



Preliminary ruling procedure – a useful tool within the national judicial system

Tallin - 2024

WORKING SESSION

Case 1: Principles, YC

Legal context

1. European Union law

Charter of Fundamental Rights of the European Union

Article 49

Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

Relevant case-law

Judgment of 19 October 2023, G. ST T., C-655/21, EU:C:2023:791,

55. Subject to compliance with the general principles of EU law, including the principle of proportionality, Member States may impose, in respect of the same facts, a combination of administrative and criminal penalties. It follows that, provided that the criminal provision, as such, complies with the requirements arising from the principle that offences and penalties must be defined by law, that principle does not preclude national legislation from classifying the same conduct as a criminal offence and an administrative offence and



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therefore from defining the conduct penalised by such offences in similar, or even identical, terms.

59. The principle that offences and penalties must be defined by law does not preclude national legislation which provides, in the event of use in the course of trade of a trade mark without the consent of the proprietor of the exclusive right, that the same conduct may be classified as both an administrative offence and a criminal offence, without laying down criteria enabling the administrative offence to be distinguished from the criminal offence, the offence being described in similar, or even identical, terms in the criminal law and in the Law on trade marks.

2. Bulgarian law

The Criminal Code

Article 2(1): ‘For any offence, the law applicable shall be the law in force at the material time.’

Article 55: “(1) In exceptional or numerous mitigating circumstances, where even the lightest penalty provided for by law is disproportionate, the court shall: 1. set a penalty below the lower limit; 2. replaces:(b) the term of imprisonment, where no lower limit is provided for, by probation;

(3) In such cases, the court may choose not to impose the lightest penalty provided for by law, in addition to the term of imprisonment. ’

Article 172, in the version prior to the entry into force of the Law amending and supplementing the Criminal Code, provided:

Any person who, without the consent of the proprietor of the exclusive right, uses a trade mark in the course of trade... shall be liable to a term of imprisonment of up to five years and a fine of up to BGN 5 000.

(2) If the act referred to in paragraph 1 has been committed repeatedly or has caused significant harmful consequences, the sentence shall be between five and eight years’ imprisonment and a fine of between BGN 5 000 and BGN 8 000.

Article 172 of that code, in the version resulting from the Law of 2022, states:

Any person who, without the consent of the proprietor of the exclusive right, uses a trade mark in the course of trade... shall be liable to a term of imprisonment of between one and six years and a fine of up to BGN 10 000.



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(2) if the act referred to in paragraph 1 has been committed repeatedly or has caused significant harmful consequences, the sentence shall be between five and eight years' imprisonment and a fine of between BGN 10 000 and BGN 15 000.

The Law on trade marks and geographical indications

Article 127, entitled 'Administrative offences and penalties':

'(1) Any person who uses in the course of trade within the meaning of Article 13 (1) and (2) goods or services bearing a sign identical with, or similar to, a registered trade mark, without the proprietor's consent, shall be liable to a fine of between BGN 2 000 and BGN 10 000, and individual undertakings and legal persons shall be liable to a fine of between BGN 3 000 and BGN 20 000.

(2) In the event of a repeat offence and any subsequent infringement within the meaning of paragraphs 1 to 5, committed within one year of the entry into force of the decision imposing a previous penalty, the offender shall be liable to a fine of between BGN 3 000 and BGN 15 000, and individual undertakings and legal persons, by a fine of between BGN 5 000 and BGN 30 000.

(5) The object of the offence within the meaning of paragraphs 1 to 4, irrespective of its owner, shall be confiscated for the benefit of the State and surrendered to the Ministry of the Interior for destruction, the proprietor of the trade mark or a person authorised by him to be present at destruction.

3. The main proceedings

1. YC sells, as sole trader, inter alia, clothing and shoes in a shop located in its home in Bulgaria.
2. During a police check carried out in that shop, it was found that 61 items offered for sale, namely clothing, footwear and clackets, bore signs similar to the trade marks 'Adidas', 'Nike', 'Puma', 'Dolce', 'Gabbana' and 'Lacoste'. The expert appointed in the criminal proceedings against IC estimated the total value of those articles, which, in his view, constituted obvious imitations of original goods, at BGN 868 (approximately EUR 445).
3. An agreement on criminal proceedings was concluded between the public prosecutor, IC and its lawyer, with a view to settling the case. In that agreement, IC acknowledged



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that, on 10 November 2021, it had committed the offence referred to in Article 172 (1) of the Criminal Code by using, in the course of its business, the trade marks referred to in the preceding paragraph. Furthermore, that agreement provided for IC to be sentenced to a probation sentence with two measures to be carried out for a period of eight months, namely registration at her current address twice a week and regular compulsory meetings with a probation officer. Finally, the goods concerned by the infringement were confiscated in favour of the State.

4. The agreement at issue in the main proceedings was submitted by the public prosecutor to the District Court for the purpose of reviewing its legality.
5. This court considers that the Charter applies to the case in the main proceedings, given that the relevant national criminal and administrative rules, in particular Article 172 of the Criminal Code, constitute the implementation of international rules on the protection of intellectual property, in particular the TRIPS Agreement, which form an integral part of EU law.
6. This court is uncertain whether the criminal offence and the penalty provided for in Article 172 (1) of the Criminal Code are consistent with the principle that offences and penalties must be defined by law and with the principle of proportionality, as set out in Article 49 (1) and (3) of the Charter.
7. Considering that there is a substantial disproportion of the penalties laid down in Article 172 of the Criminal Code to penalties laid down for other offences which it describes as ‘traditional’, such as the imposition of bodily injuries, this court has doubts regarding the principle of proportionality, namely whether that principle precludes national legislation under which a custodial sentence may be imposed on a person who has first infringed intellectual property rights, whatever the extent or seriousness of the infringement.
8. After the modification of Article 172 (1) of the Criminal Code, by a Law of 2022, it is no longer possible, in the case of an offence committed, to impose a probation sentence in place of a custodial sentence. That increase in penalties has been criticised with regard to its conformity with the principle of proportionality of criminal offences and penalties.
9. As regards the principle that offences and penalties must be defined by law, on one hand, it must be noted that the absence of objective criteria on the basis of which the national court may assess the seriousness of the offence committed for the purposes of deciding whether that offence constitutes an administrative offence or a criminal offence gave rise to divergent national case-law. On the other hand, the constituent elements of the administrative offence provided for in Article 127 of the ZMGO are identical to those of the offence referred to in Article 172 of the Criminal Code. Thus,



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the district court does not have criteria enabling it to assess the seriousness of the offence committed for the purposes of deciding whether that offence constitutes an administrative offence or a criminal offence.

- a) You, acting as the District Court, would you address CJEU a preliminary reference? Briefly motivate your answer.
- b) Considering, in theory, an affirmative answer to point a), try to sketch the question(s) for the preliminary reference.