Anonymised version

Case C-453/24 [Hadenov] [i]

Request for a preliminary ruling

Date lodged:

26 June 2024

Referring court:

Sofiyski gradski sad (Bulgaria)

Date of the decision to refer:

26 June 2024

Penalised person:

BC

Other party to the main proceedings:

Sofiyska gradska prokuratura

ORDER

No 1974

Sofia, 26 June 2024

SOFIYSKI GRADSKI SAD, Nakazatelno Otdelenie (Sofia City Court, Criminal Division) … […]

following consideration of … […] private prosecution No 20241100203449 of 2024

Proceedings pursuant to Article 32(1) of the Zakon za priznavane, izpalnenie i izprashtane na aktove za konfiskatsia ili otnemane i reshenia za nalagane na

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

finansovi sanktsii (Law on the recognition, execution and transfer of confiscation decisions and decisions imposing financial penalties), in conjunction with Article 16(5) thereof … […].

1. The referring court, which must rule on the recognition and execution of a financial penalty under Framework Decision 2005/214, finds that there is an optional ground for refusal under Article 7(2)(g)(i), namely the right of the penalised person to participate has been infringed. That leaves the executing authority with the choice of either refusing recognition and execution solely on the basis of that infringement or ordering recognition and execution notwithstanding the infringement.

2. Before delivering its judgment, the referring court seeks the assistance of the Court of Justice of the European Union as regards the possibility of interpreting and applying the Framework Decision in such a way that the infringement which gave rise to that ground for refusal can be remedied by the issuing authority through the assistance which the executing authority can give it. That would remove the optional ground for refusal under Article 7(2)(g)(i) of Framework Decision 2005/214.

3. That requires a request for a preliminary ruling from the Court of Justice of the European Union.

Applicable European Union law

4. Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [(OJ 2005 L 76, p. 16]; 'Framework Decision 2005/214'.

Article 7(2):

'… The competent authority in the executing State may … refuse to recognise and execute the decision if it is established that …'

(g)(i):

'according to the certificate provided for in Article 4, the person concerned … in case of a written procedure was not, in accordance with the law of the issuing State, informed personally or via a representative, competent according to national law, of his right to contest the case and of time limits of such a legal remedy.'

Article 7(3):

'In cases referred to in paragraphs 1 and 2(c) and (g), before deciding not to recognise and to execute a decision, either totally or in part, the competent authority in the executing State shall consult the competent authority in the issuing State, by any appropriate means, and shall, where appropriate, ask it to supply any necessary information without delay.'

Article 20(3):

‘Each Member State may, where the certificate referred to in Article 4 gives rise to an issue that fundamental rights or fundamental legal principles as enshrined in Article 6 of the Treaty may have been infringed, oppose the recognition and the execution of decisions. The procedure referred to in Article 7(3) shall apply.’

---

5. 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’.

Article 8(6): ‘This Article shall be without prejudice to national rules that provide for proceedings or certain stages thereof to be conducted in writing, provided that this complies with the right to a fair trial.’

---

6. 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)]; ‘Directive 2012/13’.

Article 6(3): ‘Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.’

7. Case-law of the Court of Justice of the European Union

Judgment of 15 October 2015 in [Case] C-216/14, EU:C:2015:686; ‘judgment in [Case] C-216/14’;

Judgment of 22 March 2017 in [Joined Cases] C-124/16, C-188/16 and C-213/16, EU:C:2017:228; ‘judgment in [Case] C-124/16’;

Judgment of 5 [December] 2019 in [Case] C-671/18, EU:C:2019:1054; ‘judgment in [Case] C-671/18’;

Judgment of 14 May 2020 in [Case] C-615/18, EU:C:2020:376; ‘judgment in [Case] C-615/18’;

Judgment of 6 October 2021 in [Case] C-338/20, EU:C:2021:805; ‘judgment in [Case] C-338/[20]’;

Applicable national law

8. Framework Decision 2005/214 was implemented at national level by the Zakon za priznavane, izpalnenie i izprashtane na aktove za konfiskatsia ili otnemane i reshenia za nalagane na finansovi sanktsii (Law on the recognition, execution and transfer of confiscation orders and decisions imposing financial penalties) [(DV No 15 of 23 February 2010)], … […]; 'the national law'.

9. The national law confers on the court the power to recognise a decision imposing a financial penalty and to authorise [execution thereof] (Article 31(1)) and provides for a judicial procedure involving the penalised person (Article 32(1), in conjunction with Article 16(1) to (8)). Specifically, under the national law the referring court is the executing authority within the meaning of Framework Decision 2005/21[4].

10. Article 16(4) of the national law is worded:

'The court shall the inform the person concerned of the decision and subsequently hear him or her'.

Article 16(5) of the national law is worded:

'The court may directly request the competent authority of the issuing State to supply additional information and set a time limit for the receipt thereof.'

11. The national law provides, in Article 35(9), the following optional ground for refusing to recognise and execute a financial penalty imposed in another Member State:

'The court may refuse to recognise a decision imposing a financial penalty and authorise execution thereof if it establishes that:

… according to the certificate, the person concerned, in case of a written procedure, was not, in accordance with the law of the issuing State, informed personally or via a representative of his or her right to contest the case and of time limits for such a legal remedy.

12. The national law lays down the obligation to consult the issuing authority, by any appropriate means, before deciding to refuse to recognise the decision imposing a financial penalty and to authorise execution thereof. Article 32(3) thus provides:

'The court shall consult with the competent authorities of the issuing State, by any appropriate means, before it decides not to recognise the decision imposing a financial penalty, pursuant to Article 35(9).'

13. Furthermore, Article 32(4) of the national law refers to the general rules of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure), including Article 274(2), which states that:

'… the court … shall inform … the parties of their rights as provided for in this Law'.

Under Article 55, the penalised person has the following rights:

'… to know of offence with which [the accused] is being charged in that capacity …; to participate in the trial; … to contest acts which prejudice his or her rights and legitimate interests; …'.

However, the rules on supplying information about rights and notification of the accusation apply to the national procedure for recognising the decision imposing a financial penalty. They are not intended to apply in the penalty procedure which has already been conducted in the issuing State and culminated in the issuance of the decision whose recognition and execution are the subject of the national procedure.

Facts

14. Recognition and execution of a decision imposing a financial penalty of EUR 350 on a Bulgarian national for non-payment of the toll payable at 10.28 hours on 9 June 2023 on Motorway 4 at kilometre 60.66 in Nickelsdorf (infringement of Paragraph 20(1) of the Bundesstraßen-Mautgesetz 2002 (2002 Law concerning Tolls on Federal Roads), in conjunction with […] Paragraphs 10(1) and 11(1) thereof) was sought before the referring court by a certificate pursuant to Article 4 of Framework Decision 2005/214, issued on 24 May 2024 by an Austrian non-judicial authority (Bezirkshauptmannschaft Neusiedel am See).

[It] states that the decision was issued on 24 January 2023 [*] and became final on 12 January 2024.

15. Point 2(b) of Section H of the certificate notes that a written procedure was carried out and that the penalised person was informed, in accordance with the law of the issuing State, personally or via a representative, of his right to contest the decision and of the time limits within which legal remedy must be sought. In addition, Point 3.3.3.3. of Section H notes that the penalised person was informed on 28 December 2023 of his right to contest the decision and did not seek legal remedy within the time limit laid down for doing so.

At the same time, Point 3.4 of Section H expressly notes 'without proof of service'.

16. Attached to the certificate is a decision imposing a financial penalty (penalty order) of 24 November 2023 in German and Bulgarian, stating the offence, the financial penalty imposed, the nature of the legal remedy and the time limit for

[*] Translator's note: 24 November 2023 may be meant here, as in paragraph 16.

seeking it, namely two weeks. It is clear from the wording of the decision imposing a financial penalty (penalty order) and in particular from the information in the top left-hand corner (personal details and address of the penalised person) that it was sent to be served on the person concerned.

17. However, there is no evidence that the decision imposing a financial penalty (penalty order) was actually served on the penalised person, either personally or via a representative. On the contrary, the referring court assumes, on the basis of the note 'without proof of service' in Point 3.4. of Section H, that the issuing authority itself does not claim that service was in fact effected.

18. Following supplementary information provided in the execution procedure, it was established that the penalised person had registered two addresses with the local authority, a permanent one and a current one. The address in the certificate and the decision imposing a financial penalty (penalty order) corresponds to the registered permanent address.

19. The referring court held a hearing in its capacity as the executing judicial authority. The penalised person was not present. He was summoned via his permanent address as stated in the certificate and the decision imposing a financial penalty (penalty order), it being established that he does not actually live there; the neighbours do not know the person concerned. He was also summoned via the second address – registered as the current address. That summons was returned with the note that the flat was inhabited; however, nobody would open the door to the court official; therefore, service was impossible.

20. A defence lawyer appointed by the court, who had never seen the penalised person and had no contact with him or his relatives, took part in the hearing. The defence lawyer objected to the recognition of the certificate and specifically emphasised in that regard that the decision imposing the financial penalty (penalty order) had not been served on the person concerned and that that person had not been able to exercise his right to seek legal remedy.

Assessment of the referring court as the executing authority

21. After hearing the parties on the question whether the decision imposing a financial penalty (penalty order) should be recognised, the referring court finds that all the legal conditions for granting the Austrian issuing authority's application are met, other than one, namely that the penalised person's right to participate must be safeguarded by being duly provided with information about that decision and of the possibility of contesting it before the competent authority.

22. More specifically, the referring court considers that the penalised person was not duly provided with information about the decision imposing a financial penalty (penalty order) on 28 December 2024. † That date is stated in the

† Translator's note: 28 December 2023 may be meant here.

certificate but it is clear from the note in Point 3.4. that that is only the date on which the information may have been supplied, without there being any proof thereof. Furthermore, the executing authority itself has established that the penalised person does not live at the address to which the decision imposing a financial penalty (penalty order) was sent; he may live at a different address. Therefore, there is no doubt that the person concerned was not duly provided with information about the decision imposing a financial penalty (penalty order). The defence's arguments to this effect are comprehensively substantiated.

24. Therefore, the grounds for refusal under Article 7(2)(g)(i) of the Framework Decision obtain since the penalised person has not been informed personally or via a representative. In fact, Point 3.4. of the certificate notes that there is no information about the service of the letter sent; the referring court, as the executing judicial authority, also concludes, after an additional examination, that no service has been effected.

25. The non-provision of information leads to an infringement of Article 20(3) of the Framework Decision, in conjunction with the right to information about the accusation, which accrues to the penalised person under Article 6(3) of Directive 2012/13, and in conjunction with the right to participate in any hearing following a written part of the procedure, which accrues the penalised person under Article 8(6) of Directive 2016/343.

26. However, the referring court points out that this is an optional ground for refusal. There is no obligation to refuse, rather a decision can be taken to do so.

27. Consequently, the referring court, as the executing authority, can take two approaches. Firstly, it can refuse to recognise the decision imposing a financial penalty (penalty order) and the execution thereof. Secondly, it can recognise the decision and allow the execution of the financial penalty, which is carried out by the Bulgarian tax authorities.

Proposal of the referring court

28. However, the referring court wishes to avoid the two opposing solutions since each of them involves an infringement of various aspects of EU law. If the court decides to refuse, it undermines the mechanism of judicial cooperation in criminal matters and fosters impunity. If it recognises the decision, it infringes the rights which accrue to the penalised person under EU law (see paragraph 25 above); there would then be concerns that the penalty was imposed unlawfully.

29. The referring court considers it appropriate to adopt a third, different approach, which takes account of all protected legal interests. That would mean, first, ensuring the right of the penalised person to participate in person and, second, recognising a decision imposing a financial penalty (penalty order) in so far as the issuing authority does not annul it after legal remedy has been sought before it.

30. More specifically: The referring court proposes, in its capacity as executing authority within the meaning of Framework Decision 2005/214, assisting the issuing authority in affording the penalised person the legal protection denied to him in the procedure for serving the decision imposing a financial penalty.

31. In practice, that means that the executing authority, having come to the conclusion that the decision imposing a financial penalty (penalty order) has not been duly served, contacts the issuing authority and asks it whether the penalised person can raise an objection to the decision in this case, either as an initial objection (if the issuing authority assumes that the period for seeking legal remedy has not yet started) or as restoration of his position to the status quo ante (if the time limit has expired but was not observed for important reasons).

32. It appears possible that the issuing authority will give a favourable response and specify the time limits within which an objection (possibly with an application for restoration of the position of the person concerned to the status quo ante) can be raised. The executing authority will then use all means available under national law duly to serve the decision imposing a financial penalty (penalty order), specifying the time limit for raising an objection.

33. That solution would remove the ground for refusal under Article 7(2)(g)(i) of the Framework Decision; at the same time, the right to information about the accusation, which accrues to the penalised person under Article 6(3) of Directive 2012/13, and the right to participate in any hearing following a written part of the proceedings, which accrues to the penalised person under Article 8(6) of Directive 2016/343, would be duly safeguarded.

34. Finally, the executing judicial authority could suspend its procedure and await the outcome of the legal remedy pursued by penalised person. If that person does not seek legal remedy within the specified time limit or seeks legal remedy but his objection is not upheld and the decision imposing a financial penalty (penalty order) remains in force, there is no longer any obstacle to the recognition and execution thereof.

35. If, on the other hand, the issuing authority were to reply to the request referred to in paragraph 30 above, stating that all possible legal remedies against the decision imposing a financial penalty (penalty order) were definitively time-barred, the referring court, as the executing authority, would conclude that the issuing judicial authority does not wish to grant the penalised person the rights under Article 6(3) of Directive 2012/13 and Article 8(6) of Directive 2016/343. That conclusion would be a reason to apply Article 7(2)(g)(i) of the Framework Decision and to refuse recognition and execution.

36. In the view of the referring court, that approach would be in keeping with the spirit of mutual cooperation between the Member States' authorities responsible for combating crime and would make that cooperation more effective, while at the same time safeguarding the rights accruing to penalised persons under

European Union law. It would also be consistent with the principle of mutual recognition (paragraphs 31 and 33 of [the judgment in Case] C-671/18) since safeguarding the rights of the penalised person under Article 6(3) of Directive 2012/13 and Article 8 of Directive 2016/343 would result in the removal of the obstacle to recognition (paragraph 44 of [the judgment in Case] C-671/18).

The legal possibilities provided for in the national law for supplying the penalised person with information about the decision imposing a financial penalty (penalty order)

37. The national law is worded so broadly that it allows the executing judicial authority to supply the penalised persons with information about the decision imposing a financial penalty (penalty order).

38. Article 16(4) of the national law obliges the court to provide the person concerned with information about that decision and to hear him or her subsequently; paragraph 5 [of that article] gives the executing authority the power to request additional information from the issuing authority without limiting the scope [thereof] (see paragraph 10 above); Article 32(3) necessarily requires the executing authority to consult the issuing authority before refusing to recognise the decision imposing a financial penalty (see paragraph 12 above).

39. In addition, the national law lays down an obligation on the executing authority to provide the penalised person with information about his or her rights in the national procedure for executing the decision imposing a financial penalty (penalty order) (see paragraph 13 above). In the view of the referring court, that obligation may, in the light of Article 32(3) of the national law, be interpreted more broadly as meaning that the executing authority must also, at the express request of the issuing authority, provide information about the rights which the penalised person enjoys under the law of the issuing State in the procedure for adopting the decision imposing a financial penalty and, in particular, the possibilities for raising an objection to it.

The German precedent

40. [In] its judgement in [Case] C-216/14, the Court of Justice of the European Union laid down a particularly strict condition in relation to the German legal order: actual and not [merely] presumed supply of information to the penalised person. In practice, that condition is difficult or even impossible to fulfil.

41. Therefore, the German judges proposed an alternative solution with their three questions referred in case C-124/16. In accordance with that solution, even if the decision was not in fact served on the accused person, it should be deemed to have been served and therefore the decision becomes final as uncontested; however, if the accused person has the right to apply for and obtain restoration of his or her position to the status quo ante, the legal remedy sought in due time after such restoration leads to a reopening of the case and to that person, again as the accused person, being granted real and effective protection. As can be seen from

paragraphs 47 and 48 and the operative part of the Court of Justice's judgment in [Case] C-124/16, that legal solution has been considered appropriate. The questions referred in [Case] C-615/18 (paragraph 52) and the Court of Justice's answer (paragraph 69, 76 and 77) are worded in a similar manner.

42. If the Austrian authorities see the possibility of interpreting their law in the same or a similar way, the mechanism proposed by the referring court could prove sufficiently effective.

The contribution of the executing authority to communicating information to the penalised person

43. The Court of Justice of the European Union has already ruled that Directive 2012/13 does not lay down the procedures for communicating information to the accused person about the accusation (paragraph 62 of [the judgment in case] C-216/14 and paragraph 33 of [the judgment in case] C-338/20). Consequently, there should be nothing to prevent the executing authority itself from assisting the issuing authority in duly communicating information to the penalised person. Since that person is subject to the competence of the executing authority, the latter is in a better position to provide information.

44. In addition, the Court of Justice of the European Union has pointed out that it is possible to communicate information to the accused about the accusation only at the final conviction is executed, focussing on the rights of the defence following the provision of information (paragraphs 47 and 51 of [judgment in case] C-124/16) (even though that case does not concern execution by the judiciary of another Member State).

45. However, there are doubts as to whether or not the opposite is the case. That is because Framework Decision 2005/214 does not provide for any such acts by the executing judicial authority. The notification under Article 7(3) relates to obtaining certain information and not to the performance of acts with a view to providing information that has not been provided up to that point in time.

46. For this very reason, the question is worded as conferring a power on the executing authority, that is to say the authority only performs those acts if it considers them necessary, but is not obliged to do so.

47. Accordingly, the referring court needs an answer from the Court of Justice of the European Union in order to be able to assess whether such a power is compatible with the executing authority's obligations under Framework Decision 2005/214 or must be excluded.

48. On those grounds, the referring court has, pursuant to Article 267 TFEU,

ORDERED:

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

Can the obligation relating to recognition under Article 6 of Framework Decision 2005/214, the power to consult under Article 7(3) of that decision, and the principle of preventing impunity, be interpreted as conferring on the executing authority, where it has established that there is an optional ground for refusal under Article 7(2)(g)(i) of that decision, the power to:

(1) consult the issuing authority in accordance with Article 7(3) of the Framework Decision to determine whether the penalised person has a current possibility of raising an objection to the decision imposing a financial penalty;

(2) if the answer is in the affirmative, serve the decision imposing a financial penalty on the penalised person and inform him or her of the right to object;

(3) await the outcome of any objection and take it into account in its decision as to the merits [?]

Proceedings in this case are stayed.

… […]