

# CJEU: Prosecutor Can Balance Defence Rights Against Effective Fraud Prosecution (Kolev II)



## News

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In [Case C-612/15](#) (criminal proceedings against *Nikoley Kolev, Stefan Kostadinov*, judgment of 5 June 2018, see [eucrim 2/2018](#), pp. 99/101), the CJEU ruled that Union law, i.e., the obligation to protect the EU's financial interests in accordance with Art. 325(1) TFEU, precludes national legislation that establishes a procedure for the termination of criminal proceedings, such as that provided for in Arts. 368 and 369 of the Bulgarian Code of Criminal Procedure, in so far as that legislation is applicable in proceedings initiated with respect to cases of serious fraud or other serious illegal activities affecting the financial interests of the European Union in customs matters. The CJEU added that it is up to the national court to give full effect to Art. 325(1) TFEU by disapplying that legislation, where necessary, while also ensuring respect for the fundamental rights of the persons accused.

Following this judgment, the referring court wished to remedy itself the procedural irregularities that had occurred during the pre-trial phase of the criminal proceedings against the defendants. The irregularities concerned their right to be informed about the charges and to access the case material, although the trial phase had already been terminated and the case referred back to the prosecutor. The appeal court criticised this action on the part of the referring court, because it was contradictory to national procedural law. The appeal court requested that the referring court refer the case back to the prosecutor.

The referring court again referred the case to the CJEU, seeking clarification on whether Union law precludes the interpretation made by the appeal court ([Case C-704/18](#), "*Kolev II*"). The referring court argued that the injunction of the appeal court would make it impossible to comply with the operative part of the CJEU judgment according to which the defendants' rights in Arts. 6 and 7 of Directive 2012/13 must be implemented.

In its [judgment of 12 February 2020](#), the CJEU clarified that the choice on how the defendants' rights are ensured falls within the procedural autonomy of the Member States. In applying the principles of equivalence and effectiveness, the CJEU concludes that, as it is with the criminal court, the prosecutor is also able to guarantee the rights of the defence in the pre-trial phase. Hence, there is nothing wrong with the injunction of the higher court (imposed on the referring court to refer the case back to the prosecutor), after termination of the trial phase of the criminal proceedings, for procedural irregularities committed during the pre-trial phase of those proceedings to be remedied.

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ISSN: 1862-6947

<https://eucrim.eu>

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The project is co-financed by the [Union Anti-Fraud Programme \(UAFP\)](#), managed by the [European Anti-Fraud Office \(OLAF\)](#).



**Co-funded by  
the European Union**