

Case C-203/21

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:

Okrazhen sad Burgas (Bulgaria)

Date of the decision to refer:

12 March 2021

Applicant:

Bezirksstaatsanwaltschaft Burgas

Defendant:

DELTA STROY 2003 EOOD

Subject matter of the main proceedings

Criminal proceedings and administrative penalty proceedings running in parallel – Possibility, provided for in national law, of holding a legal person liable under administrative criminal law by imposing on it, at the request of the public prosecutor, a fine for an offence committed by its representative before the commission of that offence has been confirmed by a final judgment – Applicability of Framework Decision 2005/212/JHA where a fine equal to the economic advantage obtained from the offence may be imposed

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Are Articles 4 and 5 of Framework Decision 2005/212/JHA and Article 49 of the Charter of Fundamental Rights of the European Union to be

interpreted as permitting legislation of a Member State under which, in proceedings such as those in the main proceedings, the national court may impose a penalty on a legal person for a specific criminal offence the commission of which has not yet been established because it is the subject of parallel criminal proceedings which have not been definitively concluded?

2. Are Articles 4 and 5 of Framework Decision 2005/212/JHA and Article 49 of the Charter of Fundamental Rights of the European Union to be interpreted as permitting legislation of a Member State under which, in proceedings such as those in the main proceedings, the national court may impose a penalty on a legal person by fixing the amount of that penalty at the amount of the proceeds which would have been obtained from a specific criminal offence the commission of which has not yet been established because it is the subject of parallel criminal proceedings which have not been definitively concluded?

Provisions of EU law and international law relied on

Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, Articles 2, 4 and 5

Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders

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

Charter of Fundamental Rights of the European Union, Articles 48 and 49

European Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 6 and 7, and its additional protocol, Article 1

Case-law of the Court of Justice of the European Union relied on

Judgment of the Court of Justice of 19 March 2020, C-234/18 (EU:C:2020:221)

Case-law of the European Court of Human Rights relied on

Sud Fondi srl and Others v. Italy, no. 75909/01, 20 January 2009

Varvara v. Italy, no. 17475/09, 29 October 2013

G.i.e.m. S.r.l. and Others v. Italy, nos. 1828/06, 34163/07 and 19029/11, 28 June 2018

Provisions of national law relied on

Constitution of the Republic of Bulgaria, Article 31(3)

Nakazatelen kodeks (Criminal Code, Bulgaria; 'the NK'), Article 255

Nakazatelno-protsesualen kodeks (Code of Criminal Procedure, Bulgaria; 'the NPK', Articles 1, 16 and 301(1)

Zakon za administrativnite narushenia i nakazania (Law on administrative offences and administrative penalties, Bulgaria; 'the ZANN'), Articles 83, 83a, 83b, 83c, 83d and 83f

Succinct presentation of the facts and procedure in the main proceedings

- 1 ZK manages and represents the company DELTA STROY 2003 EOOD. On 5 August 2019, ZK was accused of having evaded, in that capacity, the assessment and payment of tax liabilities of a significant amount – a total of 11 388.98 leva (BGN) – in the form of a continuing offence in the city of Burgas in the period from 17 March 2009 to 13 August 2009. That amount represents the value added tax payable under Article 25(6) of the Zakon za danak varhu dobavenata stoinost (Law on value added tax; 'the ZDDS') for a total of three tax periods, namely March, April and July 2009. That act fulfils the criteria for constituting an offence under points 2 and 3 of Article 255(1) of the NK (evasion of payment of tax liabilities of a significant amount by filing an incorrect or incomplete return or by failing to submit an accounting document) in conjunction with Article 26 of the NK (continuing offence).
- 2 Criminal proceedings were instituted against ZK before the Okrazhen sad (Regional Court), Burgas, which had not yet been concluded at first instance when the present order for reference was made. The law provides for the possibility of an appeal and an appeal in cassation after the judgment of the court of first instance has been delivered.
- 3 On 9 December 2020, a public prosecutor of the Bezirksstaatsanwaltschaft Burgas (Regional Prosecutor's Office, Burgas) proposed, in accordance with Articles 83a et seq. of the ZANN, to the Regional Court, Burgas that a fine be imposed on DELTA STROY 2003 EOOD for enrichment in the form of an economic advantage in the total amount of BGN 11 388.98 as a result of the commission by the person managing and representing the company of an offence under points 2 and 3 of Article 255(1) of the NK, read in conjunction with Article 26 thereof.
- 4 The proceedings against DELTA STROY 2003 EOOD were instituted on the basis of the fact that a bill of indictment charging the managing director of that company with a tax offence was filed with the Regional Court, Burgas, on the basis of which criminal proceedings were instituted before that court, which have not yet been concluded at first instance.

- 5 According to Article 83a(1) of the ZANN, a fine of up to BGN 1 000 000 is to be imposed on a legal person that has enriched or would enrich itself by committing an offence under the provisions of the Criminal Code listed [in that provision of the ZANN] (which include Article 255 of the NK) where the offence was committed by a person who is authorised to form the will of the legal person or who can represent it, whereby the amount may not be less than the proceeds if the advantage is economic in nature. According to Article 83a(4) of the ZANN, a fine is to be imposed irrespective of the criminal liability of the persons who participated in the commission of the offence under Article 83a(1) of the ZANN. According to Article 83a(5) of the ZANN (in the version applicable in the present case), the proceeds obtained directly or indirectly by the legal person from the offence pursuant to paragraph 1 are to be confiscated for the benefit of the State, unless they are subject to restitution or return or to confiscation under the Criminal Code. Where the items or assets which are the subject of the offence are not available or have been disposed of, the recovery of the equivalent value in BGN is to be ordered.
- 6 According to Article 83b of the ZANN, proceedings under Article 83a of that law are to be instituted, on a reasoned proposal from the public prosecutor responsible for assessing the case or the case file for the relevant offence to the regional court of the domicile of the legal person, after the bill of indictment has been filed with the court. In accordance with Article 83d of the ZANN, the court seised is to examine the public prosecutor's proposal and assess, on the basis of the evidence gathered, whether the legal person has obtained unlawful proceeds, whether there is a connection between the person who committed the criminal offence and the legal person, whether there is a connection between the criminal offence and the proceeds accruing for the legal person, as well as the nature of the proceeds and, if they constitute an economic advantage, the amount of the latter. The court is to issue a decision either imposing a fine or refusing to impose a fine.

Essential statements of the Public Prosecutor's Office

- 7 In his proposal submitted pursuant to Article 83a et seq. of the ZANN, the public prosecutor states that, in his view, the legal conditions for holding the legal person liable under administrative criminal law have been met, for the following reasons.

The legal person enriched itself by means of the offences committed within the meaning of points 2 and 3 of Article 255(1) of the NK, read in conjunction with Article 26 thereof.

The offence was committed by a person who managed and represented the company and was authorised to form the will of the legal person and to represent it.

The legal person DELTA STROY 2003 EOOD obtained proceeds that are attributable to the offence committed. They amount to BGN 11 388.98 and represent value added tax payable within the meaning of Article 25(6) of the

ZDDS (in the version of 13 February 2009), the payment of which had been evaded by the manager.

The prosecutor points out that that amount was a receivable of the State, governed by public law, which the company had not paid and which it would have had to pay and would have paid if the fiscal relationship had developed in a lawful manner.

The non-payment of that debt constitutes an economic advantage and there is a connection between that advantage and the criminal offence.

The public prosecutor therefore proposes that the court impose a fine on the legal person DELTA STROY 2003 EOOD in the maximum amount pursuant to Article 83a(1) of the ZANN.

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

- 8 First, the referring court provides an overview of the legislative history and the main features of the proceedings under Article 83a et seq. of the ZANN. Those proceedings were first introduced into Bulgarian positive law in 2005. According to its original wording, the provision provided that the court was to impose a fine on a legal person only after a criminal conviction had become final. In 2015, the content of that provision was amended in its entirety and the requirement that the criminal conviction must have become final in order for a fine to be imposed was removed.
- 9 As stated above, the proceedings under Article 83a et seq. of the ZANN are instituted on a reasoned proposal by the public prosecutor after the bill of indictment has been filed. The referring court emphasises that, at present, for the purpose of imposing a fine on a legal person, the law does not necessarily require the existence of a final conviction for a specific offence committed by the natural person in connection with the company's activity penalised by a fine. Arguments put forward in support of that view are, on the one hand, the absence of that very requirement in the ZANN and, on the other hand, point 3 of Article 83f(1) of the ZANN, according to which the proceedings in which a final decision of a regional court or appellate court has been delivered are subject to revision if, after the decision on the imposition of the fine on the legal person has become final, the legal person referred to in points 1 to 4 of Article 83a(1) of the ZANN is acquitted by a final court decision or the suspended preliminary investigation is discontinued by the public prosecutor where the act was not committed or does not constitute a criminal offence.
- 10 The court seised points out that two sets of parallel proceedings are pending in the present case. First, criminal proceedings were instigated against the managing director of the company DELTA STROY 2003 EOOD, in which he was charged with committing the criminal offence under Article 255 of the NK. The proceedings were still ongoing at the time when the order for reference was made.

Subsequently, proceedings under Article 83a et seq. of the ZANN were instituted for the imposition of a fine on the company, which, according to the referring court, corresponds to the proceeds from the aforementioned offence under Article 255 of the NK (the commission of which has yet to be established in the first set of proceedings, that is to say, the criminal proceedings). The Regional Court points out that the ZANN does not currently provide for the possibility of staying the proceedings provided for in Article 83a et seq. thereof until the criminal proceedings have been concluded.

- 11 The referring court takes the view that the imposition of a fine on a legal person for a specific offence in the amount of the proceeds which were or would have been obtained from that offence undoubtedly constitutes a total or partial confiscation of the proceeds of the offence. In the light of Article 2(1) of Framework Decision 2005/212/JHA and the fact that the offence under Article 255 of the NK is punishable by a custodial sentence of one to six years, the Regional Court takes the view that the present case falls within the scope of the Framework Decision.
- 12 In that respect, the referring court takes into account the decision of the Court of Justice in Case C-234/18 – which followed a request for a preliminary ruling made by a different Bulgarian court – by pointing to the fact that the present case is different. The Regional Court states that the proceedings under Article 83a et seq. of the ZANN concern the imposition of an administrative penalty – a ‘fine’ – on a legal person for a specific offence committed by its representative. They have all the characteristics of ‘criminal’ rather than ‘civil’ proceedings. The referring court takes the view that they concern the final deprivation of property (confiscation) ordered by a court in relation to a criminal offence. Proceedings are conducted before a criminal court in accordance with the ZANN, whereby the NPK applies on a subsidiary basis. The decision imposes a fine on a legal person in connection with the commission of a specific criminal offence, the amount of which is determined on the basis of the amount of the proceeds that were obtained or would have been obtained. The aim of imposing a penalty is to punish and deter the commission of criminal offences, and not to make good the damage caused by them, and the law allows for the imposition of a penalty even where no actual proceeds have been obtained or the proceeds do not constitute an economic advantage. Consequently, the decision to be given by the court seised in the proceedings under Article 83a et seq. of the ZANN is delivered after the conduct of proceedings that concern one or more offences, do not focus solely on unlawfully acquired property and are directly related to the outcome of the criminal proceedings. The referring court concludes that this should lead to the conclusion that Framework Decision 2005/212/JHA is applicable.
- 13 The Regional Court recalls that it is settled case-law of the Court of Justice that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law. The national court refers to Article 49 of the Charter, which enshrines the principle of legality of criminal offences and penalties, which includes a prohibition of the imposition of

a penalty before the commission of an offence has been established. In order to be able to presume the commission of an offence for which a corresponding penalty is to be imposed, this must have been established in accordance with national law. This requires a finding that the natural person concerned has committed a specific act constituting a criminal offence under national law and has been found guilty of committing that offence by a criminal court. Under Bulgarian national law, specifically Article 31(3) of the Constitution and Article 16 of the NPK, this can take place only by way of a final judgment under the NPK. According to Article 1(1) of the NPK, the latter sets out the rules according to which criminal proceedings are to be conducted in order to ensure the investigation of criminal offences, the establishment of the guilty party or parties and the proper application of the law.

- 14 Next, the court seized examines the questions to be considered under Article 83d of the ZANN in order to issue a judicial decision (the court must assess, on the basis of the evidence gathered, whether the legal person has obtained unlawful proceeds, whether there is a connection between the person who committed the criminal offence and the legal person, whether there is a connection between the criminal offence and the proceeds accruing for the legal person, as well as the nature of the proceeds and, if they constitute an economic advantage, the amount of the latter. The referring court points out that one question that does not feature among those questions is whether the offence was committed – a question that precedes all of the others.
- 15 In actual fact, the present proceedings under Article 83a et seq. of the ZANN, which were instituted on the basis of the bill of indictment filed in respect of the company's managing director before the criminal proceedings brought against him were concluded, in practice allow for the imposition of a penalty on the basis solely of the circumstances set out in the charge brought for a specific type of offence. Since the commission of that offence has not been established by a final court decision, the referring court considers that it is doubtful whether this is compatible with the principle of legality of criminal offences and penalties enshrined in Article 49 of the Charter.
- 16 For the same reasons, the present Chamber has doubts as to the extent to which the proceedings under Article 83a et seq. of the ZANN, according to which the national court may impose a penalty on a legal person for a specific offence the commission of which has not yet been established because it is the subject of parallel criminal proceedings which have not been definitively concluded, are compatible with Framework Decision 2005/212/JHA, read in conjunction with Article 49 of the Charter. That possibility calls into question compliance with the fundamental principle of EU law not to impose a penalty before the offence has been established and may lead to an impairment of the mutual trust and mutual recognition underpinning judicial cooperation between the Member States of the European Union.

- 17 The referring court considers that the question referred is of importance in the context of Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders. Framework Decision 2005/212/JHA is an act which seeks to oblige the Member States to establish common minimum rules on confiscation of instrumentalities and proceeds of crime, in particular with a view to facilitating mutual recognition of confiscation orders in criminal proceedings. In accordance with Article 83a(2) of the ZANN, a fine may be imposed on a legal person which does not have its seat in the territory of the Republic of Bulgaria, which means that the enforcement of that decision of the Bulgarian court in another Member State would have to take place on the basis of Framework Decision 2006/783/JHA. Cooperation between Member States, based on the principle of mutual recognition and immediate execution of judicial decisions, presupposes confidence that the decisions to be recognised and executed will always be taken in compliance with the principles of legality, subsidiarity and proportionality. Consequently, in order to recognise and enforce a decision imposing a fine on a legal person, the executing Member State must be satisfied that that decision was given by the issuing State after a procedure in accordance with those principles, including in accordance with Article 49 of the Charter. The question arises as to whether this is the case if the Bulgarian court's judgment under Article 83a of the ZANN imposes a fine on a legal person for a specific criminal offence the commission of which has not yet been established because it is the subject of parallel criminal proceedings that have not been definitively concluded.
- 18 For those reasons, the referring court takes the view that the correct resolution of the dispute requires an answer to the question of whether the fundamental principle of EU law – of legality of criminal offences and penalties – is respected where, in proceedings such as those in the main proceedings, the court imposes a penalty on the company before the commission of the offence is established in the parallel criminal proceedings under Article 255 of the NK.