# CJEU: Exclusion Rules on Unlawfully Obtained Evidence Precede Anti-Fraud Obligations

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News

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Do Art. 325 TFEU and the PIF Convention – read in the light of the principle of effective prosecution of VAT offences – restrict the applicability of national rules on the inadmissibility of evidence? This question was at the core of the CJEU's judgment of 17 January 2019 in the case C-310/16 (criminal proceedings against Peter Dzivev, Galina Angelova, Georgi Dimov, Milko Velkov).

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**Facts of the Case and Legal Question**

The judgment concerned a request for a preliminary ruling from the *Spetsializiran nakazatelen sad* (Specialised Criminal Court, Bulgaria). The referring court had to decide whether the defendants could be convicted of VAT evasion. The court noted that interception of the defendants' telecommunications had been authorised by a court that no longer had jurisdiction after reform of the Bulgarian Code of Criminal Procedure in 2012. However, the court added the following:

- None of the authorisations were reasoned;
- The interceptions fell into a transitional phase before and after the reform of the Code of Criminal Procedure transitional rules remained unclear that governed the transfer of jurisdiction to courts competent to authorise "special investigation methods" after the reform;
- In the case of Mr. Dzivev, only the interceptions of telecommunications initiated on the basis of authorisations granted by the court, which lacked jurisdiction, clearly establish the commission of the tax offences he was accused of.

Against this background, the referring court asks whether reliance on the illegally obtained evidence (here: wiretapping) would counteract the Member State's obligations stemming particularly from Art. 325 TFEU and Art. 2(1), 1(1)(b) of the Convention on the protection of the European Communities' financial interests ("PIF Convention"), which, as established by previous CJEU case law, require the effective criminalisation of VAT fraud.

**The CJEU's Decision and Reasoning**

First, the CJEU reiterated the main aspects of previous case law regarding the obligations stemming from Art. 325 TFEU. Reference was particularly made to the decisions in *WebMindLicences* (C-419/14; cf. V. Cov-

olo, eucrim 3/2016, p. 146); *M.A.S. and M.B.* (C-42/17, cf. eucrim 4/2017, p. 168); *Scialdone* (C-574/15, cf. eucrim 2/2018, p. 95); and *Kolev and Kostadinov* (C-612/15, cf. eucrim 2/2018, p. 99):

- The procedure for taking evidence and the use of evidence in VAT-related criminal proceedings is within the competence of the Member States;
- Member States must, however, counter fraud and other illegal activities affecting the EU's financial interests through effective and deterrent measures;
- There is a direct link between collection of VAT revenue (in compliance with the EU law) and the availability of corresponding VAT resources to the EU budget;
- Criminal penalties may be essential in order to combat certain serious cases of VAT evasion in an effective and dissuasive manner as required by the PIF Convention;
- Infringements of EU law must be penalised under (procedural and substantive) conditions, which are analogous to those applicable to infringements of national law of a similar nature and importance; in any event, these conditions must make the penalty effective, proportionate and dissuasive;
- Rules of national criminal procedure must permit effective investigation and prosecution of offences linked to such conduct.

Although Member States have procedural and institutional autonomy to counter infringements of harmonised VAT rules, this autonomy is, *inter alia*, limited by the principle of effectiveness. National courts may be obliged to disapply national provisions which prevent the application of effective and deterrent penalties in connection with (criminal) proceedings concerning serious VAT infringements.

The CJEU stressed, however, that these obligations have their limits, i.e., "the effective collection of the European Union's resources does not dispense national courts from the necessary observance of the fundamental rights guaranteed by the Charter and of the general principles of EU law, given that the criminal proceedings instigated for VAT offences amount to an implementation of EU law, within the meaning of Article 51(1) of the Charter. In criminal law, those rights and those principles must be respected not only during the criminal proceedings, but also during the stage of the preliminary investigation, from the moment when the person concerned becomes an accused."

The authorities must act within legal limits to observe the principles of legality and the rule of law. In addition, the interception of telecommunications amounts to an interference with the right to private life, and is therefore subject to the requirements of Art. 7 CFR.

Transferring these yardsticks to the present case, the CJEU concluded that "it is common ground that the interception of telecommunications at issue in the main proceedings was authorised by a court which did not have the necessary jurisdiction. The interception of those telecommunications must therefore be regarded as not being in accordance with the law, within the meaning of Article 52(1) of the Charter."

As a result, EU law cannot require a national court to disapply national rules on the exclusion of illegally obtained evidence, even if the evidence could "increase the effectiveness of criminal prosecutions enabling national authorities, in some cases, to penalise non-compliance with EU law."

The CJEU pointed out that the following aspects of the referring court are irrelevant:

- The unlawful act committed was due to the imprecise nature of the provision transferring power to the competent court;
- Only the interception of telecommunications initiated on the basis of authorisations granted by a court lacking jurisdiction could prove the guilt of one of the four defendants in the main proceedings.

**Put in Focus**

In sum, the CJEU follows the – much more detailed – opinion of AG *Bobek* of 25 July 2018.

The judgment summarises the cornerstones of CJEU case law in relation to the protection of the EU's financial interests. Recent judgments (see above) clarified the borders between procedural and institutional autonomy of the Member States when countering fraud affecting the EU's financial interests and common obligations stemming from EU law, including the principles of effectiveness, proportionality, and equivalence. The judgment is a further "brick in the wall" as regards the question of which procedural rules remain untouched by EU law. After the impact of *res judicata* in *XC and Others* (C-234/17, cf. eucrim 3/2018, p. 142), the CJEU has added the rules on exclusion of evidence to those important principles of national procedural law that precede the effectiveness of EU law.

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