Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

17 January 2019*

(Reference for a preliminary ruling — Value added tax (VAT) — Protection of the European Union's financial interests — Article 325(1) TFEU — Convention on the protection of the European Communities' financial interests — Criminal proceedings concerning VAT offences — Principle of effectiveness — Taking of evidence — Interception of telecommunications — Authorisation granted by a court that lacks jurisdiction — Taking those interceptions into consideration as evidence — Provisions of national law — Prohibition)

In Case C-310/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria), made by decision of 25 May 2016, received at the Court on 31 May 2016, in the criminal proceedings against

Petar Dzivev

Galina Angelova,

Georgi Dimov,

Milko Velkov,

THE COURT (Fourth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Seventh Chamber, acting as President of the Fourth Chamber, K. Jürimäe, C. Lycourgos, E. Juhász and C. Vajda, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by R. Troosters, J. Baquero Cruz and P. Mihaylova, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 July 2018,

gives the following

* Language of the case: Bulgarian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 325(1) TFEU, Article 1(1)(b) and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Luxembourg on 26 July 1995 (OJ 1995, C 316, p. 48, 'the PFI Convention') and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in criminal proceedings brought against Petar Dzivev, Galina Angelova, Georgi Dimov and Milko Velkov accused of having committed offences relating to value added tax (VAT).

Legal context

EU law

3 By virtue of Article 325 TFEU:

'1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.

2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.

…'

The PIF Convention

4 Article 1 of the Convention provides:

'1. For the purposes of this Convention, fraud affecting the European Communities' financial interests shall consist of:

…

(b) in respect of revenue, any intentional act or omission relating to:

– the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,

– non-disclosure of information in violation of a specific obligation, with the same effect,

– misapplication of a legally obtained benefit, with the same effect.

2. Subject to Article 2(2), each Member State shall take the necessary and appropriate measures to transpose paragraph 1 into their national criminal law in such a way that the conduct referred to therein constitutes criminal offences.

…'

5 Article 2(1) of the PFI Convention provides:

'Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1, and participating in, instigating, or attempting the conduct referred to in Article 1(1), are punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty which can give rise to extradition, it being understood that serious fraud shall be considered to be fraud involving a minimum amount to be set in each Member State. This minimum amount may not be set at a sum exceeding [EUR] 50 000.'

Decision 2007/436/EC

6 Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17), provides in Article 2(1):

'Revenue from the following shall constitute own resources entered in the general budget of the European Union:

…

(b) ... the application of a uniform rate valid for all Member States to the harmonised VAT assessment bases determined according to Community rules. ...'

Bulgarian law

The Constitution of the Republic of Bulgaria

7 Article 32(2) of the Bulgarian Constitution prohibits the interception of a person's conversations, except in cases provided for by law.

8 Article 121(4) of that constitution stipulates that judicial documents must be reasoned.

The NPK

9 Article 348 of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure, 'the NPK') provides as follows:

'A judgment or decision may be revoked or amended on an appeal on a point of law:

(1)

…

2. where it is vitiated by a substantial infringement of essential procedural requirements.

…

(3) The infringement of the rules of procedure shall be substantial:

1. if it led to a limitation of the procedural rights of the defendant or the other parties and it has not been remedied;

2. if it is not reasoned, or there are no minutes of the hearing at first instance or the appeal hearing;

3. if the sentence or decision was handed down by a court which lacked jurisdiction;

4. if the secrecy of the deliberations was violated when the sentence or decision was handed down.'

The ZIDNPK

10 On 1 January 2012, the Zakon za izmenenie i dopalnenie na nakazatelno-protsesualnia kodeks ('Law amending and extending the Code of Criminal Procedure', 'the ZIDNPK') on the establishment and operation of the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) entered into force. The ZIDNPK makes provision for the transfer of certain powers of the Sofiyski gradski sad (Sofia District Court, Bulgaria) to the Spetsializiran nakazatelen sad (Specialised Criminal Court) which has exclusive jurisdiction over proceedings against criminal organisations.

11 Under Article 5 of the ZIDNPK, jurisdiction to authorise the interception of telecommunications of persons suspected of belonging to a criminal organisation has been transferred from the Sofiyski gradski sad (Sofia District Court) to the Spetsializiran nakazatelen sad (Specialised Criminal Court).

12 By virtue of Article 9(2) of the ZIDNPK, proceedings already under way are to be brought to a close by the authorities which, until that transfer, had jurisdiction. That provision was amended on 6 March 2012 to the effect that review by the courts of those procedures continued to come under the jurisdiction of the court which had jurisdiction before 1 January 2012.

Provisions relating to special investigation techniques

13 The procedure which makes it possible to intercept telecommunications is governed by Articles 1 to 3, 6 and 12 to 18 of the Zakon za spetsialnite razuznavatelni sredstva (Law on special investigation methods) and Articles 172 to 177 of the NPK. As was explained by the referring court, telecommunications may be intercepted in the course of a preliminary investigation and after criminal proceedings have been initiated. Such a step must be authorised beforehand by the court with jurisdiction on request, respectively, from the Director of the General Directorate for combating organised crime or the prosecutor. The court decision authorising the interception of telecommunications must be reasoned and, in accordance with Article 15 of the Law on special investigation methods and Article 174 of the NPK, be handed down by the President of the court with jurisdiction or the Vice-President authorised for that purpose.

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

14 Mr Dzivev, Ms Angelova, Mr Dimor and Mr Velkov are charged with having committed, between 1 June 2011 and 31 March 2012, tax offences via a trading company, Karoli Kepital EOOD. Mr Dzivev is accused, inter alia, of directing a criminal organisation involving the other three defendants, which sought, in the present case, to profit from not paying the tax due under the Zakon za danak varhu dobavenata stoynost (Law on value added tax) (DV No 63 of 4 August 2006), in the version in force at the material time.

15 In the preliminary investigation, a number of applications for authorisation to initiate the interception of the telecommunications of the four defendants, submitted by the Director of the Glavna direktsia za borba s organiziranata prestapnost (General Directorate for combating organised crime, Bulgaria) between November 2011 and February 2012, were granted by the Sofiyski gradski sad (Sofia District

Court). After the criminal proceedings commenced, the prosecutor, in March 2012, sought and obtained a number of authorisations from the Spetsializiran nakazatelen sad (Specialised Criminal Court) to intercept more of the defendants' telecommunications.

16 The referring court states that none of the authorisations at issue in the main proceedings was reasoned and that those granted in the months November 2011 to January 2012 did not indicate correctly, in particular, whether the President or the Vice-President of the Sofiyski gradski sad (Sofia District Court) had acted. Those defects did not render the authorisations at issue in the main proceedings unlawful. However, the authorisations granted in January and February 2012 were granted by a court which lacked jurisdiction. After that date, all authorisation requests should have been sent to the President of the Spetsializiran nakazatelen sad (Specialised Criminal Court), and not the President of the Sofiyski gradski sad (Sofia District Court). Since the latter court no longer had jurisdiction to examine and grant those applications, it should have transferred them to the President of the Spetsializiran nakazatelen sad (Specialised Criminal Court).

17 The referring court states that systemic errors were subsequently uncovered by officials in the issuing of authorisations for the use of special investigation methods, in particular the interception of telecommunications, which consequently led to the applicable law being amended.

18 In addition, that court states that the issue whether the transitional rule in Article 9 of the ZIDNPK also concerned ongoing preliminary investigations was not clear. That provision would appear to have given rise to extensive and contradictory case-law. In Interpretation Decision No 5/14, the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria) confirmed that there could be no exception to the principle that the courts have exclusive jurisdiction in matters of criminal justice. In that regard, the referring court states that that principle is of particular significance under national law, especially in cases in which special investigation methods are used, which include the interception of telecommunications. However, referring to the judgment of the Court of Justice of 17 December 2015, *WebMindlicences* (C-419/14, EU:C:2015:832, paragraph 91), that court asks whether the guidance provided by that interpretative judgment also applies where compliance with EU law is at issue.

19 The referring court adds that, in the case of Mr Dzivev, only the interception of telecommunications initiated on the basis of authorisations granted by the court which lacked jurisdiction establishes clearly and beyond question that the offences of which he is accused were committed and makes it possible for him to be convicted, while the other defendants could be convicted on the basis of evidence obtained lawfully.

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

'(1) Do the following legal provisions:

– Article 325(1) TFEU which provides that the Member States must take measures that effectively afford protection against fraud and any other illegal activities affecting the financial interests of the Union,

– Article 2(1) of the PFI Convention, read in conjunction with Article 1(1)(b) of that convention and with Article 2(1)(b) of Decision 2007/436, according to which every Member State is to take the necessary measures to ensure the effective punishment of VAT evasion,

– the first and second paragraphs of Article 47 of the Charter which guarantees the right to an effective remedy before a tribunal previously established by law,

preclude national legislation, according to which evidence obtained through the deployment of "special investigation methods", specifically through the interception of the telephone conversations of individuals subsequently charged with a VAT-related offence, cannot be used because that interception was ordered by a court that lacked jurisdiction, bearing in mind the following factors:

– previously (between one and three months earlier), an application was made to intercept some of those telecommunications, and this was authorised by the same court which at that point still had jurisdiction;

– an application for authorisation of the disputed interception of telecommunications (for the extension of the earlier interception of telecommunications and for the tapping of new telephone connections) was made to the same court when it no longer had jurisdiction because, immediately before that, its jurisdiction had been transferred to a different court; despite its lack of jurisdiction, the original court examined the substance of the application and granted the authorisation;

– at a later point (about one month later), a fresh application was made to authorise the tapping of the same telephone connections which was granted by the court that now had jurisdiction;

– none of the orders made actually contain any reasoning supporting them;

– the statutory provision transferring jurisdiction was unclear and led to numerous contradictory court decisions, which resulted in the Varhoven kasatsionen sad (Supreme Court of Cassation) delivering a binding interpretation decision about two years after the legal transfer of jurisdiction and after the interception of telecommunications in question;

– the court examining the substance of the present case does not have jurisdiction to decide on applications for the authorisation of the deployment of special investigation methods (the interception of telecommunications); however, it does have jurisdiction to decide on the legality of any interception of telecommunications carried out, in particular to make a finding that an authorisation does not meet the statutory requirements, and thus to refuse to take into account evidence gathered following that authorisation; that power exists only if a valid order has been made authorising the interception of telecommunications;

– the use of that evidence (the defendants' telephone conversations, the interception of which was ordered by a court that had lost its jurisdiction) is of crucial importance to the resolution of the question of a person's culpability as the leader of a criminal organisation formed for the purpose of committing tax offences covered by the [Law on value added tax, in the version in force at the material time,] and as the instigator of specific tax offences, in the knowledge that he may be found guilty and sentenced only if those telephone conversations can be used in evidence, and that, otherwise, he would have to be acquitted?

(2) Does the judgment [which will be given in the case] *Ognyanov* (C-614/14) apply to the present case?'

Procedure before the Court

21 By decision of 25 July 2016, received at the Court on 4 August 2016, the referring court decided to withdraw its second question referred for a preliminary ruling. In that regard, the referring court observes that the second question became devoid of purpose following the ruling of the Court of Justice of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514).

22 In addition, by decision of the President of the Court of Justice of 12 May 2017, the present case was suspended until the delivery of the judgment in *M.A.S. and M.B.* (judgment of 5 December 2017, C-42/17, EU:C:2017:936). The proceedings before the Court were resumed on 12 December 2017.

Consideration of the question referred

23 By its question, the referring court asks, in essence, whether Article 325(1) TFEU, and Article 1(1)(b) and Article 2(1) of the PFI Convention, read in conjunction with the Charter, must be interpreted to the effect that, in the light of the principle of effectiveness of the prosecution of VAT offences, they preclude a national court from applying a national provision excluding, from a prosecution, evidence such as the interception of telecommunications which requires prior judicial authorisation, where that authorisation was given by a court that lacked jurisdiction, in a situation in which that evidence alone is capable of proving that the offences in question were committed.

24 In order to answer that question, it should be noted that EU law, in its present state, does not make provision for rules, which may be applied to the circumstances of the case, relating to the procedure for the taking of evidence and the use of that evidence in VAT-related criminal proceedings. Therefore, that sphere falls, in principle, within the competence of the Member States (see, to that effect, judgments of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 65, and of 2 May 2018, *Scialdone*, C-574/15, EU:C:2018:295, paragraph 25).

25 That being so, under Article 325(1) TFEU, Member States are required to counter fraud and any other illegal activities affecting the financial interests of the European Union through effective deterrent measures (judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 50 and the case-law cited).

26 Since the European Union's own resources, by virtue of Article 2(b) of Decision 2007/436, include revenue from the application of a uniform rate to the harmonised VAT assessment bases determined in accordance with EU rules, there is a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the EU budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second (judgment 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 31, and of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 51).

27 To ensure that all that revenue is collected and, thereby, to ensure the financial interests of the European Union, Member States are free to choose the applicable penalties, which may take the form of administrative penalties, criminal penalties or a combination of the two. Criminal penalties may nevertheless be essential to combat certain serious cases of VAT evasion in an effective and dissuasive manner, as is required by Article 2(1) of the PFI Convention, read in conjunction with Article 1(1) of that convention (see, to that effect, judgments of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 20; of 2 May 2018, *Scialdone*, C-574/15, EU:C:2018:295, paragraph 36, and of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 54).

28 In that regard, Member States must ensure that infringements of EU law, including the harmonised rules deriving from Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive (see, to that effect, judgment of 2 May 2018, *Scialdone*, C-574/15, EU:C:2018:295, paragraph 28).

29 The Member States must also ensure that the rules of criminal procedure, laid down by national law, permit effective investigation and prosecution of offences linked to such conduct (see, to that effect, judgments of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 65, and of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 55).

30 It follows that, even though the penalties and administrative and/or criminal procedures relating to those penalties established by Member States in order to counter infringements of harmonised VAT rules fall within their procedural and institutional autonomy, that autonomy is nevertheless limited by the principle of effectiveness, which requires that such penalties be effective and dissuasive, in addition to the principle of proportionality and the principle of equivalence, the application of which is not in point in the present case (see, to that effect, judgment of 2 May 2018, *Scialdone*, C-574/15, EU:C:2018:295, paragraph 29).

31 In that context, it is primarily for the national legislature to take the necessary measures. It is for the national legislature, where required, to amend the legislation and to ensure that the procedural rules applicable to the prosecutions of offences affecting the financial interests of the European Union are not designed in such a way that there arises, for reasons inherent in those rules, a systemic risk that acts that may be categorised as such offences may go unpunished, and also to ensure that the fundamental rights of accused persons are protected (judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 65).

32 The Court has held that it is for the national courts to give full effect to the obligations under Article 325(1) TFEU and to disapply national provisions which, in connection with proceedings concerning serious VAT infringements, prevent the application of effective and deterrent penalties to counter fraud affecting the financial interests of the Union (judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 39).

33 However, the obligation to ensure 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 (see, to that effect, judgments of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 52; of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraphs 68 and 71, and of 20 March 2018, *Di Puma and Zecca*, C-596/16 and C-597/16, EU:C:2018:192, paragraph 31 and the case-law cited).

34 Thus, the obligation to ensure the effective collection of the European Union's resources does not dispense national courts from the necessary observance of the principle of legality and the rule of law which is one of the primary values on which the European Union is founded, as is indicated in Article 2 TEU.

35 In that regard, it follows, in particular, from the requirements derived from the principle of legality and the rule of law that the exercise of the power to impose penalties cannot take place, as a matter of principle, outside the legal limits within which an administrative authority is authorised, in accordance with the law of the Member State by which it is governed, to act (see, by analogy, judgment of 1 October 2015, *Weltimmo*, C-230/14, EU:C:2015:639, paragraph 56).

36 In addition, the interception of telecommunications amounts to an interference with the right to a private life, enshrined in Article 7 of the Charter. Such an interference may be allowed, in accordance with Article 52(1) of the Charter, only if it is provided for by law and if, while respecting the essence of

that right and subject to the principle of proportionality, it is necessary and genuinely meets objectives of general interest recognised by the Union (see, to that effect, judgment of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraphs 71 and 73).

37 In that regard, 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.

38 It must therefore be observed that the provision at issue in the main proceedings reflects the requirements set out in paragraphs 35 to 37 above, in that it requires the national court to exclude, from a prosecution, evidence such as the interception of telecommunications requiring prior judicial authorisation, where that authorisation was given by a court that lacked jurisdiction.

39 It follows that EU law cannot require a national court to disapply such a procedural rule, even if the use of that evidence gathered unlawfully could increase the effectiveness of criminal prosecutions enabling national authorities, in some cases, to penalise non-compliance with EU law (see, by analogy, with regard to domestic rules of procedure conferring the force of *res judicata* on a decision of a court, judgment of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 53 and the case-law cited).

40 In that regard, the fact, pointed out by the referring court, that the unlawful act committed is due to the imprecise nature of the provision transferring power at issue in the main proceedings is irrelevant. The requirement that any limitation on the exercise of the right conferred by Article 7 of the Charter must be in accordance with the law means that the legal basis authorising that limitation should be sufficiently clear and precise (see, to that effect, judgment of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 81). It is also of no relevance that, in the case of one of the four defendants in the main proceedings, only the interception of telecommunications initiated on the basis of authorisations granted by a court lacking jurisdiction could prove his guilt and justify a conviction.

41 In the light of the foregoing considerations, the answer to the question referred is that Article 325(1) TFEU, and Article 1(1)(b) and Article 2(1) of the PFI Convention, read in conjunction with the Charter, must be interpreted to the effect that, in the light of the principle of effectiveness of the prosecution of VAT offences, they do not preclude a national court from applying a national provision excluding, from a prosecution, evidence such as the interception of telecommunications requiring prior judicial authorisation, where that authorisation was given by a court that lacked jurisdiction, in a situation in which that evidence alone is capable of proving that the offences in question were committed.

Costs

42 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 (Fourth Chamber) hereby rules:

Article 325(1) TFEU, and Article 1(1)(b) and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Luxembourg on 26 July 1995, read in conjunction with the Charter of Fundamental Rights of the European Union, must be interpreted to the effect that, in the light of the principle of effectiveness of the prosecution of value added tax (VAT)

offences, they do not preclude a national court from applying a national provision excluding, from a prosecution, evidence such as the interception of telecommunications requiring prior judicial authorisation, where that authorisation was given by a court that lacked jurisdiction, in a situation in which that evidence alone is capable of proving that the offences in question were committed.

[Signatures]