

Case C-372/23

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court

Date lodged:

13 June 2023

Referring court:

Administrativen sad Haskovo (Bulgaria)

Date of the decision to refer:

1 June 2023

Appellant:

VU

Respondent:

Teritorialna direksia Mitnitsa Burgas kam Agentsia ‘Mitnitsi’

Intervener:

Okrazhna prokuratura Haskovo

Subject matter of the main proceedings

Appeal on a point of law against a judgment upholding an administrative penalty order by which a customs authority had imposed a fine for the customs offence of smuggling and had confiscated for the benefit of the State the goods involved in the offence

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Is Article 15 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, read in conjunction with Article 42(1) thereof, to be interpreted as precluding a national rule such as that laid down in Article 233(1) of the Zakon za mitnitsite (Customs Law; ‘the ZM’), read in conjunction with Article 7 of the Zakon za administrativnite narushenia i nakazania (Law on administrative offences and administrative penalties; ‘the ZANN’), which provides for the imposition of a penalty for smuggling not committed intentionally in cases where a customs offence is committed through a lack of diligence consisting in failure to comply with the prescribed form of declaration of goods transported across the national border? Is a national rule lawful which, in such cases, allows the offence to be classed as customs smuggling committed through negligence, or is intent a necessary constituent of customs smuggling?
2. Is Article 42(1) of Regulation (EU) No 952/2013 to be interpreted as precluding a national rule such as that laid down in Article 233(1) of the ZM, read in conjunction with Article 7 of the ZANN, under which a first offence falling under the heading of ‘smuggling’, whether committed intentionally or through negligence, is punishable by a penalty of the same nature and the same amount, namely a fine of between 100% and 200% of the customs value of the property involved in the offence?
3. Is Article 42(2) of Regulation (EU) No 952/2013 to be interpreted as precluding national legislation, such as that under Article 233(6) of the ZM, which provides, as an additional administrative penalty, for the confiscation (removal for the benefit of the State) of the goods or property which were involved in the offence and the possession of which is not prohibited? Is confiscation of the items involved in the offence lawful in those cases where the confiscated assets belong to someone other than the offender?
4. Is Article 42(1) of Regulation (EU) No 952/2013, read in conjunction with Article 49(3) of the Charter of Fundamental Rights of the European Union, to be interpreted as meaning that a national rule such as that of Article 233(6) of the ZM, which, alongside fines, provides for the additional penalty of confiscation (removal for the benefit of the State) of the goods or property which were involved in the offence and the possession of which is not prohibited, is unlawful in the following cases by reason of constituting a disproportionately punitive interference with the right to property which is not commensurate with the legitimate goal being pursued: both generally, in those cases where the confiscated asset, being the item involved in the offence, belongs to the offender and in those cases where it belongs to a third party other than the offender, and particularly in those cases where the offender committed the offence not intentionally but through negligence?

5. Is Article 5(3) of Regulation (EU) No 952/2013, read in conjunction with Article 41 of the Charter of Fundamental Rights of the European Union, to be interpreted as meaning that the authorities carrying out customs controls must comply with the provisions of the European Code of Good Administrative Behaviour, in particular Articles 6 to 10 thereof, and that a national rule such as that laid down in Article 233(1) of the ZM, read in conjunction with Article 7(2) of the ZANN, is unlawful which provides that penalties for intentional conduct may be imposed on persons who have committed a formal and negligent infringement of customs law and that confiscation for the benefit of the State of the item involved in the offence belonging to a third party may be ordered under Article 233(6) of the ZM, without the person who acted without due diligence having previously been instructed as to how to conduct him or herself in accordance with the law and how to complete his or her documents for the carriage of goods across an external border of the European Union properly as prescribed by law?

Provisions of EU legislation and EU case-law

Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code ('Regulation No 952/2013), Articles 5, 15, 42 and 198

Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property ('Framework Decision 2005/212'), Articles 2 and 4

Charter of Fundamental Rights of the European Union ('the Charter'), Articles 17, 41, 47 and 49

European Code of Good Administrative Behaviour, Articles 6, 7, 8, 9 and 10

Judgment of the Court of Justice of 14 January 2021, *Okrazhna prokuratura – Haskovo and Apelativna prokuratura – Plovdiv* (C-393/19, EU:C:2021:8, paragraphs 1 and 2 of the operative part)

Provisions of national law

Zakon za mitnitsite (Customs Law; 'the ZM'), Articles 16, 66 and 233

Zakon za administrativnite narushenia i nakazania (Law on administrative offences and administrative penalties; 'the ZANN'), Articles 6, 7, 11, 28, 36 and 58d

Nakazatelen kodeks (Criminal Code; 'the NK'), Articles 11 and 242

Succinct presentation of the facts and procedure

- 1 By order of an investigating customs inspector in pre-trial proceedings, VU, Novi Pazar, Republic of Serbia, was brought to trial as a defendant; he was accused of having committed a criminal offence subject to public prosecution by transporting across the national border from the Republic of Türkiye to the Republic of Bulgaria at the Kapitan Andreevo border crossing in the municipality of Svilengrad, Haskovo region, on 28 May 2021, in an HGV of the Mercedes make with a semi-trailer, for commercial purposes without the knowledge or approval of the customs authorities, a large quantity of goods, namely aluminium plates of 6 mm [thickness] and a surface area of 2.80 by 1.30 m, totalling 728 m², aluminium plates of 12 mm [thickness] and a surface area of 3.66 x 1.40 m, totalling 459.62 m², and aluminium plates of 6 mm [thickness] and a surface area of 2.80 x 1.30 m, totalling 152.88 m²; altogether totalling 1 340.5 m² with a total value of 72 711.00 leva (BGN) (offence under Article 242(1)(e) of the NK).
- 2 By order of a public prosecutor of the Okrazhna prokuratura Haskovo (Haskovo Regional Prosecutor's Office), the criminal proceedings were terminated for lack of evidence; the material evidence was returned to the director of the Teritorialna direksia Mitnitsa Burgas (Burgas Regional Customs Directorate) for an opinion.
- 3 As the referring court has indicated, the criterion for distinguishing between the criminal offence of aggravated smuggling (Article 242(1)(e) of the NK) and the administrative offence of customs smuggling (Article 233 of the ZM) is the value of the smuggled property.
- 4 In the course of the proceedings, an opinion was formulated at the Burgas Regional Customs Directorate, in which it was stated that the customs value of the goods described amounted to BGN 73 140.06.
- 5 On 10 December 2021, on the basis of that assessment, the Deputy Director of the Burgas Regional Customs Directorate issued an administrative penalty order imposing on VU a fine of BGN 73 140.06 for violating Article 233(1) of the ZM (**point I**) and confiscating, for the benefit of the State, aluminium plates of 6 mm [thickness] and a surface area of 2.80 x 1.30 m, totalling 728 m², aluminium plates of 12 mm [thickness] and a surface area of 3,66 x 1.40 m, totalling 307.44 m², aluminium plates of 12 mm [thickness] and a surface area of 3.66 x 1.54 m, totalling 152.88 m², as well as aluminium plates of 4 mm [thickness] and a size of 2.88 x 1.30 m, totalling 152.88 m² – altogether totalling 1 340.5 m², with a customs value of BGN 73 140,06 (**point II**). **Point III** of that administrative penalty order indicated that the articulated lorry owned by the legal person ZEBEX D.O.O., Republic of Serbia, comprising the Mercedes tractor unit and the semi-trailer, two registration certificates and one ignition key, held by the legal person, was **not** to be confiscated for the benefit of the State but surrendered to the owner or to a person authorised by the owner.

- 6 **Points I and II** of the administrative penalty order were contested by VU before the Rayonen sad Svilengrad (Svilengerad District Court). By judgment of 17 January 2022, that court upheld the order. It found that VU had in fact transported goods of a commercial nature and quantity across the national border and imported them into Bulgaria without the knowledge or approval of the customs authorities, thereby committing the offence of ‘customs smuggling’ under Article 233(1) of the ZM in the second of the specified methods of performance (transport), as VU had not previously fulfilled the obligation to make a written declaration for the transported goods. The Svilengrad District Court also held that the appellant’s oral communication indicating that the goods which he was transporting weighed approximately 23 000 kg in no way matched the defining characteristics of the term ‘declaration’, since a declaration included an exhaustive, precise and unequivocal indication of the articles transported and the quantities of each article in a written customs declaration. The court stated that an oral declaration was admissible if the goods were not of a commercial nature, if they were of a commercial nature but were contained in the traveller’s personal luggage and in other circumstances. In the light of the established facts, it could be logically concluded, the court held, that the appellant was guilty of a lack of diligence since, if he had complied more carefully with his obligations, he would have established at the very start of the transport operation that the goods actually being transported did not correspond to those described in the transport documents. It concluded that, since that lack of diligence amounted to negligence and, in the light of Article 7(2) of the ZANN and of the fact that negligence as a form of culpability in the commission of an offence was not expressly ruled out by law under Article 233(1) of the ZM, the constituent elements of that offence were undoubtedly present.
- 7 The Svilengrad District Court considered that, in its nature and extent, the administrative penalty had been correctly applied. In accordance with Article 233(1) of the ZM, a fine corresponding to 100% of the customs value of the undeclared goods, that is to say BGN 73 140.06, had been imposed. The administrative penalty order was also found to be lawful and correct as regards the confiscation for the benefit of the State of the goods involved in the offence. The court held that part of the order to be wholly lawful, since it was founded on the applicable legal basis (Article 233(6) of the ZM).

The essential arguments of the parties in the main proceedings

- 8 VU argues that the offence of ‘customs smuggling’ cannot be committed through culpable negligence, since the very concept of ‘smuggling’ implicitly includes the existence of an intentional act. In the present case, he submits, the offence was committed negligently, but the provision of Article 233 of the ZM which was applied by the administrative enforcement authority served to combat intentional smuggling. The imposition of a penalty, namely a fine of 100 to 200% of the customs value of the undeclared goods (100% in the present case), he argues, is therefore inconsistent with the purpose of the law.

- 9 VU further submits that, through the penalty order, goods belonging to a third party who had nothing to do with the offence committed had been confiscated for the benefit of the State. He states that the aluminium plates confiscated for the benefit of the State, with a total value of BGN 73 140.06, were the property of a Serbian undertaking and were, through negligence, not declared by the carrier to the customs authorities in the prescribed form.
- 10 In connection with this submission, VU claims that the administrative penalty order infringes European Union law. In that regard, he argues in particular that the conduct of the customs officials during his inspection did not comply with Articles 6, 7, 8, 9 and 10 of the European Code of Good Administrative Behaviour ('the Code') and Article 41 of the Charter and that he was held liable in the present case in breach of Article 7 of the Code. He submits that he communicated the necessary information orally to the customs officers, which was why it could not be assumed that he negligently and without the knowledge or approval of the customs authorities brought (transported) goods across the national border which were not declared in the prescribed form. The appellant emphasises that the administrative penalty order confirmed by the district court, as well as imposing the fine, ordered the confiscation for the benefit of the State of the undeclared goods, which were the property of another person, that being a penalty for which Article 42(2) of Regulation No 952/2013 makes no provision. Framework Decision 2005/212, he argues, is applicable *per argumentum a fortiori*, and Article 2(1) thereof, read in conjunction with Article 17(1) of the Charter, as well as Article 4 thereof, read in conjunction with Article 47 of the Charter, should also be interpreted, on the basis of the judgment of the Court of Justice of the European Union of 14 January 2021 in Case C-393/19, as also applying in cases where the conduct at issue does not constitute a criminal but an administrative offence. Smuggling, therefore, can only be committed intentionally, he submits, and so the first paragraph of Article 233 of the ZM is not applicable to acts of negligence, notwithstanding Article 7(1) and (2) of the ZANN, while Article 4 of Framework Decision 2005/212 and Article 47 of the Charter do not allow property belonging to a person other than the offender to be confiscated in criminal proceedings without that person having effective remedies.
- 11 For the reasons set out above, VU requests that the judgment under appeal and the administrative penalty order confirmed by it be set aside. In the event that the Court of Cassation finds that national law has not been applied in accordance with EU law, the referring court is requested to make a reference to the Court of Justice of the European Union for a preliminary ruling on the interpretation of provisions of EU law.
- 12 The respondent contends that the appeal on a point of law is unfounded.
- 13 The Haskovo Regional Public Prosecutor's Office states that it will comment on the appeal on a point of law in the course of the main proceedings. It considers that the request for a reference for a preliminary ruling must be rejected.

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

- 14 The referring court acknowledges that the lack of a legal provision in the *lex specialis* of the ZM (Customs Law) distinguishing between the intentional and negligent commission of the administrative offence defined in Article 233(1) of the ZM may be contrary to EU law. In that regard, it considers that the question whether VU committed an administrative offence and how it should be penalised was possibly not handled fairly within the meaning of Article 41(1) of the Charter. The imposition of a penalty without a distinguishing criterion relating to the form of culpability entails the application of the provision of national law relied on to all persons who have fulfilled the objective conditions for commission of the offence referred to in that provision, which means that the persons concerned are treated in the same way regardless of the fact that, in some cases, the offenders may not have intended or attempted to bring or transport goods across the national border without the knowledge or approval of the customs authorities. The approach taken by the national legislature in the situation under consideration may be regarded as contrary to the principle of proportionality between the severity of the penalty and the offence, which must be regarded as contrary to Article 49(3) of the Charter. In that context, it may also be argued that the action of the customs authorities is not consistent with Articles 6 to 10 of the Code. The rule which applies in the present case does not always afford the person on whom a penalty has been imposed the legal opportunity to prove that he or she did not commit his or her acts intentionally and hence the possibility of obtaining a reduction, annulment or commutation of the penalty into a less severe penalty. These alternatives are at the discretion of the administrative enforcement authorities, which may take a decision to that effect under Article 28 of the *lex generalis*, the ZANN; a second, similar option in this respect is to reach a plea agreement under Article 58d of the ZANN.
- 15 On the other hand, it is conceivable that the relevant national provisions in the present case comply with EU law and that the State (through the customs authorities in the present case), by applying those provisions, is acting in conformity with Article 15(1) and (2) and Article 42(1) and (2) of Regulation No 952/2013, that there has been no breach of Article 41(1) or Article 49(3) of the Charter or of other provisions of EU law and that the customs authorities have not breached the Code.
- 16 Then it should be recalled that, in its judgment of 14 January 2021 in Case C-393/19, delivered in the context of a request for a preliminary ruling made by the Apelativen sad Plovdiv (Court of Appeal, Plovdiv, Bulgaria), the Court of Justice held as follows:

‘Article 2(1) of Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, read in the light of Article 17(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a national law which permits the

confiscation of an instrumentality used to commit an aggravated smuggling offence where that property belongs to a third party acting in good faith.

2. Article 4 of Framework Decision 2005/212/JHA, read in the light of Article 47 of the Charter of Fundamental Rights, must be interpreted as precluding a national law which permits the confiscation, in the context of criminal proceedings, of property belonging to a person other than the person who committed the criminal offence, without the former being afforded an effective remedy.’

- 17 The examination carried out in the above-mentioned judgment of the Court concerned national legislation of the Republic of Bulgaria, namely Article 242(7) and (8) of the NK (paragraph (8) has since been declared unconstitutional by a judgment of the Konstitusionen sad (Constitutional Court) of the Republic of Bulgaria, but paragraph (7) remains in force). Under Article 242(7) of the NK, the smuggled property, regardless of its ownership, is confiscated for the benefit of the State; if it no longer exists or has been sold, the recovery of its value is ordered on the basis of the national retail selling price.
- 18 The confiscation for the benefit of the State of the property involved in the offence, ordered by part II of the administrative penalty order confirmed by the Svilengrad District Court, constitutes a similar case to that which is regulated in Article 242(7) of the NK, the difference being that the property was confiscated in the present case on account of an administrative offence (under Article 233(1) of the ZM), not on account of a criminal offence.
- 19 For the reasons set out above, the referring court considers it necessary that the Court of Justice of the European Union rule expressly on the confiscation of the property involved in an administrative offence under Article 233(1) of the ZM and, as appropriate, that clarity be established as to whether Article 233(6) of the ZM is contrary to EU law.
- 20 Having regard to Article 17 of the Charter and Article 42(2) of Regulation No 952/2013, it is reasonable to consider that the confiscation of the property involved in the offence infringes VU’s rights. Consideration of the question of confiscation of the property involved in the offence for the benefit of the State is relevant in the present case, since the offender is responsible to the owner of the goods which he is transporting for those goods. For this reason, the confiscation of the goods by means of an administrative penalty order may spill over into the sphere of VU’s own legal rights and obligations in that actions for indemnification or other claims may be brought against him.
- 21 On the other hand, it may be argued that the confiscation of the property involved in the offence for the benefit of the State under Article 233(6) of the ZM is a lawful act which complies with Article 2 of Framework Decision 2005/212, Article 42 and Article 198(1)(a) of Regulation No 952/2013 and other provisions of EU law and is compatible with the provisions of the Code.

- 22 According to the referring court, Article 7(2) of the ZANN, which is the general rule in relation to Article 233(1) of the ZM, was introduced by the legislature in view of the lesser public threat arising from administrative offences compared, for example, with offences defined in the NK (Criminal Code), which lists the cases where provision is made for a penalty that depends on the form of culpability (intent or negligence). It could therefore be assumed that the penalty provided for in Article 233(1) of the ZM does not go beyond the normative content of Article 42 of Regulation No 952/2013 and is not contrary to Article 49(3) of the Charter. In addition, Article 233(1) of the ZM provides for a maximum penalty of 100% to 200% of the customs value of the goods, which means that the administrative enforcement authority applies the provision in the light of all the facts and circumstances of the case, including the form of culpability.
- 23 For the reasons set out above, the referring court considers it necessary, in order to determine properly the dispute before it, to refer the questions it has formulated, pursuant to Article 267(3) TFEU, read in conjunction with Article 267(1)(a) and (b) thereof, and to request that the case be joined with Case C-717/22 of the Court of Justice of the European Union for joint consideration.
- 24 Case C-717/22 of the Court of Justice of the European Union concerns a request for a preliminary ruling under Article 19(3)(b) TEU, read in conjunction with Article 267 TFEU (procedure provided for in Article 93 et seq. of the Rules of Procedure of the Court of Justice). The questions referred for a preliminary ruling have been raised in administrative enforcement proceedings pending before the Svilengrad District Court since 2022 on the basis of an action brought by Sistem Lux OOD, Serbia.