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Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

21 October 2021 (*)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive 2012/13/EU – Right to information in criminal proceedings – Article 6(3) – Rights of suspects or accused persons to be informed of their rights – Articles 47 and 48 of the Charter of Fundamental Rights of the European Union – National law not providing for a procedural mechanism for remedying errors and omissions in the content of the indictment)

In Case C-282/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria), made by decision of 22 June 2020, received at the Court on 26 June 2020, in the criminal proceedings against

ZX,

other party to the proceedings:

Spetsializirana prokuratura

THE COURT (Tenth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Fourth Chamber, acting as President of the Tenth Chamber, I. Jarukaitis and M. Ilešič, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Czech Government, by M. Smolek, J. Vláčil and by T. Machovičová, acting as Agents,
- the Hungarian Government, by M. Fehér and M. Tátrai, acting as Agents,
- the European Commission, by P. Van Nuffel, M. Wasmeier and I. Zaloguín, acting as Agents,

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

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6(3) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1) and of Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The request has been made in criminal proceedings brought against ZX for possession of counterfeit money.

Legal context

European Union law

3 Recitals 14 and 41 of Directive 2012/13 state:

‘(14) ... This Directive ... lays down common minimum standards to be applied in the field of information about rights and about the accusation to be given to persons suspected or accused of having committed a criminal offence, with a view to enhancing mutual trust among Member States. This Directive builds on the rights laid down in the Charter, and in particular Articles 6, 47 and 48 thereof, by building upon Articles 5 and 6 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (“ECHR”),] as interpreted by the European Court of Human Rights. ...

...

(41) This Directive respects fundamental rights and observes the principles recognised by the Charter. In particular, this Directive seeks to promote the right to liberty, the right to a fair trial and the rights of the defence. It should be implemented accordingly.’

4 Article 6(3) to (4) of that directive, headed ‘Right to information about the accusation’, provides:

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

4. Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings.’

Bulgarian law

5 Article 246(2) and (3) of the Nakazatelno-protsesualen kodeks (Criminal Procedure Code) provides:

‘2. The statement of facts in the indictment shall set out: the offence committed by the accused; the time, place and manner in which it was committed; the victim and the amount of the damage; ...

3. the operative part of the indictment shall state: ... the legal classification of the act committed ...’

6 Article 248(1) and (3) of the Criminal Code Procedure provides:

‘(1) The following questions shall be raised at the preliminary hearing:

...

3. in the course of the pre-trial proceedings, was there an infringement of essential procedural requirements which could be rectified and which resulted in a restriction of the procedural rights of the accused person, the victim or their dependants?

...

(3) At the trial before the courts of first instance, appeal and cassation, it is not permissible to challenge violations of the procedural rights referred to in paragraph 1(3) which were not raised at the pre-trial hearing, including at the initiative of the judge-rapporteur, or which are considered insignificant.’

7 Under Article 249(2) of that code:

‘Where proceedings are suspended on the basis of Article 248(1)(3) of the [Criminal Procedure Code], the court shall notify the case to the public prosecutor by means of an order indicating the violations committed.’

8 In accordance with Article 287(1) of that code, ‘the prosecutor shall bring new charges where, during the course of the judicial investigation, there are grounds for making substantial amendments to the charges in order to apply a law imposing more serious sanctions’. Under Article 287(3), the amendment of the charges entails an obligation to ensure that the rights of defence are protected, that is to say that the case is to be adjourned on the application of the defence in order to prepare having regard to the amended charges.

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

9 ZX is subject to criminal proceedings in Bulgaria for possession, on 19 July 2015, of fake money quoted on currency markets at home and abroad, namely 88 banknotes of EUR 200 which he knew to be counterfeit, contrary to Article 244(2) of the Criminal Code, read in conjunction with paragraph 1 thereof.

10 At the pre-trial hearing, the regularity of the indictment was specifically raised. ZX did not challenge it and the competent court decided that the indictment complied with all the formalities.

11 However, after all the evidence had been gathered, when assessing whether the conditions for hearing the parties and giving judgment had been met, that court found some errors and omissions in the indictment that had not been noticed at the pre-trial hearing. First, the length of time during which the accused person was in possession of the 88 counterfeit banknotes was not accurately recorded, secondly, the indictment did not give a full description of the legal characteristics of the act in question and, thirdly, there was an error in the statement of the provisions of Bulgarian criminal law which were allegedly infringed.

12 At the trial on 12 June 2020, the referring court drew attention to those defects in the indictment. The Spetsializirana prokuratura (Specialised Prosecutor's Office, Bulgaria) ('the Prosecutor') indicated that that was to be remedied immediately by amending the charges. ZX observed that, despite the defects in the legal classification of the facts, there was no basis for amending the charges under Article 287 of the Criminal Procedure Code. ZX proposed that the referring court should correct those errors in its judgment in order to clarify the correct legal classification of the offence.

13 The national court states that, in the main proceedings, it is required to determine whether it is possible, in the light of the prosecutor's statement at the main hearing, to remedy those procedural defects in the indictment, which it considers to be substantial and as impeding the proper conduct of the criminal proceedings.

14 In that regard, it considers that the defects should have been established at the pre-trial hearing, the court proceedings should have been suspended and the case should have been referred back to the prosecutor with instructions to remedy them and to draw up a new indictment. No such steps were taken. It further notes that, after a legislative reform adopted in the course of 2017 ('the 2017 reform'), it follows from Article 248(3) of the Criminal Procedure Code that such a possibility may be exercised only during the pre-trial hearing, as Bulgarian law does not provide for a mechanism to remedy such defects in the indictment, after that hearing, for example by referring the case back to the prosecutor.

15 Therefore, the referring court states that the first question referred concerns whether, after the pre-trial hearing, the prohibition in the national legislation on signalling defects in the information submitted with regard to the charges and, in that regard, the impossibility of remedying those defects, are consistent with Article 6(3) of Directive 2012/13. It asks, in particular, whether that provision is also applicable after the pre-trial hearing, for example at subsequent hearings, once the evidence gathering is complete, but before the court has given judgment on the substance of the charges. Furthermore, the referring court considers that that prohibition may be incompatible with the first and second paragraphs of Article 47 of the Charter, which concern the right to an effective remedy and to a fair trial.

16 If the Court concludes that that national legislation does not comply with EU law, the referring court asks, in the context of the second question referred, how a procedural defect relating to the right of the accused person to know what he or she is accused of should be remedied. Since, in accordance with the judgment of 14 May 2020, *Staatsanwaltschaft Offenburg* (C-615/18, EU:C:2020:376), Article 6(3) of Directive 2012/13 has direct effect, it is necessary to provide for a procedural means by which that direct effect can be achieved.

17 In that regard, the referring court considers that there are two possible procedural avenues.

18 The first approach would be to apply Article 287 of the Criminal Procedure Code, with a broad interpretation, which allows the charges to be amended, in particular, when the prosecutor has made a mistake in drafting the indictment. Such an amendment would be accompanied by the necessary safeguards to ensure that the accused person is able defend himself or herself. Specifically, the judge would give the prosecutor the opportunity to make the relevant changes in the content of the indictment in order to eliminate errors and omissions, and then the prosecutor would inform the defence *ex officio* and give it the opportunity to prepare for those amendments, which would include, inter alia, the opportunity to file new requests for evidence. However, that court points out that the possibility of amending the charges, within the meaning of Article 287, has not yet been used by the national courts to remedy procedural defects in the indictment, such as those at issue in the main proceedings.

19 However, that court considers, first, that the application of that procedural route has the result that the solution provided by Article 248(3) of the Criminal Procedure Code is incompatible with EU law. Secondly, that application requires the procedural defect in the indictment to be corrected after the evidence-gathering procedure has been completed, but before the proceedings on the substance.

20 The second possible course of action would be to disapply the prohibition in the Criminal Procedure Code following the 2017 reform, and to apply the procedure that was in force until that reform, for example suspension of the court proceedings, referral of the case back to the prosecutor to draw up a new indictment, and resumption of the case with a new hearing of all witnesses.

21 Thus, in the context of the second question, the referring court asks whether those possible procedural avenues are consistent with EU law and, in particular, with Article 6(3) of Directive 2012/13. Moreover, with regard to Article 47 of the Charter, it asks whether those procedural avenues are the most consistent with the rights to an effective remedy and access to a fair trial.

22 The referring court points out that the Court has already ruled on identical factual circumstances, namely an indictment vitiated by procedural defects which infringe the accused person's right to know the charges against him or her. Thus, it follows from the judgments of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392), and of 12 February 2020 *Kolev and Others* (C-704/18, EU:C:2020:92) that national legislation must provide for a sufficiently effective mechanism to remedy defects in the indictment which affect the rights of the accused person under Article 6(3) of Directive 2012/13, whether through the court itself or by referring the case to the prosecutor. However, the national court considers that those judgments do not enable it to answer the questions it is asking.

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

‘(1) Is a national law, namely Article 248(3) of the Criminal Procedure Code of the Republic of Bulgaria, which does not provide for any procedural remedy for errors and omissions in the content of the indictment which prejudice the right of the accused person to know what he or she is accused of, after the end of the first hearing in a criminal case (pre-trial hearing), compatible with Article 6(3) of Directive 2012/13 and Article 47 of the [Charter]?’

(2) If the answer to that question is in the negative: would an interpretation of the national provisions governing amendment of the charges that allows the prosecution service to rectify those substantive ambiguities and shortcomings in the indictment at the hearing, so as to take proper and

effective account of the accused person's right to be informed of the accusation, be in keeping with the aforesaid provisions and with Article 47 of the Charter, or would it be in keeping with those provisions to refrain from applying national legislation prohibiting the staying of court proceedings and referral of the case back to the public prosecution service with directions to draft a new indictment?'

Consideration of the questions referred

The first question

24 By its first question, the national court asks, in essence, whether Article 6(3) of Directive 2012/13 and Article 47 of the Charter must be interpreted as precluding national legislation which does not provide for a procedural means of remedying errors and defects in the content of the indictment which prejudice the right of the accused person to be provided with detailed information about the charges, following the pre-trial hearing in a criminal case.

25 First, it should be recalled that Article 6 of Directive 2012/13 defines, in the provisions it contains, rules relating to the right to be informed of the charges brought against one, which are intended to ensure the fairness of the proceedings and to permit the effective exercise of the rights of the defence (judgment of 13 June 2019, *Moro*, C-646/17, EU:C:2019:489, paragraph 43, and order of 14 January 2021, *UC and TD (Deficiencies in the bill of indictment)*, C-769/19, not published, EU:C:2021:28, paragraph 43).

26 As stated, in essence, in recitals 14 and 41 of Directive 2012/13, that directive builds on the rights set out, inter alia, in Articles 47 and 48 of the Charter and seeks to promote those rights. More specifically, Article 6 of that directive expressly establishes one aspect of the right to an effective remedy and the rights of the defence, enshrined in Article 47 and Article 48(2) of the Charter (see, to that effect, judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 88, and of 14 May 2020, *Staatsanwaltschaft Offenburg*, C-615/18, EU:C:2020:376, paragraph 71).

27 Secondly, as to the moment at which the benefit of the procedural rights enshrined in Article 6(3) of Directive 2012/13 must be ensured, the Court has noted that, in principle, it is, at the latest, before the criminal court begins to examine the charges on the merits and the commencement of the proceedings (see, to that effect, judgment of 12 February 2020, *Kolev and Others*, C-704/18, EU:C:2020:92, paragraph 39, and order of 14 January 2021, *UC and TD (Deficiencies in the bill of indictment)*, C-769/19, not published, EU:C:2021:28, paragraph 44).

28 In that regard, the Court held that nothing in Directive 2012/13 precludes the judge from taking the necessary measures to regularise the indictment, provided that the rights of the defence and to a fair trial are duly protected (see, to that effect, judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 94).

29 Further, the Court has already accepted that the information in relation to the charges sent to the defence may be the subject of later amendments, in particular as regards the legal classification of the alleged acts. Such amendments must however be disclosed to the accused person or his or her lawyer at a point in time when they still have the opportunity to respond effectively, before the stage of deliberation. In that connection, that possibility is envisaged in Article 6(4) of Directive 2012/13, which provides that suspects or accused persons must be informed promptly of any changes in the information given in accordance with that article in the course of criminal proceedings where this is necessary to safeguard the fairness of the proceedings (see, to that effect, judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 95).

30 It follows from all that case-law that the rights deriving from Article 6(3) of Directive 2012/13 must be protected throughout the criminal proceedings and thus, in the present case, also after the pre-trial hearing in a criminal case. However, the referring court states that, following the 2017 reform, the possibility of suspending the court proceedings and referring the case back to the prosecutor with instructions to remedy procedural defects in the indictment and to draw up a new indictment may be exercised pursuant to Article 248(3) of the Criminal Procedure Code only during such a hearing, as Bulgarian law does not provide for a mechanism to remedy such defects thereafter.

31 It follows that such legislation does not comply with Article 6(3) of Directive 2012/13 or Article 47 of the Charter since, after that hearing, the absence of a procedural mechanism for remedying the defects in the indictment prevents the accused person from knowing, in sufficient detail, the charges brought against him or her, which is liable to impede the effective exercise of the rights of the defence.

32 Therefore, the answer to the first question is that Article 6(3) of Directive 2012/13 and Article 47 of the Charter must be interpreted as precluding national legislation which does not provide for a procedural mechanism for remedying errors and omissions in the indictment which prejudice the right of the accused person to be provided with detailed information concerning the charges following the pre-trial hearing in a criminal case.

The second question

33 By its second question, the referring court asks, in essence, whether Article 6(3) of Directive 2012/13 and Article 47 of the Charter are to be interpreted as requiring an interpretation of national law concerning the amendment of the charges, which allows the prosecutor to remedy errors and omissions in the indictment at the trial, while actively and effectively safeguarding the rights of the defence of the accused person, or whether those provisions require that the prohibition in national law on suspending court proceedings and referring the case back to the prosecutor to draw up a new indictment be disapplied.

34 The Court has already observed that EU law does not specify the national authority responsible for ensuring that accused persons benefit from the rights enshrined in Article 6(3) of Directive 2012/13, nor the procedure to be followed for that purpose (see, to that effect, judgment of 12 February 2020, *Kolev and Others*, C-704/18, EU:C:2020:92, paragraph 40, and order of 14 January 2021, *UC and TD (Deficiencies in the bill of indictment)*, C-769/19, not published, EU:C:2021:28, paragraph 44).

35 Thus the specific arrangements for implementing Article 6(3) of Directive 2012/13 fall within the procedural autonomy of the Member States, subject to compliance with the principle of equivalence, which requires that national rules are not less favourable than those governing similar domestic situations, and the principle of effectiveness, which requires that national procedural rules do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (see, to that effect, judgment of 12 February 2020, *Kolev and Others*, C-704/18, EU:C:2020:92, paragraphs 48 and 49, and order of 14 January 2021, *UC and TD (Deficiencies in the bill of indictment)*, C-769/19, not published, EU:C:2021:28, paragraphs 47 to 49).

36 In particular, Article 6(3) of Directive 2012/13 does not preclude the right of accused persons to be informed of the charge being assured either by the public prosecutor, following referral of the case during the pre-trial phase of the criminal proceedings, or by the competent criminal court when the case is brought to judgment (see, to that effect, judgment of 12 February 2020, *Kolev and*

Others, C-704/18, EU:C:2020:92, paragraph 44, and order of 14 January 2021, *UC and TD (Deficiencies in the bill of indictment)*, C-769/19, not published, EU:C:2021:28, paragraph 46).

37 In the present case it must be observed that, where the criminal proceedings, taken as a whole, have not been terminated, the exercise of the procedural rights laid down in Article 6(3) of Directive 2012/13 may be assured provided that, in the trial phase the court is itself able to remedy the defects in the indictment, or the prosecutor to whom the case is to be referred has the opportunity to do so, ensuring that the rights of the defence are respected (see, to that effect, judgment of 12 February 2020, *Kolev and Others*, C-704/18, EU:C:2020:92, paragraphs 54 and 55, and order of 14 January 2021, *UC and TD (Deficiencies in the bill of indictment)*, C-769/19, not published, EU:C:2021:28, paragraph 49).

38 In that regard, the Court has also made clear that, in any event, whenever the point in time when the information referred to in Article 6(3) of Directive 2012/13 is provided, the accused person and his or her lawyer must have, inter alia, with due regard for the adversarial principle and the principle of equality of arms, sufficient time to become acquainted with that information, and must be placed in a position to prepare the defence effectively, submit any observations and, when necessary, to make any application, such as an application for further investigation, that they are entitled to make under national law (see, to that effect, judgment of 13 June 2019, *Moro*, C-646/17, EU:C:2019:489, paragraph 53 and the case-law cited, and order of 14 January 2021, *UC and TD (Deficiencies in the bill of indictment)*, C-769/19, not published, EU:C:2021:28, paragraph 50).

39 Having regard to the questions raised by the national court as to whether EU law requires either a consistent interpretation of national law or the disapplication of the provisions of Article 248(3) of the Criminal Procedure Code, as amended in 2017, in order to apply the provision which existed until then, which allowed the court proceedings to be suspended and the case to be referred to the public prosecutor, it is important to recall that, in order to ensure the effectiveness of all the provisions of EU law, the principle of the primacy of that law requires the national courts to interpret, as far as possible, their domestic law in a manner consistent with EU law (see, to that effect, judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 57).

40 It is only where it is unable to interpret national law in compliance with the requirements of EU law, that the national court, which is called upon within the exercise of its jurisdiction to apply provisions of EU law, is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such provision by legislative or other constitutional means (see, to that effect, judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 58 and the case-law cited).

41 Thus, where it is impossible to give a consistent interpretation, any national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it (see, to that effect, judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 61 and the case-law cited). In that regard, the Court has already held that Article 6(3) of Directive 2012/13 must be regarded as having such direct effect (see, to that effect, judgment of 14 May 2020, *Staatsanwaltschaft Offenburg*, C-615/18, EU:C:2020:376, paragraph 72).

42 In the present case, the national court states that national law permits it to give a broad interpretation of the Criminal Procedure Code and, in particular, the rules on amendment of the indictment laid down in Article 287 thereof, which allow procedural defects in the indictment to be

remedied. Specifically, it states that, in order to respect the rights of the defence of the accused person, when applying Article 287 the court first gives the prosecutor the opportunity to make the relevant amendments to the indictment in order to eliminate errors and omissions, then the prosecutor informs the defence and, finally, the defence is given the opportunity to prepare for those amendments, including, if necessary, by filing new requests for evidence.

43 It is important to note that such a mechanism appears to be consistent with Article 6(3) of Directive 2012/13 and Article 47 of the Charter, in that it allows for an effective application of the requirements of Article 6(3), and also appears likely to ensure the right of the accused person to effective judicial protection.

44 In those circumstances, since the national court is able to interpret the Criminal Procedure Code in conformity with those provisions of EU law, it is not obliged to disapply Article 248(3) of the Criminal Procedure Code, as it results from an amendment adopted in 2017. It is, however, for the referring court to carry out the necessary verifications in that respect.

45 In the light of the foregoing considerations, the answer to the second question is that Article 6(3) of Directive 2012/13 and Article 47 of the Charter must be interpreted as requiring the referring court to give an interpretation of the national rules on the amendment of the indictment, as far as possible in a manner consistent with that law, so as to enable the prosecutor to remedy errors and omissions in the content of the indictment at the trial, while at the same time actively and genuinely safeguarding the rights of the defence of the accused person. Only if the referring court considers that such an interpretation is not possible should it disregard the national provision prohibiting the suspension of court proceedings and refer the case back to the public prosecutor in order for the latter to draw up a new indictment.

Costs

46 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 (Tenth Chamber) hereby rules:

- 1. Article 6(3) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation which does not provide for a procedural means of remedying, errors and deficiencies in the indictment which prejudice the right of the accused person to be provided with detailed information about the charges following the pre-trial hearing in a criminal case.**
- 2. Article 6(3) of Directive 2012/13 and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as requiring the referring court to give an interpretation of the national rules on the amendment of the charges, as far as possible in a manner consistent with that law, so as to enable the prosecutor to remedy errors and omissions in the content of the indictment at the trial, while at the same time actively and genuinely safeguarding the rights of the defence of the accused person. Only if the referring court considers that such an interpretation is not possible should it disregard the national provision prohibiting the suspension of court proceedings and refer the case back to the public prosecutor in order for the latter to draw up a new indictment.**

[Signatures]

* Language of the case: Bulgarian.
