Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 23 February 2016 [1]

Case C-614/14

Criminal proceedings
against
Atanas Ognyanov
(Request for a preliminary ruling from the

Sofiyski gradski sad (Sofia City Court, Bulgaria))

(Reference for a preliminary ruling — Article 267 TFEU — Article 94 of the Rules of Procedure of the Court of Justice — Content of a request for a preliminary ruling and obligations incumbent on the referring court or tribunal — Statement of the factual and legal context — National rule compelling the referring court to disqualify itself on the ground that it set out the factual and legal context of the case for the purposes of making a reference for a preliminary ruling to the Court — Articles 47 and 48 of the Charter)

I – Introduction

1. Are the detailed rules laid down in Article 267 TFEU and Article 94 of the Rules of Procedure of the Court of Justice with respect to the content of a request for a preliminary ruling capable of undermining the guarantee of rights enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter')?

2. Is a referring court or tribunal required to disqualify itself from the case in the main proceedings on the ground that it set out the factual and legal context of that case in the request for a preliminary ruling which it submitted in those proceedings?

3. That appears to be the position under Bulgarian law, pursuant to Article 29 of the Code of Criminal Procedure (Nakazalno protsesualen kodeks, the 'NPK').

4. On the basis of that provision, the Sofia City Public Prosecutor's Office (Sofiyska gradska prokuratura) asked the Sofiyski gradska sad (Sofia City Court) to disqualify itself on the ground that, in the request for a preliminary ruling submitted in Case C-554/14 *Ognyanov*,[2] pending before the Court, the Sofia City Court, in the course of setting out the factual and legal context of that case, expressed a 'preliminary view' before it had commenced its deliberations, thus failing to discharge its duty of impartiality and, moreover, infringing the right to the presumption of innocence enjoyed by Mr Ognyanov.

1 — Original language: French.

2 — The requests for a preliminary ruling submitted in that case and in the present case relate to the same dispute pending before the Sofiyski gradski sad (Sofia City Court) and I am delivering a separate Opinion in relation to those requests.

5. In the present case, the Court is therefore asked to consider whether EU law precludes a rule such as that at issue in the main proceedings.

6. I do not deny that the preliminary reference mechanism can present national courts and tribunals of all types and at all levels with issues that are sometimes difficult to manage, particularly given the differences that exist between national legislation with respect to the judiciary, that legislation, moreover, being among the least harmonised and most diverse.

7. However, the abundant case-law establishing the principle of cooperation between the national courts and the Court of Justice in the context of references for a preliminary ruling and the many regulatory provisions that shape that mechanism leave no room for doubt as to the answer to be given to that question.

8. In setting out, in the request for a preliminary ruling made in Case C-554/14, the factual and legal context of that case, the Sofiyski gradski sad (Sofia City Court) was simply complying with the detailed rules laid down in Article 267 TFEU and Article 94 of the Rules of Procedure with respect to the submission of a request for a preliminary ruling to the Court, and those detailed rules, if properly implemented, cannot be regarded as undermining the fairness of the proceedings or the fundamental rights of the parties.

9. A provision such as that at issue in the main proceedings must therefore be disregarded.

10. First, because it calls into question the essential rules governing the operation of the preliminary reference procedure as defined in Article 267 TFEU and the case-law of the Court and specified in Article 94 of the Rules of Procedure.

11. Second, because its effect, ultimately, is to deprive the Bulgarian criminal courts of the opportunity to make a reference for a preliminary ruling to the Court, thus encroaching upon the specific prerogatives conferred on them by the FEU Treaty and the Court's case-law.

12. In its order for reference, the Sofiyski gradski sad (Sofia City Court) is in no doubt, it may be added, as to how the aforementioned provisions of EU law are to be interpreted.

13. The purpose of its request, as I see it, is to change the Bulgarian criminal courts' perception of the preliminary reference procedure, and perhaps even that of the Konstitutsionen sad (Constitutional Court),[3] and to demonstrate the inconsistencies present in legislation which, if implemented, may deter every Bulgarian criminal court from submitting a request for a preliminary ruling to the Court.

14. The referring court points out, it is true, that a request for a preliminary ruling is a new exercise for the Bulgarian criminal courts, given the limitation laid down in Article 10(1) of Protocol 36 on transitional provisions, annexed to the FEU Treaty.

15. However, while the procedure for requesting a preliminary ruling is new to the Bulgarian criminal justice system, it is nonetheless an exercise in which the Bulgarian civil and administrative courts are particularly well versed, as the relatively high number of questions referred for a preliminary ruling by those courts confirms.[4]

3 — See, in that regard, Vatsov, M., 'European integration through preliminary rulings? The case of the Bulgarian Constitutional Court', *The preliminary reference to the Court of justice of the European Union by Constitutional Courts, German Law Journal*, Vol. 16, No 6, 2015.

4 — For an account of the legislation and practice relating to references for a preliminary ruling in Bulgaria, see the Bulgarian report by Fartunova, M., in Coutron, L., 'L'obligation de renvoi préjudiciel à la Cour de justice: une obligation sanctionnée?', Bruylant, Brussels, 2014, p. 145.

16. In that regard, the Code of Civil Procedure (Grazdhanski protsesualen kodeks [5]), in Part VII, Chapter 59,[6] sets out all of the procedural rules applicable to the submission of a request for a preliminary ruling to the Court. Article 630, concerning the content of a request for a preliminary ruling, stipulates in paragraph 1, in accordance with the detailed rules laid down in Article 94 of the Rules of Procedure, that '[t]he request for a preliminary ruling shall contain a description of the facts of the case, the applicable national law, an exact reference to the provision or act of which an interpretation or assessment as to validity is sought, the reasons why the referring court considers that a request for a preliminary ruling is necessary for the correct adjudication of the case and the formulation of the question referred for a preliminary ruling.[7]

17. Although the rules laid down in Chapter 59 are in principle confined exclusively to civil matters, they are also applicable to proceedings brought before the administrative courts, pursuant to Article 144 of the Code of Administrative Procedure (Administrativnoprotsesualen kodeks).[8]

18. The requirements relating to the content of a request for a preliminary ruling, laid down in Article 267 TFEU and Article 94 of the Rules of Procedure as well as in the case-law of the Court, far from being unknown to the national legislature and courts, are therefore part of Bulgaria's legal arsenal and have been since the Republic of Bulgaria acceded to the European Union in 2007.

19. While I appreciate that some criminal courts may encounter difficulties when using what is for them the unfamiliar preliminary reference mechanism, the fact remains that the rules governing the making of a reference for a preliminary ruling which are laid down in Article 267 TFEU and Article 94 of the Rules of Procedure are exactly the same whether the matter is civil or criminal. While Chapter 3 of Title III of the Rules of Procedure contains special provisions applicable to cases falling within the area of freedom, security and justice, those provisions do not in any way affect the referring court's obligations under Article 94 of the Rules of Procedure.

20. In the light of the foregoing submissions, which are based on the provisions of legislation and case-law establishing the cooperation that must exist between national courts and the Court of Justice in the context of a reference for a preliminary ruling, the answer to be given to the referring court will therefore leave no room for doubt.

21. Consequently, I shall propose that the Court rule that Article 267 TFEU and Article 94 of the Rules of Procedure, read in the light of the provisions referred to in Articles 47 and 48 of the Charter, must be interpreted as meaning that they preclude a national rule such as that at issue in the main proceedings, which compels the referring court to disqualify itself from the main proceedings on the ground that it set out the factual and legal context of that case in its request for a preliminary ruling.

22. As a consequence, the Sofiyski gradski sad (Sofia City Court) will be required to disapply such a rule.

23. I shall also say that, taking into account the institutional and procedural autonomy enjoyed by the Member States, Article 267 TFEU and Article 94 of the Rules of Procedure do not preclude a referring court or tribunal from hearing the parties again and conducting further enquiries, and altering accordingly the findings it made in its order for reference, after the Court has delivered its judgment.

5 — The 'GPK'. An English-language version of the GPK is available on the website of the Varhoven kasatsionen sad (Supreme Court of Cassation) at the following address: http://www.vks.bg/english/vksen_p04_02.htm#PART_SEVEN__Content of Request.

6 — Part VII is entitled 'Special rules of civil procedure falling within the scope of EU law (effective from 27 July 2007)'. Chapter 59 itself deals with 'requests for a preliminary ruling'.

7 — Unofficial translation.

8 — That article provides that the GPK is to apply on a subsidiary basis to all matters to which the Code of Administrative Procedure does not devote express provisions.

II – Factual and legal context

24. In the present case, Mr Ognyanov, a Bulgarian national, was sentenced by the Danish courts to 15 years' imprisonment for aggravated theft and murder. Mr Ognyanov served part of his sentence in prison in Denmark from 10 January 2012 until 1 October 2013, on which date he was transferred to the Bulgarian authorities in order to serve the remainder of his sentence in Bulgaria, in accordance with the Convention on the Transfer of Sentenced Persons, signed in Strasbourg on 21 March 1983.[9] Following Mr Ognyanov's transfer, the Sofiyski gradski sad (Sofia City Court) referred to the Court of Justice three questions for a preliminary ruling on the interpretation of Article 17 of Council Framework Decision 2008/909/JHA[10] (Case C-554/14).

25. Following the referral of those questions, the Sofia City Public Prosecutor's Office asked the Sofiyski gradski sad (Sofia City Court) to disqualify itself on the ground that, in paragraphs 2 to 4 of the request for a preliminary ruling which it had made in that case, that court had expressed a view on questions of fact and law, and did so before the commencement of deliberation.

26. It is clear from the order for reference in the present case that, in accordance with Article 29 of the NPK, as interpreted by the Varhoven kasatsionen sad (Supreme Court of Cassation), the expression by a judge of a preliminary view on the substance of a case before the commencement of deliberation on that case constitutes an instance of bias.

27. In the event of bias, the judge must disqualify himself, meaning, first, that he stops examining the case, second, that the case is reassigned to other judges within the court in question and, third, that the case is re-examined by the newly appointed court.

28. If the judge fails to disqualify himself, continues to examine the case and delivers a final decision, that decision will be vitiated for having been given in 'breach of essential procedural requirements'. A higher court will set aside that decision and the case will be reassigned to another panel of judges for re-examination.

29. The Sofiyski gradski sad (Sofia City Court) states that the case-law is particularly strict in its interpretation of the criterion of 'bias'. In this regard, it points out in particular that that criterion is reviewed *ex officio* and even the most insignificant comment with respect to the facts of the case or their legal classification automatically constitutes a ground for the judge's disqualification.

30. By way of illustration, the Sofiyski gradski sad (Sofia City Court) cites five decisions of the Varhoven kasatsionen sad (Supreme Court of Cassation)[11] in which the latter set aside the decisions of courts of first instance on grounds of bias.

31. Finally, it is apparent from the order for reference that the expression of a preliminary view by a judge has as its consequence not only his disqualification from the case and/or the setting aside of his final decision but also the commencement of disciplinary proceedings against him for a disciplinary offence. Points 2.3 and 7.4 of the national code of professional conduct (Kodeks za etichno povedenie) prohibit a judge from commenting publicly on the outcome of a case which he has been asked to examine or expressing a preliminary view. Furthermore, Point 7.3 of that code provides that the judge may comment on questions of legal principle but must refrain from referring to the specific facts of the case or their legal classification.

9 — The Convention is available on the Council of Europe's website. It has been ratified by 64 countries and came into force on 1 July 1985. The Republic of Croatia and the Republic of Finland are the only Member States which have not signed it.

10 — Council Framework Decision of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27).

11 — Criminal cases Nos 352/2008, 438/2009, 466/2009, 527/2009 and 463/2013.

32. In the present case, it is claimed that, in submitting questions for a preliminary ruling in Case C-554/14, the referring court publicly and officially expressed a preliminary view on the specific facts of that case.

III – The questions referred for a preliminary ruling

33. In those circumstances the Sofiyski gradski sad (Sofia City Court) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does it constitute an infringement of EU law (second paragraph of Article 267 TFEU, in conjunction with Article 94 of the Rules of Procedure of the Court of Justice, Articles 47 and 48 of the Charter of Fundamental Rights of the European Union or other applicable provisions) if the court which submitted the request for a preliminary ruling allows the proceedings to continue before it after delivery of the preliminary ruling and delivers a decision on the substance of the case without disqualifying itself, a ground for such disqualification being that the court had expressed a preliminary view on the merits of the case in the request for a preliminary ruling (in that it considered certain facts to have been established and a certain legal provision to be applicable to those facts)?

The question is referred on the assumption that all procedural provisions protecting the parties' rights to adduce evidence and to make submissions were complied with in the determination of the facts and applicable law for the purposes of submitting the request for a preliminary ruling.

(2) If the answer to the first question is that it is lawful for the proceedings to be allowed to continue, does it constitute an infringement of EU law if:

(a) The court reproduces in its final decision, without amendment, all the findings set out in its request for a preliminary ruling and declines to take new evidence or to hear the parties in relation to those factual and legal outcomes (with the court, in practice, taking new evidence and hearing the parties only in respect of matters not regarded as having been established in the request for a preliminary ruling)?

(b) The court takes new evidence and hears the parties on all relevant issues, including those on which it has already stated its view in the request for a preliminary ruling, and sets out its view in its final decision on the basis of all the evidence adduced and after examining all the parties' arguments, irrespective of whether the evidence was adduced before submission of the request for a preliminary ruling or after delivery of the preliminary ruling, and of whether the arguments were put forward beforehand or afterwards?

(3) If the answer to the first question is that it is compatible with EU law for the proceedings to be allowed to continue, is it compatible with EU law if the court decides not to allow the case in the main proceedings to continue before it and to disqualify itself from the case on the ground of bias, it being contrary to national law (which offers a higher level of protection in respect of the interests of the parties and of justice) for the proceedings to be allowed to continue, and where such disqualification is based on the fact that:

(a) before delivering its final decision, the court had expressed a preliminary view on the proceedings in the context of the request for a preliminary ruling, which is permissible under EU law but not under national law;

(b) the court's final view would be set out in two legal acts instead of one (on the assumption that the request for a preliminary ruling constitutes a final, rather than a preliminary, view), which is permissible under EU law but not under national law?'

34. Observations were submitted by the Spanish and Netherlands Governments and by the European Commission.

35. Regrettably, the parties to the main proceedings and the Bulgarian Government did not submit observations.

IV – My analysis

36. As case-law and legal literature have made sufficiently clear, the preliminary reference procedure is the keystone of the European Union judicial system, the implementation of which falls to the national courts.

37. As the Court recalled in its Opinion 2/13,[12] the preliminary reference procedure, 'by setting up a dialogue between one court and another, … between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law …, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties'.[13]

38. In finding against a Member State on the ground that a national court did not give adequate reasons for its refusal to submit a request for a preliminary ruling to the Court of Justice, the European Court of Human Rights, in its judgment in *Dhahbi v. Italy*,[14] adjudicating in accordance with an already well-established line of case-law, emphasised the importance of that mechanism in Europe and definitively confirmed that the jurisdiction to make a reference for a preliminary ruling which the national court or tribunal enjoys is essential to such a degree that that court or tribunal cannot exercise it arbitrarily without running the risk of infringing the right to a fair hearing.

A – *The first question*

39. By its first question, the referring court asks the Court, in essence, whether Article 267 TFEU, read in conjunction with Article 94 of the Rules of Procedure and Articles 47 and 48 of the Charter, must be interpreted as meaning that it precludes a national rule which compels the referring court to disqualify itself from the case in the main proceedings on the ground that it set out the factual and legal context of that case in its request for a preliminary ruling, thus deviating from its duty of impartiality and infringing the right to the presumption of innocence.

40. As I have stated, the Sofiyski gradski sad (Sofia City Court) is in no doubt as to how the aforementioned provisions are to be interpreted. The answer to that question is clear, taking into account, first, the rules laid down by legislation and case-law which have shaped the preliminary ruling mechanism for decades and, secondly, the case-law of the European Court of Human Rights.

12 — EU:C:2014:2454.

13 — Paragraph 176 and the case-law cited.

14 — No 17120/09. In that case, the Italian authorities had refused to grant the applicant, a Tunisian national, a family allowance benefit, on the ground that that allowance was payable only to Italian nationals and EU nationals. Before the Italian courts, the applicant challenged the difference in treatment to which he had been subjected and asked that a question be referred to the Court of Justice for a preliminary ruling on the interpretation of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part (OJ 1998 L 97, p. 2), which prohibits discrimination against Tunisian workers in social matters. That request was unsuccessful, the Corte suprema di cassazione (Court of Cassation, Italy) having dismissed it without making the reference. The applicant therefore applied to the European Court of Human Rights. In that case, the European Court of Human Rights was asked to determine whether the refusal of the Corte suprema di cassazione to make a reference for a preliminary ruling to the Court of Justice was contrary to the right to a fair hearing. Reiterating the reasoning which it had followed in similar previous cases, the European Court of Human Rights held that Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), places on domestic courts an obligation to give reasons for decisions by which they refuse to refer a question for a preliminary ruling, in the light of the applicable law (§ 31).

1. The rules laid down by legislation and case-law with respect to the content of a request for a preliminary ruling

41. According to settled case-law, Article 267 TFEU provides for a procedure of close and direct cooperation between the Court of Justice and the national courts and tribunals, by means of which the Court provides the national courts and tribunals with the points of interpretation of EU law which they need in order to decide the disputes before them. [15] Its purpose is to ensure the primacy of EU law and the uniform interpretation of its provisions in all the Member States.

42. In that dialogue between one court and another, each showing due regard for the jurisdiction of the other, each assumes its own responsibilities. Such judicial cooperation 'works both ways', however. [16] While the Court of Justice must do its utmost to help the referring court to interpret and apply EU law correctly, not least by giving it the widest measure of discretion to refer matters to it, [17] the referring court must, for its part, take into account the unique function performed by the Court of Justice in this process and thus endeavour to provide it with all the information and evidence necessary to enable it to exercise its function in accordance with the objective referred to in Article 267 TFEU.

43. The Court therefore requires the request for a preliminary ruling to contain a summary of the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based. The request must also include the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law. [18]

44. Finally, the referring court or tribunal must state the reasons which prompted it to inquire about the interpretation or validity of certain provisions of EU law and the relationship that it identifies between those provisions and the national legislation applicable to the main proceedings. In that regard, it should be noted that the Court takes account of the nature of the litigation when assessing whether those requirements have been met. The Court thus considers that 'the requirements [concerning the content of a request for a preliminary ruling] can be more easily fulfilled where the context of [that] request … is already largely familiar from a previous reference for a preliminary ruling'. [19] However, the Court is more demanding where the request is made in the context of proceedings relating to competition or public procurement, in so far as those spheres are characterised by complex factual and legal situations. [20]

45. The jurisdiction thus enjoyed by the referring court or tribunal is justified by the fact that it alone has direct knowledge of the facts underlying the dispute and will assume sole responsibility for the subsequent judicial decision. [21]

46. Aside from and in addition to the statement of the factual and legal context, the Court requires the referring court to explain why it considers a reply to its questions to be necessary or useful for the purposes of resolving the dispute where the reasons are not unequivocally clear from the file. [22]

15 — Order in *Abdallah* (C-144/11, EU:C:2011:565, paragraph 9 and the case-law cited) and the judgment in *FIRIN* (C-107/13, EU:C:2014:151, paragraph 29 and the case-law cited).

16 — This is the expression used by Advocate General Wahl in his Opinion in *Venturini and Others* (C-159/12 to C-161/12, EU:C:2013:529, point 56 et seq.).

17 — Judgment in *Elchinov* (C-173/09, EU:C:2010:581, paragraph 26 and case-law cited).

18 — Order in *Debiasi* (C-560/11, EU:C:2012:802, paragraph 24 and the case-law cited) and the judgment in *Petru* (C-268/13, EU:C:2014:2271, paragraph 22). See also the order in *Abdallah* (C-144/11, EU:C:2011:565, paragraph 10 and the case-law cited).

19 — Order in *3D I* (C-107/14, EU:C:2014:2117, paragraph 12).

20 — See, on the subject of competition law, the order in *Fontaine* (C-603/11, EU:C:2012:731, paragraph 15) and, on the subject of public procurement, the judgment in *Azienda sanitaria locale n. 5 «Spezzino» and Others* (C-113/13, EU:C:2014:2440, paragraphs 47 and 48).

21 — Order in *Debiasi* (C-613/10, EU:C:2011:266, paragraph 20) and the judgment in *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 24).

22 — Judgment in *Foglia* (244/80, EU:C:1981:302, paragraph 17) and the order in *Talasca* (C-19/14, EU:C:2014:2049, paragraph 28).

47. That information is essential if the Court is to be able to give a useful and reliable answer to the question raised, by assessing all the circumstances of fact and law characterising the dispute. The Court can then be sure that the assumed facts on which the request for a preliminary ruling is based do indeed fall within the scope of EU law, that the question is relevant and that it is not hypothetical.[23] It should be recalled that the Court's task is not to formulate advisory opinions on general or hypothetical questions but to assist in the administration of justice in the Member States by providing a useful and correct interpretation of EU law. The Court is therefore empowered to give rulings on the interpretation or the validity of an EU provision only on the basis of the facts which the national court puts before it.[24]

48. Furthermore, the information contained in the request for a preliminary ruling is essential in enabling the governments of the Member States and the other interested parties to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union.[25] Only the orders for reference are notified to the interested parties, who do not have sight of any case file that may be sent to the Court by the national court or tribunal.[26]

49. It should be pointed out that the Court does not require the referring court or tribunal first to make all the findings of fact and of law required by its judicial function before it may refer a question for a preliminary ruling to the Court.[27]

50. It is true that the Court considers that it may be convenient, in certain circumstances, for the facts of the case to be established and for questions of purely national law to be resolved at the time the reference is made to it. The Court nonetheless recognises that it is for the referring court or tribunal alone to decide at what stage in the proceedings it needs to refer a question for a preliminary ruling to the Court,[28] since there are considerations of procedural economy and expediency the assessment of which is, once again, a matter for the referring court or tribunal alone. The latter alone has direct knowledge of the facts of the case and of the arguments of the parties and is therefore in the best position to determine at what stage in the proceedings it requires an interpretation of EU law from the Court.

51. Those requirements with regard to the content of a request for a preliminary ruling were codified in Article 94 of the Rules of Procedure, 'of which the national court is supposed, in the context of the cooperation instituted by Article 267 TFEU, to be aware and which it is bound to observe *scrupulously*'.[29]

52. Article 94 of the Rules of the Procedure of the Court provides as follows:

'In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

(a) a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;

23 — See, for example, the judgment in *Konstantinides* (C-475/11, EU:C:2013:542, paragraph 61) and the orders in *Mlamali* (C-257/13, EU:C:2013:763, paragraph 32 and the case-law cited) and *Szabó* (C-204/14, EU:C:2014:2220, paragraph 22 et seq.).

24 — Order in *Talasca* (C-19/14, EU:C:2014:2049, paragraph 18 and the case-law cited) and the judgment in *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 15).

25 — Order in *Abdallah* (C-144/11, EU:C:2011:565, paragraph 11 and the case-law cited).

26 — See the order in *3D I* (C-107/14, EU:C:2014:2117, paragraph 9). See also the judgment in *Pringle* (C-370/12, EU:C:2012:756, paragraph 85 and the case-law cited) and the order in *D'Aniello and Others* (C-89/13, EU:C:2014:299, paragraph 17).

27 — Judgments in *Winner Wetten* (C-409/06, EU:C:2010:503, paragraph 39) and *VEBIC* (C-439/08, EU:C:2010:739, paragraph 47).

28 — See, in particular, the judgment in *Irish Creamery Milk Suppliers Association and Others* (36/80 and 71/80, EU:C:1981:62, paragraphs 6 and 7 and the case-law cited).

29 — See the order in *Talasca* (C-19/14, EU:C:2014:2049, paragraph 21). My emphasis.

(b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.'

53. While paragraphs (a) and (b) of that article concern the description of the factual and legal context of the case brought before the Court, paragraph (c) has to do with the reasons for the reference *stricto sensu*. [30]

54. Those requirements also appear in the recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings. [31] Point 22 of the recommendations, concerning the form and content of the request for a preliminary ruling, states that the request must 'be sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a clear understanding of the factual and legal context of the main proceedings'.

55. Point 22 draws attention to Article 94 of the Rules of Procedure, concerning the content of the request for a preliminary ruling.

56. The foregoing shows, if confirmation were necessary, that the statement of the factual and legal context of the case in the main proceedings is a constituent, if not essential, element of the request for a preliminary ruling and its absence will be a ground for declaring the request to be manifestly inadmissible. [32]

57. Furthermore, it should be recalled that those procedural requirements were reproduced in Article 1 of Protocol No 16 to the ECHR [33] for the purposes of advisory opinions being sought from the European Court of Human Rights. That article requires the national court or tribunal to give reasons for its request and to 'provide the relevant legal and factual background of the pending case', without which the request for an opinion may be refused.

58. The fact that that protocol has not as yet entered into force does not prevent me from making the point that the advisory opinion mechanism which it is intended to establish draws extensively on the way in which the preliminary reference procedure operates, a fact which demonstrates clear recognition of that procedure, the nature and operation of which cannot be disputed.

59. In the light of the foregoing, it is clear that, in setting out in the request for a preliminary ruling in Case C-554/14 the factual and legal context of that case, the Sofiyski gradski sad (Sofia City Court) was simply following the rules laid down by the EU legislature and the Court of Justice with respect to the implementation of Article 267 TFEU.

60. Although, in so doing, the Sofiyski gradski sad (Sofia City Court) infringes the rules of the NPK, it is nonetheless important to point out that its approach is perfectly consistent with the national rules governing the making of a reference for a preliminary ruling by the Bulgarian civil and administrative courts.

30 — Judgment in *Gullotta and Farmacia di Gullotta Davide & C.* (C-497/12, EU:C:2015:436, paragraph 17).

31 — OJ 2012 C 338, p. 1; 'the recommendations'.

32 — See, in particular, the order in *Debiasi* (C-613/10, EU:C:2011:266) and the judgment in *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 25).

33 — Protocol adopted by the Committee of Ministers of the Council of Europe on 10 July 2013. The mechanism provided for in that protocol will allow the highest courts and tribunals of the States Parties to the ECHR to request the Court to give an advisory opinion on questions relating to the interpretation or application of the rights and freedoms defined in the ECHR.

61. As I noted in my introductory remarks, Chapter 59 of Part VII of the GPK sets out all the procedural rules applicable to the submission of a request for a preliminary ruling to the Court of Justice.

62. Articles 628 to 633 of the GPK transpose into Bulgarian law the conditions and effects of a request for a preliminary ruling submitted by a national court, in particular the provisions of Article 267 TFEU and the case-law of the Court.

63. Articles 628 and 629 of the GPK define the circumstances in which the national court may or must apply to the Court by way of the preliminary reference procedure.

64. Article 630 of the GPK lays down the rules applicable to the content of a request for a preliminary ruling.

65. Article 630(1) largely reproduces the rules laid down in Article 94 of the Rules of Procedure and Point 22 of the recommendations, stipulating as it does, let us recall, that '[t]he request for a preliminary ruling shall contain a description of the facts of the case, the applicable national law, an exact reference to the provision or act of which an interpretation or assessment as to validity is sought, the reasons why the referring court considers that a request for a preliminary ruling is necessary for the correct adjudication of the case and the formulation of the specific question referred for a preliminary ruling'.

66. I would also reiterate that, although the rules laid down in Chapter 59 of Part VII of the GPK are, in principle, exclusively confined to civil cases, they are also applicable to proceedings brought before the administrative courts, in accordance with Article 144 of the Code of Administrative Procedure (Administrativnoprotsesualen kodeks).[34] Indeed, according to legal literature, it would seem that the scope of those rules is more general yet in that they are applicable to any judicial proceedings, Chapter 59 constituting the national legal basis for use of the preliminary reference procedure by the Bulgarian courts, with the exception of the Konstitutsionen sad (Constitutional Court).[35]

67. The requirements relating to the content of a request for a preliminary ruling, laid down in Article 267 TFEU and Article 94 of the Rules of Procedure as well as in the case-law of the Court, are therefore part of Bulgaria's legal arsenal and have been since the Republic of Bulgaria acceded to the European Union in 2007.

68. The fact that the proceedings at issue in Case C-554/14 are criminal is no reason for the referring court not to provide a clear and sufficient statement of the factual and legal context of that case. On the contrary, the application of that rule is even more imperative given that those proceedings may culminate in custodial measures, adopted on the basis of national legislation that is among the least harmonised in the European Union, and relating to facts that need to be clearly explained.

69. In the light of the foregoing, the difference between the rules governing the making of a reference for a preliminary ruling in civil and administrative proceedings, which transpose the provisions contained in Article 267 TFEU and Article 94 of the Rules of Procedure, and the rule at issue, which applies to criminal proceedings, is therefore neither justified nor consistent.

70. Moreover, although the Sofia City Public Prosecutor's Office considers, in the present case, that, in setting out the factual and legal context of Case C-554/14, the Sofiyski gradski sad (Sofia City Court) infringed the right to a fair trial enshrined in Article 47 of the Charter and the right to the presumption of innocence under Article 48 of the Charter, those fears are entirely unwarranted.

34 — See footnote 8 of this Opinion.

35 — See the Bulgarian report by Fartunova, M., p. 147.

71. The obligation placed on the referring court or tribunal to give reasons for its request for a preliminary ruling and to provide all the factual and legal information necessary for an understanding of the dispute is liable not to detract from but to guarantee the fairness of the proceedings, provided of course that the detailed rules laid down in Article 267 TFEU and Article 94 of the Rules of Procedure are correctly implemented.

72. In Case C-554/14, the mere fact that the Sofiyski gradski sad (Sofia City Court) set out the factual and legal context in its request for a preliminary ruling constitutes neither proof of bias such as to compel that court to disqualify itself from the case nor an infringement of the principle of the presumption of innocence.

2. The referring court's duty of impartiality

73. Both the Court of Justice and the European Court of Human Rights have had occasion, in the course of their case-law, to define the concept of an 'impartial tribunal' as established in Article 47 of the Charter and Article 6(1) of the ECHR respectively. [36]

74. Indeed, the Court has made the independence of the judiciary, one aspect of that being impartiality, [37] one of the defining criteria of 'court or tribunal' within the meaning of Article 267 TFEU. [38] Thus, the impartiality of the judge must be regarded as a condition of recourse to the preliminary reference procedure.

75. A judge is presumed to be impartial, [39] that is to say free of prejudice or bias. [40]

76. The European Court of Human Rights will thus assess the impartiality of a court or tribunal by means of a subjective test whereby it ascertains the judge's personal conviction and takes account of his behaviour, in particular whether he has shown any personal bias or prejudice in the case or exhibited any hostility. [41]

77. Furthermore, as part of a more objective test, an impartial court or tribunal is one which has only one interest in the outcome of the proceedings, namely the strict application of the rule of law. [42] Thus, irrespective of the judge's personal conduct, impartiality requires that the court or tribunal be impervious to all external factors and neutral with respect to the interests before it. [43]

78. In order to dispel any legitimate doubt on the part of individuals and to safeguard the confidence which impartiality is meant to create (in accordance with the adage 'justice must not only be done, it must also be seen to be done' [44]), the requirement of impartiality necessitates the adoption of rules relating, inter alia, to the composition of the judicial body and the appointment, length of service and the grounds for abstention, disqualification and dismissal of its members. [45]

79. In the present case, any infringement of the right referred to in Article 47 of the Charter arises not from the detailed rules laid down in legislation, but from the referring court's conduct.

36 — See, in that regard, the guide to Article 6, available at the following website http://www.echr.coe.int/Documents/Guide_Art_6_FRA.pdf.

37 — Judgment in *TDC* (C-222/13, EU:C:2014:2265, paragraph 31 and case-law cited).

38 — Judgment in *TDC* (C-222/13, EU:C:2014:2265, paragraph 27).

39 — ECtHR *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 58, Series A no. 43.

40 — ECtHR *Wettstein v. Switzerland*, no. 33958/96, § 43, ECHR 2000-XII and *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009.

41 — ECtHR *Buscemi v. Italy*, no. 29569/95, §§ 67 and 68, ECHR 1999-VI.

42 — Judgment in *TDC* (C-222/13, EU:C:2014:2265, paragraph 31 and the case-law cited).

43 — Judgment in *TDC* (C-222/13, EU:C:2014:2265, paragraph 32 and the case-law cited).

44 — [French translation of adage].

45 — Judgment in *TDC* (C-222/13, EU:C:2014:2265, paragraph 32 and the case-law cited). See also ECtHR *Micallef v. Malta* [GC], no. 17056/06, § 98 and 99, ECHR 2009.

80. So it is that the Sofia City Public Prosecutor's Office considers that the material contained in the request for a preliminary ruling is sufficient to cast doubt on the impartiality of the Sofiyski gradski sad (Sofia City Court), whose task it will later be to settle the dispute.

81. The Public Prosecutor's Office takes the view that, by setting out in its order for reference in Case C-554/14 the factual and legal context of that case, the Sofiyski gradski sad (Sofia City Court) expressed a 'preliminary view' before commencing its deliberation of that case. In accordance with Article 29 of the NPK, this would constitute an instance of 'bias' such as to compel the referring court to disqualify itself from the case. According to the order for reference in the present case, even the most insignificant comment by the court with respect to the facts of the case or their legal classification falls within the scope of that article and entails the court's disqualification.

82. In the present case, those fears are unfounded.

83. It is the settled case-law of the European Court of Human Rights that the mere fact that a judge has taken pre-trial decisions cannot by itself justify concerns about his impartiality. What matters is the scope and nature of the measures which have been taken. [46] While making a reference to the Court of Justice for a preliminary ruling constitutes a judicial decision, the fact remains that the act of setting out, in the course of that reference, the matters of fact and law inherent in the case in question is nothing more than a finding on the part of the referring court, since the latter does not then go on to carry out a legal classification of those facts in a manner contrary to the case-law referred to in point 8 of the order for reference in the present case.

84. It is clear that, in Case C-554/14, point 2 of the order for reference deals with the 'facts of the case', point 3 relates to the 'substantive law applicable to questions other than those which are the subject of the request for a preliminary ruling but which justify the need to submit that request to the Court' and point 4 is concerned with the 'substantive law applicable to the resolution of the point of law at issue in the main proceedings'.

85. A close examination of those points shows that none of them betrays any prejudice or bias on the part of the referring court.

86. On the contrary, the detail of those findings of facts and law demonstrates a thorough knowledge of the case file which, to my mind, does not warrant that court being suspected of bias. Even if that court had carried out a preliminary analysis of the information available, the European Court of Human Rights has repeatedly held that such an analysis cannot be regarded as prejudging the final analysis. [47]

87. In the light of the foregoing, therefore, there is nothing to support the proposition that, by setting out the factual and legal context of Case C-554/14 in its order for reference, the Sofiyski gradski sad (Sofia City Court) failed to discharge its duty of impartiality, as required by Article 47 of the Charter.

3. Observance of the right to the presumption of innocence

88. Here again, any infringement of the right guaranteed in Article 48 of the Charter arises not from the detailed rules laid down in legislation, but from the behaviour of the referring court.

46 — ECtHR *Morel v. France*, no. 34130/96, § 45, ECHR 2000-VI.

47 — Idem.

89. The question, therefore, is whether, in its statement of the factual and legal context of Case C-554/14, the referring court's statement of reasons suggests that it considers the person concerned to be guilty of the offence even though his guilt has not been proven. [48] The premature expression of such an opinion by the referring court would indisputably run foul of the presumption of innocence. [49]

90. In the present case, that question does not arise.

91. The right of any accused to be presumed innocent can have no application to an individual who has already been found guilty of the offence in question, [50] as Mr Ognyanov was. [51]

92. In any event, we must not lose sight of the fact that the request for a preliminary ruling submitted by a referring court has as its sole purpose to obtain a correct interpretation of EU law, and the question of whether, on the basis of that interpretation, the person concerned is to be found innocent or guilty of the facts at issue is determinable only from the assessment to be carried out exclusively by that court itself.

93. In the light of those considerations, I take the view that the mere fact that the Sofiyski gradski sad (Sofia City Court) set out in its request for a preliminary ruling in Case C-554/14 the factual and legal context of that case constitutes neither proof of bias such as to compel it to disqualify itself from that case nor a breach of the principle of the presumption of innocence.

94. Thus, if the detailed rules laid down in Article 267 TFEU and Article 94 of the Rules of Procedure with respect to the submission of a request for a preliminary ruling are correctly applied, they are not capable of detracting from the impartiality of the referring court or tribunal or of infringing the right to the presumption of innocence, enshrined in Articles 47 and 48 of the Charter respectively.

95. At this stage in my analysis, it is clear that the national rule at issue, as interpreted by the Varhoven kasatsionen sad (Supreme Court of Cassation), is liable to prevent, or at least deter, a Bulgarian criminal court from submitting a question for a preliminary ruling, thus encroaching upon the inherent prerogatives conferred on it by Article 267 TFEU and the case-law of the Court.

96. After all, pursuant to that rule, the criminal court incurs not only disqualification but also a disciplinary penalty for setting out the factual and legal context of the case in its order for reference, in accordance with the detailed rules laid down in Article 267 TFEU and Article 94 of the Rules of Procedure.

97. This leads to the absurd and paradoxical result that a court submitting a request for a preliminary ruling in accordance with EU law would then be regarded, under national legislation, as infringing the fundamental rights of the parties.

98. Such a rule is clearly incompatible with the requirements inherent in the very nature of EU law, since it has the effect of diminishing the effectiveness of EU law by deterring Bulgarian criminal courts from submitting a reference for a preliminary ruling to the Court of Justice.

48 — See, in particular, ECtHR *Nerattini v. Greece*, no. 43529/07, § 23, 18 December 2008.

49 — See, in particular, ECtHR *Garycki v. Poland*, no. 14348/02, § 66, 6 February 2007, and *Nešťák v. Slovakia*, no. 65559/01, § 88, 27 February 2007.

50 — ECtHR *Phillips v. the United Kingdom*, no. 41087/98, § 35, ECHR 2001-VII.

51 — Mr Ognyanov has already been sentenced to imprisonment for the offences of which he was convicted by the Danish judicial authorities.

99. First, in the judgment in *Elchinov*,[52] concerning a request for a preliminary ruling from the Administrativen sad Sofia-grad (Sofia City Administrative Court), the Court reiterated that national courts or tribunals must have the widest possible powers to apply EU law, since Article 267 TFEU gives them the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case.[53]

100. The Court held that national courts or tribunals must not be prevented from referring matters to the Court by a national procedural rule of whatever kind, further stating that the discretion to refer a question for a preliminary ruling is an inherent prerogative which those courts or tribunals, ruling at first instance, must be able to exercise at any stage in the proceedings.[54]

101. Secondly, it should be recalled that, in its judgment in *Dhahbi v. Italy*, the European Court of Human Rights held that, where a preliminary ruling mechanism exists, the refusal of a national court or tribunal to submit a question for a preliminary ruling may, in certain circumstances, affect the fairness of the proceedings and infringe the right to a fair trial as enshrined in Article 6(1) of the ECHR. That was the conclusion of that court in that instance, inasmuch as it found that the national court had refused, quite arbitrarily and without any statement of reasons, to submit a request for a preliminary ruling to the Court of Justice.

102. If a national court or tribunal were to refuse to make a reference for a preliminary ruling on the ground that, in so doing, it incurs not only its disqualification but also a disciplinary penalty for setting out the factual and legal basis of the case, this would unquestionably constitute a violation of Article 6 of the ECHR.

103. In the light of the foregoing, there is no doubt that EU law, in particular Article 267 TFEU and Article 94 of the Rules of Procedure, precludes a national rule such as that at issue in the main proceedings, which, if retained, could have a very serious adverse effect on the preliminary reference mechanism, as well as on the cooperation established between the Court of Justice and the national courts, and would undermine the primacy of EU law.

104. I shall therefore propose that the Court rule that Article 267 TFEU and Article 94 of the Rules of Procedure must be interpreted as meaning that they preclude a national rule such as that at issue, which compels the referring court to disqualify itself from the case on the ground that it set out the factual and legal context of that case in its request for a preliminary ruling.

B – *The second question*

105. By its second question, the Sofiyski gradski sad (Sofia City Court) asks the Court, in essence, whether Article 267 TFEU and Article 94 of the Rules of Procedure preclude a referring court or tribunal from hearing the parties again and undertaking new measures of inquiry, and modifying accordingly the findings it reached in its order for reference, after the Court has delivered its judgment.

106. First, in accordance with settled case-law, it is for the national court or tribunal alone to decide at what stage in the proceedings it is appropriate to refer a question to the Court for a preliminary ruling.[55]

52 — C-173/09, EU:C:2010:581.

53 — Paragraph 26 and the case-law cited.

54 — Judgment in *Elchinov* (C-173/09, EU:C:2010:581, paragraphs 25 and 26 and the case-law cited.

55 — See, in particular, the judgments in *Irish Creamery Milk Suppliers Association and Others* (36/80 et 71/80, EU:C:1981:62, paragraph 7) and *Sibilio* (C-157/11, EU:C:2012:148, paragraph 31 and the case-law cited).

107. While the Court considers that it might be convenient, in certain circumstances, for questions of purely national law to be resolved at the time the reference is made to the Court,[56] it nonetheless recognises that the national court or tribunal is free to exercise that discretion at whatever stage in the proceedings it considers appropriate.[57] The decision of when to make a reference for a preliminary ruling is dictated by considerations of procedural economy and expediency which fall to the national court or tribunal alone to assess, since it alone has direct knowledge of the facts of the case and the arguments of the parties.

108. Beyond that case-law, there is no provision of EU law that prohibits the national court or tribunal, after having referred a question for a preliminary ruling, from altering its assessment of the relevant factual and legal context in the course of its examination of the case pending before it.

109. After all, such a prerogative is, in fact, a component of the institutional and procedural autonomy enjoyed by the Member States; the Court does not therefore have jurisdiction to rule on the specific application of national rules of procedure.

110. In accordance with the Court's settled case-law, it is for the referring court or tribunal alone to determine the scope of national provisions and how they should be applied. Thus, once the Court has delivered its judgment, the referring court or tribunal must continue its examination of the case in the main proceedings in accordance with national rules of judicial organisation and procedure and with due regard for the fundamental rights of the parties.

111. The only obligation incumbent on the national court or tribunal at that stage of the proceedings is to give full effect to the interpretation of EU law adopted by the Court. The replies given by the Court to the referring court or tribunal are to be regarded as imposing a decisive and binding interpretation of EU law, since the Court's role under Article 267 TFEU is not to provide an advisory opinion.[58]

112. In the light of the foregoing, the answer to be given to the referring court must be that, taking into account the institutional and procedural autonomy enjoyed by the Member States, Article 267 TFEU and Article 94 of the Rules of Procedure do not preclude a referring court or tribunal from hearing the parties again and undertaking new measures of inquiry, and altering accordingly the findings it reached in its order for reference, after the Court has delivered its judgment, provided that it gives full effect to the interpretation of EU law adopted by the Court.

C – *The third question*

113. In the event that the Court finds that Article 267 TFEU and Article 94 of the Rules of Procedure preclude a national rule such as that at issue, the referring court, by its third question, asks, in essence, whether EU law precludes it from choosing to disqualify itself in accordance with the national rule at issue, on the ground that that rule ensures a higher level of protection for the fundamental rights of the parties.

114. In other words, does EU law preclude the referring court from applying a national rule despite the fact that it has been held to be contrary to EU law?

115. There is no doubt about the answer to that question. The referring court is under an obligation to disapply such a rule.

56 — Judgment in *Melki and Abdeli* (C-188/10 et C-189/10, EU:C:2010:363, paragraph 41 and the case-law cited).

57 — Judgment in *Elchinov* (C-173/09, EU:C:2010:581, paragraph 26 and the case-law cited).

58 — See, in particular, judgment in *Kleinwort Benson* (C-346/93, EU:C:1995:85, paragraph 24).

116. Under Article 280 TFEU, '[t]he judgments of the Court … shall be enforceable'. Moreover, Article 633 of the GPK explicitly affirms the same principle.

117. It is settled case-law that a judgment in which the Court gives a preliminary ruling is binding on the national court or tribunal, as regards the interpretation of provisions of EU law in question, for the purposes of the decision to be given in the main proceedings.[59] As I stated in point 111 of this Opinion, the Court does not give advisory opinions under Article 267 TFEU.

118. If the Court were to consider that Article 267 TFEU, which is a directly applicable rule, precludes a national rule such as that at issue, the national court would therefore be obliged to disapply that national rule in such a way as to ensure the primacy, effectiveness and unity of EU law.[60]

V – Conclusion

119. In the light of the foregoing submissions, I propose that the questions submitted by the Sofiyski gradski sad (Sofia City Court) should be answered as follows:

(1) Article 267 TFEU and Article 94 of the Rules of Procedure of the Court must be interpreted as meaning that they preclude a national rule such as that at issue, which compels the referring court to disqualify itself from a case on the ground that it set out the factual and legal context of that case in the request for a preliminary ruling submitted to the Court, in accordance with the detailed rules laid down in those provisions.

Taking into account the principle referred to in Article 280 TFEU, the referring court is required to disapply the national rule at issue.

(2) Article 267 TFEU and Article 94 of the Rules of Procedure must be interpreted as meaning that, taking into account the institutional and procedural autonomy enjoyed by the Member States, they do not preclude a referring court or tribunal from hearing the parties again and undertaking new measures of inquiry, and altering accordingly the findings it reached in its order for reference, after the Court has delivered its judgment, provided that it gives full effect to the interpretation of EU law adopted by the Court.

59 — Judgment in *Elchinov* (C-173/09, EU:C:2010:581, paragraphs 29 and 30 and the case-law cited).

60 — See the judgments in *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 43 and the case-law cited) and *Elchinov* (C-173/09, EU:C:2010:581, paragraph 31 and the case-law cited).