OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 13 July 2017(1)

Case C?574/15

Mauro Scialdone

(Request for a preliminary ruling from the Tribunale di Varese (District Court, Varese, Italy))

(Reference for a preliminary ruling — Value added tax (VAT) — Directive 2006/112 — Article 4(3) TEU — Principle of sincere cooperation — Article 325 TFEU — Protection of the financial interests of the Union — Convention on the protection of the European Communities' financial interests (PIF Convention) — National law providing for criminal penalties relating to failure to pay withholding tax and VAT by the legal deadline — Higher financial threshold applicable to VAT related offences — National law providing for the extinction of criminal liability if VAT is paid — Member States' obligation to establish effective, proportionate and dissuasive penalties — Charter of Fundamental Rights of the European Union — Article 49(1) of the Charter — Principle of legality — Retroactive application of the more lenient penalty — Legal certainty)

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I. Introduction

1. In Italy, the failure to pay correctly declared VAT within the deadline prescribed by the law leads to criminal sanctions. Mr Mauro Scialdone, as the sole director of a company that failed to pay within the prescribed deadlines, was therefore charged for committing a criminal offence.

2. While criminal proceedings against Mr Scialdone were ongoing, the applicable national law was amended. First, the amendment raised the threshold above which failure to pay VAT is deemed a criminal offence considerably. It also established different thresholds with regard to VAT and withholding tax. Second, it added a new ground for extinction of criminal liability if the tax debt, including administrative penalties and interest, is paid in full before the first instance trial is declared open.

3. After the new amendment entered into force, Mr Scialdone's conduct would no longer have been punishable on the basis of the principle of retroactive application of the more lenient criminal penalty. The amount of VAT he failed to pay on time is below the new threshold. The referring court nonetheless entertains doubt as to whether the amendment is compatible with Article 4(3) TEU, Article 325 TFEU, the VAT Directive, (2) and with the Convention on the protection of the European Communities' financial interests. (3) Does the new sanctions regime for failure to pay VAT respect the duty to establish sanctions for infringements of EU law in a manner analogous to those imposed for similar infringements under national law? Is it compliant with the obligation of Member States to impose dissuasive and effective sanctions? Those are the core questions that the Court is invited to answer in the present case.

4. In addition, however, the referring court also suggested that if the amendment at issue were to be declared incompatible with EU law, that amendment should be set aside. The effect would be the continuation of the criminal prosecution of Mr Scialdone. The present case therefore raises fundamental issues concerning the principles of legality and legal certainty, and, in particular, the retroactive application of the more lenient penalty enshrined in Article 49(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

II. Legal framework

A. EU law

1. The Charter

5. Article 49 of the Charter sets out the principles of legality and proportionality of criminal offences and penalties. Its first paragraph reads as follows: 'No one shall 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. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.'

2. Article 325 TFEU

6. According to Article 325(1) TFEU, '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’.

7. Article 325(2) TFEU provides that: ‘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.’

3. The PIF Convention

8. Article 1 of the PIF Convention provides that:

‘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.

…

4. The intentional nature of an act or omission as referred to in paragraphs 1 and 3 may be inferred from objective, factual circumstances.’

9. According to Article 2(1) of the PIF Convention ‘each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1, and participating in, instigating, or attempting the conduct referred to in Article 1(1), are punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty which can give rise to extradition, it being understood that serious fraud shall be considered to be fraud involving a minimum amount to be set in each Member State. This minimum amount may not be set at a sum exceeding [EUR] 50 000’.

4. The VAT Directive

10. According to Article 206 of the VAT Directive, ‘any taxable person liable for payment of VAT must pay the net amount of the VAT when submitting the VAT return provided for in Article 250. Member States may, however, set a different date for payment of that amount or may require interim payments to be made’.

11. Article 250(1) of the VAT Directive provides that: ‘Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.’

12. Under Article 273 of the VAT Directive, ‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers. ...’.

5. Regulation No 2988/95

13. According to Article 1(2) of Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities’ financial interests: (4) ‘“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.’

B. **Italian law**

14. Articles 10bis and 10ter of Legislative Decree 74/2000, (5) at the time of the facts of the present case and until 21 October 2015, provided as follows:

‘Article 10bis

Whoever fails to pay within the period fixed for the filing of the withholding agent’s annual tax return, the withholding tax resulting from the certification issued to the taxpayers in respect of whom tax is withheld, shall be sentenced to a term of imprisonment of six months to two years when that amount exceeds EUR 50 000 for each tax period.

Article 10ter

Article 10bis shall apply also, within the limits laid down therein, to any person who fails to pay the value added tax owed on the basis of the annual return, by the deadline for payment on account in relation to the following tax period.’

15. Article 13(1) of Legislative Decree 74/2000 provided for a reduction in the penalties on account of mitigating circumstances, with a reduction of the penalty of up to one third and exclusion of ancillary penalties if the tax debts, including administrative sanctions, were extinguished by payment before the proceedings at first instance were declared opened.

16. As a result of the amendments introduced, respectively, by Articles 7 and 8 of Legislative Decree 158/2015, (6) Articles 10bis and 10ter of Legislative Decree 74/2000 are worded as follows (as from 22 October 2015):

‘Article 10bis

Whoever fails to pay within the period fixed for the filing of the withholding agent’s annual tax return the withholding tax payable on the basis of that return or resulting from the certification issued to the taxpayers in respect of whom tax is withheld, shall be sentenced to a term of

imprisonment of six months to two years when that amount exceeds EUR 150 000 for each tax period.

Article 10ter

Whoever fails to pay, within the period fixed for payment on account in relation to the following tax period, the value added tax payable on the basis of the annual return, shall be sentenced to a term of imprisonment of six months to two years when that amount exceeds EUR 250 000 for each tax period.'

17. Legislative Decree 158/2015 also modified Article 13(1) of Legislative Decree 74/2000. It has added a new ground for extinction of criminal liability. It reads as follows: 'The offences set out in Articles 10bis, 10ter and 10quater, first paragraph, shall not be punishable if, before the proceedings at first instance are declared opened, the tax debts, including administrative penalties and interest, have been extinguished by the payment in full of the sums owed ...'

18. Finally, a separate provision governs administrative tax penalties. Under Article 13(1) of Legislative Decree No 471/1997: (7) 'Any person who fails to pay, in whole or in part, within the prescribed periods, instalments, periodic payments, the equalisation payment or the balance of tax due on the tax return, after deduction in those cases of the amount of the periodic payments and instalments, even if they have not been paid, shall be liable to an administrative penalty amounting to 30% of each outstanding amount, even where, after the correction of clerical or calculation errors noted during the inspection of the annual tax return, it transpires that the tax is greater or that the deductible surplus is less. …'

III. **Facts, procedure and questions referred**

19. The Agenzia delle Entrate ('the Revenue Agency') carried out an inspection of the company Siderlaghi Srl. The company had duly declared its VAT for the financial year of 2012. The amount of VAT due totalled EUR 175 272. National law required that that amount be paid at the end of a period fixed for payment in relation to the following tax period, that is, on 27 December 2013. The inspection revealed that Siderlaghi Srl had failed to pay the VAT owed within the deadline.

20. The Revenue Agency issued notice of the debt to Siderlaghi Srl. The company opted to pay the tax in instalments. This meant, under national law, that the amount of the administrative sanctions applicable could be reduced by two thirds.

21. As Mr Scialdone is the sole director of Siderlaghi Srl the public prosecutor initiated a criminal procedure against him as the legal representative of the company for failure to pay VAT within the prescribed period. The prosecutor's office charged Mr Scialdone with the criminal offence under Article 10ter of Legislative Decree 74/2000. It requested the Tribunale di Varese (District Court, Varese, Italy) (the referring court) to order that he pay a criminal fine of EUR 22 500.

22. After the criminal procedure against Mr Scialdone was initiated, Legislative Decree 158/2015 amended Articles 10bis and 10ter of Legislative Decree 74/2000 and also inserted a ground for extinction of criminal liability through Article 13 of Legislative Decree 74/2000.

23. The effects of those amendments are that, first, the thresholds above which failure to pay the tax constitutes a criminal offence have been raised. The original threshold fixed at EUR 50 000 for offences relating to failure to pay withholding tax and VAT (note that the same threshold applied to both types of tax) increased to EUR 150 000 for withholding tax and EUR 250 000 for VAT. Second, the offence ceases to be punishable if the tax debt, including the administrative penalties and interest, is paid before the trial at first instance is declared open.

24. The national court explains that, in the present case, the defendant is charged with failing to pay VAT in an amount corresponding to the sum of EUR 175 272. The effect of the amendments introduced by Legislative Decree 158/2015 is that his conduct ceases to be of a criminal nature, as that amount falls below the new minimum threshold of EUR 250 000. The more recent provision would, as a provision more favourable to the offender, be applicable. However, if the new rules were to be declared incompatible with EU law, those rules would have to be set aside. As a consequence, the conduct of the defendant could still give rise to a criminal conviction.

25. With regard to the new ground for extinction of criminal liability, the national court explains that due to the fact that Siderlaghi Srl has opted for payment of the debt in instalments, it is likely that payment will be made before trial proceedings commence. Hence, the request for a penalty order lodged by the public prosecutor would have to be rejected. However, if that new ground for extinction of criminal liability were to be considered to be incompatible with EU law, the national court would be able to rule on the criminal liability of the defendant.

26. Furthermore, if EU law were to be construed in the manner proposed by the referring court, Member States would be obliged to sanction the failure to pay VAT of an amount of at least EUR 50 000 and upwards by imprisonment. According to that court, this would mean that the infringement in the present case would have to be considered as particularly serious. Thus, the penalty requested by the public prosecutor could be rejected by the national judge inasmuch as the sanction proposed, which binds the national judge, excludes imprisonment. That exclusion considerably reduces, according to the national court, the effectiveness of the sanction.

27. Within this factual and legal context, the Tribunale di Varese (District Court, Varese) has stayed proceedings and referred the following questions for a preliminary ruling:

‘(1) May EU law, and more particularly Article 4(3) TEU, in conjunction with Article 325 TFEU and Directive 2006/112/EC, which lay down for the Member States the duty of equal treatment so far as concerns policies relating to penalties, be interpreted as precluding the enactment of a provision of national law providing that the penal consequences of failure to pay VAT follow once a financial threshold is crossed greater than the threshold provided for in the case of failure to pay income tax?

(2) May EU law, and more particularly Article 4(3) TEU in conjunction with Article 325 TFEU and Directive 2006/112, which oblige the Member States to provide effective, dissuasive and proportionate penalties to protect the financial interests of the European Union, be interpreted as precluding the enactment of a national provision which exempts the defendant (whether a director, legal representative, person to whom responsibility for fiscal matters has been delegated or an accessory to the offence) from liability to punishment, if the entity with legal personality concerned has made late payment both of the tax itself and of the administrative penalties owed in connection with VAT, even though the tax assessment has already been made, criminal proceedings and indictment initiated, and the establishment of *inter partes* proceedings duly confirmed, but before trial proceedings have been declared opened, in a system that does not impose on that director, legal representative, or delegate and accessory to the offence any other penalty, not even an administrative penalty?

(3) Must the concept of fraud governed by Article 1 of the PIF Convention be interpreted as encompassing cases of failure to pay or of partial or late payment of VAT and, consequently, does Article 2 of that convention require the Member State to punish with a term of imprisonment failure to pay or partial or late payment of VAT in relation to sums in excess of EUR 50 000?

If the answer is in the negative, it will be necessary to determine whether the rule under Article 325 TFEU, which requires the Member States to provide penalties, including criminal penalties, which are dissuasive, proportionate and effective, must be interpreted as precluding national legislation which exempts from criminal and administrative liability the directors and legal representatives of legal persons, or the persons to whom the functions of those legal persons are delegated and persons who are accessories to the offence, for failure to pay or partial or late payment of VAT in relation to sums equivalent to three or five times the minimum threshold laid down in case of fraud, that is to say, EUR 50 000.’

28. The German, Italian, Netherlands, and Austrian Governments as well as the European Commission have presented written observations. All those interested parties, with the exception of the Austrian Government, presented oral argument at the hearing held on 21 March 2017.

IV. **Analysis**

29. The three questions posed by the referring court seek to ascertain whether the amendments made by Legislative Decree 158/2015 regarding failure to pay declared VAT are compliant with EU law. The referring court has posed its questions with regard to Article 4(3) TEU, Article 325 TFEU, the PIF Convention and the VAT Directive.

30. The legislative landscape of the present case is indeed somewhat complex. That is why I will first analyse which specific EU law provisions invoked by the national court are applicable to the present case (A), before proposing answers to the three questions posed by the referring court (B). To conclude, I will dwell on the consequences a potential finding of incompatibility with EU law could (or rather should not) have in the main proceedings (C).

A. **The EU law provisions applicable to the present case**

1. *The PIF Convention*

31. All of the interested parties that submitted observations before the Court agree that the PIF Convention does not apply in the present case. Their reasons for coming to that conclusion, however, differ.

32. The Netherlands Government argues that the PIF Convention is not applicable to VAT. The other interested parties that presented observations (as well as the Netherlands Government, in a subsidiary argument) submit that the offence related to failure to pay VAT at issue in the present case is not covered by the concept of ‘fraud’ under the PIF Convention.

33. Two different arguments are thus being advanced. The first one denies the applicability of the PIF Convention to VAT per se, in general. The second argument maintains that although VAT might perhaps be covered by the PIF Convention, the specific type of behaviour at stake in the present case is not. I will examine these two arguments in turn.

(a) *The PIF Convention and VAT*

34. In *Taricco*, the Court stated that the concept of ‘fraud’ defined in Article 1 of the PIF Convention ‘covers revenue derived from applying a uniform rate to the harmonised VAT assessment bases determined according to EU rules’. (8)

35. In the present case, the Netherlands Government has invited the Court to revisit that finding. In its view, VAT does not form part of the concept of ‘revenue’ for the purposes of the PIF Convention. According to the Netherlands Government, the Member States as parties to the PIF Convention provided for an authentic interpretation of the scope of the notion of ‘revenue’ according to Article 31 of the Vienna Convention on the Law of the Treaties (9) in an explanatory report. (10) That report explicitly excludes VAT from the notion of ‘revenue’ in Article 1(1) of the PIF Convention. (11) The Netherlands Government further argues that the Court has already taken into account declarations and explanatory reports as elements of authoritative interpretation: it ought to do so also in the present case.

36. I disagree with the proposition that the 1997 Explanatory Report would represent any kind of ‘authentic interpretation’ of a convention signed between the Member States two years earlier. In my view, the arguments of the Netherlands Government can be dismissed without the Court needing to make any pronouncements on the complex issue of the role of the Vienna Convention in the interpretation of conventions between the Member States.(12)

37. On the level of a general proposition, I certainly agree with the Netherlands Government that, within the EU legal system, the will or intent of the author of the act plays a *certain* interpretative role. (13) Such legislative intent might be expressed within the same document, as is the case with a preamble, or in a separate document. For instance, in the past, the Court has referred to preparatory works, (14) declarations annexed to the Treaties, (15) or certain explanatory documents to interpret primary law. (16)

38. However, there are two elements that have to be present for such documents or pronouncements to be seen as an expression of the drafters’ intent: institutional and temporal. *Institutionally*, such documents have to be discussed or approved by the same parties or bodies that adopted the final instrument or participated in its adoption. *Temporally*, in order to be said to genuinely reflect the state of mind of the drafter(s) during the decision-making process, such documents normally ought to be drawn up either in the course of the drafting or, at the latest, at the point when the instrument was adopted.

39. The problem with the Netherlands Government's argument is that it fails on both these accounts. The 1997 Explanatory Report at issue in the present case was not adopted by the same parties, namely the Member States, but was approved by the Council — which is not a party to the Convention. (17) Furthermore, the Convention was signed in 1995. The Explanatory Report is dated from 1997.

40. The fact that the Explanatory Report cannot be said to be endowed with any 'authentic' interpretative value in the present case does not preclude, however, that such an explanatory report has a certain *persuasive* force. The Explanatory Report was, after all, approved by the institution responsible for preparing the draft that was to be submitted to the Member States as contracting parties. (18) In similar situations, the Court has relied on explanatory reports on different occasions in the past. (19) In particular, it has taken into consideration explanatory reports drawn up by the Council with regard to conventions which, such as the PIF Convention, have been adopted under Article K.3 TEU. (20)

41. The interpretative value of similar explanatory reports is nonetheless different. Such explanatory reports are not *the* 'authentic' interpretation, but *one of* the interpretative arguments that may be taken into account, and then weighted together and against other arguments drawn from the text, logic, further context and purpose of the interpreted provision. More importantly still, the use of such arguments encounters its clear limits in the text of the legal provision interpreted. Thus, such a report cannot be relied upon for reaching an interpretation that goes against the wording, and systematic and teleological interpretation of a provision.

42. As already lucidly explained by Advocate General Kokott in her Opinion in *Taricco* (21) that would be precisely the result that the Court would come to if it were to follow the argument advanced by the Netherlands Government.

43. Indeed, the exclusion of VAT from the notion of 'revenue' in the definition of fraud under the PIF Convention does not result from its wording. Quite to the contrary, the PIF Convention suggests through its Article 1(1)(b) a broad interpretation of the concept of 'revenue', as there is a general reference to the 'resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities'. VAT is part of the EU's own resources, which are at the core of the notion of 'revenue'. (22) Furthermore, the PIF Convention does not lay down any condition relating to direct collection for the European Union's accounts. (23) This broad understanding is supported by the objectives laid down in the preamble of the PIF Convention — 'noting that fraud affecting Community revenue and expenditure in many cases is not confined to a single country and is often committed by organised criminal networks', stating that 'protection of the European Communities' financial interests calls for the criminal prosecution of fraudulent conduct injuring those interests', and adding that there is a need to 'make such conduct punishable with effective, proportionate and dissuasive criminal penalties'. All in all, such statements may be seen as aiming at the VAT system as well. Finally, the fact that the PIF Convention refers to 'tax' offences, is another indication that VAT is not excluded from the concept of financial interests of the Union. (24)

44. As a result, the Explanatory Report cannot be used to significantly modify the scope of a provision against its wording, the system and the objectives laid down in the PIF Convention. The exclusion of one component of the system of the EU's own resources from the scope of the PIF Convention by means of such a report would go far beyond mere 'explanation'. It would effectively amount to a modification of the scope of the PIF Convention.

45. It should be added that such a modification was certainly possible. Had it really been the intention of the Contracting Parties to exclude VAT from the scope of the PIF Convention, nothing

would have prevented them from including a modified definition of the notion of ‘revenue’ in a subsequent protocol. Indeed, when modifications of the scope of the PIF Convention were deemed necessary, this was done through the adoption of specific protocols on two different occasions. (25)

46. Therefore, I see no good reason to depart from the conclusion that VAT falls within the scope of the PIF Convention.

(b) *The concept of fraud under the PIF Convention*

47. The parties that presented observations before the Court concurred that failure to pay duly declared VAT does not constitute fraud in the sense of Article 1(1)(b) of the PIF Convention. The Italian Government further clarified in its written and oral submissions that offences regarding failure to declare, or provision of false information, as well as other offences concerning fraudulent conduct, are foreseen in other provisions of Legislative Decree 74/2000.

48. I agree with the view that the offence to which Article 10ter of Legislative Decree 74/2000 refers (both before and after the amendment by Legislative Decree 158/2015) cannot be subsumed under the notion of fraud of the PIF Convention.

49. Article 1(1)(b) of the PIF Convention defines fraud for the purposes of that convention. It refers, in respect of revenue, to three types of intentional acts or omissions which have as an effect the illegal diminution of EU resources: (i) the use or presentation of false, incorrect or incomplete statements or documents; (ii) the non-disclosure of information in violation of a specific obligation; and, (iii) the misapplication of a legally obtained benefit.

50. None of the three types of fraud enumerated corresponds to the behaviour with which the present case is concerned. Article 10ter of Legislative Decree 74/2000 concerns failure to pay duly declared VAT within the deadline established by law. Even though such a failure to pay may well be intentional and may have as an effect the diminution of tax revenue, that conduct does not entail false, incorrect or incomplete statements or documents, or non-disclosure of information. Everything was correctly declared. For whatever reason however the correct declaration has not been followed by equally correct, meaning timely, payment. Moreover, it cannot be considered that by failing to pay duly declared VAT, there is a ‘misapplication of a legally obtained benefit’. By definition, failure to pay within the period prescribed by the law is illegal.

51. For these reasons, I consider that the concept of fraud in Article 1(1)(b) of the PIF Convention cannot be said to include an offence such as the one at issue in the main proceedings: the failure to pay duly declared VAT within the deadline set out in the law. Therefore, I agree that the PIF Convention is not applicable in the present case.

2. *Article 325 TFEU*

52. Article 325 TFEU represents the consolidation of the duties of the Union and the Member States to protect the Union’s financial interests. It also sets out the competences of the Union in this field.

53. Article 325(1) TFEU contains the obligation of the EU and the Member States to counter *fraud* and *any other illegal activities* affecting the financial interests of the Union through measures which shall both act as a deterrent and be effective. Article 325(2) TFEU states that 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.

54. There is disagreement among the parties that presented observations as to the applicability of Article 325(1) and (2) TFEU in the present case.

55. The German Government maintains that paragraphs 1 and 2 of Article 325 TFEU are not applicable. This is, first, because the financial interests of the Union are not affected as VAT has been correctly declared. Second, the offence at issue in the present case does not fall within the scope of application of Article 325(2) TFEU either, as it only covers 'fraud'. Third, the offence is also not covered by Article 325(1) TFEU because that provision has to be interpreted systematically in the sense that the 'other illegal activities' to which it refers concern only fraudulent acts of a similar seriousness. The Netherlands Government maintained a similar position at the hearing.

56. The Italian Government submitted at the hearing that paragraphs 1 and 2 of Article 325 TFEU are not applicable to the offence at issue in the present case. This is because the behaviour covered by Article 10ter of Legislative Decree 74/2000 cannot be considered to be a fraudulent action in the sense of the PIF Convention.

57. The Commission holds the opposite view. It argues that Article 325(2) TFEU has to be interpreted in a broad way. It encompasses the notion of 'other illegal activities' referred to in Article 325(1) TFEU, which are liable to include offences or irregularities of a non-fraudulent character.

58. In my view, the correct interpretation of Article 325(1) and (2) TFEU appears to be somewhere in the middle of those positions. First, the offence at issue in the present case is liable to affect the financial interests of the Union (a). Second, the offence falls within the remit of Article 325(1) TFEU but not Article 325(2) TFEU (b). Third, the obligation to establish measures to protect the financial interests of the Union, which are analogous to those taken to protect national financial interests emanates not only from Article 325(2) TFEU, but also from a combined reading of Article 325(1) TFEU and Article 4(3) TEU (c).

(a) *On whether the financial interests of the Union are affected*

59. The Court has already clarified that the scope of the 'financial interests of the Union' is broad. It encompasses revenue and expenditure covered by the budget of the Union and of other bodies, offices and agencies established by the Treaties. (26) Revenue from application of a uniform rate to the harmonised VAT assessment bases determined according to EU rules is included in the EU's own resources. On that basis, the Court confirmed that there is a direct link between the collection of the VAT revenue in compliance with the applicable EU law and the availability to the EU budget of VAT resources: 'any lacuna in the collection of the first potentially causes a reduction in the second'. (27)

60. The Court thus declared that it is not only tax penalties and criminal proceedings for tax evasion concerning false information in relation to VAT, (28) but more generally, *proper collection* of VAT, that is linked to the protection of the financial interests of the Union in accordance with Article 325 TFEU. (29) The Court further confirmed that national measures concerning offences related to VAT that seek to ensure the correct collection of the tax, such as the provisions of Italian law concerning failure to pay the VAT at issue in the present case, constitute implementation of Article 325 TFEU for the purposes of Article 51(1) of the Charter. (30)

61. The offence at issue in the present case concerns *failure* to pay. An argument could therefore be made that the financial interests of the Union are not really affected: the payment is delayed, but it is forthcoming. Coupled with the duty to pay interest on the sum due once it is paid,

the Union's revenue should ultimately not be affected. Thus, such an offence could not be covered by Article 325(1) TFEU.

62. It ought to be stressed that the offence is not just aiming at *late* payments, but, more broadly, at *failure* to pay, for whatever reason. Thus, the monies owed might indeed be paid later, but might also not be paid at all. Be that as it may, the sums due were simply not paid. As a matter of common sense, not receiving one's money is no doubt likely to affect one's financial interests, certainly given that, as the Commission correctly pointed out, the offence is triggered only upon reaching a certain, not insignificant and marginal, threshold.

63. Therefore, the German Government's submission that the 'late payment' of VAT is not liable to affect the financial interests of the Union as VAT has been correctly declared, cannot be upheld.

(b) *The applicability of paragraphs 1 and 2 of Article 325 TFEU*

64. Due to its complex legislative history, (31) Article 325 TFEU is perhaps not the most straightforward of Treaty provisions.

65. The key element extensively discussed in the present case is the textual difference between the first and the second paragraphs of Article 325 TFEU. Article 325(1) TFEU refers to both 'fraud' and 'other illegal activities'. Article 325(2) TFEU, however, mentions only 'fraud'.

66. Neither of those concepts is defined in the Treaties. The concept of *fraud* ought to be interpreted as an autonomous concept of EU law, in the light of the general objective of Article 325 TFEU to offer a solid protection framework of the financial interests of the Union. (32) The scope of that notion does not necessarily correspond to the definition of fraud in national criminal laws. (33) The definition of 'fraud' in the PIF Convention, to which the Court referred in its judgment in *Taricco* , (34) constitutes useful guidance in this regard, as it was the first definition provided in EU law. However, the notion of fraud in Article 325 TFEU is not necessary limited to that of the PIF Convention or that of secondary legislation. (35) The generic notion of 'fraud' of Article 325 TFEU is also liable to encompass, in the specific field of VAT, intentional acts or omissions which have the aim to obtain an unfair economic or tax advantage, to the detriment of the EU's financial interests. (36)

67. Be that as it may, the Court confirmed that late payment of VAT cannot, per se, be equated with tax evasion or fraud. (37)

68. The notion of *any other illegal activities* to which Article 325(1) TFEU refers is no doubt a broader concept than fraud. On its natural reading, the notion is likely to encompass any illegal, that is, unlawful, behaviour that affects the financial interests of the Union.

69. I see no reason why a failure to pay within the deadline set by law, which in this sense is clearly illegal, should not be understood as other illegal activity. As already explained above in points 59 to 63 of this Opinion, a failure to pay once one has reached thresholds such as those provided for in national law may certainly affect the financial interests of the Union in the sense of Article 325(1) TFEU.

70. However, the notion of 'other illegal activities' is not present in Article 325(2) TFEU, which only establishes the duty of Member States to adopt the same measures to counter *fraud* affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests. There are two possible ways of interpreting this difference in wording.

71. On the one hand, it could be suggested that, similar to Article 325(1) TFEU, Article 325(2) TFEU covers both, ‘fraud’ as well as ‘other illegal activities’. This line of argument would portray Article 325(1) TFEU as a ‘chapeau’, establishing a reference framework applicable to the entire provision of Article 325 TFEU, including all its paragraphs. It would stress the fact that Article 325(1) TFEU sets out a general obligation of the Union and the Member States to counter fraud and any other illegal activities ‘through measures to be taken in accordance with this Article’. It would also point out the complex legislative history of that provision, (38) which makes any clear inference of legislative will difficult in view of the rapid successive modifications of that provision.

72. On the other hand, it could be equally plausible to rely on the clear textual difference between Article 325(1) TFEU and Article 325(2) TFEU, and to maintain that Article 325(2) TFEU covers only measures aimed at countering fraud, *but not* other illegal activities. Those two provisions foresee a different scope of the effectiveness duty and the assimilation duty respectively established therein. Had the drafters of the Treaties intended that both paragraphs have the same meaning, why the difference in wording? Had they intended that the two notions of Article 325(1) TFEU be read as a ‘chapeau’ for the entire article, why was a third, joint notion encapsulating both (an overarching legislative term) not introduced? There are also further systemic arguments: Article 325(3) and (4) TFEU clearly maintain the same distinction and refer only to fraud. Thus, it is difficult to see the absence of ‘other illegal activities’ in Article 325(2) as a mere ‘slip of the pen’ of the Treaty drafters, unless of course those drafters were very absent-minded and their pen slipped three times within the same article.

73. On the whole, I consider the second interpretative approach more plausible. Nonetheless, for the purposes of the present case, I am not convinced that the Court would in fact need to make any pronouncements on this issue. Although extensively discussed, Article 325(2) TFEU is a bit of a red herring in the present case. For all practical purposes, the scope of the obligation under Article 325(1) TFEU, if read and considered jointly with the principle of sincere cooperation enshrined in Article 4(3) TEU, amounts to a fairly identical obligation of adopting analogous measures to protect national and EU financial interests.

(c) *Article 325(1) TFEU in conjunction with Article 4(3) TEU*

74. Even if Article 325(2) TFEU were deemed not to be applicable in the present case, there is still the transversally applicable principle of sincere cooperation enshrined in Article 4(3) TEU. That principle, read in conjunction with the general obligation established in Article 325(1) TFEU, amounts to the obligation to adopt measures against illegal activities affecting the EU’s financial interests, under conditions analogous to those applicable to illegal activities affecting national financial interests.

75. The substantive overlap of the obligations imposed by Article 325(2) TFEU and the principle of sincere cooperation under Article 4(3) TEU has its roots in the genealogy of the former provision. In a way, Article 325(2) TFEU represents an area-specific codification of the case-law of the Court on the principle of loyal cooperation. (39)

76. The fact that obligations under Article 4(3) TEU are of a transversal nature, permeating the entire EU legal system, has a further consequence. The obligation to adopt measures combating illegal activities affecting the financial interests of the EU under conditions analogous to those applicable with regard to national financial interests does not operate only in combination with the obligations imposed by Article 325(1) TFEU: it does so also in combination with the more specific obligations resulting from the VAT Directive. Since the provisions of the VAT Directive are no doubt the more detailed provisions regarding payment and collection of the tax, a more investigative analysis can properly be carried out under the provisions of that directive. I turn to

those in the following section of this Opinion.

77. Before that, however, one concluding remark is worth highlighting: the *measures* to be adopted in order to counter fraud and other illegal activities under Article 325(1) TFEU and Article 4(3) TEU are not necessarily measures of a criminal nature. What is required is that the measures be effective and dissuasive. Thus, of course, such measures may entail, as *ultima ratio*, criminal sanctions. However, before reaching that level, a broader range of actions, such as administrative, civil, or organisational measures, may be sufficient to effectively counter fraud and other illegal activities. (40) Similarly, the measures to be adopted by the Member States in compliance with Article 325 TFEU are not limited to those connected to criminal activities or administrative irregularities already covered by EU sectorial legislation. (41)

3. *The VAT Directive and the principle of sincere cooperation*

78. Article 206 of the VAT Directive establishes the obligation of taxable persons to pay VAT when submitting the tax return provided for in Article 250 of that directive. It does, however, grant Member States the possibility to set a different date for payment. Article 273 of the VAT Directive leaves the Member States with the freedom to adopt measures to ensure payment — they may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion.

79. Beyond these provisions, however, the VAT Directive does not lay down any further specific rules to ensure proper collection. It does not provide for any concrete measures or, if appropriate, sanctions, that are to be adopted in cases of failure to pay by the deadline established by the Member States according to Article 206 of the VAT Directive.

80. The choice of appropriate sanctions thus remains within the discretion of the Member States. That discretion is nonetheless not unlimited: in the absence of a specific provision for penalties in case of infringement, Article 4(3) TEU requires the Member States to adopt effective measures against conduct detrimental to the EU's financial interests. (42) Those measures shall be applicable under both procedural and substantive conditions analogous to those applicable to infringements of national law of a similar nature and importance. In any case, the penalties imposed by those measures ought to be effective, proportionate and dissuasive. (43)

81. In the particular field of VAT, Member States are required to fight tax evasion. (44) More generally, and according to established case-law, Article 2, Article 250(1) and Article 273 of the VAT Directive, read in conjunction with Article 4(3) TEU, require Member States to take all appropriate legislative and administrative measures to ensure collection of all the VAT due on their territory. (45) Member States are under the obligation to check the returns, accounts and other relevant documents of taxable persons, and to calculate and collect the tax due. (46)

82. In sum, what follows from these considerations is that the obligations imposed by the VAT Directive, read in conjunction with Article 4(3) TEU, clearly reach beyond fraud prevention. They are more general. They concern the correct collection of the tax, *writ large*. Thus, they not only capture rules established by Member States to sanction the infringement of obligations of a merely formal nature, such as mistaken declarations, but also late payments, provided that they do not go further than is necessary to achieve the objectives of ensuring the correct collection of VAT and of preventing evasion. (47)

83. It might again be repeated that the fact that such national measures are covered by the abovementioned rules of the VAT Directive, read in conjunction with Article 4(3) TEU, does not prejudge, in my view, the nature of national measures. Similar, or rather even a fortiori, to Article 325(1) TFEU, (48) the VAT Directive does not necessarily oblige the Member States to impose

penalties of a criminal nature. The choice of means is again a matter for the Member States' discretion. EU law is interested in the actual result: effective, proportionate and dissuasive measures that ensure correct collection and prevent evasion.

4. *Interim conclusion*

84. As a consequence of the foregoing, it is my view that Article 4(3) TEU, Article 325(1) TFEU, and Articles 206 and 273 of the VAT Directive are the applicable provisions for the purposes of the present case.

B. **Response to the questions referred**

85. I will now examine the concrete questions posed by the referring court in the light of the above identified applicable provisions of EU law.

86. The following argument is structured as follows: first, I will deal with the first part of the third question referred by the national court concerning the PIF Convention (1). Second, I will turn to the first question relating to the duty of establishing equivalent sanctions (2). Third, I will address jointly the second question and the second part of the third question referred by the national court that concerns the duty to adopt effective, dissuasive and proportionate sanctions for infringements of EU law (3).

1. *First part of the third question: the PIF Convention*

87. The referring court wishes to know whether the concept of fraud in Article 1 of the PIF Convention encompasses the failure to pay or partial or late payment of VAT. It asks whether, consequently, Article 2 of that convention requires the Member State to punish that conduct when it concerns sums in excess of EUR 50 000 with a term of imprisonment.

88. The answer is no. As I have explained above in points 48 to 51 of this Opinion, the PIF Convention is not applicable in the present case. On my understanding, the offence at issue in the present case cannot be subsumed under the notion of fraud according to Article 1(1)(b) of that convention.

89. I therefore propose that the first part of the third question be answered as follows: the concept of fraud in Article 1(1)(b) of the PIF Convention does not cover an offence, such as the one at issue in the main proceedings, concerning the failure to pay correctly declared VAT within the deadline set by law.

2. *First question: differentiated thresholds and the duty of establishing equivalent sanctions*

90. By its first question, the referring court asks whether Article 10ter of Legislative Decree 74/2000 (pursuant to its amendment by Legislative Decree 158/2015), which sets out a higher criminalisation threshold for failure to pay VAT (EUR 250 000) than it does for withholding tax (EUR 150 000), is compatible with EU law.

91. This question is essentially about the duty of establishing analogous or equivalent sanctions for infringements of EU law as those that are foreseen for similar infringements of national law. In the context of the present case, that duty arises from Article 4(3) TEU in conjunction with Article 325(1) TFEU and the abovementioned provisions of the VAT Directive.

92. Relying specifically on the principle of sincere cooperation as expressed in Article 4(3) TEU, the Court has established that Member States must ensure that infringements of EU law are sanctioned under conditions, both procedural and substantive, which are 'analogous to those

applicable to infringements of national law of a similar nature and importance ...'.Furthermore, national authorities must proceed with respect to infringements of EU law 'with the same diligence as that which they bring to bear in implementing corresponding national laws'. (49)

(a) *What is the 'analogous' national regime?*

93. The difficulty in the present case is the establishment of the reference framework under which the duty to establish analogous sanctions is to be assessed. What may be viewed as infringements of national law of a *similar* nature and importance? What other national legislative framework can serve as a reference point in the present case?

94. The observations presented before the Court conclude that the differentiated thresholds introduced by Legislative Decree 158/2015 do not infringe the duty of establishing analogous or equivalent sanctions. The reasons for arriving at such a conclusion, however, differ.

95. The Italian Government submits that the two offences are not at all comparable. The Commission maintains that the different thresholds introduced in Articles 10bis and 10ter of Legislative Decree 74/2000 are comparable, but that the difference can be justified. The Austrian Government puts forward a more novel argument, suggesting that the field of VAT cannot, by definition, pose any problems regarding the duty to establish equivalent sanctions. VAT constitutes revenue for both the Member States and the Union. Therefore, the financial interests of the Union in the form of VAT revenue are always protected in exactly the same way as national financial interests.

96. In the present case, the assessment of analogous sanctions essentially boils down to ascertaining whether the VAT system can be compared with direct taxation for the purposes of assessing the duty to establish analogous sanctions.

97. Two approaches can be envisaged in this regard.

98. First, following a more *narrow* approach, corresponding to the one advocated by the Austrian Government, the VAT regime could be seen as an island entirely of itself. (50) Its unique and peculiar characteristics and functioning would render the comparison with any other taxation system or source of revenue impossible. As VAT is a national *and* EU revenue resource, the duty to set up analogous sanctions would always be fulfilled per se.

99. I understand why, in relation to more specific and concrete issues, where there might be more differences than similarities in the system and the collection of the VAT, such an approach might be suggested. In the present state of the law, such an approach would be, however, problematic and illogical. It would deprive the key requirement of adopting analogous or similar measures — the 'assimilation duty' — of any content. Assimilation (equivalence) could no longer be examined. Its yardstick would effectively be circular, tested on and against itself. (51)

100. A second, *broader* approach to comparability, places the reference framework at a higher level of abstraction, while looking for the closest possible analogy to the pertinent EU law infringement in the national legal system. Once the view becomes more abstract and panoramic, it also becomes clear that no tax is an island entirely of itself; every tax is a piece of a (taxable) continent, a part of the main.

101. In my view, the 'duty of assimilation' requires that kind of broader take on comparability in order to identify the relevant infringements of national law which are of a similar nature and importance, particularly in the field of the protection of the financial interests of the Union. There, the vantage point is by nature a structural, systemic comparison. A requirement of complete

identity would make it very difficult to find equivalent sources of revenue or expenditure in the Member States. Infringements related to VAT, due to the specificity of the system of collection of the tax, could never be considered as analogous to infringements of any other tax.

102. By contrast, in individual cases concerning the application of the principle of non-discrimination or the principle of equivalence to discrete procedural rules or remedies, the focus is by definition much more concrete and much narrower. If that is the case, the concrete and specific differences between direct and indirect taxation, assessed at that level of abstraction, may well render individual situations incomparable. (52)

103. In any case, such broader approach was already embraced by the Court in *Taricco*. When providing indications for the national court in order to carry out the assessment of the equivalence of regimes concerning limitation periods in VAT evasion-related cases, the Court referred to the limitation periods applicable with regard to import duties on tobacco products. (53)

104. In the present case, the closest analogy to the offence related to failure to pay VAT of Article 10ter of Legislative Decree 74/2000 is the offence related to failure to pay withholding tax by the substitute of the taxpayer of Article 10bis of the same decree. Both offences share a number of similarities: their general objective is to ensure collection. Both offences cover conduct connected to failure to pay within the deadline set by law. The systemic parallelism of both provisions arises from the Italian legislation itself, which has chosen to regulate both offences in the same legislative act, in closely connected parallel provisions.

105. I therefore see no particular logical difficulty in suggesting that Article 10bis is the ‘analogous’ provision to Article 10ter of Legislative Decree 74/2000. Both offences are comparable. The next issue then becomes whether the differentiated threshold contained in both provisions can be justified.

(b) *A justified differentiation?*

106. The Italian Government sought to explain the reasons that have inspired the legislature to set out different thresholds applicable to infringements for the failure to pay VAT and withholding tax.

107. First, as a preliminary point, the Italian Government clarified at the hearing that taxable persons are not subject to the regime of criminal offences for failure to pay direct taxes. The offence to which Article 10bis relates does not concern the taxpayer, but the person obliged to pay withholding tax in his place.

108. Second, besides the general structural differences following from the direct and indirect character of taxation, the Italian Government has advanced specific grounds for the differentiation. They relate to the higher degree of seriousness, and the greater difficulty of discovery and collection.

109. On the one hand, with regard to failure to pay the withholding tax resulting from the certification issued to the taxpayer in respect of whom tax is withheld, the Italian Government explains that Article 10bis concerns not only an omission to pay, but also the issuance of an incorrect document. Detection of the failure and collection of the tax are therefore hindered, since the substituted person receives a certification which liberates him from payment vis-à-vis the administration.

110. On the other hand, with regard to failure to pay the withholding tax resulting from the annual tax return filed by the withholding agent, the Italian Government states that the higher degree of seriousness ensues from the consequences that that failure may entail for the substituted

taxpayers, who face the risk of having to pay the tax that is owed twice.

111. Within both of these grounds, the difficulty of discovering the infringement (54) as well as the different protected interests were said to be considered by the national legislature as justifying the differentiation in thresholds at issue.

112. Naturally, some of the arguments advanced by the Italian Government may be seen as more convincing than others. Equally, one may still be unclear about what exactly occurred in 2015 to lead to the sudden need to differentiate between the thresholds in both offences that was not there before, when both infringements were regulated in the same terms.

113. However, I think that issues like the present one are precisely the realm in which Member States are entitled to make their own legislative choices. The Italian Government has, in my view, offered plausible reasons as to why it wished to differentiate. It has further shown that there was a deliberative process in this regard on the national level. If the scope of procedural discretion and institutional autonomy has any meaning in this area, it should not be the role of the Court to second-guess such national legislative choices, which are further embedded in the broader and more complex legislative fabric of Member States' tax legislation.

114. As a consequence, I suggest that Article 4(3) TEU, read in conjunction with Article 325(1) TFEU and the VAT Directive, does not preclude national provisions establishing, for the purposes of determining the punishable character of the conduct consisting in failure to pay a tax by the legal deadline, a financial threshold which is higher for VAT than the one provided for withholding tax.

3. *Second question and the second part of the third question: extinction of criminal liability and effective and dissuasive sanctions*

115. The national court has further expressed doubts about the impact on the effectiveness and dissuasiveness of the criminal sanctions provided for by Legislative Decree 74/2000 that the two modifications introduced by Legislative Decree 158/2015 might have.

116. First, by its second question, the referring court wishes to know whether Article 4(3) TEU, read in conjunction with Article 325(1) TFEU and the VAT Directive, preclude a national provision that extinguishes the criminal liability of the persons responsible for fiscal matters if the entity they represent pays the amount of VAT due, together with interest and administrative penalties owed in connection with late payment, before the first instance trial proceedings are declared opened. The national court emphasises that the Italian system does not impose on those persons any other penalty, not even of an administrative nature.

117. Second, in the second part of the third question, the referring court asks whether Article 325(1) TFEU must be interpreted as precluding national legislation which exempts from criminal and administrative liability those persons responsible for tax matters for failure to pay, partial or late payment of VAT, in relation to sums equivalent to three or five times the minimum threshold of EUR 50 000 laid down by the PIF Convention.

118. Both questions concern the duty of Member States to adopt effective and dissuasive sanctions. I examine both of them in turn in this section.

(a) *The new ground for extinction of criminal liability*

119. The Commission considers that the second question, relating to the new ground for extinction of criminal liability introduced by Legislative Decree 158/2015 (new Article 13(1) of Legislative

Decree 74/2000), should be declared inadmissible. It submits that, bearing in mind that the threshold for the VAT-related offence (EUR 250 000) has not been reached in the present case (the sum owed was EUR 175 272), that ground could not be applied in this case.

120. I agree. Indeed, if the Court decides to follow my proposed answers to the first and third questions, there will be no need to give an answer to the second question. However, in order to fully assist the Court, I shall provide a concise outline of an answer to this particular question should the Court come to a different conclusion.

121. In general, (55) the obligation to provide for effective, dissuasive and proportionate sanctions for the protection of the financial interests of the Union emerges from a twofold source in EU law. The duty of sincere cooperation of Article 4(3) TEU entails the requirement to effectively and dissuasively tackle infringements of the obligation to pay VAT according to Articles 206 and 273 of the VAT Directive: there is a general obligation to take all legislative and administrative measures for ensuring collection of all VAT due in their territory. (56) The same also emanates from Article 325(1) TFEU, which requires Member States to counter fraud and other illegal activities affecting the EU's financial interests through effective and deterrent measures. (57)

122. In my view, the new ground for extinction of criminal liability at issue does not infringe the obligation to impose effective and dissuasive sanctions.

123. First, in general, the obligation to adopt proportionate, effective and dissuasive penalties in the field of VAT does not necessarily entail the obligation to impose sanctions of a criminal nature. (58) Indeed, in certain situations, the seriousness of the offences may require criminalisation as the only solution to guarantee effectiveness and dissuasiveness. (59) However, outside such specific and serious situations, the applicable penalties may take the form of administrative penalties, criminal penalties or a combination of the two. (60)

124. In the VAT context, failure to pay the *correctly* declared tax by the legal deadline cannot be considered of such seriousness that the duty to adopt effective and dissuasive measures would invariably require the establishment of criminal sanctions. (61) Member States may, of course, with due regard to their economic and social situation, proceed to adopt such sanctions in cases which they consider to be sufficiently serious, while respecting the principle of proportionality. However, the criminalisation of such behaviour cannot be said to be required as a matter of EU law.

125. Second, the effective and dissuasive character of the measures set up by the Italian legislation to ensure collection of VAT has to be considered in broader, systemic terms. Due regard must be paid to the interplay between various criminal and administrative sanctions applicable when there is failure to pay VAT by the deadline set out in the law. (62)

126. The Italian Government has explained that, according to Article 13(1) of Legislative Decree 471/1997, the entities obliged to pay the tax are in any case subject to a system of administrative sanctions that can reach 30% of the unpaid amount plus interest. It appears from the legislative history of the amendment in question shows that the existence of administrative sanctions –that continue to apply for those situations not reaching the threshold for criminal sanctions– has been duly taken into account by the modification of the threshold in Legislative Decree 158/2015. (63) In the same vein, the new ground for extinction of criminal liability linked to payment is a legislative choice to grant the possibility to avoid criminal liability in case the entity liable to pay the tax satisfies its debts, including the tax due, interest and payment of administrative sanctions. Also in this situation, administrative sanctions for the taxpaying entities have been deemed to be sufficient by the legislature. (64)

127. In other words, even if the responsible director of the legal entity that owes the tax might

escape criminal liability if the legal entity makes the payment eventually, the legal entity that is primarily responsible will still have to pay interest and administrative penalties for late payment.

128. It might be useful, at this stage, to take a step back and try to see the wood, not just the individual tree. What is the objective of criminalising late payment of sums owed to the public purse? Perhaps in contrast to other criminal acts, where the damage that has been done cannot be undone, and where the primary objective of the sanction becomes to punish and to reform the offender, for fiscal or taxation crimes, the objective is *also* to use the threat of a criminal sanction to coerce payment in the individual case and thus to foster compliance more generally in the future. In other words, the criminalisation is not the sole purpose in itself. Another purpose of the sanction is likely to be to maintain fiscal soundness and foster compliance. If that logic is embraced, then the fact that the offender has been given a last chance to comply before the trial begins is in fact not impeding the effectiveness of the enforcement: rather to the contrary. (65)

129. Against this background, the ground for extinction of criminal liability introduced in Article 13 of Legislative Decree 74/2000 fosters compliance and, therefore, furthers the effectiveness and dissuasiveness of the system of enforcement. The effectiveness of sanctions is connected with the incentive to pay the tax. The dissuasiveness is ensured by the need to acquire not only the principal amount, but also interest that has accrued and the corresponding amount of the administrative sanctions.

130. It might be recalled that in the past, the Court has declared a progressive sanctions regime as being suitable to foster regularisation of payment. (66) It has also considered interest as an appropriate sanction in cases concerning infringements of a formal nature. (67)

131. Finally, it ought to be borne in mind that while imposing effective and dissuasive sanctions within the scope of EU law, Member States also have to comply with the principle of proportionality. It is apparent from the preparatory documents of Legislative Decree 158/2015 that the Italian legislature has chosen to adopt a progressive scale of administrative and criminal sanctions. Reflecting proportionality considerations, it has reserved criminal penalties for the most serious cases. In this context, the ground for extinction of criminal liability at stake in the present case may also be seen as further embedding proportionality considerations into the overall enforcement regime.

(b) *The relevance of the threshold of EUR 50 000 established in the PIF Convention*

132. With regard to the second part of the third question posed by the referring court, I do not consider the threshold of the PIF Convention to be an appropriate point of reference to assess the effectiveness of sanctions outside the framework defined under that particular instrument.

133. First and foremost, as explained in points 48 to 51 of the present Opinion, the offence at issue does not fall within the scope of the PIF Convention. The threshold established by the PIF Convention is only relevant for the specific offence of fraud.

134. Second, as a subsidiary note, the threshold of EUR 50 000 referred to in Article 2 of the PIF Convention applies only as a criterion for establishing a minimum amount above which fraud is to be considered so serious as to give rise to *penalties involving deprivation of liberty which can give rise to extradition*. However, the threshold of EUR 50 000 is not even applicable as a general threshold for criminalisation as such.

135. Therefore, I do not think that the threshold referred to by the PIF Convention could even be referred to for the purpose of a broader analogy. It is not at all relevant in a case like the present one.

(c) *Interim conclusion*

136. As a result, I propose that the Court answer the second question and the second part of the third questions as follows: the duty to provide effective, dissuasive and proportionate penalties to ensure correct collection of VAT imposed by Article 325(1) TFEU and Article 4(3) TEU, read in conjunction with VAT Directive, does not preclude national legislation, such as that at issue in the present case, which, while providing for a system of administrative sanctions, exempts natural persons responsible for tax matters:

– from criminal and administrative liability for failure to pay correctly declared VAT within the deadline set by law in relation to sums equivalent to three or five times the minimum threshold of EUR 50 000 laid down by the PIF Convention;

– from criminal liability if the entity with regard to which they operate has made late payment of the VAT due, as well as interest and the amounts imposed by administrative sanctions, before the trial at first instance is declared open.

C. **Effects of a potential incompatibility between national legislation and EU law**

137. In the present Opinion, I have proposed that the Court answer the questions posed by the referring court in the sense that the pertinent provisions of EU law *do not* preclude the modifications made by Legislative Decree 158/2015. Should the Court reach the same conclusion, there would be no need to address potential (temporal) effects of a declaration of incompatibility in the present case.

138. If the Court were to decide otherwise, the effects of the incompatibility of national law with EU law would have to be addressed. In particular, it would be necessary to examine the practical implications that ensue from the principle of primacy of EU law, that is, the requirement to disapply national provisions contrary to EU law. That would have to be done in the light of the scenario at hand, where the national provisions at issue constitute *more lenient* criminal law provisions in an ongoing criminal procedure.

139. In order to fully assist the Court, I shall offer some concluding thoughts on this issue, as it has been raised expressly by the referring court and discussed by the interested parties at the oral hearing.

140. The national court expressed the view that, if the amendments made by Legislative Decree 158/2015 were to be considered incompatible with EU law, the subsequent disapplication of the more lenient rules would neither contradict the principle of legality nor the *lex mitior* principle enshrined in Article 49(1) of the Charter. First, the disapplication of the national provisions as amended by Legislative Decree 158/2015 would entail the (re)application of the previous version of those provisions, in force at the time of the salient facts. Second, if declared incompatible with EU law, the new provisions would have never been lawfully part of the Italian legal order. As the decisions of the Court in preliminary ruling proceedings have an *ex tunc* effect, the provision thereby interpreted would have to be applied in the manner indicated by the Court also to legal relationships preceding the judgment, but not having yet come to an end.

141. The Commission and the Italian Government engaged with those arguments at the hearing.

They seem to be of the view that the more lenient provisions of national law could not be disapplied in the present case, *even if* those provisions were declared to be incompatible with EU law.

142. I agree with the Commission and the Italian Government. In my opinion, the legality principle precludes the possibility to set aside more lenient criminal provisions in the course of ongoing criminal proceedings, even if those more lenient rules were found to be incompatible with EU law. In other words, in a case like the present one, the primacy of EU law provisions imposing on Member States the duty to enact effective, dissuasive and analogous sanctions needs to be applied in a manner which is consistent with other rules of equal standing within the EU legal order: the principle of *lex mitior*, provided for in Article 49(1) of the Charter, coupled with the protection of legitimate expectations and legal certainty, considered in the specific context of criminal law.

143. It is common ground that according to the principle of primacy of EU law, provisions of the Treaties and directly applicable provisions of secondary law have the effect, merely by entering into force, of rendering inapplicable conflicting national provisions. (68)

144. The disapplication duty constitutes perhaps the most vigorous emanation of that principle. The practical consequences of primacy in individual cases must be, however, weighed against and reconciled with the general principle of legal certainty and, more specifically in the field of criminal law, with the legality principle. The obligations of Member States to ensure effective collection of EU resources cannot after all run counter to the rights of the Charter, (69) which also provides for the fundamental principles of legality, *lex mitior* and legal certainty.

145. In the ensuing analysis, I suggest that the principle of legality, which is properly to be understood not just in a minimalist fashion (1), but more broadly, as also encompassing the *lex mitior* rule together with the imperative of enhanced legal certainty in criminal matters (2), requires that, in the present case, the more lenient provisions of Legislative Decree 158/2015 could not be disapplied (3). The latter conclusion holds, irrespective of whether the eventual incompatibility with EU law were to be declared with reference to primary law (Article 325(1) TFEU) or with regard to the VAT Directive.

1. *The ‘core’ of the legality principle: the prohibition of retroactivity*

146. The legality principle, enshrined in Article 49(1) of the Charter, entails, first and foremost, the prohibition of retroactivity. It is provided for in the first two sentences of that provision. (70) It corresponds, in the sense of Article 52(3) of the Charter, to Article 7 of the European Convention on Human Rights (ECHR).

147. The ‘core’ of the legality principle, which constitutes the strongest and most specific expression of the principle of legal certainty, (71) may be said to cover just the *substantive* elements of the definition of offences and penalties. It requires that legislation must clearly define offences and penalties that apply at the moment when the punishable act or omission was committed. That requirement is satisfied once individuals are able to ascertain which acts or omissions will make them criminally liable, on the basis of the wording of the relevant provision and, if need be, with the interpretative assistance of case-law. (72) Those requirements do not however prohibit the gradual clarification of rules of criminal liability by means of judicial interpretation, provided that those interpretations are reasonably foreseeable. (73)

148. As a consequence, if national law, in the version applicable at the material time in the main proceedings, did not contain express provisions establishing criminal liability for a certain conduct, ‘the principle that criminal penalties must have a proper legal basis, enshrined in Article 49(1) of

the Charter of Fundamental Rights of the European Union, would prohibit the imposition of criminal penalties for such conduct, even if the national rule were contrary to EU law'. (74)

149. Thus, the 'core' of the legality principle, reflected in the first and second sentences of Article 49(1) of the Charter, prohibits the retroactive application of new criminal rules concerning the determination of offences and penalties which were not in force at the time the punishable act was committed. Two elements are worth stressing here: the limitation to *substantive* elements of the act and penalty, focusing on *one specific moment* in time — when the act or omission was committed.

2. *The broader understanding of the legality principle: lex mitior and legal certainty in criminal matters*

150. However, the content of the guarantees provided for in Article 49(1) does not stop there. From my point of view, the genuine content of the guarantees provided by Article 49(1) is broader, in both of the dimensions just outlined: substantive as well as temporal.

151. Without entering into any deeper debates on what exactly is *substantively* covered, it might perhaps be simply recalled that under the ECHR, the exact scope of Article 7(1) is also far from clear. In particular, the notion of 'penalty' and its scope has been undergoing some jurisprudential evolution. Recently, in *Del Río Prada*, the Grand Chamber of the European Court of Human Rights (ECtHR) recalled that the distinction between a 'penalty' (the 'substance', which ought to be covered by Article 7(1) ECHR) and a measure which concerns the execution or enforcement of a penalty (leaning more towards the elements of 'procedure') is not clear cut. (75) The ECtHR carried out a broader assessment based, inter alia, on the nature and purpose of the measure, its characterisation under national law, and its effects.

152. There is a lot to be said for such an effect- or impact-oriented assessment, which is less concerned with the finesses of individual national taxonomies, which may of course differ across the Member States, and looks more concretely into the genuine operation of the rules. Above all, however, perhaps it best captures what the focus of effective protection of fundamental rights ought to be: the individual and the impact a rule has on his position, not the taxonomic labels attached to it by the respective national law.

153. For this reason, although the wording of the third sentence of Article 49(1) of the Charter speaks of a 'lighter penalty', I do not think that that provision could be read as referring only and exclusively to the severity of the penalty. It must be read as also including at least all the constitutive elements of a crime, for a simple reason: if, following the commission of the crime, a new law is enacted that changes the definition of the criminal offence to the benefit of the accused, that would mean that his act would no longer be criminally punishable (at all). If no longer punishable, that would mean no penalty can be imposed. *No* penalty is certainly a *lighter* penalty. It would be simply illogical to insist, in such circumstances, on the fact that the new law does not technically speaking directly regulate 'penalties'.

154. The more important element for the present case is perhaps the second one: the *temporal* dimensionof what is protected by the legality principle. In this regard, the wording of the third sentence of Article 49(1) of the Charter already clearly indicates that that principle is also concerned with the time *after* the commission of the criminal offence. The third sentence provides for the retroactive application of the more lenient penalty: *lex mitior*.

155. The *lex mitior* rule had already been recognised by the Court as a general principle of EU law resulting from the constitutional traditions common to the Member States. (76) This line of case-law, together with Article 49(1) of the Charter, have in fact proven to be influential in the evolution

of the case-law of the ECtHR. It would appear that the ECtHR has departed from its own case-law, according to which the principle of *lex mitior* was not covered by Article 7 ECHR, to recognise it as an element implicit in that provision, also under the influence of the broader protection provided under EU law. (77)

156. *Lex mitior* effectively constitutes an exception to the prohibition of retroactive application of criminal law. It authorises retroactivity *in bonam partem*. Logically therefore, retroactivity in *malam partem* is banned.

157. According to recent ECtHR case-law, the principle of retroactivity of the more lenient criminal law entails that 'where there are differences between the criminal law in force at the time of the commission of an offence and subsequent criminal laws enacted before a final judgment is rendered, the court must apply the law whose provisions are most favourable to the defendant'. (78) For the ECtHR, this obligation to apply 'among several criminal laws, the one whose provisions are the most favourable to the accused is a clarification of the rules on the succession of criminal laws, which is in accord with another essential element of Article 7, namely the foreseeability of penalties'. Like the prohibition of retroactive application, the *lex mitior* applies with regard to provisions defining offences and penalties. (79)

158. The precise content of the *lex mitior* rule, however, is far from settled. That principle has a specific underlying inspiration: it 'involves a succession of laws over time and is based on the conclusion that the legislature changed its position either on the criminal classification of the act or the penalty to be applied to an offence'. (80) This specificity has led to some approaches which emphasise the different rationales underlying the prohibition of retroactive application of criminal law and the principle *lex mitior*. The principle *lex mitior*, according to those views, would not quite emanate from the requirements of foreseeability or legal certainty requirements. It would merely rest on considerations of fairness, reflecting the changes of view of the legislature with regard to wrongful conduct. (81)

159. Whatever the precise value underpinning the *lex mitior* rule, its operation is not difficult to understand: unless there is a clear instance of self-serving legislation or even misuse of legislative procedures, (82)*lex mitior* is, by definition, a 'one-way ticket' to a more lenient destination. It means that after the commission of the act, the new criminal law rules may only be applied to the benefit of the accused. In rather unlikely scenarios, this might even happen *repetitively* to the benefit of the accused. That can also be reconciled with the language and the spirit of the third sentence of Article 49(1) of the Charter. However, I consider that what cannot be reconciled with that provision is either reversal back to the more severe provision once *lex mitior* was correctly triggered, or the adoption of new, harsher criminal rules, and their retroactive application. If that were the case, it would turn the *lex mitior* rule into an unstable, reversible rule, allowing back and forth changes in criminal rules after the commission of the act.

160. Therefore, the *lex mitior* principle and the principle of legal certainty are not circumscribed to the moment in time when the facts were committed. They stretch along the duration of the entire criminal procedure. (83)

161. Indeed, it should be recalled that the application of the *lex mitior* principle is itself embedded into the broader principle of legal certainty, which requires that rules of law must be clear and precise and that their application must be foreseeable by those subject to them. (84) That is to enable those concerned to be aware of the extent of the obligations which are imposed on them, and to ascertain unequivocally what their rights and obligations are and take steps accordingly. (85)

162. Therefore, the *lex mitior* principle forms part of the basic legal rules regulating the inter-

temporal operation of subsequently enacted criminal provisions. The requirements of foreseeability and legal certainty therefore also encompass its application as part of the national and the EU legal systems. It would be at odds with those requirements, essential to the principle of legal certainty, if, once a more lenient criminal law has been enacted and become applicable, it is disapplied in order to render applicable a more stringent criminal law again, even if it was in force at the time of the commission of the facts.

163. In sum, my opinion is that the *lex mitior* principle guaranteed in the third sentence of Article 49(1) of the Charter precludes the reverting to previous, harsher rules concerning the constitutive elements of a crime and penalties, if the later duly enacted national legislation generated legitimate expectations in the personal sphere of the accused. Such guarantee might be seen either as forming a broader layer of the legality principle, or as a distinct right, emanating from the requirements of legal certainty and foreseeability of criminal laws.

164. The basic underlying concern is clear: individuals must be able to rely on duly promulgated rules of criminal law (86) and adapt their behaviour accordingly. It is indeed entirely possible that, relying on the more lenient rules promulgated in national law, a person subject to criminal proceedings or his representation could have taken certain procedural decisions or modified their course of action in a manner relevant to the further development of those proceedings.

165. Certainly, EU law forms part of the national legal systems. It must therefore be taken into account when assessing compliance. It could be thus suggested that *ignoratia legis europae non excusat*. An individual not paying his taxes cannot have a ‘right to impunity’ guaranteed by national law that is incompatible with EU law.

166. In cases like the present one, I find that proposition very difficult to embrace, on a number of levels. Focusing only on the level of practical implications, can it really, reasonably, be expected that individuals constantly self-assess promulgated national laws as to their compliance with EU law and on that basis decide on their criminal liability? Even if one were to suggest that that is indeed to be expected in cases of national legislation saying ‘be X’ and a clear rule of EU law saying ‘be non-X’, can it also be expected with regard to the compatibility of national rules with somewhat ‘textually economical’ provisions of EU law, such as the Article 325(1) TFEU, the interpretation of which requires the (in fact repeated) attention of the Grand Chamber of the Court?

3. *The implications of the lex mitior principle and legal certainty in the present case*

167. The Court was already confronted with the question of whether the principle of the retroactive application of the more lenient penalty applies in the case in which that penalty is at variance with other rules of EU law in *Berlusconi*. (87) However, as that case concerned a directive, the response given was based on the fact that provisions of directives cannot be invoked in order to aggravate or determine the criminal liability of individuals. (88)

168. In the present case, the pertinent EU law provisions are not only the VAT Directive, read in conjunction with Article 4(3) TEU, but also provisions of primary law, namely Article 325(1) TFEU, which ‘impose on Member States a precise obligation as to the result to be achieved that is not subject to any condition regarding application of the rule ... which they lay down’. (89) The Court has held, as a consequence, that Article 325(1) and (2) TFEU can deploy the effect ‘in their relationship with the domestic law of the Member States, of rendering automatically inapplicable, merely by their entering into force, any conflicting provision of national law’. (90) This statement was, however, immediately qualified: in such a scenario, the national court must also ensure that the fundamental rights of the persons concerned are respected. (91)

169. The imperative of the respect of the principles of legality — including the *lex mitior* rule — and

legal certainty, prevents, in my view, the possibility of setting aside the more lenient national criminal provisions in the main proceedings. There are two ways in which that conclusion might be reached in the present case, if necessary.

170. First, the amendment that altered the criminalisation threshold for the offence of failure to pay declared VAT (while also adding the new ground for extinction of criminal liability) has, in my view, modified the constitutive elements of a criminal act. The setting of a monetary threshold for triggering criminal liability is an objective element of the definition of a crime. As such, this change could be seen as falling within the substantive 'core' of the principle of legality, read together with the *lex mitior* principle.

171. Second, even if such a successive change were to be seen as outside of the narrower vision of the legality principle, since, strictly speaking, it reaches beyond the moment at which the original act was committed, it would certainly be caught by the broader understanding of that principle. Upon entering into force, the new national amendment triggered the *lex mitior* rule, which has generated legitimate expectations in the personal sphere of the accused that the new, more lenient provision will be applicable to him.

172. Two further concluding remarks are called for.

173. First, in a case like the present one, whether a potential incompatibility of the national rules with EU law would be declared with regard to EU secondary law or EU primary law ultimately makes little difference. The reasoning outlined above and the limits of Article 49(1) of the Charter are transversal, applicable irrespective of the source of obligation at the EU law level.

174. Certainly, the Court has emphasised that 'directly applicable rules of law of the Union which are an immediate source of rights and obligations for all concerned, whether Member States or individuals who are parties to legal relationships under Union law, must deploy their full effects in a uniform manner in all Member States, as from their entry into force and throughout the duration of their validity'. (92)

175. However, at the same time, it has also been acknowledged that the impossibility of relying on certain EU law provisions to determine or aggravate criminal responsibility cannot be restricted, per se, to directives. Similar considerations have been relied upon with regard to provisions of a regulation empowering Member States to adopt penalties for infringements of its provisions, precisely with the aim of complying with the principles of legal certainty and the prohibition of retroactivity, as enshrined in Article 7 ECHR. (93)

176. In my view, it cannot be automatically assumed that Treaty provisions which impose on Member States a precise and unconditional obligation as to the result to be achieved, as is the case for Article 325(1) and (2) TFEU, automatically fulfil, in each and every situation, the requirement of foreseeability required by the principles of legality and legal certainty in the particular field of criminal law. (94)

177. The principle of legality cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability.It may, however, 'preclude the retroactive application of a new interpretation of a rule establishing an offence'. (95) The key element is, again, foreseeability of the individual rule in question.

178. On a more general, systemic note, I find it difficult to see why the case-law on the differentiated direct effect of Treaty provisions as opposed to directives, which in itself is the fruit of historically conditioned evolution of the case-law of this Court rather than of any principled choice based on clearly discernible differences in the wording of those sources of EU law, should be the

determining factor in cases like the present one. Should past doctrinal boxes that are difficult to explain even to an avid student of EU law really be determinant for the (non-)establishment of criminal liability in cases largely disconnected from the specific issues of direct effect? Even more so in a case like the present one where, for all practical purposes, the content of both layers of obligations (Treaty and the VAT Directive) is fairly similar, and the assessment of them is effectively carried out jointly?

179. Second, the underlying question raised by the present case is the issue of temporal effects of the decisions of this Court. (96) As the national court recalled in its order for reference, the default rule of temporal applicability of the decisions of the Court is essentially one of *incidental retrospectivity*: the Court provides interpretation of provisions of EU law *ex tunc*, which becomes immediately applicable to all ongoing (and sometimes even closed (97)) cases applying the same provision. However, there are limits to such an approach, which again boil down to the same issue: foreseeability. The further the Court develops the law beyond the specific wording of the interpreted provisions, the more difficult it arguably becomes to maintain the rule of full *ex tunc* application of those judicial pronouncements. (98)

180. An eventual incompatibility of the national rules with EU law does not have the effect of rendering national rules non-existent. (99) The fact that national rules which are found later to be incompatible with EU law are able to give rise to legal effects, which are in certain circumstances capable of generating expectations, is demonstrated by the fact that the Court has on certain occasions limited the effects of its judgments temporally in order to protect the requirements of the principle of legal certainty. In this context, it may be recalled that the Court has declared that ‘exceptionally and for overriding considerations of legal certainty’ the Court (alone) may ‘grant a provisional suspension of the ousting effect which a rule of EU law has on national law that is contrary thereto’. (100)

181. It might be stressed that suggesting that, as a matter of EU law, *lex mitior* and the requirement of legal certainty in criminal matters prevent the disapplication of the more lenient rules of national law would not require any major reassessment of the indeed rather restrictive approach to the limitation of temporal effects of the decisions of the Court. It would just carve out a narrow exception for the individual ongoing criminal cases, while leaving the general normative consequences of the incompatibility untouched. The findings of the Court could naturally give rise to infringement proceedings for failure to comply with the obligations arising from it, (101) and would, in any event, lead to the obligation to modify accordingly the national legal order for the future.

V. **Conclusion**

182. In the light of the aforementioned considerations, I propose to the Court to answer the questions posed by the Tribunale di Varese (District Court, Varese) as follows:

– The concept of fraud in Article 1(1)(b) of the PIF Convention on the protection of the European Communities’ financial interests does not cover an offence, such as the one at issue in the main proceedings, concerning the failure to pay correctly declared VAT within the deadline set by law.

– Article 4(3) TEU, read in conjunction with Article 325(1) TFEU and the VAT Directive, does not preclude national provisions establishing, for the purposes of determining the punishable character of the conduct consisting in failure to pay a tax by the legal deadline, a financial threshold which is higher for value added tax (VAT) than the one provided for withholding tax.

– The duty to provide effective, dissuasive and proportionate penalties to ensure correct

collection of VAT imposed by Article 325(1) TFEU and Article 4(3) TEU, read in conjunction with VAT Directive, does not preclude national legislation, such as that at issue in the present case, which, while providing for a system of administrative sanctions, exempts natural persons responsible for tax matters:

– from criminal and administrative liability for failure to pay correctly declared VAT within the deadline set by law in relation to sums equivalent to three or five times the minimum threshold of EUR 50 000 laid down by the PIF Convention;

– from criminal liability if the entity with regard to which they operate has made late payment of the VAT due, as well as interest and the amounts imposed by administrative sanctions, before the trial at first instance is declared open.

1 Original language: English.

2 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) (‘the VAT Directive’).

3 Convention drawn up on the basis of Article K.3 of the Treaty on European Union, (OJ 1995 C 316, p. 49) (‘the PIF Convention’).

4 Council Regulation of 18 December 1995 (OJ 1995 L 312, p. 1) (‘Regulation No 2988/95’).

5 Decreto Legislativo 10 marzo 2000, n. 74, Nuova disciplina dei reati in materia di imposte sui redditi e sul valore aggiunto, a norma dell’articolo 9 della legge 25 giugno 1999, n. 205 (Legislative Decree No 74 of 10 March 2000, New rules governing offences in matters of income tax and VAT in accordance with Article 9 of Law No 205 of 25 June 1999) (GURI No 76 of 31 March 2000) (‘Legislative Decree 74/2000’).

6 Decreto Legislativo 24 settembre 2015, n. 158, Revisione del sistema sanzionatorio, in attuazione dell’articolo 8, comma 1, della legge 11 marzo 2014, n. 23 (Legislative Decree No 158 of 24 September 2015, Revision of the system of sanctions implementing Article 8(1) of Law No 23 of 11 March 2014) (GURI No 233 of 7 October 2015 — Ordinary Supplement No 55) (‘Legislative Decree 158/2015’).

7 Decreto Legislativo 18 dicembre 1997, n. 471, Riforma delle sanzioni tributarie non penali in materia di imposte dirette, di imposta sul valore aggiunto e di riscossione dei tributi, a norma dell’articolo 3, comma 133, lettera q), della legge 23 dicembre 1996, n. 662 (Legislative Decree of 18 December 1997 on the reform of non-criminal tax penalties in the field of direct taxation, value added tax and tax collection, in accordance with Article 3(113q) of Law No 662 of 23 December 1996) (GURI No 5 of 8 January 1998 — Ordinary Supplement No 4).

8 Judgment of 8 September 2015, Taricco and Others (C?105/14, EU:C:2015:555, paragraph 41).

9 Concluded on 23 May 1969, *United Nations Treaty Series*,Vol. 1155, p. 331. The Netherlands Government argues that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose; the context shall also be taken into account as well as, inter alia, any agreement between the parties in connection with the application of its provisions (Article 31(1) and (3)(a) of the Vienna Convention). It also cites Article 31(4) of the Vienna Convention, according to which a special meaning shall be given to a term if it is established that the parties so intended.

10 Explanatory Report on the Convention on the protection of the European Communities’

financial interests (Text approved by the Council on 26 May 1997) **(**OJ 1997 C 191, p. 1).

11 According to paragraph 1(1) of that report, ‘revenue means revenue deriving from the first two categories of own resources referred to in Article 2(1) of Council Decision 94/728/EC of 31 October 1994 on the system of the European Communities’ own resources … This does not include revenue from application of a uniform rate to Member States’ VAT assessment base, as VAT is not an own resource collected directly for the account of the Communities. Nor does it include revenue from application of a standard rate to the sum of all the Member States’ GNP’.

12 The Court already stated that although the Vienna Convention binds neither the European Union nor all its Member States, it reflects the rules of customary international law which are, as such, binding upon the EU institutions. They form part of the legal order of the European Union — see, for example, judgment of 25 February 2010, Brita (C?386/08, EU:C:2010:91, paragraphs 42 and 43 and the case-law cited) or, for a more recent confirmation, judgment of 21 December 2016, Council v Front Polisario (C?104/16 P, EU:C:2016:973, paragraph 86). For a general study, see, for example, Kuijper, P.J., ‘The European Courts and the Law of Treaties: The Continuing Story’, in Cannizzaro, E. (ed.) *The Law of Treaties Beyond the Vienna Convention*, OUP, 2011, pp. 256 to 278. However, the Court has referred to the Vienna Convention mostly with regard to treaties with third states. The Court has also declared that the rules laid down in the Vienna Convention apply to an agreement concluded between the Member States and an international organisation (judgment of 11 March 2015, Oberto and O’Leary, C?464/13 and C?465/13, EU:C:2015:163, paragraph 36). To my knowledge, the Vienna Convention has only been referred to once in the framework of a convention between Member States adopted on the basis of ex-Article 220 EEC, in judgment of 27 February 2002, Weber (C?37/00, EU:C:2002:122, paragraph 29) referring to the territorial application of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1972 L 299, p. 32; as amended by the successive accession conventions for the new Member States,).

13 Within the system of EU law, that role is nonetheless quite different from any forms of *binding* authentic interpretation within the meaning of Article 31(2) and (3)(a) and (b) of the Vienna Convention (further on those provision, see, for example, Villinger, M.E., *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff, Leiden, 2009, pp. 429 to 432).

14 See, for example, judgments of 27 November 2012, Pringle(C?370/12, EU:C:2012:756, paragraph 135), and of 3 October 2013, Inuit Tapiriit Kanatami and Others v Parliament and Council(C?583/11 P, EU:C:2013:625, paragraph 59).

15 See, for example, judgment of 2 March 2010, *Rottmann* (C?135/08, EU:C:2010:104, paragraph 40).

16 See, in particular, the Explanations relating to the Charter of Fundamental Rights, (OJ 2007 C 303, p. 17), originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union.

17 For the sake of completeness, it might be added that the same would also be applicable to a potential argument drawn from Article 31(3)(a) or (4) of the Vienna Convention, advanced by the Netherlands Government (above, footnote 9).

18 The PIF Convention was adopted on the basis of Article K.3(2)(c) TEU (in its Maastricht version), according to which the Council was entitled to draw up conventions that it should recommend to the Member States for adoption in accordance with their respective constitutional requirements.

19 See, for example, judgments of 26 May 1981, Rinkau (157/80, EU:C:1981:120, paragraph 8); of 17 June 1999, Unibank(C?260/97, EU:C:1999:312, paragraphs 16 and 17); of 11 July 2002, Gabriel(C?96/00, EU:C:2002:436, paragraph 41 et seq.); and of 15 March 2011, Koelzsch (C?29/10, EU:C:2011:151, paragraph 40).

20 The Court has also referred to explanatory reports of conventions adopted on the basis of that provision (some of which never entered into force), which served as a source for inspiration of subsequent acts of secondary law. See, e.g. judgments of 8 May 2008, Weiss und Partner (C?14/07, EU:C:2008:264, paragraph 53); of 1 December 2008, Leymann and Pustovarov (C?388/08 PPU, EU:C:2008:669, paragraph 74); of 15 July 2010, Purrucker(C?256/09, EU:C:2010:437, paragraph 84 et seq.); of 11 November 2015, Tecom Mican and Arias Domínguez (C?223/14, EU:C:2015:744, paragraphs 40 and 41); and of 25 January 2017, Vilkas (C?640/15, EU:C:2017:39, paragraph 50).

21 Opinion of Advocate General Kokott in Taricco and Others (C?105/14, EU:C:2015:293, points 99 to 102).

22 Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (70/243/ECSC, EEC, Euratom) (OJ, English Special Edition, 1970(I), p. 224). See, for the provision currently in force, Article 2(1)(b) of Council Decision 2014/335/EU, Euratom of 26 May 2014 on the system of own resources of the European Union(OJ 2014 L 168, p. 105). It is estimated that, for 2015, revenue from 'traditional own resources' amounts to 12.8% and from VAT 12.4% of the total own resources revenue. See European Commission, *Integrated Financial Reporting Package*, 2015.

23 Judgment of 8 September 2015,Taricco and Others (C?105/14, EU:C:2015:555, paragraph 41). That is the case of Article 2 of Regulation 2899/95, which refers to 'revenue accruing from own resources collected directly on behalf of the Communities'.

24 Article 5(3) of the PIF Convention.

25 Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests (OJ 1996 C 313, p. 2) and Second Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities' financial interests (OJ 1997 C 221, p. 12).

26 Judgments of 10 July 2003, Commission v ECB (C?11/00, EU:C:2003:395, paragraph 89), and Commission v EIB (C?15/00, EU:C:2003:396, paragraph 120).

27 See judgments of 15 November 2011, Commission v Germany (C?539/09, EU:C:2011:733, paragraph 72); of 26 February 2013, Åkerberg Fransson (C?617/10, EU:C:2013:105, paragraph 26); of 8 September 2015, Taricco and Others (C?105/14, EU:C:2015:555, paragraph 38); of 7 April 2016, Degano Trasporti (C?546/14, EU:C:2016:206, paragraph 22); and of 16 March 2017, Identi (C?493/15, EU:C:2017:219, paragraph 19).

28 Judgment of 26 February 2013, Åkerberg Fransson (C?617/10, EU:C:2013:105, paragraph 27).

29 See, to that effect, judgment of 8 September 2015, Taricco and Others (C?105/14, EU:C:2015:555, paragraph 39).

30 See judgment of 5 April 2017, Orsi and Baldetti (C?217/15 and C?350/15, EU:C:2017:264,

paragraph 16).

31 Article 209a TCE (Maastricht) only contained the current paragraphs 2 and 3. The Treaty of Amsterdam added the current paragraph 1 in the then Article 280 TEC, as well as paragraph 4 containing a legal basis for the adoption of Community measures, providing however that ‘these measures shall not concern the application of national criminal law or the national administration of justice’. The Treaty of Lisbon has deleted that limitation. For the evolution of the wording of this provision across the successive versions of the Treaty before the Treaty of Lisbon see Opinion of Advocate General Jacobs in Commission v ECB (C?11/00, EU:C:2002:556).

32 See, on the broad concept of ‘fraud’ under Article 325 TFEU for example: Waldhoff, C., ‘AEUV Art. 325 (ex-Art. 280 EGV) [Bekämpfung von Betrug zum Nachteil der Union]’ in Calliess, C., and Ruffert, *EUV/AEUV Kommentar*, 5th ed., C.H. Beck, Munich, 2016, paragraph 4; Magiera ‘Art. 325 AEUV Betrugsbekämpfung’ in Grabitz, E., Hilf, M., and Nettesheim, M., *Das Recht der Europäischen Union* (C.H. Bech, Munich, 2016, paragraph 15 et seq.; Satzger ‘AEUV Art. 325 (ex-Art. 280 EGV) [Betrugsbekämpfung]’ in Streinz, *EUV/AEUV* (C.H. Beck, Munich, 2012, paragraph 6; Spitzer, H., and Stiegel, U., ‘AEUV Artikel 325 (ex-Artikel 280 EGV) [Schutz der finanziellen Interessen der Union]’ in von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, Nomos, Baden-Baden, 2015, paragraph 12 et seq.

33 See, for example, for the difficulties on the definition of ‘fraud’, ‘Incompatibilités entre systèmes juridiques et mesures d’harmonisation: Rapport final du groupe d’experts chargé d’une étude comparative sur la protection des intérêts financiers de la Communauté’, Delmas-Marty, M., on *Seminar on the Legal Protection of the Financial Interests of the Community*, Brussels, November1993, Oak Tree Press Dublin, 1994. See also, for a general overview, the *Study on the legal framework for the protection of EU financial interests by criminal law* RS 2011/07 Final Report 4 May 2012.

34 Judgment of 8 September 2015, Taricco and Others (C?105/14, EU:C:2015:555, paragraph 41).

35 See, for example, the definition contained in the Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law COM(2012) 363 final. The original legal basis of the proposal was Article 325(4) TFEU. The legal basis was modified in the negotiation of the proposal to Article 83(2) TFEU (Position of the Council at first reading, Council Document 6182/17of 5 April 2017).

36 See, to that effect, judgments of 27 September 2007, *Collée* (C?146/05, EU:C:2007:549, paragraph 39); of 8 May 2008, *Ecotrade* (C?95/07 and C?96/07, EU:C:2008:267, paragraph 71); and of 17 July 2014, Equoland (C?272/13, EU:C:2014:2091, paragraph 39).

37 See, to that effect, judgments of 12 July 2012, EMS-Bulgaria Transport (C?284/11, EU:C:2012:458 paragraph 74), and of 20 June 2013, Rodopi-M 91 (C?259/12, EU:C:2013:414, paragraph 42).

38 Above, footnote 31.

39 Judgment of 21 September 1989, Commission v Greece (68/88, EU:C:1989:339, paragraphs 24 and 25). See, confirming this substantive overlap, judgment of 8 July 1999, Nunes and de Matos (C?186/98, EU:C:1999:376, paragraph 13), referring to Article 5 of the EC Treaty and to the first paragraph of Article 209a of the EC Treaty.

40 See for example, judgment of 29 March 2012, Pfeifer & Langen (C?564/10, EU:C:2012:190,

paragraph 52) with regard to Article 325 TFEU in connection with measures for the collection of interest when recovering advantages wrongly received from the European Union budget.

41 See, to that effect, judgment of 28 October 2010, SGS Belgium and Others (C?367/09, EU:C:2010:648, paragraphs 40 and 42).

42 See, for example, judgment of 28 October 2010, *SGS Belgium and Others* (C?367/09, EU:C:2010:648, paragraph 41).

43 See, for example, judgments of 21 September 1989, Commission v Greece (68/88, EU:C:1989:339, paragraph 24), and of 3 May 2005, Berlusconi and Others (C?387/02, C?391/02 and C?403/02, EU:C:2005:270, paragraph 65 and the case-law cited).

44 See judgments of 26 February 2014, *Åkerberg Fransson*, (C?617/10, EU:C:2013:105, paragraph 25); of 8 September 2015, Taricco and Others (C?105/14, EU:C:2015:555, paragraph 36; and of 17 December 2015, *WebMindLicenses* (C?419/14, EU:C:2015:832, paragraph 41).

45 See, to that effect, judgment of 7 April 2016, Degano Trasporti (C?546/14, EU:C:2016:206, paragraph 19 and the case-law cited).

46 See, for example, judgment in *Commission* v *Italy* (C?132/06, EU:C:2008:412, paragraph 37).

47 See, to that effect, judgments of 12 July 2012, EMS-Bulgaria Transport (C?284/11, EU:C:2012:458, paragraph 69); of 20 June 2013, Rodopi-M 91 (C?259/12, EU:C:2013:414, paragraph 38 et seq.); and of 17 July 2014, Equoland (C?272/13, EU:C:2014:2091, paragraph 46).

48 Above, point 77 of this Opinion.

49 See judgments of 21 September 1989, Commission v Greece (68/88, EU:C:1989:339, paragraphs 24 and 25), and of 8 July 1999, Nunes and de Matos (C?186/98, EU:C:1999:376, paragraphs 10 and 11).

50 For a similar approach, see also Delmas-Marty, M., ‘Incompatibilités entre systèmes juridiques et mesures d’harmonisation’, op. cit., p. 97; Waldhoff, C.,‘AEUV Art. 325 (ex-Art. 280 EGV) [Bekämpfung von Betrug zum Nachteil der Union]’ in Calliess, C., and Ruffert, *EUV/AEUV Kommentar*, 5th ed., C.H. Beck, Munich, 2016, paragraph 10; Spitzer, H., and Stiegel, U., ‘AEUV Artikel 325 (ex-Artikel 280 EGV) [Schutz der finanziellen Interessen der Union]’ in von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, Nomos, Baden-Baden, 2015, paragraph 44.

51 Unless of course, one day, the assimilation (or equivalence) assessment were no longer to be carried out *internally* (within a Member State), but rather *externally* (comparing the approaches among the Member States). *Pragmatically*, such a change in the law might perhaps indeed be necessary one day, if more and more national legal regimes become harmonised, with any suitable national comparators effectively disappearing. *Systemically*, such a way of assessing appropriateness of procedures or remedies would perhaps better foster the idea of similarity that ought to be embedded in national enforcement of EU law, instead of a test that effectively further underlines potential divergence.

52 It is in such a specific context that I understand that the Italian Constitutional Court stated that there is a lack of comparability of Articles 10bis and 10ter of the Legislative Decree at issue in the present case. See judgment of the Italian Constitutional Court of 12 May 2015, 100/2015 (IT:COST:2015:100). More broadly, direct and indirect taxation were also considered to be incomparable by the case-law of the Court, but yet again in a different context (also in the field of

VAT, but in a case related to the right of the taxpayer for reimbursement, not with regard to the imposition of sanctions by the Member States). See judgment of 15 March 2007, Reemtsma Cigarettenfabriken (C?35/05, EU:C:2007:167, paragraphs 44 and 45).

53 Judgment of 8 September 2015, Taricco and Others (C?105/14, EU:C:2015:555, paragraph 48). Similarly, the Court has declared in its judgment of 29 March 2012, Pfeifer & Langen (C?564/10, EU:C:2012:190, paragraph 52) that Member States are required, on the basis of Article 325 TFEU, and in the absence of specific EU rules, 'where their national law provides for the collection of interest when recovering advantages of the same type wrongly received from their own budget to collect interest in the same way when recovering advantages wrongly received from the European Union budget'.

54 See, on the relevance of the difficulty of finding an infringement, judgment of 25 February 1988, Drexl (299/86, EU:C:1988:103, paragraphs 22 and 23).

55 See above, points 52 to 84 of this Opinion.

56 Judgments of 17 July 2008, *Commission* v *Italy* (C?132/06, EU:C:2008:412, paragraph 37); of 26 February 2013, Åkerberg Fransson(C?617/10, EU:C:2013:105, paragraph 25); and of 8 September 2015, Taricco and Others (C?105/14, EU:C:2015:555, paragraph 36).

57 Judgments of 26 February 2013, Åkerberg Fransson(C?617/10, EU:C:2013:105, paragraph 26), and of 8 September 2015, Taricco and Others (C?105/14, EU:C:2015:555, paragraph 37).

58 See also above points 77 and 83.

59 Judgment of 8 September 2015, Taricco and Others (C?105/14, EU:C:2015:555, paragraph 39). See also Opinion of Advocate General Ruiz-Jarabo Colomer in Commission v Council (C?176/03, EU:C:2005:311, point 43).

60 Judgments of 26 February 2013, Åkerberg Fransson(C?617/10, EU:C:2013:105, paragraph 34), and of 8 September 2015, Taricco and Others (C?105/14, EU:C:2015:555, paragraph 39).

61 It is to be noted that, from a comparative perspective, not all Member States contemplate criminal sanctions for behaviour related to failure to pay VAT by the legal deadline. There appears to be considerable variation in this regard.

62 It might be added that the related issue concerning the principle *ne bis in idem* is the subject matter of a pending case in *Menci*. In view of the importance of the questions raised by the judgment of 15 November 2016 of the European Court of Human Rights, *A and B v. Norway* (CE:ECHR:2016:1115JUD002413011, Grand Chamber) with regard to the interpretation of Article 50 of the Charter, the case has been assigned to the Grand Chamber and the oral procedure has been reopened. See order of the Court (Grand Chamber) of 25 January 2017, Menci(C?524/15, not published, EU:C:2017:64).

63 See the explanation of Article 8 (modifying Article 10ter of Legislative Decree 74/2000) in the statement of reasons accompanying the draft legislative decree (Schema di Decreto Legislativo concernente la revisione del sistema sanzionatorio), of 26 June 2015.

64 See, ibid., the explanation of Article 11 (modifying Article 13 of Legislative Decree 74/2000).

65 That is perhaps also why variously worded rules concerning the discontinuation of public prosecution for the failure to pay fiscal, tax, or social security contributions if the debt is paid in full before the trial is opened can be found in a number of Member States' legal systems.

66 Judgment of 20 June 2013, Rodopi-M 91 (C?259/12, EU:C:2013:414, paragraph 40).

67 With regard to infringements of formal obligations, see judgment of 17 July 2014, Equoland (C?272/13, EU:C:2014:2091, paragraph 46 and the case-law cited).

68 See, for example, judgments of 9 March 1978, Simmenthal(106/77, EU:C:1978:49, paragraph 17), and of 14 June 2012,ANAFE (C?606/10, EU:C:2012:348, paragraph 73 and the case-law cited).

69 See, to that effect, judgment of 29 March 2012, Belvedere Costruzioni (C?500/10, EU:C:2012:186, paragraph 23).

70 Before the entry into force of the Charter, the principle that criminal provisions shall not have retroactive effect was also considered to be among the general principles of law, the observance of which is ensured by the Court. See, for example, judgments of 10 July 1984, Kirk (63/83, EU:C:1984:255, paragraph 22); of 13 November 1990, Fédesa and Others (C?331/88, EU:C:1990:391, paragraph 42); of 7 January 2004, X(C?60/02, EU:C:2004:10, paragraph 63); of 15 July 2004, Gerekens and Procola (C?459/02, EU:C:2004:454, paragraph 35); and of 29 June 2010, E and F (C?550/09, EU:C:2010:382, paragraph 59).

71 See, to that effect, judgments of 3 June 2008, *Intertanko and Other*s (C?308/06, EU:C:2008:312, paragraph 70), and of 28 March 2017, *Rosneft* (C?72/15, EU:C:2017:236, paragraph 162).

72 See, for example judgments of 3 May 2007, Advocaten voor de Wereld (C?303/05, EU:C:2007:261, paragraph 50); of 31 March 2011, Aurubis Balgaria (C?546/09, EU:C:2011:199, paragraph 42); and of 28 March 2017, *Rosneft* (C?72/15, EU:C:2017:236, paragraph 162).

73 See judgment of 28 March 2017, *Rosneft* (C?72/15, EU:C:2017:236, paragraph 167 and the case-law cited).

74 See, for example, judgments of 7 January 2004, X(C?60/02, EU:C:2004:10, paragraph 63), and of 28 June 2012, Caronna(C?7/11, EU:C:2012:396, paragraph 55).

75 See judgments of the European Court of Human Rights of 21 October 2013, *Del Río Prada v. Spain* [GC], (CE:ECHR:2013:1021JUD004275009, § 85 et seq., referring, inter alia, to judgment of 12 February 2008, Kafkaris v. Cyprus [GC] CE:ECHR:2008:0212JUD002190604, § 142).

76 See, judgments of 3 May 2005, Berlusconi and Others (C?387/02, C?391/02 and C?403/02, EU:C:2005:270, paragraph 68); of 8 March 2007, Campina(C?45/06, EU:C:2007:154, paragraph 32); of 11 March 2008, Jager(C?420/06, EU:C:2008:152, paragraph 59); and of 4 June 2009, Mickelsson and Roos(C?142/05, EU:C:2009:336, paragraph 43).

77 Grand Chamber judgment of the European Court of Human Rights of 17 September 2009, *Scoppola v. Italy (No. 2)* (CE:ECHR:2009:0917JUD001024903, §§ 105 to 109).

78 See the Grand Chamber judgments of the European Court of Human Rights of 17 September 2009, *Scoppola v. Italy (No. 2)* (CE:ECHR:2009:0917JUD001024903, § 109), and of 18 March 2014, *Öcalan v. Turkey* (No. 2) (CE:ECHR:2014:0318JUD002406903, § 175). See also

judgments of the European Court of Human Rights of 12 January 2016, *Gouarré Patte v. Andorra* (CE:ECHR:2016:0112JUD003342710, § 28); of 12 July 2016, *Ruban v. Ukraine* (CE:ECHR:2016:0712JUD000892711, § 37); and of 24 January 2017, *Koprivnikar v. Slovenia* (CE:ECHR:2017:0124JUD006750313, § 49).

79 Grand Chamber judgment of the European Court of Human Rights of 17 September 2009, *Scoppola v. Italy (No. 2)* (CE:ECHR:2009:0917JUD001024903, § 108).

80 Judgment of 6 October 2016, Paoletti and Others (C?218/15, EU:C:2016:748, paragraph 27).

81 See, in particular, the partly dissenting opinion of Judge Nicolaou, joined by Judges Bratza, Lorenzen, Jo?ien?, Villiger and Sajó in the *Scoppola* case (footnote 77), as well as the dissenting opinion of Judge Sajó in judgment of ECtHR of 24 January 2017, *Koprivnikar v. Slovenia* (CE:ECHR:2017:0124JUD006750313). A broader view of the principle, however, was embraced in the concurring opinion of Judge Pinto de Albuquerque joined by Judge Vu?ini?, in the European Court of Human Right's Grand Chamber judgment of 18 July 2013, *Maktouf and Damjanovi? v. Bosnia and Herzegovina* (CE:ECHR:2013:0718JUD000231208).

82 Thus, for example, the hijacking of the legislative process and the adoption of self-serving rules in favour of certain persons would fall outside of such correct application of the principle of *lex mitior*. Such persons could not have had any good faith and hence legitimate expectations. By contrast, with regard to 'normal' addressees of the legislation, there is a correlation between the applicability of the principle of *lex mitior* and legal certainty and the foreseeability of the law.

83 Again, it is to be noted that the ECtHR has considered, in its assessment of Article 7(1) ECHR, that not only is the formulation of a penalty at the time of the commission of the offences relevant, but also, in certain cases, the time when the sentence was adopted and notified. Judgment of the European Court of Human Rights of 21 October 2013, *Del Río Prada v. Spain* (CE:ECHR:2013:1021JUD004275009, §§ 112 and 117), referring to the fact that the changes in case-law (amounting to the lengthening of the duration of incarceration) could not have been foreseen by the applicant at the time when the applicant was convicted and at the time when she was notified of the decision to combine her sentences and set a maximum term.

84 See, for example, judgment of 13 October 2016, Polkomtel (C?231/15, EU:C:2016:769, paragraph 29 and the case-law cited).

85 See, for example, judgments of 9 March 2017, Doux (C?141/15, EU:C:2017:188, paragraph 22 and the case-law cited), and of 28 March 2017, *Rosneft* (C?72/15, EU:C:2017:236, paragraph 161).

86 Unlike the *ANAFE* case, this case is not concerned with an administrative instruction, but with criminal law. See judgment of 14 June 2012, ANAFE (C?606/10, EU:C:2012:348, paragraph 70 et seq.), where the Court rejected the possibility to rely on legitimate expectations of holders of re-entry permits issued by the French administration in violation of the Schengen Code.

87 See judgment of 3 May 2005, Berlusconi and Others (C?387/02, C?391/02 and C?403/02, EU:C:2005:270 paragraph 70).

88 See, for example, judgments of 11 June 1987, X (14/86, EU:C:1987:275, paragraph 20); of 8 October 1987, Kolpinghuis Nijmegen(80/86, EU:C:1987:431 paragraph 13); of 26 September 1996, Arcaro (C?168/95, EU:C:1996:363, paragraph 37); of 12 December 1996, X (C?74/95 and C?129/95, EU:C:1996:491, paragraph 24); of 7 January 2004, *X* (C?60/02, EU:C:2004:10,

paragraph 61); and of 3 May 2005, Berlusconi and Others, (C?387/02, C?391/02 and C?403/02, EU:C:2005:270, paragraph 74); or of 22 November 2005,Grøngaard and Bang (C?384/02, EU:C:2005:708, paragraph 30). See also, with regard to framework decisions, judgments of 16 June 2005, Pupino(C?105/03, EU:C:2005:386, paragraph 45), and of 8 November 2016, Ognyanov (C?554/14, EU:C:2016:835, paragraph 64).

89 Judgment of 8 September 2015, Taricco and Others (C?105/14, EU:C:2015:555, paragraph 51).

90 Judgment of 8 September 2015, Taricco and Others (C?105/14, EU:C:2015:555, paragraph 52).

91 Judgment of 8 September 2015, Taricco and Others (C?105/14, EU:C:2015:555, paragraph 53).

92 See judgment of 8 September 2010, Winner Wetten (C?409/06, EU:C:2010:503, paragraph 54 and the case-law cited).

93 See judgment of 7 January 2004, *X* (C?60/02, EU:C:2004:10, paragraphs 62 and 63).

94 There might, however, be Treaty provisions that clearly define ‘the infringements and the nature and extent of the penalties’ so as to fulfil the requirements of Article 49(1) of the Charter. See judgment of 29 March 2011, ThyssenKrupp Nirosta v Commission (C?352/09 P, EU:C:2011:191, paragraph 82 et seq.) in which the Court declared that ‘at the material time, Article 65(1) and (5) [Treaty establishing the European Coal and Steel Community] provided a clear legal basis for the penalty imposed in this case, so that the appellant could not be unaware of the consequences of its conduct’.

95 See, for example, judgment of 28 June 2005, Dansk Rørindustri and Others v Commission (C?189/02 P, C?202/02 P, C?205/02 P to C?208/02 P and C?213/02 P, EU:C:2005:408, paragraph 217); or that of 10 July 2014, Telefónica and Telefónica de España v Commission (C?295/12 P, EU:C:2014:2062, paragraph 147).

96 See, generally, on temporal limitations of preliminary rulings, Düsterhaus, D., ‘*Eppur Si Muove!* The Past, Present and (possible) Future of Temporal Limitations in the Preliminary Ruling Procedure’, *Yearbook of European Law*, Vol. 35, 2016, pp. 1 to 38).

97 See, to that effect, judgment of 13 January 2004, *Kühne & Heitz* (C?453/00, EU:C:2004:17, paragraph 28), or that of 18 July 2007, *Lucchini* (C?119/05, EU:C:2007:434, paragraph 63).

98 It might be added that the problem is certainly not new and certainly not limited to the EU legal order. For a comparative overview see, for example, Steiner, E., *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions*, Springer, 2015 or Popelier, P., et al. (eds), *The Effects of Judicial Decisions in Time*, Intersentia, Cambridge, 2014.

99 See, to that effect, judgments of 22 October 1998, IN. CO. GE.'90 and Others (C?10/97 to C?22/97, EU:C:1998:498, paragraph 21), and of 19 November 2009, Filipiak (C?314/08, EU:C:2009:719, paragraph 83).

100 See judgments of 28 July 2016, Association France Nature Environnement (C?379/15, EU:C:2016:603, paragraph 33), referring to judgment of 8 September 2010, Winner Wetten (C?409/06, EU:C:2010:503, paragraph 67).

101 See, for example, judgments of 21 September 1989, Commission v Greece (68/88,

EU:C:1989:339, paragraph 24); of 18 October 2001, Commission v Ireland (C?354/99, EU:C:2001:550 paragraphs 46 to 48); and of 17 July 2008, *Commission* v *Italy* (C?132/06, EU:C:2008:412, paragraph 52).