

Case C-398/23**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:**

29 June 2023

Referring court:

Sofiyski gradski sad (Bulgaria)

Date of the decision to refer:

29 June 2023

Defendant:

PT

Subject matter of the main proceedings

Criminal proceedings involving charges against 41 persons for running and participating in a criminal organisation engaged in the distribution of drugs.

Subject matter and legal basis of the request

Interpretation of Articles 4 and 5 of Framework Decision 2004/757, Article 4 of Framework Decision 2008/841, Article 6 of Directive 2012/13 and Articles 20, 47, 48 and 52 of the Charter of Fundamental Rights of the European Union ('the Charter')

Questions referred for a preliminary ruling

Is a national law which stipulates that the co-defendants and their defence counsel must give their consent in order for an agreement discontinuing criminal proceedings against a defendant to receive approval when those proceedings are at the trial stage, but under which such consent is not required when those proceedings are at the pre-trial stage, compatible with Article 4(1) and Article 5 of Framework Decision 2004/757 and Article 4 of Framework Decision 2008/841, read in conjunction with Article 20 of the Charter?

Is a national law that limits the possibility for a defendant to have the court examine the substance of an agreement he or she has entered into (under which he or she is to receive a more lenient penalty) – that limitation consisting of a requirement for the consent of the co-defendants to be obtained – compatible with Article 4(1) of Framework Decision 2004/757, read in conjunction with Articles 48(2) and 52(1) of the Charter?

Is a national law that provides for that limitation also as a consequence of providing the defendant with detailed information on the accusation compatible with Article 6(3), read in conjunction with Article 6(1) of Directive 2012/13 and in conjunction with Articles 47(1) and 52(1) of the Charter?

Provisions of European Union law and case-law relied on

Treaty on the European Union

Charter of Fundamental Rights of the European Union

Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ 2004 L 335, p. 8).

Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ 2008 L 300, p. 42)

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1)

Judgment of 6 June 2023, *O.G. (European arrest warrant issued against a third-country national)* (C-700/21, EU:C:2023:444)

Judgment of 13 June 2019, *Moro* (C-646/17, EU:C:2019:489)

Provisions of national law relied on

National procedural law – Nakazatelno-protsesualen kodeks (Code of Criminal Procedure; ‘the NPK’) – Article 381 (agreement to resolve the case entered into between the public prosecutor and the defence counsel for the accused person(s) at the pre-trial stage), Article 382 (court approval of an agreement entered into at the pre-trial stage), Article 384 (court approval of an agreement to resolve the case entered into between the public prosecutor and the defence counsel for the defendant(s) at the trial stage), Article 383 (equivalence of the effects of an approved agreement and those of a final judgment), Article 118(1)(1) (examination as a witness of an accused person/defendant in respect of whom the proceedings have been concluded by an agreement or final judgment), second limb of Article 120(1) of the NPK (obligations of the witness).

Terminology used for the purposes of the request for a preliminary ruling

‘Accused person’ means a person who, at the pre-trial stage of the proceedings, is subject to prosecution by way of an express legal act (decision designating an accused person) specifying the offence in respect of which a formal accusation is made as well as its legal classification, and informing the accused person in general terms of the suspicions against him or her.

‘Pre-trial stage’ means the preparatory stage of the criminal proceedings, which facilitates the collection of evidence and the public prosecutor’s decision on whether to lodge a bill of indictment with the court.

‘Defendant’ refers to the person (the accused person at the pre-trial stage) in respect of whom a bill of indictment has been lodged with the court (trial stage), setting out, in as detailed manner as possible, the factual and legal grounds of the accusation.

‘Trial phase’ means the actual central stage of the criminal proceedings, which is initiated by the public prosecutor lodging a bill of indictment with the court.

The agreement

If the accused person/defendant pleads guilty to the offence with which he or she has been charged, his or her defence counsel may enter into an agreement with the public prosecutor (Article 381(1) and Article 384 of the NPK). In the case of multiple defendants/accused persons, each of them may enter into such an agreement separately and independently (Article 381(7) and Article 384 of the NPK).

An agreement replaces a decision on the merits. The agreement is to govern all the points that would have to be stated in the judgment on the merits (in the judgment in criminal proceedings), that is to say, it must state the offence committed by the accused person/defendant and its legal classification, as well as the nature and extent of the penalty (amongst other points) (Article 381(5) of the NPK).

It is often the case that the penalty agreed is more lenient than the penalty that would have been imposed if the case had been heard under the ordinary procedure (Article 381(4) and Article 384 of the NPK).

An agreement is to be signed by the public prosecutor and the defence counsel. If the accused person/defendant consents to the agreement, he or she must also sign it; he or she also waives the right to have the case heard under the ordinary procedure (Article 381(6) and Article 384 of the NPK).

The parties (to the agreement) then request the court to approve the agreement (Article 382(1) and Article 384 of the NPK). If the court considers that the agreement is lawful, it is to approve it (Article 382(7) and Article 384 of the NPK).

An agreement may be entered into both during the pre-trial stage and during the trial stage of criminal proceedings (Article 381 and 384 of the NPK).

If the agreement is entered into during the pre-trial stage (that is to say, after the defence counsel has been informed of the main features of the accusation by means of the decision designating an accused person, as set out above), it suffices if solely the public prosecutor, the defence counsel and the accused person give their consent; it is not necessary for the co-accused persons and their defence counsel to give their consent (Article 381(6) of the NPK).

If the agreement is entered into during the trial stage (that is to say, after the bill of indictment has been lodged with the court and served on the defence counsel and the defendant), the consent of all parties to the court proceedings, including the co-defendants and their defence counsel, is also required (Article 384(3) of the NPK).

In the present case, the consent of the other 39 co-defendants and their legal counsel is thus required, pursuant to Article 384(3) of the NPK, in order for the agreement entered into by PT to be eligible for approval.

An agreement approved by the court at the pre-trial or trial stage of criminal proceedings has the nature of a final judgment (Article 383(1) of the NPK); this means that the accused person/defendant in respect of whom the proceedings were resolved by agreement may be examined as a witness in those same proceedings (which are continuing in respect of the co-accused persons/co-defendants) (Article 118(1)(1) of the NPK).

A witness (unlike an accused person/defendant, who has the right to remain silent) is obliged to say everything he or she knows about the case (second limb of Article 120(1) of the NPK) and may refuse to testify only in exceptional cases.

Succinct presentation of the facts and procedure in the main proceedings

- 1 Criminal proceedings are in progress against 41 persons for running and participating in a criminal organisation which sought to enrich itself through the distribution of drugs – cocaine, heroin, marijuana, amphetamine, methamphetamine and MDMA. One of those persons is PT and another is SD. Charges have also been brought for ancillary offences, namely against PT, for alleged possession of cocaine with the intention of distributing it, and against SD for having allegedly cultivated marijuana for the requirements of that criminal organisation.
- 2 A bill of indictment was initially lodged on 25 March 2020, but for procedural reasons – that is to say, because of its unclear content, which did not permit the accused persons to understand what they were being charged with – the case was referred back to the public prosecutor in order for those defects to be remedied.

- 3 During the pre-trial stage, the public prosecutor and SD's defence counsel entered into an agreement on 26 August 2020, in which SD pleaded guilty in exchange for a more lenient penalty.

The consent of the 40 co-defendants was not obtained for the purposes of approval of the agreement.

The court (not the referring court) approved the agreement on 1 September 2020.

- 4 On 28 August 2020, the Spetsializirana prokuratura (Specialised Public Prosecutor's Office, Bulgaria) filed a new, corrected version of the bill of indictment. The court proceedings were reopened before the referring court. This time, it was found that the charges were clear and detailed and suitable for the initiation of the proceedings.
- 5 Having taken cognisance of those new, corrected charges, PT asked to plead guilty and to enter into an agreement in order that he would receive a more lenient penalty. Thus, on 17 November 2020, the public prosecutor and PT's defence counsel entered into an agreement in which PT pleaded guilty; a custodial sentence of three years was decided upon, suspended for five years. Due to the fact that the consent of all co-defendants and their defence counsel had not been given, another panel of judges (different from the referring court) refused to approve that agreement on 21 January 2021.
- 6 On 10 May 2022, the public prosecutor and PT's defence counsel once again entered into the same agreement. Citing provisions of EU law, they entered a request for the consent of the co-defendants not to be sought for the purposes of approval of the agreement by the court.
- 7 On 18 May 2022, another panel of judges (different from the referring court) held that the consent of the other parties was required for the approval of the agreement and that, for that reason, approval should not be granted (without informing the other 39 co-defendants of the agreement and obtaining their consent).
- 8 On the same day, immediately following the refusal to approve the agreement, the parties to that agreement – the public prosecutor, PT and his defence counsel – confirmed to the referring court that they wished to enter into such an agreement. In particular, they also confirmed their view that the consent of the co-defendants was not required for the approval of that agreement.
- 9 The referring court states that the second agreement was rejected on the grounds that the co-defendants and their defence counsel had not given their consent, although their views in that regard had not been sought. In particular, the fact that consent had not been given in respect of the first agreement of 17 November 2020 does not warrant the conclusion that such consent would not be given in respect of the second agreement of 10 May 2022.

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

- 10 In the present case, the referring court is to determine whether it is necessary for the other 39 co-defendants to consent to the agreement entered into by PT's defence counsel and the public prosecutor in the context of the criminal proceedings pending before it concerning charges of participating in a criminal organisation engaged in the distribution of drugs and of possession of drugs for the purposes of their distribution.
- 11 In that respect, the referring court has already made a reference for a preliminary ruling in Case C-432/22, which is pending; however, in the light of the Court of Justice of the European Union's new case-law in Case C-700/21, it has decided to refer the same question from a different angle.
- 12 In view of the fact that the interpretation now sought relates to provisions of the Charter (Article 20 and 47) and that those provisions are applicable only in cases involving the application of EU law, the referring court sets out certain considerations in that regard.
- 13 According to the referring court, as the legal mechanism of entering into an agreement constitutes a means of imposing a penalty, it comes within the scope of Article 4(1) of Framework Decision 2004/757, which concerns the nature and level of the penalty for offences relating to possession of drugs for distribution purposes and provides that the penalty must be effective, proportionate and dissuasive.
- 14 In addition, the referring court considers that the agreement also constitutes a measure implementing Article 5 of Framework Decision 2004/757 and Article 4 of Framework Decision 2008/841, which provide for the possibility of imposing a more lenient penalty in cases where the accused person/defendant cooperates. That court states, in that regard, that the agreement is a legal means of putting an end to the criminal acts of the accused person/defendant, and that it enables the accused person/defendant to present evidentiary testimony concerning the conduct of his or her co-defendants, in so far as it is intended to examine him or her as a witness subsequently, after approval of the agreement.
- 15 For those reasons, the referring court therefore considers that the national legal mechanism of entering into an agreement transposes the corresponding provisions of Framework Decision 2004/757 (Article 4(1) and (5)) and Framework Decision 2008/841 (Article 4), irrespective of the fact that the national provisions were introduced before the adoption of the framework decisions, and that the Charter is therefore applicable.

The first question referred

- 16 By its first question, the referring court is seeking to ascertain whether the national legislation providing for entry into an agreement – which, by its nature, transposes Article 4(1) and Article 5 of Framework Decision 2004/757 and Article 4 of Framework Decision 2008/841 – is compatible with the requirement for equality before the law, as enshrined in Article 20 of the Charter.
- 17 The referring court cites the case-law of the Court of Justice of the European Union, which provides that the Member State's transposition discretion is not unlimited and that the fundamental principles set out in Article 6(1) of the Treaty on European Union, including the principle of equality before the law laid down in Article 20 of the Charter, must be complied with (C-700/21, paragraphs 39 and 40). According to that principle, similar situations must not be treated differently and different situations must not be treated in the same manner, unless such different treatment is objectively justified.
- 18 In that regard, the referring court considers that the accused persons and defendants have equivalent legitimate interests when entering into an agreement. They are in a comparable situation with respect to the subject matter, purpose and principles of the national legislation and, although they are equally subject to the scope of Framework Decision 2004/757 and Framework Decision 2008/841, the provisions of which do not make any distinction regarding whether the agreement is concluded at the pre-trial stage or at the trial stage, they are treated differently.
- 19 The referring court states that in the national legislation governing the entry into an agreement it is only in respect of the trial stage, vis-à-vis defendants, that the consent of the co-defendants and their legal counsel is required; the court called upon to rule on the agreement is deprived of the power to assess, with regard to the specific circumstances of the individual case, whether or not it is necessary to obtain the consent of the co-defendants (that is to say, whether that is an indispensable requirement).

The second question referred

- 20 By its second question, the referring court seeks to ascertain whether the national legislation governing agreements entered into at the trial stage constitutes a limitation on the rights of the defence guaranteed under Article 48 of the Charter, as conferred by EU law on a defendant such as PT pursuant to Article 4(1) of Framework Decision 2004/757 and, if so, whether such a limitation is compatible with Article 52 of the Charter.
- 21 In that regard, the referring court points out that the concept of 'rights of the defence' under Article 48(2) of the Charter does not refer to national law, but instead has an autonomous meaning; it is therefore for the Court alone to assess whether the agreement (concluded at the pre-trial or trial stage), as governed by Bulgarian law, constitutes a legal remedy and whether restrictions on its effectiveness are lawful.

- 22 Notwithstanding the existence of contradictory and non-binding national case-law of the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria; ‘the VKS’) concerning the question of whether the accused person/defendant has a right to an agreement, the referring court maintains that there is indeed such a right to an agreement, since the court dealing with the agreement is required to rule on its substance and the agreement provides for the imposition of a more lenient penalty.
- 23 In the light of all of the foregoing considerations, the referring court states that the national legislation governing agreements entered into at the trial stage (Article 384(3) of the NPK) constitutes a significant limitation on that legal remedy, depriving it of its effectiveness. In the present case, it appears impossible to obtain the consent of the other 39 co-defendants in order to enable PT potentially to receive the penalty provided for in the agreement, which is more lenient than that which he would receive if the proceedings were to conclude with a conviction.
- 24 It is the referring court’s opinion that, whilst the limitation in question that restricts entry into an agreement at the trial stage is provided for by law, it is not related to objectives of general interest or the need to protect the rights and interests of others for the purposes of Article 52 of the Charter, especially since there are no victims involved in the present proceedings.
- 25 The referring court considers that the interests of the co-defendants do not come within the scope of Article 52 of the Charter in so far as they have an interest in opposing the entry into an agreement by PT, who could subsequently testify against them as a witness. That interest is therefore not justified.

The third question referred

- 26 By its third question, the referring court is seeking to ascertain whether the national rules governing entry into agreements at the trial stage also constitute a limitation on the right to an effective legal remedy by limiting a right guaranteed under Article 47 of the Charter and granted to a defendant such as PT under EU law pursuant to Article 6(3) of Directive 2012/13 and, if so, whether such a limitation is compatible with Article 52 of the Charter.
- 27 In the view of the referring court, the national legislation governing entry into an agreement at the trial stage (Article 384(3) of the NPK) is an erroneous transposition of Article 6(1) of Directive 2012/13.
- 28 Applying the national rule, which provides that an accused person may enter into an agreement without the consent of the co-accused persons only at the pre-trial stage but must obtain such consent at the trial stage, produces the following outcome: by exercising his or her right of access to the full text of the bill of indictment, in accordance with Article 6(3) of Directive 2012/13, the defendant loses the option to enter into an agreement without having to obtain the consent of the co-defendants.

- 29 Thus, an accused person who accepts the more general description of the accusation set out in the decision designating an accused person, and who enters into an agreement solely on the basis of the partial information contained therein, can have the court examine that agreement without first having to obtain the consent of the co-accused. However, if accused persons wait until they have received the bill of indictment in order fully to familiarise themselves with the charges against them, and then make an informed decision to enter into an agreement, they must – once that agreement has been entered into with the public prosecutor – obtain the consent of the co-defendants in order for the court to be able to examine the substance of the agreement.
- 30 In the view of the referring court, exercise of the right laid down in Article 6(3) of Directive 2012/13 directly affects the effectiveness of the legal remedies available to the defendant under national law – in particular, it limits the possibility for entry into an agreement – which leads to the conclusion that the right of the defendant to be informed of the accusation is substantially deprived of the practical effectiveness necessary to ensure a fair trial, including with regard to the effective exercise of the rights of the defence.
- 31 The practical effectiveness of the detailed information on the accusation, which is to be provided in accordance with Article 6(3) of the directive, is also reflected in the possibility for the defendant to make an informed choice as to how to exercise his or her rights of defence, which also includes entry into an agreement. However, as an automatic consequence of the exercise of that right, the defendant is simultaneously faced with the limitation that he or she must obtain the consent of all co-defendants and their legal counsel in order for the court to be able to examine that agreement.
- 32 The referring court considers that such a limitation can be justified only in the light of Article 52 of the Charter and refers, in that regard, to its observations made in relation to the second question referred.
- 33 The referring court maintains that the situation in the present case is different from the situation in Case C-646/17, in that PT himself has not, by his own actions, caused the limitations in respect of the court's examination of the agreement he has entered into. Adopting the contrary view would be tantamount to reproaching him for wanting to exercise his right under Article 6(3) of the directive in order to obtain detailed information on the accusation before deciding to enter into an agreement. Such a reproach would largely undermine the right to information on the accusation as recognised in that directive.