Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

10 November 2022*

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Framework Decision 2005/212/JHA – Applicability – Imposition of a financial penalty on a legal person for non-payment of tax debts – Concept of 'confiscation' – Articles 48, 49 and 52 of the Charter of Fundamental Rights of the European Union – Penalties of a criminal nature – Principles of the presumption of innocence and the legality and proportionality of criminal offences and penalties – Rights of the defence – Imposition of a criminal penalty on a legal person for an offence committed by the representative of that legal person – Parallel criminal proceedings against that representative that have not been concluded – Proportionality)

In Case C-203/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Okrazhen sad – Burgas (Regional Court, Burgas, Bulgaria), made by decision of 12 March 2021, received at the Court on 31 March 2021, in the criminal proceedings against

DELTA STROY 2003,

intervening parties:

Okrazhna prokuratura – Burgas,

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, L.S. Rossi, J.-C. Bonichot, S. Rodin and O. Spineanu-Matei, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of the European Commission by M. Wasmeier and I. Zaloguin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 June 2022,

gives the following

* Language of the case: Bulgarian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 4 and 5 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), and of Article 49 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The reference has been made in proceedings brought against DELTA STROY 2003 EOOD ('Delta Stroy') for the purpose of imposing a financial penalty on that company for a criminal offence relating to value added tax (VAT) alleged against its manager and representative.

Legal context

European Union law

Framework Decision 2005/212

3 Article 1 of Framework Decision 2005/212, entitled 'Definitions', provides:

'For the purposes of this Framework Decision:

– "proceeds" means any economic advantage from criminal offences. It may consist of any form of property as defined in the following indent,

– "property" includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title or interest in such property,

– "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,

– "confiscation" means a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property,

…'

4 Article 2 of that framework decision, entitled 'Confiscation', provides:

'1. 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.

2. In relation to tax offences, Member States may use procedures other than criminal procedures to deprive the perpetrator of the proceeds of the offence.'

5 Article 4 of that framework decision, entitled 'Legal remedies', states:

'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.'

6 Article 5 of that same framework decision, 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.'

Framework Decision 2005/214/JHA

7 Article 1 of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ 2005 L 76, p. 16), entitled 'Definitions', provides:

'For the purposes of this Framework Decision:

…

(b) "financial penalty" shall mean the obligation to pay:
  (i) a sum of money on conviction of an offence imposed in a decision;

…

A financial penalty shall not include:

– orders for the confiscation of instrumentalities or proceeds of crime,

…'

Directive 2014/42/EU

8 Article 2 of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ 2014 L 127, p. 39) provides:

'For the purpose of this Directive, the following definitions apply:

(1) "proceeds" means any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits;

(2) "property" means property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title or interest in such property;

…

(4) "confiscation" means a final deprivation of property ordered by a court in relation to a criminal offence;

…'

9 Article 14(1) of that directive provides:

'Joint Action 98/699/JHA [of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime (OJ 1998 L 333, p. 1)], point (a) of Article 1 and Articles 3 and 4 of [Council] Framework Decision 2001/500/JHA [of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ 2001 L 182, p. 1)], and the first four indents of Article 1 and Article 3 of Framework Decision 2005/212/JHA, are replaced by this Directive for the Member States bound by this Directive, without prejudice to the obligations of those Member States relating to the time limits for transposition of those Framework Decisions into national law.'

Bulgarian law

The Zann

10 The zakon za administrativnite narushenia i nakazania (Law on administrative offences and penalties) (DV No 92 of 28 November 1969), in the version applicable to the facts in the main proceedings ('the Zann'), includes a Chapter 4, entitled 'Administrative penalties of a criminal nature imposed on legal persons and sole traders', which itself includes Articles 83, 83a, 83b and 83d to 83g of that law.

11 Article 83 of that law provides:

'(1) In the cases provided for by the relevant law, decree, order of the Council of Ministers or municipal order, a financial penalty may be imposed on legal persons and sole traders for failure to fulfil their obligations to the State or the municipality in the exercise of their activities.

(2) The penalty referred to in the previous paragraph shall be imposed in accordance with the detailed rules laid down by this Law, where the corresponding legislative act does not provide otherwise.'

12 Article 83a of the Zann provides:

'(1) Any legal person which has been enriched or is liable to be enriched as a result of an offence under Article 255 … of the Criminal Code and any offence committed, on behalf of or on the initiative of an organised criminal group, by:

1. a person having the power to bind the legal person;

2. a person representing the legal person;

3. a person elected to a controlling or supervisory body of the legal person, or

4. a worker or an employee to whom the legal person has assigned a particular task, where the offence was committed in the exercise of or in connection with that task,

shall be punished by a financial penalty at least equal to the value of the advantage up to a maximum of 1 000 000 [leva (BGN), approximately EUR 511 000] in the case of a pecuniary advantage …

(2) The financial penalty shall also be imposed on any legal person whose seat is not in the territory of the Republic of Bulgaria, where the offence referred to in paragraph 1 has been committed in the territory of the Republic of Bulgaria.

(3) The financial penalty shall be imposed on the legal person even where the persons referred to in paragraph 1(1), (2) and (3) have instigated or have been complicit in them, and where the offence has not gone beyond the stage of attempt.

(4) The financial penalty shall be imposed irrespective of whether the persons who participated in the offence referred to in paragraph 1 actually incur criminal liability.

(5) The direct or indirect advantage which the legal person has derived from the offence referred to in paragraph 1 shall be seized for the benefit of the State if it is not to be returned or repaid, or shall be seized in accordance with the Criminal Code. Where the property or asset which is the subject of the offence has disappeared or been disposed of, an amount corresponding to its value in leva (BGN) shall be awarded.

…'

13 Under Article 83b of the Zann:

'(1) The procedure referred to in Article 83a shall be initiated, on the reasoned proposal of the prosecutor competent to examine the case or the file relating to the offence in question, before the Okrazhen sad [(Regional Court, Bulgaria)] of the place where the legal person has its seat and, in the cases referred to in Article 83a(2), before the Sofiyski gradski sad [(Sofia City Court, Bulgaria)]:

1. after the indictment, the order proposing to exonerate the perpetrator of the offence of criminal liability and to impose an administrative penalty on him or her, or the agreement to negotiate a penalty has been lodged with the court;

…

(2) The proposal must …:

1. contain a description of the offence, set out the circumstances in which it was committed and show the existence of a causal link between the offence and the advantage for the legal person;

2. state the nature and value of the advantage;

3. state the name, line of business, registered office and address of the management of the legal person;

4. state the personal details of the representative of the legal person;

5. set out the personal details of the persons accused or convicted of the offence;

6. contain a list of the written documents establishing the circumstances referred to in points 1 and 2, or certified copies of those documents;

7. contain a list of persons to be summoned;

8. set out the date and place of its drafting and the name, function and signature of the prosecutor.

…'

14 Article 83d of that law states:

'…

(2) The court, sitting as a single judge, shall examine the proposal at a public hearing in which the public prosecutor shall take part and to which the legal person shall be summoned.

(3) Failure of the representative of the legal person to appear, where the summons was duly served, shall not prevent the court from hearing the case.

(4) The court shall gather evidence of its own motion or at the request of the parties.

(5) The court shall examine the case and, on the basis of the evidence gathered, assesses:

1. whether the legal person in question has obtained an unlawful advantage;

2. whether there is a link between the perpetrator of the offence and the legal person;

3. whether there is a link between the offence and the advantage obtained by the legal person;

4. the nature and value of the advantage, if the advantage is financial.

(6) the court shall give its ruling by means of a decision by which:

1. it imposes a financial penalty; [or]

2. it refuses to impose a financial penalty.

(7) The decision referred to in paragraph 6(1) shall contain:

1. details relating to the legal person;

2. information concerning the origin, nature and value of the advantage;

3. the amount of the financial penalty imposed;

4. a description of the property which may be confiscated for the benefit of the State;

5. taxation of costs.

…'

15 According to Article 83e of that law:

'…

(1) The decision of the Okrazhen sad [(Regional Court)] under Article 83d(6) may be challenged by an appeal [brought by the person on which the penalty was imposed] or by a complaint ("protest") [made by the public prosecutor] before the Apelativen sad [Court of Appeal, Bulgaria], within 14 days of its notification to the parties.

(2) The case shall be examined at a public hearing in which the public prosecutor shall take part. The legal person shall also be summoned to the hearing.

(3) Only written evidence shall be accepted in the proceedings …

(4) The Apelativen sad [(Court of Appeal)] shall give its ruling by means of a decision by which it may:

1. annul the decision of the Okrazhen sad [(Regional Court)] and refer the case back for reconsideration, where substantial breaches of the procedural rules were committed during the proceedings at first instance;

2. annul the decision of the Okrazhen sad [(Regional Court)] and impose a financial penalty;

3. annul the decision of the Okrazhen sad [(Regional Court)] and refuse to impose a financial penalty;

4. amend the decision of the Okrazhen sad [(Regional Court)];

5. confirm the decision of the Okrazhen sad [(Regional Court)].

(5) The decision of the Apelativen sad [(Court of Appeal)] shall be final.'

16 Article 83f of the Zann is worded as follows:

'…

'(1) The proceedings by which the Okrazhen sad [(Regional Court)] or the Apelativen sad [(Court of Appeal)] has delivered a final decision may be reopened where:

1. it is established by a decision or judgment which has become final that some of the written evidence on the basis of which the decision had been taken is false or contains false information;

2. it is established by a decision or judgment which has become final that the judge, the public prosecutor, a party or an intervener in the proceedings committed an offence in relation to his or her participation in the proceedings;

3. after the decision to impose a financial penalty on the legal person has entered into force, the person referred to in Article 83a(1)(1) to (4) was acquitted by a judicial decision which has become final, or the public prosecutor has terminated the preliminary proceedings suspended in the cases referred to in Article 24(1)(1) of the Code of Criminal Procedure;

4. after the decision has entered into force, circumstances or evidence have come to light which were not known to the party or to the court and which are of significant importance for the purposes of the case;

5. a decision of the European Court of Human Rights has found a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms which is of significant importance for the purposes of the case;

6. a substantial breach of the Rules of Procedure was committed during the proceedings.

(2) The application to reopen the proceedings may be submitted within six months of the date on which the triggering event became known and, in the cases referred to in subparagraph 1(6), from the entry into force of the decision of the Okrazhen sad [(Regional Court)] or the Apelativen sad [(Court of Appeal)].

(3) The application to reopen the proceedings shall not suspend enforcement of the decision which has entered into force unless the court decides otherwise.

(4) An application to reopen the proceedings may be submitted by:

1. the prosecutor of the regional Public Prosecutor's Office;

2. the legal person on which a financial penalty was imposed.

(5) The application to reopen the proceedings shall be examined by the Apelativen sad [(Court of Appeal)] for the judicial district in which the authority which delivered the decision that entered into force is located.

(6) The Apelativen sad [(Court of Appeal)] shall examine the application in a formation of three judges. In relation to a decision of the Apelativen sad (Court of Appeal), the request that the case be reopened shall be examined by a different chamber of that Apelativen sad [Court of Appeal].

(7) The case shall be examined at a public hearing with the participation of the public prosecutor. The legal person shall also be summoned to the hearing.

(8) Where it considers that the application is well founded, the Apelativen sad [(Court of Appeal)] shall set the decision aside and remit the case for reconsideration, indicating the stage in the proceedings from which the examination is to be resumed.'

17 Article 83g of that law provides:

'For matters which are not governed by Articles 83b and 83d to 83f, the provisions of the Code of Criminal Procedure shall apply.'

The Criminal Code

18 Article 255(1) of the Nakazatelen kodeks (Bulgarian Criminal Code) provides:

'Any person who evades the establishment or payment of high tax debts, in that he or she:

…

2. provides false information or conceals the truth in the declaration which he or she has made;

3. fails to issue an invoice or other accounting document,

…

shall be sentenced to a term of imprisonment of between one and six years and a fine of up to [BGN] 2 000'.

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

19 ZK is the manager and representative of Delta Stroy, established in Burgas (Bulgaria). In that capacity, on 5 August 2019, ZK was charged, in circumstances amounting to a continuous offence, for having evaded payment of tax debts in the total amount of BGN 11 388.98 (approximately EUR 5 800), corresponding to the VAT payable for the tax periods of March, April and July 2009, an offence provided for and punishable under Article 255(1)(2) and (3) of the Criminal Code. At the date on which the present request for a preliminary ruling was lodged, those criminal proceedings were pending before the Okrazhen sad – Burgas (Regional Court, Burgas, Bulgaria).

20 On 9 December 2020, the prosecutor of the okrazhna prokuratura – Burgas (Regional Public Prosecutor's Office, Burgas, Bulgaria) proposed to the Okrazhen sad – Burgas (Regional Court, Burgas), in separate proceedings, that a financial penalty be imposed on Delta Stroy, on the basis of Articles 83a et seq. of the Zann, on the ground that that company had obtained a pecuniary advantage from ZK's offence. The indictment relating to that offence was attached to that proposal.

21 The Okrazhen sad – Burgas (Regional Court, Burgas) has doubts as to whether Articles 83a et seq. of the Zann are compatible with Framework Decision 2005/212 and with the principle of the legality of criminal offences and penalties, enshrined in Article 49 of the Charter, in that they allow a criminal court to impose a financial penalty on a legal person for an offence which is the subject of parallel criminal proceedings which have not yet been definitively concluded.

22 That court notes, first, that an earlier version of the relevant provisions of the Zann provided that a financial penalty could be imposed on a legal person for an offence committed by a natural person in connection with the activity of that legal person only after the judicial decision convicting that natural person had become final. However, following the amendment of those provisions, such a requirement had been abandoned.

23 The referring court explains that, in the present case, two parallel proceedings have been brought, one against ZK, based on Article 255(1) of the Criminal Code, for a tax offence he allegedly committed, and the other against Delta Stroy, based on Article 83a et seq. of the Zann, seeking the imposition of a financial penalty on that company in an amount equivalent to the pecuniary advantage derived from that offence. The referring court notes that the Zann does not provide for the possibility of staying the proceedings brought under Article 83a et seq. thereof until the criminal proceedings against ZK have been closed.

24 Next, the referring court considers that the imposition on a legal person, by reason of the commission of an offence by a natural person, of a financial penalty corresponding to the advantage which that legal person derived or could derive from that offence constitutes confiscation of all or part of the proceeds of the offence, within the meaning of Article 2(1) of Framework Decision 2005/212.

25 Lastly, the referring court notes that Article 49 of the Charter enshrines the principle of the legality of criminal offences and penalties, which prohibits the imposition of a penalty before the reality of the offence has been established. Yet, the question whether an offence has actually been committed by the natural person is not one of the factors which the criminal court must assess, under Article 83d(5) of the Zann, for the purpose of potentially imposing a criminal financial penalty on a legal person.

26 Thus, the procedure under Article 83a et seq. of the Zann allows, in practice, a penalty to be imposed on a legal person based solely on the details of the accusation made against the representative and manager of that legal person in relation to a particular offence the reality of which has not yet been established by means of a final judicial decision.

27 In those circumstances, the Okrazhen sad – Burgas (Regional Court, Burgas) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are Articles 4 and 5 of Framework Decision [2005/212] and Article 49 of the [Charter] to be interpreted as permitting legislation of a Member State under which, in proceedings such as those in the main proceedings, the national court may impose a penalty on a legal person for a specific criminal offence the commission of which has not yet been established because it is the subject of parallel criminal proceedings which have not yet been definitively concluded?

(2) Are Articles 4 and 5 of Framework Decision [2005/212] and Article 49 of the [Charter] to be interpreted as permitting legislation of a Member State under which, in proceedings such as those in the main proceedings, the national court may impose a penalty on a legal person by fixing the amount of that penalty at the amount of the proceeds which would have been obtained from a specific criminal offence the commission of which has not yet been established because it is the subject of parallel criminal proceedings which have not yet been definitively concluded?’

Consideration of the questions referred

The first question

Preliminary observations

28 According to the Court's settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly mentioned in the questions referred to the Court of Justice by those courts (see, to that effect, judgment of 7 July 2022, *Pensionsversicherungsanstalt (Child-raising periods completed abroad)*, C-576/20, EU:C:2022:525, paragraph 35 and the case-law cited).

29 In that regard, in the first place, it should be noted that, although, by its first question, the referring court asks about the interpretation of Articles 4 and 5 of Framework Decision 2005/212, which concerns the confiscation of crime-related proceeds, instrumentalities and property, the main proceedings do not relate to such a confiscation procedure.

30 As regards, first of all, the concept of 'confiscation', it is appropriate to refer not to the definition in the fourth indent of Article 1 of Framework Decision 2005/212, but to the definition in Article 2(4) of Directive 2014/42, since that directive, pursuant to Article 14(1) thereof, replaced, inter alia, the first four indents of Article 1 of that framework decision. According to the latter definition 'confiscation' means a 'final deprivation of property ordered by a court in relation to a criminal offence'.

31 Next, Article 2(1) of Framework Decision 2005/212 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.

32 Lastly, it is apparent from Article 2(1) of Directive 2014/42 that 'proceeds' correspond to any economic advantage derived from a criminal offence and may consist of any form of property.

33 In that context, although a sum of money constitutes 'property' liable to be confiscated (see, to that effect, judgment of 21 October 2021 *Okrazhna prokuratura – Varna*, C-845/19 and C-863/19, EU:C:2021:864, paragraph 58), such property can be confiscated, pursuant to Article 2(1) of Framework Decision 2005/212, only if it corresponds to the advantage deriving from a criminal offence, namely the proceeds of that offence, or to the instrumentalities of that offence, namely the object used or intended to be used to commit that offence.

34 By contrast, the term 'financial penalty', as defined in Article 1(b)(i) of Framework Decision 2005/214, refers to the obligation to pay a sum of money on conviction of an offence imposed in the context of a decision in criminal proceedings. That provision states that that concept does not include, inter alia, orders for the confiscation of instrumentalities or proceeds of crime.

35 In that regard, it should be noted that the amount of the financial penalty will not necessarily correspond to the value of the economic advantage derived from the offence which that penalty punishes. Such a penalty may be set at an amount that is lower than, equal to or greater than the value of that advantage and may even be imposed in the absence of such an advantage or concurrently with confiscation of the proceeds from the criminal offence. Moreover, such a financial penalty is not comparable to confiscation of the instrumentalities by which the offence in question was committed.

36 It is thus apparent that, in adopting Framework Decisions 2005/212 and 2005/214, the EU legislature intended to distinguish between measures relating to the confiscation of property, constituting the product or instrumentalities of criminal offences, from measures relating to the financial penalties in respect of such offences.

37 In the present case, the referring court considers that the imposition on a legal person, by reason of the commission of an offence by a natural person, of a financial penalty corresponding to the advantage which the legal person derived or could derive from that offence constitutes confiscation of all or part of the proceeds of the offence, within the meaning of Framework Decision 2005/212. That court states, however, that Bulgarian law authorises the imposition of such a financial penalty even where no advantage has actually been obtained or where the advantage is not pecuniary in nature, and adds that the procedure referred to in Article 83a et seq. of the Zann does not focus exclusively on the property acquired unlawfully. Furthermore, it is apparent from Article 83a(1) that the amount of the financial penalty which may be imposed may exceed the value of the advantage obtained.

38 In the light of the foregoing, a financial penalty, such as that provided for in Article 83a(1) of the Zann, does not constitute confiscation within the meaning of Framework Decision 2005/212 and Directive 2014/42, even where the amount of that penalty corresponds to the value of the pecuniary advantage derived from the offence.

39 It follows that that framework decision is not applicable to the dispute in the main proceedings and that, therefore, there is no need to interpret Articles 4 and 5 of that decision in the context of the present reference for a preliminary ruling.

40 As regards, in the second place, the referring court's doubts as to whether Articles 83a et seq. of the Zann are compatible with Article 49 of the Charter, it must, first, be noted that the main proceedings concern the imposition of a financial penalty on a company on the ground of an unlawful pecuniary advantage obtained by that company as a result of a criminal offence allegedly committed by its representative and manager in relation to VAT declarations.

41 The Court has already held that, since they seek to ensure the proper collection of VAT and to combat fraud, administrative penalties imposed by the national tax authorities and criminal proceedings initiated in respect of VAT-related offences constitute implementation of EU law, within the meaning of Article 51(1) of the Charter (see, to that effect, judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 26 and 27, and of 5 May 2022, *BV*, C-570/20, EU:C:2022:348, paragraph 26). The same applies to penalties imposed by a court in the context of such criminal proceedings. It follows that the Charter is applicable to the case in the main proceedings.

42 Second, it is common ground that the system of penalties at issue in the main proceedings is criminal in nature. The referring court states, in particular, that the procedure under Article 83a et seq. of the Zann has all the characteristics of a criminal procedure.

43 Third, Article 49 of the Charter enshrines, inter alia, the principle of the legality of criminal offences and penalties and corresponds, as is apparent from the explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

44 Pursuant to Article 52(3) of the Charter, in so far as the Charter contains rights which correspond to those guaranteed by the ECHR, the meaning and scope of those rights are to be the same as those laid down by the ECHR. The Court must, accordingly, ensure that its interpretation of Article 49 of the Charter ensures a level of protection which does not disregard that guaranteed by Article 7 ECHR, as interpreted by the European Court of Human Rights (see, to that effect, judgment of 23 November 2021, *IS (Illegality of the order for reference)*, C-564/19, EU:C:2021:949, paragraph 101 and the case-law cited).

45 As the referring court itself noted, the European Court of Human Rights has held that Article 7 of the ECHR precludes the imposition of a criminal sanction on an individual without his or her personal criminal liability being established and declared beforehand, otherwise the principle of the presumption of innocence guaranteed by Article 6(2) of the Convention would also be breached (ECtHR, 28 June 2018, G.I.E.M S.r.l. and *Others v. Italy*, CE:ECHR:2018:0628JUD000182806, § 251).

46 In so far as Article 49 of the Charter must be interpreted as containing the same requirements as those stemming from Article 7 of the ECHR and which are mentioned in the preceding paragraph, Article 49 of the Charter is relevant to the answer to be given to the first question referred for a preliminary ruling.

47 That said, as confirmed by the case-law referred to in paragraph 45 above, such requirements are also equivalent to those arising from the principle of the presumption of innocence laid down in Article 6(2) of the ECHR, which is expressly enshrined in Article 48(1) of the Charter.

48 Thus, having regard to the subject matter of the present request for a preliminary ruling, which concerns, in essence, the attribution, by presumption, of criminal liability to a legal person on account of the acts of its representative and manager, it is sufficient, in the context of the answer to be given to that question, to refer not to Article 49 but to Article 48(1) of the Charter, which, in accordance with the case-law cited in paragraph 44 above, must be interpreted ensuring a level of protection which does not infringe Article 6 of the ECHR.

49 Article 48(2) of the Charter, which enshrines the principle of respect for the rights of the defence, also appears relevant for the purpose of providing a useful answer to the referring court.

50 Accordingly, it is necessary to reformulate the first question as seeking, in essence, to establish whether Article 48 of the Charter must be interpreted as precluding national legislation under which a national court may impose on a legal person a criminal penalty for an offence for which a natural person who has the power to bind or represent that legal person is allegedly liable, where that liability has not yet been definitively established.

Substance

51 Under Article 48(1) of the Charter, everyone who has been charged is to be presumed innocent until proved guilty according to law. That presumption applies where determinations are made as to objective elements constituting an offence that may lead to the imposition of administrative sanctions of a criminal nature (judgment of 9 September 2021, *Adler Real Estate and Others*, C-546/18, EU:C:2021:711, paragraph 46 and the case-law cited), as is the case here, as has been held in paragraph 42 above.

52 Moreover, Article 48(2) of the Charter states that respect for the rights of the defence of anyone who has been charged must be guaranteed. The Court has already held that respect for the rights of the defence is, in all proceedings in which penalties may be imposed, a fundamental principle of EU law (judgments of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission and Others*, C-550/07 P, EU:C:2010:512, paragraph 92, and of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 204).

53 According to the referring court, it is apparent from the combined provisions of Article 83a(1) and Articles 83b and 83f of the Zann that a criminal penalty may be imposed on a legal person where it has been enriched or is liable to be enriched as a result of an offence attributable to a natural person who has the power to bind it or who represents it, even before that natural person has been definitively convicted of that offence.

54 Moreover, it is apparent from the order for reference that the court before which the proposition from the competent prosecutor to impose a financial penalty on a legal person, in application of Article 83a(1) of the Zann, is brought must, in accordance with Article 83d(5) of that law, examine the case on the basis of only the factors referred to in that provision, namely, whether an unlawful advantage has been obtained by the legal person in question, whether there is a link between the perpetrator of the offence and the legal person, whether there is a link between the offence and the advantage obtained and the nature and value of the advantage, if that advantage is pecuniary in nature. The referring court points out that all those elements are based on the premiss that a criminal offence has been committed and adds that the court before which the proposition from the competent prosecutor is brought is not authorised to contest the merits of that premiss, since it is only in the context of the criminal proceedings initiated against the natural person that the matter of whether a criminal offence has been committed may be dealt with.

55 Lastly, there is nothing in the documents before the Court to suggest that the legal person has full jurisdiction to challenge, at a later stage in the proceedings initiated against it, the claim that an offence was committed.

56 Although that legal person may bring an appeal against its conviction under Article 83e of the Zann, the appellate court does not appear to be in a position to assess the truth of that premiss either.

57 Similarly, it is only in certain very specific circumstances that the proceedings which led to a criminal penalty being imposed on a legal person may be reopened, in accordance with Article 83f of that law. Therefore, without there even being any need to rule on whether those grounds for reopening the proceedings confer on the court hearing the case more extensive

powers than those available to it when ruling at first instance or on appeal, it is sufficient to state that this is an exceptional remedy which cannot be exercised as of right by the legal person convicted under Article 83a et seq. of that law.

58 It follows that, as the Advocate General observed, in essence, in points 50 and 52 of his Opinion, a legal person may have a definitive criminal penalty imposed on it as a result of an offence imputed to a natural person who has the power to bind or represent it, without the competent court being able to assess whether that offence was in fact committed and without the legal person being able to put forward its observations in that regard to useful effect.

59 Such a situation is such as to infringe, in a manifestly disproportionate manner, the principle of the presumption of innocence and the rights of the defence, which are guaranteed to that legal person pursuant to Article 48 of the Charter.

60 While it is true that Article 48 of the Charter does not preclude a Member State from establishing presumptions of fact or of law, it is for that Member State to confine presumptions provided for in the criminal law within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence, otherwise the principle of the presumption of innocence enshrined in paragraph 1 of that article would be disproportionately impaired (see, to that effect, judgment of 9 September 2021, *Adler Real Estate and Others*, C-546/18, EU:C:2021:711, paragraph 47).

61 Similarly, the European Court of Human Rights has held that the Contracting States may, in certain circumstances, penalise a simple or objective fact as such. However, the ECHR does require the Contracting States to remain within certain limits as regards criminal law. These limits will be overstepped where a presumption has the effect of making it impossible for an individual to exonerate himself or herself from the accusations against him or her, thus depriving that person of the benefit of Article 6(2) of the ECHR (see, to that effect, ECtHR, 28 June 2018, *G.I.E.M S.r.l. and Others v. Italy*, ECLI:CE:ECHR:2018:0628JUD000182806, § 243 and the case-law cited).

62 As has been pointed out in paragraph 54 above, the court called upon to impose a penalty on a legal person is empowered only to rule on certain specific factors, without being able to assess the reality of the offence on which such a penalty may be based. It follows that that legal person is not in a position effectively to exercise its rights of defence, since it cannot dispute the reality of that offence and must, ultimately, bear the consequences of the fact that separate proceedings have been brought against the natural person who has the power to bind it or represent it.

63 It is important, in that regard, to bear in mind that, the rights of the defence are of a subjective nature, such that it is the concerned parties themselves that must be able effectively to exercise those rights (judgment of 9 September 2021, *Adler Real Estate and Others*, C-546/18, EU:C:2021:711, paragraph 59 and the case-law cited). Moreover, it cannot in any way be ruled out that the legal person and the natural person who has the power to bind or represent it have different interests.

64 Such a conclusion cannot be called into question by the fact that it is open to a legal person, under Article 83f of the Zann, to apply for the proceedings to be reopened with a view to having the financial penalty imposed on it discharged, inter alia where the natural person who has the

power to bind or represent that legal person is exonerated from the charges brought against him or her. As has been stated in paragraph 55 above, such a remedy cannot be treated in the same way as a remedy of full jurisdiction which could be exercised by that legal person as of right.

65 Furthermore, while it is true that the procedure established by Article 83a et seq. of the Zann makes it possible to protect the financial interests of the European Union by ensuring correct collection of VAT, the fact remains that such an objective cannot justify disproportionate interference with the guarantees contained in Article 48 of the Charter (see, by analogy, judgment of 23 November 2006, *Jussila v. Finland*, CE:ECHR:2006:1123JUD007305301, § 36). Moreover, it has not been established that a procedure such as that at issue in the main proceedings is necessary in order to avoid a systemic risk of impunity.

66 It follows that a procedure such as that provided for in Articles 83a et seq. of the Zann infringes, in a manifestly disproportionate manner, the rights enshrined in Article 48 of the Charter.

67 It follows from the foregoing considerations that Article 48 of the Charter must be interpreted as precluding national legislation under which a national court may impose on a legal person a criminal penalty for an offence for which a natural person who has the power to bind or represent that legal person is allegedly liable, where that legal person has not been put in a position to dispute the reality of that offence.

The second question

68 In the light of the answer to the first question, there is no need to address the second question.

Costs

69 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fourth Chamber) hereby rules:

Article 48 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation under which a national court may impose on a legal person a criminal penalty for an offence for which a natural person who has the power to bind or represent that legal person is allegedly liable, where that legal person has not been put in a position to dispute the reality of that offence.

[Signatures]