Case C-265/23 [Volieva] [1]

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:

25 April 2023

Referring court:

Okrazhen sad – Sliven (Bulgaria)

Date of the decision to refer:

12 April 2023

Criminal proceedings against:

DM

AV

WO

AQ

Subject matter of the main proceedings

The dispute in the main proceedings is governed by Article 247 et seq. of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure; 'the NPK') and was brought by the indictment filed by the now dissolved Spetsializirana prokuratura (Specialised Public Prosecutor's Office, Bulgaria) at the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria), which was also dissolved on 7 July 2022, against DM, AV, WO and AQ for the criminal offences provided for in Article 321(3), read in conjunction with paragraph 2 of that article, of the Nakazatelen kodeks (Criminal Code; 'the NK') (membership of a criminal organisation) and Article 301(1) of the NK (passive bribery).

[1] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

Subject matter and legal basis of the request

Interpretation of EU law; Article 267 TFEU

Questions referred for a preliminary ruling

1. In criminal cases concerning offences falling within the scope of EU law, must Article 52 in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union and Article 4 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime and the third sentence of Article 19(1) of the Treaty on European Union be interpreted as precluding national legislation such as that contained in Chapter XXVI of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure) (as amended by Darzhaven vestnik [State Gazette] No 63/2017, in force since 5 November 2017), which abrogates the right of an accused person to have the criminal proceedings against him or her discontinued, where that right arose under a law providing for such a possibility but, as a result of a judicial error, was established only after that law had been repealed?

2. What effective remedies, within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union, should be available to such an accused person, and, in particular, is a national court required to discontinue entirely the criminal proceedings against such an accused person if a formation of the court previously seised had failed to do so, even though the relevant conditions were satisfied under the national law then in force?

Provisions of European Union law and case-law relied on

Treaty on European Union – Article 19(1) and (3);

Treaty on the Functioning of the European Union – Article 267;

Charter of Fundamental Rights of the European Union – Articles 47, 48 and 52;

Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime – Article 4;

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings – recitals 10, 14, 27, 28 and 41;

Judgment of the Court of Justice of the European Union of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392);

European Court of Human Rights (‘the ECtHR’) – judgments of 10 May 2011, *Dimitrov and Hamanov v. Bulgaria* (CE:ECHR:2011:0510JUD004805906), and

of 10 January 2012, *Biser Kostov v. Bulgaria* (CE:ECHR:2012:0110JUD003266206).

Provisions of national law relied on

The NPK in the version in force from 29 April 2006 to 28 May 2010 – Article 334, point 4, Article 368(1) and (2), Article 369(1) to (5);

Zakon za izmenenie i dopalnenie na NPK (Bulgarian law amending and supplementing the NPK, published in [State Gazette; 'DV'] No 32 of 2010, in force since 28 May 2010) – Paragraphs 51, 54 and 66;

The NPK in the version in force from 13 August 2013 to 5 November 2017 – Article 334, point 4, Article 368(1) and (2), Article 369(1) to (5);

The NPK in the version in force since 5 November 2017 – Article 246(1) to (4), Article 334, point 4, Article 368(1) to (3), Article 369(1) to (3);

Prehodni i zaklyuchitelni razporedbi kam Zakona za izmenenie i dopalnenie na Zakona za sadebnata vlast (Transitional and final provisions of the Law amending and supplementing the Law on the judiciary, DV No 32 of 2022, in force since 28 July 2022, as amended by judgment No 7 of the Konstitutsionen sad na Republika Bulgaria [Constitutional Court of the Republic of Bulgaria] – No 56 of 2022) – Paragraphs 43, 48 to 53, 59;

The NK – Articles 20, 26, 301, 321.

Succinct presentation of the facts and procedure in the main proceedings

1 On 5 July 2013, five persons, including DM, were charged, by an order of an investigating authority, with committing offences under Article 321(3) of the NK, read in conjunction with paragraph 2 of that article (membership of a criminal organisation), and Article 301(1) of the NK (passive bribery).

2 Due to the excessive length of the pre-trial proceedings, the accused DM applied to the Specialised Criminal Court on 31 August 2015 for the case to be brought to trial in accordance with the provision of Article 368(1) of the NPK in force at that time.

3 By order dated 30 September 2015 entered in the register of the Specialised Criminal Court, the court returned the case file in accordance with Article 369(1) of the NPK in the version in force at that time and gave the Specialised Public Prosecutor's Office the opportunity, within a period of three months, either to submit the case to the court for trial with an indictment, with a proposal for release from criminal liability with the imposition of an administrative penalty or with a plea bargain, or to discontinue the criminal proceedings by notifying the court.

4 On 8 January 2016, the Specialised Public Prosecutor's Office submitted the case to the court for trial by filing an indictment against four accused persons, including the accused DM, for offences under Article 321(3) of the NK, read in conjunction with paragraph 2 of that article, and Article 301(1) of the NK.

5 On 3 February 2016, in accordance with Article 249(2) of the NPK, read in conjunction with Article 248(2), point 3 thereof, in the version in force on that date, the Judge-Rapporteur, by decision of the same date, discontinued the court proceedings on the ground of substantial procedural errors capable of being rectified and referred the case back to the Public Prosecutor's Office for rectification of the errors. In accordance with Article 369(3) of the NPK, in the version prior to the amendment of 5 November 2017, a period of one month was given to the Specialised Public Prosecutor's Office to rectify the procedural errors and to submit the case relating to the charges against DM for criminal offences provided for in Article 321(3) of the NK, read in conjunction with paragraph 2 of that article, and Article 301(1) of the NK to the court.

6 A new indictment was drawn up within the prescribed period of one month. This was filed with the court by the Specialised Public Prosecutor's Office on 22 March 2016.

7 Proceedings were initiated before the Specialised Criminal Court. The Judge-Rapporteur was unable to establish that substantial procedural errors capable of being rectified were made during the pre-trial proceedings and therefore ordered that the case be heard in open court, with summons to the parties.

8 By application of 5 April 2016 and objection of 13 April 2016, the accused DM requested that the formation of the Specialised Criminal Court dealing with the case entirely discontinue the criminal proceedings against her in accordance with the third alternative of Article 369(4) of the NPK, in the version prior to its amendment of 5 November 2017, on account of new procedural errors made during the pre-trial proceedings.

9 The representatives of the accused DM submitted the same applications at the hearings on 25 May 2016 and 27 June 2016. That court rejected those applications by separate recorded orders, taking the view that the indictment complied with the requirements of Article 246 of the NPK.

10 On 5 November 2017, amendments to Chapter XXVI of the NPK entered into force, abolishing the possibility for criminal proceedings to be discontinued on account of the excessive length of pre-trial proceedings or on account of substantial procedural errors made during pre-trial proceedings.

11 The case was heard in public for more than three and a half years before the Specialised Criminal Court (the proceedings were initiated on 23 March 2016 and closed by judgment of 19 November 2019).

12 By judgment of 19 November 2019, the Specialised Criminal Court found the accused DM guilty of the offences with which she was charged and imposed on her a custodial sentence and a fine and deprived her of the rights attached to her office.

13 That judgment was challenged before the Apelativen spetsializiran nakazatelen sad (Specialised Criminal Court of Appeal) and proceedings were brought before that court.

14 By judgment of 9 November 2020, the Specialised Criminal Court of Appeal set aside the judgment of the Specialised Criminal Court in its entirety and referred the case back to that court for further prosecution, on the ground that there were substantial procedural errors capable of being rectified, with the result that the indictment of 22 March 2016 did not meet the requirements of Article 246 of the NPK.

15 Following the referral of the case back to the Specialised Criminal Court, on 3 February 2021, in the context of considering and deciding on the points referred to in Article 248(1) of the NPK, that court discontinued the court proceedings by recorded order and referred the case back to the Public Prosecutor's Office for rectification of the substantial procedural errors made when drafting the indictment in the pre-trial proceedings, which were identified and detailed in the judgment of the Specialised Criminal Court of Appeal.

16 On 7 July 2022, the Specialised Public Prosecutor's Office lodged a new indictment against the accused DM and the three other accused persons. Proceedings were initiated before the Specialised Criminal Court.

17 By decision of 15 July 2022, the Judge-Rapporteur discontinued the proceedings before the Specialised Criminal Court and referred the case to the court having jurisdiction, Okrazhen sad Stara Zagora (Regional Court, Stara Zagora), in accordance with Paragraph 49 of the Prehodnite i zaklyuchitelni razporedbi kam Zakona za izmenenie i dopalnenie na Zakona za sadebnata vlast (Transitional and final provisions of the Law amending and supplementing the Law on the judiciary, DV No 32 of 26 April 2022, which entered into force on 28 July 2022).

18 Proceedings were initiated before the Regional Court, Stara Zagora, in which, however, all the judges declared themselves to be biased. The court proceedings were discontinued and, in accordance with Article 43, point 3 of the NPK, the case was referred to the Varhoven kasatsionen sad (Supreme Court of Cassation) for the designation of another court of equal rank to hear it, the court having jurisdiction, namely the Regional Court, Stara Zagora, not having been able to form a panel of judges. By decision of the Supreme Court of Cassation of 17 January 2023, the case was referred to the Okrazhen sad Sliven (Regional Court, Sliven) for trial.

19 Proceedings were initiated before the Regional Court, Sliven. In these proceedings, a representative of the accused DM raised the issue of the

discontinuation of the criminal proceedings against her and asked the panel to refer a question to the Court of Justice of the European Union for a preliminary ruling.

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

20 The concept of Chapter XXVI of the NPK, according to which an accused person may request that his or her case be tried or discontinued, already existed in the former NPK (Article 239a). It was also incorporated into the NPK promulgated in DV No 86 of 28 October 2005, in force since 29 April 2006, and declared by the Constitutional Court of the Republic of Bulgaria to be compatible with the country's basic law.

21 The purpose of Chapter XXVI of the NPK is to ensure that investigations are conducted within a reasonable period of time in order to eliminate the risk that, for various reasons, a person is charged and the case then remains in the preparatory phase of the criminal proceedings for years, while the accused suffers all the adverse consequences arising from that status.

22 The introduction of the possibility for an accused person to request that his or her case be brought before the court does not prevent thorough investigations from being carried out, given that, under Article 219(1) of the NPK, a person is charged where sufficient evidence of his or her guilt has been obtained. The referring court points out that, for this reason, a period of two years from the commencement of the proceedings at first instance and a period of one year in the appeal proceedings should be sufficient to gather the remaining evidence.

23 In the 2006 version of Chapter XXVI of the NPK, the legislature also provided for the possibility that the court of first instance may not exercise its power, under Art. 369(4) of the NPK, to discontinue the criminal proceedings under certain conditions, even though those conditions were met; in such a case, the court of appeal then has that power, but only in the context of reviewing the judgment after the court proceedings at first instance have been completed (argument based on Article 334, point 4 of the NPK).

24 The Zakon za izmenenie i dopalnenie na NPK (Law amending and supplementing the NPK) repealed Chapter XXVI of the NPK in its entirety in 2010. However, under a transitional provision of that law, proceedings under Chapter XXVI of the NPK that are still pending may be concluded in accordance with the previous procedural rules (that is to say the procedural rules predating the repeal of that chapter). That provision creates predictability and legal certainty for persons who have requested that their case be brought to trial or ensures that they can exercise their right to have the criminal proceedings against them discontinued if the conditions under Article 369(4) of the NPK are met.

25 In that regard, in its judgment of 10 May 2011 in *Dimitrov and Hamanov v. Bulgaria*, the ECtHR held, in paragraphs 92 and 119, that [the procedure under]

repealed Chapter XXVI of the NPK was the only remedy that the ECtHR had found, in certain situations, to be effective in relation to the length of criminal proceedings in Bulgaria, since that remedy could function either as an acceleratory one (it could expedite the bringing of a case to trial) or as a compensatory one (it could lead to a discontinuance of proceedings). In its judgment, the ECtHR held that Bulgaria must introduce, within 12 months from the date on which its judgment became final, an effective remedy which complied with the requirements set out in that judgment.

26 In 2012, the ECtHR again held, in paragraph 85 of the judgment in *Biser Kostov v. Bulgaria*, that the procedure under Article 239a (repealed) of the former NPK, introduced by the Zakon za izmenenie i dopalnenie (Amending and supplementing law, DV No 50/2003), which for the first time provided for an accused person to request that his or her case be brought to trial, was the only remedy which could be considered effective in respect of complaints about the excessive length of criminal proceedings. The ECtHR added that, in the case in question, the procedure under Article 239a of the NPK 'brought to an abrupt end a deficient investigation marked by an obstinate refusal of the prosecutor to address the concerns repeatedly expressed by the courts'. In other words, the referral of the case for trial at the request of the accused is the consequence, not the cause, of an infringement of rights.

27 As a result of those two judgments of the ECtHR, as well as other adverse rulings against Bulgaria by the ECtHR concerning the excessive length of proceedings, Chapter XXVI of the NPK was re-enacted in 2013 (DV No 71/2013), with almost identical wording to that of 2006. Article 368(1) was amended to provide that the period during which the case was pending before the court or the criminal proceedings were suspended was excluded from the two-year period. The period referred to in Article 369(1) was extended from two to three months. The possibility for the Court of Appeal to discontinue criminal proceedings under Article 334, point 4 of the NPK if the court of first instance has not made use of its power under Article 369(4) of the NPK was reintroduced.

28 The referring court notes that, in the present case, the accused DM requested that her case was brought for trial on 31 August 2015, at which time the 2013 version of Chapter XXVI of the NPK was in force. For that reason, that court held that the conditions laid down in Article 368(1) of the NPK were satisfied and granted the Public Prosecutor's Office a period of three months in which to submit an indictment to the court. The Public Prosecutor's Office lodged that indictment, but the court found that substantial procedural errors had been made during the pre-trial proceedings and therefore granted the Public Prosecutor's Office, in accordance with Article 369(3) of the applicable NPK, a final period of one month to rectify those procedural errors. If the Public Prosecutor's Office fails to rectify the procedural errors within the prescribed period or commits new procedural errors, it is imperative, in accordance with Article 369(4) of the NPK, that the criminal proceedings against the accused DM be discontinued, even in the absence of a request to that effect from the parties to the proceedings.

29 The Public Prosecutor's Office submitted a new indictment to the court on 22 March 2016, within the prescribed period of one month. According to the referring court, the main source of disagreement is whether that indictment meets the requirements of Article 246 of the NPK, according to which the indictment must be clearly and unambiguously formulated so that the accused can understand it, effectively organise his or her defence and gather the relevant evidence. That question was discussed at the hearings on 25 May 2016 and 27 June 2016 at the request of the accused DM, the latter's representatives referring to defects they considered to be present in the indictment and demanding the discontinuation of the criminal proceedings brought against the accused, in accordance with the third alternative of Article 369(4) of the NPK in force at that time in 2016. However, the court rejected those arguments, found that there were no substantial procedural errors capable of being rectified and refused to discontinue the criminal proceedings against the accused DM.

30 According to the provisions of the NPK, decisions of the court discontinuing criminal proceedings are subject to independent challenge on appeal (both by the accused and the Public Prosecutor's Office), but decisions refusing to discontinue proceedings are not. Those decisions are, indeed, subject to judicial review, but together with the judgment delivered by the court of first instance. Therefore, at this stage of the criminal proceedings, the possibilities of legal protection under the 2016 proceedings at first instance in relation to the right, arising from the third alternative of Article 369(4) of the NPK, for the criminal proceedings against the accused DM to be entirely discontinued, have been exhausted.

31 If the court of first instance has not exercised its powers under Article 369(4) of the NPK, there is, in accordance with the version of the NPK then in force (Article 334, point 4), the possibility to protect that right to discontinuation, namely in the context of the review of the conviction on appeal. If the court of second instance finds that procedural errors were indeed committed in the pre-trial proceedings, including in the drafting of the indictment, it must set aside the conviction and, under the second alternative of Article 334, point 4, discontinue the criminal proceedings in accordance with Article 369(4) of the NPK in force. That power of the court of appeal creates legal certainty and predictability for the persons for whom the right under Article 369(4) of the NPK has arisen. Furthermore, that power of the court of second instance shows that, in principle, the procedure under Chapter XXVI of the NPK does not end when the indictment is submitted to the court.

32 In the view of the referring court, the proceedings that the accused requested be brought on 31 August 2015 in accordance with Chapter XXVI of the NPK are therefore still pending until the final conclusion of the criminal proceedings against her, that is to say are still pending at the present time. Since the court of first instance refused to discontinue the criminal proceedings against her, the only way, on 27 June 2016, for the accused DM to protect this right was to request that the Court of Appeal do so, but only after the court of first instance had delivered its criminal judgment.

33 While the court was hearing the case that was pending in 2016, legislative amendments to Chapter XXVI of the NPK entered into force in the meantime, namely on 5 November 2017. Those amendments abolished the institution, applied until that point, of a case being tried at the request of the accused. Unlike when Chapter XXVI of the NPK was previously repealed, this time there is no transitional provision for pending proceedings under Chapter XXVI of the NPK, such as those of the accused DM. A completely different mechanism has been introduced, aimed at accelerating the pre-trial and court proceedings, but without a compensatory function in case the acceleration measures are unsuccessful. In fact, the possibility for criminal proceedings to be discontinued in the event of excessive duration of pre-trial proceedings and repeated substantial procedural errors capable of being rectified has been abolished.

34 The proceedings before the Specialised Criminal Court were concluded following proceedings at first instance that lasted more than three and a half years; those proceedings had been initiated on 23 March 2016 and ended with a criminal judgment delivered on 19 November 2019. The court convicted the accused DM but, on 9 November 2020, the court of second instance, namely the Specialised Criminal Court of Appeal, set aside that criminal judgment on the grounds that breaches had been committed in the drafting of the indictment of 22 March 2016 and that it did not satisfy the requirements of Article 246 of the NPK. The Court of Appeal pointed out that many of the objections raised by the defence lawyers at a hearing at first instance had not been properly addressed. However, the criminal proceedings against the accused DM were not discontinued, as the Court of Appeal does not, under the NPK currently in force, have the power under the second alternative of Article 334, point 4 of the NPK.

35 In the view of the referring court, it is clear beyond any doubt from the development of the case described and from the judgment of the Court of Appeal which has become final that, since 22 March 2016, the conditions laid down in the third alternative of Article 369(4) of the NPK, in the version in force at that time, have been met with regard to the charges against the accused DM. According to the referring court, if that legal provision had been correctly applied by the court of first instance, the criminal proceedings against the accused DM should already have been discontinued in 2016. Due to the erroneous conclusion of the formation of the Specialised Criminal Court dealing with the proceedings initiated in 2016 that no substantial procedural error capable of being rectified had been made in the pre-trial proceedings, the criminal proceedings against the accused DM are still pending and have now lasted for a total of approximately ten years.

36 The referring court states that the Constitutional Court of the Republic of Bulgaria, in its 1999 judgment, found that ‘the provision under which pending proceedings are discontinued […] is contrary to the requirements of the rule of law relating to respect for acquired rights, legal certainty and predictability’. In the present case, the NPK does not contain any express provision on the discontinuation of pending proceedings under the previous version of Chapter

XXVI. However, this follows from the fact that there is no transitional provision governing their status.

37 In another judgment, from 2010, the Constitutional Court of the Republic of Bulgaria found that the principle of non-retroactivity of laws is infringed where the new legal assessment of the effects of a right that has arisen – albeit under a different legal framework – entails the abolition of rights or results in negative consequences for old cases. In the light of the principle of the rule of law, it is impermissible, under constitutional law, for the legislature to subsequently impose adverse consequences on individuals who have acquired rights and acted in accordance with the existing legal framework.

38 According to the referring court, this view of the Constitutional Court of the Republic of Bulgaria is relevant in the present case precisely because of the significant differences between the provisions of Chapter XXVI of the NPK in the versions before and after 5 November 2017. On 22 March 2016, under the old legal framework, the accused DM acquired the right to have the criminal proceedings against her discontinued under Article 369(4) of the NPK. She expressed that she wished to exercise that right on four occasions. The fact that, due to a judicial error, the acquisition of that right was not established until almost five years later, by which point another law applied which did not make any provisions for old cases and, in that sense, created adverse consequences for them, has no bearing on the exercise of that right.

39 Chapter XXVI of the NPK, in the 2013 version, applied to all offences provided for by the Bulgarian Criminal Code, with the exception of serious intentional crimes resulting in death. In that sense, Articles 368 and 369 of the NPK were also applicable to offences that fell within the scope of application of Council Framework Decision 2008/841/JHA, in particular to membership of a criminal organisation within the meaning of Article 321(3) of the NK, read in conjunction with paragraph 2 of that article, and to the corresponding ancillary offences.

40 Those provisions of the NPK, which were in force until 5 November 2017, give effect to the possibility, under Article 4 of Framework Decision 2008/841, for Member States not to impose a penalty on the perpetrator of offences related to a criminal organisation in certain circumstances, in this case because of inaction by the investigating authorities or substantial procedural errors committed in the pre-trial proceedings.

41 Chapter XXVI of the NPK is an instrument ensuring effective legal protection within the meaning of the third sentence of Article 19(1) TEU, since it guarantees the right of accused persons to a fair and public hearing within a reasonable time within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union.

42 The referring court considers that the version of Chapter XXVI of the NPK currently in force (Articles 368 and 369 of the NPK), which substantially amends

the provisions of the chapter previously in force without including a transitional provision for pending proceedings initiated under the old regime, and which effectively deprives accused persons of the possibility to exercise their acquired right to have the criminal proceedings against them discontinued, is contrary to EU law.

43 It considers that there is an infringement of Article 4 of Framework Decision 2008/841, since there is an obstacle to applying measures in the Republic of Bulgaria, as a member of the EU, ensuring that, in certain circumstances, a perpetrator of offences related to organised crime is exempted from penalties, after such measures had already been introduced and the accused persons had acquired the right to avail themselves of those measures.

44 The infringement is such that it also concerns the third sentence of Article 19(1) TEU, since persons who have been charged with the offences referred to in Framework Decision 2008/841 are deprived of the possibility of effective legal protection, namely for their case to be decided within a reasonable time.

45 There is also a breach of Article 52 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 47 thereof, as the application of an effective remedy, which was introduced into national law when implementing a European Framework Decision and as a result of numerous adverse rulings by the ECtHR, is restricted, thus calling into question the fairness of the criminal proceedings as a whole.

46 For the reasons set out above, the referring court considers that the correct judgment in the case brought before it by the indictment submitted by the Public Prosecutor's Office and by the initiation of criminal proceedings requires answers to the question of whether the abovementioned provisions of EU law must be interpreted as precluding national legislation such as that contained in Chapter XXVI of the NPK (as amended by DV No 63/2017, in force since 5 November 2017), which abrogates the right of an accused person to have the criminal proceedings against him or her discontinued, where that right arose under a law providing for such a possibility but, as a result of a judicial error, was established only after that law had been repealed, and to the question of what effective remedies, within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union, should be available to such an accused person and, in particular, whether a national court may, on the basis of EU law, order the discontinuation of criminal proceedings against such a person as the only and fairest possible form of compensation for the course of the proceedings.