the recitals of the latter, its objective is to combat cross-border organised crime. It should therefore also apply to ancillary offences committed by a criminal organisation, such as the illegal importation of cigarettes without strip stamps from one Member State to another, in which those cigarettes are transported and stored.

Moreover, the Court has held that it applies in all cases where national law provides for deprivation of liberty for more than one year (judgment of 14 January 2021, *Okrazhna prokuratura – Haskovo and Apelativna prokuratura – Plovdiv*, C-393/19, EU:C:2021:8, paragraphs 38 to 41). That condition is met in the main proceedings (see paragraph 7 above).

Therefore, it is necessary to interpret the provisions of Directive 201[4]/42, and possibly Framework Decision 2005/212.

15. The question referred for a preliminary ruling

Since Article 2(3) of Directive 201[4]/42 does not refer to national law, the content of the concept of ‘instrumentality’ should always be the same, irrespective of national specificities.

The national law defines the offence relating to cigarettes without strip stamps as the ‘possession’ of such cigarettes. This means that the accused persons must have exercised effective control over the cigarettes without strip stamps. According to the interpretation given by the VKS (see paragraph 9 above), where cigarettes without strip stamps are held in possession in a vehicle, the latter is not a means of committing the offence.

In the main proceedings, it was established that ZhU had the cigarettes in his possession for nine days in a truck belonging to him, which he drove from Greece to Bulgaria. It was also alleged that RD had the cigarettes in his possession for one day in a truck belonging to him and that he was unloading the cigarettes when he was arrested.

That is to say, in the first case, the truck was used to transport the cigarettes and to store them while they were being transported, and, in the second case, it was used only to store the cigarettes, in so far as the Public Prosecutor’s Office has not alleged that they were transported.

The question arises as to whether the trucks in those two cases were used as a means of committing the criminal offence for the purposes of Article 2(3) of

Directive 201[4]/42. In particular, the question arises as to whether the fact that the national law does not criminalise the transport of cigarettes without strip stamps but does criminalise the possession of such cigarettes leads to the conclusion that, if the cigarettes without strip stamps were stored in the truck, the latter does not constitute an instrumentality, irrespective of whether or not it is used to transport them.

16. Usefulness of the Court's answer

Were the Court of Justice of the European Union to conclude that the trucks can be regarded as instrumentalities of the offence, the referring court must rule on the question as to the possible confiscation of the trucks for the benefit of the State under Article 53(1)(a) of the NK.

This applies to the Iveco truck owned by ZhU, whose offence has now been finally established on the basis of the agreement concluded.

It could be the case with regard to RD's Mercedes truck if the referring court finds that the latter committed the offence.

In both cases, ZhU and RD must be informed of that possibility so that they can organise their defence (judgment of 14 January 2021, *Okrazhna prokuratura – Haskovo and Apelativna prokuratura – Plovdiv*, C-393/19, EU:C:2021:8, paragraph 60).

The answer of the Court of Justice of the European Union will therefore be useful for the referring court for the purposes of (1) ascertaining whether the question as to the confiscation of the two trucks must form part of the subject matter of the proceedings and whether a judicial decision must be given on that question; and also (2) giving the persons concerned the opportunity to comment on such confiscation, which presupposes that they are informed of their rights in advance and are able to participate in the proceedings.

[...]