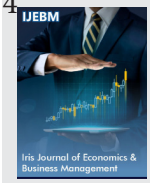

ISSN: 2993-8732

DOI: 10.33552/IJEBM.2026.03.000568

Iris Journal of
Economics & Business Management

Iris Publishers

Opinion

The Right to a Defense and to Access to a Lawyer: The Long Road to Reality or Another Legal Reality

Simona Franguloiu[123*]

[1]*Associate researcher at Acad. Andrei Rădulescu, Institute of Legal Research of the Romanian Academy*

[2]*Trainer at National Institute of Magistracy, Bucharest, Romania*

[3]*Lecturer, PhD, Faculty of Economic and Legal Sciences, "Constantin Brâncoveanu" University of Pitești, Romania*

Corresponding author: Associate researcher, Institute of Legal Research of the Romanian Academy, Trainer at National Institute of Magistracy, Lecturer, Faculty of Economic and Legal Sciences, University of Pitești, Romania

Received Date: April 07, 2026

Published Date: April 16, 2026

Abstract

The right to defense, enshrined in various international legal instruments of a conventional or EU nature, remains in certain situations merely a purely rhetorical acknowledgment, given that during criminal investigations, criminal prosecution documents are drawn up in the absence of the suspect's or defendant's lawyer. On the other hand, certain evidence obtained during an administrative inquiry complementary to a criminal investigation may be gathered without the suspect's lawyer being informed, as ruled by the European Court of Justice (CJEU). In this paper, we will attempt to discern the purpose of Directive 2013/48 of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in proceedings relating to the European arrest warrant, the reasoning behind its adoption, and how it has been transposed and is applied, prompted by certain decisions handed down by the Court of Justice of the European Union, and whether an administrative investigation in which evidence is obtained without informing the lawyer is compatible with the essence of this right.

Keywords: Right to defense; right of access; lawyer; procedural guarantee

Abbreviations: OLAF: European Anti-Fraud Office; EPPO: European Public Prosecutor's Office; CJEU: Court of Justice of the European Union; ECHR: European Court of Human Rights; ECHR: European Convention on Human Rights; CFREU: Charter of Fundamental Rights of the European Union; EDP: European Delegated Prosecutor; TFEU: Treaty on the Functioning of the European Union

Introduction

The recognition and guarantee of the right to defense and the right to have access to a lawyer in criminal proceedings and in the execution of a European arrest warrant are widely recognized, being a subject long discussed in legal doctrine and applied in judicial practice. For these reasons, it might seem at least outdated to address the topic of a right that serves as a procedural guarantee and has been elevated to the status of a principle of criminal procedure. Furthermore, the numerous decisions rendered by the European Court of Human Rights (ECHR) regarding violations of the right to a defense under Article 6(3) of the European Convention on Human Rights and Fundamental Freedoms, as part of the right to a fair trial, consistently sanction any violation of this fundamental right, as a rational a priori principle of law. On the other hand, Article 48 of the Charter of Fundamental Rights of the European Union (CFREU) enshrines the same right, with the same meaning. Similarly, the provisions of Directive 2013/48 of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in proceedings relating to the European arrest warrant [1], which imposes on Member States the positive

obligation to ensure that persons accused in criminal proceedings are guaranteed the right to a lawyer throughout the proceedings, with whom they may have confidential meetings. An important aspect from the perspective of this initiative is the right of a suspect or accused person to have their lawyer present during any investigative or evidence-gathering actions, to the extent that such actions are provided for under the relevant domestic law and to the extent that the presence of the suspect or accused person is mandatory or permitted. Although Member States may establish practical arrangements regarding the presence of a lawyer during investigative or evidence-gathering actions, these may not undermine the effective exercise and substance of the rights of the suspected person. In the process of obtaining and gathering evidence, it is necessary to respect the principle of fairness in the obtaining and administration of evidence, as a fundamental principle of criminal proceedings. The question arises as to whether and to what extent this principle is respected in the context of a supplementary administrative investigation (within the framework of an ongoing criminal investigation) and we will express our opinion on this matter.

Discussion

Essentially, the opinion we are expressing through this submission is prompted by the Order issued by the Fifth Chamber of the General Court on January 14, 2026, in Case T-200/25 [2]. In essence, as a matter of fact, in 2021, the European Anti-Fraud Office (OLAF) opened an administrative investigation into suspected fraud regarding projects funded under the Integrated Territorial Investment for the Danube Delta, based on information from the Romanian media, in accordance with Article 5 of Regulation (EU, Euratom) No. 883/2013 of the European Parliament and of the Council of September 11, 2013, concerning investigations conducted by OLAF. This institution informed the European Public Prosecutor's Office (EPPO) of potential fraud related to those projects, which falls within the scope of Article 3 of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. A few days later, a European Delegated Prosecutor (EDP) opened a criminal investigation based on the information received from OLAF, and on the same day, the EDP requested OLAF's assistance in accordance with Article 101((3)(a) of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO) [3], receiving several months later a report containing analytical support and operational analysis in response to the request.

Subsequently, the European Public Prosecutor requested OLAF to open a complementary administrative investigation, in accordance with Article 101(3)(c) of Regulation 2017/1939 [4], to support the ongoing EPPO investigation; OLAF forwarded to the European Public Prosecutor's Office the report prepared as part of the supplementary investigation, in which it found that the complainants (in the case at hand) had engaged in potentially criminal conduct in obtaining EU funding.

The complainants in this case sought the annulment of OLAF's final report on the grounds that it produced direct and individual legal effects on them, as it attributed criminal conduct to them, and the European Public Prosecutor's Office relied on this report to bring charges against them. Second, the right to effective judicial protection, enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, renders the action against the contested report admissible before the Court.

The European Commission raised a plea of inadmissibility on the ground that the contested report cannot be the subject of an action brought by the applicants under Article 263 TFEU, since OLAF reports do not have binding legal effects on the persons mentioned therein and do not bring about a distinct change in their legal situation. In the Commission's view, OLAF reports constitute merely evidence that may be used in national proceedings, which must be assessed in accordance with the rules of evidence under national law, arguing that, in any event, the consequences of an alleged irregularity in the conduct of an OLAF investigation may, however, be addressed by the competent national courts in the context of national criminal proceedings, following a possible indictment by the European Public Prosecutor's Office, and consequently, the applicants will be able to avail themselves of the remedies available from those authorities.

Although OLAF may recommend in its reports the adoption of measures with binding legal effects that adversely affect the persons concerned, the opinion it formulates in that regard imposes no obligation, not even of a procedural nature, on the authorities to which it is addressed (see, in that regard, Order of 22 December 2022, AL v Commission, T 692/21, EU:T:2022:862, paragraph 29 [5]. It should be noted that this case concerned civil and disciplinary proceedings, not criminal proceedings. From the perspective of the nature of the proceedings, there are certain differences between criminal and civil proceedings (in the broad sense) with regard to the right to a fair trial and, in particular, the right to a fair trial specific to criminal proceedings.

In our view, the General Court's reasoning contains certain logical inconsistencies: on the one hand, the judgment states that "*24... any procedural or substantive violations invoked to invalidate the final report of an OLAF investigation cannot render that report legally ineffective vis-à-vis the persons mentioned therein. Such violations may be challenged only in support of an action brought against a subsequently contestable act, to the extent that they influenced its content, and not independently, in the absence of such an act... The same applies, moreover, to procedural acts adopted by the European Public Prosecutor's Office that are intended to produce legal effects vis-à-vis third parties, a category that includes, among others, suspects. These acts are subject to judicial review by the competent national courts in accordance with Article 42(1) of Regulation 2017/1939, interpreted in the light of recital 87 thereof".*

However, it is noted that the report drawn up by OLAF produced legal effects vis-à-vis the applicants, who do not have the status of "third parties" as the General Court emphasized, but rather of persons directly involved in the case and who, on the basis of that report, acquired the status of suspects, with criminal proceedings having been initiated against them.

The General Court further emphasizes that "*25. Furthermore, the applicants are mistaken in arguing that, should the action for annulment be declared inadmissible, they would have no remedy against OLAF's actions, given that national courts have no jurisdiction either to annul EU acts or to review OLAF's compliance with the procedural safeguards it is required to provide under Regulation No. 883/2013. 26. As regards the principle of effective judicial protection, it should be noted that, although the requirement regarding legal effects that are binding on the applicant and capable of affecting his or her interests by bringing about a distinct change in his or her legal situation must be interpreted in the light of the principle of effective judicial protection, such an interpretation cannot go so far as to annul that requirement without exceeding the jurisdiction conferred by the TFEU on the EU courts. The fact that the courts of the Member States may not have jurisdiction to rule on the contested report does not mean that the action for annulment brought by the applicants before the Court satisfies the conditions for admissibility laid down in Article 263 TFEU (see, to that effect, Order of 12 November 2018, Stichting Against Child Trafficking v Commission, T 658/17, paragraph 29)*" [6].

On the other hand, in a contradictory manner, the General Court found that although the action for annulment of the contested report must be deemed inadmissible, the applicants are not denied access to a court, on the grounds that the procedural acts of the EPPO's Office intended to produce legal effects vis-à-vis third parties are subject to judicial review by the competent national courts, which could concern the EPPO's Office's assessment of the evidence contained in the OLAF reports drawn up during the proceedings.

Another noteworthy aspect is that the CJEU resolved the case by taking into account, in addition to the provisions of Article 263 TFEU, Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council on cooperation with the European Public Prosecutor's Office and the effectiveness of investigations by the European Anti-Fraud Office [7], which introduced the possibility of filing a complaint regarding a potential violation of procedural safeguards and fundamental rights by OLAF.

The fundamental logical flaw in the reasoning of the European Court of Justice is represented by the following allegation: "*30. It follows from all of the above that the contested report has no legal effect on the applicants and does not constitute an act causing them harm. Consequently, the plea of inadmissibility raised by the Commission must be upheld, and the present action must be declared inadmissible".*

Thus, the General Court finds that this report has no effect on the applicants (suspects in the criminal case pending before the EPPO and who have been charged on the basis of this report) and, at the same time, that the courts of the Member States may not have jurisdiction to rule on this report, which is likely to place the suspects/plaintiffs in that case in a situation where they cannot challenge this report in any way, except in the event that they acquire the status of defendants, are indicted, and can defend themselves only within the criminal proceedings in which they have been charged.

We note that all the judgments cited by the General Court in support of the objection raised by the European Commission relate to civil cases, not criminal ones: the key point is that the right to a fair trial, particularly regarding the fairness of the collection and handling of evidence, is compromised under these circumstances. It is true that the EPPO may request OLAF's assistance regarding possible fraud involving European funds, but the requirements and essence of the right to a fair trial require, in our view, that within the framework of that complementary administrative investigation, the suspect (the applicant in this case) be given the opportunity to defend himself. This argument becomes even more relevant given that, based on this report, the applicants were charged, meaning a serious legal consequence has occurred, one capable of having significant effects on the legal entity's business and its credibility.

Another relevant and, in our view, surprising aspect concerns the Court's failure to address Directive 2013/48 of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings, as well as Article 48 of the Charter of Fundamental Rights of the European Union (CFREU) - legal instruments designed to provide an absolute guarantee of the right to a defense. These legal texts, to which is added the provision of Article 6 of the ECHR, cited above, together with the Court's failure to make any reference to them, demonstrate the fragility of the ruling: the European court failed to take into account this right, which constitutes one of the main guarantees of any criminal proceeding, alongside the fact that evidence obtained during a supplementary administrative investigation - in which the accused were completely deprived of the opportunity to defend themselves - constituted the very basis for their indictment by the EPPO. The fact that this evidence is to be assessed by the national court conducting the criminal proceedings and that the court has the possibility of excluding it (to the extent that a violation of rights is found that renders the procedural act null and void) is not sufficient to remedy the nullity at this stage of the proceedings, and in our opinion, the European court should have taken into account the violation of the right to a fair trial in the context of this supplementary administrative inquiry within a criminal investigation.

It is true that with the increase in the number and importance of cross-border investigations in the EU, ensuring the admissibility of evidence obtained in another Member State in criminal proceedings has become essential, both from the perspective of the effective application of the law and from the perspective of the protection of fundamental rights, the two aspects requiring a balance. National criminal investigation authorities often investigate crimes in which some of the evidence is located abroad [8]. Although the aforementioned provisions - Article 6 of the ECHR and Articles 47 and 48 of the CFREU - must ensure that evidence obtained in cross-border investigations does not lead to its unlawful or unfair use, we observe that achieving both objectives (ensuring efficiency and protecting fundamental rights) is more than difficult, not only because each Member State has its own rules regarding investigative measures and the exclusion of evidence, but especially because the European Court itself contributes to this.

Conclusions

It should be noted that the EU's political agenda has imposed different standards, which has led both legal scholars, academic

studies [9], and practitioners alike to analyze to what extent divergent national rules on the admissibility and exclusion of evidence raise a problem regarding the use or non-use of evidence obtained through judicial cooperation between institutions, since the national criminal procedure laws of Member States assign different consequences regarding the obtaining and use of evidence obtained in violation of fundamental rules. On the other hand, exclusion rules are the only logical consequence of the EU directives on the rights of suspected or accused persons, which must be effective but are not accompanied by a rule providing for the inadmissibility of evidence obtained in violation of these rights.

Therefore, given the lack of legislative rules at the EU level regarding the collection, use, and exclusion of evidence, the question logically arises: Is it possible for common standards to exist in the human rights case law of the two European courts (the ECtHR and the CJEU, including the General Court), and could these standards serve as a basis for legislative harmonization, given that they are overlooked even by a European court?

References

1. Directive 2013/48 of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings. OJ L 294 PP. 1-12.
2. Order of the General Court (Fifth Chamber). Case T 200/25.
3. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.
4. Published in OJ 2017 L 198 P.29.
5. Case AL v. Commission, T 692/21.
6. Case Stichting Against Child Trafficking v. Commission, T 658/17.
7. Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council on cooperation with the European Public Prosecutor's Office and the effectiveness of investigations by the European Anti-Fraud Office.
8. B Garamvölgyi, K Ligeti, A Ondrejova, M von Galen (2021) Admissibility of Evidence in Criminal Proceedings in the EU. Eucrim-Europian Law Forum Preventation. Investigation. Prosecution 15(3).
9. G Vermeulen, W De Bondt, Y Van Damme (2010) EU cross-border gathering and use of evidence in criminal matters. Toward mutual recognition of investigative measures and free movement of evidence? Vol. 37 IRCP-series, 2010; K. Ligeti (Ed.,), Toward a Prosecutor for the European Union, Volume 1: A Comparative Analysis, 2013.