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ECLI:EU:C:2018:392

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

5 June 2018 (\*)

(Reference for a preliminary ruling — Article 325 TFEU — Fraud or any other illegal activities affecting the financial interests of the European Union in customs matters — Effectiveness of prosecution — Closure of criminal proceedings — Reasonable time — Directive 2012/13/EU — Right of a person to be informed of the charges against him — Right of access to case materials — Directive 2013/48/EU — Right of access to a lawyer)

In Case C-612/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria), made by decision of 11 November 2015, received at the Court on 18 November 2015, in the criminal proceedings against

**Nikolay Kolev,**

**Milko Hristov,**

**Stefan Kostadinov,**

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano (Rapporteur), Vice-President, R. Silva de Lapuerta, M. Ilešič, J.L. da Cruz Vilaça, J. Malenovský and E. Levits, Presidents of Chambers, E. Juhász, A. Borg Barthet, J.-C. Bonichot, F. Biltgen, K. Jürimäe, C. Lycourgos, M. Vilaras and E. Regan, Judges,

Advocate General: Y. Bot,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 15 November 2016,

after considering the observations submitted on behalf of:

- the Bulgarian Government, by L. Zaharieva and E. Petranova, acting as Agents,
- the European Commission, by R. Troosters and V. Soloveytchik, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 April 2017,

gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 325 TFEU, 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), and 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).

2 The request has been made in criminal proceedings brought against Mr Nikolay Kolev, Mr Milko Hristov and Mr Stefan Kostadinov, who are accused of having committed various criminal offences as customs officers at Svilengrad (Bulgaria).

## **Legal context**

### **EU law**

Decision 2007/436/EC, Euratom

3 Article 2(1)(a) of 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), which was applicable at the material time, provides that own resources of the European Union include Common Customs Tariff duties.

Regulation (EC) No 450/2008 *and* Regulation (EU) No 952/2013

4 Article 21(1) of Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code) (OJ 2008 L 145, p. 1), which was applicable at the material time, provided:

‘Each Member State shall provide for penalties for failure to comply with Community customs legislation. Such penalties shall be effective, proportionate and dissuasive.’

5 That regulation was repealed on 30 October 2013 by Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1), Article 42(1) of which essentially repeats the above Article 21(1).

Directive 2012/13

6 Recitals 10, 14, 27, 28 and 41 of Directive 2012/13 state:

‘(10) Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust. Such common minimum rules should be established in the field of information in criminal proceedings.

...

(14) This Directive ... lays down common minimum standards to be applied in the field of information about rights and about the accusation to be given to persons suspected or accused of having committed a criminal offence, with a view to enhancing mutual trust among Member States. This Directive builds on the rights laid down in the Charter, and in particular Articles ... 47 and 48 thereof, by building upon [Article 6] ECHR as interpreted by the European Court of Human Rights ...

...

(27) Persons accused of having committed a criminal offence should be given all the information on the accusation necessary to enable them to prepare their defence and to safeguard the fairness of the proceedings.

(28) The information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given promptly, and at the latest before their first official interview by the police or another competent authority, and without prejudicing the course of ongoing investigations. A description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given, to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defence.

...

(41) ... In particular, this Directive seeks to promote ... the right to a fair trial and the rights of the defence. ...’

7 Article 1 of that directive provides:

‘This Directive lays down rules concerning the right to information of suspects or accused persons, ... to the accusation against them. ...’

8 Article 6 of that directive, headed ‘Right to information about the accusation’, provides:

‘1. Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

...

3. 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. Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings.’

9 Article 7(2) and (3) of that directive, that article being headed ‘Right of access to the materials of the case’, provide:

‘2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.

3. ... 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.’

Directive 2013/48

10 Recital 12 of Directive 2013/48 states:

‘This Directive lays down minimum rules concerning the right of access to a lawyer in criminal proceedings ... In doing so, it promotes the application of the Charter, in particular Articles ... 47 and 48 thereof, by building upon [Article 6] ECHR, as interpreted by the European Court of Human Rights. ...’

11 Article 1 of that directive is worded as follows:

‘This Directive lays down minimum rules concerning the rights of suspects and accused persons in criminal proceedings ... to have access to a lawyer. ...’

12 Article 3(1) of that directive, that article being headed ‘The right of access to a lawyer in criminal proceedings’, provides:

‘Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.’

Bulgarian law

*The provisions relating to the right of access to a lawyer*

13 Under the combined provisions of Article 91(3) and Article 92 of the Nakazatelno protsesualen kodeks (Code of Criminal Procedure), in the version in force at the material time (‘the Code of Criminal Procedure’), where two accused persons have the same lawyer, the court must dismiss that lawyer if the defence of one of those individuals is in conflict with the defence of the other. In accordance with settled national case-law, there is a conflict of interests of those individuals if one of them makes a statement in his defence that can incriminate the other, while the latter makes no such statement.

14 Article 94(4) to (6) of that code govern the naming, by an independent body, of a substitute court-appointed lawyer.

*The provisions relating to the charges, the investigation file and the indictment*

15 Articles 219 and 221 of the Code of Criminal Procedure provide that the investigating authority is to draw up the charges, in a document setting out the main facts of the offence and the legal classification of those facts. That document is to be disclosed to the person accused and to his or her lawyer, who are to sign the document in acknowledgment of it.

16 The disclosure of the investigation file is governed by Articles 226 to 230 of the code. Pursuant to those articles, documents gathered at the end of the investigation are to be disclosed to the defence, prior to any indictment being issued, if the defence so requests. If such a request is made, the accused and his or her lawyer are summoned to attend at least three days before that disclosure and can then study the documents concerned over an appropriate period of time. If the accused and his or her lawyer are not at the address provided or if they do not attend on the day when they are summoned to do so, and have no valid excuse, the obligation to disclose the documents is extinguished.

17 Pursuant to, inter alia, Article 246 of that code, where the prosecutor decides to bring the case before a court, he is to issue the indictment, which closes the pre-trial stage of the criminal proceedings and opens the trial stage of those proceedings. The indictment, which constitutes, according to the referring court, the ‘final detailed statement of charges’, sets out in detail the facts and the legal classification of those facts. The indictment is submitted to the court, which is bound, within a period of 15 days, to determine whether any infringements of essential procedural requirements have been committed. If there are none, the court sets the date for the first hearing. The accused and his or her lawyer are to receive a copy of that indictment together with a summons to that hearing. They then have a period of seven days, a period that can be extended, to prepare the defence.

*The legal provisions and case-law relating to infringement of essential procedural requirements*

18 Article 348(3)(1) of the Code of Criminal Procedure states that an infringement of ‘essential’ procedural requirements has been committed where the infringement significantly affects a procedural right recognised by law. In accordance with the case-law of the Varhoven kasatsionen sad (Supreme Court of Appeal, Bulgaria), such infringements include a failure to draw up or to disclose the charges, the investigation file or the indictment, and also any contradiction that vitiates that indictment. The defective measure must be replaced by a new measure, with the proviso that the court cannot itself cure any infringements of essential procedural requirements committed by the prosecutor, but must, for that purpose, return the case to the prosecutor.

*The provisions relating to closure of criminal proceedings*

19 The closure of criminal proceedings was, at the material time, governed in particular by Articles 368 and 369 of the Code of Criminal Procedure, the aim of those provisions, according to the referring court, having been to accelerate the pre-trial stage of the criminal proceedings.

20 Under Article 368 of that code, where the pre-trial stage of the criminal proceedings had not been brought to an end on the expiry of two years after the bringing of charges for serious offences, the accused could request that a court apply the procedure laid down in Article 369 of that code so

that either the case should be set down for trial or, failing that, the criminal proceedings should be closed.

21 In accordance with Article 369, the court, if it found that that period of two years had expired, was to refer the case back to the prosecutor, giving the latter a period of three months to conclude the investigation and to bring to an end the pre-trial stage of the criminal proceedings, either by halting the prosecution or by bringing the case for trial. If the prosecutor chose the second option, he had a period of an additional 15 days to issue and submit to the court an indictment. If the prosecutor did not comply with those further time limits, the court was to take charge of the case and close the criminal proceedings. If, on the other hand, the prosecutor brought the pre-trial stage of the procedure to an end and submitted an indictment to the court within the period prescribed, the court 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 the court considered that such infringements had been committed, it was again to refer the case back to the prosecutor, giving the latter an additional period of one month to cure those infringements. If the prosecutor did not comply with that time limit, if the prosecutor did not cure those infringements, or if he committed further infringements, the court would close the criminal proceedings.

22 Where all those conditions were met, the accused had a right to have the proceedings closed and the court was bound to so order, the court itself having no power to cure identified infringements of essential procedural requirements or to examine the merits of the case. The decision to close the criminal proceedings definitively halted any prosecution, with the consequence that it was no longer possible to prove the individual in question to be criminally liable. That decision was not, other than in exceptional circumstances, subject to appeal.

23 By a letter dated 25 August 2017, the referring court informed the Court of the amendment of Articles 368 and 369 of the Code of Criminal Procedure, and the insertion, in that code, of a new Article 368a. By virtue of those provisions, as amended, a court could no longer order the closure of criminal proceedings, but could solely decide that they should be accelerated. However, according to the referring court, those amendments are not applicable, *ratione temporis*, to the main proceedings.

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

24 Eight customs officers at Svilengrad, Mr Dimitar Dimitrov, Mr Plamen Drenski, Mr Kolev, Mr Hristov, Mr Kostadinov, Mr Nasko Kurdov, Mr Nikola Trifonov and Mr Georgi Zlatanov, are accused of having participated in a criminal undertaking, in the period from 1 April 2011 to 2 May 2012, on the ground that they allegedly demanded bribes from drivers of lorries and cars crossing the border between Bulgaria and Turkey in order not to carry out customs inspections and not to document any irregularities identified. Mr Kostadinov and Mr Kurdov are also accused of receiving the bribes thus collected, and Mr Drenski, Mr Hristov and Mr Trifonov are accused of corruption. Those various acts constitute, under Articles 215, 301 and 321 of the *Nakazatelen kodeks* (the Criminal Code), offences that are punishable by custodial sentences which may extend, in certain cases, to six or ten years' imprisonment and, with respect to alleged corruption, by fines.

25 Those eight individuals were arrested during the night of 2 and 3 May 2012. The charges against them were drawn up immediately after their arrest, then stated in more detail in the course of 2013 and disclosed to those individuals. They were also informed of the evidence gathered.

26 Since some of those individuals entered into an agreement with the prosecuting authority in order that their prosecution would, in part, be halted, the case was brought before the referring court

so that it could ratify the agreement. However, since that court considered that the charges had not been adopted by the competent body and that there were infringements of procedural requirements, that court refused that request on two occasions.

27 Consequently, the case was referred back to the competent prosecutor of the specialised prosecuting authority for him to draw up new charges against the eight accused. However, the proceedings were then halted in practice and the time limits set for the investigation were extended on several occasions.

28 In 2014, since the investigation had still not been concluded although two years had elapsed since the date charges were brought, Mr Kolev, Mr Hristov and Mr Kostadinov brought before the referring court, on the basis of Article 368 of the Code of Criminal Procedure, an application requesting that that court apply the procedure laid down in Article 369 of that code. Since that court upheld the application, it referred the case back to the prosecutor, giving the latter a period of three months, that is, until 29 January 2015, to conclude the investigation, draw up new charges, disclose those charges and the investigation file to the accused and bring to an end the pre-trial stage of the criminal proceedings, the prosecutor then having fifteen additional days to issue an indictment and submit it to the court.

29 The prosecutor drew up new charges and submitted an indictment to the referring court within the period prescribed.

30 However, those charges were not disclosed to Mr Kolev, Mr Kostadinov or their lawyers. They stated that they were unable to appear on the dates set for that disclosure for medical and professional reasons. Further, neither those individuals nor Mr Hristov were informed of the contents of the investigation file.

31 By order of 20 February 2015, the referring court held that infringements of essential procedural requirements had been committed on the ground that, first, the new charges drawn up had not been disclosed to Mr Kolev and Mr Kostadinov, in breach of their procedural rights, and the indictment contained information as to the charges that had not been properly disclosed to them. Further, the referring court stated that the parts of the indictment concerning what Mr Hristov was alleged to have done were vitiated by contradictions. Consequently, in accordance with Article 369 of the Code of Criminal Procedure, that court again ordered the case to be referred back to the prosecutor, giving the latter a period of one month, that is, until 7 May 2015, to cure the infringements of procedural requirements identified, failing which the criminal proceedings initiated against Mr Kolev, Mr Hristov and Mr Kostadinov would be closed.

32 However, although he summoned Mr Kolev and Mr Kostadinov on several occasions, the prosecutor did not succeed in making proper disclosure of the charges drawn up and of the investigation file. Nor could the file be disclosed to Mr Hristov. Those three individuals and their lawyers again stated that they could not appear on the set dates for a variety of reasons, including travel abroad, medical and professional reasons and a failure, by the prosecutor, to comply with the legal period of three days prior notice with respect to the disclosure of the investigation file.

33 Consequently, the referring court, by order of 22 May 2015, held that the prosecutor had not cured the infringements of essential procedural requirements previously identified and had committed further infringements on the ground that the procedural rights of Mr Kolev, Mr Hristov and Mr Kostadinov had again been infringed and that the contradictions in the indictment had not been entirely removed.

34 Accordingly, while stating that it was possible that those three individuals and their lawyers had abused their rights and had engaged in no more than delaying tactics in order to prevent the prosecutor from bringing to an end the pre-trial stage of the criminal proceedings and from curing the infringements within the period prescribed, that court held that the conditions for the closure of those proceedings were met and that those individuals therefore had a right to have those proceedings closed. In that regard, the referring court stated, in essence, that the fact that an accused abused his or her rights and objectively prevented the prosecutor from carrying out the various procedural acts required by the law could not preclude the closure of the criminal proceedings in question. Notwithstanding those findings, the referring court nonetheless decided to suspend the case rather than order the closure of proceedings.

35 Both the prosecutor, who claimed that no infringement of essential procedural requirements had been committed, and Mr Hristov, who considered that the referring court had erred in not closing the criminal proceedings concerned, lodged appeals against that order.

36 By order of 12 October 2015, the appellate court held that the referring court ought to have closed the criminal proceedings in accordance with Articles 368 and 369 of the Code of Criminal Procedure and, for that purpose, referred the case back to the referring court.

37 However, the referring court is uncertain whether the judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555), delivered by the Court when the case was pending before the appellate court, does not cast doubt on the compatibility of Articles 368 and 369 with EU law, in particular with the obligation on Member States to ensure the effective prosecution of offences affecting the financial interests of the European Union.

38 If that is the case, the referring court is uncertain as to the consequences of such incompatibility. In that regard, while stating that it would be bound, if need be, to disapply the articles at issue, that court seeks to ascertain what specific measures it should take in order to ensure the full effectiveness of EU law while ensuring the protection of the rights of the defence and the right of Mr Kolev, Mr Hristov and Mr Kostadinov to a fair trial.

39 The referring court envisages a number of options.

40 First, the referring court might decide to disapply the time limits laid down in Article 369 of the Code of Criminal Procedure and, consequently, allow the prosecutor greater time to cure the identified irregularities in the issuing of the indictment and in disclosure to the accused of the charges and the investigation file, before the case was again brought before the court. The referring court is uncertain however as to what specific measures it ought to take in order to protect the right of those individuals to have their case heard within a reasonable time, enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

41 Second, the referring court could decide to open the trial stage of the criminal proceedings despite the irregularities committed in the course of the pre-trial stage of those proceedings. However, the referring court is uncertain whether EU law precludes it from doing so.

42 In that context, the referring court wonders whether, in the first place, those irregularities, which constitute 'infringements of essential procedural requirements' under Bulgarian law, must also be classified as such under Articles 6 and 7 of Directive 2012/13 and under Article 3(1) of Directive 2013/48. In the second place, if that is so, the referring court seeks to ascertain whether it could open the trial stage of the proceedings notwithstanding the infringements of essential



procedural requirements committed, cure those infringements in the course of that stage of the proceedings, then rule on the merits of the case, without terminating the proceedings pursuant to Articles 368 and 369 of the Code of Criminal Procedure.

43 Further, the referring court, which noted that Mr Kostadinov and Mr Kurdov had the same lawyer, considers that there is a conflict of interest between them because the former provided information that could incriminate the latter, who remained silent. The referring court questions the compatibility with Article 3(1) of Directive 2013/48 of Article 91(3) and Article 92 of the Code of Criminal Procedure, which require that court to dismiss that lawyer for that reason, notwithstanding the fact that Mr Kostadinov and Mr Kurdov are fully informed and oppose the dismissal. On that subject, the referring court is uncertain whether the right of access to a lawyer laid down in Article 3(1) is respected if it names, as replacements, two court-appointed lawyers.

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

‘(1) Is a national law compatible with the obligation of a Member State to provide for the effective prosecution of criminal offences by customs officials if that law provides for criminal proceedings brought against customs officials — for participation in a conspiracy to commit corruption offences while performing their professional duties (accepting bribes for non-performance of customs inspections), and for specific bribery offences and receiving bribes paid — to be terminated, without the court having examined the charges brought, under the following conditions: (a) two years have elapsed since the accused was charged; (b) the accused has lodged a request for the pre-trial investigation to be concluded; (c) the court has given the prosecutor a period of three months to conclude the pre-trial investigation; (d) during that period, the prosecutor has committed ‘infringements of essential procedural requirements’ (failure properly to notify a supplementary charge, failure to disclose the investigation file, contradictory indictment); (e) the court has given the prosecutor a further period of one month to remedy those ‘infringements of essential procedural requirements’; (f) the prosecutor has failed to remedy the ‘infringements of essential procedural requirements’ within that time limit — albeit that the infringements committed within the first three-month period and the failure to remedy them within the subsequent one-month period are attributable both to the prosecutor (failure to remove contradictions in the indictment; failure to take real action for most of those periods) and also to the defence (breach of the duty to cooperate with respect to notification of the charge and inspection of the investigation file due to the hospitalisation of the accused and claims regarding the lawyers’ other professional commitments); (g) the accused has acquired a subjective right to the termination of the criminal proceedings on account of the failure to remedy the ‘infringements of essential procedural requirements’ within the prescribed periods?’

2) If the answer [to the first question] is in the negative, which part of the abovementioned legislation should the national court disapply in order to ensure that EU law is applied effectively: (a) termination of the criminal proceedings once the one-month period has expired; or (b) categorisation of the abovementioned defects as ‘infringements of essential procedural requirements’; or (c) protection of the subjective right arising in the first question under (g) if there is a possibility that that infringement may be remedied effectively in the court phase of the proceedings?

(a) Should the decision to disapply national rules providing for the termination of criminal proceedings be determined by:

- i) the prosecutor's being granted an additional period of time to remedy the 'infringement of essential procedural requirements' equal to the period during which he was, objectively, precluded from doing so because of obstacles attributable to the defence?
- (ii) the court's establishing in the case of (i) above that the obstacles are the result of an 'abuse of law', and
- (iii) if the answer to question 2(a)(i) is in the negative, the national court's establishing that national law provides sufficient guarantees that the pre-trial investigation will be completed within a reasonable time?
- b) Is the decision not to categorise the abovementioned defects in accordance with national law as 'infringements of essential procedural requirements' compatible with EU law, that is to say:
- i) Would the right under Article 6(3) of Directive 2012/13 for the defence to be provided with detailed information on the accusation be adequately safeguarded:
- if that information was provided after the actual submission of the indictment to a court but before examination of the indictment by the court, or if, at an earlier stage, prior to submission of the indictment to the court, the defence was provided with full information about the essential elements of the charges (as in Mr Hristov's case)?
  - in the event that the answer to question 2(b)(i), first indent, is in the affirmative, if that information was provided after the actual submission of the indictment to a court but before the court had examined it, and the defence had, at an earlier stage, been provided with partial information about the essential elements of the charges prior to submission of the indictment to the court, the provision of only partial information being attributable to obstacles on the part of the defence (as in the case of Mr Kolev and Mr Kostadinov), and
  - if the information was contradictory as regards the way in which the corruption was actually described (at one point it is stated that another defendant expressly demanded the bribe, while Mr Hristov indicated his dissatisfaction, by grimacing, when the person undergoing the customs inspection offered too little money, whereas elsewhere it is asserted that Mr Hristov explicitly and specifically demanded a bribe)?
- ii) Would the right under Article 7(3) of Directive 2012/13 for the defence to be granted access to case materials 'at the latest upon submission of the merits of the accusation to the judgment of a court' be adequately safeguarded in the main proceedings if the defence had access to the essential part of the materials at an earlier stage and was given the opportunity to inspect the materials but, because of various obstacles (illness, professional commitments), and in reliance on national law which requires at least three days' notice to be given of the availability of materials for inspection, did not avail itself of that opportunity? Must a further opportunity for inspection be given once those obstacles are removed and subject to at least three days' notice being given? Is it necessary to establish whether the obstacles referred to did, objectively, exist or constitute an abuse of law?
- iii) Does the legal requirement laid down in Article 6(3) and Article 7(3) of Directive 2012/13 ('at the latest on submission of the merits of the accusation to a court'/'at the latest upon submission of the merits of the accusation to the judgment of a court') have the same meaning in both provisions? What does that requirement mean: prior to the actual submission of the merits of the accusation to [the judgment of] a court, or at the latest on their submission to the court, or after their submission to a court but before the court has taken steps to examine the merits of the accusation?

iv) Does the legal requirement to provide information on the accusation to the defence and access to the materials of the case in such a way as to ensure that ‘the effective exercise of the rights of the defence’ and ‘the fairness of the proceedings’ can be safeguarded in accordance with Article 6(1) and Article 7(2) and (3) of Directive 2012/13 have the same meaning in both provisions? Would that requirement be met:

– if the detailed information on the accusation was provided to the defence after submission of the indictment to a court but before any steps had been taken to examine its merits and the defence had been given sufficient time for preparation, incomplete and partial information on the accusation having been provided at an earlier stage;

– if the defence was granted access to all the case materials after submission of the indictment to a court but before any steps had been taken to examine its merits, and the defence had been given sufficient time for preparation, access to the majority of the case materials having been given to the defence at an earlier stage?

– if the court adopted measures to guarantee to the defence that all statements given by the defence after studying the detailed indictment and all the case materials would have the same effect as they would have had if those statements had been given to the prosecutor before submission of the indictment to the court?

v) Would ‘the fairness of the proceedings’ in accordance with Article 6(1) and (4) of Directive 2012/13 and ‘the effective exercise of the rights of the defence’ in accordance with Article 6(1) of that directive be safeguarded if the court decided that judicial proceedings should be commenced in respect of a definitive charge that is contradictory as regards the way in which the demand for a bribe was expressed, but then gave the prosecutor an opportunity to remove those contradictions and enabled the parties to exercise fully those rights which they would have had if the charge had been filed without any such contradictions?

vi) Would the right of access to a lawyer enshrined in Article 3(1) of Directive 2013/48/EU be adequately safeguarded if, during the pre-trial investigation, the lawyer was given the opportunity to appear in order to be notified of the provisional charges and to be given full access to all case materials, but failed to appear due to professional commitments and in reliance on national law requiring at least three days’ notice to be given? Is it necessary for a new time limit of at least three days to be imposed once those commitments have been met? Is it necessary to establish whether the reason for the non-appearance is valid or whether there has been an abuse of law?

vii) Would the infringement during the pre-trial investigation of the right of access to a lawyer enshrined in Article 3(1) of Directive 2013/48 have an effect on the ‘practical and effective exercise of rights of defence’ if, after submission of the indictment to the court, the court granted the lawyer full access to the final and detailed indictment and to all the case materials, and then adopted measures to guarantee to the lawyer that all statements made by him after studying the detailed indictment and all the case materials would have the same effect as they would have had if those statements had been made to the prosecutor before submission of the indictment to the court?

c) Is the subjective right of the accused to have the criminal proceedings terminated (under the above conditions) compatible with EU law, notwithstanding the fact that the ‘infringement of essential procedural requirements’ which the prosecutor has failed to remedy may be fully remedied as a result of measures taken by the court in the judicial phase of the proceedings, so that ultimately the legal position of the accused is identical to that which he would have had if the infringement had been remedied in due time?

3) Can more favourable national rules on the right to a trial within a reasonable time, the right to information and the right of access to a lawyer be applied if they — in conjunction with other circumstances (the procedure described at point 1) — would result in the termination of the criminal proceedings?

4) Is Article 3(1) of Directive 2013/48 to be interpreted as authorising the national court to exclude from the court proceedings a lawyer who has represented two of the accused, one of whom has given a statement regarding matters that are prejudicial to the interests of the other, who has not given a statement?

If this question is to be answered in the affirmative, would the court be safeguarding the right of access to a lawyer in accordance with Article 3(1) of Directive 2013/48 if, having allowed a lawyer who has simultaneously represented two defendants with conflicting interests to take part in the proceedings, it appointed new, different defence lawyers to represent each of those defendants?

### **Consideration of the questions referred**

#### **Preliminary observations**

45 As a preliminary matter, it must be noted that, by order of 28 September 2016, notified to the Court on 25 October 2016, the referring court found that one of the accused in the main proceedings, Mr Hristov, had died and therefore ordered the closure of criminal proceedings against him.

46 It is clear from both the wording and the scheme of Article 267 TFEU that the preliminary ruling procedure presupposes that a dispute is actually pending before the national courts in which they are called upon to give a decision which is capable of taking account of the preliminary ruling given by the Court (judgment of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 24).

47 That being the case, there is no need to answer the questions referred in so far as they relate to the situation of Mr Hristov.

48 That said, the four questions and sub-questions referred, which partly overlap, can be grouped into three sets. Accordingly, the first, second and third questions and their sub-questions have to be understood as relating to (i) whether EU law, in particular Article 325 TFEU, precludes national legislation, such as Articles 368 and 369 of the Code of Criminal Procedure, and what are the consequences if such legislation is incompatible with EU law, and (ii) the rights of individuals to be informed of the charges against them and to have access to case materials. The referring court's fourth question concerns its doubts as to (iii) the scope of the right of access to a lawyer, in circumstances such as those of the main proceedings.

#### **The obligations stemming from Article 325 TFEU**

49 By its first, second and third questions, the referring court seeks, in essence, to ascertain whether, with respect to criminal offences in customs matters, Article 325 TFEU must be interpreted as precluding national legislation that establishes a procedure for terminating criminal proceedings, such as that provided for in Articles 368 and 369 of the Code of Criminal Procedure. If it does, the referring court is uncertain as to the consequences if such legislation is incompatible with a provision of the FEU Treaty.

50 In order to answer those questions, it must be noted that Article 325(1) TFEU requires the Member States to counter fraud and any other illegal activity affecting the financial interests of the Union through effective and deterrent measures (see, to that effect, judgments of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 37, and of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 30).

51 Under Article 2(1)(a) of Decision 2007/436, own resources of the European Union include, inter alia, Common Customs Tariff duties. Therefore, there is a direct link between the collection of revenue deriving from those duties and the availability to the EU budget of the corresponding resources. Any failure in the collection of the former potentially causes a reduction in the latter (see, by analogy, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 31 and the case-law cited).

52 Accordingly, in order to ensure the protection of the financial interests of the Union, the Member States are obliged to adopt the measures necessary to guarantee the effective and comprehensive collection of customs duties, an obligation which dictates that customs inspections may be properly carried out.

53 It follows from the requirements of Article 325(1) TFEU that the Member States must, to that end, provide for the application of penalties that are effective and that act as a deterrent in cases of contravention of the EU customs legislation. Further, the obligation on the Member States to provide for penalties that are effective, proportionate and dissuasive in such cases was laid down in Article 21(1) of Regulation No 450/2008 and is now imposed in Article 42(1) of Regulation No 952/2013.

54 While the Member States have in that regard a freedom to choose the applicable penalties, which may take the form of administrative penalties, criminal penalties or a combination of the two, they must nonetheless ensure that cases of serious fraud or any other serious illegal activity affecting the financial interests of the Union in customs matters are punishable by criminal penalties that are effective and that act as a deterrent (see, to that effect, judgments of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraphs 33 to 35 and the case-law cited; of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 20, and of 2 May 2018, *Scialdone*, C-574/15, EU:C:2018:295, paragraphs 34 and 35).

55 The Member States must also ensure that the rules of criminal procedure permit effective investigation and prosecution of offences linked to such conduct.

56 In this case, the accused persons in the main proceedings were charged with having participated in a criminal undertaking for more than a year by demanding bribes from those crossing the border between Bulgaria and Turkey in order not to carry out customs inspections and not to document any irregularities identified, and, as regards Mr Kostadinov in particular, receiving the bribes thus collected.

57 Such actions, which the referring court describes as systematic and continuing contraventions of the customs rules and which constitute, under Bulgarian law, offences punishable by custodial sentences that may extend, as the case may be, to six or ten years' imprisonment, are liable to impede the collection of customs duties. Without prejudice to the findings of fact in the main proceedings that are to be made by the referring court, such actions appear to be capable of being categorised as serious fraud or any other serious illegal activity affecting the financial interests of the Union within the meaning of Article 325(1) TFEU.

58 Neither the referring court nor the interested parties in the present proceedings have disputed that the criminal penalties laid down by national law are effective and have a deterrent effect.

59 However, it remains to be determined whether the rules laid down in Articles 368 and 369 of the Code of Criminal Procedure are not such as to be liable to impede the effective investigation and prosecution of cases of serious fraud or other serious illegal activity affecting those interests, contrary to Article 325(1) TFEU.

60 In that regard, it is apparent from the order for reference that, pursuant to Articles 368 and 369, the national courts must, at the request of persons accused, order the termination of criminal proceedings if, on the expiry of a period of two years, increased by periods of 3.5 months and one month, the prosecutor has not concluded the investigation and, where appropriate, drawn up the charges and served them on the defence, given the defence access to the case materials and submitted an indictment to the court, or if the prosecutor has, in that context, committed infringements of essential procedural requirements, within the meaning of Bulgarian law, which the prosecutor has not cured within the periods allowed. Where the conditions set out in Articles 368 and 369 are satisfied, termination of the criminal proceedings is automatic, so that the court is bound to so order. That termination is moreover not subject to appeal and is final.

61 However, it appears from reading the order for reference that the national court does not have the power, in response to the particular circumstances of the specific case, including the complexity of the case and the conduct of the parties, to extend the time limits thus prescribed or to examine the merits of the case and, as envisaged by the referring court, itself to correct any infringements of essential procedural requirements that may have been committed in the pre-trial stage, even where the possibility exists that the prejudicial effect of those infringements on the rights of the defence might be cured by the adoption of appropriate measures in the course of the trial stage.

62 In particular, it appears from reading the order for reference that the impediments created by the defence to due disclosure of the charges and the case materials, including any delaying tactics on the part of the defence, do not preclude the expiry of the periods of 3.5 months and one month imposed on the prosecutor to bring the investigation to an end and to bring the case before a court, in accordance with Article 369 of the Code of Criminal Procedure, and that those impediments are therefore liable to lead to the termination of criminal proceedings, thus precluding any continuation of the prosecution or any new prosecution.

63 That being the case, it is clear that the national legislation at issue in the main proceedings is liable to impede the effectiveness of criminal prosecution and the punishment of acts that may be categorised as serious fraud or other serious illegal activity affecting the financial interests of the Union, contrary to Article 325(1) TFEU.

64 As regards the consequences of that interpretation of Article 325(1) TFEU, it must be recalled that that article imposes on the Member States precise obligations, as to the result to be achieved, which are not subject to any condition regarding the application of the rules which that article lays down (judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 38 and the case-law cited).

65 The primary responsibility lies with the national legislature to adopt the measures necessary to meet those obligations. It is therefore 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.

66 For its part, the referring court must also, without waiting until the national legislation at issue is thus amended by legislation or by any other constitutional procedure, give full effect to those obligations by interpreting that legislation so far as at all possible in the light of Article 325(1) TFEU, as interpreted by the Court, or, as necessary, disapplying that legislation (see, to that effect, judgment of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 49).

67 In the event that, as appears to be the view of the referring court, a number of measures could conceivably give effect to the obligations at issue, it will be for that court to determine which of those measures to apply. In particular, it is for that court to decide whether it is necessary, to that end, to disregard all the requirements set out in Articles 368 and 369 of the Code of Criminal Procedure, or whether it is appropriate to extend the time limits imposed on the prosecutor by those articles with respect to bringing the pre-trial stage of the proceedings to an end and with respect to correcting any irregularities committed during that stage, or again whether, provided that the prosecutor has, in the particular case, submitted an indictment before the court within those time limits, the court must open the trial stage of the proceedings and itself cure those irregularities. In that regard, the referring court must however ensure that, at the various stages of proceedings, any deliberate and abusive obstruction on the part of the defence to the proper conduct and progress of those proceedings can be overridden.

68 In that context, and in light of the fact that the criminal proceedings at issue constitute an implementation of, in particular, Article 325(1) TFEU and, therefore, of EU law, within the meaning of Article 51(1) of the Charter (see, by analogy, judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 21), the referring court must also satisfy itself that the fundamental rights guaranteed by the Charter to the accused persons in the main proceedings are respected. Those rights cannot be defeated by the obligation to ensure the effective collection of the Union's resources (see, to that effect, judgments of 29 March 2012, *Belvedere Costruzioni*, C-500/10, EU:C:2012:186, paragraph 23, and of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraphs 46 and 52).

69 In particular, as regards the conduct of criminal proceedings, in the first place, it is the duty of the referring court to take the measures necessary to ensure respect for the rights of the defence, guaranteed by Article 48(2) of the Charter, in particular the right of an individual to be informed of the charges against him and to have access to the case materials. Since those rights are more specifically the subject matter of the second set of questions submitted by the referring court, reference is made to paragraphs 78 to 100 of the present judgment.

70 In the second place, the referring court must, when it decides on the measures to be applied in this specific case in order to give full effect to Article 325(1) TFEU, protect the right of accused persons to have their case heard within a reasonable time.

71 In that regard, it must be stated that that right constitutes a general principle of EU law (see, to that effect, judgment of 17 December 1998, *Baustahlgewebe v Commission*, C-185/95 P, EU:C:1998:608, paragraph 21), enshrined in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and in the second paragraph of Article 47 of the Charter with respect to the trial procedure. In criminal law, that right must be respected not only during the trial procedure, but also during the stage of the preliminary investigation, from the moment when the person concerned becomes an accused (see, by analogy, ECtHR, 15 July 2002, *Affaire stratégies et communications et Dumoulin v. Belgium*,

CE:ECHR:2002:0715JUD003737097, § 39, and ECtHR, 10 September 2010, *McFarlane v. Ireland*, CE:ECHR:2010:0910JUD003133306, § 143).

72 In accordance with the Court's settled case-law, the reasonableness of the length of proceedings cannot be determined by reference to a precise maximum limit determined in an abstract manner. It must be assessed in the light of all of the circumstances specific to each case, the importance of the case for the person concerned, its complexity or the conduct of the competent authorities and the parties, where such complexity or delaying tactics on the part of the defence may be deemed to justify a period that is *prima facie* too long (see, to that effect, judgments of 26 November 2013, *Groupe Gascogne v Commission*, C-58/12 P, EU:C:2013:770, paragraphs 85 and 86, and of 14 June 2016, *Marchiani v Parliament*, C-566/14 P, EU:C:2016:437, paragraphs 99 and 100).

73 Accordingly, as the Advocate General stated, in essence, in point 91 of his Opinion, it is for the referring court to determine whether, in this specific case, the right of the individuals concerned to have their case heard within a reasonable time has been respected, taking into consideration not only the fact that the investigation in the main proceedings concerns eight individuals, accused of participation in a criminal undertaking that was active for slightly more than a year, but also the possibility that the delay that occurred might be due, in part, to the conduct of the defence.

74 It is also for the referring court to determine the specific measures that are to be taken in order to guarantee respect for that right, taking account of all the procedural remedies offered by national law, taken as a whole and interpreted in the light of EU law. In the event that, as stated in paragraph 67 of the present judgment, 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.

75 Further, it must be emphasised that the referring court cannot order the closure of the criminal proceedings, pursuant to the national legislation at issue in the main proceedings, solely on the ground that such closure would allegedly constitute the most favourable outcome for the accused persons in relation to the right of those persons to have their case heard within a reasonable time and to their rights of defence. While the national authorities and courts remain free to apply national standards of protection of fundamental rights, that is subject to the condition that, *inter alia*, the primacy, unity and effectiveness of EU law are not thereby compromised (see, to that effect, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 47 and the case-law cited).

76 In the light of the foregoing, Article 325(1) TFEU must be interpreted as precluding 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 Union in customs matters. It is for the national courts to give full effect to Article 325(1) TFEU, by disapplying that legislation, as necessary, while also ensuring respect for the fundamental rights of the persons accused.

### **The right of individuals to be informed of the charges against them and to have access to the case materials, under Directive 2012/13**

77 First, it must be observed that the referring court seeks the interpretation of provisions of Directive 2012/13 and of a provision of Directive 2013/48 in relation to the rights of the accused



person and his lawyer to be informed of the charges and to have access to the case materials. However, since the latter directive, unlike the former, contains no specific provision governing those rights, only Directive 2012/13 need be interpreted in that regard.

78 By its second and third questions, the referring court seeks, in essence, to ascertain whether, in the first place, Article 6(3) of Directive 2012/13 must be interpreted as meaning that the right of an individual to be informed of the charges against him that is laid down in that provision is respected in the event that detailed information on the charges is disclosed to the defence only after the lodging before the court of the indictment that initiates proceedings, but before the court begins to examine the merits of the charges and before the commencement of any hearing when argument is submitted to the court.

79 In the second place, the referring court asks the Court whether Article 7(3) of that directive must be interpreted as meaning that the right of access to the case materials that is laid down in that provision is safeguarded when the competent authorities have given to the defence the opportunity to consult those materials during the pre-trial stage of the criminal proceedings, even if the defence has not been in a position to avail itself of that opportunity. If not, the referring court asks whether that right is respected in the event that the defence is offered a further opportunity to acquaint itself with those materials after the date of lodging before the court of the indictment that initiates proceedings, but before the court begins to examine the merits of the charges and before the commencement of any hearing when argument is submitted to the court.

80 In the third place, if the answer to the preceding questions is negative, the referring court is uncertain as to whether it is possible to cure the infringements at issue in the course of the trial stage of the proceedings.

81 While it is for the referring court to determine whether the provisions of Directive 2012/13 have been complied with in the main proceedings and what specific measures must, if necessary, be adopted to that end, it is the task of the Court to indicate to the referring court the objective factors that should influence such an assessment.

82 For that purpose, it must be noted that, as stated in recital 14 and Article 1 of Directive 2012/13, the subject matter of that directive is the establishment of minimum standards to be applied in the field of information to suspects or accused persons.

83 In particular, Article 6(3) of that directive provides that the Member States are to ensure that detailed information is provided to accused persons on the charges, including the nature and legal classification of the criminal offence, as well as the nature of the accused person's participation. Article 7(2) of that directive adds that suspects or accused persons, or their lawyers, must be granted access to material evidence, both incriminatory and exculpatory, that is in the possession of the competent authorities.

84 As regards when that disclosure and when that access are to occur, Article 6(3) and Article 7(3) of Directive 2012/13 merely provide, respectively, that disclosure must take place 'at the latest upon submission of the merits of the accusation to the judgment of a court' and that access must be guaranteed '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'.

85 Accordingly, as the Advocate General stated in point 98 of his Opinion, those provisions make no reference to a precise time in that regard.

86 Further, the wording of those provisions, in their various language versions, do not make it possible to determine unequivocally the final point in time at which the disclosure of detailed information on the charges and access to the case materials must be ensured. In some of those versions, such as those in French and Dutch, the provisions in question could be interpreted as referring to either the point in time when the court that has jurisdiction to examine the merits of the charges is seised and proceedings commence before it, or, as the Advocate General stated in point 100 of his Opinion, the date when the case is at the stage of deliberation. On the other hand, other language versions, such as the German version, refer to the point in time when the indictment is laid before that court. Similarly, the English and Italian versions, among others, make reference to the point in time when the merits of the charges have to be assessed by the court.

87 In those circumstances, those provisions should be interpreted in the light of their context and their objective (see, to that effect, judgment of 20 December 2017, *Spain v Council*, C-521/15, EU:C:2017:982, paragraph 158).

88 In that regard, it is apparent from recitals 10 and 14 of Directive 2012/13 that the aim of that directive is, by means of the establishment of common minimum rules governing the right to information in criminal proceedings, to increase the mutual confidence of the Member States in their respective criminal justice systems. As stated, in essence, in recital 14 and also in recital 41 of Directive 2012/13, to that end the directive builds on the rights laid down in, inter alia, Articles 47 and 48 of the Charter and seeks to promote those rights.

89 For that reason, as stated in recitals 27 and 28 of that directive and in Articles 6 and 7 thereof, it is precisely the objective of those provisions to allow for an effective exercise of the rights of the defence and to ensure the fairness of the proceedings (see, to that effect, with respect to Article 6, judgment of 22 March 2017, *Tranca and Others*, C-124/16, C-188/16 and C-213/16, EU:C:2017:228, paragraph 38 and the case-law cited).

90 That objective dictates that the person accused must receive detailed information on the charges and have the opportunity to acquaint himself with the case materials in due time, at a point in time that enables him to prepare his defence effectively, as is moreover laid down in Article 7(3) of Directive 2012/13 in relation to access to the file, it being specified that the sending of incomplete information and the granting of partial access to the case materials are in that regard insufficient.

91 Directive 2012/13 does not require the point in time when detailed information on the charges is disclosed and the point in time when access to the case materials is provided to be identical. Further, that point in time may, depending on the specific circumstances and the type of proceedings in question, be prior to or contemporaneous with the time when the court is seised, or even after that time.

92 However, that objective and the proper conduct of proceedings presuppose, as a general rule and without prejudice, in some cases, to special or simplified procedures, that that disclosure should take place, and that the opportunity to have access to the case materials should be afforded, no later than the point in time when the hearing of argument on the merits of the charges in fact commences before the court that has jurisdiction to give a ruling on the merits.

93 By means of that disclosure and that access an accused person, or his or her lawyer, is informed in detail of what he or she is alleged to have done and the legal classification of the acts committed, and of the evidence in support of those acts. The opportunity to become acquainted with that information and that evidence no later than the commencement of the hearing of argument is

essential if that person, or his lawyer, is to be able to participate properly in that argument with due regard for the adversarial principle and equality of arms, so that he is able to state his position effectively.

94 In the event of any failure to meet that requirement, there is nothing, however, in Directive 2012/13 that precludes the 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.

95 Further, that requirement does not preclude the possibility that information in relation to the charges sent to the defence may be the subject of later amendments, in particular as regards the legal classification of the alleged acts, or the possibility that new evidence may be added to the file in the course of argument. Such amendments and such evidence must however be disclosed to the accused person or his lawyer at a point in time when they still have the opportunity to respond effectively, before the stage of deliberation. That possibility is moreover envisaged in Article 6(4) of that directive, which provides that suspects or accused persons must be informed promptly of any changes in the information given in accordance with that article in the course of criminal proceedings where this is necessary to safeguard the fairness of the proceedings, and in Article 7(3) of that directive, which provides that where further material evidence comes into the possession of the competent authorities, access is to be granted to that evidence in due time to allow it to be considered.

96 In any event, in each of the situations described in paragraphs 92 and 93, paragraph 94 and in paragraph 95 of the present judgment and whenever the point in time when detailed information of the charges is provided and access to the case materials is granted, the person and his lawyer must have, *inter alia*, with due regard for the adversarial principle and the principle of equality of arms, sufficient time to become acquainted with that information and those case materials, and must be placed in a position to prepare the defence effectively, submit any observations and, when necessary, to make any application, such as an application for further investigation, that they are entitled to make under national law. As the Advocate General stated in point 101 of his Opinion, that requirement dictates that the case should, where necessary, be stayed and the case postponed to a subsequent date.

97 Last, in so far as the referring court has particular doubts as to how the right of access to the case materials laid down in Article 7(2) and (3) of Directive 2012/13 is to be exercised, it must be made clear that, in the event that the person accused or his lawyer has been summoned in order to obtain access, as requested, to those case materials during the pre-trial stage of the proceedings but where, for legitimate reasons or for reasons outside their control, they have not been able to attend on the day they are summoned to do so, respect for the rights of the defence and the fairness of proceedings, to which that provision is designed to give effect, requires that the prosecuting or judicial authorities, as appropriate, take the measures necessary to ensure that that person or his lawyer is given a further opportunity to become acquainted with the case materials. Without prejudice to what is stated in paragraphs 90 to 93 and 96 of the present judgment, that provision does not preclude that further opportunity being offered after the lodging of the indictment that initiates the trial stage of the proceedings.

98 In that context, it is, however, for the court to achieve a fair balance between, on the one hand, respect for the rights of the defence, and, on the other, the need to guarantee the effectiveness of 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, taking into account anything deliberately done by the defence to obstruct the due course of those proceedings.

99 It follows from the foregoing that Article 6(3) of Directive 2012/13 must be interpreted as not precluding the disclosure of detailed information on the charges to the defence after the lodging before the court of the indictment that initiates the trial stage of proceedings, but before the court begins to examine the merits of the charges and before the commencement of hearing of argument before the court, and 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.

100 Article 7(3) of that directive must be interpreted as meaning that it is for the national court to be satisfied 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 stage of the proceedings, but before that court begins to examine the merits of the charges and before the commencement of any hearing of argument by that court, 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.

### **The right of access to a lawyer under Directive 2013/48**

101 By its fourth question, the referring court seeks, in essence, to ascertain whether Article 3(1) of Directive 2013/48 must be interpreted as 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 and, further, as precluding the court from allowing those persons to instruct a new lawyer or, when necessary, itself naming two court-appointed lawyers, to replace the first lawyer.

102 As a preliminary point, it must be noted that, in accordance with Article 15(1) of Directive 2013/48, while the period for the transposition of that directive had not expired when the referring court lodged with the Court this request for a preliminary ruling, that period expired on 27 November 2016. That being the case, that directive is applicable to the situation of the accused persons in the main proceedings.

103 Under Article 1 of Directive 2013/48, that directive lays down minimum rules concerning the rights of suspects and accused persons to have access to a lawyer in criminal proceedings. In particular, Article 3(1) of that directive requires the Member States to ensure that suspects and accused persons have that right in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.

104 As is stated, in essence, in recital 12 of that directive, the aims of that directive include the promotion of the right to be advised, defended and represented laid down in the second paragraph of Article 47 of the Charter and of the rights of the defence guaranteed by Article 48(2) of the Charter.

105 As stated in the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), Article 48(2) of the Charter corresponds to Article 6(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and has the same meaning and scope as the latter, in accordance with Article 52(3) of the Charter.

106 However the case-law of the European Court of Human Rights indicates, in essence, that, while the right of access to a lawyer that is laid down in Article 6(3) ECHR implies that it should be open to the person concerned to use a lawyer of his own choice, that possibility is not, however, absolute (see, to that effect, ECtHR, 29 September 1992, *Croissant v. Germany*, CE:ECHR:1992:0925JUD001361188, § 29, and ECtHR, 14 January 2003, *Lagerblom v. Sweden*, CE:ECHR:2003:0114JUD002689195, § 54). Accordingly, that right may be subject to certain restrictions, provided that those restrictions prescribed by law, pursue a public interest objective and are proportionate to that objective.

107 In this case, it is apparent from the order for reference that the objective of the national legislation at issue in the main proceedings is to safeguard the right of accused persons to an effective defence.

108 It is clear that that objective, which corresponds precisely to that pursued by Article 3(1) of Directive 2013/48, is legitimate and that that legislation is proportionate to that objective.

109 On that subject, it must be emphasised that it is essential that a lawyer have no conflict of interest if the effectiveness of the rights of the defence is to be protected. Accordingly, as the Advocate General stated in point 110 of his Opinion, a lawyer cannot fully and effectively defend two accused persons within the same proceedings if there is a conflict of interest between those persons, for example if one of them has made statements that could be used to incriminate the other, when the latter has not confirmed such statements.

110 In such circumstances, the dismissal of that lawyer and his replacement by two other lawyers who are instructed by the persons accused or by two court-appointed lawyers seem appropriate to ensure the effectiveness of the rights of the defence and of the right of access to a lawyer.

111 Consequently, the answer to the fourth question is that Article 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 and, further, as not precluding the court from allowing those persons to instruct a new lawyer or, when necessary, itself naming two court-appointed lawyers, to replace the first lawyer.

## **Costs**

112 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 (Grand Chamber) hereby rules:

**1. Article 325(1) TFEU must be interpreted as precluding national legislation that establishes a procedure for the termination of criminal proceedings, such as that provided for in Articles 368 and 369 of the *Nakazatelnio protsesualen kodeks* (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 is for the national courts 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.**

2. **Article 6(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 **must be interpreted as not precluding the disclosure of detailed information on the charges to the defence after the lodging before the court of the indictment that initiates the trial stage of proceedings, but before the court begins to examine the merits of the charges and before the commencement of any hearing of argument by the court, and 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.**

**Article 7(3) of that directive must be interpreted as meaning that it is for the national court to be satisfied 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 stage of the proceedings, but before that court begins to examine the merits of the charges and before the commencement of any hearing of argument by that court, 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.**

3. **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, **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 and, further, as not precluding the court from allowing those persons to instruct a new lawyer or, when necessary, itself naming two court-appointed lawyers, to replace the first lawyer.**

[Signatures]

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\* Language of the case: Bulgarian.