

Case C-174/22**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:**

8 March 2022

Referring court:

Varhoven kasatsionen sad (Bulgaria)

Date of the decision to refer:

25 February 2022

Appellant in the appeal in cassation:

EV

Subject matter of the main proceedings

The proceedings were initiated following an appeal in cassation brought by the accused EV against Decision No 57/05.08.2021 of the Court of Appeal, Varna.

By the decision contested before the Court of Cassation, the Court of Appeal had upheld judgment No 22/22.03.2021 of the Regional Court, Varna, by which EV had been found guilty of possession of drug precursors, without an appropriate licence and for the purpose of distribution, on 21 December 2018 in Varna, specifically two litres of toluene worth BGN 24, a material used to produce highly dangerous narcotic substances (methamphetamine), and 11.18 grams of red phosphorus worth BGN 2.79, all for a total value of BGN 26.79, and was, for that reason, under the second sentence of Article 354a(1) of the Nakazatelen kodeks (Criminal Code, Bulgaria; ‘the NK’) in conjunction with Article 58a(1) and Article 54 of the NK, sentenced to an initial custodial penalty of two years under the general rules on the penal system and a fine of BGN 20 000.

Subject matter and legal basis of the request

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

Question referred for a preliminary ruling

Do the provisions of Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004, which supplement the blanket provision of Article 354a of the NK in conjunction with Article 3(4) of the Zakon za kontrol varhu narkotichnite veshtestva i prekursorite (Law on the control of narcotic substances and drug precursors; ‘the ZKNVP’), allow a person to be found guilty of possession of a category 3 substance as per Annex I, namely toluene in a quantity of two litres?

Provisions of international law relied on

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 3

Provisions of European Union law and case-law relied on

Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors, Article 2, Article 3(2) and (6), Article 8, Annex I

Provisions of national law relied on

Criminal Code, Bulgaria (NK), Article 354a

Law on the control of narcotic substances and drug precursors (ZKNVP), Articles 1, 3 and 18a, Supplementary provisions, Paragraph 1, point 14

Naredba N° 1 za kontrol na prekursorite na narkotichnite veshtestva (Regulation No 1 on the control of drug precursors) of 18 April 2008, Articles 1, 11 and 18, Annex I

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 21 December 2018, three officers of the Varna municipal police noticed three persons who were visibly unsettled by the police presence. After verifying their identities, it transpired that it was the accused EV and two of his associates, who would later appear as witnesses in the proceedings. When asked whether they were in possession of drugs or other prohibited substances, the witnesses answered in the negative. During the conversation, the accused stated that he had two bottles of toluene on his person. He opened his bag, which contained an electronic scale and a polyethylene bag containing a red powdery substance; Mr EV explained that this was red phosphorus. The accused handed over the described items voluntarily, stating that he had purchased red phosphorus on an e-commerce website and toluene in a shop and that the substances were ingredients

for manufacturing 'Pico' (methamphetamine). The police officers took the accused to the police station. In the report drawn up in relation to the voluntary handover, Mr EV himself stated in writing that he had intended to take the items to an acquaintance who was to pay him their purchase price.

- 2 According to the results of the physico-chemical analysis, items 1 and 2 (colourless clear liquids with a total volume of 2 000 ml) are toluene; item 3 (a violet substance with a net weight of 11.64 g) is red phosphorus; item 4 (a grey electronic scale) has traces of methamphetamine.
- 3 Based on the results of the analyses carried out, the experts came to the conclusion that the items could be used as precursors in a process for synthesising the narcotic substance methamphetamine by means of what is known as the ephedrine/pseudoephedrine reduction method, which involves heating in the presence of hydroiodic acid.
- 4 The precursor is ephedrine/pseudoephedrine, which is most often obtained by extraction (purification) from pharmaceutical forms (capsules, tablets, ampoules). Hydroiodic acid is used during the stage where the precursor ephedrine/pseudoephedrine is reduced to methamphetamine, which acid is obtained by adding a prepared solution of red phosphorus (item 3) and iodine in the presence of phosphoric acid mixed in an aqueous medium. Methamphetamine base is obtained from the reaction of ephedrine/pseudoephedrine with hydroiodic acid. The process is carried out by heating on a stove in a glass vessel, which may be equipped with a reflux condenser and/or thermometer. Sodium hydroxide is added to the reaction mixture and solvents containing toluene (items 1 and 2) are used to extract the methamphetamine produced; acetone, ether, isopropyl and other substances are used to purify the methamphetamine. The end product, in the form of hydrochloride salt or sulphate, is obtained as a synthesis product in the form of a base; it is treated with sulphuric or hydrochloric acid, after which it is separated from the mixture and dried, taking the form of crystals.
- 5 According to the findings of the appraisal report, the total value of the substances found is BGN 26.795, with the value of the two toluene bottles amounting to BGN 24.00 and the value of 11.18 g of red phosphorus to BGN 2.795.

The essential arguments of the parties in the main proceedings

- 6 The accused and his defence counsels argue that the act does not constitute an offence within the meaning of the second sentence of Article 354a(1) of the NK, since the two substances found on the person of the accused during the police check have a legal use and are very common in day-to-day life. In support of the view that the act does not meet the conditions of the offence, the defence counsels make reference to Regulation (EC) No 273/2004 of the European Parliament and of the Council on drug precursors, pointing out that the substance toluene is listed under category 3 of Annex I and that its possession does not require a licence

within the meaning of Article 3(2) of the Regulation nor a registration pursuant to Article 3(6) of the Regulation.

- 7 The public prosecutor opposes this view, considering the arguments put forward by the defence to be unconvincing.

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

- 8 In order to meet the requirements of Article 3(1)(a)(iv) and 3(1)(c)(ii) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the Criminal Code of the Republic of Bulgaria criminalises various acts involving substances that may serve as precursors in the drug manufacturing process. The chosen legislative approach of regulating in one single provision – namely Article 354a(1) of the NK – two criminal offences that differ from one another only in terms of the subject of the offence also predetermines the special features of the offence whose subject is drug precursors.
- 9 Firstly, the second sentence of Article 354a(1) of the NK is a blanket provision, and for the act to constitute an offence it is necessary that its content be supplemented by the provisions of the Law on the control of narcotic substances and drug precursors (ZKNVP) and the regulations adopted pursuant to the law for its application. Reference is made to these provisions in relation to two aspects: a) the substances constituting precursors and b) the procedure and basis by which licences are granted to carry out activities relating to such substances.
- 10 Article 1(3) of the special law ZKNVP transposes the requirements of Regulation (EC) No 273/2004 of the European Parliament and of the Council on drug precursors, on the one hand, and of Council Regulation (EC) No 111/2005 laying down rules for the monitoring of trade between the Community and third countries in drug precursors, on the other.
- 11 The ZKNVP was implemented by Regulation No 1 of 18 April 2008 on the control of drug precursors. In Annex 1 thereto, the substances that may be used as precursors are divided into three categories, in accordance with the distinctions made in the two Community regulations.
- 12 These considerations on the need to supplement the second sentence of Article 354a(1) of the NK and on the material scope of the ZKNVP, in so far as it concerns drug precursors, also justify the application of EU law to the case at issue in the main proceedings.
- 13 The second special feature of the offence set out under the second sentence of Article 354a(1) of the NK is that, for the act to constitute an offence, it is necessary that it be an activity involving production, processing, acquisition, possession or distribution of precursors without an appropriate licence. Except in cases involving what are known as highly dangerous narcotic substances, the prohibition of which results from the law itself, in all other cases, including cases

relating to the possession of precursors intended for the production of narcotic substances, an appropriate licence is understood to be a legal act of a government authority authorising the holder to lawfully carry out the activity of production, processing, acquisition, possession or distribution of the substances in question, where this occurs for medical, scientific or research purposes. In the absence of such a legal act, the objective element of the offence 'without an appropriate licence' is satisfied.

- 14 One element constituting the subject of the offence in the main proceedings, namely the two litres of toluene, falls within category 3 of Annex 1 to Regulation No 1 of 18 April 2008 and within the same category in Regulation (EC) No 273/2004 of the European Parliament and of the Council on drug precursors. There is no provision to the effect that a licence or registration would be required to engage in activities relating to substances in this category, and in particular to the possession of such substances, regardless of whether the accused is considered to be an operator within the meaning of Article 2(d) of Regulation (EC) No 273/2004 (in so far as the charge brought is that the criminalised substances were intended for further sale) or a user within the meaning of Article 2(h) of that Regulation (in so far as Mr EV is charged with possession of a listed substance). Although, in relation to the substances in the first two categories of Annex 1, national case-law has established that the act is carried out without an appropriate licence, in so far as the licences (for category 1 substances) or registrations (for category 2 substances) required by the ZKNVP and Regulation No 1 are missing, the national courts merely point out that category 3 substances are subject to control under Regulation (EC) No 273/2004 of the European Parliament [and of the Council], without stating what substantive requirements apply to activities involving category 3 substances and whether a specific legal act issued by a government authority is required for their acquisition, possession and use. It is only in the decision under review, which is the subject of the main proceedings, that the lack of an appropriate licence is, as an objective element of the offence set out under the second sentence of Article 354a(1) of the NK, based on the purpose of the substance, namely the production of narcotic substances.
- 15 The referring court takes the view that, in light of the length of the criminal proceedings (the criminal proceedings were initiated on 11 March 2019 and the bill of indictment filed on 24 February 2021 before the Regional Court, Varna), the requirements of Article 107 of the Rules of Procedure of the Court of Justice of the European Union have been satisfied. In addition, the accused EV was remanded in custody pending trial for a prolonged period of time, namely from 22 January 2021 to 25 January 2022. It is in the interests of the accused that the question surrounding his criminal liability be clarified quickly.