Case C-427/22

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:

28 June 2022

Referring court:

Varhoven kasatsionen sad (Bulgaria)

Date of the decision to refer:

21 June 2022

Defendant:

BG

Representative of the Public Prosecutor:

Varhovna kasatsionna prokuratura

Subject matter of the main proceedings

An appeal on a point of law before the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria) against a judgment of a court of second instance confirming a conviction handed down by a court of first instance. A natural person was thereby sentenced to a three-year custodial sentence and the confiscation of part of his assets for having committed an offence in the form of commercial banking transactions without the required approval (known as usury). The person is alleged to have granted seven loans totalling BGN 1 030 (approximately EUR 525) to two persons and to have received interest on them.

Subject matter and legal basis of the request

Request for a preliminary ruling under Article 267 TFEU concerning the interpretation of Article 4(1)(1) and (42) of Regulation No 575/2013. It is requested that the reference for a preliminary ruling be dealt with under the urgent procedure provided for in Article 107 of the Rules of Procedure of the Court of Justice.

Questions referred for a preliminary ruling

1. Is the definition of a credit institution in Article 4(1)(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 to be interpreted as meaning that credit is to be granted exclusively from funds received from the public as deposits or other repayable funds, or may a credit institution also grant credit from funds from other sources?

2. How is the content of the 'instrument […] in any form […] by which the right to carry out the business is granted' within the meaning of Article 4(1)(42) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 to be interpreted, and does it include both the authorisation scheme and the registration scheme which grant approval for credit operations?

Provisions of public international law

Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 – Article 6(1).

Provisions of European Union law relied on

Treaty on European Union (TEU) – Article 6(3).

Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1, 'the Regulation') – Recital 5; Article 4(1)(1), (26) and (42).

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338, 'the Directive') – Recitals 2, 42 and 97; Article 3(1)(1) and (22); Article 9(1); Article 34; Annex I, points 1 and 2.

Provisions of national law relied on

– Nakazatelno-protsesualen kodeks (Code of Criminal Procedure, 'the NPK') – Article 24(1)(1); Article 347(1); Article 348(1)(1) and Article 348(2); Article 354(1)(1), (2) and (4) and (2)(2).

Nakazatelen kodeks (Criminal Code, 'the NK') – Articles 54(1) and 252(1).

‘Article 252. … (1) … Any person who, without the necessary approval, carries out, on a commercial basis, banking, insurance or other financial transactions, provides payment services or issues electronic money requiring such approval shall be punished by a term of imprisonment of between three and five years and confiscation up to one half of the offender’s assets.’

Zakon za kreditnite institutsii (Law on Credit Institutions; ‘the ZKI’) – Articles 2(1), 3(1)(1), (2) and (3), 3a(1) to (5), 13(1), 24(1); Dopalnitelni razporedbi (additional provisions), Paragraph 1(4) and (36).

Zakon za bankite i kreditnoto delo (Law on banks and the credit sector) (repealed) – Article 1.

Zakon za bankite ot 1997 (Law on banking of 1997) (repealed) – Article 1(5).

Zakon za zadalzheniata i dogovorite (Law on obligations and contracts) – Article 240.

Naredba № 26 ot 23 april 2009 g. za finansovite institutsii (Regulation No 26 of 23 April 2009 on financial institutions) – Article 2(1).

Succinct presentation of the facts and procedure in the main proceedings

1 Between April 2016 and September 2017, BG was a member of the municipal council of Knezha, Pleven Province. There, he was known to have lent cash with interest to persons undergoing hardship, [it is reported as follows:] to which effect many witnesses, including those who had received similar loans, testified before the court of first instance. In the criminal case, there is nothing to indicate that those cases were investigated or that BG was also charged in those cases. The charge relates only to the loans taken out by witnesses KM and VC.

2 KM’s child was sick and she was in financial difficulties. She learned that BG was granting interest-bearing cash loans. In November 2016, KM received a loan of BGN 100, which she had to repay within one month with BGN 50 interest.

3 As security for the loan, BG took KM’s debit card for her bank account and the PIN code associated with that card. In the same month, KM repaid BGN 150 to BG. During the period from November to December 2016, she took out two further loans with BG, the first in the amount of BGN 100 with interest of BGN 50 and the second in the amount of BGN 30 with interest of BGN 30.

4 On 16 December 2016, BG withdrew BGN 150 with KM’s debit card and KM repaid the remaining BGN 60 to him in cash. KM then blocked her debit card at the bank because BG refused to give it back to her as, in his opinion, she still owed him money.

5 VC was also in financial difficulties. She learned that BG was granting interest-bearing cash loans and contacted him. In April 2016, VS received a loan from him in the amount of BGN 200 with monthly interest of BGN 80. BG took the debit card for her bank account as security for recovering the money and interest.

6 For eight months, VC paid BG only the monthly interest on the loan. She subsequently took out loans with BG in the amount of BGN 200 on three occasions – in December 2016, in January 2017 and in September 2017 – at the same monthly interest rate of BGN 80 each time.

7 After the money had entered her account, VS travelled with BG to an automated teller machine, withdrew her money with the debit card, paid BG the full amount of the loan due for that month in cash, retained the remainder of the money withdrawn for herself and handed her debit card over to BG.

8 On 5 December 2017, VC filed a complaint against BG with the Pleven City Public Prosecutor's Office and blocked the debit card.

9 By judgment of 1 October 2020, the Plevenski Okrazhen sad (Regional Court, Pleven, Bulgaria) found BG guilty of carrying out, between April 2016 and September 2017, commercial banking transactions as a natural person without the necessary approval under the ZKI by granting to two persons seven interest-bearing cash loans totalling BGN 1 030 (approximately EUR 525).

10 He was therefore sentenced, on the basis of Article 252(1) of the NK, to a three-year custodial sentence, which was suspended for a four-year probation period, and the confiscation of one sixth of the two properties situated in the city of Knezha and the two cars owned by him.

11 BG lodged an appeal against the sentence with the Apelativ sad – Veliko Tarnovo (Court of Appeal, Veliko Tarnovo, Bulgaria), which upheld that sentence by judgment of 15 April 2021.

12 That judgment is being challenged by BG before the referring court.

The essential arguments of the parties in the main proceedings

13 On appeal, BG submitted that his conduct did not, from the outset, constitute a criminal offence under Article 252(1) of the NK. In his view, the ZKI contains no legal definition of a banking transaction. He submitted that the principal characteristic of the banking business is to take deposits or other repayable funds from the public, by means of which credits are granted, and that business is subject to an authorisation scheme. He further submitted that the fact of granting, on a commercial basis, funds which have not been taken as deposits from the public by financial institutions or natural persons in breach of a scheme which derogates from the authorisation scheme (a registration, declaration or general

scheme) cannot be regarded as carrying out banking transactions without the necessary approval.

14 On appeal on a point of law, BG requested that the referring court exercise its jurisdiction under national law and acquit him, on the ground that it had not been established that he had granted interest-bearing loans.

15 The Public Prosecutor in the appeal proceedings did not give an view on BG's claim that he had not committed any offence under Article 252(1) of the NK. In the context of the appeal on a point of law, the Varhovna kasatsionna prokuratura (Public Prosecutor's Office at the Supreme Court of Cassation) has also not given a view on that matter. However, it disputes the defendant's assertion that it had not been established during the proceedings that an interest-bearing loan had been granted.

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

16 In the context of the appeal on a point of law, the referring court sits as the final third instance for the application of the law. It is for the referring court to determine whether the court of second instance correctly applied the substantive law (the NK) on the basis of the facts which it considered to be established by the evidence adduced in the course of the proceedings.

17 The referring court is entitled, under national law, to acquit the accused where the facts allow for the conclusion that he has not committed the conduct of which he stands accused or where his conduct does not, from the outset, constitute a criminal offence. It also has jurisdiction to vary the judgment of the appeal court and, on the basis of the facts on which the accused has built his defence, to classify his conduct as a separate offence, punishable by a penalty equal to or less severe than that for the offence for which he was found guilty.

18 In order to assess whether it should exercise any of those powers – including abandoning its long-standing and until recently unaltered case-law that the commercial granting of a cash credit by a natural person ('usury') is a criminal offence under Article 252(1) of the NK, the referring court requires clarification of the meaning of Article 4(1)(1) and (42) of the Regulation in conjunction with Article 9(1) of the Directive and points 1 and 2 of Annex I to the Directive, which together constitute the legal framework establishing the rules governing access to the performance of the activities of a credit institution.

19 In the present case, although recital 42 of the Directive leaves it to the Member States themselves to determine what conduct is to be pursued as a crime in the financial and banking sector, the interpretation of the provisions of EU law relied on is relevant for determining the actual content of the individual constituent elements of criminal offences referred to in Article 252(1) of the NK, which protects the harmonised framework of the banking and financial sector at national level against possible criminal interference.

20 The offence of which BG was found guilty relates to a provision which was included in the NK in 1995 in response to the transition to a market economy following democratic changes in the Republic of Bulgaria and the resulting changes in the economic sphere. It was introduced in order to protect the financial system, in particular the banking industry, against the unregulated entry on the market of new legal entities (known as pyramid schemes) and against activities which undermine its normal functioning and stability.

21 Bulgarian criminal law does not provide for undertakings to be criminally liable, with the result that a criminal offence may be committed, under Article 252(1) of the NK, only by adult natural persons (after reaching the age of 18) or minor natural persons (after reaching the age of 14). In civil matters, natural persons may grant interest-bearing loans where they have agreed the loan in writing with the borrower.

22 For offences under Article 252(1) of the NK, case-law has been developed according to which the grant of credits between legal persons and/or natural persons does not, in general, constitute a criminal offence where they are granted only on a one-off basis and not systematically, on a commercial basis or as a source of income for the person granting the credit.

23 According to the ZKI, a bank (credit institution) is a legal person which takes deposits or other repayable funds from the public and grants credits or other forms of financing for its own account and at its own risk. Strictly speaking, reference is made to the typical and most characteristic transactions of every banking (credit) institution: taking deposits and granting credits. However, the law does not require banks to grant credits exclusively from the capital deposits taken. It is therefore assumed that, after the legislature established as an offence the carrying out of any banking transaction without approval, the same applies for bank credit, which, under the ZKI, is subject to an (authorisation) scheme that grants approval.

24 That case-law has been abandoned in individual (previous) decisions of the referring court. It is assumed that the commercial granting of interest-bearing loans from funds which were not taken as deposits from the public (known as usury) cannot be defined as a ‘banking transaction’. By those decisions, the defendants in the relevant criminal cases are acquitted on appeal on a point of law, on the ground that the provision in Article 252(1) of the NK is applicable only to activities for which an (authorisation) scheme that grants approval is provided for.

25 According to the ZKI, a financial institution is a person other than an institution or an industrial holding company whose main activity consists, inter alia, in granting credits from funds which have not been taken as deposits or other repayable funds from the public. Since the granting of credits from such funds constitutes a financial transaction for which the ZKI provides for a registration scheme but not an authorisation scheme, it is not, in that case, an offence to pursue that activity commercially.

26 The referring court requires an interpretation of the definition of a credit institution within the meaning of Article 4(1)(1) of Regulation (EU) No 575/2013 in order to determine whether the use of the conjunction 'and', which links the activity of taking deposits or other repayable funds from the public to the activity of granting credits, means that credit institutions may grant credit only with funds taken from the public and may not grant credits from funds which they have received from other sources, such as bank charges, interest, etc.

27 The doubt as to the exact scope of the definition in Article 4(1)(1) of the Regulation also arises from the express prohibition laid down in Article 9(1) of the Directive against persons or undertakings other than credit institutions from carrying out the business of taking deposits or other repayable funds from the public, and on the provisions of points 1 and 2 of Annex I to the Directive, which list those two activities separately.

28 The referring court is also faced with difficulties in interpreting the definition of the concept of 'authorisation', within the meaning of Article 4(1)(42) of the Regulation, since that instrument grants the right to carry out the business within the framework defined by that Regulation and by the Directive.

29 In accordance with Article 4(1)(26) of the Regulation and Article 34 of the Directive, financial institutions may pursue the activities listed in Annex I; point 2 of that annex refers to loan transactions, in particular consumer credits. It is therefore essential for the referring court to ascertain whether the phrase 'instrument issued in any form by the authorities by which the right to carry out the business is granted' in Article 4(1)(42) of the Regulation covers both the authorisation (under the authorisation scheme granting approval) as well as certification (under the registration scheme granting approval).

30 The referring court asks the Court to deal with the request for a preliminary ruling under the urgent procedure provided for in Article 107 of the Rules of Procedure of the Court of Justice. The proceedings in the two phases of the criminal proceedings (investigation and court proceedings) have been ongoing for six years, during which time the confiscation was ordered by a prohibition on disposing of two immovable properties (one co-owned with a third party) and the seizure of BG's two cars. That was done in order to ensure enforcement of the sentence provided for in Article 252(1) of the NK. There is a real risk of infringing the right to a fair trial provided for in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms with regard to the requirement that the duration of proceedings be reasonable and the requirement of legal certainty, which form part of EU law as general principles under Article 6(3) of the Treaty on European Union.