



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

25 January 2024*

(Reference for a preliminary ruling – Area of freedom, justice and security – Judicial cooperation in criminal matters – Framework Decision 2005/212/JHA – Confiscation of crime-related proceeds, instrumentalities and property – Third indent of Article 1 – Concept of ‘instrumentality’ – Article 2(1) – Obligation for Member States to take measures to enable the confiscation of instrumentalities from criminal offences – Vehicle used to transport excise goods without a tax marking in breach of the law)

In Case C-722/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sofiyski gradski sad (Sofia City Court, Bulgaria) made by decision of 22 November 2022, received at the Court on 24 November 2022, in the proceedings brought by

Sofiyski gradski sad

THE COURT (Eighth Chamber),

composed of N. Piçarra (Rapporteur), President of the Chamber, N. Jääskinen and M. Gavalec, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Greek Government, by L. Kotroni, A. Magrippi and E. Tsaousi, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by S. Grünheid and I. Zaloguin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Bulgarian.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of the third indent of Article 1 of Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (OJ 2005 L 68, p. 49).
- 2 The request has been made in proceedings brought *ex officio*, concerning the confiscation of vehicles used by certain members of an organised crime group, whose convictions have become final, in order to transport excise goods without tax markings in breach of the law.

Legal context

European Union law

- 3 Recitals 1 and 10 of Framework Decision 2005/212 are worded as follows:
 - ‘(1) The main motive for cross-border organised crime is financial gain. In order to be effective, therefore, any attempt to prevent and combat such crime must focus on tracing, freezing, seizing and confiscating the proceeds from crime. However, this is made difficult, inter alia, as a result of differences between Member States’ legislation in this area....
 - (10) The aim of this Framework Decision is to ensure that all Member States have effective rules governing the confiscation of proceeds from crime, inter alia, in relation to the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime. ...’
- 4 Article 1 of that framework decision, entitled ‘Definitions’, in its third indent, provides:

‘For the purposes of this Framework Decision:

...
- “instrumentalities” means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences’.
- 5 Article 2(1) of that framework decision, entitled ‘Confiscation’, provides:

‘Each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.’
- 6 Article 4 of the same framework decision, entitled ‘Legal remedies’, is worded as follows:

‘Each Member State shall take the necessary measures to ensure that interested parties affected by measures under Articles 2 and 3 have effective legal remedies in order to preserve their rights.’

7 Article 5 of Framework Decision 2005/212, entitled ‘Safeguards’ provides:

‘This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental principles, including in particular the presumption of innocence, as enshrined in Article 6 of the Treaty on European Union.’

Bulgarian law

8 Article 53(1)(a) of the Nakazatelen kodeks (Criminal Code) of 1 May 1968 (DV No 26 of 2 April 1968), in the version applicable to the facts in the main proceedings (DV No 60 of 5 August 2011) (‘the NK’), provides:

‘Irrespective of criminal liability, the following shall be confiscated in favour of the State:

a) property belonging to the offender which was intended or served for the purpose of committing a deliberate criminal offence;

...’

9 Under Article 234(1) and (2), subparagraph 3, of the NK, holding of excise goods without tax markings in breach of the law, is punishable, if the offence involves large quantities, by a custodial sentence of two to eight years and a ban on practising certain occupations or activities.

10 In accordance with Article 321(2) and (3), subparagraph 2, of the NK, participation in an organised crime group for the purposes of enrichment is punishable by a custodial sentence of 3 to 10 years.

The dispute in the main proceedings and the question referred for a preliminary ruling

11 AP, BP, OP and PG were sentenced, pursuant to Article 321(3), subparagraph 2, of the NK, to custodial sentences of three years for AP, one year for BP and OP, and six months for PG, for having participated, between August 2011 and June 2012, in an organised crime group committing, for profit, offences under Article 234 of the NK.

12 On 20 August 2011, AP, BP and GV purchased, as part of that organised crime group, a tractor unit in Bulgaria, driven by OP in Greece on 21 August 2011, to which OP attached a trailer loaded with packets of cigarettes, worth 2.348 million Bulgarian leva (BGN) (approximately EUR 1.2 million), without tax markings. On 23 August 2011, OP drove that vehicle to Varna (Bulgaria), where that cargo was delivered to a warehouse. On 24 August 2011, that cargo was confiscated by the police. For that offence, AP, BP, OP and GV were sentenced, on the basis of Article 234(2), subparagraph 3, of the NK, to custodial sentences of one year and 11 months for AP, one year for BP and OP, and four years for GV.

13 In that context, the Sofiyski gradski sad (Sofia City Court, Bulgaria), which is the referring court, initiated *ex officio* proceedings to determine the fate of the physical evidence obtained in the course of the criminal proceedings which led to the convictions referred to in paragraphs 11 and 12 above, which have become final. In particular, that court questions whether the tractor

unit and the trailer, which were used to transport the cargo of packets of cigarettes without tax markings from Greece to Bulgaria, were used as ‘instrumentalities’ of a criminal offence, within the meaning of the third indent of Article 1 of Framework Decision 2005/212.

- 14 That court observes, first, that the national legislation at issue in the main proceedings classifies as a criminal offence the possession of excise goods without tax markings, but not the transport of those products. It notes, secondly, that the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria), in its interpretative decision No 2/13 of 18 December 2013, held that the vehicle or means of transport in which excise goods without tax markings are found, which are caught by Article 234 of the NK, do not constitute an instrumentality of that offence and therefore cannot be confiscated under Article 53(1)(a) of the NK.
- 15 The referring court takes the view, however, that possession is an actual power exercised over such products and that their transportation is an expression of that power. Accordingly, in its view, the tractor unit and the trailer at issue in the main proceedings were used as ‘instrumentalities’ of the criminal offence consisting of the possession of a ‘significant quantity’ of packets of cigarettes without tax markings.
- 16 In those circumstances the Sofiyski gradski sad (Sofia City Court) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

‘Is it compatible with Article 2 of Framework Decision 2005/212, read in conjunction with the third indent of Article 1 thereof, to interpret a national law as meaning that a heavy goods vehicle (tractor unit and trailer) which members of an organised crime group used for the holding and transport of large quantities of excise goods (cigarettes) without tax markings should not be confiscated as an instrumentality?’

Consideration of the question referred

- 17 By its question, the referring court asks, in essence, whether the third indent of Article 1 and Article 2 of Framework Decision 2005/212 must be interpreted as meaning that a vehicle used to transport excise goods without tax markings in breach of the law constitutes an ‘instrumentality’ of a criminal offence.
- 18 Under the third indent of Article 1 of the Framework Decision 2005/212, the concept of ‘instrumentalities’ means ‘any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences’.
- 19 Article 2(1) of that framework decision requires each Member State to take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.
- 20 It follows from those provisions, in particular from the terms ‘any property’ and ‘in any manner’, that, in so far as property is used or intended to be used to commit a criminal offence falling within the scope of that framework decision, it constitutes an ‘instrumentality’ of that criminal offence.

- 21 In the present case, it is apparent from the request for a preliminary ruling that the criminal offence at issue in the main proceedings, provided for in Article 234(2), subparagraph 3, of the NK, namely the holding of large quantities of excise goods without tax markings, is punishable by a custodial sentence of two to eight years. Subject to the verifications which it is for the referring court to carry out, that criminal offence may thus fall within the scope of Framework Decision 2005/212, pursuant to Article 2(1) thereof.
- 22 Consequently, where a vehicle is used, ‘in any manner’, to commit such a criminal offence, that vehicle falls within the concept of ‘instrumentalities’, within the meaning of the third indent of Article 1 of that framework decision, without it being necessary to draw a distinction according to whether that vehicle is used as a means of transportation or as a means of holding or storing the products which are the subject of the criminal offence concerned.
- 23 In the light of the referring court’s questions, it is important to point out that the binding nature of a framework decision, such as Framework Decision 2005/212, gives rise to an obligation, in particular for the courts of the Member States, to interpret national law, so far as possible, in the light of the wording and the purpose of the framework decision concerned, in order to achieve the result sought by that framework decision. That obligation is inherent in the system of the FEU Treaty, since it permits those courts, for matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them (see, to that effect, judgments of 16 June 2005, *Pupino*, C-105/03, EU:C:2005:386, paragraph 43, and of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 31 and the case-law cited).
- 24 The principle that national law must be interpreted in conformity with EU law requires that, where necessary, the national court considers the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision. However, that principle cannot serve as the basis for an interpretation of national law *contra legem* (see, to that effect, judgments of 16 June 2005, *Pupino*, C-105/03, EU:C:2005:386, paragraph 47, and of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 66 and the case-law cited).
- 25 The obligation on the national court to refer to the content of a framework decision when interpreting and applying the relevant rules of its national law is limited by general principles of law, particularly the principles of legal certainty and non-retroactivity. These principles preclude that obligation from leading to the criminal liability of individuals who have committed an offence from being determined or aggravated on the basis of a framework decision alone, independently of an implementing law (see, to that effect, judgments of 16 June 2005, *Pupino*, C-105/03, EU:C:2005:386, paragraphs 44 and 45, and of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 75 and the case-law cited).
- 26 Subject to those reservations, the obligation to interpret national law in conformity with EU law requires national courts to disapply, on their own authority, the interpretation adopted by a higher court which it must follow in accordance with national law, if that interpretation is not compatible with the framework decision concerned. Consequently, a national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law for the sole reason that that provision has consistently been interpreted and applied by a higher court in a manner that is incompatible with EU law (see, to that effect, judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraphs 78 and 79 and the case-law cited).

- 27 In the present case, it should be noted, first, that the provisions of Framework Decision 2005/212 which are the subject of the request for a preliminary ruling, do not concern the extent of the criminal liability of the persons concerned by a possible confiscation measure and, second, that the confiscation for the benefit of the State of instrumentalities used to commit a criminal offence takes place, under Article 53(1) of the NK, ‘irrespective of any criminal liability’.
- 28 Moreover, any decision concerning possible confiscation in the main proceedings must, in accordance with Article 5 of Framework Decision 2005/212, respect fundamental rights, in particular the right to property enshrined in Article 17(1) of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 52(1) thereof. Such confiscation cannot affect the right to property of a third party acting in good faith, who did not know and could not know that his property had been used to commit a criminal offence (see, to that effect, judgment of 14 January 2021, *Okrazhna prokuratura – Haskovo et Apelativna prokuratura – Plovdiv*, C-393/19, EU:C:2021:8, paragraph 55).
- 29 Furthermore, Article 4 of Framework Decision 2005/212, read in the light of Article 47 of the Charter of Fundamental Rights, requires Member States to ensure that persons affected by a confiscation measure have effective legal remedies to safeguard their rights. Those persons are not only those found guilty of a criminal offence, but also third parties whose property is affected by that measure (see, to that effect, judgment of 14 January 2021, *Okrazhna prokuratura – Haskovo et Apelativna prokuratura – Plovdiv*, C-393/19, EU:C:2021:8, paragraphs 60, 61 and 63).
- 30 In the light of all the above reasons, the answer to the question referred is that the third indent of Article 1 and Article 2 of Framework Decision 2005/212 must be interpreted as meaning that a vehicle used to transport excise goods without tax markings in breach of the law constitutes an ‘instrumentality’ of a criminal offence.

Costs

- 31 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

The third indent of Article 1 and Article 2 of Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property

must be interpreted as meaning that a vehicle used to transport excise goods without tax markings in breach of the law constitutes an ‘instrumentality’ of a criminal offence.

[Signatures]