Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

12 February 2020*

(Reference for a preliminary ruling — Article 267 TFEU — Implementation of a preliminary ruling of the Court — Power of a higher court to impose an injunction relating to the detailed rules for implementation — Procedural autonomy of the Member States — Principle of effectiveness — Observance of the rights of the defence)

In Case C-704/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria), made by decision of 30 October 2018, received at the Court on 12 November 2018, in the criminal proceedings against

Nikolay Kolev and Others,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, I. Jarukaitis, E. Juhász, M. Ilešič and C. Lycourgos (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the European Commission, by F. Erlbacher and R. Troosters and by Y. Marinova, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 267 TFEU.

2 The request has been made in criminal proceedings brought against Mr Nikolay Kolev and others ('the accused persons'), eight persons accused of having committed various criminal offences as Bulgarian customs officers.

* Language of the case: Bulgarian.

Legal context

EU law

3 Article 6 of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1), entitled 'Right to information about the accusation', provides, in paragraph 3 thereof:

'Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.'

4 Article 7 of that directive, entitled 'Right of access to the materials of the case', provides, in paragraph 3 thereof:

'Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.'

Bulgarian law

5 Under Article 249 of the Nakazatelno protsesualen kodeks (Code of Criminal Procedure), a court may terminate the trial phase in criminal proceedings and refer the case back to the prosecutor in order to remedy procedural defects concerning the pre-trial phase of those proceedings, relating to informing the accused person of the charge against him and providing access to the case materials.

6 As is apparent from the order for reference, the national legislation applicable to the facts in the main proceedings preclude a judicial decision, adopted on the basis of Article 249 of the Code of Criminal Procedure, from being modified after its adoption.

7 Articles 368 and 369 of the Code of Criminal Procedure, in the version thereof in force at the time of the facts in the main proceedings, provided for a mechanism allowing persons subject to criminal proceedings to ensure, as a result of significant breaches of procedure by the prosecutor, the final termination of the criminal proceedings in their entirety, that is to say not only the trial phase, but also the pre-trial phase of those proceedings.

8 Under Article 369 of the Code of Criminal Procedure, at the request of the person accused, the court, after ruling that the pre-trial phase of the criminal proceedings was not terminated within two years after the charge, is to refer the case back to the prosecutor, setting a deadline for the latter to finalise the investigation of the case and to complete that pre-trial phase either by halting the prosecution, or by bringing the case for trial. In the latter case, the prosecutor has an additional period of time in order to issue an indictment and submit it to the court.

9 In the event that the prosecutor fails to comply with those new time limits, the court was to take charge of the case and terminate the criminal proceedings. If, on the other hand, the prosecutor brought the pre-trial phase of the proceedings to an end and submitted an indictment to the court within the period prescribed, the latter was to examine the legality of the procedure and in particular was to satisfy itself that there were no infringements of essential procedural requirements. If it considered that such infringements had been committed, the court was again to refer the case back to

the prosecutor, giving the latter an additional period to remedy those infringements. If the prosecutor did not comply with that time limit, if he did not remedy those infringements, or if he committed further infringements, the court would terminate the criminal proceedings.

The dispute in the main proceedings and the question referred for a preliminary ruling

10 The accused persons have been subject to criminal proceedings since 2012 for having participated, in their capacity as Bulgarian customs officers, in a criminal organisation. Since the referring court, the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria), considered that the charges had not been adopted by the competent body and that they included infringements of procedural requirements, the case was referred back to the competent prosecutor of the specialised prosecuting authority for him to draw up new charges against the persons accused. The proceedings were nevertheless stayed and the time limits specified for the investigation were extended several times.

11 In 2014, the referring court received an application seeking the application of the procedure set down in Articles 368 and 369 of the Code of Criminal Procedure. In accordance with those provisions, that court first referred the case back to the prosecutor, giving him a time limit to conclude the investigation of the case, draw up new charges, disclose those charges and the investigation file to the accused persons and to terminate the pre-trial phase of the criminal proceedings, the prosecutor then having an additional time limit to issue an indictment and submit it to the court.

12 Following the drawing up of new charges by the prosecutor and the presentation of an indictment within the specified time limits, that court found new procedural irregularities adversely affecting the accused persons and again referred the case back to the prosecutor.

13 By order of 22 May 2015, that court ruled that the prosecutor had not remedied the previously established infringements of essential procedural requirements and had committed further infringements. It therefore held that the conditions for the termination of the criminal proceedings had been met and that that termination was therefore the right of all of those persons.

14 However, despite those findings, the referring court did not order the termination of the criminal proceedings, in accordance with Articles 368 and 369 of the Code of Criminal Procedure, but, as is apparent from the order for reference in the present case, it decided, on the basis of Article 249 of that code, to terminate the trial phase and to again refer the case back to the prosecutor, so that the latter remedy the infringements of procedural requirements relating, first, to informing the accused persons of the charges against them and, secondly, providing access to the case materials.

15 The court hearing the appeal brought against that order of 22 May 2015 ruled, by order of 12 October 2015, that the referring court should have terminated the criminal proceedings, in accordance with Articles 368 and 369 of the Code of Criminal Procedure, and referred the case back to that court.

16 By decision of 11 November 2015, the referring court referred to the Court a first request for a preliminary ruling which gave rise to the judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392) ('the *Kolev* judgment').

17 In point 1 of the operative part of that judgment, the Court ruled that Article 325(1) TFEU precludes national legislation that establishes a procedure for the termination of criminal proceedings, such as that provided for in Articles 368 and 369 of the 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. It added, in the same point, that it is for the national court to give full effect to Article 325(1) TFEU, by

disapplying that legislation, where necessary, while also ensuring respect for the fundamental rights of the persons accused, stating, in paragraph 70 of that judgment, that those rights include the right of those persons to have their case heard within a reasonable time.

18 The Court stated, in paragraph 67 of that judgment, that, in the event that a number of measures could conceivably give effect to the obligations deriving from Article 325(1) TFEU, it would be for the referring court to determine which of those measures to apply. In that regard, the Court in particular considered the possibility, for the referring court, provided that the prosecutor has submitted an indictment before that court within the required time limits, to open the trial phase of the proceedings and itself remedy possible irregularities committed during the pre-trial phase of those proceedings.

19 As regards respect for the right of accused persons to have their case heard within a reasonable time, the Court ruled, in paragraph 74 of the *Kolev* judgment, that it is also for the referring court to determine the measures to be taken in order to guarantee respect for that right, taking account of all the procedural remedies offered by its national law, taken as a whole and interpreted in the light of EU law. In the event that a number of approaches might conceivably be taken in order to give full effect to the obligations stemming from Article 325(1) TFEU, it is for that court to choose those which, of those various approaches, make it possible in the specific case to safeguard the fundamental right in question.

20 In point 2 of the operative part of the *Kolev* judgment, the Court interpreted Articles 6 and 7 of Directive 2012/13, which enshrine the rights of accused persons to be informed of the accusation against them and to have access to case materials.

21 More specifically, the Court ruled, first, that Article 6(3) of that directive does not preclude the disclosure of detailed information on the charges to the defence after the lodging before the court of the indictment that initiates the trial phase of proceedings, but before that court begins to examine the merits of the charges and before the commencement of the hearing of arguments before it, or after the commencement of that hearing but before the stage of deliberation, where the information thus disclosed is the subject of subsequent amendments, provided that all necessary measures are taken by the court in order to ensure respect for the rights of the defence and the fairness of the proceedings.

22 Secondly, the Court ruled that, in accordance with Article 7(3) of Directive 2012/13, it is for the national court to ensure that the defence has been granted a genuine opportunity to have access to the case materials, such access being possible, in some cases, after the lodging before the court of the indictment that initiates the trial phase of the proceedings, but before that court begins to examine the merits of the charges and before the commencement of any hearing of argument before it, and after the commencement of that hearing but before the stage of deliberation where new evidence is placed in the file in the course of proceedings, provided that all necessary measures are taken by the court in order to ensure respect for the rights of the defence and the fairness of the proceedings.

23 In point 3 of the operative part of the *Kolev* judgment, the Court interpreted Article 3(1) of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 294, p. 1).

24 The referring court states that, by orders of 13 June and 14 September 2018, it implemented points 3 and 1, respectively, of the operative part of the *Kolev* judgment.

25 As regards, by contrast, point 2 of the operative part of that judgment, the referring court considers that it is faced with a national procedural rule preventing the implementation thereof in the case being heard before it.

26 It states that, in the present case, the trial phase of the criminal proceedings was already terminated by the order of 22 May 2015, taken on the basis of Article 249 of the Code of Criminal Procedure and which has in the meantime become final. That court is thus prevented, under its national law, from undertaking any subsequent steps allowing it to apply the Court's interpretation of Directive 2012/13 to the main proceedings.

27 In the light of paragraphs 67 and 74 of the *Kolev* judgment, the referring court however considers that it is necessary to interpret its national law so that that procedural impediment does not hinder the application of EU law.

28 In that regard, the referring court states that the final decision to terminate the trial phase is procedurally significant in so far as it involves the case being referred back to the prosecutor in order to carry out procedural acts and does not, in itself, confer substantive rights on the accused persons. It considers that that decision grants those persons an advantage in so far as the case is delayed, which cannot be upheld since it leads to an infringement of the principle of examining criminal charges within a reasonable time, as referred to by the Court in paragraphs 70 to 74 of the *Kolev* judgment. Moreover, it notes that it would be possible, during the trial phase of the proceedings, to give effect to all the procedural rights which the accused persons derive from Directive 2012/13, as interpreted by the Court in the *Kolev* judgment.

29 On the basis of those considerations, by order of 14 September 2018, the referring court decided to set aside the national provision which does not allow the modification of a decision to terminate the trial phase adopted in accordance with Article 249 of the Code of Criminal Procedure.

30 Two of the accused persons lodged an appeal against that order, which was annulled by the court seised on the ground, first, that the *Kolev* judgment is not applicable in relation to the trial phase which had already been terminated and, secondly, that the Court did not rule on the compatibility of Article 249 of the Code of Criminal Procedure with Article 325 TFEU.

31 The appeal court remitted the case back to the referring court, requesting it to terminate the trial phase and to refer the case back to the prosecutor. The referring court states that it is thus faced with an explicit prohibition on applying point 2 of the operative part of the *Kolev* judgment.

32 In that regard, the referring court has doubts relating to the appeal court's interpretation of that judgment. The latter based its decision on facts which were known to the Court when it delivered its judgment, namely the termination of the judicial proceedings by order of 22 May 2015. However, it is precisely in the light of those facts that the Court expressly provided for the possibility, for the referring court, to comply with that judgment by opening the trial phase of the proceedings and by itself remedying the procedural irregularities.

33 In those circumstances, the Spetsializiran nakazatelen sad (Specialised Criminal Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 267 TFEU be interpreted as authorising a national court not to apply a preliminary ruling in the main proceedings, with regard to which that ruling was issued, in reliance on the factual circumstances taken into account by the Court when it gave the preliminary ruling?'

Consideration of the question referred

34 First, it must be noted that it is apparent from the order for reference that, by order of 22 May 2015, adopted on the basis of Article 249 of the Code of Criminal Procedure, the referring court had terminated the trial phase of the main criminal proceedings, a decision which, under national law, precludes the trial phase from being reopened. Since it considers that a decision taken on such a basis involves the case being referred back to the prosecutor, the appeal court criticised the referring court for having decided, on 14 September 2018, following the *Kolev* judgment, to preclude the application of Article 249 of the Code of Criminal Procedure in order itself to remedy the procedural irregularities committed during the pre-trial phase of those proceedings. Moreover, that appeal court requested it, on the basis of Article 249 of that code, to refer the case back to the prosecutor.

35 The referring court considers however that such an injunction would imply point 2 of the operative part of the *Kolev* judgment not being complied with.

36 In those circumstances, the question referred must be understood as asking, in essence, whether, in the light of the Court's interpretation of Article 6(3) and Article 7(3) of Directive 2012/13 in point 2 of the operative part of the *Kolev* judgment, Article 267 TFEU must be interpreted as precluding a provision of national law which obliges the referring court to comply with an injunction, imposed on it by a higher court, to refer the case in the main proceedings back to the prosecutor, following the termination of the trial phase of the criminal proceedings, so that procedural irregularities committed during the pre-trial phase of those proceedings be remedied.

37 According to the Court's settled case-law, Article 267 TFEU requires referring courts to give full effect to the interpretation of EU law provided by the Court in judgments in preliminary ruling proceedings (see, to that effect, judgments of 3 February 1977, *Benedetti*, 52/76, EU:C:1977:16, paragraph 26, and of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 28).

38 In order to answer the question referred, it is necessary, therefore, as a first step, to clarify the scope of the *Kolev* judgment as regards the interpretation of Article 6(3) and Article 7(3) of Directive 2012/13, set out in point 2 of the operative part of that judgment, then, as a second step, to examine whether the provision of national law at issue in the main proceedings, provided for in Article 249 of the Code of Criminal Procedure, as interpreted by the national court to mean that, once the trial phase of criminal proceedings are terminated, the case is withdrawn from the court and it must be referred back to the prosecutor so that procedural irregularities committed during the pre-trial phase of those proceedings are remedied, is such as to prevent the implementation of point 2.

39 As regards, in the first place, the scope of the *Kolev* judgment, it must be noted that, in point 2 of the operative part of that judgment, as is apparent from paragraphs 20 to 22 of the present judgment, the Court, in essence, specified the stage at which the benefit of procedural rights set out in Article 6(3) and Article 7(3) of Directive 2012/13 must be upheld, namely, in principle, at the latest before the criminal court commences examining the merits of the charges and before the commencement of any hearing of argument before it.

40 By contrast, it must be noted that the *Kolev* judgment does not specify the national authority responsible for ensuring that accused persons benefit from the rights at issue or the procedure which must be followed in that regard.

41 As regards the detailed rules for that procedure, the Court states, at most, in paragraph 98 of that judgment, that it is for the national court to ensure a fair balance between, on the one hand, respect for the rights of the defence and, on the other hand, the need to guarantee the effectiveness of the prosecution and punishment of offences affecting the financial interests of the European Union, and also the need to ensure that the proceedings are completed within a reasonable time.

42 It should be noted that a similar obligation is imposed also, necessarily, on the public prosecutor, during the pre-trial phase of the criminal proceedings.

43 In paragraphs 72 and 73 of the *Kolev* judgment, the Court again held that the reasonableness of the length of proceedings cannot be determined by reference to a precise maximum limit determined in an abstract manner, but must be appraised in the light of the specific circumstances of each case, such as the importance of the case for the person concerned, its complexity or the conduct of the competent authorities and the parties, the number of accused persons and the duration and seriousness of the allegations against those persons, since the complexity of the case or delaying tactics on the part of the defence may be deemed to justify a period that is prima facie too long.

44 It follows that the *Kolev* judgment does not preclude that the rights of accused persons and their lawyers to be informed of the charges and to have access to case materials be assured either by the prosecutor after the case is referred during the pre-trial phase of the criminal proceedings, or by the referring court when the case is brought to judgment.

45 It follows therefrom that, contrary to what is suggested by the referring court by the wording of its question for a preliminary ruling, the Court, in that judgment, in no way took into account the fact that the trial phase of the main criminal proceedings had been terminated by that court by its order of 22 May 2015, adopted on the basis of Article 249 of the Code of Criminal Procedure.

46 On the contrary, it follows from paragraphs 41 and 67 of the *Kolev* judgment that the referring court had itself considered, in its order for reference, the possibility of opening the trial phase of the proceedings, notwithstanding the adoption of its order of 22 May 2015. Therefore, the Court did not examine, and still less did it reject as being contrary to EU law, the interpretation of Article 249 of the Code of Criminal Procedure provided by the appeal court.

47 As regards, in the second place, the impact of that provision of national procedural law on the implementation of point 2 of the operative part of the *Kolev* judgment, it is not disputed that the order of 22 May 2015 adopted by the referring court on the basis of that provision resulted in the trial phase of the criminal proceedings being terminated and the case being referred back to the prosecutor. It is, therefore, necessary to examine whether such a provision is likely to prevent the national judicial authorities from undertaking any subsequent steps in order to allow the interpretation made in point 2 to be applied, as is feared by the referring court.

48 In that regard, it must be stated that, as is apparent from paragraphs 67 and 74 of the *Kolev* judgment, the Court did not lay down specific detailed rules for the implementation of point 2 of the operative part of that judgment in the context of the main proceedings. More particularly, since the opening of the trial phase of the proceedings by the referring court in order itself to remedy the irregularities is only one possibility amongst others envisaged by the Court in that judgment, the choice of those detailed rules falls within the procedural autonomy of the Member States.

49 In those circumstances, it is for the domestic legal system of each Member State to establish those detailed rules, provided however that the national rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, inter alia judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral*, 33/76, EU:C:1976:188, paragraphs 5 and 6; of 28 September 1994, *Fisscher*, C-128/93, EU:C:1994:353, paragraph 39; and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 171).

50 It is therefore necessary to verify whether the reference of the case back to the prosecutor so that procedural irregularities committed during the pre-trial phase of the criminal proceedings be remedied is likely to infringe those principles, in the light of the Court's interpretation of Article 6(3) and Article 7(3) of Directive 2012/13 in point 2 of the operative part of the *Kolev* judgment.

51 In that regard, it should be noted, first, as regards the principle of equivalence, that it is in no way apparent from the reference for a preliminary ruling that the injunction issued by the appeal court to the referring court infringes that principle.

52 Secondly, as regards the principle of effectiveness, it should at the outset be noted that EU law does not preclude referring courts from being required to follow the instructions of a higher court as regards the interpretation of national procedural law for the implementation of a preliminary ruling, since those instructions do not undermine, in particular, the effectiveness of EU law as interpreted by the Court in that judgment. Therefore, the Court has in particular held that, provided that the effective protection of individual rights derived from EU law is guaranteed, it is not for it to become involved in resolving questions of jurisdiction to which the classification of certain legal situations based on EU law may give rise in the national judicial system (see, to that effect, judgment of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 47).

53 That being said, it follows from the principle of effectiveness that the referring court cannot be required to comply with the injunction imposed on it by the appeal court to refer the case in the main proceedings back to the prosecutor if that injunction undermined the effectiveness of Article 6(3) and Article 7(3) of Directive 2012/13, as interpreted by the Court in the *Kolev* judgment.

54 In that regard, it is nevertheless necessary to point out that, although the trial phase of the main criminal proceedings at issue was terminated, the same cannot be said with respect to those proceedings in their entirety, since the case was referred back to the prosecutor.

55 There is nothing to suggest that the reference of the case in the main proceedings back to the prosecutor is likely to hinder or prevent the exercise of procedural rights set out in Article 6(3) and in Article 7(3) of Directive 2012/13 and to thus undermine the effectiveness of those provisions, to the extent that the prosecutor, in the context of the pre-trial phase of the criminal proceedings, or the referring court, in the context of the subsequent trial phase, ensures that those provisions are applied as interpreted by the Court in point 2 of the operative part of the *Kolev* judgment.

56 As regards the concerns expressed by the referring court concerning the impact of such a reference on the length of the proceedings, it should be noted that, as is apparent from paragraph 42 of the present judgment, it is for the prosecutor, as it is for the national court, to ensure during the pre-trial phase of the criminal proceedings a fair balance between, on the one hand, respect for the rights of the defence and, on the other hand, the need to guarantee the effectiveness of the prosecution and punishment of offences affecting the financial interests of the European Union, and also the need to ensure that the proceedings are completed within a reasonable time.

57 It follows from all of the foregoing considerations that the answer to the question referred is that, in the light of the Court's interpretation of Article 6(3) and Article 7(3) of Directive 2012/13 in point 2 of the operative part of the *Kolev* judgment, Article 267 TFEU must be interpreted as not precluding a provision of national procedural law which obliges the referring court in the case giving rise to that judgment to comply with an injunction, imposed on it by a higher court, to refer the case back to the prosecutor, after the termination of the trial phase of the criminal proceedings, for procedural irregularities committed during the pre-trial phase of those proceedings to be remedied, to the extent that those provisions of EU law, as interpreted by the Court in point 2 of the operative part of that judgment, are respected in the context of the pre-trial phase of the criminal proceedings or in that of the subsequent trial phase thereof.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

In the light of the Court's interpretation of Article 6(3) and Article 7(3) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings in point 2 of the operative part of the judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392), Article 267 TFEU must be interpreted as not precluding a provision of national procedural law which obliges the referring court in the case giving rise to that judgment to comply with an injunction, imposed on it by a higher court, to refer the case back to the prosecutor, after the termination of the trial phase of the criminal proceedings, for procedural irregularities committed during the pre-trial phase of those proceedings to be remedied, to the extent that those provisions of EU law, as interpreted by the Court in point 2 of the operative part of that judgment, are respected in the context of the pre-trial phase of the criminal proceedings or in that of the subsequent trial phase thereof.

[Signatures]