Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 13 January 2022 [1]

Case C-569/20

Criminal proceedings against
IR
interested party:
Spetsializirana prokuratura

(Request for a preliminary ruling from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria))

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive (EU) 2016/343 – Right to be present at the trial – Articles 8 and 9 – Requirements in the event of a conviction *in absentia* – Right to a new trial – Absconding of the accused person – National legislation excluding the reopening of criminal proceedings when the person convicted *in absentia* has absconded after learning of the charges brought against him during the investigation phase of the proceedings)

I. Introduction

1. Can an individual who has been convicted following a trial at which he did not appear in person because he absconded be entitled to a new trial, in accordance with the second sentence of Article 8(4) and Article 9 of 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? [2]

2. That, in essence, is the subject matter of the questions referred for a preliminary ruling by the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria).

3. This request was made in criminal proceedings in which the decision was taken to bring IR to trial *in absentia*. Although that individual was informed of the charges against him during the preliminary investigation stage, he absconded, with the result that he was not informed of either the definitive indictment, or the date and place of his trial, or the consequences of any failure to appear.

[1] Original language: French.

[2] OJ 2016 L 65, p. 1.

4. The referring court is therefore uncertain as to the scope of the requirements laid down by the EU legislature in Directive 2016/343 in order to safeguard the latter's rights of defence. In particular, it seeks to determine whether it will be possible to enforce the decision handed down at the end of the trial held in his absence pursuant to Article 8(2) and (3) of that directive or, on the contrary, whether it will be necessary to arrange a new trial, pursuant to the second sentence of Article 8(4) and Article 9 of that directive.

5. In this Opinion, I shall explain that, while informing the accused person of his trial is an essential requirement laid down in Directive 2016/343 for ensuring that the rights of defence are complied with, the EU legislature nevertheless allows the Member States to examine the extent to which that requirement has been satisfied *in concreto*. It invites the Member States to pay particular attention to the conduct of both the competent national authorities in communicating that information and of that person in receiving it.

6. In that context, I shall set out the reasons why Article 8(2) and (3) of Directive 2016/343, which allows Member States to enforce a decision delivered following a trial at which the accused person did not appear, covers a situation in which the national court finds, having regard to all the specific circumstances of the situation at issue, that, despite the diligence and efforts of the competent national authorities to inform the accused person of his trial and the consequences of non-appearance, that person has deliberately and intentionally failed to fulfil the obligations incumbent on him to receive that information with a view to evading the course of justice. I shall clarify that, in a situation in which the national court makes such findings, the second sentence of Article 8(4) and Article 9 of Directive 2016/343 do not preclude national legislation under which a new trial is not to be granted where the accused person has absconded after having been informed of the charges against him during the preliminary investigation stage, but before he is informed of the definitive indictment.

II. Legal context

A. Directive 2016/343

7. Directive 2016/343 lays down, in accordance with Article 1 thereof, common minimum rules concerning, first, certain aspects of the presumption of innocence and, secondly, the right to be present at the trial.

8. Recitals 37 and 38 state:

'(37) It should … be possible to hold a trial which may result in a decision on guilt or innocence in the absence of a suspect or accused person where that person has been informed of the trial and has given a mandate to a lawyer who was appointed by that person or by the State to represent him or her at the trial and who represented the suspect or accused person.

(38) When considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention should, where appropriate, also be paid to the diligence exercised by public authorities in order to inform the person concerned and to the diligence exercised by the person concerned in order to receive information addressed to him or her.'

9. Article 8 of that directive, entitled 'Right to be present at the trial', provides in paragraphs 1 to 4 thereof:

'1. Member States shall ensure that suspects and accused persons have the right to be present at their trial.

2. Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that:

(a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or

(b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State.

3. A decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned.

4. Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in paragraph 2 of this Article because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced. In that case, Member States shall ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9.'

10. Article 9 of that directive, entitled 'Right to a new trial', provides:

'Member States shall ensure that, where suspects or accused persons were not present at their trial and the conditions laid down in Article 8(2) were not met, they have the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed. In that regard, Member States shall ensure that those suspects and accused persons have the right to be present, to participate effectively, in accordance with procedures under national law, and to exercise the rights of the defence.'

B. Bulgarian law

11. Article 55(1) of the Nakazatelno-protsesualen kodeks (Criminal Procedure Code, 'the NPK') states:

'The accused person shall have the following rights: … to participate in criminal proceedings …'

12. Article 94(1) and (3) of the NPK provides:

'(1) The participation of a defence counsel in criminal proceedings is mandatory if:

…

8. the case is tried in the absence of the accused person;

…

(3) Where the participation of a defence counsel is mandatory, the competent authority shall appoint a lawyer as a defence counsel.'

13. Article 247b(1) of the NPK is worded as follows:

'By order of the Judge-Rapporteur, a copy of the indictment shall be served on the accused person. Through service of the indictment, the accused person shall be informed of the date fixed for the preliminary hearing, the matters referred to in Article 248(1), his right to appear in court with a defence counsel of his choice, the possibility of having a defence counsel officially appointed in the cases provided for in Article 94(1) and the fact that the case may be tried and decided in his absence, in accordance with Article 269.'

14. Article 269 of the NPK provides:

'(1) In cases where the accused person has been indicted for a serious criminal offence, his presence at the hearing shall be mandatory.

…

(3) Provided that this does not prevent the truth from being ascertained objectively, the case may be tried in the absence of the accused person, if:

1. he is not to be found at the address indicated by him or he has changed address without notifying the competent authority;

2. his place of residence in Bulgaria is not known and has not been identified following an extensive search;

…

4. [that residence] is outside the territory of the Republic of Bulgaria, and

   (a) his place of residence is not known;

   …'

15. Article 423(1) to (3) of the NPK provides:

'(1) Within 6 months of becoming aware of a final judgment in criminal proceedings or of the actual communication of such a judgment to the Republic of Bulgaria by another country, the person convicted *in absentia* may request the reopening of the criminal case, relying on the fact that he was not present during the criminal proceedings. The request shall be granted, except, first, in the event that the convicted person has absconded after notification of the charges in the preliminary procedure, with the result that the procedure under Article 247b(1) cannot be carried out or, secondly, after that procedure was carried out, the convicted person failed to appear at the hearing without a valid reason.

(2) The request shall not suspend enforcement of the criminal conviction, unless the court decides otherwise.

(3) The procedure for reopening the criminal case shall be terminated if the person convicted *in absentia* fails to appear at the hearing without a valid reason.'

16. Article 425(1)(1) of the NPK states:

'Where the court finds the request to reopen the proceedings is well founded, it may:

1. overturn the conviction … and refer the case for a new trial and shall indicate the stage from which the new examination of the case shall begin'.

III. The dispute in the main proceedings and the questions referred for a preliminary ruling

17. The Spetsializirana prokuratura (Specialised Public Prosecutor's Office, Bulgaria) brought criminal proceedings against IR because of his alleged participation in an organised crime group with the objective of committing tax offences punishable by custodial sentences.

18. The indictment was served on IR personally. Following that notification, IR indicated the address at which he could be contacted. However, he was not found at that address either during the judicial stage of the criminal proceedings or at the time of the attempts by the Spetsializiran nakazatelen sad (Specialised Criminal Court) to summon him to the hearing. Moreover, the lawyer instructed by him ceased to defend him. The referring court appointed a lawyer of its own motion who did not, however, get in contact with IR.

19. The indictment was vitiated by an irregularity and, consequently, that act was declared void and the judicial proceedings initiated against him were closed. [3]

20. A fresh indictment was subsequently drawn up and the proceedings were reopened. However, IR was sought on that occasion too, including through his family members, his former employers and mobile telephone operators, but could not be located. It thus appears that, in the new legal proceedings, the competent national authorities were unable to notify the new indictment adopted against IR, despite the steps they took to that end, owing to the fact that he had absconded.

21. The referring court considers that the case must be heard in the absence of IR; this was discussed at the first hearing of the case. It states, however, that, in the event that IR is convicted *in absentia*, it will have to set out in its decision the procedural safeguards available to him following the trial and, in particular, the remedies available to him, so as to ensure compliance with Directive 2016/343.

22. As regards both the proper conduct of a trial *in absentia* and the legal remedies, there is an ambiguity as regards the procedural guarantees which the person concerned must enjoy in a situation such as that at issue, where, after having been notified of the first indictment and before the commencement of the judicial phase of the criminal proceedings, he absconded. The referring

[3] In accordance with the case-law of the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria), the vitiated act must be replaced by a new act, it being specified that the court cannot itself remedy infringements of essential procedural requirements committed by the prosecutor, but must, to that end, refer the case back to the latter.

court states, moreover, that it cannot be ruled out that IR might be found and arrested in the territory of another Member State and surrendered to the Bulgarian authorities pursuant to a European arrest warrant. The questions on the scope of Directive 2016/343 should therefore be examined in the light of Article 4a of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,[4] as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.[5]

23. In those circumstances, the Spetsializiran nakazatelen sad (Specialised Criminal Court) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Article 8(2)(b) in conjunction with recitals 36 to 39 of Directive 2016/343 and Article 4a(1)(b) in conjunction with recitals 7 to 10 of Framework Decision [2002/584] to be interpreted as covering a case in which the accused person was informed of the list of charges against him, in its original version, and then, due to the fact that he has fled, objectively cannot be informed of the trial and is defended by a lawyer appointed *ex officio* with whom he has no contact?

(2) If this is answered in the negative:

Is a national provision (Article 423(1) and (5) of the NPK), pursuant to which no provision is made for any legal protection against investigative measures carried out *in absentia* and against a conviction handed down *in absentia* where the accused person, after having been informed of the original list of charges, is in hiding and therefore could not be informed of the date and place of the trial or of the consequences of non-appearance, consistent with Article 9 in conjunction with the second sentence of Article 8(4) of Directive 2016/343 and Article 4a(3) in conjunction with Article 4a(1)(d) of Framework Decision [2002/584]?

(3) If this is answered in the negative:

Does Article 9 of Directive 2016/343 in conjunction with Article 47 of the Charter [of Fundamental Rights of the European Union] have direct effect?'

24. Only the European Commission submitted written observations and replied to the Court's written questions.

IV. Analysis

A. Admissibility

25. In order to examine the reference for a preliminary ruling, it is necessary to make a preliminary observation on the admissibility of the first and second questions referred.

26. Those two questions each consist of two parts. The first part concerns the interpretation of the relevant provisions of Directive 2016/343, while the second part relates to that of the provisions of Framework Decision 2002/584. Like the Commission, I consider that the interpretation of the provisions of that framework decision, and in particular of Article 4a

4 OJ 2002 L 190, p. 1.

5 OJ 2009 L 81, p. 24, 'Framework Decision 2002/584'.

thereof, is not relevant to the outcome of the dispute in the main proceedings. In the light of the factual context described in the request for a preliminary ruling, I note that the dispute pending before the referring court, in which that court is called upon to give a decision, does not concern, either primarily or indirectly, the question of the validity or execution of a European arrest warrant. The interpretation sought by the Spetsializiran nakazatelen sad (Specialised Criminal Court) of the provisions laid down in Article 4a of that framework decision is in fact a hypothetical problem, since that court notes that it cannot be ruled out that IR might be found and arrested in the territory of another Member State and surrendered to the Bulgarian authorities pursuant to a European arrest warrant.

27. In those circumstances, I propose, in accordance with the case-law of the Court, that the first and second questions referred for a preliminary ruling be declared inadmissible in so far as they concern the interpretation of Framework Decision 2002/584. [6]

B. Substance

28. The present reference for a preliminary ruling asks the Court, in essence, to determine the extent to which a person convicted following a trial at which he did not appear can benefit, pursuant to Article 9 of Directive 2016/343, from a new trial where that person, having been notified of an indictment which has subsequently been annulled, has absconded, with the result that he has not been informed of either the definitive indictment, or his trial, or the consequences of non-appearance, on the one hand, and is represented by a lawyer appointed by the State with whom he has no contact, on the other.

29. The referring court submits its questions to the Court in the light of the provisions laid down in Article 423(1) of the NPK. That article lays down the principle that the application to reopen the criminal proceedings is granted where that request is made by a person convicted *in absentia* within six months of his knowledge of the conviction. [7] However, that article provides for exceptions to that principle. [8] Thus, the request that the criminal proceedings be reopened may be rejected where the convicted person has absconded after notification of the charges during the investigation, but before he has been notified of the definitive indictment. According to the referring court, it follows that no new trial is granted in a situation where the accused person was therefore not informed of either the preliminary hearing, or the possibility of being represented by a lawyer or the consequences of failing to appear.

30. Since no provision of Directive 2016/343 provides any clear indication as to the legal regime applicable to an absconded person or as to the rights conferred on that person following a trial at which he did not appear, the referring court therefore asks the Court to determine whether such a rule is compatible with that directive.

6 See, inter alia, judgments of 29 January 2013, *Radu* (C-396/11, EU:C:2013:39, paragraph 22 and the case-law cited), and of 28 October 2021, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo* (C-319/19, EU:C:2021:883, paragraph 24 and the case-law cited).

7 Under Article 425(1)(1) of the NPK, the reopening of criminal proceedings may result in the annulment of the conviction and the referral of the case so that it may be re-examined on the merits at the stage at which the court indicates that the re-examination of the case must begin.

8 The application may be refused in two types of situation. The present request for a preliminary ruling falls within the first situation. The second situation is where the definitive indictment was served on the convicted person who, without good reason, did not appear at the hearing.

31. To that end, it asks the Court to clarify whether a person in the situation of IR must be regarded as falling within the legal regime laid down in Article 8(2) and (3) of Directive 2016/343, under which it is possible to enforce the decision handed down following a trial at which that person did not appear (first question), or rather that referred to in Article 8(4) and Article 9 of that directive, under which that person should benefit from a new trial (second question).

32. Since those two sets of rules are connected, I propose that the Court examine the first and second questions together.

33. I shall begin my analysis with an examination of the wording of Articles 8 and 9 of Directive 2016/343, before focusing, first, on the objectives which the EU legislature seeks to pursue in the context of that directive and, secondly, on the case-law established by the European Court of Human Rights with regard to compliance with Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. [9]

1. Textual analysis of Article 8(2) and (4) and Article 9 of Directive 2016/343

34. After confirming the principle that accused persons have the right to be present at their trial, the EU legislature permits Member States to provide for procedures to enable persons to be tried in their absence. Thus, under Article 8(2) and (3) of Directive 2016/343, Member States may provide for a trial in the absence of the accused person and for the enforcement of the decision adopted at the end of that trial. Those provisions are based on the premiss that that person was informed of the date and place of his trial, with the result that he is considered to have voluntarily and unequivocally waived his right to be present at it.

35. As I shall demonstrate, it is clear from Articles 8 and 9 of that directive that persons convicted in proceedings in which they did not appear can be divided into two categories. First, that of the persons for whom it is certain that they were or could have been aware of the date and place of their trial and, secondly, that of the remainder. Persons in the second category are entitled to a new trial, whereas persons in the first category do not benefit from such a measure. The EU legislature lays down two conditions for a refusal to organise a new trial. [10]

36. The first condition, referred to in Article 8(2)(a) of Directive 2016/343, relates to the provision of information to the accused person. That person must have been informed, in due time, of his trial and of the consequences of non-appearance. In other words, that person must have been aware of the fact that a decision on guilt or innocence may be made against him if he is not present at the trial.

37. The second condition, referred to in Article 8(2)(b) of that directive, relates to the representation of the accused person by a lawyer. It covers the case in which that person, having been informed of the trial, deliberately chose to be represented by legal counsel instead of appearing in person at the trial. [11] That is, in principle, sufficient to demonstrate that he waived his right to be present at his trial, while guaranteeing his right to defend himself. The European Court of Human Rights considers that the right of everyone charged with a criminal offence to be effectively defended by a lawyer, appointed officially if need be, is one of the fundamental features of a fair trial. An accused person does not lose the benefit of that right merely on

9 Signed in Rome on 4 November 1950 ('the ECHR').

10 See also recital 35 of that directive.

11 See also recital 37 of Directive 2016/343.

account of not being present at the trial. It is therefore of crucial importance for the fairness of the criminal justice system that the absence of the accused person from his trial is not penalised by derogating from the right to the assistance of a defence counsel and that he be adequately defended both at first instance and on appeal. [12]

38. In the first place, I note that, in order for each of those conditions to be satisfied, it is necessary for the accused person to have been informed of his trial. Compliance with that obligation is therefore essential for the purpose of enforcing a conviction delivered following a trial at which that person did not appear.

39. In the second place, I note that failure to comply with that obligation to notify results in the application of the rules laid down in Article 8(4) and Article 9 of Directive 2016/343, since the competent national authorities are then required to ensure that the accused person benefits from a new trial. As is clear from the wording of those articles, [13] the provisions referred to in Article 8(2) and (3) and those laid down in Article 8(4) and Article 9 of that directive are linked in such a way as to form a coherent whole, with the provision of information to that person constituting a 'tipping point' between the two bodies of rules.

40. The scope of the right to a new trial is therefore defined in Article 9 of that directive.

41. As regards the form of the new trial, the EU legislature leaves it to the Member States to determine the system of legal remedies and procedures which ensure respect for the rights of defence of persons convicted *in absentia*. That is perfectly consistent in view of the minimal nature of the rules laid down by Directive 2016/343, [14] since that directive is not a complete and exhaustive instrument intended to lay down all the conditions for the adoption of a judicial decision. [15] The choice of those methods falls within the procedural autonomy of the Member States and is made on the basis of the particular features of their legal system.

42. As regards the scope of that new trial, the EU legislature, however, imposes precise and unequivocal obligations on the Member States. It requires them to establish a procedure which allows a fresh determination of the merits of the case, including examination of new evidence, and which may, moreover, lead to the original decision being reversed. It then requires Member States to ensure that the accused person enjoys, in the context of that new legal remedy, the right to be present and actually participate in the proceedings which result therefrom, in accordance with the procedures laid down by national law, and that he will be able to exercise his rights of defence.

43. Here, the EU legislature integrates the essential requirements of a new trial established by the European Court of Human Rights, which I set out in points 66 and 67 of this Opinion. [16]

[12] See, in that regard, judgments of the ECtHR of 13 February 2001, *Krombach v. France* (CE:ECHR:2001:0213JUD002973196, § 89), and of 1 March 2006, *Sejdovic v. Italy* (CE:ECHR:2006:0301JUD005658100, § 91).

[13] The provisions on the right to a new trial are applicable only in so far as 'it is not possible to comply with the conditions laid down in [Article 8(2)] because a suspect or accused person cannot be located despite reasonable efforts having been made' (Article 8(4)) or 'the conditions laid down in Article 8(2) [are] not met' (Article 9).

[14] See Article 1 and recitals 2 to 4 and 9 of that directive.

[15] See judgment of 19 September 2018, *Milev* (C-310/18 PPU, EU:C:2018:732, paragraphs 45 to 47).

[16] The European Court of Human Rights also considers that the Contracting States to the ECHR enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6 of that convention, provided, however, that the resources available under domestic law are shown to be effective where a person 'charged with a criminal offence' has neither waived his right to appear and to defend himself nor sought to escape trial. See, by way of illustration, ECtHR, 14 June 2001, *Medenica v. Switzerland* (CE:ECHR:2001:0614JUD002049192, § 55).

44. Following that examination of the wording of Directive 2016/343, I note that a situation in which the accused person has not been informed of either the trial or the consequences of non-appearance does not therefore, a priori, fall within the scope of the provisions laid down in Article 8(2) of that directive, but within those laid down in Article 8(4) thereof.

45. However, there continues to be a 'grey area' concerning the situation of persons who have not been informed of their trial for a reason which is attributable to them. The question which must be answered in the present case is, in particular, whether that interpretation is applicable in a situation in which the accused person was unable to be informed of either his trial or the consequences of failing to appear by reason of the fact that he absconded.

46. In other words, did the EU legislature intend to render compliance with the obligation to provide information an absolute requirement, irrespective of the conduct of the accused person and, in particular, the reasons why that person could not be located, despite the efforts made by the competent national authorities? Does the EU legislature require Member States to provide for a new trial every time an accused person absconds?

47. For the reasons which I shall now set out, I am not convinced that such is the case.

48. In the first place, it is apparent from recital 36 of Directive 2016/343 that the obligation on the competent national authorities to inform the accused person of the trial implies that he is summoned in person or officially informed in due time, by other means, of the scheduled date and place of the trial in such a way as to enable him to be aware of it. Here too, the EU legislature integrates the case-law of the European Court of Human Rights, according to which an accused person cannot be said to have implicitly, by his conduct, waived the right to take part in his trial unless it has been shown that he could reasonably have foreseen what the consequences of his conduct would be in that regard.[17] The national courts must therefore exercise due diligence by summoning the accused person properly,[18] which means that he must be notified of a hearing in such a way as not only to have knowledge of the date, time and place of the hearing, but also enough time to prepare his case and to attend the court hearing.[19]

49. However, it follows from recital 38 of Directive 2016/343 that the manner in which the information is provided and, in particular, its adequacy, may be the subject of a review. The EU legislature states that, 'when considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention should, where appropriate, also be paid to the diligence exercised by public authorities in order to inform the person concerned and to the diligence exercised by the person concerned in order to receive information addressed to him or her'.

50. From that I infer that the Member States may then carry out a case-by-case examination of the manner and circumstances in which the information was communicated to the accused person. The use of the expressions 'where appropriate' and 'also' is intended, in my view, to show that the Member States may take into consideration factors other than those relating to the nature, form or content of the document by which the information was communicated. By

[17] See, inter alia, judgments of the ECtHR of 1 March 2006, *Sejdovic v. Italy* (CE:ECHR:2006:0301JUD005658100, §§ 87 and 89); of 24 April 2012, *Haralampiev v. Bulgaria* (CE:ECHR:2012:0424JUD002964803, § 33), and of 22 May 2012, *Idalov v. Russia* (CE:ECHR:2012:0522JUD000582603, § 173).

[18] See, by way of illustration, judgments of the ECtHR of 12 February 1985, *Colozza v. Italy* (CE:ECHR:1985:0212JUD000902480, § 32), and of 12 June 2018, *M.T.B. v. Turkey* (CE:ECHR:2018:0612JUD004708106, §§ 49 to 53).

[19] See, by way of illustration, judgment of the ECtHR of 28 August 2018, *Vyacheslav Korchagin v. Russia* (CE:ECHR:2018:0828JUD001230716, § 65).

requiring the Member States to pay 'particular attention' to the diligence exercised by both the national authorities and the accused person in order, respectively, to communicate or receive the information, the EU legislature places emphasis, in my view, on the conduct of each of the parties to the criminal proceedings.

51. It is in the context of that examination that Member States may, in my view, take into account the fact that the accused person absconded. Although that concept is referred to in recital 39 of Directive 2016/343, it is not defined in the context of that directive. Nevertheless, it follows from the ordinary meaning of the French word '*fuite*' that it reflects, above all, a form of conduct and, in particular, one by which a person evades, escapes or attempts to avoid that which is arduous, burdensome or dangerous. [20]

52. I think it is therefore necessary to distinguish between two situations in the case of absconded persons.

53. The first situation is where, despite all the diligence and efforts made by the national authorities to inform the accused person of the date and place of his trial and the consequences of failing to appear, that person was not provided with that information because he deliberately and intentionally failed to comply with the obligations imposed on him to be informed of his trial, with the intention of evading the course of justice. In that situation, where the national authorities have taken all the steps required to inform the accused person and that person, by his conduct, obstructs the provision of that information, I take the view that the Member States must be in a position to enforce the conviction in accordance with Article 8(3) of Directive 2016/343 and refuse to organise a new trial.

54. The second situation is one in which the accused person has not been informed of the date and place of his trial for reasons which, by contrast, are very different, beyond his control or linked to the existence of legitimate reasons, such as his marginalisation or even vulnerability. In that situation, where the failure to comply with the obligation to be informed does not result from a deliberate and intentional breach by the accused person of the obligations imposed on him, Member States must ensure that that person enjoys the right to a new trial, in accordance with the principles set out in the second sentence of Article 8(4) and Article 9 of Directive 2016/343.

55. The distinction which I propose to make in the case of absconded persons requires the national court to carry out a full examination of all the circumstances of the case.

56. It must therefore verify that the national authorities have exercised sufficient diligence in their efforts to inform the accused person, ensure his presence before the trial court and locate him, while taking into account, in that context, the nature and scope of the obligations imposed on that person to receive the information relating to the trial. Where appropriate, the national court must be able to demonstrate unequivocally, on the basis of specific and objective facts of the case, that that person was informed of the nature and cause of the charges brought against him and that he deliberately and intentionally failed to fulfil his obligations to be informed of his trial, for example, by communicating an incorrect address or by failing to make known a change of address, despite instructions to that effect.

[20] See the *dictionnaire de l'Académie française* and the *dictionnaire Larousse*.

57. The interpretation which I suggest of the wording of Article 8(2) of Directive 2016/343 is not, in my view, such as to undermine the objectives pursued by the EU legislature. [21]

2. Teleological analysis of Directive 2016/343

58. I would recall that the purpose of Directive 2016/343 is to lay down common minimum rules concerning the right to be present at the trial in order to strengthen the Member States' mutual recognition of, and trust in, each other's criminal justice systems. [22] I would also recall, in accordance with the Court's case-law, that that directive is not a complete and exhaustive instrument intended to lay down *all the conditions for the adoption of a judicial decision*. [23] Thus, although the EU legislature requires the Member States to provide for a new trial with a view to ensuring respect for the rights of defence of persons convicted *in absentia*, that cannot, in order to attain the objectives pursued by that directive, necessarily result in a right in favour of those persons to benefit from a new trial in all situations.

59. As the Court held in the order of 14 January 2021, *UC and TD (Deficiencies in the bill of indictment)*, [24] it is thus for the national court to 'strike a fair balance between, on the one hand, respect for the rights of defence and, on the other, the need to ensure that prosecutions are effective and that proceedings take place within a reasonable time'. [25] Such a strict interpretation of the right to a fair trial, which requires as a matter of course the possibility of initiating a new trial, even where the competent national authorities are de facto unable to inform the accused person of his trial on the basis that he has absconded, because he deliberately and intentionally fails to fulfil the obligations imposed on him to receive that information, would risk contributing to the abuses of rights and procedure perpetrated by particular defendants who hope to rely on the expiry of the reasonable period or limitation period for prosecution, resulting in delays to the administration of justice, victims, who must at times bear the psychological and financial costs of repeated hearings, feeling discouraged, or even a denial of justice.

60. The rules laid down in Article 8(2) to (4) and Article 9 of Directive 2016/343 must therefore ensure a fair balance between, on the one hand, the effectiveness of prosecutions and the sound administration of justice by allowing the Member States to enforce a decision against a person who, in flagrant breach of his obligations, has made it impossible for the competent national authorities to inform him of his trial so as to escape the course of justice and, on the other, the right to a new trial, which must serve to safeguard the rights of defence of a person who neither intended to waive his right to appear and defend himself, nor intended to evade justice.

61. Finally, the interpretation which I recommend is consistent with the case-law established by the European Court of Human Rights with regard to compliance with Article 6(1) ECHR.

[21] See judgment of 13 February 2020, *Spetsializirana prokuratura (Hearing in the absence of the accused person)* (C-688/18, EU:C:2020:94, paragraph 29 and the case-law cited).

[22] See Article 1 and recitals 2 to 4, 9 and 10 of Directive 2016/343.

[23] See, to that effect, judgment of 19 September 2018, *Milev* (C-310/18 PPU, EU:C:2018:732, paragraphs 45 to 47).

[24] C-769/19, not published, EU:C:2021:28.

[25] Paragraph 45 of that order and the case-law cited.

3. Analysis of the case-law of the European Court of Human Rights

62. In its judgment of 13 February 2020, *Spetsializirana prokuratura (Hearing in the absence of the accused person)*,[26] the Court of Justice referred to the reasons why it is necessary to take the case-law of the European Court of Human Rights on the subject of respect for the right to be present at the trial into account when interpreting the provisions laid down in Directive 2016/343.[27] The EU legislature clearly set out in recitals 11, 13, 33, 45, 47 and 48 of that directive its intention to strengthen and ensure the effective application of the right to a fair trial in criminal proceedings by including, in EU law, the case-law established by that court concerning compliance with Article 6(1) ECHR.

63. As regards that article, the European Court of Human Rights holds that the fact of a person absconding is sufficiently serious where that person knows that criminal proceedings have been brought against him, is aware of the nature and cause of the accusation and does not intend to take part in the trial or intends to avoid prosecution.[28]

64. In that context, that court's reasoning is twofold.

65. First, the European Court of Human Rights determines whether it has been established, on the basis of objective and relevant facts, that the accused person has waived his right to appear and defend himself or that he intended to evade justice. In that regard, that court requires national courts to exercise due diligence by personally notifying the accused person of the charges against him and by summoning him in the prescribed manner.[29] In the absence of the receipt of an official notification, certain sufficient facts and findings may, according to that court, make it possible to demonstrate unequivocally that the accused person has been informed that criminal proceedings have been brought against him, that he is aware of the nature and cause of the accusation and that he does not intend to take part in the trial or intends to avoid prosecution.[30] It is in that context that it examines whether the competent national authorities exercised sufficient diligence in their efforts to locate the accused person and inform him of the criminal proceedings,[31] in particular by carrying out appropriate investigations.[32] In the judgment of 11 October 2012, *Abdelali v. France*,[33] the same court thus pointed out that the mere absence of the applicant from his habitual place of residence or his parents' residence was not sufficient for the view to be taken that the applicant was aware of his prosecution and trial and that he had 'absconded'.

26 C-688/18, EU:C:2020:94.

27 See paragraphs 34 and 35 of that judgment.

28 See judgment of the ECtHR of 1 March 2006, *Sejdovic v. Italy* (CE:ECHR:2006:0301JUD005658100, §§ 98 to 101).

29 See footnote 18 of this Opinion. According to the case-law of the European Court of Human Rights, such a waiver cannot be inferred either from vague and non-official knowledge (see, inter alia, ECtHR, 23 May 2006, *Kounov v. [Bulgaria]* (CE:ECHR:2006:0523JUD002437902, § 47)), or from a mere presumption, or from a mere classification as an absconded person (see ECtHR, 12 February 1985, *Colozza v. Italy* (CE:ECHR:1985:0212JUD000902480, § 28)).

30 See judgments of the ECtHR of 1 March 2006, *Sejdovic v. Italy* (CE:ECHR:2006:0301JUD005658100, §§ 98 to 101); of 23 May 2006, *Kounov v. Bulgaria* (CE:ECHR:2006:0523JUD002437902, § 48); of 26 January 2017, *Lena Atanasova v. Bulgaria* (CE:ECHR:2017:0126JUD005200907, § 52); and of 2 February 2017, *Ait Abbou v. France* (CE:ECHR:2017:0202JUD004492113, §§ 62 to 65).

31 In the judgment of 12 February 1985, *Colozza v. Italy* (CE:ECHR:1985:0212JUD000902480, § 28), the European Court of Human Rights states that 'it is difficult to reconcile' the situation found 'with the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 [ECHR] are enjoyed in an effective manner'. In the judgment of 12 June 2018, *M.T.B. v. Turkey* (CE:ECHR:2018:0612JUD004708106, §§ 51 to 54), that court held that the court adjudicating on the substance had not exercised due diligence in its efforts to locate the applicant by merely notifying the decision in accordance with the provisions of national law. According to that court, that notification alone does not suffice to relieve the State of its obligations under Article 6 ECHR.

32 See judgment of the ECtHR of 12 February 1985, *Colozza v. Italy* (CE:ECHR:1985:0212JUD000902480, § 28).

33 CE:ECHR:2012:1011JUD004335307, § 54.

66. Where those findings are not sufficient, the European Court of Human Rights examines, secondly, the extent to which the accused person was able, with certainty, to benefit from the opportunity to appear at a new trial.[34] In its view, the duty to guarantee the right of the accused person to be present in the courtroom – either during the original proceedings against him or a new trial – ranks as one of the essential requirements of Article 6 ECHR. Otherwise, the criminal proceedings would be regarded as being 'manifestly contrary to the provisions of Article 6 [ECHR]' or constituting a 'flagrant denial of justice'.[35]

67. The European Court of Human Rights thus requires that the accused person should be able to obtain a fresh determination of the merits of the charges brought against him, both in fact and in law, by a court 'which [is] competent to determine all the aspects of the matter' in his presence,[36] offering him all the guarantees of a fair trial afforded by Article 6 ECHR. However, it leaves the Contracting States 'a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements [of that article]', provided that 'the resources available under domestic law must be shown to be effective where a person "charged with a criminal offence" has neither waived his right to appear and to defend himself nor sought to escape trial'.[37]

68. The principles thus set out were applied by the European Court of Human Rights in the judgment of 26 January 2017, *Lena Atanasova v. Bulgaria*.[38] In the case which gave rise to that judgment, that court was asked to rule on whether the Varhoven kasatsionen sad (Supreme Court of Cassation) had infringed Article 6(1) ECHR by rejecting, on the basis of Article 423(1) of the NPK – referred to in the present request for a preliminary ruling – a request for the reopening of the criminal proceedings made by the applicant, who had absconded, on the ground that she had tried to escape trial and had therefore herself made it impossible to participate in her criminal proceedings by her wrongful conduct.[39]

69. The European Court of Human Rights considered that that rejection did not to constitute such an infringement since the accused person had knowingly and validly waived, implicitly, her right, guaranteed by Article 6(1) ECHR, to appear in person before the courts. That court first found that the applicant had been duly informed of the existence of criminal proceedings against her and of the charges against her, that she had acknowledged the facts and stated that she was prepared to provide detailed explanations and negotiate the terms of her conviction. That court also held that the summons to appear could not be served on her because of her change of domicile, a change which she had failed to communicate to the competent authorities. That court held that the national authorities had, moreover, taken the steps reasonably necessary to ensure that the accused person was present at the trial. In that case, the authorities had, first, sought to summon that person at the address which she had communicated before looking for her, next, at her known addresses or in the prisons and had, finally, also assured themselves that she had not left the national territory.[40]

[34] See judgments of the ECtHR of 12 February 1985, *Colozza v. Italy* (CE:ECHR:1985:0212JUD000902480, § 29), and of 1 March 2006, *Sejdovic v. Italy* (CE:ECHR:2006:0301JUD005658100, § 101 *in fine*).

[35] See judgments of the ECtHR of 1 March 2006, *Sejdovic v. Italy* (CE:ECHR:2006:0301JUD005658100, § 84), and of 12 June 2018, *M.T.B. v. Turkey* (CE:ECHR:2018:0612JUD004708106, § 61).

[36] See judgment of the ECtHR of 12 February 1985, *Colozza v. Italy* (CE:ECHR:1985:0212JUD000902480, §§ 31 and 32).

[37] See judgment of the ECtHR of 14 June 2001, *Medenica v. Switzerland* (CE:ECHR:2001:0614JUD002049192, § 55). See also judgments of the ECtHR of 12 February 1985, *Colozza v. Italy* (CE:ECHR:1985:0212JUD000902480, § 30), and of 1 March 2006, *Sejdovic v. Italy* (CE:ECHR:2006:0301JUD005658100, § 82).

[38] CE:ECHR:2017:0126JUD005200907.

[39] See §§ 27 and 28 of that judgment.

[40] See §§ 52 and 53 of that judgment.

70. By contrast, that is not the conclusion reached by the European Court of Human Rights in its judgment of 23 May 2006, *Kounov v. Bulgaria*.[41] In that judgment, that court found that there had been an infringement of Article 6(1) ECHR in so far as the applicant, who had been convicted *in absentia*, had been denied the right to reopen the criminal proceedings without the authorities having established that he had unequivocally waived his right to appear. In that judgment, that court held that the defendant had been heard on the offences in question, but had not been personally made aware of his indictment. It considered that, in the absence of any notification to the applicant of the charges against him, there was nothing in the evidence produced before it to establish that he was aware of the commencement of proceedings, his committal for trial or the date of his trial. It took the view that, having been questioned by the police on the facts, the applicant could only assume that proceedings were going to be initiated, but could not in any event have specific knowledge of the charges which were going to be brought.[42]

71. I note that the European Court of Human Rights therefore also seeks to ensure a balance between respect for the rights of defence of a person who did not appear at his trial and the need to ensure the effectiveness of criminal proceedings in situations in which that person has unequivocally demonstrated his wish to evade that prosecution.

72. In the light of all those considerations, I propose that the Court should rule that Article 8(2) and (3) of Directive 2016/343 covers a situation in which the national court finds, having regard to all the specific circumstances of the situation at issue, that, despite the diligence and efforts of the competent national authorities to inform the accused person of his trial and the consequences of non-appearance, that person has failed, deliberately and intentionally, to fulfil the obligations incumbent on him to receive that information with a view to evading the course of justice.

73. In the context of that examination, it is for the national court to determine the nature and scope of the obligations incumbent on the accused person to be informed and, where appropriate, to demonstrate unequivocally, on the basis of specific and objective facts, that that person was aware of the nature and cause of the accusations made against him and that he deliberately and intentionally absconded.

74. The second sentence of Article 8(4) and Article 9 of Directive 2016/343 must be interpreted as not precluding national legislation under which a new trial is not to be granted where the accused person has absconded after having been informed of the charges against him during the preliminary investigation stage, but before he is informed of the definitive indictment, provided that the national court makes the abovementioned findings.

75. In view of the answer which I propose should be given to the first and second questions referred for a preliminary ruling, considered together, I do not consider it necessary to answer the third question.

41 CE:ECHR:2006:0523JUD002437902, §§ 32, 49, 53 and 54. See, also, precedent-setting judgment of 1 March 2006, *Sejdovic v. Italy* (CE:ECHR:2006:0301JUD005658100, § 100), in which the European Court of Human Rights held that such circumstances were not established in the absence of objective factors other than that based on the accused person's absence from his habitual residence, with the national authorities proceeding on the assumption that the applicant was involved in the crime of which he was accused or was responsible for that crime. That court adopted the same approach in its judgment of 28 September 2006, *Hu v. Italy* (CE:ECHR:2006:0928JUD000594104, §§ 53 to 56).

42 In the judgment of 1 March 2006, *Sejdovic v. Italy* (CE:ECHR:2006:0301JUD005658100, § 85), the European Court of Human Rights held, however, that the reopening of the time allowed for appealing against a conviction *in absentia*, where the defendant was entitled to attend the hearing in the court of appeal and to request the admission of new evidence, entailed the possibility of a fresh factual and legal determination of the criminal charge, so that the proceedings as a whole could be said to have been fair.

V. Conclusion

76. In the light of all the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) as follows:

(1) Article 8(2) and (3) of 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 must be interpreted as covering a situation in which the national court finds, having regard to all the specific circumstances of the situation at issue, that, despite the diligence and efforts of the competent national authorities to inform the accused person of his trial and the consequences of non-appearance, that person has failed, deliberately and intentionally, to fulfil the obligations incumbent on him to receive that information with a view to evading the course of justice.

(2) In the context of that examination, it is for the national court to determine the nature and scope of the obligations incumbent on the accused person to be informed and, where appropriate, to demonstrate unequivocally, on the basis of specific and objective facts, that that person was aware of the nature and cause of the accusations made against him and that he deliberately and intentionally absconded.

(3) The second sentence of Article 8(4) and Article 9 of Directive 2016/343 must be interpreted as not precluding national legislation under which a new trial is not to be granted where the accused person has absconded after having been informed of the charges against him during the preliminary investigation stage, but before he is informed of the definitive indictment, provided that the national court makes the abovementioned findings.