OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 30 April 2015 (1)

Case C?105/14

Ivo Taricco and Others

(Request for a preliminary ruling from the Tribunale di Cuneo (Italy))

(Protection of the European Union’s financial interests — Tax offences in the field of value added tax — Duty of the Member States to impose effective, proportionate and dissuasive penalties — Criminal penalties — Limitation period for proceedings — Statutory restriction of the overall length of the limitation period in the event of its interruption — National limitation regime which, in many cases, may have the effect of exempting offenders from punishment — Legality of the penalties — Prohibition on retroactivity — Article 325 TFEU — Directive 2006/112/EC — Regulation (EC, Euratom) No 2988/95 — Convention on the protection of the European Communities’ financial interests (‘PIF Convention’)

I – **Introduction**

1. Does EU law require the courts of the Member States to refrain from applying certain provisions of their national law on the limitation periods applicable to the prosecution of criminal offences in order to guarantee the effective punishment of tax offences? That, in essence, is the question which the Court of Justice is called upon to consider in the present case in the light of a request for a preliminary ruling from an Italian criminal court.

2. That question has arisen in the context of a case of organised tax fraud in the trade in champagne which was uncovered in Italy. Mr Taricco and several other defendants are charged, as members of a criminal organisation, with having submitted fraudulent value added tax (‘VAT’) returns using invoices relating to non-existent transactions. Their practices were apparently similar to carousel fraud.

3. In all likelihood, the prosecution of the criminal offences alleged to have been committed in that context will become time-barred even before a final criminal judgment is given. According to the information supplied by the referring court, this is due not only to the circumstances of this particular case, but also to a structural problem in the Italian criminal justice system, which provides for various ways of interrupting the limitation period applicable to the bringing of proceedings but not for its suspension while criminal proceedings are ongoing. That system also provides for an absolute limitation period, introduced by a statutory provision of 2005, which, in the event of interruption, is now only a quarter longer than the original period and not — as before — half as long again. In many cases, it would seem, the absolute limitation period in particular has the effect of exempting the offender from punishment.

4. Relating as it does to VAT, a share of the revenue from which forms part of the European Union's own resources, (2) the present case provides the Court with an opportunity to clarify a number of fundamental questions relating to the protection of the European Union's financial interests. In so doing, the Court must give due consideration to the rights of the accused in criminal proceedings. In this respect, the present case may be vaguely reminiscent of the famous case *Berlusconi and Others*. (3) On closer consideration, however, the points of law raised here differ from those with which the Court was concerned on that occasion.

II – **Legal framework**

A – *EU law*

5. The framework of EU law relevant to this case is, in essence, determined by various provisions on the protection of the financial interests of the European Union (formerly, the European Communities). Particular attention must be drawn to Articles 4(3) TEU and 325 TFEU, Regulation (EC, Euratom) No 2988/95 (4) and the 'PIF Convention'. (5) Regard must also be had to Directive 2006/112/EC on the common system of value added tax. (6)

6. In addition, the Court is also invited to consider the interpretation of Articles 101 TFEU, 107 TFEU and 119 TFEU, the wording of which I shall not reproduce below.

Provisions of the FEU Treaty

7. Article 325 TFEU provides as follows:

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

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

…'

Regulation (EC, Euratom) No 2988/95

8. Regulation No 2988/95 establishes general rules relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to EU law (formerly, Community law). Article 1(2) defines the constituent elements of an irregularity as follows:

'"Irregularity" shall mean any infringement of a provision of Community law resulting from an act or

omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.'

9. Article 3 of Regulation No 2988/95 governs the limitation period for proceedings:

'1. The limitation period for proceedings shall be four years as from the time when the irregularity referred to in Article 1(1) was committed. However, the sectoral rules may make provision for a shorter period which may not be less than three years.

In the case of continuous or repeated irregularities, the limitation period shall run from the day on which the irregularity ceases. …

The limitation period shall be interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity. The limitation period shall start again following each interrupting act.

However, limitation shall become effective at the latest on the day on which a period equal to twice the limitation period expires without the competent authority having imposed a penalty, except where the administrative procedure has been suspended in accordance with Article 6(1).

…

3. Member States shall retain the possibility of applying a period which is longer …'

10. Article 6(1) of Regulation No 2988/95 contains rules governing administrative proceedings when criminal proceedings in connection with the same facts are running in parallel:

'Without prejudice to the Community administrative measures and penalties adopted on the basis of the sectoral rules existing at the time of entry into force of this Regulation, the imposition of financial penalties such as administrative fines may be suspended by decision of the competent authority if criminal proceedings have been initiated against the person concerned in connection with the same facts. Suspension of the administrative proceedings shall suspend the period of limitation provided for in Article 3.

…'

The PIF Convention

11. A series of common provisions on the protection of the European Union's financial interests under criminal law is also contained in the PIF Convention signed in Luxembourg on 26 July 1995, which was concluded by the then 15 Member States of the European Union on the basis of Article K.3(2)(c) EU (7)(8) and entered into force on 17 October 2002.

12. Under the heading 'General provisions', Article 1 of the PIF Convention defines the constituent elements of fraud and requires the Member States to make the acts so covered criminal offences:

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

…

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

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

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

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

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

3. Subject to Article 2(2), each Member State shall also take the necessary measures to ensure that the intentional preparation or supply of false, incorrect or incomplete statements or documents having the effect described in paragraph 1 constitutes a criminal offence if it is not already punishable as a principal offence or as participation in, instigation of, or attempt to commit, fraud as defined in paragraph 1.

…'

13. Article 2 of the PIF Convention contains the following obligation on the Member States to introduce penalties:

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

2. However, in cases of minor fraud involving a total amount of less than ECU 4 000 and not involving particularly serious circumstances under its laws, a Member State may provide for penalties of a different type from those laid down in paragraph 1.

…'

The VAT Directive (Directive 2006/112/EC)

14. Under Title IX of Directive 2006/112, which carries the heading 'Exemptions', Article 131, which forms part of the 'General provisions' of Chapter 1, provides:

'The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.'

15. Article 138(1), which is one of the provisions concerning 'exemptions for intra-Community transactions' under Chapter 4 of Title IX of Directive 2006/112, provides as follows in connection with exemptions related to the supply of goods:

‘Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.’

16. In addition, the provisions on ‘exemptions for transactions relating to international trade’, contained in Chapter 10 of Title IX of Directive 2006/112, include Article 158, paragraph 1 of which, concerning ‘customs warehouses, warehouses other than customs warehouses and similar arrangements’, reads, in part, as follows:

‘1. By way of derogation from Article 157(2), Member States may provide for warehousing arrangements other than customs warehousing in the following cases:

(a) where the goods are intended for tax-free shops, for the purposes of the supply of goods to be carried in the personal luggage of travellers taking flights or sea crossings to third territories or third countries, where that supply is exempt pursuant to point (b) of Article 146(1);

(b) where the goods are intended for taxable persons, for the purposes of carrying out supplies to travellers on board an aircraft or a ship in the course of a flight or sea crossing where the place of arrival is situated outside the Community;

(c) where the goods are intended for taxable persons, for the purposes of carrying out supplies which are exempt from VAT pursuant to Article 151.’

2. Where Member States exercise the option of exemption provided for in point (a) of paragraph 1, they shall take the measures necessary to ensure the correct and straightforward application of this exemption and to prevent any evasion, avoidance or abuse.

…’

B – *Italian law*

17. Article 157 of the Italian Codice penale, (9) as amended by Law No 251 of 5 December 2005 (10) (‘Law No 251/2005’) provides as follows under the heading ‘Limitation, limitation period’:

‘Prosecution of an offence shall be time-barred after a period equal to the maximum duration of the penalty laid down in the criminal-law provision for the offence itself; the foregoing notwithstanding, the limitation period shall be no less than six years for serious offences and four years for other offences, even where the latter are punishable only by a fine.

For the purposes of determining the limitation period, regard shall be had to the penalty laid down by law for the committed or attempted offence, with no account being taken of mitigating or aggravating circumstances, with the exception of those circumstances for which the law provides a penalty other than the standard penalty …

…’

18. Article 158 of the Codice penale governs the starting point of the limitation period:

‘Time shall start to run from the day on which the offence was committed or, in the case of attempted or continuing offences, from the date on which the offender’s activity or continuing activity ceased.

…’

19. Article 159 of the Codice penale determines the cases in which the limitation period is suspended. These include cases where the matter is brought before another court or where the defence counsel or the accused is prevented from entering an appearance. ‘Time shall start to run again on the date when the cause of its suspension ceases to exist.’

20. Article 160 of the Codice penale contains the following provision on the interruption of the limitation period:

‘The limitation period shall be interrupted by judgment or conviction.

An order applying protective measures *ratione personae* or confirming detention in custody or arrest; examination before the court or public prosecuting authority or an invitation to appear before the public prosecuting authority for questioning; an order fixing the hearing on the request for the case to be discontinued; a committal for trial; and an order fixing the preliminary hearing … shall also interrupt the limitation period.

Where it is interrupted, the limitation period shall start to run again from the day of the interruption. If there is more than one interruption, the limitation period shall start to run from the last such interruption; however, the periods laid down in Article 157 may not, in any circumstances, be extended beyond the periods fixed in the second subparagraph of Article 161 …’

21. Prior to the revision of the rules on limitation introduced by Law No 251/2005, the limitation period could be extended by no more than half in the event of an interruption of that period.

22. The effects of suspending and interrupting the limitation period are determined as follows in Article 161 of the Codice penale:

‘The suspension and interruption of the limitation period shall affect all those who committed the criminal offence.

With the exception of the prosecution of offences provided for in Article 51(3)(b) and (c) of the Code of Criminal Procedure, an interruption of the limitation period may give rise to an extension of that period by no more than one quarter, an extension by no more than half in the cases provided for in the second indent of Article 99, an extension by no more than two thirds in the cases provided for in the fourth indent of Article 99, or an extension by no more than double in the cases provided for in Articles 102, 103 and 105.’

23. Article 416 of the Codice penale provides that the establishment of an organisation the purpose of which is to commit crime shall be punishable by a term of imprisonment of between three and seven years. The mere participation in such an organisation shall be punishable by a term of imprisonment of between one and five years.

24. In accordance with Article 2 of Decreto legislativo (11) No 74 of the President of the Republic of 10 March 2000 (‘Legislative Decree 74/2000’), (12) the submission of a fraudulent VAT return through the use of invoices or other documents relating to non-existent transactions (false invoices) is punishable by a term of imprisonment of between one year and six months and six years. In accordance with Article 8 of Legislative Decree 74/2000, the issuing of false invoices to enable third parties to evade VAT is punishable by the same penalty.

III – **Facts and main proceedings**

25. Mr Ivo Taricco and a number of other persons (also referred to as ‘the accused’) are charged with having established a criminal organisation or having participated as a member in such an organisation in the period from 2005 to 2009. The purpose of that criminal organisation is said to have been the commission of the criminal offences of producing false invoices and submitting fraudulent VAT returns through the use of false invoices.

26. The false invoices, which amounted in total to several million euros, related to commercial transactions involving champagne. It is alleged that, on the basis of agreements between the accused, domestic sales of champagne were, with the assistance of a number of undertakings each statutorily represented by persons from among the accused, falsely recorded as intra-Community supplies.

27. At the centre of those activities was the company Planet Srl. It knowingly took receipt of false invoices from a number of other undertakings (so-called ‘missing traders’ (13)) which in turn acted as purported importers of champagne. Planet entered those invoices in its accounts, deducting the VAT recorded in each of them as input tax and, subsequently, submitting false annual VAT returns. In this way, Planet was able to procure champagne at costs far below the market price and, ultimately, to distort competition. As for the ‘missing traders’, some of them did not submit any annual VAT returns at all, while others submitted returns but did not actually pay the corresponding VAT.

28. On completion of the preliminary investigations, charges were brought against the defendants. The application to commit the defendants for trial was initially made to the Tribunale di Mondovì (District Court, Mondovì). Following a series of objections raised by the defendants’ lawyers at the preliminary hearing, (14) as a result of which the proceedings were put back to the preliminary investigation stage, the criminal proceedings are again at the stage of the preliminary hearing, now pending before the Tribunale di Cuneo (District Court, Cuneo), the referring court. (15) At this point in the proceedings, the judge conducting the preliminary hearing (16) has to determine whether, on the basis of the results of the investigations, there are grounds for committing the defendants for trial and fixing a date for the trial.

29. The referring court states that, under the Italian provisions on the limitation period for proceedings, the prosecution of all the tax offences with which the defendants are charged will — even taking into account the statutory extension of the limitation period on account of various measures which have caused that period to be interrupted — become time-barred on 8 February 2018 at the latest. Indeed, the prosecution of one of the defendants, Mr Anakiev, has been time-barred since 11 May 2013.

30. As the referring court points out, it is ‘quite likely’ that the prosecution of all the defendants in the present case will become time-barred before a final judgment is given. As the referring court says, that state of affairs is not peculiar to the present case but is found in many criminal proceedings brought in Italy, particularly those relating to economic offences, which, by their very nature, often require particularly extensive investigations and are highly complex.

31. In the light of the foregoing, the referring court expresses the concern that the limitation regime in Italy — contrary to the purpose it is actually intended to serve — is in reality becoming a ‘guarantee of impunity’ for economic criminals and that Italy is effectively neglecting its obligations under EU law. It attributes this primarily to Law No 251/2005, under which limitation periods which are interrupted are now extended by only a quarter, whereas they were previously extended by half.

IV – **Request for a preliminary ruling and procedure before the Court**

32. By order of 17 January 2014, received on 5 March 2014, the Tribunale di Cuneo referred the following questions to the Court for a preliminary ruling:

(1) In so far as it provides for the limitation period to be extended by only a quarter following interruption and, therefore, allows crimes to become time barred, resulting in impunity, even though criminal proceedings were brought in good time, has the amendment to the last subparagraph of Article 160 of the Italian Criminal Code made by Law No 251 of 2005 led to infringement of the provision protecting competition in Article 101 TFEU?

(2) Has the Italian State, in amending by Law No 251 of 2005 the last subparagraph of Article 160 of the Italian Criminal Code, in so far as this provides for the limitation period to be extended by only a quarter following interruption, which means therefore that there are no penal consequences for crimes committed by unscrupulous economic operators, unlawfully introduced a form of aid prohibited by Article 107 TFEU?

(3) Has the Italian State, in amending by Law No 251 of 2005 the last subparagraph of Article 160 of the Italian Criminal Code, in so far as this provides for the limitation period to be extended by only a quarter following interruption, thus conferring impunity on those who exploit the Community directive, unlawfully added a further exemption to those exhaustively listed by Article 158 of Council Directive 2006/112/EC of 28 November 2006?

(4) In so far as it provides for the limitation period to be extended by only a quarter following interruption and, therefore, fails to penalise conduct that deprives the State of the resources necessary in order to meet its obligations to the European Union also, has the amendment to the last subparagraph of Article 160 of the Italian Criminal Code made by Law No 251 of 2005 led to breach of the principle of sound public finances laid down by Article 119 TFEU?

33. Mr Anakiev was the only one of the accused in the dispute in the main proceedings to take part in the preliminary ruling procedure by submitting written pleadings. The Italian, German and Polish Governments and the European Commission also took part in the written procedure. With the exception of Mr Anakiev and the Polish Government, the same parties were also represented at the hearing on 3 March 2015.

V – **Preliminary remarks of a procedural nature**

34. Before I turn to the substantive assessment of the questions referred, I must first, in the light of the doubts expressed by a number of parties to the proceedings, make a number of preliminary points of a procedural nature which have to do, on the one hand, with the Court's jurisdiction to answer the questions referred (see Section A immediately below) and, on the other hand, with the admissibility of those questions (see Section B below).

A – *The Court's jurisdiction to answer the questions referred*

35. In accordance with Article 267 TFEU, the Court has jurisdiction to give preliminary rulings on the interpretation of the Treaties and the acts of the institutions, bodies, offices or agencies of the Union, which is to say that its powers extend in principle to the interpretation of the whole of EU law. (17)

36. In the present case, that jurisdiction is not precluded by the fact that the main proceedings concern tax offences under national law. Even though competence in matters of criminal law and criminal procedure continues to lie largely with the Member States, the national authorities are

none the less required to exercise their respective powers in accordance with the provisions of EU law. (18) Moreover, with regard specifically to criminal proceedings in the field of VAT, the Court held only recently that such proceedings fall within the scope of EU law. (19)

37. In this context, the Court has jurisdiction to interpret EU law in its entirety, including the PIF Convention, in so far as the latter may prove to be relevant to the resolution of the present case. It is true that that convention was concluded in 1995, under the former 'third pillar' of the European Union, on the basis of the original version of the EU Treaty. (20) In accordance with Article 9 of the Protocol on transitional provisions, (21) however, the PIF Convention continues to apply even after the abolition of the European Union's pillar structure following the entry into force of the Treaty of Lisbon. It therefore remains an integral part of EU law.

38. Furthermore, since 1 December 2014, there have been no restrictions on the jurisdiction of the Court of Justice to give preliminary rulings in the area covered by the former third pillar of the European Union (see Article 10(1) and (3) of the Protocol on transitional provisions). This also applies to requests for a preliminary ruling made even before 1 December 2014, such as the present request. (22)

39. That said, even before 1 December 2014, the Court of Justice had jurisdiction in any event to hear and determine requests for a preliminary ruling made by any Italian court with respect to the interpretation of the PIF Convention. This is because the Italian Republic had from the outset already recognised on other bases the Court's jurisdiction to give such preliminary rulings, that is to say, on the one hand, on the basis of an additional protocol to the PIF Convention, (23) and, on the other hand, on the basis of Article 35(2) and (3)(b) EU, (24) having consistently granted all national courts the right to make a reference for a preliminary ruling. (25)

40. In the light of the foregoing, the Court's jurisdiction to consider all the legal issues raised by the present request for a preliminary ruling is beyond question.

B – *Admissibility of the questions referred*

41. A number of parties to the proceedings also raise objections to the admissibility of the questions referred to the Court (Article 267 TFEU, Article 94 of the Rules of Procedure). In essence, they doubt whether those questions are relevant to the judgment to be given in resolution of the dispute in the main proceedings.

42. It should be pointed out in this regard that, in accordance with settled case-law, it is solely for the referring court to determine, in the light of the particular circumstances of the case, the need for a preliminary ruling by the Court as well as the relevance of the questions submitted to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle required to give a ruling. Where a national court refers to the Court of Justice questions relating to EU law, there is also a presumption of relevance in favour of the request for a preliminary ruling. (26)

43. Accordingly, the Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (27)

44. There is no such risk in the present case.

45. The information contained in the order for reference with respect to the facts of the main

proceedings, the applicable national law and the need for a preliminary ruling is sufficient to enable both the Court and the parties to the proceedings within the meaning of Article 23 of the Statute of the Court to adopt an informed position on the questions referred.

46. It is after all readily apparent from the account given by the referring court what the subject-matter and issues of the dispute in the main proceedings are, in other words that charges have been brought against a number of persons in Italian criminal proceedings relating to tax offences and the referring court fears that they — like many other suspected offenders in similar situations — may escape the penalty prescribed for those offences because the time-limits for proceedings laid down in the domestic provisions on limitation periods, in particular the period by which those time-limits are extended where they are interrupted, are too short, with the result that the prospect of the defendants being definitively convicted before the proceedings become time-barred seems illusory.

47. Furthermore, it cannot be said that the questions referred to the Court are of a hypothetical nature or that they obviously have no bearing on the actual facts of the dispute in the main proceedings. For, according to the order for reference, the answer to be given by the Court is crucial to determining whether the provisions on limitation periods laid down in the national law are applicable in the main proceedings and whether a final resolution of the dispute in the main proceedings before the limitation period expires is realistically possible.

48. What is more, contrary to the view taken by the Italian Government, the referring court is not prevented from making the systemic shortcoming of Italian criminal law identified by it the subject-matter of a reference to the Court on the basis of a specific dispute pending before it. On the contrary, the Court has on a number of occasions already considered structural problems alleged to exist in a domestic system of penalties, including, in particular, in response to requests for a preliminary ruling made in ongoing national criminal proceedings. (28)

49. Even if the general principles of EU law, such as the principle of the legality of penalties, prohibited a deviation from the national provisions on limitation periods at issue, this would not, contrary to the view of the Italian Government and of Mr Anakiev, affect the admissibility of the request for a preliminary ruling, but would at most require the Court to provide some clarification in this regard as part of its substantive response to the questions referred. (29)

50. There may, it is true, be some uncertainty as to the relevance of the questions referred in so far as the referring court asks the Court for an interpretation of a number of provisions of primary law (Articles 101 TFEU, 107 TFEU and 119 TFEU) which at first sight appear to have no bearing on the matters relating to limitation periods in criminal law at issue here. None the less, it does not strike me as being *obvious* that the aforementioned provisions bear no relation at all to the dispute in the main proceedings. Only an examination — however brief — of the *substance* of the aforementioned provisions of the TFEU by the Court can show whether or not they preclude rules on limitation in criminal law such as those laid down in the Italian legislation at issue. (30)

51. Finally, for the sake of completeness, it must also be pointed out that the comparatively early stage of the dispute in the main proceedings — that is to say the stage *prior* to committal for trial — also does not detract from the admissibility of the request for a preliminary ruling. (31)

52. In short, the concerns expressed to the Court with respect to the admissibility of this request for a preliminary ruling must therefore be dismissed.

VI – **Substantive assessment of the questions referred**

53. As is clear from the order for reference, the Tribunale di Cuneo proceeds on the

assumption that the limitation period applicable to most of the criminal offences relevant to the main proceedings is six years and that the limitation period applicable to the establishment of a criminal organisation is seven years. If, as in this case, the limitation period is interrupted by particular investigative or prosecution measures, it is, according to the order for reference, extended by one quarter, thus increasing the six-year limitation period to seven years and six months and the seven-year limitation period to eight years and nine months, with those periods, in principle, continuing to run as a pending criminal trial progresses. In many cases, that absolute limitation regime has the effect of exempting offenders from punishment.

54. Against that background, the referring court, by its request for a preliminary ruling, seeks to ascertain, in essence, whether EU law precludes a provision of domestic law on the limitation of criminal prosecutions such as the fourth paragraph of Article 160 of the Codice penale, as amended by Law No 251/2005, pursuant to which, the limitation period applicable to tax offences in the field of VAT, if interrupted, is extended by only one quarter of the original period, after which action is absolutely time-barred.

55. More specifically, by its four questions, the referring court seeks information on how to interpret Articles 101 TFEU, 107 TFEU and 119 TFEU and Article 158 of Directive 2006/112.

56. I shall now look first of all at those provisions (see in this regard Section A immediately below), before making a number of further comments concerning the duty of the Member States to impose effective penalties (see in this regard Section B below) and going on, finally, to examine the impact which any incompatibility on the part of the domestic limitation regime with EU law will have on the dispute in the main proceedings (see Section C below).

A – *The provisions of EU law raised by the referring court*

57. The Tribunale di Cuneo has devoted its questions, four in total, to EU competition law (see in this regard Section 1 immediately below), the possibilities of exemption from VAT (see Section 2 below) and the principle of sound public finances (see Section 3 below).

1. EU competition law (first and second questions referred)

58. By its first two questions, the referring court wishes to ascertain, in essence, whether a limitation regime such as that laid down in Italian law adversely affects competition on the European internal market and thus infringes the provisions of Article 101 TFEU and 107 TFEU.

59. It should be noted in this regard that, while an excessively lax limitation regime and the associated absence of effective criminal penalties for irregularities in matters of VAT may well afford the undertakings involved in such irregularities an unfair competitive advantage on the internal market, this does not constitute an infringement of Article 101 TFEU or 107 TFEU.

60. It is true that Article 101 TFEU, read in conjunction with Article 4(3) TEU, prohibits the Member States from creating a situation in which it is easier for undertakings to conclude anti-competitive agreements with each other. (32) However, it would be going too far to conclude from a potentially inadequate enforcement of the national provisions of criminal law governing tax offences in matters of VAT that such a state of affairs necessarily promotes collusive conduct between undertakings. Moreover, should any anti-competitive agreements between undertakings none the less be concluded, these are – entirely independently of criminal law in matters of taxation – punishable under the procedures provided for in competition law and by the specific penalties laid down there.

61. With regard to the prohibition on State aid under Article 107 TFEU, it is true that the

inadequate enforcement of penalties in matters of VAT may potentially give rise to a financial advantage for undertakings. However, that advantage is not selective because it does not favour certain undertakings or sectors over others, but applies equally to all undertakings which are subject to the national criminal law. (33)

62. The referring court is right to say that systemic shortcomings in the regime which a Member State applies to the punishment of tax offences in matters of VAT may give rise to a distortion of competition vis-à-vis undertakings from other Member States in which the national authorities adopt a stricter response to irregularities. However, that issue cannot be assessed by reference to antitrust or State aid law but must be considered in the context of the system of VAT and the associated duty to impose effective penalties. (34)

2. Exemptions under the VAT Directive (third question)

63. By its third question, the referring court wishes to ascertain whether a limitation regime such as that laid down in Italian law has the effect of creating a new exemption from VAT not provided for in Directive 2006/112.

64. In this regard, it should be pointed out first of all that the Tribunale di Cuneo appears to have made an error in its determination of the applicable provision of Directive 2006/112. Article 158 of that directive, cited in the order for reference, concerns the exemption from VAT of certain transactions in very specific circumstances, for example in tax-free shops, on board aircraft or ships and in diplomatic and consular exchanges. Such circumstances quite clearly do not exist here.

65. As the Commission has rightly pointed out, however, the applicable provision might conceivably be Article 138 of Directive 2006/112, which governs the circumstances in which the intra-Community supply of goods is exempt from VAT. There is definitely a connection between that provision and the facts of the main proceedings, in so far as the defendants are accused of having fraudulently misrepresented their domestic trade in champagne as intra-Community supplies.

66. However, the situation described by the referring court, whereby, in many cases, criminal prosecutions of tax offences become time-barred on account of shortcomings in national law, does not in itself have the effect of exempting the undertakings in question from VAT. After all, the existence of a right to levy tax on them is not dependent upon the enforceability of any right on the part of the State to punish them.

3. The principle of sound public finances (fourth question)

67. Last but not least, by its fourth question, the referring court seeks information on whether a limitation regime such as that laid down in Italian law is consistent with the principle of sound public finances, as expressed in Article 119 TFEU.

68. As the introductory provision on the Economic and Monetary Union in Title VIII of the FEU Treaty, Article 119(3) TFEU sets out certain ‘guiding principles’ applicable to the activities of the Member States and the European Union, including, among others, the principle of sound public finances.

69. Contrary to the view which the Commission appears to take, Article 119(3) TFEU not only provides the Member States with guidance on policy; it also imposes on them a binding EU-law requirement as regards the formulation of their public budgets. That requirement is no less legal because its content is not particularly specific and requires further clarification by other provisions

and legal acts. (35) However, it does necessarily follow from the comparatively general nature of Article 119(3) TFEU that the Member States have a broad discretion in the choice of the national measures which they consider — on the basis of complex economic assessments — to be best suited to guaranteeing sound public finances within their respective areas of competence. (36)

70. Not every measure impacting on expenditure or revenue that is adopted by national authorities, nor every failure to enforce a right to tax that actually exists, is necessarily to be regarded as an infringement of the principle of sound public finances. What matters is, rather, whether the finances of the Member State in question, when considered in their entirety, may be described as ‘sound’, a factor which is measured by reference in particular to the provisions and criteria relating to the avoidance of excessive government deficits (Article 126(1) and (2) TFEU in conjunction with Protocol No 12 to the EU Treaty and the FEU Treaty).

71. Consequently, the mere fact that the Italian rules on limitation in matters relating to the criminal prosecution of tax offences may exhibit the systemic shortcomings described by the referring court is not such as to support the assumption of an infringement of the principle of sound public finances as enshrined in Article 119(3) TFEU.

4. Interim conclusion

72. In summary, it may be concluded that none of the provisions of EU law specifically referred to by the referring court precludes a regime applicable to limitation periods for proceedings such as that introduced into Italian criminal law by the last subparagraph of Article 160 of the Codice penale, as amended by Law No 251/2005.

73. However, that conclusion is not in itself sufficient to provide the referring court with a useful response that will facilitate its decision on the dispute in the main proceedings. A number of further comments on the duty on the Member States to impose effective penalties are required (see in this regard Section B immediately below); we must also look briefly at the impact which any incompatibility on the part of the national limitation regime with EU law will have on the dispute in the main proceedings (see Section C below).

B – *The duty on the Member States to impose effective penalties*

74. The question of the duty on the Member States to impose effective penalties for tax offences in matters of VAT is not expressly raised by the referring court in its request for a preliminary ruling.

75. It is true that it is, in principle, for the referring court alone to determine the subject-matter of the questions it intends to refer to the Court, (37) and that, for its part, the Court does not have jurisdiction to consider points of law which the national court has expressly or implicitly omitted from its request for a preliminary ruling. (38)

76. That said, the Court does have jurisdiction, when ruling on a request for a preliminary ruling, to give clarifications, in the light of the information in the case-file, to guide the referring court in giving judgment in the main proceedings and, in so doing, also to consider provisions to which the referring court has not referred. (39)

77. A theme that runs throughout the order for reference in the present case is the national court’s concern that the limitation regime laid down in the last subparagraph of Article 160 of the Codice penale, as amended by Law No 251/2005, might reflect a systemic shortcoming which, in the case of many tax offences in Italy, has the effect of exempting offenders from punishment.

78. As a result, the request for a preliminary ruling raises — at least implicitly — the additional question of whether a limitation regime such as that laid down in Italian law is compatible with the duty on the Member States under EU law to impose penalties for irregularities in matters of VAT. A useful response to the request for a preliminary ruling is inconceivable without an analysis of that additional question.

79. I shall now consider first of all whether a regime such as that laid down in Italian law discharges the *general duty* incumbent on the Member States to impose effective penalties for infringements of EU law (see Section 1 below), before then turning to the *more specific duty* incumbent on the Member States to punish as a matter of criminal law fraud affecting the European Union's financial interests (see in this regard Section 2 below).

1. The general duty to impose effective penalties

80. It is a general principle of EU law, which can ultimately be traced back to the duty of sincere cooperation (Article 4(3) TEU), that for infringements of EU law by individuals Member States must provide penalties which are effective, proportionate and dissuasive, (40) and that infringements of EU law must also — at the very least — be punishable under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance. (41) These principles are, ultimately, specific expressions of the principles of effectiveness and equivalence

81. With regard, first, to the *principle of equivalence*, the Commission argued at the hearing that there are indeed offences under Italian criminal law which are not subject to any absolute limitation period at all. If these were to include offences in the field of economic crime which are equivalent to VAT fraud, an absolute limitation period could not be applied to VAT fraud either.

82. The Court recently made express reference to the requirement of effective, proportionate and dissuasive penalties that follows from the *principle of effectiveness* in connection with VAT too. Alongside various provisions of Directive 2006/112, the Court again relied in this regard on the Member States' duty of sincere cooperation under Article 4(3) TEU. (42)

83. A functioning system of penalties for infringements of EU law is particularly important in matters of VAT, since it not only serves to ensure that all undertakings active on the internal market are treated equally, but is also intended to protect the European Union's financial interests, the own resources of which include part of the VAT charged by Member States. (43) In accordance with Article 325 TFEU, Member States are therefore required to counter illegal activities affecting the financial interests of the European Union 'through effective deterrent measures'. (44) The same requirement follows from Regulation No 2988/95, which also serves to protect the financial interests of the European Union.

84. It is true that neither the provisions of primary law (Article 4(3) TEU and Article 325 TFEU) nor the relevant provisions of secondary law (Regulation No 2988/95 and Directive 2006/112) impose any kind of obligation on Member States to punish irregularities in the field of VAT necessarily *as matters of criminal law*. On the contrary, Member States are free — subject to the provisions of the PIF Convention (45) — to choose the applicable penalties, with the result that the national system may even, in principle, comprise a combination of administrative and criminal penalties. (46) It is, however, inherent in the concept of a 'penalty' that Member States must do more than simply collect VAT that is owed anyway, together with any default interest due.

85. The penalties actually applied in the Member State concerned — be they administrative or criminal in nature — must none the less be effective, proportionate and dissuasive. (47) It is

contrary to the requirements of EU law for a Member State to found its national system of penalties, drawn from a combination of administrative- and criminal-law provisions, on two pillars which neither individually nor jointly satisfy the criteria of being effective, proportionate and dissuasive.

86. It is for the referring court to assess whether the penalties provided for in the national system are effective, proportionate and dissuasive. As part of that assessment, the provision laying down the penalty in question must be analysed by reference to the role of that provision in the legislation as a whole, including the progress and special features of the procedure before the various national authorities, in each case in which that question arises. (48)

87. As I stated in my Opinion in *Berlusconi and Others*, (49) there is in principle no reason why Member States should not make subject to limitation penalties which they are required to introduce under EU law, since limitation periods serve to ensure legal certainty and protect defendants, and do not in principle preclude the effective imposition of penalties. Furthermore, Article 3 of Regulation No 2988/95 also provides for a limitation period applicable to the administrative penalties laid down there.

88. It must be ensured, however, that the limitation rules applicable do not have the general effect of undermining the effectiveness and dissuasiveness of the penalties provided for. Consequently, irregularities in matters of VAT must not be subject to penalties in theory alone. The system of penalties must rather be framed in such a way as to ensure that anyone who provides false information in connection with VAT or participates in such practices fears, in fact also, that penalties will be imposed on him. (50)

89. Account must also be taken, as the Commission rightly points out, of any interaction between criminal and administrative penalties. Thus, deficiencies in the system of criminal penalties may adversely affect the system of administrative penalties. This will be the case, for example, where the national law provides that administrative proceedings are to be stayed for the duration of ongoing criminal proceedings (51) and, once the limitation period for criminal prosecution has expired, cannot subsequently be resumed because the infringement concerned has become time-barred in accordance with criteria laid down in administrative law, too.

90. In this connection, it is worth mentioning the existing case-law on certain rules of procedure in Italian tax law. According to that case-law, although Member States may in certain circumstances terminate lengthy tax proceedings, (52) they must not refrain on a general and indiscriminate basis from verifying the taxable transactions effected in a series of tax years from the point of view of any liability to VAT. (53)

91. If, in the light of all those criteria, the effect of national rules on limitation periods is, by virtue of the scheme of those rules, that the effective, proportionate and dissuasive penalties provided for are, in reality, likely to be imposed only rarely, those rules will be contrary to the general duty on Member States to impose effective penalties for infringements of EU law. (54)

2. The specific duty to provide for effective criminal penalties

92. In addition to the general duty to impose effective penalties which we have just considered, there is a further specific duty on Member States to punish *as a matter of criminal law* fraud affecting the European Union’s financial interests.

93. That duty to provide for criminal penalties arises from the PIF Convention, in particular from Article 2(1) thereof, which stipulates that fraud affecting the European Union’s financial interests must be punished by effective, proportionate and dissuasive criminal penalties; in cases of serious

fraud, provision is even to be made for criminal penalties involving deprivation of liberty.

94. It is true that the Council of the European Union interprets the scope of the PIF Convention narrowly and would like to exclude VAT from it. In its Explanatory Report, (55) it adopted the position that, for the purposes of the PIF Convention, ‘revenue’ means the first two categories of the European Union’s own resources only, that is to say, on the one hand, customs duties and, on the other hand, certain agricultural levies and contributions. Conversely, the Council takes the view that European Union revenue within the meaning of the PIF Convention does not include revenue from the application by Member States of a uniform rate of VAT, as that own resource is not collected directly for the account of the European Union.

95. Consequently, in accordance with the view expressed by the Council in its Explanatory Report, which was also endorsed by Germany at the hearing before the Court, the duty under EU law to impose criminal sanctions would not apply to irregularities in matters of VAT. (56)

96. However, the Council’s Explanatory Report is simply the non-legally binding opinion of an institution of the European Union which, moreover, is not itself a party to the PIF Convention but merely took part in the associated preparatory work by drawing up the text of the Convention and recommending it to the Member States for adoption in accordance with their respective constitutional requirements (Article K.3(2)(c) EU).

97. The Council’s Explanatory Report cannot therefore be regarded as the authoritative interpretation of the PIF Convention, particularly since neither the Convention itself nor the additional protocol thereto makes any reference whatsoever to that report. The Court alone is entitled to give an interpretation of the PIF Convention which is legally binding within the European Union; this was made apparent from the very outset by the additional protocol to the PIF Convention, which empowered the Court to interpret that convention, and now follows from the second sentence of Article 19(1) TEU, Article 19(3) TEU and Article 267 TFEU.

98. In my view, the Court should not treat the Council’s Explanatory report on the PIF Convention any differently from the press releases which the EU institutions issue in connection with legislative acts or the statements entered in the minutes on the occasion of the adoption of such legal acts: it is settled case-law that such communications cannot be used for the purposes of interpreting a provision of secondary law if they are not referred to in the wording of that provision. (57)

99. That is the situation here. In order to justify the exclusion of VAT from the scope of the PIF Convention, the Council, in its Explanatory Report, refers only to the fact that VAT ‘is not an own resource collected directly for the account of the [European Union]’. (58) That particular consideration does not, however, appear in the wording of the PIF Convention and is not capable of justifying a restrictive interpretation of its scope.

100. The scope of the PIF Convention is actually very broadly defined. It is clear from Article 1(1)(b) of the Convention that its scope extends without restriction to all of the European Union’s ‘revenue’ from the ‘resources’ of its ‘general budget’. Those resources include not least the European Union’s own resources arising from VAT. (59) There is, after all, a direct link between the collection of VAT by the Member States and the availability to the European Union budget of the corresponding VAT resources. (60)

101. Furthermore, a broad interpretation of its scope as including VAT is consistent with the objective of the PIF Convention, which is intended, very generally, to combat fraud affecting the European Union's financial interests and by means of which such fraud is to be combatted with the utmost vigour. (61)

102. Restricting the scope of the PIF Convention exclusively to cases of fraud relating to customs duties and agricultural levies and contributions, on the other hand, would significantly reduce the contribution made by that legal instrument to the protection of the European Union's financial interests. Such a narrow interpretation of the scope of the PIF Convention, as the Council appears to have in mind, would be contrary to the rule to the effect that the interpretation of a provision of EU law proposed by an institution of the European Union must not affect the effectiveness of that provision. (62)

103. The PIF Convention therefore imposes a duty on the Member States to punish as a matter of criminal law cases of fraud affecting the European Union's financial interests in the field of VAT — and in any event fraud of some seriousness. That duty is particularly important here, given that, because of the circumstances in which VAT fraud often takes place, administrative penalties alone — in particular fines and additional charges for late payment — would be unlikely to have a sufficiently dissuasive effect. After all, many individuals and undertakings involved in such fraud are in an extremely precarious financial position in any event.

104. It is for the referring court to assess whether the criminal penalties provided for in the national system are 'effective, proportionate and dissuasive' within the meaning of Article 2(1) of the PIF Convention. That assessment must take into account the submissions made above: (63) the provision laying down the penalty in question must be analysed by reference to the role of that provision in the legislation as a whole, including the progress and special features of the procedure before the various national authorities, in each case in which that question arises.

105. If, in the light of all those criteria, the effect of national rules on limitation periods is, by virtue of the scheme of those rules, that the effective, proportionate and dissuasive penalties provided for are, in reality, likely to be imposed in fact only rarely, those rules will be contrary to the duty incumbent on Member States under Article 2 of the PIF Convention to provide for adequate criminal penalties for fraud affecting the European Union's financial interests.

C – *The impact on the dispute in the main proceedings of any incompatibility on the part of the national limitation regime with EU law*

106. In the event that the referring court reaches the conclusion, on the basis of the criteria set out above, that the national limitation regime, and in particular the provision, as referred to in the order for reference, contained in the last subparagraph of Article 160 of the Codice penale, as amended by Law No 251/2005, is contrary to EU law, consideration must be given finally to what impact that conclusion has on the dispute in the main proceedings.

107. It is settled case-law that the national courts are required to give full effect to EU law. (64)

108. To that end, they have a duty first and foremost to interpret and apply national law as a whole in a manner consistent with EU law. In so doing, the national courts are required to interpret national law as far as possible in the light of the wording and the purpose of the applicable provisions of EU law in order to achieve the result envisaged by those provisions. (65) Taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, they must do whatever lies within their jurisdiction with a view to ensuring that the provisions of European Union are fully effective and achieving an outcome consistent with the

objective pursued by EU law. (66)

109. In particular, the referring court will have to assess whether, on the basis of an interpretation consistent with EU law, it is able to achieve an outcome the effect of which is to suspend the limitation period for such time as the main proceedings are pending before the Italian criminal courts — or at least before particular judicial bodies.

110. Nevertheless, the obligation to interpret national provisions in a manner consistent with EU law is limited by general principles of law and it cannot serve as the basis for an interpretation of a national law contra legem. (67)

111. If the referring court were unable to interpret the national law in such a way as to achieve an outcome consistent with EU law, it would be required to give full effect to EU law, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, there being no requirement for that court to request or await the prior setting aside of such provision by legislative or other constitutional means. (68)

112. Consequently, the referring court would, if appropriate, have to refrain from applying a provision such as the last subparagraph of Article 160 of the Codice penale, as amended by Law No 251/2005, in the main proceedings if that provision were to reflect a systemic shortcoming which prevents the achievement of an outcome consistent with EU law because the limitation periods are excessively short.

113. More detailed consideration must be given first, however, to the question of whether such an approach is precluded by the general principles of EU law, namely the principle of the legality of penalties (*nullum crimen, nulla poena sine lege*). That principle is one of the general legal principles underlying the constitutional traditions common to the Member States (69) and now enjoys the status of a fundamental right of the European Union under Article 49 of the Charter of Fundamental Rights. In accordance with the requirement of homogeneity (first sentence of Article 52(3) of the Charter), in interpreting Article 49 of the Charter, regard must be had not least to Article 7 ECHR and the case-law of the European Court of Human Rights (ECtHR) on that provision.

114. The principle of the legality of penalties states that no one is to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed, and, furthermore, that a heavier penalty is not to be imposed than the one that was applicable at the time the criminal offence was committed (first and second sentences of Article 49(1) of the Charter). That principle goes hand in hand with the rule that directives cannot be relied upon directly in order to determine or aggravate liability in criminal law. (70)

115. Contrary to the view taken by Mr Anakiev and the Italian Government, however, in a case such as that at issue, there is no risk of any conflict with the principle of the legality of penalties. After all, from a material point of view, that principle requires only that legislation must provide a clear definition of offences and the penalties which they attract. (71) Provisions on limitation periods, however, say nothing about the criminal liability of an act or the penalty which that act attracts, but deal only with whether a criminal offence may be prosecuted, and, consequently, are not even caught by the rule of *nullum crimen, nulla poena sine lege*. (72) For the same reason, the principle of the retroactive application of the more lenient penalty (third sentence of Article 49(1) of the Charter of Fundamental Rights (73)) also does not apply to matters of limitation periods.

116. It is in this respect, moreover, that the present case differs fundamentally from *Berlusconi and Others*, which, unlike this dispute, concerned an amendment of the *substantive* provisions of the

national law, in particular the applicable framework of penalties for certain criminal offences, that gave rise, inter alia, to more lenient penalties and thus had an indirect impact on the limitation period for proceedings. (74)

117. Against that background, the requirements governing the legality of penalties are fully satisfied in a case such as that at issue here, given that the criminal liability of the conduct of which the defendants are accused and the penalty which that conduct attracts follow unaltered from Italian criminal law, more specifically from Articles 2 and 8 of Legislative Decree 74/2000. Neither the criminal liability of, nor the penalty for, the conduct in question follows in any way directly from provisions of EU law such as Article 4(3) TEU, Article 325 TFEU, Directive 2006/112, Regulation No 2988/95 or the PIF Convention.

118. Unlike in *Berlusconi and Others*, therefore, in this case, the application of requirements under EU law would not, by itself, give rise to obligations on the part of an individual. In particular, it would not determine or aggravate the liability in criminal law of individuals. It would simply — at a procedural level — release the national prosecution authorities from shackles which are contrary to EU law.

119. It cannot be inferred from the principle of the legality of penalties that the applicable rules on the length, course and interruption of the limitation period must of necessity always be determined in accordance with the statutory provisions that were in force at the time when the offence was committed. No legitimate expectation to that effect exists.

120. Rather, the period of time within which a criminal offence may be prosecuted can still be altered even after the offence has been committed, so long as the limitation period has not expired. (75) The position here is ultimately no different from that which obtains in the context of the application of new procedural rules to situations which, although they began in the past, have not yet come to an end. (76)

121. Within the context of the procedural autonomy enjoyed by the Member States, this means that, in all cases where the limitation period has not yet expired, (77) a measure of discretion is available to take into account assessments of EU law which the courts of the Member States must fully exhaust, with due regard for the principles of equivalence and effectiveness, when applying their respective national laws.

122. This does not mean, however, that *new* limitation periods would be derived *directly* from EU law. In any event, there are no provisions in Article 4(3) TEU, Article 325 TFEU, Regulation No 2988/95 or the PIF Convention that are sufficiently specific to be capable of being applied directly to individuals. The same is true — by reason not least of its legal nature — of Directive 2006/112. (78)

123. The length and course of the limitation periods must, rather, be the subject of specific provisions of national law which are consistent with EU law. In this regard, EU law has, at most, an *indirect effect* on the dispute in the main proceedings, in so far as it helps the national courts to set the correct parameters for applying domestic law in a manner consistent with EU law.

124. This does not involve the complete abolition of limitation but the application of an adequate limitation regime (79) which makes the imposition of effective, proportionate and dissuasive penalties in a fair trial of an appropriate length (second paragraph of Article 47 of the Charter of Fundamental Rights; first sentence of Article 6(1) ECHR) seem like a realistic prospect.

125. One of the steps to be taken by the referring court in this regard might be to apply the provisions on limitation *without* the absolute limitation period laid down in the last subparagraph of

Article 160 of the Codice penale, as amended by the Law No 251/2005. As I have already said, (80) it would appear from information supplied by the Commission at the hearing that Italian law does indeed provide for criminal offences — including in the area of economic crime — which are not subject to an absolute limitation period at all.

126. An alternative approach might conceivably be to apply the revised limitation periods applicable to tax offences, which have been extended by a third, as now provided for in Law No 148/2011. (81) (82) Finally, a further possibility would be to regard the earlier rules on limitation periods, as provided for in the Codice penale *before* its amendment by Law No 251/2005, as still being applicable to the present case.

127. Which of those various options is to be selected is ultimately a matter of national law and its interpretation, the assessment of which falls to the national courts alone. From the point of view of EU law, the only requirement is that the solution adopted should be applied in a fair trial (second paragraph of Article 47 of the Charter of Fundamental Rights, first sentence of Article 6(1) ECHR), in a non-discriminatory manner and on the basis of clear, comprehensible and generally applicable criteria.

VII – **Conclusion**

128. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions referred to it by the Tribunale di Cuneo:

(1) Articles 4(3) TEU and 325 TFEU, Regulation (EC, Euratom) No 2988/95 and Directive 2006/112/EC are to be interpreted as meaning that they require the Member States to provide for effective, proportionate and dissuasive penalties for irregularities in matters of VAT.

(2) Article 2(1) of the Convention on the protection of the European Communities' financial interests, signed in Luxembourg on 26 July 1995, requires the Member States to punish fraud in matters of VAT by means of effective, proportionate and dissuasive criminal penalties which must, in serious cases of fraud at least, also include penalties involving deprivation of liberty.

(3) A provision of national law on limitation periods for proceedings which, for reasons relating to the scheme of that provision, has the effect in many cases of exempting from punishment the perpetrators of fraud in matters of VAT is incompatible with the aforementioned provisions of EU law. In pending criminal proceedings, the national courts must refrain from applying such a provision.

1 – Original language: German.

2 – See Article 2(1)(b) 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), 'the Own Resources Decision'.

3 – Judgment in *Berlusconi and Others* (C?387/02, C?391/02 and C?403/02, EU:C:2005:270).

4 – Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1).

5 – Convention on the protection of the European Communities' financial interests, signed in Luxembourg on 26 July 1995 (OJ 1995 C 316, p. 49). The abbreviation 'PIF' stands for the French version of the phrase 'protection of financial interests' ('*protection des intérêts financiers*').

6 – Council Directive 2006/112/EC of 28 November 2006 on the common system of value

added tax (OJ 2006 L 347, p. 1).

7 – Treaty on European Union, as amended by the Treaty of Maastricht.

8 – OJ 1995 C 316, p. 48.

9 – Criminal Code.

10 – *GURI* No 285 of 7 December 2005.

11 – Legislative Decree.

12 – Legislative Decree 74/2000 is entitled '*Nuova disciplina dei reati in materia di imposte sui redditi e sul valore aggiunto*' (New rules governing offences in matters of income tax and VAT) and is published in *GURI* No 76 of 31 March 2000.

13 – The term 'missing traders' refers to undertakings exclusively engaged in the production of tax documentation for the purposes of tax evasion.

14 – In the language of the case: udienza preliminare.

15 – The functions of Tribunale di Mondovì were since consolidated with those of the Tribunale di Cuneo.

16 – Giudice dell'Udienza Preliminare.

17 – The only exceptions to its jurisdiction to give preliminary rulings are certain parts of EU law relating to the Common Foreign and Security Policy (see the sixth sentence of the second subparagraph of Article 24(1) TEU and Article 275(1) TFEU).

18 – Judgments in *Cowan* (186/87, EU:C:1989:47, paragraph 19); *Placanica* (C?338/04, C?359/04 and C?360/04, EU:C:2007:133, paragraph 68); and *Achughbabian* (C?329/11, EU:C:2011:807, paragraph 33).

19 – Judgment in *Åkerberg Fransson* (C?617/10, EU:C:2013:105, paragraphs 27 and 28).

20 – Treaty on European Union, as amended by the Treaty of Maastricht.

21 – Protocol No 36 to the EU Treaty and the FEU Treaty (OJ 2008 C 115, p. 322).

22 – See to this effect the judgment in *Wery?ski* (C?283/09, EU:C:2011:85, paragraphs 30 and 31).

23 – Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests, signed in Brussels on 29 November 1996 (OJ 1997 C 151, p. 1). Like the PIF Convention itself beforehand, this additional protocol was also concluded on the basis of Article K.3(2)(c) EU and entered into force on 17 October 2002.

24 – Treaty on European Union, as amended by the Treaty of Amsterdam.

25 – See, on the one hand, the declaration by the Italian Republic under Article 35(2) and (3)(b) EU (notice published in OJ 1999 L 114, p. 56) and, on the other hand, the declaration by the Italian Republic of 19 July 2002 under the additional protocol to the PIF Convention, the latter being available for download on the following webpage of the Council of the European Union (last visited

on 20 February 2015): http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/ratification/?v=decl&aid= 1996090&pid=I.

26 – Judgments in *Beck and Bergdorf* (C?355/97, EU:C:1999:391, paragraph 22); *Régie Networks* (C?333/07, EU:C:2008:764, paragraph 46); and *Križan and Others* (C?416/10, EU:C:2013:8, paragraph 54).

27 – Judgments in *Bosman* (C?415/93, EU:C:1995:463, paragraph 61); *Beck and Bergdorf* (C?355/97, EU:C:1999:391, paragraph 22); *Régie Networks* (C?333/07, EU:C:2008:764, paragraph 46); and *Križan and Others* (C?416/10, EU:C:2013:8, paragraphs 53 and 54).

28 – See, inter alia, judgments in *Berlusconi and Others* (C?387/02, C?391/02 and C?403/02, EU:C:2005:270) and *Åkerberg Fransson* (C?617/10, EU:C:2013:105).

29 – See to this effect judgment in *Berlusconi and Others* (C?387/02, C?391/02 and C?403/02, EU:C:2005:270) and order in *Mulliez and Others* (C?23/03, C?52/03, C?133/03, C?337/03 and C?473/03, EU:C:2006:285), in which the Court made no mention of the objections of inadmissibility raised by various parties to the proceedings but proceeded directly to give answers on the substance of the questions referred.

30 – See points 57 to 72 of this Opinion, below.

31 – The Court replied to the same effect, in the judgment in *E and F* (C?550/09, EU:C:2010:382), to a request for a preliminary ruling from a German court which was also required to rule on the opening of the criminal trial on the basis of an indictment drawn up by the Public Prosecutor's Office. See also — more generally — judgments in *AGM-COS.MET* (C?470/03, EU:C:2007:213, paragraph 45) and *Coleman* (C?303/06, EU:C:2008:415, paragraphs 28 to 32).

32 – Judgments in *Asjes and Others* (209/84 to 213/84, EU:C:1986:188, paragraphs 71 and 72); *Vlaamse Reisbureaus* (311/85, EU:C:1987:418, paragraph 10); *Cipolla and Others* (C?94/04 and C?202/04, EU:C:2006:758, paragraphs 46 and 47); and *API and Others* (C?184/13 to C?187/13, C?194/13, C?195/13 and C?208/13, EU:C:2014:2147, paragraphs 28 and 29).

33 – See to that effect judgments in *Germany* v *Commission* (C?156/98, EU:C:2000:467, paragraph 22); *Commission* v *Government of Gibraltar and United Kingdom* (C?106/09 P and C?107/09 P, EU:C:2011:732, paragraphs 72 and 73); *3M Italia* (C?417/00, EU:C:2012:184, paragraphs 41 to 44); and *P* (C?6/12, EU:C:2013:525, paragraph 18).

34 – See in that regard points 74 to 121 of this Opinion, below.

35 – The latter point is emphasised in the judgment in *Caja de Ahorros y Monte de Piedad de Madrid* (C?484/08, EU:C:2010:309, paragraph 46), in connection with the principle of an open market economy with free competition, also enshrined in Article 119 TFEU.

36 – See to the same effect the judgment in *Échirolles Distribution* (C?9/99, EU:C:2000:532, paragraph 25), again in connection with the principle of an open market economy with free competition enshrined in Article 119 TFEU.

37 – Judgments in *Franzén* (C?189/95, EU:C:1997:504, paragraph 79) and *Belgian Electronic Sorting Technology* (C?657/11, EU:C:2013:516, paragraph 28), as well as order in *Szabó* (C?204/14, EU:C:2014:2220, paragraph 16).

38 – Judgments in *Alsatel* (247/86, EU:C:1988:469, paragraphs 7 and 8) and *Hennen Olie* (C?302/88, EU:C:1990:455, paragraph 20); see also the recent Opinion of Advocate General

Mengozzi in *Wagner-Raith* (C?560/13, EU:C:2014:2476, points 16 to 48).

39 – Judgments in *SARPP* (C?241/89, EU:C:1990:459, paragraph 8); *Ritter-Coulais* (C?152/03, EU:C:2006:123, paragraph 29); *Promusicae* (C?275/06, EU:C:2008:54, paragraph 42); *Aventis Pasteur* (C?358/08, EU:C:2009:744, paragraph 50); and *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve* (C?562/13, EU:C:2014:2453, paragraph 37).

40 – Judgments in *Commission* v *Greece* (68/88, EU:C:1989:339, paragraph 24); *Berlusconi and Others* (C?387/02, C?391/02 and C?403/02, EU:C:2005:270, paragraph 65); *Adeneler and Others* (C?212/04, EU:C:2006:443, paragraph 94); and *Fiamingo and Others* (C?362/13, C?363/13 and C?407/13, EU:C:2014:2044, paragraphs 62 and 64).

41 – Judgments in *Commission* v *Greece* (68/88, EU:C:1989:339, paragraphs 23 and 24) and *Berlusconi and Others* (C?387/02, C?391/02 and C?403/02, EU:C:2005:270, paragraphs 64 and 65); see to the same effect the judgment in *SGS Belgium and Others* (C?367/09, EU:C:2010:648, paragraph 41).

42 – Judgment in *Åkerberg Fransson* (C?617/10, EU:C:2013:105, paragraphs 25 and 36).

43 – Article 2(1)(b) of the Own Resources Decision; see also the judgments in *Commission* v *Italy* (C?132/06, EU:C:2008:412, paragraph 39); *Belvedere Costruzioni* (C?500/10, EU:C:2012:186, paragraph 22); and *Commission* v *Germany* (C?539/09, EU:C:2011:733, paragraphs 71 and 72).

44 – Judgment in *Åkerberg Fransson* (C?617/10, EU:C:2013:105, paragraphs 26 and 36).

45 – See points 92 to 105 of this Opinion, below.

46 – Judgment in *Åkerberg Fransson* (C?617/10, EU:C:2013:105, paragraph 34). It is clear from Article 6 of Regulation No 2988/95 that Member States are free to use *criminal* penalties.

47 – See to that effect — albeit in a different context — the judgments in *Colson and Kamann* (14/83, EU:C:1984:153, paragraph 28); *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraphs 102 to 104); and *Fiamingo and Others* (C?362/13, C?363/13 and C?407/13, EU:C:2014:2044, paragraph 61 *in fine*).

48 – As I have pointed out before, in my Opinion in *Berlusconi and Others* (C?387/02, C?391/02 and C?403/02, EU:C:2004:624, point 91).

49 – See again in this regard my Opinion in *Berlusconi and Others* (C?387/02, C?391/02 and C?403/02, EU:C:2004:624, point 107).

50 – See my Opinion in *Berlusconi and Others* (C?387/02, C?391/02 and C?403/02, EU:C:2004:624, point 108).

51 – This possibility is made available to the Member States by Article 6 of Regulation No 2988/95.

52 – Judgment in *Belvedere Costruzioni* (C?500/10, EU:C:2012:186, paragraph 28).

53 – Judgment in *Commission* v *Italy* (C?132/06, EU:C:2008:412, paragraphs 43 to 47 and 52).

54 – See to the same effect my Opinion in *Berlusconi and Others* (C?387/02, C?391/02 and C?403/02, EU:C:2004:624, point 110).

55 – Explanatory Report on the Convention on the protection of the European Communities' financial interests, approved by the Council on 26 May 1997 (OJ 1997 C 191, p. 1); in that report, see in particular the explanations relating to Article 1(1) of the Convention (OJ 1997 C 191, p. 4, last paragraph).

56 – The German Government takes the view that the inclusion of VAT within the areas in which EU law requires the Member State to introduce criminal penalties is only provided for in a legislative proposal by the Commission, which is still pending: Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests, COM(2001) 272 final (OJ 2001 C 240 E, p. 125).

57 – Judgments in *Antonissen* (C?292/89, EU:C:1991:80, paragraph 18); *Skov and Bilka* (C?402/03, EU:C:2006:6, paragraph 42); and *Quelle* (C?404/06, EU:C:2008:231, paragraph 32).

58 – See in this regard the relevant passage from the Explanatory Report in OJ 1997 C 191, p. 4, final paragraph.

59 – Article 2(1)(b) of the Own Resources Decision.

60 – Judgments in *Commission* v *Germany* (C?539/09, EU:C:2011:733, paragraph 72) and *Åkerberg Fransson* (C?617/10, EU:C:2013:105, paragraph 26).

61 – First and second recitals in the preamble to the Council Act drawing up the PIF Convention (OJ 1995 C 316, p. 48).

62 – *Commission* v *Belgium* (C?437/04, EU:C:2007:178, at the end of paragraph 56).

63 – See above, points 86 to 90 of this Opinion.

64 – Opinion 1/09 (EU:C:2011:123, paragraph 68); with specific regard to directives, see also, inter alia, the judgment in *Kücükdeveci* (C?555/07, EU:C:2010:21, paragraph 48).

65 – With regard to the interpretation of national law in a manner consistent with primary law, see the judgments in *Murphy and Others* (157/86, EU:C:1988:62, paragraph 11) and *ITC* (C?208/05, EU:C:2007:16, paragraph 68); with regard to the interpretation of national law in a manner consistent with secondary law, see the judgments in *Marleasing* (C?106/89, EU:C:1990:395, paragraph 8); *Pfeiffer and Others* (C?397/01 to C?403/01, EU:C:2004:584, paragraph 113); *Dominguez* (C?282/10, EU:C:2012:33, paragraph 24); and *Asocia?ia Accept* (C?81/12, EU:C:2013:275, paragraph 71).

66 – Judgments in *Pfeiffer and Others* (C?397/01 to C?403/01, EU:C:2004:584, paragraphs 115 to 119); *Adeneler and Others* (C?212/04, EU:C:2006:443, paragraph 111); *Dominguez* (C?282/10, EU:C:2012:33, paragraph 27); *Association de médiation sociale* (C?176/12, EU:C:2014:2, paragraph 38); and *Schoenimport 'Italmoda' Mariano Previti* (C?131/13, C?163/13 and C?164/13, EU:C:2014:2455, paragraph 52); similarly, see the earlier judgment in *Colson and Kamann* (14/83, EU:C:1984:153, paragraph 28: 'in so far as it is given discretion to do so under national law').

67 – Judgment in *Association de médiation sociale* (C?176/12, EU:C:2014:2, paragraph 39); see also judgments in *Kolpinghuis Nijmegen* (80/86, EU:C:1987:431, paragraph 13) and *Adeneler and Others*

(C?212/04, EU:C:2006:443, paragraph 110).

68 – Judgments in *Simmenthal* (106/77, EU:C:1978:49, paragraphs 21 and 24); *Melki and Abdeli* (C?188/10 and C?189/10, EU:C:2010:363, paragraph 43); and *Åkerberg Fransson* (C?617/10, EU:C:2013:105, paragraph 45).

69 – Judgments in *Advocaten voor de Wereld* (C?303/05, EU:C:2007:261, paragraph 49) and *Intertanko and Others* (C?308/06, EU:C:2008:312, paragraph 70).

70 – Judgments in *X* (14/86, EU:C:1987:275, paragraph 20); *Kolpinghuis Nijmegen* (80/86, EU:C:1987:431, paragraph 13); *X* (C?74/95 and C?129/95, EU:C:1996:491, paragraph 24); *Berlusconi and Others* (C?387/02, C?391/02 and C?403/02, EU:C:2005:270, paragraph 74); and *Grøngaard and Bang* (C?384/02, EU:C:2005:708, paragraph 30).

71 – Judgments in *Advocaten voor de Wereld* (C?303/05, EU:C:2007:261, paragraph 50); *Intertanko and Others* (C?308/06, EU:C:2008:312, paragraph 71); and *Lafarge* v *Commission* (C?413/08 P, EU:C:2010:346, paragraph 94).

72 – See in this regard the judgments of the ECtHR in *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 149, ECHR 2000-VII, and *Scoppola v. Italy (no. 2)*, no. 10249/03, § 110, 17 September 2009; in connection with the judgment of the ECtHR in *Coëme and Others v. Belgium*, see: judgment No 236 of the Italian Constitutional Court (Corte costituzionale) of 19 July 2011, paragraph 15; to the same effect, see the earlier judgment of the German Federal Constitutional Court (Bundesverfassungsgericht) (*BVerfGE* 25, 269, 286 et seq.).

73 – On the fact that that principle is enshrined in the constitutional traditions common to the Member States and in the general legal principles of EU law, see also the judgment in *Berlusconi and Others* (C?387/02, C?391/02 and C?403/02, EU:C:2005:270, paragraphs 68 and 69) and my Opinion in that case (EU:C:2004:624, points 155 to 157). The ECtHR, too, has recently recognised that principle in the context of Article 7 ECHR (judgment in *Scoppola v. Italy (no. 2)*, no. 10249/03, §§ 105 to 109, 17 September 2009).

74 – See the judgment in *Berlusconi and Others* (C?387/02, C?391/02 and C?403/02, EU:C:2005:270, paragraphs 18 to 22) and my Opinion in that case (EU:C:2004:624, point 31).

75 – Judgment of the ECtHR in *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 149, ECHR 2000-VII.

76 – See to that effect judgments in *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270, paragraph 9); *Pokrzeptowicz-Meyer* (C?162/00, EU:C:2002:57, paragraph 49); *Molenbergnatie* (C?201/04, EU:C:2006:136, paragraph 31); and *Commission* v *Spain* (C?610/10, EU:C:2012:781, paragraph 45). See also my Opinion in *Commission* v *Moravia Gas Storage* (C?596/13 P, EU:C:2014:2438, points 28 to 31).

77 – According to the information supplied by the referring court, prosecution of the offences forming the subject-matter of the indictment against one of the defendants, Mr Anakiev, has already become time-barred.

78 – Judgments in *Arcaro* (C?168/95, EU:C:1996:363, paragraph 36); *X* (C?74/95 and C?129/95, EU:C:1996:491, paragraph 23); and *Berlusconi and Others* (C?387/02, C?391/02 and C?403/02, EU:C:2005:270, paragraph 73).

79 – See in this regard points 87 and 88 of this Opinion, above.

80 – See in this regard point 81 of this Opinion, above.

81 – See Article 2(36-21)(1) thereof (*GURI* No 216 of 16 September 2011).

82 – One of the defendants, Mr Anakiev, referred to these new rules in the proceedings before the Court.