
# EPPO AND EU LAW: A STEP FORWARD IN INTEGRATION

TOPIC 1: THE ROAD TO EPPO

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# THE FRAUD TO THE UNION'S FINANCIAL INTERESTS AND THE EUROPEAN COURT OF JUSTICE CASE LAW. FROM A JUDICIAL POINT OF VIEW: WHY WE DID NEED EPPO?

UNIVERSITÀ DEGLI STUDI DI MILANO BICOCCA

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Alessandro Marciano, référendaire, Chambers of judge K. Jürimäe, ECJ

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# WHY WE DID (DO) NEED AN EU PROSECUTOR?

- The **establishment of EPPO is a major change** and a major improvement from different points of view.
- Why we did (do) need an EU prosecutor from a "**judicial point of view**"?
- Fight against fraud to financials interests of the EU has been a **part of the EU "policies"** from the 70ies.
- As it has happened in many areas of EU law, **the ECJ "***a apporté sa pierre à l'édifice*".

# HOW THE ECJ CONTRIBUTED TO THE EVOLUTION OF THE FIGHT AGAINST FRAUD TO FINANCIALS INTERESTS OF THE EU?

ECJ case law had an impact on:

I. the **evolution of the notion of "fraud to financials interests of the EU" and**, consequently, on the evolution **of the EU legal framework**;

II. **enhancing the effectiveness** of the fight against fraud *in concreto* (i.e. at national level).

SPOILER ALERT:

- The Part II of our analysis of the ECJ case law will help us to answer the question: Why we did (do) need an EU prosecutor from a "judicial point of view"?

PART I

# "THE EVOLUTION OF THE NOTION OF "*FRAUD TO FINANCIALS INTERESTS OF THE EU*" AND OF THE EU LEGAL FRAMEWORK.

# THE EU LEGAL FRAMEWORK

3 different periods:

1) **1970-1990:** No legal framework;
2) **1990-2000:** The Maastricht Treaty and the PIF Convention;
3) **After 2000 up to the present days:** The PIF directive and the EPPO regulation.

# THE EU LEGAL FRAMEWORK

1) **1970 -1990**

- No legal ground, neither in the original treaties, nor in other legislative acts.
- First project of common PIF regulation (i.e. the PIF convention) was discussed.

2) **1990-2000**

- **The Maastricht Treaty**: (article 209 A) enshrine the principle of equivalence:

  *"Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests."*

- **PIF Convention** → first definition of "*fraud*".
- **Regulation n°2988/1995** on the protection of the European Communities financial interests.

# THE EU LEGAL FRAMEWORK

## 3) 2000 up to the present days

- Traité EC
- **Lisbon Treaty**: NEW article 86 TFEU and article 325 TFEU.
- **"PIF" Directive (EU) 2017/1371** of the European Parliament and of the European Council of 5 July 2017, on the fight against fraud to the Union's financial interests by means of criminal law, defines which crimes are considered crimes affecting the EU budget.
- **Council Regulation (EU) 2017/1939 of 12 October 2017,** implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, sets the basis for the functioning of the EPPO.

# ECJ CASE LAW

## 1) 1970 -1990

→ ***ECJ, C-68/88, Commission/Greece*** (“**greek mais**” ruling) **establishes the Principle of equivalence and effectiveness for sanctions** = MS must foresee sanctions for violations of the EU law which are comparable to those applicable in case of violation on national law and these sanctions must be “*effective, proportionate and dissuasive*”:

1) **infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law** of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive;

2) **the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws**.

# ECJ CASE LAW

***ECJ, C-68/88, Commission/Greece***

*22 According to the Commission, the* ***Member States are required by virtue of Article 5 of the EEC Treaty to penalize any persons who infringe Community law in the same way as they penalize those who infringe national law. The*** *Hellenic Republic failed to fulfil those obligations by omitting to initiate all the criminal or disciplinary proceedings provided for by national law against the perpetrators of the fraud and all those who collaborated in the commission and concealment of it.*

*23 It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.*

*24 For that purpose,* ***whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive****.*

*25 Moreover,* ***the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws****.*

*26 In the present case, it does not appear from the file on the case that the Greek authorities have instituted criminal or disciplinary proceedings against the persons who took part in the commission and concealment of the fraud denounced by the Commission or that there was any impediment to the institution of such proceedings.*

# ECJ CASE LAW

→ **The Maastricht Treaty: article 209 A**

"***Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests***.

*Without prejudice to other provisions of this Treaty, Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organize, with the help of the Commission, close and regular cooperation between the competent departments of their administrations.*"

→ **PIF convention : article 2**

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

# ECJ CASE LAW

**3) From 2000 up to present days**

→ ***ECJ most important rulings*** concerning the notion of "*fraud to financial interests of the EU*" are concentrated in this third period.

→ ***What did the ECJ in practice?***

1) ECJ has **extended the scope** of the notion of "*financial interests*": notion of financial interests ≠ notion of the "budgetary" interests of the EU strictly speaking.

- **The ECJ has ruled** : "*the expression 'financial interests of the Community' in Article 280 EC must be interpreted as encompassing not only revenue and expenditure covered by the Community budget but also, in principle, revenue and expenditure covered by the* ***budget of other bodies, offices and agencies established by the EC Treaty.***"

2) The ECJ has extended the notion of "*fraud*", both under a subjective as well an objective point of view:

- under a **subjective point of view**, the author of the fraud can be not only any EU citizen but also, within the EU institutions and bodies, a member of the EU staff;
- under an **objective point of view**: VAT (Common Customs Tariff duties, **irregularities having no specific financial impact)**.

# "FINANCIAL INTERESTS OF THE EU"

- ***ECJ, C-15/00, Commission/EIB***

*120 Second, it must be found that, contrary to the EIB's submission,* ***the expression 'financial interests of the Community' in Article 280 EC must be interpreted as encompassing not only revenue and expenditure covered by the Community budget but also, in principle, revenue and expenditure covered by the budget of other bodies, offices and agencies established by the EC Treaty****.*

*121 Among the factors bearing out such a finding is,* ***first, the fact that the expression is peculiar to Article 280 EC and is different from the terms used in other provisions of Title II of Part Five of the EC Treaty, entitled 'Financial Provisions'****, which refer invariably to the 'budget' of the European Community. The same may be said of the fact, pointed to by the Netherlands Government, that the expression 'financial interests of the Community' seems wider than the expression 'items of revenue and expenditure of the Community' found inter alia in Article 268 EC.*

*122* ***Second, the fact that a body, office or agency owes its existence to the EC Treaty suggests that it was intended to contribute towards the attainment of the European Community's objectives*** *and places it within the Community legal order, so that the resources that it has at its disposal by virtue of the Treaty have by their nature a particular and direct financial interest for the Community.*

*123 As regards more specifically the EIB, it may be noted in that respect that it was established by the EC Treaty* […]*. It follows that the EIB, by virtue of the EC Treaty, forms part of the framework of the Community (Commission v EIB, paragraph 29).*

[…]

*125.* ***It is clear from the foregoing considerations that the expression 'financial interests of the Community' in Article 280 EC is not restricted exclusively to the budget of the European Community in the strict sense but also covers the resources and expenditure of the EIB*** *(see, by analogy, in relation to the applicability to the EIB of Article 179 of the EC Treaty (now Article 236 EC), Mills v EIB, cited above, paragraph 14).*

- ***ECJ, C-11/00, Commission/ECB***

*92 As regards more specifically the ECB, it may be noted in that respect that it is clear from Article 8 EC and Article 107(2) EC that the ECB was established and given legal personality by the EC Treaty. Furthermore, under Article 4(2) EC and Article 105(1) EC, the primary objective of the ESCB, at the heart of which is the ECB, is to maintain price stability and, without prejudice to this objective, to lend support to the general economic policies in the European Community, with a view to contributing to the achievement of the objectives of the Community as laid down in Article 2 EC, which include an economic and monetary union and also the promotion of sustainable and non-inflationary growth. It follows that the ECB, pursuant to the EC Treaty, falls squarely within the Community framework.*

*93* ***Various other Community legal provisions afford further confirmation that the ECB's resources and their use are thus of evident financial interest to the European Community and its objectives****.*

[…]

*95* ***It is clear from the foregoing considerations that the expression 'financial interests of the Community' in Article 280 EC is not restricted exclusively to the budget of the European Community in the strict sense but also covers the resources and expenditure of the ECB.***

# "FRAUD"

## A) subjective point of view

### *ECJ, C-15/00 Commission/EIB*

*131 By introducing into Article 280 EC the statements in paragraphs 1 and 4, the draftsmen of the Treaty of Amsterdam clearly intended to step up the fight against fraud and irregularities affecting the financial interests of the European Community, in particular by expressly conferring on the Community the specific task of 'combating', like the Member States, such fraud and irregularities by adopting 'measures' which act as a 'deterrent' and afford 'effective protection in the Member States'.*

[…]

*133. Article 280(4) EC must be construed as providing a fuller explanation of the Community's competence and specifying certain of the conditions on which it is exercised. It thus lays down the procedural requirements governing the adoption of Community measures and likewise states that action by the European Community is as much aimed at preventing fraud as at combating it. It also states that the Community's powers are subject to certain limits in that the measures adopted cannot concern the application of national criminal law or the administration of justice in the Member States.*

*134. In that context, **the fact that Article 280(4) EC refers in particular to the need to afford effective and equivalent protection in the Member States cannot be taken to mean that the draftsmen of the Treaty of Amsterdam implicitly intended to make any action taken by the Community subject to a supplementary restriction as basic as a prohibition on combating fraud and other irregularities affecting its financial interests by adopting legislative measures covering the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties**.*

## B) objective point of view

***ECJ, C-617/10, Åkerberg Fransson***

"25 In relation to VAT, it follows, […] that due on its territory and for preventing evasion (see Cas**every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT** e C-132/06 Commission v Italy [2008] ECR I-5457, paragraphs 37 and 46).

26 Furthermore, Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial Interests of the European Union as they take to counter fraud affecting their own interests (see, to this effect, Case C-367/09 SGS Belgium and Others [2010] ECR I-10761, paragraphs 40 to 42). **Given that the European Union's own resources include,** as provided in Article 2(1) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17), **revenue from application of a uniform rate to the harmonized VAT assessment bases determined according to European Union rules, there is thus a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second** (see, to this effect, Case C-539/09 Commission v Germany [2011] ECR I-11235, paragraph 72).

27 **It follows that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter**."

# B) objective point of view (II)

## ***ECJ, C-612/15, Kolev***

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

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

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

## B) objective point of view (III)

## ***C-357/19, Euro Box Promotion***

*183 As the advocate general stated at paragraphs 94 and 95 of his opinion, in cases C-357/19 and C-547/19,* ***the notion of "financial interests" of the EU, pursuant to article 325 TFEU, encompasses both revenue and expenditure covered by the EU budget****. This interpretation is confirmed by the definition of "fraud" resulting from article 1 of the PIF convention, which concerns different actions or omissions relating to said revenues and expenditures.*

*184 As far as the concept of "any other illegal activity", ex article 325 TFEU, is concerned it has to be noted that the expression "illegal activity" usually refers to actions against the law, and that the and the use of the word 'any' indicates the intention to encompass all unlawful behavior, without distinction. Furthermore, in view of the importance that should be accorded to protecting the financial interests of the European Union, which in itself constitutes an objective of the latter the concept of 'illegal activities' cannot be interpreted restrictively.*

*185 Therefore, as the advocate general pointed out at paragraph 100 of his opinion in cases C-357/19 and C-547/19, said notion of "illegal activity" encompasses any corruption of public officials or abuse of office which affects the financial interests of the Union through the misappropriation of EU funds. In this framework, it makes no difference whether corruption takes the shape of an action or an omission of the public official at issue, bearing in mind that an omission can be as harmful for the financial interests of the EU as an action such as the omission of a public official to carry out the checks and the verifications required for expenditures covered by the EU budget or the authorization of inappropriate expenditures concerning EU funds.*

[…]

*187* ***It should be noted that the Cour has already stated that even irregularities having no specific financial impact may be seriously prejudicial to the financial interests of the European Union.*** *Therefore, as the advocate general stated at paragraph 103 of his opinion in cases C-357/19 and C-547/19, any other illegal activities affecting the financial interests of the Union' in Article 325(1) TFEU could cover not only (accomplished) acts of corruption and fraud committed in the context of public procurement, but also attempts to commit the same acts, provided naturally that the threshold of 'attempt' is reached and is punishable under national law.*

→ ***What did the ECJ in practice?***

✓ ***ECJ, C-15/00, Commission/BEI*: ECJ extended the scope of the notion of "*financial interests*"** ruling *"that not only revenue and expenditure covered by the Community budget but also, in principle, revenue and expenditure covered by the* ***budget of other bodies, offices and agencies established by the EC Treaty.***

✓ The ECJ extended the notion of "*fraud*", both under a subjective as well an objective point of view:

a) under a **subjective point of view**, the author of the fraud shall be considered not only any EU citizen but also the author of the actions carried out, **within the EU institutions and bodies, by the EU staff (ECJ, C-15/00, Commission/BEI)**;

b) under an **objective point of view** the ECJ has interpreted that notion of "fraud" widely and as encompassing:

- VAT (***ECJ, C-617/10, Åkerberg Fransson)***;
- (Common Customs Tariff duties, **ECJ, C-612/15, Kolev**; irregularities having no specific financial impact, **C-357/19, Euro Box Promotion**).

# CONSEQUENCES ON THE LEGAL FRAMEWORK

✓

CHAPTER 6
COMBATTING FRAUD
Article 325
(ex Article 280 TEC)

*"1. **The Union and the Member States shall counter fraud and any other illegal activities** affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, **and in all the Union's institutions, bodies, offices and agencies**.*
*2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.*
*3. Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.*
*4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies.*

*5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article."*

# CONSEQUENCES ON THE LEGAL FRAMEWORK (II)

- ✓ **PIF directive**

*Article 2*

*Definitions and scope*

*"1. For the purposes of this Directive, the following definitions apply:*

*(a) 'Union's financial interests' means all revenues, expenditure and assets covered by, acquired through, or due to:*

*(i) the Union budget;*

*(ii)* ***the budgets of the Union institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them****;*

*(b) 'legal person' means an entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations."*

**N.B.: VAT**

PART II

# Enhancing the effectiveness of the fight against fraud *in concreto*.

- Before the adoption of the PIF directive, the EU did not have a specific tool to fight fraud trough the provision of harmonized criminal sanctions on the matter.

- How did the ECJ made possible the adoption of criminal penalties in this – non harmonized – domain?

  The **Rewe principle**: "*In the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy, on condition, however, that those rules are not less favorable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness)*". (***ECJ, C-33/76, Rewe, paragraph 5***)

- **Limitation of the procedural autonomy of the MS through the application of the principles of effectiveness and equivalence** = important tools for the EU construction

  → in those areas where harmonization of national laws has not been undertaken, the ECJ, *via* the limitations of the procedural autonomy, rendered **effective the protection of rights conferred upon individuals by EU provisions having direct effect**.

  → EXEMPLE: Art 101, paragraph 1, TFEU.

- The ECJ transposed the Rewe principle in the area of the application of national sanctions for the infringement of EU law in the "greek mais".

→ ***ECJ, C-68/88, Commission/Greece***

"*23 It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions,* ***Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law****.*

*24 For that purpose,* ***whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive****."*

- How the ECJ limited, *in concreto*, procedural autonomy of the MS?

**The ECJ established direct effect article 325 TFEU and imposed further obligations on MS, both on their judges as well as on the national legislators!**

- **First step:**

***ECJ, C-617/10, Åkerberg Fransson***

"*26 **Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests**. Given that the European Union's own resources include, as provided in Article 2(1) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17), revenue from application of a uniform rate to the harmonized VAT assessment bases determined according to European Union rules, there is thus a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second."*

- **Following, more effective, step:**

***ECJ, C-105/14, Taricco***

*"39 Although the Member States have freedom to choose the applicable penalties — which may take the form of administrative penalties, criminal penalties or a combination of the two — in order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected in accordance with the provisions of Directive 2006/112 and Article 325 TFEU (see, to that effect, judgment in Åkerberg Fransson, C-617/10, EU:C:2013:105, paragraph 34 and the case-law cited), criminal penalties may nevertheless be essential to combat certain serious cases of VAT evasion in an effective and dissuasive manner.*

*[…]*

*43 It follows from all of the considerations set out in paragraphs 37 and 39 to 41 of the present judgment that the* ***Member States must ensure that such cases of serious fraud are punishable by criminal penalties which are, in particular, effective and dissuasive. Moreover, the measures adopted in that respect must be the same as those which the Member States adopt in order to combat equally serious cases of fraud affecting their own financial interests****."*

→ ***What does this imply?***

49 "*In the event that the national court concludes that the national provisions at issue* ***do not satisfy the requirement of EU law that measures to counter VAT evasion be effective and dissuasive, that court would have to ensure that EU law is given full effect****, if need be* ***by disapplying those provisions and thereby neutralising the consequence referred to in paragraph 46 above, without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure****.*

50 *In that respect, it must be emphazised that the* ***Member States' obligation to counter illegal activities affecting the financial interests of the European Union through dissuasive and effective measures****, and their obligation to take the same measures to counter fraud affecting those interests as they take to counter fraud affecting their own financial interests, are* ***obligations imposed, inter alia, by EU primary law, namely Article 325****(1) and (2) TFEU.*

51 *Those provisions of EU primary law 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****, noted in the previous paragraph, which they lay down.*

52 ***The provisions of Article 325(1) and (2) TFEU therefore have the effect, in accordance with the principle of the precedence of EU law****, 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.*"

- In the subsequent **M.A.S and M.B. case (C-42/17, often referred to as the Taricco 2 case)**, the ECJ confirmed the so-called "Taricco formula" i.e. the need to disapply national legislation conflicting with the principle of effective protection of EU financial interests.

## → First message

32 **It is for the Member States to ensure effective collection of the Union's own resources** (see, to that effect, judgment of 7 April 2016, Degano Trasporti, C-546/14, EU:C:2016:206, paragraph 21). **On that basis, they are obliged to collect sums corresponding to the own resources which, because of fraud, have been withheld from the EU budget**.

[…]

**35 Thus the Member States, if they are not to disregard their obligations under Article 325(1) and (2) TFEU, must ensure that, in cases of serious fraud affecting the EU's financial interests in relation to VAT, criminal penalties that are effective and deterrent are adopted** (see, to that effect, the Taricco judgment, paragraphs 42 and 43).

**36 Consequently, it must be considered that Member States are in breach of their obligations under Article 325(1) and (2) TFEU if the criminal penalties adopted to punish serious VAT fraud do not enable the collection in full of VAT to be guaranteed effectively**. The Member States must also ensure that the limitation rules laid down by national law allow **effective punishment of infringements** linked to such fraud.

[…]

41 **It is primarily for the national legislature to lay down rules on limitation that enable compliance with the obligations under Article 325 TFEU**.

→ **Second message**

"49 Where the imposition of criminal penalties is concerned, the competent national courts must ensure that the rights of defendants flowing from the principle that offences and penalties must be defined by law are guaranteed".

- Criminal law is at issue, possible harm to fundamental rights of the persons concerned (i.e. articles 47-50 of the Charter).

# ON THE PRINCIPLE OF EFFECTIVENESS (I)

## → ***ECJ, C-574/15, Scialdone***

"37 *However, it must be pointed out that a failure to pay VAT such as that at issue in the main proceedings is characterized by the fact that the taxable person, having submitted a complete and correct VAT return for the tax year in question, in accordance with Article 250(1) of the VAT Directive, fails to pay the VAT resulting from that tax return to the Treasury within the time limit prescribed by law, in contravention of the requirements of Article 206 of that directive.*

38 *As all the parties who have submitted observations to the Court have maintained, in so far as the taxable person has duly complied with his obligations to declare VAT, such a failure to pay VAT does not constitute 'fraud', within the meaning of Article 325 TFEU, irrespective of whether the failure is intentional or not.*

39 *Likewise, a failure to pay declared VAT does not constitute 'fraud' within the meaning of the PFI Convention."*

# ON THE PRINCIPLE OF EFFECTIVENESS (II)

***40 It follows that neither the Court's interpretation of Article 325(1) TFEU in relation to cases of VAT fraud nor the PFI Convention is applicable to the case of failure to pay declared VAT.***

*[…]*

*44 Nevertheless, the fact remains that **such failures to pay**, particularly where they result from the taxable person using, for his own purposes, the funds corresponding to the tax payable to the detriment of the Treasury, **constitute 'illegal activities' liable to affect the financial interests of the European Union, within the meaning of Article 325(1) TFEU, which accordingly require the application of effective and dissuasive penalties**.*

*45 That interpretation cannot be called into question by the argument of the German and Netherlands Governments that the phrase 'any other illegal activities' contained in Article 325(1) TFEU refers solely to acts of the same nature and gravity as fraud. As observed by the Advocate General in points 68 and 69 of his Opinion, the term 'illegal activities' usually denotes unlawful behaviour, and the use of the word 'any' indicates the intention to encompass all unlawful behaviour, without distinction. Furthermore, in view of the importance that should be accorded to protecting the financial interests of the European Union, which in itself constitutes an objective of the latter […], the concept of 'illegal activities' cannot be interpreted restrictively*

*55 In order to assess whether a difference such as that between the thresholds laid down in, respectively, Article 10 bis and Article 10 ter of Legislative Decree No 74/2000, as amended by Legislative Decree No 158/2015, complies with the principle of equivalence, it is necessary, in accordance with the considerations set out in paragraph 53 above, to determine whether a failure to pay withholding income tax may be regarded as an infringement of national law of a similar nature and importance to a failure to pay declared VAT.*

# ON THE PRINCIPLE OF EQUIVALENCE

→ ***ECJ, C-574/15, Scialdone***

*56 In that regard, it is true that both a failure to pay VAT and a failure to pay withholding income tax are characterised by non-compliance with the obligation to pay the tax due within the time limit prescribed by law. It is also apparent from the order for reference that the Italian legislature pursued the same objective in providing that both such forms of conduct constitute an offence, namely ensuring that the Treasury is paid tax in good time and, thus, that all tax revenue is collected.*

*[…]*

*57 However, as the Italian Government asserts,* ***the offences*** *defined and penalised, respectively, by Article 10 bis and Article 10 ter of Legislative Decree No 74/2000, as amended by Legislative Decree N°158/2015,* ***can be distinguished by both their constituent elements and the difficulty involved in their detection****.*

*58 [examination of such differences]*

*59* ***In view of those factors, those two offences cannot be regarded as being of a similar nature and importance, within the meaning of the case-law referred to in paragraph 28 above****.*

*60* ***Consequently, the principle of equivalence does not preclude a difference such as that between the thresholds laid down, respectively, in Article 10 bis and Article 10 ter of Legislative Decree N°74/2000.***

# FINAL REMARKS

1) **ECJ contributed and stimulated the evolution of the legal framework by interpreting the provisions in force since the beginning of the fight against fraud to financial interest of the EU.**

→ In that sense even after the establishment of EPPO, ECJ will have its say on the matter BUT thanks to EPPO it will have more opportunities to do so (case law was not abundant).

2) **ECJ enhanced the fight against fraud to financial interest of the EU through the limitation of the principle of the procedural autonomy:**

→ however, the responsibility for carrying out the fight (initiative) fell only on MS = differences in the "effectiveness" of the fight between MS

→ establishment of EPPO that centralizes the combatting of crimes provided by the PIF directive is an important goal that has been reached.

# THANK YOU FOR YOUR ATTENTION