

# CJEU Ruling on Effective Prosecution of PIF Offences and Guarantee of Defence Rights

Thomas Wahl

On 5 June 2018, the Grand Chamber of the CJEU delivered its [judgment in Case C-612/15](#) – criminal proceedings against *Nikoley Kolev, Stefan Kostadinov*. The request for a preliminary ruling was presented by a Bulgarian court in the context of prosecution of PIF-related offences (bribes for non-performance of customs inspections) against Bulgarian customs officers at the border between Bulgaria and Turkey. They concern the interpretation of Art. 325 TFEU and the two procedural rights Directives, i.e. Directive 2012/13/EU on the right to information in criminal proceedings and Directive 2013/48/EU on the right of access to a lawyer. For the background of the case and the opinion of Advocate General Yves Bot, see [eucrim 2/2017](#), pp. 64-65.

The first question concerns the compatibility of provisions of the Bulgarian code of criminal procedure with Art. 325 TFEU. The Bulgarian code rather automatically requires termination of criminal proceedings if a certain time limit is exceeded – even if the delay is attributable to the defendant and irrespective of the seriousness and complexity of the case. The CJEU first recalled its established case law on the interpretation of Art. 325 TFEU, which requires Member States to have rules of criminal procedure in place that permit effective investigation and prosecution of serious fraud and other serious illegal activities affecting the EU's financial interests in customs matters. The CJEU found that the national legislation at issue is liable to impede the effectiveness of criminal prosecution and the punishment of the acts that are serious PIF offences in the present case. Therefore, the national court must immediately give full effect to EU obligations and disapply that legislation. The national court is free as to how to implement this finding, i.e. whether it disregards all requirements set out in the provisions of the Bulgarian code of criminal procedure or whether it extends the time limits imposed on the prosecutor to conclude the pre-trial stage of the proceedings. Furthermore, the national court is obliged to ensure respect for the fundamental rights of the persons accused.

The second set of questions deal with the interpretation of Art. 6(3) and Art. 7(3) of Directive 2012/13 and, more precisely, the point of time of disclosure of detailed information on the charges as well as of access to the case material in the pre-trial phase. The CJEU was also asked to decide whether infringements of said provisions can be cured in the course of the trial stage.

The CJEU stated that the wording of said provisions of Directive 2012/13 in their various language versions does not unequivocally determine the final point in time at which the disclosure of detailed information on the charges and access to the case material must be ensured. Therefore, these provisions must be interpreted in the light of their context and their objective. In view of the adversarial principle and the equality of

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arms, the CJEU concluded that, as a general rule, the disclosure should take place, and the opportunity to have access to the case materials should be afforded no later than the point in time at which the hearing of arguments on the merits of the charges in fact commences before the court that has jurisdiction to give a ruling on the merits. In the event of any failure to meet this requirement, there is nothing, however, in Directive 2012/13 that precludes the national court from taking the measures necessary to correct that failure, provided that the rights of the defence and the right to a fair trial are duly protected. The CJEU further provided guidance in the event that the charge is subsequently amended or new evidence occurs.

In addition, all judicial acts must ensure respect for the defence rights and the fairness of the proceedings. This means, for instance, that the defendant and his lawyer must have sufficient time to get acquainted with the information disclosed or with the case materials, and they must have the opportunity to submit any observations or, when necessary, apply for further investigations. In addition, the defendant and his lawyer must have further opportunity to access the case materials if they were not able to attend on the day the case material could be accessed for legitimate reasons or for reasons outside their control.

The third set of questions refers to the interpretation of Art. 3(1) of Directive 2013/48, the right to access to a lawyer of the defendant's own choice and the rules on dismissing the lawyer instructed by two accused persons.

In this context, the CJEU first observed that the Directive's obligations to allow accused persons to exercise their rights of defence practically and effectively must be read in light of Art. 48(2) CFR and Art. 6(3) ECHR. The CJEU recalled the case law of the ECtHR in that this right is not absolute and may be subject to restrictions. The CJEU further noted that the Bulgarian legislation in question pursues a legitimate aim, i.e., to ensure an effective defence, and that – for the protection of the effectiveness of the rights of the defence – avoiding a lawyer's conflicts of interest is essential.

As a result, the CJEU concluded that Art. 3(1) of Directive 2013/48 must be interpreted as not precluding national legislation that requires a national court to dismiss the lawyer instructed by two accused persons, against their wishes, on the ground that there is a conflict of interest between those persons. Furthermore, Art. 3(1) does not preclude the national court from allowing those persons to instruct a new lawyer or, when necessary, itself naming two court-appointed lawyers, to replace the first lawyer.

The judgment is one of the first judgments that combines the effectiveness of the prosecution of "EU offences" and interpretation of the defence rights laid down in the EU's Directives on strengthening procedural safeguards. It may also give guidance on the future investigations of the EPPO.

The judgment is interesting from another legal viewpoint: The CJEU confers pre-effects of Directive 2013/48 to existing national criminal procedural law because the date of transposition had not yet expired when the Bulgarian court lodged the request for a preliminary ruling.

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