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Lingua del documento :

ECLI:EU:C:2021:864

Provisional text

JUDGMENT OF THE COURT (Third Chamber)

21 October 2021 (*)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive 2014/42/EU – Freezing and confiscation of instrumentalities and proceeds of crime in the European Union – Scope – Confiscation of illegally obtained assets – Economic benefit derived from a criminal offence which has not been the subject of a conviction – Article 4 – Confiscation – Article 5 – Extended confiscation – Article 6 – Confiscation from a third party – Conditions – Confiscation of money allegedly belonging to a third party – Third party having no right to appear as a party in the confiscation proceedings – Article 47 of the Charter of Fundamental Rights of the European Union)

In Joined Cases C-845/19 and C-863/19,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Apelativen sad – Varna (Court of Appeal, Varna, Bulgaria), made by decisions of 7 November 2019 (C-854/19) and of 19 November 2019 (C-863/19), received at the Court on 19 and 26 November 2019 respectively, in the criminal proceedings against

DR (C-845/19),

TS (C-863/19),

interested party:

Okrazhna prokuratura – Varna,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Second Chamber, acting as President of the Third Chamber, J. Passer, F. Biltgen, L.S. Rossi (Rapporteur) and N. Wahl, Judges,

Advocate General: P. Pikamäe,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 13 January 2021,

after considering the observations submitted on behalf of:

- the Okrazhna prokuratura – Varna, by I. Todorov and V. Chavdarov, acting as Agents,
- the Bulgarian Government, by M. Georgieva, T. Mitova and E. Petranova, acting as Agents,
- the Austrian Government, by J. Schmoll and F. Zeder, acting as Agents,
- the European Commission, initially by S. Grünheid, Y. Marinova and R. Troosters, and subsequently by S. Grünheid and Y. Marinova, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 March 2021,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of 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) and of Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The requests have been made in the context of criminal proceedings against DR (C-845/19) and TS (C-863/19) (together, ‘the persons concerned’) concerning applications for the confiscation, following the conviction of the persons concerned of possession of narcotics for the purposes of their distribution, of sums of money which those persons claim belong to third parties.

Legal context

EU law

Framework Decision 2004/757/JHA

3 Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ 2004 L 335, p. 8) provides, in Article 2 thereof, entitled ‘Crimes linked to trafficking in drugs and precursors’:

‘1. Each Member State shall take the necessary measures to ensure that the following intentional conduct when committed without right is punishable:

- (a) the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs;

...

(c) the possession or purchase of drugs with a view to conducting one of the activities listed in (a);

...'

4 Pursuant to Article 4(2) of that framework decision:

'Each Member State shall take the necessary measures to ensure that the offences referred to in Article 2(1)(a), (b) and (c) are punishable by criminal penalties of a maximum of at least between 5 and 10 years of imprisonment in each of the following circumstances:

...

(b) the offence either involves those drugs which cause the most harm to health, or has resulted in significant damage to the health of a number of persons.'

Directive 2014/42

5 According to recitals 11, 19 to 21, 33 and 38 of Directive 2014/42:

'(11) There is a need to clarify the existing concept of proceeds of crime to include the direct proceeds from criminal activity and all indirect benefits, including subsequent reinvestment or transformation of direct proceeds. Thus proceeds can include any property including that which has been transformed or converted, fully or in part, into other property, and that which has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds. It can also include the income or other benefits derived from proceeds of crime, or from property into or with which such proceeds have been transformed, converted or intermingled.

...

(19) Criminal groups engage in a wide range of criminal activities. In order to effectively tackle organised criminal activities there may be situations where it is appropriate that a criminal conviction be followed by the confiscation not only of property associated with a specific crime, but also of additional property which the court determines constitutes the proceeds of other crimes. This approach is referred to as extended confiscation. ...

(20) When determining whether a criminal offence is liable to give rise to economic benefit, Member States may take into account the modus operandi, for example if a condition of the offence is that it was committed in the context of organised crime or with the intention of generating regular profits from criminal offences. However, this should not, in general, prejudice the possibility to resort to extended confiscation.

(21) Extended confiscation should be possible where a court is satisfied that the property in question is derived from criminal conduct. This does not mean that it must be established that the property in question is derived from criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities. In this context, the court has to consider the specific

circumstances of the case, including the facts and available evidence based on which a decision on extended confiscation could be issued. The fact that the property of the person is disproportionate to his lawful income could be among those facts giving rise to a conclusion of the court that the property derives from criminal conduct. Member States could also determine a requirement for a certain period of time during which the property could be deemed to have originated from criminal conduct.

...

(33) This Directive substantially affects the rights of persons, not only of suspected or accused persons, but also of third parties who are not being prosecuted. It is therefore necessary to provide for specific safeguards and judicial remedies in order to guarantee the preservation of their fundamental rights in the implementation of this Directive. This includes the right to be heard for third parties who claim that they are the owner of the property concerned, or who claim that they have other property rights (“real rights”, “*ius in re*”), such as the right of usufruct. The freezing order should be communicated to the affected person as soon as possible after its execution. Nevertheless, the competent authorities may postpone communicating such orders to the affected person due to the needs of the investigation.

...

(38) This Directive respects the fundamental rights and observes the principles recognised by [the Charter] and the European Convention for the Protection of Human Rights and Fundamental Freedoms[, signed at Rome on 4 November 1950], as interpreted in the case-law of the European Court of Human Rights. This Directive should be implemented in accordance with those rights and principles. This Directive should be without prejudice to national law in relation to legal aid and does not create any obligations for Member States’ legal aid systems, which should apply in accordance with the Charter and [the European Convention for the Protection of Human Rights and Fundamental Freedoms].’

6 Article 1 of Directive 2014/42, entitled ‘Subject matter’, provides:

‘1. This Directive establishes minimum rules on the freezing of property with a view to possible subsequent confiscation and on the confiscation of property in criminal matters.

2. This Directive is without prejudice to the procedures that Member States may use to confiscate the property in question.’

7 Article 2 of that directive, entitled ‘Definitions’, 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;

...’

8 Article 3 of that directive, entitled ‘Scope’, provides as follows:

‘This Directive shall apply to criminal offences covered by:

...

(g) [Framework Decision 2004/757];

...’

9 Article 4 of Directive 2014/42, entitled ‘Confiscation’, states, in paragraph 1 thereof:

‘Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia.’

10 Article 5 of the directive, entitled ‘Extended confiscation’, provides:

‘1. Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.

2. For the purpose of paragraph 1 of this Article, the notion of “criminal offence” shall include at least the following:

...

(e) a criminal offence that is punishable, in accordance with the relevant instrument in Article 3 or, in the event that the instrument in question does not contain a penalty threshold, in accordance with the relevant national law, by a custodial sentence of a maximum of at least four years.’

11 Article 6 of that directive, entitled ‘Confiscation from a third party’, provides:

‘1. Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.

2. Paragraph 1 shall not prejudice the rights of bona fide third parties.’

12 Article 8 of the same directive, entitled ‘Safeguards’, provides:

‘1. Member States shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights.

...

6. Member States shall take the necessary measures to ensure that reasons are given for any confiscation order and that the order is communicated to the person affected. Member States shall provide for the effective possibility for a person in respect of whom confiscation is ordered to challenge the order before a court.

7. Without prejudice to [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 [Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 294, p. 1)], persons whose property is affected by a confiscation order shall have the right of access to a lawyer throughout the confiscation proceedings relating to the determination of the proceeds and instrumentalities in order to uphold their rights. The persons concerned shall be informed of that right.

8. In proceedings referred to in Article 5, the affected person shall have an effective possibility to challenge the circumstances of the case, including specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct.

9. Third parties shall be entitled to claim title of ownership or other property rights, including in the cases referred to in Article 6.

...’

Bulgarian law

The NK

13 Article 53 of the Nakazatelen kodeks (Criminal Code; ‘the NK’) states:

‘(1) 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; where such property no longer exists or has been disposed of, its equivalent value shall be determined;

(b) property belonging to the offender which has been the subject matter of a deliberate criminal offence, in the cases expressly provided for in the Special Part of the present code.

(2) The following shall also be confiscated in favour of the State:

- (a) property which has been the subject matter or instrument of a criminal offence and the possession of which is prohibited, and
- (b) the direct and indirect proceeds of a criminal offence, where these are not subject to return or recovery; where such proceeds no longer exist or have been disposed of, their equivalent value shall be determined.
- (3) For the purposes of paragraph 2(b):
1. “direct proceeds” shall mean any economic advantage arising as an immediate consequence of an offence;
 2. “indirect proceeds” shall mean any economic advantage arising from the disposal of direct proceeds, as well as any property resulting from the subsequent conversion, in whole or in part, of direct proceeds, including where the latter have been intermingled with property acquired from a legitimate source; property up to the value of the direct proceeds incorporated shall be liable to confiscation, as well as any increase in the property directly linked to the disposal or conversion of the direct proceeds or to the incorporation of the direct proceeds in the property.’

14 Article 354a of the NK provides:

‘(1) Any person who, without the appropriate authorisation, produces, processes, acquires or possesses narcotics or analogues thereof for the purpose of distribution, or who distributes narcotics or analogues thereof, shall be subject, in the case of highly dangerous narcotics or analogues thereof, to a term of imprisonment of between two and eight years and a fine of [between 5 000 Bulgarian leva (BGN) and BGN 20 000 (approximately EUR 2 500 and EUR 10 000)] and, in the case of dangerous narcotics or analogues thereof, to a term of imprisonment of between one and six years and a fine of [between BGN 2 000 and BGN 10 000 (approximately EUR 1 000 and EUR 5 000)]. ...

...

(3) Any person who, without the appropriate authorisation, acquires or possesses narcotics or analogues thereof shall be subject:

1. in the case of highly dangerous narcotics or analogues thereof, to a term of imprisonment of between one and six years and a fine of [between BGN 2 000 and BGN 10 000];
2. in the case of dangerous narcotics or analogues thereof, to a term of imprisonment of up to five years and a fine of [between BGN 1 000 and BGN 5 000 (approximately EUR 500 to EUR 2 500)].

...’

The NPK

15 Article 306(1)(1) of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure; ‘the NPK’) provides:

- ‘1. The court may also rule by way of order on the following matters:

(1) the imposition of an aggregate sentence pursuant to Articles 25 and 27 as well as the application of Article 53 of the [NK].

...’

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

16 On 21 February 2019, in the city of Varna (Bulgaria), DR and TS were in possession, without authorisation and with a view to their distribution, of highly dangerous narcotics. They were convicted of that offence under Article 354a of the NK and were sentenced, respectively, to a term of imprisonment of one year and a fine of BGN 2 500 (approximately EUR 1 250), and a term of imprisonment of two years, suspended for four years, and a fine of BGN 5 000 (approximately EUR 2 500).

17 In the course of a search of the premises where DR lived with his mother and grandparents and of his car, carried out by the competent authorities in the course of pre-trial proceedings, those authorities found a sum of money amounting to BGN 4 447.06 (approximately EUR 2 200).

18 In the course of a search of the premises where TS lived with his mother, also carried out in the context of pre-trial proceedings, the competent authorities discovered a sum of money amounting to BGN 9 324.25 (approximately EUR 4 800).

19 Following the criminal conviction of the persons concerned, the Okrazhna prokuratura – Varna (Regional Public Prosecutor’s Office, Varna, Bulgaria) (‘the Public Prosecutor’s Office’) applied to the Okrazhen sad Varna (Regional Court, Varna, Bulgaria), the first instance court, for the confiscation of those sums of money in favour of the State, in accordance with Article 306(1)(1) of the NPK. The first instance court examined that application of the Public Prosecutor’s Office at a public hearing attended by the persons concerned and their two lawyers.

20 Before that court, DR stated that the sum of money referred to in paragraph 17 of the present judgment belonged to his grandmother and that the latter had obtained it under a bank loan. He also provided written evidence which established that, in December 2018, his grandmother had withdrawn the sum of BGN 7 000.06 (approximately EUR 3 500) from her bank account. DR’s grandmother did not take part in the proceedings before the first instance court, since Bulgarian law does not permit her, as a party distinct from the perpetrator of the offence concerned, to take part in those proceedings. Nor was she heard as a witness.

21 In the course of those proceedings, TS claimed that the sum of money referred to in paragraph 18 of the present judgment belonged to his mother and his sister. In that regard, he provided written evidence which established that, in March 2018, his mother had taken out a consumer loan from DSK Bank EAD for the sum of BGN 17 000 (approximately EUR 8 500). TS’s mother was also unable to take part in the proceedings before the Okrazhen sad Varna (Regional Court, Varna). She was, however, heard as a witness concerning the sum of money that had been found at the premises where she lived with her son.

22 The Okrazhen sad Varna (Regional Court, Varna) refused to authorise the confiscation of the sums of money at issue in the main proceedings, taking the view that the criminal offence of which the persons concerned had been convicted, namely that of possessing narcotics for the purposes of their distribution, was not such as to generate an economic benefit. In that regard, that court held that, although there is evidence, namely witness statements, that, in the cases in the main proceedings, the persons concerned had been selling narcotics, the conditions for confiscation in

favour of the State referred to in Article 53(2) of the NK were not met, since the Public Prosecutor's Office had not charged the persons concerned with selling narcotics and the existence of trafficking in narcotics had not been confirmed by the criminal convictions.

23 The Public Prosecutor's Office brought an appeal against the judgment of the Okrazhen sad Varna (Regional Court, Varna) before the referring court, arguing that the first instance court had not applied Article 53(2) of the NK in the light of Directive 2014/42. The persons concerned do not share the Public Prosecutor Office's view and argue that only material property which is directly derived from the offence of which the concerned persons have been convicted may be confiscated.

24 In those circumstances, the Apelativen sad – Varna (Court of Appeal, Varna) decided to stay the proceedings and to refer the following questions, which are worded identically in Cases C-845/19 and C-863/19, to the Court of Justice for a preliminary ruling:

'(1) Are [Directive 2014/42/EU] and [the Charter] applicable with respect to a criminal offence consisting of possession of narcotics for the purpose of distribution thereof, committed by a Bulgarian citizen in the territory of the Republic of Bulgaria, and where the potential economic proceeds are also realised and located in [Bulgaria]?

(2) Should the answer to the first question be in the affirmative, how should the concept of "economic advantage derived ... indirectly from a criminal offence" in Article 2(1) of [Directive 2014/42] be understood, and can a sum of money, found in and confiscated from the home of the convicted person and his family and from a car driven by him, constitute such an advantage?

(3) Is Article 2 of [Directive 2014/42] to be interpreted as precluding a legal provision such as that of Article 53(2) of [the NK], which does not provide for the confiscation of an "economic advantage derived ... indirectly from a criminal offence"?

(4) Is Article 47 of [the Charter] to be interpreted as precluding a national legal provision such as that of Article 306(1)(1) of [the NPK], which allows for the confiscation for the benefit of the State of a sum of money in respect of which it is claimed that it belongs to a person other than the person who committed the criminal offence, without that third party being able to take part in those proceedings in his or her own right and having direct access to the courts?'

Consideration of the questions referred

The first question

25 By its first question, the referring court asks, in essence, whether Directive 2014/42 must be interpreted as meaning that the possession of narcotics for the purposes of their distribution comes within its scope, even though all the elements inherent in the commission of that offence are confined within a single Member State.

26 As a preliminary point, it is necessary to determine whether an offence consisting in the possession of narcotics for the purposes of their distribution, within the meaning of Article 354a(1) of the NK, such as the offence at issue in the main proceedings, comes within the material scope of Directive 2014/42.

27 In that regard, it should be noted that Article 3 of that directive lists the criminal offences to which that directive is to apply, namely those covered by the legal instruments set out in points (a) to (k) of that article.

28 More specifically, under Article 3(g) thereof, Directive 2014/42 is to apply to criminal offences covered by Framework Decision 2004/757.

29 Article 2(1)(c) of that framework decision includes, among those offences, the possession or purchase of drugs with a view to conducting one of the activities listed in Article 2(1)(a) of that framework decision, namely, inter alia, the distribution and sale of drugs.

30 Therefore, an offence such as that referred to in paragraph 26 of the present judgment comes within the material scope of Directive 2014/42.

31 As regards the question referred, it should be noted that Directive 2014/42 is based, inter alia, on Article 83(1) TFEU.

32 Pursuant to the first subparagraph of Article 83(1) TFEU, the European Union is able to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Moreover, it is apparent from the second subparagraph of Article 83(1) that ‘illicit drug trafficking’ is one of those areas of crime.

33 Thus, the possession of narcotics for the purposes of their distribution is a particularly serious form of crime with a cross-border dimension that may result, inter alia, from the nature or impact of such an offence, within the meaning of Article 83(1) TFEU, so that the EU legislature is competent to adopt, on the basis of that provision, minimum harmonisation rules concerning the definition of criminal offences and sanctions in the area under consideration, without that competence covering solely situations in which the elements inherent in the commission of a particular offence are not confined within a single Member State. In addition, such a limitation is not apparent from the provisions of Directive 2014/42 either.

34 In the light of the foregoing considerations, the answer to the first question is that Directive 2014/42 must be interpreted as meaning that the possession of narcotics for the purposes of their distribution comes within its scope, even though all the elements inherent in the commission of that offence are confined within a single Member State.

The second and third questions

35 It should be observed as a preliminary point that, in the context of 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 indicated in the questions referred to the Court of Justice by those courts (judgment of 8 May 2019, *PI*, C-230/18, EU:C:2019:383, paragraph 42 and the case-law cited).

36 The second and third questions concern the interpretation of the concept of ‘economic advantage derived ... indirectly from a criminal offence’, set out in Article 2(1) of Directive 2014/42.

37 More specifically, by those questions, the referring court wishes to ascertain, in essence, first, whether that provision must be interpreted as precluding national legislation which does not provide for the confiscation of an economic advantage derived indirectly from a criminal offence and,

second, whether the sums of money seized at the home of the persons concerned and their families and in the car used by one of the persons concerned constitute such an economic advantage.

38 In that regard, it must be noted that the concept of ‘economic advantage derived ... indirectly from a criminal offence’ comes within the definition of the concept of ‘proceeds’ set out in Article 2(1) of Directive 2014/42, according to which ‘proceeds’ are ‘any economic advantage derived directly or indirectly from a criminal offence’, which ‘may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits’.

39 As is apparent from paragraph 2.6 of the explanatory memorandum to the Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union (COM(2012) 85 final), which gave rise to Directive 2014/42, the definition of the concept of ‘proceeds’, within the meaning of that directive, was extended in relation to the definition of that concept set out in Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (OJ 2005 L 68, p. 49), in order to include the possibility of confiscating all valuable benefits resulting from the proceeds of crime, including indirect proceeds.

40 Furthermore, as the Advocate General observed in point 49 of his Opinion, by referring expressly, in Article 2(1) of Directive 2014/42, to direct or indirect advantages, the EU legislature did not intend to establish two distinct concepts that are independent of each other. As is apparent from recital 11 of that directive, the concept of ‘proceeds’ was clarified by that directive, to include not only the property arising directly from the criminal offence concerned, but also all conversions of that property and the other valuable benefits generated by it.

41 In the present case, it is apparent from the orders for reference that the national legislation provides, as follows from Article 53(2) of the NK, for the confiscation of ‘direct and indirect proceeds of a criminal offence’. Furthermore, Article 53(3) of the NK states that “‘indirect proceeds’ shall mean any economic advantage arising from the disposal of direct proceeds, as well as any property resulting from the subsequent conversion, in whole or in part, of direct proceeds’.

42 It thus appears, subject to verification by the referring court, which alone has jurisdiction to interpret national law, that the legislation at issue in the main proceedings does indeed provide for the confiscation of an economic advantage derived indirectly from a criminal offence, within the meaning of Article 2(1) of Directive 2014/42.

43 In any event, even assuming that the directive was transposed incorrectly or incompletely into Bulgarian law, that directive may not, in accordance with the Court’s settled case-law, be relied upon as such by a Member State against an individual in order to disapply a provision of domestic law which is contrary to it, in order to impose obligations on that individual (see, to that effect, judgment of 8 October 2020, *Subdelegación del Gobierno en Toledo (Consequences of the judgment in Zaizoune)*, C-568/19, EU:C:2020:807, paragraph 35 and the case-law cited).

44 That said, it is apparent from the very wording of Article 2(1) of Directive 2014/42 that, in order to be classified as ‘proceeds’, the economic advantage, whether direct or indirect, must, in any event, derive from a criminal offence.

45 In the present case, it is apparent from the orders for reference, first, that the persons concerned were convicted of the possession of highly dangerous narcotics, with a view to their distribution, although that criminal offence did not, in itself, generate an economic advantage.

Secondly, although there was evidence that the persons concerned had been selling narcotics, they were neither prosecuted for nor convicted of such a criminal offence.

46 In those circumstances, in order to give a useful answer to the referring court, it should be considered, in accordance with the case-law cited in paragraph 35 of the present judgment, that, by its second and third questions, that court asks, in essence, whether Directive 2014/42 must be interpreted as providing only for the confiscation of property constituting an ‘economic advantage’ derived from the criminal offence in respect of which the perpetrator of that offence has been convicted, or as providing also for the confiscation of property belonging to that perpetrator for which there is evidence that it constitutes an economic benefit derived from other criminal conduct.

47 In accordance with Article 1(1) thereof, Directive 2014/42 establishes minimum rules on, inter alia, the confiscation of property in criminal matters.

48 More specifically, pursuant to Articles 4, 5 and 6 thereof, that directive requires Member States to provide for such confiscation in three situations which must be considered in turn.

49 As regards, in the first place, Article 4(1) of that directive, that article requires Member States to take the necessary measures to enable the confiscation, either in whole or in part, inter alia, of proceeds, namely economic benefits derived, directly or indirectly, from a criminal offence, subject to a final conviction for a criminal offence, including a conviction resulting from proceedings in absentia.

50 In that regard, it should be noted that, even though that provision refers to a final conviction for a criminal offence, it does not specify whether that criminal offence must necessarily be that from which the proceeds in question arise or whether it may be another criminal offence possibly associated with the former.

51 As the Advocate General observed, in essence, in point 56 of his Opinion, the scope of Article 4(1) of Directive 2014/42 can better be understood by comparison with the case of confiscation referred to in Article 5 of that directive and in the light of recital 19 thereof.

52 Under Article 5 of Directive 2014/42, Member States are required to adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, is satisfied that the property in question is derived from criminal conduct.

53 As regards recital 19 of that directive, it states that, in order to effectively tackle organised criminal activities there may be situations where it is appropriate that a criminal conviction be followed by the confiscation not only of property associated with a specific crime, but also of additional property which the court determines constitutes the proceeds of other crimes. According to the same recital, that approach is referred to as ‘extended confiscation’, within the meaning of Article 5 of that directive.

54 Thus, it must be held that extended confiscation, as provided for in Article 5, covers situations in which Article 4 of the same directive may not be applied because there is no association between the property in question and the offence for which the final conviction has been handed down.

55 Consequently, Article 4 of Directive 2014/42, read in the light of Article 5 and recital 19 thereof, must be interpreted as meaning that, for the purposes of its application, it is necessary that the proceeds whose confiscation is being contemplated arise from the criminal offence in respect of which the perpetrator has been finally convicted.

56 In the present case, to the extent that, as follows from paragraph 45 of the present judgment, the criminal offence of possession, for the purposes of their distribution, of highly dangerous narcotics, in respect of which the persons concerned were convicted by final judgment, does not, in itself, generate an economic benefit, the sums of money whose confiscation is sought could not, therefore, have arisen from that criminal offence.

57 It follows that the confiscation of such sums of money is not covered by Article 4(1) of Directive 2014/42.

58 As regards, in the second place, Article 5 of Directive 2014/42, given that the concept of ‘property’ to which it refers covers, under Article 2(2) of that directive, property of ‘any description’ and, therefore, also sums of money, it must be noted that, as is apparent from its wording, Article 5(1) requires, for the purposes of the confiscation of property, three cumulative conditions to be met.

59 First, the person to whom the property belongs must be convicted of a ‘criminal offence’.

60 In that regard, Article 5(2) of Directive 2014/42 states that the concept of ‘criminal offence’ is to include at least, as is apparent from that paragraph 2(e), a criminal offence that is punishable, in accordance with the relevant instrument in Article 3 of that directive, by a custodial sentence of a maximum of at least four years.

61 In the present case, as stated in paragraph 29 of the present judgment, the possession of narcotics for the purposes of their distribution is a criminal offence punishable in accordance with Article 2(1)(c) of Framework Decision 2004/757, to which Article 3(g) of Directive 2014/42 refers.

62 Furthermore, as regards the requirement referred to in paragraph 60 of the present judgment that the criminal offence must be punishable by a custodial sentence of a maximum of at least four years, it must be noted that, pursuant to Article 4(2)(b) of that framework decision, the maximum penalty laid down for the offence referred to in Article 2(1)(c) thereof is of at least five years, in particular where the offence involves those drugs which cause the most harm to health.

63 In the present case, as is apparent from the orders for reference, the persons concerned were convicted of the possession of highly dangerous narcotics, which tends to indicate that those convictions related to offences involving those drugs which cause the most harm to health, within the meaning of Article 4(2)(b) of Framework Decision 2004/757, so that the offence they committed does appear to be punishable by a custodial sentence of a maximum of at least four years.

64 Secondly, the criminal offence of which the person has been convicted must be liable to give rise, directly or indirectly, to economic benefit.

65 In that regard, recital 20 of Directive 2014/42 states that, when determining whether a criminal offence is liable to give rise, directly or indirectly, to economic benefit, ‘Member States may take into account the *modus operandi*, for example if a condition of the offence is that it was committed in the context of organised crime or with the intention of generating regular profits from

criminal offences'. The second sentence of that recital states, nevertheless, that taking account of that modus operandi 'should not, in general, prejudice the possibility to resort to extended confiscation'.

66 In the present case, it will therefore be for the referring court to assess whether the offence at issue in the main proceedings consisting in the possession of highly dangerous narcotics for the purposes of their distribution is liable to give rise, directly or indirectly, to economic benefit, taking into consideration, where appropriate, the modus operandi of the offence, including, in particular, the fact that it was committed in the context of organised crime or with the intention of generating regular profits from criminal offences.

67 Third, as is apparent from recital 21 of Directive 2014/42, the court must, in any event, be satisfied, on the basis of the circumstances of the case, including the specific facts and available evidence, that the property in question is derived from criminal conduct. In that regard, the referring court may, in particular, take into account, as provided for in Article 5(1) of Directive 2014/42, the fact that the value of the property in question is disproportionate to the lawful income of the convicted person. That said, pursuant to Article 8(8) of Directive 2014/42, that person must have an effective possibility to challenge the circumstances of the case, including specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct.

68 As regards, in the third place, Article 6 of Directive 2014/42, relating to confiscation from a third party, it requires Member States to adopt the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation.

69 In that regard, it must be noted that the confiscation referred to in Article 6 of Directive 2014/42 presupposes that the existence of a transfer of proceeds to a third party or an acquisition of such proceeds by a third party has been established and that that third party was aware of the fact that the purpose of that transfer or acquisition was, for the suspected or accused person, to avoid confiscation.

70 The orders for reference do not indicate that that is the case in the cases in the main proceedings, with the result that Article 6 of Directive 2014/42 does not appear to be relevant in the context of those cases.

71 In the light of all the foregoing considerations, the answer to the second and third questions is that Directive 2014/42 must be interpreted as meaning that it not only provides for the confiscation of property constituting an economic benefit derived from the criminal offence in respect of which the perpetrator has been convicted, but also provides for the confiscation of property belonging to that perpetrator in respect of which the national court hearing the case is satisfied that it derives from other criminal conduct, in compliance with the safeguards provided for in Article 8(8) of that directive and on condition that the offence in respect of which its perpetrator has been convicted is among those listed in Article 5(2) of that directive and that that offence is liable to give rise, directly or indirectly, to economic benefit within the meaning of the same directive.

The fourth question

72 By its fourth question, the referring court asks, in essence, whether Article 47 of the Charter must be interpreted as precluding national legislation which allows for the confiscation, in favour of the State, of property which is claimed to belong to a person other than the perpetrator of the criminal offence at issue, without that person having the right to appear as a party in the confiscation proceedings.

73 It should be recalled that the Charter's scope of application, so far as concerns action of the Member States, is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing EU law (judgment of 14 January 2021, *Okrazhna prokuratura – Haskovo and Apelativna prokuratura – Plovdiv*, C-393/19, EU:C:2021:8, paragraph 30 and the case-law cited).

74 In the present case, it is apparent from the orders for reference that Article 53(2)(b) of the NK was inserted by the *Zakon za izmenenie i dopalnenie na nakazatelnia kodeks* (Law amending and supplementing the Criminal Code) (DV No 7 of 22 January 2019) and that the aim of that law was to implement Directive 2014/42 in Bulgarian law, within the meaning of Article 51(1) of the Charter. Thus, in adopting that law, the Bulgarian legislature was required to observe the fundamental rights enshrined in Article 47 of the Charter.

75 Under the first and second paragraphs of Article 47 of the Charter, everyone whose rights and freedoms guaranteed by the law of the European Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article and, in particular, is entitled to a fair hearing. In addition, the fundamental rights referred to in Article 47 are reaffirmed by Directive 2014/42 itself, Article 8(1) of which provides that Member States are to take the necessary measures to ensure that the persons affected by the measures provided for under that directive have the right to an effective remedy and to a fair trial in order to uphold their rights.

76 In that regard, it should be noted that, on account of the general nature of the wording of Article 8(1) of Directive 2014/42, the persons for whom the Member States must guarantee effective remedies and a fair trial are not only those convicted of an offence but also third parties whose property is affected by the confiscation order (see, by analogy, judgment of 14 January 2021, *Okrazhna prokuratura – Haskovo and Apelativna prokuratura – Plovdiv*, C-393/19, EU:C:2021:8, paragraph 61).

77 That interpretation also follows from recital 33 of Directive 2014/42, which states that that directive substantially affects the rights of persons, not only of suspected or accused persons, but also of third parties who are not being prosecuted but are claiming that they are the owner of the property concerned. It is therefore necessary, according to that recital, to provide for specific safeguards and judicial remedies in order to ensure the preservation of their fundamental rights in the implementation of that directive.

78 As follows from Article 8 thereof, Directive 2014/42 provides for several specific safeguards in order to ensure the preservation of the fundamental rights of such third parties in the implementation of that directive.

79 Among those safeguards is that referred to in Article 8(7) of that directive, according to which persons whose property is affected by a confiscation order are to have the right of access to a lawyer throughout the confiscation proceedings relating to the determination of the proceeds and instrumentalities in order to uphold their rights. In addition, according to that provision, the persons concerned must be informed of that right.

80 In the light of paragraphs 76 and 77 of the present judgment and in so far as Article 8(7) of Directive 2014/42 refers not only to the person who is accused or convicted of a criminal offence, but, more generally, to persons whose property is affected, that provision applies also to third parties claiming that they are the owner of the property whose confiscation is being contemplated, who, in accordance with Article 8(9) of that directive, are to be entitled to claim title of ownership to that property, including in the cases referred to in Article 6 of that directive.

81 In addition, the right of access to a lawyer throughout the confiscation proceedings clearly entails the right of that third party to be heard in the context of those proceedings, which, according to the Court's case-law, guarantees the holder of that right the opportunity to make known his or her views effectively (see, to that effect, judgment of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591, paragraph 34), which is confirmed by recital 33 of Directive 2014/42, according to which the specific safeguards and judicial remedies in order to guarantee the preservation of the fundamental rights of third parties, in the implementation of that directive, includes the right to be heard for third parties who claim that they are the owner of the property concerned.

82 It thus follows from Article 8(1), (7) and (9) of Directive 2014/42 that a third party who claims or in respect of whom it is claimed, in the context of confiscation proceedings, that he or she is the owner of the property whose confiscation is being contemplated, must be informed of his or her right to appear as a party in those proceedings and his or her right to be heard, and must be placed in a position to exercise those rights and claim title of ownership before a confiscation order as regards that property is made.

83 In the present case, the Bulgarian Government has stated, in its written observations submitted to the Court, that, under Bulgarian law, third parties, such as those in question in the main proceedings, may not appear as a party in the actual confiscation proceedings provided for in Article 306(1)(1) of the NPK. However, according to that government, Bulgarian law offers all third parties who claim that their right to property has been infringed in the course of such proceedings an opportunity to bring their claim before a civil court. More specifically, such third parties may have recourse to the action for recovery of ownership, governed by Article 108 of the *Zakon za sobstvenostta* (Law on Property) (DV No 92 of 16 November 1951).

84 It must be held that the existence, in Bulgarian law, of such an action does not satisfy the requirement arising from Article 8(1), (7) and (9) of Directive 2014/42, as set out in paragraph 82 of the present judgment. By such an action, third parties may at most react to a possible infringement of their right to property arising from a confiscation order as regards their property, but may not assert that right in order to prevent the actual adoption of such an order.

85 In the light of the foregoing considerations, the answer to the fourth question is that Article 8(1), (7) and (9) of Directive 2014/42, read in conjunction with Article 47 of the Charter, must be interpreted as precluding national legislation which allows for the confiscation, in favour of the State, of property which is claimed to belong to a person other than the perpetrator of the criminal offence, without that person having the right to appear as a party in the confiscation proceedings.

Costs

86 Since these proceedings are, for the parties to the main proceedings, a step in the actions 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 (Third Chamber) hereby rules:

1. **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 must be interpreted as meaning that the possession of narcotics for the purposes of their distribution comes within its scope, even though all the elements inherent in the commission of that offence are confined within a single Member State.**
2. **Directive 2014/42 must be interpreted as meaning that it not only provides for the confiscation of property constituting an economic benefit derived from the criminal offence in respect of which the perpetrator has been convicted, but also provides for the confiscation of property belonging to that perpetrator in respect of which the national court hearing the case is satisfied that it derives from other criminal conduct, in compliance with the safeguards provided for in Article 8(8) of that directive and on condition that the offence in respect of which its perpetrator has been convicted is among those listed in Article 5(2) of that directive and that that offence is liable to give rise, directly or indirectly, to economic benefit within the meaning of the same directive.**
3. **Article 8(1), (7) and (9) of Directive 2014/42, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation which allows for the confiscation, in favour of the State, of property which is claimed to belong to a person other than the perpetrator of the criminal offence, without that person having the right to appear as a party in the confiscation proceedings.**

[Signatures]

* Language of the case: Bulgarian.
