

Case C-722/22**Request for a preliminary ruling****Date lodged:**

24 November 2022

Referring court:

Sofiyski gradski sad (Bulgaria)

Date of the decision to refer:

22 November 2022

O R D E R

[...]

Sofiyski gradski sad (Sofia City Court), [...] Criminal Division

[...]

Proceedings under Article 485 et seq. of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure; ‘the NPK’) and Article 267(2) TFEU

- 1 According to the interpretation given by the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria), national law precludes the confiscation of a vehicle used by an organised criminal group to transport excise goods not bearing tax markings. At the same time, it must be held that the vehicle is an instrumentality within the meaning of EU law and that, in this case, the need for confiscation must be judicially examined.
- 2 This makes it necessary to request a preliminary ruling. For the foregoing reasons, the referring court issues the following

O R D E R

The following request for a preliminary ruling is made to the Court of Justice of the European Union:

3 Question referred for a preliminary ruling

Is it compatible with Article 2 of Framework Decision 2005/212, read in conjunction with the third indent of Article 1 thereof, to interpret a national

law as meaning that a heavy goods vehicle (tractor unit and trailer) which members of an organised crime group used for the holding and transport of large quantities of excise goods (cigarettes) without tax markings should not be confiscated as an instrumentality?

4 EU law

Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (OJ L 68/49 of 10 July 2012; ‘Framework Decision 2005/212’)

National law

- 5 Nakazatelen kodeks (Criminal Code; ‘the NK’), [...] in the version in force at the time of the offence, DV (State Gazette) No. 60/11

Zakon za aktsizite i danachnite skladove [...] (Law on excise duties and tax warehouses; ‘the ZADS’)

Interpretative Decision No. 2 of 18 December 2013 of the VKS (Varhoven kasatsionen sad, Supreme Court of Cassation) [...]; ‘Interpretative Decision 2/13’

- 6 Under Article 321(3)(2), read in conjunction with Article 321(2), of the NK, participation in an organised crime group for the purposes of enrichment is punishable by a custodial sentence of 3 to 10 years.

Under Article 234(2)(3), read in conjunction with Article 234(1), of the NK, holding of excise goods without tax markings, where the latter are legally mandatory, is punishable, if the offence involves large quantities, by a ‘custodial sentence’ of two to eight years and the ‘withdrawal of the right to practise certain occupations or activities’.

Under Article 2(2) of the ZADS, tobacco products are subject to excise duty. According to Article 11 of the ZADS, cigarettes are tobacco products. Under Article 4(7) of the ZADS, payment of the excise duty due is made by purchasing a tax marking (*banderol*). This is affixed to the excise goods, as required by Articles 20(2)(6) and 64 of the ZADS.

It follows that cigarettes are excise goods, the holding of which makes it absolutely necessary to affix a tax marking to them.

- 7 Under Article 53(1)(a) of the NK, items belonging to a person which have been used as instruments to commit an intentional offence are to be confiscated. The statutory provision reads as follows:

‘Article 53(1) Irrespective of criminal liability, the following shall be confiscated in favour of the State:

(a) property belonging to the offender which was intended or served for the purpose of committing a deliberate criminal offence.’

According to national law and national case-law, a motor vehicle used to commit an offence is, as a general rule, regarded as an instrumentality of the offence.

- 8 According to national legal literature, excise goods without a tax marking constitute goods involved in the criminal offence referred to in Article 234(1) of the NK. The actual commission of the offence takes place through the exercise of actual control over the 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 Decision 2/13, the Supreme Court of Cassation held that, where goods without tax markings are found in a vehicle and those goods are involved in the criminal offence referred to in Article 234 of the NK, that vehicle is not an instrumentality. Consequently, [the latter] cannot be confiscated as an instrumentality under Article 53(1)(a) of the NK.

The reason for this lies in the view that the offence consists in the ‘holding’ of excise goods without tax markings ‘regardless of the place where the property is located’ and ‘regardless of where and how they are stored, held, etc.’.

The Supreme Court of Cassation held that ‘in so far as holding is exercised by acting on the goods involved in a criminal offence, the vehicle or the means of transport in which the excise goods without tax markings were found should be regarded only as a place where actual physical control of the goods is exercised’.

The Supreme Court of Cassation concluded as follows:

‘The vehicle or means of transport found to contain excise goods without tax markings that are goods involved in a criminal offence under Article 234 of the NK shall not be liable to confiscation under Article 53(1)(a) of the NK.’

Facts of the case

- 9 On the basis of final judicial decisions, namely [the approval of] an agreement [with the Public Prosecutor’s Office] of 12 March 2015 and a criminal judgment of the referring court of 23 June 2016, amended by the Apelativen spetsializiran nakazatelen sad (Specialised Criminal Court of Appeal, Bulgaria) in a judgment of 13 April 2018 and amended in turn by the Supreme Court of Cassation in a decision of 8 October 2018, the following facts relating to the request for a preliminary ruling are established:

1. AP, BP, OP and PG participated, from August 2011 to June 2012, in an organised criminal group formed in breach of Article 321 of the NK with the

object of committing, for the purposes of enrichment, offences under Article 234 of the NK, that is to say the holding of cigarettes without tax markings. For this offence, AP received a custodial sentence of three years, BP and OP received custodial sentences of one year and PG a custodial sentence of six months; the sentences of AP, BP and OP were suspended.

2. This organised criminal group transported cigarettes without tax markings from Greece to Bulgaria during the second half of August 2011, using a lorry comprising a Scania tractor unit [...], which was owned by OP, and a trailer [...], which was effectively purchased by OP on 10 August 2011.

On 19 August 2011, the tractor unit in whose trailer the cigarettes without tax markings had been loaded broke down on the road from Athens to Thessaloniki. That is why, on 20 August 2011, AP, BP and GB purchased a second-hand MAN tractor unit [...] from a private individual in Bulgaria; they paid the purchase price in cash and took immediate possession of the tractor unit; they handed it over to OP, who drove it to Greece on 21 August 2011. There he attached the trailer to the new tractor unit; the trailer was laden with the cigarettes without tax markings – 313 500 cigarette packets worth 2.348 million leva (BGN), equivalent to about 1.2 million euros.

Thereafter, on 23 August 2011, OP drove the lorry to Varna, Bulgaria, where the cigarettes were unloaded into a warehouse. The cigarettes were seized by the police on 24 August 2011.

For this offence, AP was sentenced to one year and eleven months' imprisonment, BP and OP to one year's imprisonment and GB to four years' imprisonment; the sentences of AP, BP and OP were suspended.

3. Under the agreement [with the Public Prosecutor's Office] approved [by the court] regarding another offence, the Scania tractor unit [...] was confiscated for the benefit of the State.

The referring court found of its own motion that it should rule on the confiscation of the trailer [...] and the MAN tractor unit [...], which were not confiscated in the criminal proceedings.

- 10 The following additional facts do not directly relate to the question referred for a preliminary ruling:

OP purchased the trailer [...] on 10 August 2011 by paying the purchase price and taking immediate possession of the trailer; no notarised contract of sale, however, was officially concluded in respect of this purchase. There was therefore no valid formal transfer of ownership. [Translator's note: In Bulgarian law, notarial form is required for contracts for the sale of vehicles.]

The MAN tractor unit was purchased on 20 August 2011 by AP, BP and GB, who paid the full purchase price to the private individual referred to above and

obtained proprietary possession of the unit. [Translator's note: A conceptual distinction is drawn in Bulgarian law between 'държане' (*darzhane*, literally 'holding'), i.e. simple possession with no aspiration to ownership or proprietary possession (*animus possidendi*), and владение (*vladenie*, literally 'possessing'), i.e. possession with *animus possidendi*. Since the source text uses the latter word at this point, the distinction is expressed here by the use of 'proprietary possession'.] After the cigarettes had been seized on 24 August 2011, ownership of the tractor unit was transferred by the private individual to a third party, who was not one of the convicted persons, by means of a deed of sale dated 29 August 2011; this third party asserts that he had only affixed his signature and had no knowledge of the transaction; he stated that he had neither paid a purchase price nor ever seen the tractor unit. In formal terms, the third party thus became the owner of the tractor after the offence had been committed.

These circumstances can be relevant only if it is established that it is possible, in principle, to confiscate the tractor unit and trailer as an instrumentality. In this case, further examination will focus on whether they belong to the convicted persons (who paid the purchase price for them, obtained proprietary possession of them without delay and immediately used them to commit the offence) or whether they belong to third parties (in the case of the trailer, for example, the person who received the purchase price asked of him and handed the trailer over to OP; in the case of the tractor unit, the person who signed the purchase contract as the buyer).

As part of this further examination, the referring court will take into account the guidance provided by the Court of Justice in judgment of 12 May 2022, *RR and JG (Freezing of third-party property)* (C-505/20, EU:C:2022:376) and will, if necessary, address a new request to it.

Grounds for the preliminary reference

11 The applicable legal provision

To the extent that the offences were committed in 2011, Directive 2014/42 does not apply. For this reason the purpose of the questions referred for a preliminary ruling is to obtain an interpretation of Framework Decision 2005/212. As its first recital indicates, the purpose of the Framework Decision is to combat cross-border organised crime, the main motive of which is financial gain. Consequently, it should also apply to criminal activities ancillary to organised crime, such as the illegal importation from one Member State of cigarettes without tax markings into another Member State in which those cigarettes are transported and stored.

In addition, the Court has held that the Framework Decision applies in all cases where national law provides for a custodial sentence of more than one year (judgment of 14 January 2021, *Okrazhna prokuratura – Haskovo and Apelativna prokuratura – Plovdiv*, C-393/19, ECLI:EU:C:2021:8, paragraphs 38 to 41) That condition is satisfied in the main proceedings (see paragraph 7 above), since some of the sentences imposed exceeded that threshold.

12 The question referred for a preliminary ruling

From the fact that the third indent of Article 1 of Framework Decision 2005/212 does not make any reference to the national legal system, it follows that the conceptual content of ‘instrumentality’ must be one and the same, irrespective of specific national features.

12.1. Conviction for participation in an organised criminal group

Participation in an organised criminal group falls within the scope of Council Framework Decision 2008/841 of 24 October 2008 on combating organised crime (OJ L 300 of 11 November 2008, p. 42).

In the present case, it is established that the trailer and the tractor unit were purchased by members of a criminal group and used immediately thereafter to commit offences relating to the criminal activities of that group. The question is whether it is to be assumed that the purchase and use of those items amounted to a manifestation of participation in that organised criminal group within the meaning of Article 2(a) of Framework Decision 2008/841. If that is the case, those items (the trailer and the tractor unit) are instrumental, within the meaning of the third indent of Article [1] of Framework Decision 2005/212, to participation in a criminal group.

12.2. The conviction for holding of cigarettes without tax markings

In the main proceedings, it is established that the cigarettes were transported without tax markings from Greece to Bulgaria in a trailer attached to a tractor unit. These are separate items, in that the cigarettes were loaded into the trailer, while the tractor unit served to move the trailer. In other words, the tractor unit was used for the transport of the cigarettes alone, whereas the trailer was used to transport cigarettes and to store them during this transportation.

The question in these two cases is whether the tractor unit and trailer were instrumental within the meaning of the third indent of Article 1 of Framework Decision 2005/212 in the commission of the offence in national law of ‘holding of excise goods’. In particular, it must be considered whether the fact that national law does not penalise the transport of cigarettes without tax markings but only their holding means that, if cigarettes without tax markings are stored in the same lorry that is used for their transportation, it must be concluded that the lorry – the tractor unit and trailer – is not an instrumentality.

13 The view of the referring court

The purchase of the trailer and the tractor unit by members of a criminal group with the intention of using them for the criminal activities of that group is an aspect of the internal relationships within the group. It follows that those items (trailer and tractor unit) are instrumental to commission of the offence of participation in such a group.

National law criminalises the holding of excise goods without tax markings but not their transport. This does not mean, however, that no holding of the goods takes place during that transport. On the contrary, their holding takes place precisely by their being loaded into and transported by the vehicle. Holding constitutes actual physical control over the goods, and their transport is precisely a manifestation of such actual physical control. The vehicle (trailer and tractor unit) is thus an instrument through which holding of the goods takes place.

The two items (trailer and tractor unit) are therefore instrumentalities for the commission of the two offences established by final judicial decisions.

14 The relevance of a decision of the Court of Justice of the European Union

In the event that the Court decides that the tractor unit and/or the trailer constitute instrumentalities as defined in the third indent of Article 1 of Framework Decision 2005/212, it will be for the referring court to rule on their possible confiscation in accordance with Article 53(1)(a) of the NK.

In that case, [it] will examine in detail the legal relationships between the convicted persons and the persons who transferred rights to them (including those with the person who subsequently acquired the tractor unit), in order to determine whether those items should be confiscated, taking into account the guarantees of respect for fundamental rights under Article 5 of Framework Decision 200[5]/212, including the right to property, and the granting of effective remedies to safeguard those rights by Article 4 of that Framework Decision.

[...]