Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 9 June 2022 [1]

Case C-203/21

Criminal proceedings
against
DELTA STROY 2003

(Request for a preliminary ruling from the Okrazhen sad – Burgas (Regional Court, Burgas, Bulgaria))

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Framework Decision 2005/212/JHA – Applicability – Imposition of a financial penalty on a legal person for non-payment of tax debts – Penalty of a criminal nature – Presumption of the imputation of the offence to the legal person – Presumption that the legal person has committed the offence – Charter of Fundamental Rights of the European Union – Articles 47 to 49 – Principle of legality and proportionality of criminal offences and penalties – Presumption of innocence – Rights of the defence – Proportionality)

1. In response to the question, raised at the beginning of his contribution, whether legal persons may have fundamental rights, Professor P. Wachsmann gave the following answer, which is as simple as it is lucid: 'Why not, if that is what is desired?' [2] Examination of the case-law developed by the European judges dealing with fundamental rights, whether they sit in Strasbourg or in Luxembourg, shows that that has clearly been their intention, as the judges draw all possible inferences, where the texts are virtually silent, [3] from the legal personality conferred on those legal entities and therefore from their capacity to have rights and obligations. [4]

2. That assertion is key in a context of laws of the Member States which generally recognise the principle that legal persons bear criminal liability or, as in the case in the main proceedings, provide for the possibility for a court to impose an administrative penalty of a criminal nature on those persons, based on a double presumption, namely a presumption that an alleged criminal offence committed by the representative of a company may be imputed to that company. The interest presented by the present case is that it will lead the Court of Justice to examine the

1 Original language: French.

2 Wachsmann, P., 'Droits fondamentaux et personnes morales', in *Vers la reconnaissance de droits fondamentaux aux États membres de l'Union européenne? Réflexions à partir des notions d'identité et de solidarité*, Brussels, Bruylant, 2010, pp. 225-235.

3 The right to property of legal persons is set out in Article 1 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), which provides that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions'. As for the Charter of Fundamental Rights of the European Union ('the Charter'), only Articles 42 to 44 make express reference to legal persons and confer rights on them, namely the right of access to documents, the right to refer to the Ombudsman and the right to petition the European Parliament.

4 As regards the leading judgments, in the case of the Court of Justice, see judgments of 17 December 1970, *Internationale Handelsgesellschaft* (11/70, EU:C:1970:114) and of 14 May 1974, *Nold* v *Commission* (4/73, EU:C:1974:51).

compatibility of such legislation in the light of the principle of effective judicial protection, the principle of the presumption of innocence and the principle that penalties must be personal to the offender, laid down, respectively, in Articles 47, 48 and 49 of the Charter.

I. Legal framework

A. European Union law

3. Articles 47 to 49 of the Charter are relevant in the present case.

B. Bulgarian law

4. Article 83 of the Zakon za administrativnite narushenya i nakazanya (Law on administrative offences and penalties, published in DV No 92 of 28 November 1969), in the version of 14 February 2020, applicable to the dispute in the main proceedings ('the ZANN'), which comes within Chapter 4 of that law, provides:

'Chapter 4

Administrative penalties of a criminal nature imposed on legal persons and sole traders.

Article 83(1) … In the cases provided for by the relevant law, decree, order of the Council of Ministers or municipal order, a financial penalty may be imposed on legal persons and on sole traders for failure to fulfil their obligations to the State or the municipality in the exercise of their activities.

…

Article 83a … (1) Any legal person which has been enriched or is liable to be enriched as a result of an offence under Articles 255 … of the Criminal Code and any offence committed, on behalf of or on the initiative of an organised criminal group, by:

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

2. a person representing the legal person;

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

4. … a worker or an employee to whom the legal person has assigned a particular task, where the offence was committed in the exercise of or in connection with that task, shall be punished by a financial penalty at least equal to the value of the advantage, up to a maximum of BGN 1 000 000, in the case of a pecuniary advantage ….

….

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

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

…

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

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

…

(2) The proposal must:

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

2. state the nature and value of the advantage;

…

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

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

7. contain a list of the persons to be summoned;

…

Article 83d …

…

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

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

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

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

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

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

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

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

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

1. it imposes a financial penalty; [or]

2. it refuses to impose a financial penalty.

…

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

…

Article 83f … (1) The proceedings by which the Okrazhen sad [(Regional Court)] or the Apelativen sad [(Court of Appeal)] has delivered a final decision may be reopened where:

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

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

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

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

5. a decision of the European Court of Human Rights [('ECtHR')] has found a violation of the [ECHR] which is of significant importance for the purposes of the case;

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

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

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

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

1. the prosecutor of the regional public prosecutor's office;

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

…

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

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

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

5. Article 255(1) of the Nakazatelen kodeks (Bulgarian Criminal Code; 'the Criminal Code') provides:

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

…

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

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

…

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

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

6. ZK is the manager and representative of the company Delta Stroy 2003 EOOD ('Delta Stroy'), established in Burgas (Bulgaria). In that capacity, ZK was charged, on 5 August 2019, with having, in circumstances amounting to a continuous offence, evaded the determination and payment of tax debts of significant amounts, to a total of BGN 11 388.98 BGN (around 5 808,38 EUR), corresponding to the VAT payable in accordance with the Bulgarian Law on VAT, for the three tax per-

iods March, April and July 2009. That offence is covered in Article 255(1), points 2 and 3 of the Criminal Code. The criminal proceedings against ZK are pending at first instance before the Okrazhen sad – Burgas (Regional Court, Burgas, Bulgaria), which is the referring court.

7. On 9 December 2020, the prosecutor proposed before the same court, in separate proceedings, that a financial penalty be imposed on Delta Stroy, on the basis of Article 83a et seq. of the ZANN, on the ground that it obtained a pecuniary advantage as a result of the offence, referred to in Article 255(1), points 1 and 2 of the Criminal Code, committed by ZK. The indictment relating to ZK was attached to that proposal.

8. The referring court is uncertain as to whether the procedure laid down in Article 83a et seq. of the ZANN, which allows it to impose a financial penalty on a legal person in respect of an offence that is the subject of parallel criminal proceedings against the natural person who represents that legal person, which have not yet been definitively closed, is compatible with Framework Decision 2005/212/JHA [5] and with the principle of legality of criminal offences and penalties, laid down in Article 49 of the Charter, which is to be interpreted in the light of the case-law of the ECtHR relating to Article 7 of the ECHR.

9. In the first place, the referring court considers that the imposition on a legal person, on the ground that a criminal offence has been committed, of a financial penalty corresponding to the advantage that the legal person has derived or might derive from that offence constitutes a confiscation of all or part of the proceeds of the offence pursuant to Article 2(1) of Framework Decision 2005/212. The purpose of the proceedings at issue in the main proceedings is to impose a penalty called a 'financial penalty' on a legal person because of a specific offence committed by its representative. In addition, since the penalty constitutes a permanent deprivation (confiscation) of the asset, ordered by a criminal court in connection with the offence that has been committed, and since Article 83g of the Law on administrative offences and penalties refers to the Code of Criminal Procedure, those proceedings have all the characteristics of 'criminal' proceedings and not of 'civil' proceedings.

10. In the second place, the referring court observes that Article 49 of the Charter lays down the principle of legality of criminal offences and penalties, which contains a prohibition on the imposition of a penalty before it has been established that the offence was committed. It notes that the preliminary question as to whether the offence has been committed is not on the list of all the factors which the criminal court must appraise pursuant to Article 83d(5) of the ZANN. The proceedings at issue give rise, in practice, to the possibility that a penalty may be imposed on a company on the sole basis of the elements of the indictment relating to a particular offence, committed by the manager and representative of the company, the commission of which has not been established by a judicial decision which has become final, which was a requirement under the former legislation.

11. In the third place, the referring court explains that the question that arises in the present case is of great importance in the context of Framework Decision 2006/783/JHA, [6] since the national legislation makes it possible to impose a financial penalty on a legal person which does not have its headquarters in the territory of the Republic of Bulgaria.

[5] Council Framework Decision of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (OJ 2005 L 68, p. 49).

[6] Council Framework Decision of October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ 2006 L 328, p. 59).

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

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

(2) Are Articles 4 and 5 of Framework Decision [2005/212] and Article 59 of the [Charter] to be interpreted as permitting legislation of a Member State under which, in proceedings such as those in the main proceedings, the national court may impose a penalty on a legal person by fixing the amount of that penalty at the amount of the proceeds which would have been obtained from a specific criminal offence the commission of which has not yet been established because it is the subject of parallel criminal proceedings which have not yet been definitively concluded?'

III. The procedure before the Court

13. The European Commission has lodged written observations.

IV. Analysis

A. The legal framework

14. The referring court has submitted the questions for a preliminary ruling concerning the interpretation of Articles 4 and 5 of Framework Decision 2005/212 on legal remedies and respect for fundamental rights of the persons concerned on the basis that that framework decision is applicable to the main proceedings, which the Commission disputes. Since the applicability of the provisions of Framework Decision 2005/212 gives rise to difficulty, it is appropriate to ascertain whether a situation such as that described in the order for reference comes within the scope of that framework decision.[7]

1. The applicability of Framework Decision 2005/212

15. It should be emphasised, first, that Directive 2014/42/EU[8] has partially replaced Framework Decision 2005/212, which, like that directive, concerns the confiscation of instrumentalities and proceeds from crime. In accordance with recital 9 of that directive, the directive aims, in particular, to amend and expand the provisions of that framework decision. More precisely, it is apparent from Article 14(1) of Directive 2014/42 that that directive replaced only the first four

[7] See, to that effect, judgments of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 30); of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 67); and of 12 March 2020, *VW (Right of access to a lawyer in the event of non-appearance)* (C-659/18, EU:C:2020:201, paragraphs 22 and 23).

[8] Directive 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).

indents of Article 1 and Article 3 of Framework Decision 2005/212 for the Member States bound by that directive, with the consequence that Articles 2, 4 and 5 of the framework directive were maintained in force following the adoption of that directive. [9]

16. Framework Decision 2005/212 provides, in Article 2(1), that 'each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds'. In this instance, the offence of failure to determine or to pay fiscal debts at issue in the main proceedings is punishable by a term of imprisonment of between one and six years and a fine, in accordance with Article 255(1) of the Criminal Code.

17. As regards the definition of 'confiscation', it is appropriate to refer, as is apparent from point 15 of this Opinion, to the words of Article 2(4) of Directive 2014/42, notwithstanding that that directive is not applicable *ratione materiae* in the present case pursuant to Article 3 thereof, which sets out a list of the criminal offences concerned. 'Confiscation' means a 'final deprivation of property ordered by a court in relation to a criminal offence', that is to say, the definitive dispossession of the right of ownership of that property. [10]

18. In addition, in accordance with Article 2(1) and (2) of Directive 2014/42, 'proceeds' correspond to any economic advantage derived directly or indirectly from a criminal offence and may consist of any form of property, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title or interest in such property. A sum of money can clearly be the subject of confiscation, provided however that it may be regarded as the proceeds of the offence in respect of which the perpetrator has been convicted.

19. While the concepts of 'confiscation' and 'financial penalty' have in common that they originate in the commission of an offence, the latter measure differs from the former in that its purpose is not to neutralise the criminal proceeds. The purpose of a financial penalty is to punish and deter and such a penalty may be ordered irrespective of the existence of any advantage linked with the offence, in addition to the confiscation of the advantage and in an amount less than, equal to or greater than the advantage.

20. I note, in that regard, that EU law draws a clear distinction between the concepts of 'confiscation' and 'financial penalty'. As may be seen, in particular, from Articles 1 and 6 and from recitals 1 and 2 thereof, the purpose of Framework Decision 2005/214/JHA [11] is to put in place an effective mechanism for the recognition and cross-border execution and enforcement of final decisions requiring a financial penalty to be paid by a natural or legal person following the commission of one of the offences listed in Article 5 of that framework decision. [12] Article 1(b)(i) of Framework Decision 2005/214 defines 'financial penalty' as the obligation to pay a sum of money on conviction of an offence imposed in a decision in a criminal matter and states that it is not to include orders for the confiscation of instrumentalities or proceeds of crime.

[9] Judgment of 14 January 2021, *Okrazhna prokuratura – Haskovo and Apelativna prokuratura – Plovdiv* (C-393/19, EU:C:2021:8, paragraph 37).

[10] Judgment of 14 January 2021, *Okrazhna prokuratura – Haskovo and Apelativna prokuratura – Plovdiv* (C-393/19, EU:C:2021:8, paragraphs 35 to 45 and 55).

[11] Council Framework Decision of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ 2005 L 76, p. 16).

[12] Judgment of 14 November 2013, *Baláž* (C-60/12, EU:C:2013:733, paragraph 27).

21. As regards the national legislation at issue in the main proceedings, it must be stated that it draws the same distinction, since, in addition to the provisions relating to the financial penalty, it includes a specific article on the deprivation of the unlawful advantage. Article 83a(5) of the ZANN thus provides that the direct or indirect advantage which the legal person has derived from the offence referred to in paragraph 1 is to be seized for the State if it does not have to be reinstated or repaid, or that it is to be seized in accordance with the Criminal Code. In fact, it is common ground that the sole purpose of the proposal submitted by the public prosecutor's office is to secure the imposition of a financial penalty, as referred to in Article 83a(1) to (4) of that law. [13]

22. In addition, according to the actual information provided by the referring court, under the national legislation the financial penalty may be imposed even where no advantage has actually been obtained or where the advantage is not pecuniary in nature, and the procedure referred to in Article 83a et seq. of the ZANN may not focus solely on the unlawfully acquired property. [14] It follows from Article 83a(1) of that law that the financial penalty that may be imposed may exceed the value of the advantage obtained and may be up to a maximum of BGN 1 000 000 (approximately EUR 510 000), which in this instance corresponds to the proposal of the prosecutor, whereas the unlawful advantage is valued at BGN 11 388.98.

23. In those circumstances, the fact that the financial penalty may be equal to the advantage which the legal person has derived or might derive from the offence in question does not in itself permit the conclusion that that measure constitutes a confiscation of all or part of the proceeds of the offence, within the meaning of Framework Decision 2005/212 and Directive 2014/42. I consider, therefore, that Framework Decision 2005/212 is not applicable in the dispute in the main proceedings, which precludes any relevance, in the present case, of Framework Decision 2006/783, to which the referring court refers. It is appropriate, on the other hand, to examine the applicability of Article 49 of the Charter, which is also referred to in the two questions for a preliminary ruling.

2. The applicability of the Charter

24. It should be borne in mind that the field of application of the Charter, so far as action of the Member States is concerned, is defined in Article 51(1) thereof, which states that the provisions of the Charter are addressed to the Member States only when they are implementing EU law. [15]

25. It is settled case-law that administrative penalties imposed by the national tax authorities and criminal proceedings initiated in respect of VAT offences constitute implementation of Articles 2 and 273 of Directive 2006/112/EC [16] and of Article 325 TFEU and, therefore, of EU law for the purposes of Article 51(1) of the Charter. [17] In the present case, in so far as the financial penalty that may be imposed on Delta Stroy pursuant to Article 83a of the ZANN is linked to the failure

[13] It should again be noted that, in accordance with Article 83d(7) of the ZANN, the court's decision is to contain 'the amount of the financial penalty imposed' (point 3) and 'a description of the property which, where appropriate, is to be confiscated for the benefit of the State' (point 4).

[14] See paragraph 6 of the request for a preliminary ruling.

[15] Judgment of 14 January 2021, *Okrazhna prokuratura – Haskovo and Apelativna prokuratura – Plovdiv* (C-393/19, EU:C:2021:8, paragraph 30).

[16] Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

[17] Judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraphs 24 to 28), and of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraphs 8 to 21).

by its manager and representative to fulfil her obligations relating to declarations of VAT, which gave rise to the criminal proceedings against her, the provisions of the Charter are applicable, in accordance with that case-law.

26. Since Article 49 of the Charter lays down the principle of legality of criminal offences and penalties, it must be determined whether the system of penalties at issue in the main proceedings is criminal in nature. In that regard, it should be borne in mind that, according to the Court's case-law, three criteria are relevant. The first criterion is the legal classification of the offence under national law, the second is the intrinsic nature of the offence and the third is the degree of severity of the penalty that may be imposed on the person concerned. Although it is for the referring court to assess, in the light of those criteria, whether the penalties provided for by the national legislation at issue in the main proceedings are criminal in nature for the purpose of Article 49 of the Charter, the Court, when giving a preliminary ruling, may nonetheless provide clarification designed to give the national court guidance in its assessment. [18]

27. In that regard, it is common ground that the financial penalty at issue relates to an offence provided for in and punishable under Article 255 of the Criminal Code, on the basis of which Delta Stroy's representative is subject to criminal proceedings, and is defined in Article 83a et seq. of the ZANN, provisions coming within Chapter 4, entitled 'Administrative penalties of a criminal nature imposed on legal persons and individual traders'. The penalty is imposed by a criminal court following a procedure governed by Articles 83b and 83d to 83f of the ZANN, while Article 83g of the ZANN provides that for matters not governed by those provisions the Code of Criminal Procedure is to apply.

28. According to the information provided by the referring court, the financial penalty is intended to punish and to deter the commission of the offence and not to make good the damage caused by the offence, which characterises a punitive purpose constituting the essence of a criminal penalty for the purposes of Article 49 of the Charter. [19] As for the severity of the penalty, and as has been stated, the maximum amount of the penalty is BGN 1 000 000 (around EUR 510 000), which supports the view that it is of a criminal nature for the purposes of Article 49 of the Charter. [20]

29. Consequently, the system of penalties provided for in the national legislation at issue in the main proceedings is in my view criminal in nature and may thus be assessed in the light of the fundamental rights guaranteed by the Charter and, in particular, of the principle of legality of criminal offences and penalties set out in Article 49 of the Charter.

B. The first question referred

30. It should be borne in mind 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

[18] Judgment of 6 October 2021, *ECOTEX BULGARIA* (C-544/19, EU:C:2021:803, paragraphs 90 to 92).

[19] See, to that effect, judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 31).

[20] See, by analogy, judgment of 6 October 2021, *ECOTEX BULGARIA* (C-544/19, EU:C:2021:803, paragraphs 94 and 95).

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. [21]

31. In those circumstances, in order to provide a useful answer to the referring court, it is appropriate to consider, in accordance with the case-law referred to above, that, by its first question, the referring court is asking, in essence, whether Articles 47, 48 and 49 of the Charter must be interpreted as precluding national legislation under which the court may impose a financial penalty on a legal person in respect of a criminal offence committed by the natural person who represents it, but before the latter has even been the subject of a final conviction, and subject to the exercise by the legal person, after it has been ordered to pay a penalty, of a remedy where the criminal proceedings against the natural person concerned are discontinued by the prosecution or where that natural person has been acquitted by a judicial decision which has become final.

32. Furthermore, while the ECHR does not constitute, for as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into the EU legal order, it must nevertheless be recalled that, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of EU law. Furthermore, Article 52(3) of the Charter, which provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR, is intended to ensure the necessary consistency between those respective rights without adversely affecting the autonomy of EU law and that of the Court of Justice. [22]

33. The explanations relating to the Charter which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it, make clear that Articles 47 and 48 of the Charter ensure that the protection conferred by Articles 6 and 13 of the ECHR is safeguarded under EU law. [23] As regards Article 49 of the Charter, it corresponds to Article 7 of the ECHR.

1. The fundamental guarantees recognised in respect of legal persons

34. As has been stated, the principle of the recognition of fundamental rights for legal persons is now established [24] to the benefit of a judicial interpretation which, initially, found fertile ground for expression in the economic sphere, and more particularly in the sphere of competition, since the effects of the relevant legislation was mainly of interest to commercial companies. In disputes relating to the suppression of infringements of competition law, which strictly speaking do not come within criminal matters, the Court applied the essential principles of criminal law and the

[21] Judgment of 8 May 2019, *PI* (C-230/18, EU:C:2019:383, paragraph 42). Although the questions submitted refer to Article 49 of the Charter, the request for a preliminary ruling also refers to the rights guaranteed by Article 6 of the ECHR.

[22] Judgment of 2 February 2021, *Consob* (C-481/19, EU:C:2021:84, paragraph 36).

[23] Judgment of 13 September 2018, *UBS Europe and Others* (C-358/16, EU:C:2018:715, paragraph 50).

[24] It is clear, admittedly, that the difference in nature between natural persons and legal persons precludes the exercise of certain fundamental rights that assume an incarnation (for example, the prohibition of torture and inhuman or degrading punishment or treatment). A more complex question, on the other hand, is that of the limits of the enjoyment of various rights recognised to legal persons. The Court's case-law reveals treatment that is sometimes differentiated, a lesser degree of protection being afforded to legal persons, in particular with respect to the right to silence (judgment of 2 February 2021, *Consob* (C-481/19, EU:C:2021:84)) and the protection of personal data (judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 79 and the case-law cited).

fundamental principles laid down in Article 6 of the ECHR [25] for the advantage of the applicant legal persons. The Court has thus accepted, as Advocate General Bot has emphasised, [26] the applicability of the principle of personal responsibility and its corollary, namely the principle that punishment and penalties are applicable to the person responsible, on which the concept of the attributability of illicit agreements is based. [27]

35. Likewise, the Court has held that the principle of the presumption of innocence, as established in Article 6(2) of the ECHR, is one of the fundamental rights and that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, that principle applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments. [28] I recall that the presumption of innocence is intended to ensure that no one is declared guilty, or treated as being guilty, of an offence before his or her guilt has been established by a court of law. [29]

36. The Court has also applied that principle, which is set out in Article 48(1) of the Charter, [30] when determining the objective components of an infringement provided for in EU law, in that particular instance insider dealing, liable to lead to the imposition of penalties of a criminal nature. [31] It is again that principle, and the principle that penalties should be imposed only on the offender, of which the Court ensures observance [32] when the infringement of the competition rules committed by a subsidiary is imputed to the parent company, on the basis of the concept of an 'economic unit' and on the presumption that the parent company in fact exercises decisive influence over the commercial policy of the subsidiary owing to the capital links between them. [33]

37. As regards, more specifically, the use of a mechanism of presumptions which incorporates the case-law of the ECtHR, [34] the Court has indicated that, while presumptions of fact or of law operate in every legal system, Article 48 of the Charter requires Member States not to exceed a certain threshold in criminal matters. More specifically, the principle of the presumption of innocence,

[25] In a settled body of case-law, it was emphasised that fundamental rights are an integral part of the general principles of law the observance of which the Court ensures and that, to that effect, the Court finds inspiration in the constitutional traditions common to the Member States and the information provided by the international treaties on the protection of human rights on which the Member States have collaborated or to which they are signatories, the ECHR being of particular significance in that regard (see, in particular, judgment of 21 September 1989, *Hoechst* v *Commission* (46/87 and 227/88, EU:C:1989:337, paragraph 13)).

[26] See Opinion of Advocate General Bot in *ThyssenKrupp Nirosta* v *Commission* (C-352/09 P, EU:C:2010:635, points 51 and 161).

[27] See, in particular, judgments of 8 July 1999, *Commission* v *Anic Partecipazioni* (C-49/92 P, EU:C:1999:356, paragraph 78), and of 10 September 2009, *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536, paragraphs 56 and 77).

[28] See, to that effect, judgment of 8 July 1999, *Hüls* v *Commission* (C-199/92 P, EU:C:1999:358, paragraphs 149 and 150).

[29] Judgment of 16 July 2009, *Rubach* (C-344/08, EU:C:2009:482, paragraph 31 and the case-law cited).

[30] Judgment of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraph 72).

[31] See, to that effect, judgments of 23 December 2009, *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraphs 42 and 44), and of 9 September 2021, *Adler Real Estate and Others* (C-546/18, EU:C:2021:711, paragraph 46).

[32] By contrast to that case-law, emphasis should be placed on the pusillanimity of the European legislature, which excluded legal persons from the scope 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), being of the view that it was premature to legislate at EU level on the presumption of innocence of legal persons, which should be ensured by the existing legal safeguards and case-law, the evolution of which should determine whether there is a need for EU action, as stated in recitals 14 and 15 of that directive.

[33] See, in particular and recently, judgments of 28 October 2020, *Pirelli & C.* v *Commission* (C-611/18 P, not published, EU:C:2020:868, paragraphs 65 to 71), and of 15 April 2021, *Italmobiliare and Others* v *Commission* (C-694/19 P, not published, EU:C:2021:286, paragraphs 52 to 59).

[34] See, for example, ECtHR, 23 July 2002, *Janosevic v. Sweden*, CE:ECHR:2002:0723JUD003461997, § 101 and the case-law cited.

enshrined in that provision, requires Member States to confine the presumptions of fact or of law provided for in the criminal laws within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. [35]

38. It must be emphasised that the rights of the defence are part of the various elements that constitute the principle of effective judicial protection laid down in Article 47 of the Charter. [36] Article 47 provides, in the first paragraph, that everyone whose rights and freedoms guaranteed by the law of the European Union are violated is to have the right to an effective remedy, in compliance with the conditions laid down in that article. The obligation imposed on the Member States, in the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law corresponds to that right. [37] After observing that the right to an effective remedy before a tribunal, enshrined in Article 47 of the Charter, is to be found under Title VI of the Charter, relating to justice, in which other procedural principles are established which apply to both natural and legal persons, [38] the Court held that the principle of effective judicial protection must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that such persons may, in that regard, on certain conditions, be granted legal assistance. [39]

39. In conclusion, I consider that, in so far as, as in the present case, the financial penalty imposed on a legal person relates to a criminal offence and is criminal in nature, the proceedings concerning that penalty fall within the scope of Articles 6 and 7 of the ECHR and that legal person is thus entitled to rely on the fundamental rights enshrined in Articles 47 to 49 of the Charter and, consequently, the authorities of the Member States must ensure that those rights are respected. [40]

40. It is in the light of the foregoing considerations that the compatibility of the national legislation at issue in the main proceedings must be examined.

2. The compatibility of the national legislation at issue in the light of the use of a double mechanism of presumption

(a) Preliminary observations

41. In the request for a preliminary ruling, the referring court expresses its doubts as to the compatibility of the national legislation with EU law and refers to the judgment in *G.I.E.M s.r.l and others v. Italy*, [41] in which the ECtHR held that Article 7 of the ECHR precludes the imposition of a criminal sanction on a person without his or her personal criminal liability being

[35] Judgments of 23 December 2009, *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraph 43), and of 9 September 2021, *Adler Real Estate and Others* (C-546/18, EU:C:2021:711, paragraph 47).

[36] Judgment of 6 November 2012, *Otis and Others* (C-199/11, EU:C:2012:684, paragraph 48), where the Court also refers to the right of access to the courts. It will be recalled that it is Article 48(2) of the Charter that states that respect for the rights of the defence of anyone who has been charged is to be guaranteed.

[37] Judgment of 6 October 2020, *État luxembourgeois (Right to a remedy against a request for information in tax matters)* (C-245/19 and C-246/19, EU:C:2020:795, paragraph 47).

[38] That conclusion is clearly based on the taking into account of the functional and objective concept of 'litigant', that is to say, a party to the proceedings before a court or tribunal, irrespective of the distinction between natural and legal persons.

[39] Judgment of 22 December 2010, *DEB* (C-279/09, EU:C:2010:811, paragraphs 40 and 59).

[40] See, to that effect, judgment of 6 October 2021, *Prokuratura Rejonowa Łódź-Bałuty* (C-338/20, EU:C:2021:805, paragraphs 29 and 30), it being noted that the 'addressees' of the decisions issued in connection with road traffic offences referred to in that judgment may be natural or legal persons.

[41] ECtHR, 28 June 2018, *G.I.E.M s.r.l and others v. Italy* (CE:ECHR:2018:0628JUD000182806, § 251).

established and declared beforehand, which implies a finding by the court dealing with the matter that all the constituent elements of the offence in question are present. Otherwise, the presumption of innocence guaranteed by Article 6(2) of the ECHR would also be breached.

42. To my mind, it is necessary, in the first place, to point out that the referring court has not correctly understood the scope of the abovementioned judgment. The ECtHR required that the criminal liability of the person receiving a penalty be declared beforehand, in accordance with the guarantees laid down in Article 7 of the ECHR and resulting from a procedure – not necessarily criminal in nature – that complies with the requirements of Article 6 of that convention. In that specific context, it considered, in the case before it, that the finding by the national courts that all the constituent elements of the offence were present could be analysed, in essence, as such a declaration and therefore as a conviction for the purposes of Article 7 of the ECHR. [42]

43. The ECtHR did indeed recall, by reference to Articles 6(2) and Article 7 of the ECHR, which have in common that they protect the right of everyone not to be penalised without his or her personal liability having been duly established, the prohibition on punishing a person in respect of an offence committed by another. In that instance, it considered that the confiscation measure applied to legal persons, which were not parties to the proceedings as they were incapable in law of committing a criminal offence, led to a breach of the principle that a person cannot be penalised in respect of an act that engages the criminal responsibility of another. Apart from the fact that the ECtHR's appraisal was clearly closely dependant on the circumstances of that case, which are quite different from the present case, it is important, in my view, to point out that the referring court has, also and above all, failed to take into account the ECtHR's prior reminder of the possible use of presumptions, including in matters covered by Article 7 of the ECHR, and therefore of presumptions of liability. [43]

44. I observe, in the second place, that the powers of the court dealing with the matter are defined in Article 83d(5) of the ZANN, namely to determine whether the legal person in question has obtained an unlawful advantage, whether there is a link between the perpetrator of the offence and the legal person and also between the offence and the advantage obtained by that legal person and, last, to establish the value and pecuniary nature of the unlawful advantage. In taking the view that it lacks jurisdiction to ascertain whether a tax offence has been committed, as that issue is dealt with in the parallel criminal proceedings against ZK, the referring court adopts a strict interpretation of that article that is not shared by the Commission. The Commission maintains that finding the existence of an 'unlawful' advantage is among the powers of the court and that the characterisation of that qualifier necessarily permits a discussion of whether the offence was committed. It should be borne in mind, however, that, in the procedure laid down by Article 267 TFEU, while it is for the Court to interpret the provisions of EU law, it falls exclusively to the referring court to interpret national legislation. The Court must therefore base itself on the interpretation of national law as described to it by that court. [44]

45. That having been said, it is necessary to determine the compatibility of the procedure laid down in Article 83a et seq. of the ZANN which is based on a double mechanism of presumption, it being borne in mind that, while it is not for the Court to rule, in the preliminary ruling

[42] ECtHR, 28 June 2018, *G.I.E.M s.r.l and others v. Italy* CE:ECHR:2018:0628JUD000182806, §§ 255 to 261.

[43] ECtHR, 28 June 2018, *G.I.E.M s.r.l and others v. Italy* CE:ECHR:2018:0628JUD000182806, §§ 243 and 244.

[44] Judgment of 26 June 2019, *Addiko Bank* (C-407/18, EU:C:2019:537, paragraph 52).

procedure, on the compatibility of provisions of national law with the rules of EU law, it has jurisdiction to give the referring court full guidance on the interpretation of EU law that may allow it to determine the issue of compatibility for the purposes of the case before it. [45]

(b) The presumption that the offence is imputable to the legal person

46. As regards the regime of criminal liability of legal persons put in place by the Bulgarian legislation, it must be pointed out that that liability is a special liability, limited to the offences in respect of which it is provided for and conceived on the basis of a representative model. The criminal court dealing with the matter thus cannot charge the legal person concerned directly with having committed an offence, as the liability of that legal person is 'tied' to that of an identified natural person who, so far as his or her situation is concerned, is considered to have acted on behalf of the legal person, the potential or actual beneficiary of a pecuniary advantage originating in unlawful conduct. The offence, in this instance alleged to have been committed by that natural person, may then be imputed to the legal person and justify its being held liable, without any need for a separate offence to be established against it.

47. That liability on the part of the legal person resembles indirect or vicarious liability, emphasising the fact that that legal person can act only through the intermediary of natural persons capable of rendering it liable. Such a classification, which is liable to conflict with Article 7 of the ECHR and Article 49 of the Charter, which enshrines the principle of the personal nature of penalties, is not however appropriate for liability based on the technique of representation. The natural person concerned is not 'another' by comparison with the legal person but is the legal person, with whom he or she identifies. The legal person will be criminally liable as the perpetrator of the offence committed on its behalf by a natural person capable of binding it who has carried out the constituent elements of the offence. The liability in question is therefore de facto personal liability by representation, and not liability by substitution. [46]

48. It must be stated, moreover, that, in the context of *inter partes* judicial proceedings, the legal person has the opportunity to rebut that presumption that the offence is imputed to it, thus revealing that it has the rebuttable nature required by the Court. [47] The ECtHR has considered that, so far as the use of presumptions of fact or of law in criminal matters is concerned, the States must not exceed a certain threshold, which in the particular case is overstepped where a presumption has the effect of making it impossible for an individual to exonerate himself or herself from the accusations against him or her, thus depriving him or her of the benefit of the principle of the presumption of innocence. [48]

49. It should be observed in that regard that the proposal for a penalty submitted by the prosecutor must contain a number of elements, defined in Article 83b(2) of the ZANN, which show that the burden of proof is borne by the public prosecutor's office, as regards in particular the nature and the value of the advantage, and also the existence of a direct link between the offence and that advantage. The legal person concerned, which must be summoned to the public

[45] Judgment of 15 April 2021, *Grupa Warzywna* (C-935/19, EU:C:2021:287, paragraph 20).

[46] The same model has been chosen by the EU legislature in various provisions, in particular in Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties, including criminal penalties, for infringements (OJ 2005 L 255, p. 11), as amended by Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 (OJ 2009 L 280, p. 52), and in Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ 2011 L 101, p. 1).

[47] Judgment of 23 December 2009, *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraph 44).

[48] ECtHR, 28 June 2018, *G.I.E.M s.r.l and others v. Italy* CE:ECHR:2018:0628JUD000182806, § 243 and the case-law cited.

hearing at which that proposal is examined, has the opportunity to challenge the proposal in the exercise of its rights of defence. The scope of the judicial review, as defined in Article 83d(5) of the ZANN, demonstrates the rebuttable nature of the presumption of imputation of the offence, while the court must appraise, among other elements and on the basis of the evidence taken of its own motion or at the request of the parties, the existence of a link between the perpetrator of the offence and the legal person.[49] It thus appears that the court dealing with the matter has jurisdiction to examine all issues of fact and of law that are relevant *for the dispute before it*.[50]

(c) The presumption that the offence has been committed

50. It is apparent from the Bulgarian legislation that the prosecutor may submit a proposal to the criminal court containing information relating to the personal data of the persons 'accused' of having committed the offence and that that court may impose a financial penalty on a legal person 'irrespective of whether the [natural] persons who participated in the offence … actually incur criminal liability'.[51] It is thus apparent that the legal person may receive a financial penalty in respect of an alleged offence committed by the natural person capable of binding the legal person and that the competent court, at first instance or on appeal,[52] cannot assess whether that offence took place – since that question is determined solely in the trial of the natural person – or suspend the proceedings pending the outcome of that trial.[53]

51. It may indeed be observed that the prosecutor's proposal must contain a description of the offence, setting out the circumstances in which the offence was committed and a list of written documents establishing those circumstances, which is capable of showing proof of facts which, *prima facie*, make the imputability of the offence reasonably likely.[54] In addition, and above all, Article 83f of the ZANN provides that the proceedings may be reopened, at the initiative, in particular, of the legal person required to pay the penalty, where the prosecution has discontinued the proceedings against the natural person, where the act has not been committed or does not constitute an offence,[55] or where the natural person has been acquitted by a judicial decision which has become final.[56] The court to which application to reopen the proceedings is

[49] In addition, the decision whereby the court imposes a financial penalty on the legal person may be the subject of an appeal within 14 days from the date on which it is notified to the parties. The competent appellate court may amend or annul such a decision.

[50] Judgment of 9 September 2021, *Adler Real Estate and Others* (C-546/18, EU:C:2021:711, paragraph 53).

[51] See Article 83b(2), point 5, and Article 83a(4), respectively, of the ZANN. In the present case, it is common ground that, at the date of the reference for a preliminary ruling, the criminal proceedings against the person managing and representing Delta Stroy for making false statements in VAT declarations were still pending.

[52] There is nothing in the file submitted to the Court to support the view that the appellate court has wider powers than the first-instance court as regards the appraisal of the liability of the legal person.

[53] It is apparent from the order for reference that the natural person and the legal person concerned are being dealt with in separate proceedings and there is no reason to consider that the natural person, in the proceedings against him or her in respect of the same offence, can exercise the rights of defence of the legal person. Those rights are subjective in nature and it is therefore the parties concerned themselves that must be able to exercise them effectively, irrespective of the nature of the proceedings to which they are subject (judgment of 9 September 2021, *Adler Real Estate and Others* (C-546/18, EU:C:2021:711, paragraph 59)).

[54] It will be recalled that the Court has held, in essence, that, subject to respect for the rights guaranteed by EU law, in particular by the Charter, the national tax authorities must, for the purpose of establishing the existence of a VAT fraud, be able to rely on evidence obtained in the context of criminal proceedings which have not been closed and which do not involve the taxable person (judgments of 16 October 2019, *Glencore Agriculture Hungary* (C-189/18, EU:C:2019:861, paragraph 38), and of 24 February 2022, *SC Cridar Cons* (C-582/20, EU:C:2022:114, paragraph 37)).

[55] See point 2 of the order for reference.

[56] Article 4(2) of Protocol No 7 to the ECHR provides that, where appropriate, the criminal proceedings may be reopened if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

made may, following an *inter partes* procedure, and if it considers that the application to reopen the proceedings is well founded, annul the penalty decision.[57] The presumption that the offence was committed may therefore be rebutted.

52. However it must be stated that the legal person concerned may be the subject of a decision imposing a penalty which has become final,[58] followed by the execution of that decision, without having the opportunity, before that objectively harmful decision is adopted, to submit its observations on whether the tax offence imputed to it was committed, which is liable to conflict with respect for the rights of the defence.[59]

53. In addition, the reopening of the abovementioned proceedings constitutes the implementation of an extraordinary remedy, representing the continuation of the initial proceedings,[60] the initiation of which is linked to an event the occurrence of which is aleatory from a temporal viewpoint. It is conceivable that the decision acquitting the natural person against whom the proceedings were brought may be taken only after remedies have been exercised, which will extend the duration of those proceedings accordingly. While the criminal proceedings against the representative of the company are pending, as in the present case, the company will effectively be deprived of the possibility of submitting an application for the proceedings to be reopened before a court with jurisdiction to establish that the offence imputed to it was not committed and, thus, that the criminal penalty imposed is unfounded. Access to such a court must not be subject to conditions that make it excessively difficult,[61] as the legal person concerned may not be deprived of the possibility referred to above beyond a reasonable time. Such a situation is liable to be contrary to the right of access to a court.[62]

54. The fact remains that the right of access to a court and the principle of respect for the rights of the defence are not unfettered prerogatives but may, under certain circumstances, be restricted.[63]

(d) The limitation of the fundamental guarantees

55. Article 52(1) of the Charter provides that limitations may be placed on the exercise of the rights and freedoms guaranteed by the Charter, on condition, first, that those limitations are provided for by law; second, that they respect the essence of the rights and freedoms in question; and, third, that, subject to the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.[64] In that regard, I recall that the Court requires that recourse to presumptions of fact or of law in criminal matters be confined within 'reasonable limits', taking

[57] Where one of the situations in question arises – where the prosecution discontinues the proceedings against that natural person, where the act did not take place or does not constitute an offence, or where the natural person is acquitted – there is scarcely any doubt as to the outcome of the fresh examination of the case in the light of the mechanism for the imputation of the offence by representation applied as the basis of the liability of the legal person.

[58] Where there is no appeal or where the appeal is dismissed (see Article 83e(5) and Article 83f of the ZANN).

[59] See, by analogy, judgments of 16 October 2019, *Glencore Agriculture Hungary* (C-189/18, EU:C:2019:861, paragraphs 41 and 52), and of 4 June 2020, *C.F. (Tax inspection)* (C-430/19, EU:C:2020:429, paragraph 30). That case-law of the Court relating to administrative proceedings in tax inspections in VAT matters must be applicable for even stronger reasons in proceedings that may lead, in the same sphere, to the adoption of a financial penalty of a criminal nature.

[60] See, to that effect, judgment of 5 June 2014, *M* (C-398/12, EU:C:2014:1057, paragraph 39).

[61] See, to that effect, judgment of 14 November 2013, *Baláž* (C-60/12, EU:C:2013:733, paragraph 46).

[62] See, by analogy, judgment of 24 February 2022, *SC Cridar Cons* (C-582/20, EU:C:2022:114, paragraph 51).

[63] Judgments of 24 February 2022, *SC Cridar Cons* (C-582/20, EU:C:2022:114, paragraph 50), and of 16 October 2019, *Glencore Agriculture Hungary* (C-189/18, EU:C:2019:861, paragraph 43).

[64] Judgment of 6 October 2020, *État luxembourgeois (Right to a remedy against a request for information in tax matters)* (C-245/19 and C-246/19, EU:C:2020:795, paragraph 51).

into account the seriousness of what is at stake and safeguarding the rights of the defence. According to the ECtHR, the States must strike a balance between those two elements; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved. [65]

56. I observe, in the first place, that it is apparent from the order for reference that the legal basis of the regime of liability of the legal person for the tax offence at issue is established in Article 83a et seq. of the ZANN, and must therefore be considered to be provided for by the national legislation. In the second place, that regime, in my view, respects the essence of the fundamental right to effective judicial protection, as regards its two constituent elements, namely respect for the rights of the defence and respect for the right of access to a court. That regime does not impair those rights as such: all that is required in order to exercise those rights in full is compliance with a procedural framework that includes the implementation of an extraordinary remedy. [66]

57. In the third place, the regime of liability of the legal person laid down in Article 83a et seq. of the ZANN seems to me to satisfy an objective of general interest. Notwithstanding the lack of detail in the order for reference, it is possible to take the view that such a regime is an aspect of the implementation of the obligation, placed on each Member State, to take all the legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion. [67] Article 325(1) TFEU thus requires Member States to counter fraud and any other illegal activities affecting the financial interests of the European Union through effective and dissuasive measures. It should be borne in mind, in that regard, that since the European Union's own resources include, in particular, pursuant to Article 2(b) of Decision 2007/436/EC, Euratom, [68] revenue from the application of a uniform rate to the harmonised VAT assessment bases determined according to EU rules, there is a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the EU budget of the corresponding VAT resources, since any lacuna in the collection of the former potentially causes a reduction in the latter. [69]

58. In order to guarantee the collection in full of those revenues and thus to ensure the protection of the financial interests of the European Union, Member States are free to choose the applicable penalties, which may take the form of administrative penalties, criminal penalties or a combination of the two. Criminal penalties may however be necessary in order to counter, in an effective and dissuasive manner, certain cases of serious VAT fraud, as required by Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interest, signed in Brussels on 26 July 1995, [70] read in conjunction with Article 1(1) of that convention. The Member States must also ensure that the rules of criminal procedure, laid down by national law, permit effective investigation and prosecution of offences linked to such conduct. In that context, it is primarily for the national legislature to take the necessary measures. It is for the national legislature, where required, to amend its legislation and to ensure that the procedural rules applicable to the prosecution of offences affecting the financial interests of the European Union are not designed in such a way

65 ECtHR, 23 July 2002, *Janosevic v. Sweden*, CE:ECHR:2002:0723JUD003461997, § 101.

66 See, by analogy, judgment of 6 November 2012, *Otis and Others* (C-199/11, EU:C:2012:684, paragraphs 63 and 64).

67 See, to that effect, judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 25).

68 Council Decision of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17).

69 Judgment of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraphs 25 and 26).

70 OJ 1995 C 316, p. 49.

that, for reasons inherent in those rules, there is a systemic risk that acts that may be categorised as such offences may go unpunished, and also to ensure that the fundamental rights of accused persons are protected.[71]

59. In the fourth place, while it is for the referring court to ascertain, in the light of the actual circumstances of the case in the main proceedings, whether the restrictions put in place by the Bulgarian liability regime are manifestly disproportionate to the aim sought to be attained,[72] it may be observed that, as a matter of principle, the imposition of administrative or criminal penalties for breach of obligations to declare VAT is capable of ensuring compliance with the VAT legislation and that, therefore, the imposition of such penalties is appropriate for attaining the objective pursued in that respect.[73]

60. In the mechanism at issue, the purpose of a decision adopted by the court of first instance imposing a financial penalty on the legal person is to prevent any delay in the procedures carried out to establish and punish tax offences, which are based on a reasonable likelihood that the acts complained of took place[74] and that they are imputable to the legal person and to the natural person capable of binding that legal person. The natural person is directly charged with having committed the unlawful acts, which precludes any avoidance of liability, and is aware that he or she exposes the legal person to related proceedings and to penalties of a criminal nature because of his or her conduct. The possibility of imposing a penalty on the legal person at an early stage in the proceedings limits the risk of impunity, which may, in particular, be linked to fraudulent insolvency. It allows pressure to be applied to the company to require it to comply with its fiscal obligations. To that extent, the national legislation at issue may, in my view, be considered an effective instrument for the prevention and punishment of criminal behaviour by undertakings liable for VAT – an instrument that is all the more necessary in the context of a tax system that is based on the information provided by taxable persons.

61. Furthermore, no method less onerous than that mechanism suggests itself as being capable of attaining the objectives of countering VAT fraud as efficiently.[75] I note, in that regard, that the former version of the ZANN, in which the imposition of a penalty on the legal person was subject to the definitive conviction of the natural person capable of rendering the legal person liable, does not in my view present the same guarantees of efficiency as regards the prevention of the risk of impunity and the need to punish, as quickly as possible, a serious form of economic crime, which is detrimental to the public interest, but also to the interests of competing undertakings that comply with the tax legislation.

62. Last, it is not evident that any disadvantages caused by a procedural framework combining initial proceedings subject to appeal and revision are manifestly disproportionate to the objectives pursued,[76] subject, however, to verification by the referring court of two elements.

[71] See, to that effect, judgment of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraphs 27, 29 and 31).

[72] See, to that effect, judgment of 6 September 2012, *Trade Agency* (C-619/10, EU:C:2012:531, paragraph 59).

[73] See, by analogy, judgment of 14 October 2021, *Landespolizeidirektion Steiermark (Gaming machines)* (C-231/20, EU:C:2021:845, paragraph 44).

[74] The establishment, in the present case, of VAT fraud linked with failure by the manager and representative of the legal person to fulfil her obligations when declaring VAT does not in my view give rise to significant evidential problems.

[75] See, to that effect, judgment of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraph 68).

[76] See, to that effect, judgment of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraph 69). In other words, the inconveniences caused must not be disproportionate to the aims pursued.

63. First, it is common ground that if the court dealing with the matter considers that the application to reopen the proceedings submitted by the legal person is well founded, it annuls the penalty decision and remits the case for a fresh examination.[77] Apart from the fact that the application to reopen the proceedings does not automatically entail suspension of execution of such a decision, the description of the national legislation provided contains no indication of the fate of any implementing measures or of whether the penalty imposed may be repaid following the annulment of the penalty decision, which to my mind is essential. I recall that, in the context of a related problem, the Court held that Member States are required, in principle, to repay charges levied in breach of EU law and that the claim for repayment of overpaid VAT concerns the right to recovery of sums paid but not due, which helps to offset the consequences of the tax's incompatibility with EU law by neutralising the economic burden which that tax has wrongly imposed on the trader who, in fact, has ultimately borne it.[78] Furthermore, the conditions for the repayment of overpaid VAT must enable the taxable person, in appropriate circumstances, to recover the entirety of the credit arising from that overpayment; this implies that the refund be made within a reasonable period of time and that, in any event, the repayment method adopted must not entail any financial risk for the taxable person.[79]

64. Second, it appears to follow from the order for reference that, until an application to reopen the proceedings is made, the legal person on which the penalty has been imposed cannot object to the enforcement of a decision having serious consequences for its financial health, including the risk of insolvency. In those circumstances, the referring court must in my view ascertain whether the national legislation at issue permits, or does not prevent, the adoption of interim measures, such as suspension of the enforcement procedure, in exceptional cases where the urgency of the situation so requires[80] or, in other words, measures to prevent irremediable negative consequences from arising.

65. Subject to those two reservations, I consider that the presumptions contained in the national legislation at issue in the main proceedings remain within reasonable limits, in accordance with the requirement laid down by the Court.

C. The second question referred

66. In the light of my conclusion that Framework Decision 2005/212 is not applicable, and of the suggested answer to the first question, it is appropriate, to my mind, to reformulate the second question referred as meaning that the referring court is asking, in essence, whether Article 49 of

[77] In the event that the proceedings against the natural person are discontinued, or that he or she is acquitted, the question arises as to the purpose and therefore the sense of a fresh examination of the case as regards the liability of the legal person in a regime based on the imputation to the legal person of an alleged offence committed by the natural person and, apparently, on an aggregation of liabilities that prevent the legal person alone from being prosecuted in respect of an offence committed by its representative without the latter's culpability being investigated and established.

[78] Judgment of 24 February 2022, *SC Cridar Cons* (C-582/20, EU:C:2022:114, paragraph 55). Furthermore, in the context of an appraisal of the reasonable limits within which States may implement a decision imposing tax surcharges, before a decision has been taken on the action relating to such surcharges, the ECtHR considered that the possibility of the original legal position being restored in the event of a successful appeal, and therefore any amount unduly paid by the taxpayer being reimbursed, had to be taken into account (see also ECtHR, 23 July 2002, *Janosevic v. Sweden*, CE:ECHR:2002:0723JUD003461997, §§ 105 to 109).

[79] See, to that effect, judgment of 6 July 2017, *Glencore Agriculture Hungary* (C-254/16, EU:C:2017:522, paragraph 20).

[80] See, to that effect, judgments of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 67); of 14 June 2017, *Menini and Rampanelli* (C-75/16, EU:C:2017:457, paragraph 61); and of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraphs 70 and 71). In those decisions, the Court held that the principle of effective judicial protection, reaffirmed in Article 47 of the Charter, did not preclude national legislation making the application of legal action subject to the prior implementation of out-of-court conciliation and mediation procedures or to the requirement to exhaust the available administrative remedies, provided, in particular, that those procedures do not cause a substantial delay for the purpose of bringing legal proceedings and that interim measures are possible in exceptional cases where the urgency of the situation so requires.

the Charter precludes legislation, such as that at issue in the main proceedings, which provides that the financial penalty imposed on the legal person is to be at least equal to the value of the unlawful advantage.

67. In that regard, it should be borne in mind that the severity of a penalty must correspond to the seriousness of the offence concerned, that requirement following from both Article 52(1) of the Charter and the principle of proportionality of penalties laid down in Article 49(3) of the Charter. That principle has to be observed as regards the determination of the rules concerning the severity of fines and the assessment of the factors which may be taken into account in the fixing of those fines. It is also apparent from the Court's case-law that the administrative or punitive measures permitted under national legislation must not go beyond what is necessary in order to attain the objectives legitimately pursued by that legislation. [81] Although it falls to the referring court to assess whether the amount of the penalty goes beyond what is necessary to attain those objectives, it is appropriate to inform that court of certain aspects of the main proceedings that would enable it to determine whether the penalty imposed is compatible with the principle of proportionality. [82]

68. As has been stated, the national legislation at issue in the main proceedings aims – a legitimate objective if ever there was one – to penalise tax fraud, in this instance the fact that ZK fraudulently caused Delta Stroy, of which she is the manager and representative, not to establish and pay VAT, thus procuring an advantage for that company amounting to BGN 11 338.98. As regards the procedure for determining the amount of the financial penalty, that legislation provides that the court may require the company to pay a fine 'at least equal to the value of the advantage, up to a maximum of BGN 1 000 000'. The mechanism thus authorises penalties of different levels within a range, with a ceiling or maximum penalty expressed as a lump sum and a floor or minimum penalty corresponding to the automatic application of the amount of the unlawful advantage, the court deciding to impose a penalty on the legal person concerned being bound by those amounts. It may thus be considered that the legislation at issue leaves it to the court to adjust the penalty, between the two limits defined, in consideration of the seriousness of the offence and the situation of the perpetrator.

69. Is the existence of a minimum penalty capable of itself, however, of justifying the conclusion that there has been a breach of the necessary individualisation of the penalty expressed by the principle of proportionality? I observe that, as regards an administrative penalty imposed in the event of an overvaluation of the amount of the excess VAT, it has been found that such a penalty is disproportionate, since the minimum amount of the penalty could not be reduced according to the very specific circumstances of the particular case. [83] In the field of the illegal supply of gaming machines, the Court has considered that the imposition of a minimum fine per unauthorised gaming machine does not appear, in itself, to be disproportionate, given the seriousness of the infringements in question. It added, however, that as regards 'the amount of that minimum fine', it is for the national court, for the purpose of assessing its proportionality, to take account of the relationship between the amount of the fine that may be imposed and the economic benefit

[81] Judgment of 6 October 2021, *ECOTEX BULGARIA* (C-544/19, EU:C:2021:803, paragraphs 97 to 99).

[82] Judgment of 15 April 2021, *Grupa Warzywna* (C-935/19, EU:C:2021:287, paragraph 28).

[83] In the judgment of 15 April 2021, *Grupa Warzywna* (C-935/19, EU:C:2021:287, paragraph 37 and operative part), the Court ruled that that penalty is to apply without distinction to a situation where the irregularity is the result of an error of assessment made by the parties to the transaction regarding the taxable nature of that transaction, which is characterised by the lack of evidence of evasion and of losses for the State Treasure, and to a situation where such specific circumstances do not exist.

derived from the infringement committed, in order to deter offenders from committing such an infringement, while ensuring, taking account of all the circumstances of the case, that the minimum amount thus imposed is not disproportionate to that benefit. [84]

70. To my mind, it is important to emphasise that those solutions and formulations are clearly in tune with the particular circumstances of the cases in question, which are obviously distinguished from the present case, relating to the breach of obligations to declare VAT. It may seem paradoxical, moreover, not to say contradictory, to accept the proportionality of a regime of penalties which includes a minimum fine which, by definition, has the effect of constraining the court in its assessment of the amount of the fine and, on the other hand, to ask the court to disregard it in consideration of the circumstances of the case.

71. I recall, last, that the Court has generally stated that the severity of penalties must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely dissuasive effect, [85] which means that the economic advantage derived from the unlawful conduct is to be taken into account. [86] In that context, and in the light of the importance which is given in the Court's case-law, for the purposes of achieving the objective of collecting all the VAT due, to combating VAT offences, [87] the existence of a minimum floor, for the type of penalty which the fine represents, [88] corresponding to the potential or actual unlawful economic advantage, does not seem to go beyond what is necessary in order to attain that objective.

V. Conclusion

72. In the light of the foregoing considerations, I propose that the questions for a preliminary ruling referred by the Okrazhen sad – Burgas (Regional Court, Burgas, Bulgaria) be answered as follows:

(1) Articles 47 to 49 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding legislation of a Member State which, in order to combat tax fraud, lays down a presumption that an alleged criminal offence committed on behalf of a legal person by a natural person capable of binding that legal person may be imputed to that legal person and a financial penalty in respect of that offence be imposed on that legal person, subject to the right for that legal person to be able to rebut those presumptions in the context of a legal action against the penalty decision and provided that the actual procedures for the exercise of that action do not disproportionately affect the right to an effective remedy before a tribunal and respect for the rights of the defence.

84 Judgment of 14 October 2021, *Landespolizeidirektion Steiermark (Gaming machines)* (C-231/20, EU:C:2021:845, paragraphs 46 and 47).

85 See, to that effect, judgment of 6 October 2021, *ECOTEX BULGARIA* (C-544/19, EU:C:2021:803, paragraph 100), it being recalled that the need for deterrent measures is expressly set out in Article 325 TFEU.

86 In the judgment of 24 February 2022, *Agenzia delle dogane e dei monopoli and Ministero dell'Economia e delle Finanze* (C-452/20, EU:C:2022:111), the Court held that it does not appear that a system of penalties which, *in order to deprive offenders of the economic advantages* resulting from the infringement of the prohibition on selling tobacco products to minors and deter them from infringing that prohibition, provides for an accumulation of penalties, a fine and the suspension of a trading licence, exceeds the limits of what is necessary to ensure attainment of the objective of protecting health and reducing, in particular, smoking prevalence among young people.

87 Judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 44 and the case-law cited).

88 The position would be different in the case of custodial penalties.

(2) Article 49(3) of the Charter of Fundamental Rights must be interpreted as not precluding legislation of a Member State which, in order to respond to a breach by the taxable person of his obligations to declare VAT, provides for a system of penalties in the context of which a fine, the minimum amount of which corresponds to the unlawful economic advantage derived or capable of being derived, may be imposed, provided that that legislation is appropriate for ensuring the attainment of the objective of combating tax fraud and does not exceed what is necessary in order to attain that objective.