

Case C-347/21**Request for a preliminary ruling****Date lodged:**

4 June 2021

Referring court:Spetsializiran nakazatelen sad (Special Court for Criminal Cases,
Bulgaria)**Date of the decision to refer:**

3 June 2021

Defendant:

DD

Other parties to the proceedings:Spetsializirana prokuratura (Specialist Public Prosecutor's Office,
Bulgaria)

ORDER

[...]

- 1 The referring court has difficulty in assessing the precise content of the judgment of 13 February 2020 in Case C-688/18, EU:C:2020:94, as regards the procedure for remedying a defect caused by an infringement of an accused person's right to be present in person at criminal proceedings, and, in particular, in assessing whether additional or repeated investigative measures must be carried out in the presence of the accused person. Furthermore, [the court is unsure] whether that legal solution is also applicable in the case of an infringement of the accused person's right to be defended by a lawyer.

For that reason, it is necessary to make a request for a preliminary ruling from the Court of Justice of the European Union.

Facts

- 2 DD was charged with being a member, together with four other persons, of a criminal organisation which sought to enrich itself through the unlawful smuggling of nationals of third countries (Bangladesh and Iraq) into Bulgaria, the unlawful facilitation of entry into the territory, and the acceptance and payment of bribes in connection therewith, whereby public officials participated in that organisation, since three of the accused persons, including DD, were officers of the ‘Granichna politzia’ (border police) at Sofia Airport – an offence punishable under point 2 of Article 321(3) of the Nakazatelen kodeks (Criminal Code; ‘the NK’), read in conjunction with Article 321(2) thereof. In addition, he was charged with having facilitated the unlawful entry of specific persons – MM and RB – into the territory in order to gain an economic advantage, an offence punishable under Article 281(2) of the NK.
- 3 The accused person DD and his defence counsel, the lawyer VV, appeared at the hearing of 15 October 2020. A number of witnesses were examined, including the witness having confidential identity No 263. The lawyer VV had the opportunity to put questions to that witness. Due to the passage of time, the examination of the witness was postponed to a later date, namely 30 November 2020.
- 4 On 27 November 2020, a request for adjournment was received from the lawyer VV, in which he stated that he had not yet recovered after having contracted coronavirus.
- 5 At the hearing of 30 November 2020, the accused person DD requested that the proceedings be adjourned due to the absence of his lawyer. Nevertheless, the court held the hearing and proceeded with the examination of witness No 263.

The court acknowledged that doing so infringed the rights of the accused person DD to be represented by a lawyer; moreover, the right of the lawyer VV to attend and participate in the hearing was infringed. Irrespective of that, the court decided that it should proceed with the examination of the witness, giving the other parties the opportunity to question him. At the same time, the court made clear that the witness would be called to the next hearing so that the lawyer VV could put questions to him. The court considered that this would remove the prejudicial effect of holding the examination of 30 November 2020 in the absence of the lawyer VV. It cited the judgment of the Court of Justice of the European Union in Case C-688/18.

The examination of witness No 263 was continued, and the parties present put their questions to him. A copy of the minutes was sent to the lawyer VV. The following hearing was scheduled for 18 December 2020.

- 6 On 4 December 2020, the lawyer VV submitted a copy of a medical certificate attesting to the fact that he was unable to appear at the hearing of 30 November 2020.

- 7 On 10 December 2020, the lawyer VV submitted a document attesting to the fact that the accused person DD had contracted coronavirus. He submitted a request for adjournment.

On 15 December 2020, the lawyer VV submitted a document attesting to the fact that he had additional health problems, and an additional document concerning the illness of the accused person DD. He submitted a request for adjournment.

- 8 Nevertheless, the hearing took place on 18 December 2020. The court reiterated that the witness YAR, who had appeared, should be examined, whereby the lawyer VV and the accused person DD would be given the opportunity to put questions to him at the next hearing. The court once again cited the judgment of the Court of Justice in Case C-688/18.

That decision of the referring court was met with significant criticism on the part of the other lawyers.

The witness YAR was examined. Copies of the minutes were sent to the accused person DD and the lawyer VV.

- 9 The subsequent hearing took place on 11 January 2021. The accused person DD and the lawyer VV appeared at that hearing.

The lawyer VV criticised the court's decision to hold the hearings of 30 November 2020 and 18 December 2020 and submitted that the rights of the defence had been infringed. He takes the view that the court had misinterpreted EU law and, in particular, the judgment of the Court of Justice in Case C-688/18. Furthermore, that judgment concerns the absence of the accused person, but not the absence of the defence counsel. In addition, it relates to national legislation which allows a hearing to be held in the absence of the accused person and his or her lawyer, whereas the Bulgarian legal system prohibits it. Moreover, the directive lays down minimum standards, whereas the national standard provides for stronger guarantees.

In response to those objections, the court held that it is indeed unclear whether the rules protecting the accused person's right to be present in person, as established in the judgment of the Court of Justice in Case C-688/18, are also applicable to the lawyer. It made clear that the rights of the accused person DD and the lawyer VV to be present in person were infringed when the hearings of 30 November 2020 and 18 December 2020 were held, and took the view that that infringement could be remedied by a further examination of the witnesses. In that respect, it disagreed with the defence's submission that national law provided a higher level of protection and, consequently, the application of EU law was precluded.

The court held that a further examination of witness No 263 and the witness YAR should be conducted in the presence of the lawyer VV and the accused person DD, after which it should be determined whether and, if so, to what extent the infringement had been remedied.

- 10 The two witnesses were examined at the hearing on 22 February 2021. Both the accused person DD and the lawyer VV were present in person and were able to put questions to them.

The accused person DD did not ask any questions, whereas the lawyer VV questioned only the witness YAR. He expressly stated that he had no questions for the witness having confidential identity No 263.

Following that statement, the examination of witness No 263 continued with a reading of his testimony from the pre-trial phase of the proceedings. The other parties and the court put questions to him, but the accused person DD and the lawyer VV did not do so. They both stated that they had no questions.

- 11 At that hearing, the court again raised the issue of whether the lawyer VV considered that the infringement of the right (for him and the accused person) to be present in person that occurred at the hearings of 30 November 2020 and 18 December 2020 had been remedied by the examinations of the witness YAR and witness No 263.

The lawyer VV maintained that the infringement had not been remedied, since it is not possible for an unlawful procedural act to have lawful consequences. He took the view that it is only in the presence of all parties that it is possible to adduce admissible evidence. For that reason, that infringement can be remedied only by repeating the examinations of witnesses No 263 and YAR with regard to the questions put to them at the hearings of 30 November 2020 and 18 December 2020.

- 12 The court stated that, in view of the complexity of that issue, it would rule on it at a later date. However, since it takes the view that it cannot reach a convincing answer on its own, it decided to request a preliminary ruling from the Court of Justice of the European Union.

- 13 EU law

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 294 p. 1) ('Directive 2013/48').

Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1) ('Directive 2016/343').

Judgment of the Court of 13 February 2020 in Case C-688/18, EU:C:2020:94.

National law

- 14 Article 55 of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure; ‘the NPK’) provides as follows:

‘The accused person shall have the following rights: ... to participate in criminal proceedings ... to have a defence counsel’.

Article 99 of the NPK provides as follows:

‘The defence counsel shall have the following rights: ... to participate in criminal proceedings’.

Article 271(2) of the NPK provides:

‘The hearing shall be adjourned if the following persons do not appear:

...

2. the accused person ...
3. the defence counsel ...’

A hearing may be held in the absence of the accused person only if he or she cannot be found or has given his or her fully informed consent (Article 269(3) of the NPK). If the case is tried in the absence of the accused person, representation by a defence counsel is mandatory (point 8 of Article 94(1) of the NPK).

Those provisions of national law apply to the entire court proceedings, not just to a single hearing.

- 15 Under national law, if evidence is produced (in the present case, examination of witnesses) in the absence of the accused person and his or her lawyer the right of the accused person to be present in person and to have a lawyer is infringed.
- 16 It is clear that that procedural defect can be remedied only if those witnesses are called again and the accused person and his or her lawyer are given the opportunity to put questions to them.

However, national law does not expressly regulate the nature of such a re-examination of witnesses, and, in particular, the question of whether such an examination is a further or repeated examination.

In the case of a further examination, the testimonies given by those witnesses in the absence of the accused person and his or her defence counsel retains its value. This is because those testimonies were given in response to questions put by the other parties, who were present. In the case of a re-examination of the witnesses, the previously absent accused person and defence counsel are present and can ask

their questions. Thus, they can fully exercise their right to be present in person and the right to be defended by a lawyer.

In the case of a repeated examination, the testimonies given by the witnesses in the absence of the accused person and the defence counsel lose their value. This is because the testimony was given in the absence of the accused person and his or her defence counsel. In the case of a re-examination of the witnesses, not only must the previously absent accused person and defence counsel ask their questions, but the other parties must also ask their questions again, irrespective of their presence at the previous examination.

- 17 Although national law does not expressly regulate the question of whether a further or repeated examination must take place, there are indications suggesting that conducting a further examination to the full extent is sufficient.

Point 1 of Article 348(3) of the NPK reads as follows:

‘The infringement of the rules of procedure shall be substantial:

1. if it led to a limitation of the procedural rights of the parties and it has not been remedied’.

If a repeated examination is assumed, the initial examination loses its legal value. For that reason, it cannot be taken into account by the court when it gives judgment. That examination, which has no legal value, therefore does not lead to a limitation of the procedural rights of the parties.

If an additional examination is assumed, the legal value of the first examination is retained. It was conducted in the absence of the accused person and the defence counsel and therefore led to a limitation of their procedural rights. A re-examination of the same witnesses, in which the accused person and his or her lawyer may put questions to the witnesses, remedies the infringement of the procedural rules.

Considered in that light, the provision of point 1 of Article 348(3) of the NPK, in relation to the facts of the main proceedings, applies only to a further examination, not to a repeated examination. It requires a certain quality of a re-examination of the same witnesses, namely that of giving the accused person and his or her lawyer, who were absent from the previous examination, a full opportunity to ask their questions. If that opportunity is given, the previous infringement is remedied.

- 18 Questions referred for a preliminary ruling

Is the right of the accused person to be present in person under Article 8(1) of Directive 2016/343, read in conjunction with Article 10(1) and recital 44 thereof, safeguarded where a witness has been examined in the absence of the accused person at a separate hearing but the accused person had the opportunity to put questions to that witness at the subsequent hearing but

stated that he or she had no questions, or is it necessary, in order to safeguard the right to be present in person, for that examination to be repeated in its entirety, including the questions put by the other parties who were present at the first examination?

Is the right to be defended by a lawyer under Article 3(1) of Directive 2013/48, read in conjunction with Article 12(1) thereof, safeguarded where two witnesses have been examined in the absence of the lawyer at two separate hearings but the lawyer was given the opportunity to put questions to the two witnesses at the subsequent hearing, or is it necessary, in order to safeguard the right of defence by a lawyer, for those two examinations to be repeated in their entirety, including the questions of the other parties from the first hearing, and, in addition, for the lawyer who was absent from the two previous hearings to be given the opportunity to ask his questions?

Reasons for the request for a preliminary ruling

19 First question:

In the judgment in Case C-688/18, EU:C:2020:94, the Court states in paragraphs 47 and 48 that an accused person's right to be present in person is not infringed if, despite the fact that he or she was absent from a hearing, the steps taken in his or her absence are subsequently repeated in his or her presence.

That said, it is not clear what meaning the Court ascribes to the requirement that those steps be repeated. More specifically, it is not clear whether it is necessary to repeat the entire examination (which would mean that the parties who were previously present and have already asked their questions must now ask the same questions again and then the previously absent accused person can ask his or her questions), or whether the examination is to be repeated only with a view to protecting the rights of the absent accused person (which would mean that the previously absent accused person is given the opportunity to ask questions).

On the one hand, the Court refers, in paragraph 47, to a 'further examination' ('zusätzliche Zeugenvernehmung', 'l'audition supplémentaire'), providing an indication that the previous examination retains its validity.

On the other hand, in paragraph 48, the Court uses the words 'has had repeated ... the steps' ('Wiederholung', 'la réitération'), providing an indication that the previous examination loses its validity.

In addition, the Court states the following in the operative part of the judgment: 'to repeat those steps, in particular by conducting a further examination', 'insbesondere durch Durchführung einer zusätzlichen Zeugenvernehmung ... zu wiederholen', 'à réitérer lesdits actes, notamment en procédant à l'audition supplémentaire'). The Court therefore clearly links the repetition to a further examination. Nonetheless, it remains unclear what meaning the Court ascribes to

the terms used, since, according to national legal terminology, ‘repeated examination’ and ‘further examination’ are different, mutually exclusive concepts.

20 Therefore, the first question seeks clarification as to whether the conducting of a ‘further examination’ complies with the provision made by Article 10(1) of Directive 2016/343 or whether a ‘repeated examination’ must be conducted (see paragraph 16 above) in order to consider that the infringement of the accused person’s right to be present at the hearing in person, as provided under Article 8(1) of Directive 2016/343, is effectively remedied.

21 Reference is made to recital 44 of Directive 2016/343, which specifies the content of the requirement of ‘adequate and effective remedies’.

Is the term ‘adequate and effective remedies’ to be understood as meaning that the accused person who was absent from the previous hearing must be given the opportunity to ask his or her questions or that all parties, including those who were present at the previous hearing, must be given the opportunity to do so?

In particular, do those remedies apply only to effects on the legal sphere of accused persons whose right to be present in person has been infringed, since only they ‘[should be placed] in the same position in which they would have found themselves had the breach not occurred’ (recital 44)? Or do the remedies also apply to effects on the legal sphere of other parties, whose right to be present in person has not been infringed?

22 To be clear: if a ‘further examination’ is conducted (see paragraph 16 above), the other parties who were present at the previous hearing may also ask questions, but those are new questions and not a repetition of old questions already asked. Those new questions are a manifestation of their right to participate in the proceedings and not an expression of ‘adequate, effective remedies’ for an infringement of that right.

In the main proceedings, after the lawyer VV had concluded his questioning of witness No 263, and the accused person DD had stated that he had no questions of his own, the other parties asked the witness numerous new questions in connection with matters arising from the natural progress of the proceedings, namely the reading of the statement made by witness No 263 in the pre-trial phase (see paragraph 10 above). Accordingly, the solution sought by means of a ‘further examination’ as an effective remedy is not such as to preclude the possibility of the other parties putting new, additional questions to the witness.

23 Second question:

This question is identical to the first, but concerns the right of access to a lawyer under Article 3(1) of Directive 2013/48. There is no question that that right was infringed in the main proceedings, as the hearings of 30 November 2020 and 18 December 2020 (when the two witnesses were examined) were held in the

absence of the lawyer VV, with the result that the right of the accused person DD to be defended by a lawyer was not exercised.

The question therefore arises as to the nature of the effective remedy under Article 12 of Directive 2013/48, namely whether it requires that a ‘further examination’ or a ‘repeated examination’ of the two witnesses be conducted (see paragraph 16 above).

In particular, the question arises as to whether, for the purpose of safeguarding the right of the accused person DD to be defended by the lawyer VV, it was sufficient that he had the opportunity to put questions to the two witnesses at the new hearing of 22 February 2021, or whether it would have been necessary at that new hearing that, in addition to his questioning of the witnesses, the other parties (the other four accused persons and their lawyers) repeat all their questions which they had already asked at the hearings of 30 November 2020 and 18 December 2020.

The statements made above also apply to this question.

24 Usefulness of the Court’s answer

The objections of the lawyer VV cannot be disregarded. The judgment of the Court in C-688/18 does indeed leave room for different interpretations and does indeed concern only the right of the accused person to be present in person, but not the right of his or her lawyer to participate in the proceedings.

Therefore, once the Court has answered its questions, the referring court will have clarity as to whether the procedural steps that it took on 22 February 2021 in the main proceedings constituted a sufficiently effective remedy to the infringement [of the rights] of the accused person DD and his lawyer VV to be present at the criminal proceedings and to participate adequately or, conversely, whether the protection of their rights requires that a new examination of the two witnesses be conducted, in which the questions asked by the other parties during the hearings of 30 November 2020 and 18 December 2020 must be asked again.

[...]