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Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

8 June 2023 (\*)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive (EU) 2016/343 – Article 8(4) – Right to be present at the trial – Proceedings conducted in absentia – Reopening of the proceedings – Notice to the person convicted in absentia of his or her right to have the proceedings reopened)

In Joined Cases C-430/22 and C-468/22,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria), made by decisions of 28 June 2022 and of 13 July 2022, received at the Court on 28 June 2022 and on 14 July 2022, respectively, in the criminal proceedings against

**VB** (C-430/22)

**VB** (C-468/22)

other party:

**Spetsializirana prokuratura,**

THE COURT (Sixth Chamber),

composed of P.G. Xuereb, President of the Chamber, L. Bay Larsen (Rapporteur), Vice-President of the Court, acting as Judge of the Sixth Chamber, and T. von Danwitz, Judge,

Advocate General: J. Richard de la Tour,

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

## **Judgment**

1 The present requests for a preliminary ruling concern the interpretation of Article 8(4), second sentence, and of Article 9 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1).

2 The requests have been made in the context of criminal proceedings brought *in absentia* against VB for drug trafficking and possession of weapons as part of a criminal organisation.

## **Legal context**

### ***European Union law***

3 Recitals 9 and 39 of Directive 2016/343 are worded as follows:

‘(9) The purpose of this Directive is to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial.

...

(39) Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but the conditions for taking a decision in the absence of a particular suspect or accused person are not met because the suspect or accused person could not be located despite reasonable efforts having been made, for example because the person has fled or absconded, it should nevertheless be possible to take a decision in the absence of the suspect or accused person and to enforce that decision. In that case, Member States should ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they should also be informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy. Such information should be provided in writing. The information may also be provided orally on condition that the fact that the information has been provided is noted in accordance with the recording procedure under national law.’

4 Article 8 of that directive, entitled ‘Right to be present at the trial’, provides:

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

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

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

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

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

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

5. This Article shall be without prejudice to national rules that provide that the judge or the competent court can exclude a suspect or accused person temporarily from the trial where necessary in the interests of securing the proper conduct of the criminal proceedings, provided that the rights of the defence are complied with.

6. This Article shall be without prejudice to national rules that provide for proceedings or certain stages thereof to be conducted in writing, provided that this complies with the right to a fair trial.’

5 Article 9 of that directive, entitled ‘Right to a new trial’, provides:

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

### ***Bulgarian law***

6 Article 423(1) to (4) of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure; ‘the NPK’) provides:

‘(1) Within six months of becoming aware of the final judgment in criminal proceedings ... the person convicted *in absentia* may request the reopening of the criminal case, relying on the fact that he or she was not present during [the criminal proceedings].

(2) The request does not suspend the execution of the sentence, unless the court orders otherwise.

(3) Proceedings relating to the reopening of criminal proceedings shall be discontinued if the person convicted *in absentia* fails to appear at the hearing without good reason.

(4) If a person convicted *in absentia* is being remanded in custody in execution of a final judgment and the court reopens the criminal proceedings, it shall rule, in its decision, on the detention measure to be taken.’

7 Article 425(1)(1) and 425(2) of the NPK provides:

‘(1) Where the court finds that the request to have the proceedings reopened is well founded, it may:

1. overturn the conviction, judgment, order or injunction and refer the case for a new trial, indicating the stage from which the fresh examination of the case is to begin;

(2) In the cases referred to in Article 423(1), the proceedings shall be reopened and the case returned to the stage at which the proceedings began *in absentia*.’

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

8 The Spetsializirana prokuratura (Specialised Public Prosecutor’s Office, Bulgaria) initiated criminal proceedings against VB, who was accused of having participated, together with several other persons, in a criminal organisation for the purpose of the cultivation and distribution of drugs and possession of weapons, activities which constitute criminal offences punishable by custodial sentences.

9 The criminal proceedings in the main proceedings have been conducted in the absence of VB. In the context of those criminal proceedings, he was unable to receive formal notice of the charges brought against him. In addition, he could not be informed that his case had been brought before a court, or, a fortiori, informed of the date and place of the trial and the consequences of non-appearance.

10 The competent national authorities did not succeed in locating VB, since, during the investigation stage of those criminal proceedings, he had fled immediately before the police operation to arrest the suspects. VB was placed on the wanted list, including by means of a European arrest warrant, but could not be located.

11 During the pre-trial and trial phases of the same criminal proceedings, VB was successively defended by three different court-appointed lawyers, none of whom had ever seen him or been in contact with him or his relatives.

12 The criminal proceedings at issue in the main proceedings are still pending and most of the evidence has been collected. According to the referring court, it is likely that VB will be given a custodial sentence following those criminal proceedings.

13 That court states, inter alia, that, under Article 423(1) of the NPK, a person convicted *in absentia* has the right to request the reopening of the proceedings within six months of becoming aware of his or her conviction. However, Bulgarian law does not provide for a requirement to inform him or her in advance of that right to request that the proceedings be reopened. In particular, there is no requirement under Bulgarian law that the possibility to request the reopening of proceedings be set out in the judgment delivered in the absence of the accused person, or in any other decision addressed to that person.

14 Furthermore, Bulgarian law does not, in principle, provide for a predetermined right to have proceedings reopened in the event of a conviction *in absentia*. In particular, the court hearing the case in question and ruling on the merits in the absence of the accused person does not have the power to decide whether the absent accused person has the right to have the proceedings reopened by virtue of his or her absence. That is the case to the extent that the power to rule on the existence

of such a right is conferred, in Bulgarian law, on the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria), which must be seised of a request to open fresh proceedings, in accordance with Article 423(1) of the NPK, and to assess whether there are any grounds for reopening proceedings because of the absence of the accused person.

15 Lastly, the referring court states that Bulgarian law requires the person convicted *in absentia* to appear in person in order for the application to reopen proceedings to be examined on the merits, whereas Article 9 of Directive 2016/343 does not lay down such a requirement. That requirement significantly reduces the effectiveness of the right under Article 9 of that directive, since the person convicted *in absentia* runs the risk of being detained, with the result that the conviction handed down in his or her absence is executed.

16 In the light of the foregoing, the referring court asks whether, where it hears a case in the absence of the accused person, in circumstances from which it is clear that the conditions laid down in Article 8(2) of Directive 2016/343 are not met, it is obliged, in the case of a conviction *in absentia*, to note formally in the judgment that the person convicted has the right to have proceedings reopened in order to ensure that the information required under that directive, referred to in the second sentence of Article 8(4) thereof, is provided.

17 The referring court states, in this regard, that if the Court were to answer that question in the affirmative, the issue would arise as to the content of the information to be provided to the person convicted *in absentia*.

18 First, it is necessary to determine whether that person must be informed that he or she has a right to a new trial, provided that he or she has so requested, and that the only assessment made by the court examining that request concerns the nature of the reopening of proceedings or whether that person must be informed that he or she has the right to request a new trial and that that court will assess the merits of his or her request. Second, it is necessary to examine whether the same person must also be informed that he or she has an obligation to appear in person before the court dealing with his or her application to have the proceedings reopened, which presupposes that such an obligation is compatible with Article 9 of Directive 2016/343.

19 In those circumstances, the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) decided to stay the proceedings and to refer, in Case c-430/22, the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must the second sentence of Article 8(4) of Directive 2016/343 be interpreted as obliging a national court which convicts an accused person *in absentia*, without the conditions of Article 8(2) of that directive being met, to make express reference to the accused person’s right to have the proceedings reopened, to which he or she is entitled under Article 9 of that directive, in order that he or she can be informed of that right at a later stage, in particular when he or she is detained for the purpose of executing the sentence? The question arises in the light of the fact that national law provides neither for the person convicted *in absentia* to be informed of his or her right to have the proceedings reopened when he or she is detained for the purpose of executing the sentence, nor for the involvement of a court in the issuing of a European arrest warrant for the purpose of executing the sentence.

(2) Must the second sentence of Article 8(4) of Directive 2016/343, and in particular the phrase ‘also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9’, be interpreted as meaning that such information concerns a formally recognised right to have the proceedings reopened, or does it

concern the right to request such reopening, whereby the substance of the request must then be examined?’

20 In Case C-468/22, the Spetsializiran nakazatelen sad (Specialised Criminal Court) also decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is it compatible with Article 9 of Directive 2016/343 and with the principle of effectiveness for a national provision such as Article 423(3) of the Code of Criminal Procedure to oblige a person who makes a request for a new trial, because he or she had been absent from the first trial and neither of the cases in Article 8(2) of that directive applied, to appear before the court in person in order to have that request examined on the merits?’

### **Procedure before the Court**

21 By letter dated 5 August 2022, the Sofiyski gradski sad (Sofia City Court, Bulgaria) informed the Court that, following a legislative amendment which entered into force on 27 July 2022, the Spetsializiran nakazatelen sad (Specialised Criminal Court) had been dissolved and that jurisdiction to hear certain criminal cases brought before that court, including the cases in the main proceedings, had been transferred to the Sofiyski gradski sad (Sofia City Court) from that date.

### **Consideration of the questions referred**

#### ***The first question referred for a preliminary ruling in Case C-430/22***

22 By its first question in Case C-430/22, the referring court asks, in essence, whether Article 8(4) of Directive 2016/343 requires a national court, in the event of a conviction *in absentia*, where the conditions of Article 8(2) of that directive are not met, to make express reference to the right to a new trial in the judgment, so that the person convicted *in absentia* can be informed of that right at a later stage, in particular when he or she is detained for the purpose of executing the sentence.

23 As a preliminary point, it should be recalled that, according to the referring court, the circumstances of the cases in the main proceedings make it clear that, because the conditions of Article 8(2) of Directive 2016/343 are not met, Article 8(4) of that directive applies.

24 According to settled case-law, the interpretation of a provision of EU law requires that account be taken not only of the wording of that provision, but also of its context, the objectives pursued by the rules of which that provision is part and, where appropriate, its origins (see, to that effect, judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, paragraph 38 and the case-law cited). In particular, regard should be had to, *inter alia*, the recitals of the EU act concerned, since they constitute important elements for the purposes of interpretation, which may clarify the intentions of the author of that act (see, to that effect, judgment of 19 May 2022, *Spetsializirana prokuratura (Trial of an absconded accused person)*, C-569/20, EU:C:2022:401, paragraph 32).

25 With regard to the wording of Article 8(4) of Directive 2016/343, that provision indicates that, where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in Article 8(2) of that directive because a suspect or accused person cannot be located despite reasonable efforts having

been made to that end, Member States may provide that a decision can nevertheless be taken and enforced.

26 As Article 8(4) of that directive makes clear, in that case both the right to a new trial and the possibility of challenging the decision taken *in absentia* are to be brought to the attention of the person concerned when he or she is informed of that decision.

27 However, as the European Commission correctly points out, that provision does not determine the precise manner in which such information is to be provided to the person concerned, but simply provides that that information is to be provided to the person concerned when he or she is informed of the decision *in absentia*, in particular at the time of his or her arrest, given that the arrest usually follows the location of the person being sought.

28 That is borne out by recital 39 of Directive 2016/343, which states that such information, which should be provided in writing, may also be provided orally on condition that the fact that the information has been provided is noted in accordance with the recording procedure under national law.

29 Finally, it is important to recall that Directive 2016/343 is concerned solely with laying down common minimum rules and, therefore, does not provide for an exhaustive harmonisation of criminal procedure. That said, the rules laid down by national law cannot undermine that directive's aim of safeguarding the fairness of the proceedings and thus of enabling the person concerned to be present at the trial, pursuant to Articles 8 or 9 of that directive (see, to that effect, judgment of 19 May 2022, *Spetsializirana prokuratura [(Trial of an absconded accused person)]*, C-564/20, EU:C:2022:401, paragraph 43).

30 It follows that Directive 2016/343 does not impose an obligation on the court issuing the decision *in absentia* against the absent and unlocated person to include in that decision information relating to the right to a retrial and the possibility to challenge that decision. The choice of the manner in which such information is to be provided to the persons concerned is left to the discretion of the Member States, provided that it is brought to the attention of the person concerned when he or she is informed of the decision in question.

31 In the light of all of the foregoing considerations, the answer to the first question referred in Case C-430/22 is that Article 8(4) of Directive 2016/343 must be interpreted as not requiring a national court, in the event of a conviction *in absentia*, where the conditions of Article 8(2) of that directive are not met, to make express reference to the right to a new trial in the judgment convicting the person concerned.

***The second question referred for a preliminary ruling in Case C-430/22 and the question referred in Case C-468/22***

32 Since the Court has answered the first question referred in Case C-430/22 in the negative, there is no need to answer the second question in that case or the question referred in Case C-468/22, because, as noted in paragraph 17 of the present judgment, it is only if that first question is answered in the affirmative that, in the view of the referring court, the issue arises as to the content of the information to be provided to the person convicted *in absentia*, as contemplated in paragraph 18 of the present judgment.

**Costs**

33 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 (Sixth Chamber) hereby rules:

**Article 8(4) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings**

**must be interpreted as not requiring a national court, in the event of a conviction *in absentia*, where the conditions of Article 8(2) of that directive are not met, to make express reference to the right to a new trial in the judgment convicting the person concerned.**

[Signatures]

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\* Language of the cases: Bulgarian.