Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 25 July 2018 [1]

Case C-310/16

Spetsializirana prokuratura
v
Petar Dzivev,
Galina Angelova,
Georgi Dimov,
Milko Velkov

(Request for a preliminary ruling from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria))

(Reference for a preliminary ruling — Protection of the European Union's financial interests — Fight against value added tax (VAT) fraud — Tax offences — Effective collection of VAT — Scope of Member States' duties — Limits deriving from fundamental rights, EU or national — Evidence obtained in breach of national law — Interceptions of telecommunications — Lack of jurisdiction of the court authorising interceptions)

I. Introduction

1. Mr Petar Dzivev stands accused of leading a criminal gang that has committed value added tax (VAT) fraud. In order to gather evidence of his involvement, telecommunications were intercepted (phones were tapped). However, some of those recordings were ordered by a court which apparently did not have jurisdiction to make that order. Furthermore, some orders were not properly reasoned. Under Bulgarian law, the evidence thus gathered is unlawful and cannot be used in criminal proceedings against Mr Dzivev.

2. It is within such factual and legal context that the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) asks whether, in a case like the present one, EU law precludes the application of provisions of national law that prohibits the use of evidence obtained through interceptions that were ordered by a court which had no jurisdiction and/or which were not properly reasoned, if that evidence could allegedly establish Mr Dzivev's involvement in a VAT-related offence.

3. How far does the Member States' duty to protect the financial interests of the European Union under Article 325 TFEU stretch? May, or even should, any national rule be disregarded if it appears to impede the proper and full collection of VAT, including the imposing of sanctions for fraud or other illegal activities affecting the financial interests of the European Union?

1 Original language: English.

4. There is no denying that the rapid evolution of the recent case-law of this Court on that issue has not been free from controversy, and, to put it mildly, internal dissonance. First, the Court handed down the ruling in *Taricco*.[2] Then came the judgments in *M.A.S. and M.B.*[3] and *Scialdone*,[4] which seemed to steer a different (and, at least in my view, a more reasonable) course. Most recently, the judgment in *Kolev* was pronounced, which rather seems to revert to the position in *Taricco*.[5] With a number of other Court rulings orbiting that case-law, it might indeed not be entirely easy to discern what the law is at present. In this Opinion therefore, I seek to explain why I believe that the proper approach to *Taricco* and its progeny is through the lenses of *M.A.S.* and *Scialdone*, and not *Kolev*.

II. Legal framework

A. EU law

1. Charter of Fundamental Rights

5. Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') provides that 'everyone has the right to respect for his or her private and family life, home and communications'.

6. Pursuant to Article 48(2), 'respect for the rights of the defence of anyone who has been charged shall be guaranteed'.

2. Treaty on the Functioning of the European Union

7. Article 325(1) of the Treaty on the Functioning of the European Union ('TFEU') provides that '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'.

3. Convention on the Protection of the European Communities' financial interests

8. Article 1(1) of the Convention on the Protection of the European Communities' financial interests ('the PFI Convention')[6] provides that:

'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,

2 Judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555).

3 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936).

4 Judgment of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295).

5 Judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392).

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

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

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

9. Article 2(1) states that '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. Decision 2007/436

10. According to Article 2(1) of Decision 2007/436/EC, Euratom:[7]

'Revenue from the following shall constitute own resources entered in the general budget of the European Union:

…

(b) without prejudice to the second subparagraph of paragraph 4, the application of a uniform rate valid for all Member States to the harmonised VAT assessment bases determined according to Community rules. The assessment base to be taken into account for this purpose shall not exceed 50% of GNI for each Member State, as defined in paragraph 7;

…'

5. VAT Directive

11. Article 250(1) of Directive 2006/112/EC ('the VAT Directive')[8] 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. Article 273 reads as follows: '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 …'

B. National law

13. Article 32(2) of the Bulgarian Constitution provides for the prohibition of the interception of a person's telecommunications, except in cases envisaged by law.

14. Article 121(4) of the Constitution sets out the obligation for court rulings to state reasons.

7 Council Decision of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17).

8 Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

15. The interception of telecommunications is regulated by Articles 1 to 3, 6 and 12 to 18 of the Zakon za spetsialnite razuznavatelni sredstva ('Law on special intelligence methods' or 'ZSRS') and Articles 172 to 177 of the Procedural Criminal Code. As explained by the referring court, interceptions may be carried out both before (preliminary investigations) and after the criminal proceedings have been initiated. Where carried out earlier, a body within the Ministerstvo na vatreshnite raboti (Interior Ministry) applies for them to be effected (in the present case the Direktor na Glavna direktsia za borba s organiziranata prestapnost (Director of the General Directorate Combating Organised Crime)). After proceedings have commenced, it is the public prosecutor's office which makes the application. Who (or what telephone connection) should be tapped, and the offence being investigated must be listed on that application.

16. The interception of telecommunications is only lawful if it has been authorised in advance, either by the president or by the vice-president of a court which has jurisdiction to decide on the application, by way of a final court decision that is not subject to appeal.

17. On 1 January 2012, the Zakon za izmenenie i dopalnenie na Nakazatelno-protsesualnia kodeks ('Law amending and extending the Procedural Criminal Code' or 'ZIDNPK') concerning the establishment and operation of the Spetsializiran nakazatelen sad (Specialised Criminal Court) entered into force. That law transferred powers over proceedings against criminal organisations from the Sofiyski gradski sad (Sofia City Court) to the Spetsializiran nakazatelen sad (Specialised Criminal Court). Pursuant to Article 5 of the ZIDNPK, jurisdiction to make orders for the interception of telecommunications in certain cases was also transferred to that court.

18. By virtue of Article 9(2) of the ZIDNPK, existing and ongoing criminal proceedings continued to be dealt with by the bodies that up until then had the relevant jurisdiction. From 6 March 2012, the provision was further amended to the effect that judicial review of interceptions will be exercised by the court that had jurisdiction prior to 1 January 2012.

III. Facts, proceedings and the questions referred

19. Mr Dzivev, Ms Galina Angelova, Mr Georgi Dimov and Mr Milko Velkov ('the Defendants') are accused of having, in the period between 1 June 2011 and 31 March 2012, been part of a criminal gang. It is alleged that they committed tax offences for their own benefit, through the company Karoli Kepital EOOD ('Karoli'). In doing so they would have avoided the assessment or payment of tax for which the company was liable under the Zakon za danak varhu dobavenata stoynost ('Law on Value Added Tax'). Those four persons also stand accused of specific tax offences committed by Karoli from 1 June 2011 to 31 January 2012. The unreported and unpaid tax in question amounts to a total of Bulgarian leva 372 667.99 (BGN) (over EUR 190 000).

20. Prior to the initiation of criminal proceedings against the Defendants, between 10 November 2011 and 2 February 2012, the competent authority, the Director of the General Directorate Combating Organised Crime, requested that the Defendants' communications be tapped. The President of the Sofiyski gradski sad (Sofia City Court, Bulgaria) issued the order authorising that tapping.

21. The public prosecutor had competence to request phone tapping as a result of the reform of 1 January 2012. In March 2012, he applied for and obtained an order from the President of the Spetsializiran nakazatelen sad (Specialised Criminal Court, the referring court). That order authorised the tapping of specific telephone connections concerning all four Defendants.

22. The Spetsializiran nakazatelen sad (Specialised Criminal Court), asks questions concerning the review of legality of those previously authorised interceptions, noting two problematic issues arising with regard to those orders. First, there was no proper statement of reasons. The referring court indicates in its order for reference that the interception orders in question merely reproduce the text

of the statutory provisions, but contain no (individual, specific) grounds to support them. According to the referring court, that amounts to inadequate justification under Bulgarian law. Second, some of those orders (those issued in January and February 2012) would have been adopted by a judicial authority that did not have jurisdiction, namely the Sofiyski gradski sad (Sofia City Court). The latter should have transferred the requests for interceptions to the Spetsializiran nakazatelen sad (Specialised Criminal Court), as the Sofiyski gradski sad (Sofia City Court) no longer had jurisdiction to order such authorisations at the material time.

23. Furthermore, the referring court notes that there are systemic errors in the issuing of orders for the use of special intelligence methods, particularly the interception of telecommunications, which were subsequently uncovered by officials at national level. That eventually led to the applicable law being amended.

24. The referring court mentions that the transitional rule laid down in Article 9 of the ZIDNPK was not clear as to whether it also covered ongoing preliminary investigations. That provision would appear to have given rise to extensive and contradictory case-law. Nevertheless, in Interpretation Decision [9] No 5/14 of 16 January 2014, the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria) confirmed the principle of exclusive jurisdiction of the body entrusted with the task of enforcing criminal justice. There are no exceptions to that principle. According to the referring court, that principle is of particular significance under national law. This is especially true for those cases in which special intelligence methods are applied, including the interception of telecommunications. Thus, in those cases, the order may be made solely by the president (or the authorised vice-president) of the court with the relevant jurisdiction. If it had been made by a different judge at that court or by the president or vice-president of a different court, it would clearly follow that this order is not lawful and that none of the evidence submitted may be used. The assessment is based on a purely formal criterion, specifically, whether the order was made by the body which had jurisdiction.

25. As further explained by the referring court, the evidence that was obtained through the interceptions that were authorised by the court lacking jurisdiction, the Sofiyski gradski sad (Sofia City Court), is of crucial importance to the present case. It documents clearly and beyond doubt numerous phone calls exchanged between Mr Dzivev and the other Defendants, and his leading role. However, under national law, this evidence cannot be used in criminal proceedings because it was obtained illegally, having been authorised by a court that no longer had jurisdiction, and apparently which had not provided sufficient reasoning for its orders. The referring court concludes that Mr Dzivev can only be successfully convicted if those telephone conversations could be used in evidence. Otherwise, Mr Dzivev must be acquitted.

26. It is within this factual and legal context that the Spetsializiran nakazatelen sad (Specialised Criminal Court) decided to stay the proceedings and to refer the following questions to the Court:

‘(1) Is it compatible with:

– Article 325(1) of the Treaty on the Functioning of the European Union which envisages that the Member States will take measures to effectively counter fraud and any other illegal activities affecting the financial interests of the European Union;

– Article 2(1) in conjunction with Article 1(1)(b) of the [PFI Convention] in conjunction with Article 2(1)(b) of [Decision 2007/436], according to which every Member State is to take the necessary measures to ensure the effective punishment of VAT evasion;

9 The interpretation decision is a legal act by the Varhoven kasatsionen sad (Supreme Court of Cassation) which provides binding indications of the meaning of a legislative provision.

– Article 47(1) and (2) of the Charter which guarantees the right to an effective remedy before a tribunal previously established by law,

if, under national law, the evidence obtained through the deployment of "special intelligence methods", specifically through the interception of the telecommunications of individuals subsequently charged with VAT fraud, cannot be used because it was ordered by a court that lacked jurisdiction, and at the same time the following requirements are met:

– at an earlier point (between one and three months previously) the interception of some of these telecommunications was requested and ordered by the same court, when at that point it still had jurisdiction;

– an application authorising the disputed interception of telecommunications (for the extension of the earlier interception of telecommunications and for the tapping of new telephone connections) was made at the same court which no longer had jurisdiction because immediately before that its jurisdiction had been transferred to a different court; despite its lack of jurisdiction the original court examined the substance of the application and made an order;

– at a later point (about one month later) a fresh application was made to authorise the tapping of the same telephone connections and granted by the court that now had jurisdiction;

– none of the orders made actually contain any reasoning supporting them;

– the statutory regulation that ordered the transfer of jurisdiction was unclear, led to numerous contradictory court decisions and caused the Varhoven [kasatsionen] sad [Supreme Court of Cassation] to issue a binding interpretation decision about two years after the legal transfer of jurisdiction and the interception of telecommunications in question;

– the court examining the current case is not authorised to decide on applications authorising the deployment of special intelligence methods (the interception of telecommunications); however, it does have jurisdiction to decide on the legality of any interception of telecommunications carried out, including the finding that an order does not meet the statutory requirements and therefore to refrain from assessing the evidence obtained in this way; this power only exists if a valid order has been issued for the interception of telecommunications;

– the use of this evidence (the Defendants' telephone conversations, the interception of which was ordered by a court that had already lost its jurisdiction) is of crucial importance to the resolution of the question of [the Defendant's] liability as the ringleader of a criminal gang formed for the purpose of committing tax offences under the Bulgarian Value Added Tax Act or as an instigator of specific tax offences, but he can only be found guilty and sentenced if these telephone conversations can be used in evidence; otherwise he would have to be acquitted[?]

(2) Does the judgment given in the reference for a preliminary ruling C-614/14 apply in the present case?'

27. On 25 July 2016, following the judgment of the Court in Case C-614/14,[10] the referring court decided to withdraw the second question. It considered that the latter had become irrelevant as the Court had already provided it with a useful answer.

10 Judgment of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514).

28. By a decision of 12 May 2017, the President of the Court has suspended the procedure before this Court pursuant to Article 55(1)(b) of the Rules of Procedure, pending the decision in *M.A.S. and M.B.*[11] The procedure resumed on 12 December 2017 following the delivery of the Court's judgment in that case.

29. Written submissions were lodged by the Polish Government and the European Commission.

IV. Assessment

30. This Opinion is structured as follows. First, I will review what provisions of EU law are applicable to the present case and, in the light of those provisions, rephrase the question referred (A). Second, I will outline the relevant case-law on the Member States' duties with regard to the protection of the European Union's financial interests (B). Third, on the basis of that case-law, I will suggest (reasonable) limits to the (otherwise rather sweeping) duty of (effective) protection of the European Union's financial interests (C). Finally, I will turn to the specific question posed by the referring court (D).

A. Applicable law and reformulation of the question referred

1. Which provisions of EU law are applicable in the present case?

31. In its question, the referring court mentions several provisions of EU law, namely Article 325(1) TFEU, Article 2(1) and Article 1(1)(b) of the PFI Convention, Article 2(1)(b) of Decision 2007/436 and Article 47(1) and (2) of the Charter.

32. First, Article 325(1) TFEU sets out the obligations of the European Union and the Member States to counter fraud and any other illegal activities affecting the European Union's financial interests through measures which shall both act as a deterrent and be effective. It is settled case-law that the notion of 'financial interests of the Union' encompasses revenue and expenditure covered by the budget of the European Union and of other bodies, offices and agencies established by the Treaties. Revenue from application of a uniform rate to the harmonised VAT assessment bases is included in the European Union's own resources.

33. On that basis, the Court confirmed that there is a direct link between the collection of 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'.[12] Thus, protection of the EU budget requires full and proper collection of VAT. As the alleged offences in the present case are said to have impaired recovery of VAT, it follows that Article 325(1) TFEU is applicable.

34. Second, in Article 1(1)(b), the PFI Convention sets out a broad understanding of the concept of 'revenue', referring to 'the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities'. The Court confirmed in the judgment in *Taricco* that that 'covers revenue derived from applying a uniform rate to the harmonised VAT assessment bases determined according to EU rules'.[13] It remains ultimately for the referring court to

11 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936).

12 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).

13 Judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555, paragraph 41), and confirmed by the Court in judgment of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295, paragraph 36).

determine whether, on the facts of this case, the tax offences in the main proceedings would indeed fall under the notion of fraud as defined in Article 1(1)(b) of that Convention. However, based on the facts as presented by the national court, it is possible to assume that that would indeed be the case, in view of the broad understanding of VAT fraud, as referred to in Article 1(1)(b) of the PFI Convention.

35. Third, in addition to Article 325(1) TFEU and the PFI Convention, the referring court also mentions Decision 2007/436. It follows from Article 2(1)(b) of Decision 2007/436 that the European Union's own resources include revenue from application of a uniform rate to the harmonised VAT assessment bases determined according to EU rules. However, that decision does not concern the nature and ambit of the Member States' duties to protect those interests. Thus, that decision would appear to be relevant only for the determination of the scope of the notion of financial interests of the European Union for the purposes of the application of other provisions of EU law to the present case.

36. Fourth, although it has not been expressly mentioned by the referring court, the VAT Directive is also relevant in the context of cases such as the present one.[14] Article 206 of that directive establishes the obligation of taxable persons to pay VAT when submitting the tax return provided for in Article 250(1) of that directive. Article 273 of the VAT Directive leaves the Member States 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. The choice of sanctions, if any, remains within the discretion of the Member States as long as the penalties imposed are effective, proportionate and dissuasive.[15] These provisions appear to be relevant here to the extent that they also oblige Member States to adopt appropriate measures in order to ensure the proper collection of VAT and, in so doing, to protect the European Union's financial interests.

37. In my view it follows from the foregoing that Article 325(1) TFEU, Article 1(1) and Article 2(1) of the PFI Convention, and Article 206, Article 250(1) and Article 273 of the VAT Directive are the relevant provisions in the case at hand. For practical purposes, although there are some differences,[16] the duties and obligations flowing from those provisions are quite similar and can therefore be assessed together.

38. A final point should be made about the applicability of the Charter. The Commission argues that fundamental rights cannot be affected if EU law does *not* preclude the application of the national legislation at issue. The question posed by the referring court would therefore be hypothetical with regard to a possible violation of the Charter.

39. I understand the logic of that argument: if the Court decided, as the Commission indeed proposes in their written submissions, that EU law does not preclude the national rules at issue, it would not be necessary to further examine whether setting aside those rules would comply with fundamental rights.

40. However, I do not think that in a case like the present one, the Charter operates only as, metaphorically, a 'secondary dam' for the case in which a certain, perhaps indeed rather questionable, interpretation of the EU substantive rules on a given matter has already been reached. The Charter and its provisions permeate the entire EU legal order. Thus, the Charter is already applicable and

14 See, for other cases related to criminal proceedings against alleged VAT offenders where the VAT Directive has also been held relevant, judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105); of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197); and of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295).

15 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).

16 Notably, the PFI Convention, which clearly requires the criminalisation of certain behaviour affecting the financial interests of the European Union above a certain threshold, whereas both Article 325(1) TFEU and the VAT Directive leave more discretion to the Member States in this regard — judgment of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295, paragraphs 34 to 36).

relevant for the 'primary interpretation' of the substantive rules in question: in the present case, of Article 325(1) TFEU, the PFI Convention and the VAT Directive, which must be interpreted in the light of the Charter. In this way, respect for the Charter already limits the conceivable range of interpretative options for those provisions, in particular the rather limitless argument of effectiveness.

41. For these reasons, the question raised in respect of fundamental rights is not hypothetical. The relevant Charter provisions, in particular Article 7 (respect for private life) and Article 48(2) (respect for the rights of the defence), are applicable to the present case.

2. Rephrasing the national court's question

42. The referring court's question to the Court is rather detailed. Reading it in the context of the order for reference, it would appear to me that there is a particular concern about two aspects of how the interceptions at issue were authorised. First, some interception orders were issued by a court that apparently no longer had jurisdiction: the exact content and scope of jurisdiction was unclear after the passing of a legislative amendment. Second, the orders were not properly reasoned in the manner required by national law.

43. From those two statements of fact, which are exclusively for the national court to ascertain, the referring court drew the following conclusion under national law: the evidence obtained was done so unlawfully and cannot be relied upon in criminal proceedings. Yet again, subsuming facts under the appropriate provisions of national law is within the exclusive jurisdiction and responsibility of the national court.

44. For the purposes of this preliminary ruling procedure, both of these elements are taken as a given. I wish to stress that point rather clearly in view of interpretative divergences that seem apparent amongst the courts in Bulgaria as to the court that has jurisdiction to order interceptions of telecommunications after the legislative amendment had been made. It is undoubtedly not for this Court to interpret national law, nor to arbitrate on its proper interpretation among national courts.

45. Therefore, without in any way embracing or approving any of the views as to which national court had jurisdiction to order the interceptions at issue, or discussing the standards under which interception orders are to be reasoned, I will proceed from the starting point that the evidence was obtained unlawfully under national law through the interception orders, and that, as a result, the application of the national version of the 'exclusionary rule', that such evidence cannot be used in criminal proceedings, was validly triggered.

46. In view of those clarifications, the question that the Court is called on to answer can be rephrased as follows: do Article 325(1) TFEU, Article 1(1) and Article 2(1) of the PFI Convention and Articles 206, 250 and 273 of the VAT Directive, interpreted in the light of the Charter, preclude the application of national provisions on admissibility of evidence, under which evidence obtained unlawfully must be disregarded, given the specific circumstances of the main proceedings?

B. The relevant case-law

47. Effective collection of VAT has been addressed in a number of this Court's judgments.[17] However, more recently, the Court has paid special attention to situations in which criminal proceedings were brought against persons accused of offences relating either to VAT or to customs duties, and the issue of (in)effectiveness of national rules or practices applied in those proceedings. The present section will outline key statements made by the Court in the judgments pertaining to that latter line of cases.

48. First, in the judgment in *Åkerberg Fransson*,[18] the Court held that, under Article 325 TFEU, and Article 2, Article 250(1) and Article 273 of the VAT Directive, and Article 4(3) TEU, every Member State is under an obligation to take all appropriate legislative and administrative measures to ensure the collection of VAT due on its territory, and to prevent evasion and counter illegal activities affecting the European Union's financial interests.[19]

49. However, the Court also made it clear that, in implementing these obligations, the Member States were subject to EU fundamental rights on the basis of Article 51(1) of the Charter.[20] In a situation where Member States' actions are not entirely determined by EU law, national authorities and courts also remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.[21]

50. Later, the Court was questioned as to whether the principle of legality could curtail the effective collection of VAT in the judgments in *Taricco*[22] and *M.A.S. and M.B.* ('*M.A.S.*').[23]

51. In *Taricco*, the Court first restated the duties of the Member States that follow from Article 325 TFEU and Article 2(1) of the PFI Convention.[24] It concluded that national provisions on the interruption of the limitation period, which would result in there being no criminal punishment of serious fraud in a considerable number of cases, are incompatible with EU law on the ground that they are not effective and dissuasive.[25]

52. The Court then turned to the consequences of the incompatibility of those national provisions with EU law and the role of the national court. It held that subparagraphs (1) and (2) of Article 325 TFEU were directly effective. As a result, any conflicting provision of national law had to be disapplied.[26] However, the Court recalled that, in deciding to disapply the national provisions at issue, the national court must also ensure that the fundamental rights of the persons concerned are respected.[27] In any event, such a disapplication of national law would not infringe the rights of the accused, as

17 For recent examples on effective collection of VAT, but not in the context of criminal proceedings, see, for instance, judgments of 7 April 2016, *Degano Trasporti* (C-546/14, EU:C:2016:206) and of 16 March 2017, *Identi* (C-493/15, EU:C:2017:219).

18 Judgment of 26 February 2013 (C-617/10, EU:C:2013:105).

19 Judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraphs 25 to 26). See also, to that effect, judgments of 17 July 2008, *Commission* v *Italy* (C-132/06, EU:C:2008:412, paragraphs 37 and 46), and of 28 October 2010, *SGS Belgium and Others* (C-367/09, EU:C:2010:648, paragraphs 40 to 42).

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

21 Judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 29). See also, in the context of the European Arrest Warrant, judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 60).

22 Judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555).

23 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936).

24 Judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555, paragraphs 36 to 37).

25 Judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555, paragraph 47).

26 Judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555, paragraphs 51 to 52).

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

guaranteed by Article 49 of the Charter. That is because in no way would it lead to a conviction of the accused for an act or omission which did not constitute a criminal offence under national law at the time it was committed, nor to the application of a penalty which, at that time, was not laid down by national law. [28]

53. About a year later, the Court was invited to revisit its approach in *M.A.S.* The referring court in that case, the Corte costituzionale (Constitutional Court, Italy) expressed doubts as to whether the approach of *Taricco* was compatible with the overriding principles of the Italian constitutional order, in particular the (national) principle of legality (of sanctions). It argued that the primacy of EU law should not go so far as to strike at the national identity inherent in the fundamental structure of the Member State, protected under Article 4(2) TEU.

54. In its answer, the Court restated the Member States' duties arising from the directly effective Article 325(1) TFEU and the obligation for national courts to disapply contrary national provisions on limitation. [29] However, the Court also added two important qualifications to *Taricco*. First, it emphasised the primary responsibility of the national legislature to lay down rules on limitation that enable compliance with the obligations under Article 325 TFEU. [30] Second, the Court noted that, at the material time, the limitation rules applicable to criminal proceedings relating to VAT had not been harmonised by the EU legislature. [31] In this context, national authorities and courts could apply national standards of protection of fundamental rights under the conditions laid down in the judgment in *Åkerberg Fransson*. [32]

55. The Court further noted that the requirements concerning the foreseeability, precision and non-retroactivity of the criminal law, inherent in the legality principle, [33] also applied in the Italian legal system to limitation rules. As a result, the Court held that if national courts consider that the obligation to disapply the national provisions at issue conflicts with the principle of legality, they would not be obliged to comply with that obligation, even if compliance with the obligation allowed a national situation that is incompatible with EU law to be remedied. [34]

56. Since the judgment in *M.A.S.*, the Grand Chamber of the Court has issued three further judgments that concern the Member States' duties deriving from EU law as regards effective protection of financial interests of the European Union in general and the collection of VAT in particular.

57. First, in *Scialdone*, the Court recalled that, in the absence of harmonisation of the penalties in the field of VAT, it is for the Member States, in line with procedural and institutional autonomy, to decide on the penalties applicable to infringements of VAT rules, subject to respect for the principles of effectiveness and equivalence. [35] Second, in *Menci*, the Court stated that Member States are free to choose penalties against VAT infringements as long as they respect fundamental rights, especially the principle *ne bis in idem* laid down in Article 50 of the Charter. It concluded that the duplication of administrative and criminal proceedings and penalties was compatible with Article 50 under certain conditions. [36]

28 Judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555, paragraphs 55 to 57).
29 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraphs 30 to 36 and 38 to 39).
30 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 41).
31 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 44).
32 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraphs 46 to 47).
33 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraphs 51 to 52).
34 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 58 to 61).
35 Judgment of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295, paragraphs 25 and 29).
36 Judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraphs 40 to 62).

58. Third, the most recent judgment in *Kolev*[37] is also of particular relevance for the present case. In that case, the request for a preliminary ruling was also submitted by the Spetsializiran nakazatelen sad (Specialised Criminal Court) in Bulgaria. However, it concerned a national rule providing for the termination of criminal proceedings, upon the request of the accused person, where a period of more than two years from the commencement of pre-trial investigations has elapsed, and where the prosecutor has not completed the pre-trial investigation.

59. After restating that Article 325(1) TFEU requires Member States to adopt effective and dissuasive sanctions against infringements of customs legislation, the Court underlined that the Member States must also ensure that criminal procedural rules permit effective investigation and prosecution of these offences.[38] The Court further added that it is primarily for the national legislature to ensure that the procedural regime applicable for the prosecution of offences affecting the European Union's financial interests does not present, for reasons intrinsic to it, a systemic risk of impunity for conduct that constitutes such offences, and to protect the fundamental rights of the accused persons. For its part, the national court must also immediately give effect to the obligations deriving from Article 325(1) TFEU and, at the same time, uphold fundamental rights.[39] In any event, the national court cannot order the termination of criminal proceedings on the sole ground that it would be more favourable for the accused persons.[40]

60. Finally, there is also the judgment expressly quoted by the referring court: *WebMindLicences*.[41] That case concerned the defining of the relationship between an administrative procedure and a criminal procedure, and the rights of the taxable persons in that case. A question was also expressly asked about the use of evidence obtained through interceptions to establish the existence of an abusive practice concerning VAT. The referring court enquired whether the tax authorities may use evidence obtained in the context of a criminal procedure, including evidence obtained by interceptions, as the basis for their decision.

61. The Court held that Article 4(3) TEU, Article 325 TFEU and Article 2, Article 250(1) and Article 273 of the VAT Directive do not preclude the tax authorities from being able, in order to establish the existence of an abusive practice concerning VAT, to use evidence obtained without the taxable person's knowledge in the context of a parallel criminal procedure that has not yet been concluded. This came with the proviso that rights guaranteed by EU law, especially those in the Charter, are observed.[42]

62. In sum, it appears to be established case-law that Article 325(1) TFEU, as a stand-alone provision, or in combination with Article 2(1) of the PFI Convention, or with Article 2, Article 250 and Article 273 of the VAT Directive, requires Member States to adopt any measure necessary for the purposes of safeguarding the financial interests of the European Union, including effective and dissuasive administrative or criminal penalties.

63. The scope of the Member States' duties in this respect is broad. It encompasses, beyond individual sanctions, the whole set of relevant rules of national law, including rules on criminal procedure.[43] EU law aims at ensuring that, irrespective of their procedural or substantive nature, whether it is under national law or under EU law, the national rules issue do not have the effect of impeding the imposition of an effective and dissuasive sanction.

37 Judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392).

38 Judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraph 53 and 55).

39 Judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraphs 66).

40 Judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraph 75).

41 Judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832).

42 Judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 68).

43 See to that effect, in particular, judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraph 55).

64. However, the case-law is equally clear on the fact that, as a matter of principle, the Member States' obligations deriving from EU law find their limits in fundamental rights.[44] Irrespective of whether there has been harmonisation of rules directly or indirectly pertaining to sanctions in VAT or customs matters, the European Union and the Member States are bound by fundamental rights within the exercise of their respective competences, pursuant to Article 51(1) of the Charter.

C. Effective collection of VAT and its limits

65. In the crudest terms, the issue (re)opened by the present case is essentially: may a national court, in the name of 'effective collection' of VAT (or other own resources of the European Union), selectively set aside national provisions, such as rules on prescription and limitation periods (*Taricco*, *M.A.S.*); monetary thresholds for criminalisation (*Scialdone*); time limits applicable to the closure of the pre-trial stage of criminal proceedings (*Kolev*); or, as in the present case, national rules on admissibility of evidence in criminal proceedings obtained unlawfully, if the observance of those rules would mean impunity for the accused?

66. The answer of the Court to that specific question, again with some degree of simplification, oscillates from 'yes, if occurring in a considerable number of cases' (*Taricco*), to 'no, it is for the national legislature to remedy such systemic failures' (*M.A.S.* and *Scialdone*), to 'primarily no, but actually yes, if happening systematically, provided that fundamental rights of the accused are respected' (*Kolev*).

67. I find it difficult to see how the latest approach, in the judgment in *Kolev*, could be carried out by national courts in practice. A national court is supposed to set aside national rules applicable in criminal proceedings, which it evaluates as being incompatible with the directly applicable Article 325(1) TFEU, but must only set aside those if that would not then lead to a result which infringes the fundamental rights of the accused. But how are they to be identified? Are not all the rights of the accused worthy of meticulous observance within the right to a fair (criminal) trial and/or rights of defence? Or are there rights of lesser importance ('second class rights'), to be identified individually by each national court, and then selectively discarded, if they happen to hinder a conviction?

68. It would thus appear that this specific aspect of the case-law is still a 'work in progress'. In this section, I shall provide several suggestions as to how to conceptualise and advance that case-law. In doing so, it is certainly taken for granted that Member States must respect their obligations flowing from Article 325(1) TFEU and all the other relevant provisions of EU law discussed above.[45] It is also fully acknowledged that those duties may extend into whatever element of national law effectively implements those obligations.[46] Furthermore, they must be implemented in an effective manner. What will be discussed in the present section are rather the origins and the scope of limits to such sweeping obligations (Sections 1, 2, and 3); whether those limits differ based on the type of the national rule at issue (Section 4); and finally and perhaps most importantly, the issue of remedies: provided that any such incompatibility is identified, its consequences in the individual pending (and potentially other ongoing) cases (Section 5).

69. It is fair to acknowledge at the outset that the approach advocated here is based on the firm conviction that the correct approach to the Member States' potential (systemic) failures in effective collection of VAT (or the protection of other financial interests of the European Union) is the approach embraced in *M.A.S.* and *Scialdone*, and not that in *Taricco* and *Kolev*.

44 See also, in relation to the principle *ne bis in idem*, judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 21).

45 Above, points 31 to 37.

46 Thus acting within the scope of EU law — for a detailed discussion in the specific context of the VAT collection, see my Opinion in *Ispas* (C-298/16, EU:C:2017:650, points 26 to 65).

1. EU harmonisation measure

70. The enquiry into *what type* of rule, values or interests might be used for balancing or limiting the requirement of effective protection of financial interests of the European Union, and in *what way*, necessarily starts with the analysis of the nature of the EU law provisions applicable in the case at hand.

71. In the judgment in *M.A.S.*, the Court underlined the fact that, at the material time for the main proceedings, the limitation rules applicable in criminal proceedings relating to VAT had not yet been harmonised by the EU legislature, and that harmonisation had since then been only partial.[47]

72. Exactly what does 'harmonisation' mean in this context, and what does the existence or the absence of an EU harmonisation measure entail?

73. First, it is to be noted that phrasing the debate in terms of 'harmonisation' may be somewhat misleading. The problem is that the notion of 'harmonisation' implies a sort of sectoral analysis, looking at the whole area of law or at a specific legislative instrument. Furthermore, would 'partial harmonisation' or 'minimum harmonisation' within that particular scope, whatever it might be, have the same effects as 'full harmonisation'?

74. The actual test thus rather appears to be whether there is a clear rule or set of rules in EU law that aim at governing one specific aspect of a given field in an exhaustive manner, thereby effectively depriving Member States of the possibility to adopt autonomous rules. Such a test aims more at a microanalysis, looking at a specific rule or at best, a specific and well-defined aspect of EU law.

75. The judgment in *Melloni*,[48] and the rules on the grounds of non-execution of a European arrest warrant in the event of a conviction rendered *in absentia* contained in Article 4a of Framework Decision 2002/584/JHA,[49] may provide an example in that regard. The rules contained in that provision indeed exhaustively cover an aspect of the European arrest warrant procedure, thus precluding autonomous national rules on the same subject matter. The test of the existence of an EU 'harmonisation measure' in the sense outlined above was carried out at the level of Article 4a of Framework Decision 2002/584 and the situations covered thereby. But of course no claim was made that the framework decision would have covered the entire subject matter (however defined, and whether it included the whole European arrest warrant surrender procedure or criminal procedure as such).

76. Admittedly, such an effect of pre-emption does not always require a full 'textual match' between the rule(s) of EU law and the national ones. Such 'harmonisation' and the ensuing pre-emption might also be of a more functional nature. While not setting an express rule, the existence of other clear rules, as far as connected issues are concerned, may prevent or restrict certain rules of the Member States to the extent that the factual subject matter of the case falls within the scope of EU law.[50]

77. Second, the existence of clear rules that exhaustively govern a certain aspect of a broader field has a natural consequence: it excludes autonomous action on the part of the Member States. Once the EU legislature has adopted measures that fully govern a given issue, there is no longer any regulatory space for the Member States to adopt their own rules, unless these measures merely aim at implementing EU law rules, and in doing so do not go beyond what the latter allow.

47 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 44). See also, subsequently, judgment of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295, paragraphs 25 and 33).

48 Judgment of 26 February 2013 (C-399/11, EU:C:2013:107).

49 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States — Statements made by certain Member States on the adoption of the Framework Decision (OJ 2002 L 190, p. 1).

50 See, for instance, again in the context of the European arrest warrant, judgment of 30 May 2013, *F.* (C-168/13 PPU, EU:C:2013:358, paragraphs 37 to 38 and 56).

78. Third, it should be underlined that what needs to be determined in each individual case is how close the factual situation at hand in the main proceedings is to the harmonisation measure in question. No matter how clear, precise and complete the applicable EU rule is, if the set of facts in the main proceedings happens to be only remotely connected to that rule, Member States retain discretion to adopt their own autonomous rules, though the dispute still formally falls within the scope of EU law.

79. Thus, there is clearly a scale. On the one side, there will be cases in which a national rule falls under a 'harmonised' EU standard, either directly on the basis of its text, or because it is so close as to be functionally intertwined (as in *Melloni*). Moving to the side of the scale which is further from a clear rule of EU law, there will be cases in which the rule at national level still has some connection to a provision of EU law, but that connection becomes weaker. Examples in this category would include the Court's case-law on sanctions in the area of VAT, such as *Åkerberg Fransson* or *Scialdone*. The word 'sanctions', with the appropriate adjectives, is indeed mentioned in the relevant provisions of EU law, but they are certainly not detailed enough to provide any clear EU law rules as to the specific elements of sanctioning of VAT-related offences raised by those cases. Finally, at the outer end of the spectrum are cases that, while still falling within the scope of EU law, concern national rules that are quite remote from any clear EU law rules on the matter. Thus, for example, issues raised in *Ispas* (access to the file in a VAT procedure); *Kolev* (time limits applicable to the closure of the pre-trial stage of criminal proceedings); or, for that matter, in the present case, still somehow relate to VAT *collection*. But a stretch of the imagination is required to connect the word 'collection' and those factual situations.

80. The closer a situation is to a clearly defined requirement of EU law, the less discretion there is on the part of the Member State and the more uniformity there will be. Conversely, the further a case moves from a clear and specific rule of EU law, while still being within the scope of EU law, the greater the discretion on the part of the Member States, thus enabling greater diversity. Reverting to a metaphor already employed in a slightly different context,[51] but capturing the same idea: the closer one is to a lighthouse, the stronger the light from that source, blinding all other sources. The further one moves from the lighthouse, the less light there is, gradually blending (in) with light from other sources.

2. The EU or national origin of the limits to effective collection of VAT

81. In *M.A.S.*, the Court further noted that, at the material time for the main proceedings, the limitation rules applicable in criminal proceedings relating to VAT had not been harmonised by the EU legislature. Immediately after that observation, the Court held that the Italian Republic was thus, at that time, free to provide in its legal system that those rules, like the rules on the definition of offences and the determination of penalties, form part of substantive criminal law, and are thereby subject to the principle that offences and penalties must be defined by law.[52]

82. By that statement, the Court has accepted, in an area which has not yet been harmonised, the application of a specific, national interpretation of a fundamental right (the legality principle), which is protected under both EU law and national law.

83. Does that mean that effective collection of VAT is always limited because of both EU and national provisions on fundamental rights? The answer will depend on the content of the national rule in question and, as indicated in the previous section, its overlap or proximity to a 'harmonised' rule.

51 See my Opinion in *Ispas* (C-298/16, EU:C:2017:650, points 61 to 65).

52 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraphs 44 to 45).

84. In a nutshell, two situations are conceivable: *first*, the applicable national rule in question either falls squarely under the rules harmonised at EU level on its text or is functionally so close to those rules as to be effectively pre-empted by their operation. In that case, the reservations to, limitations to, and balancing with those rules will be of a 'horizontal' nature, that is, in relation to the interests, values, and fundamental rights standards of EU origin.[53] *Second*, the national rule in question does not come under such textual or (reasonably narrow) functional pre-emption, but still falls within the scope of EU law. In that case, such limits, including fundamental rights limits, will come from both systems: (minimum) EU law standards, since the Member State is acting within the scope of EU law and there cannot be an EU law mandated action without Article 51(1) of the Charter applying, and also national law limits, which may, in addition, provide for a higher level of protection in those cases.

85. This distinction explains why the Court, in *Melloni*, excluded the application of a national standard of protection, while it explicitly allowed for it in *M.A.S.*

86. In the judgment in *Melloni*, the situation at hand in the national proceedings was determined by a clear set of rules found in Framework Decision 2002/584.[54] It was therefore not possible, on the basis of any provision of national law in conjunction with Article 53 of the Charter, to add a new ground of non-execution to those laid down in Framework Decision 2002/584, even if that ground found its origin in the Member State's constitution. According to the Court, this would, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.[55]

87. In other words, save in very exceptional circumstances,[56] only the EU standard of fundamental rights shall apply in a situation of legislative uniformity at EU level where an EU measure has set clear and exhaustive requirements regarding a specific issue. In such a case, it is assumed that the EU legislature has already struck a balance between, on the one hand, the protection of fundamental rights and, on the other hand, the overall efficacy of the measure at issue with regard to its objectives. If necessary, that balance can be challenged before the Court on the basis of the EU standard of protection of fundamental rights as a yardstick of review of the EU harmonisation measure at issue. Thus, fundamental rights will ultimately be protected by the Court, bearing in mind that, by virtue of Article 52(3) of the Charter, the EU standard of protection cannot be lower than the standard laid down in the European Convention on Human Rights (ECHR).

88. By contrast, in the judgment in *M.A.S.* as well as in *Scialdone* (or in *Åkerberg Fransson*), there was no such 'harmonisation', in the sense of national rules at issue in those cases either falling directly under a clear provision of EU law to that effect or being functionally precluded by it. Accordingly, two types of limits applied to the exercise of this discretion. On the one hand, the Member States remain subject to the EU requirements of equivalence and effectiveness[57] and to the minimum standard of protection of fundamental rights guaranteed by the Charter.[58] On the other hand, because they are exercising their own discretion, Member States can also apply, when reviewing the rules adopted within the exercise of such discretion, their own concept of a fundamental right, as long as they do not provide less protection than that laid down in the Charter, pursuant to Article 53 of the latter.

53 Including also situations entirely determined by EU law through harmonisation measures in which, however, a Member State relies on Article 4(2) TEU to safeguard crucial rules or principles pertaining to the Member State's legal order, such as a national value or a fundamental right, including a specific interpretation of a right protected under EU law. Indeed, through that provision of primary law, EU law itself mandates respect for such rules and principles.

54 Above, point 75.

55 Judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 63).

56 Above, footnote 53.

57 See, to that effect, judgment of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295, paragraph 29).

58 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 47).

89. A final remark is called for concerning the required degree of 'unity' or 'uniformity' with regard to the latter situations. A recurrent statement of this Court is that the national authorities and courts remain free to apply national standards of protection of fundamental rights, on the condition that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law, are not thereby compromised.[59]

90. I must admit that I find it somewhat difficult to conceptualise the practical operation of those conditions, in particular the 'unity' requirements contained in the second condition. Time limits for making a VAT declaration can provide an example in this regard. While the fact that there must be regular VAT returns and declarations is provided for in Article 250(1) of the VAT Directive, the exact extent of how those declarations should be carried out administratively (such as how often, in what format, or according to what time limits) is not. The latter issues are therefore not 'harmonised' in the sense outlined in the previous section, thus falling within the area where the Member States retain discretion. By definition, such national rules will be diverse and divergent, but, provided that they do not threaten the primacy, the overall effectiveness, and the minimum standards of protection provided for by the Charter, such national differentiation is naturally possible.

91. Thus, while of course relevant to the national application of EU harmonised rules, the requirements of primacy, unity and effectiveness, and in particular that of 'unity', should perhaps not be taken *literally* in areas where the Member States retain discretion.

3. The role of the Charter

92. Depending on whether the situation at hand is entirely determined by EU law in the sense outlined in the previous sections, the Charter will play an intriguing dual role as a limit to effective collection of VAT. In cases falling squarely under a rule or set of rules of EU law, it will set the common *maximum* standard. In cases outside such EU law harmonisation, the Charter will provide for the *minimum* threshold of protection of fundamental rights.

93. First, in the case of harmonisation, the Charter will act as a ceiling. Since the application, through Article 53, of national standards of protection is ruled out, the Charter is the only fundamental rights yardstick on the basis of which EU harmonisation measures — or national measures that strictly implement them — will be evaluated. In this context, Article 52(3) imposes the standard of protection deriving from the Charter to be at least as high as the ECHR standard, while Article 52(1) ensures that restrictions of fundamental rights are clearly limited and do not go beyond what is necessary to ensure, for instance, protection of the European Union's financial interests. These provisions guarantee that the Charter must itself ensure a high degree of protection of fundamental rights by setting *effective* limits to VAT collection. Being an integral part of EU primary law, the Charter also benefits from the primacy, unity and effectiveness requirements. It has equal standing with other EU primary law provisions, such as Article 325 TFEU and it is for the Court to ensure the correct balance between fundamental rights and competing values or interests.

94. Second, in the absence of harmonisation, including where EU law leaves some leeway to the Member States in order to adopt their own legislative or implementing rules,[60] the Charter sets a minimum threshold. It is clear from Article 53 that Member States' constitutions — but also international law — may provide for higher standards of protection than those laid down in the Charter.

59 See in particular judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 29); of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 60); of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 47); and of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraph 75).

60 Thus, on the scale outlined above in points 79 and 80, that would cover both the middle ground (such as *Åkerberg Fransson* or *Scialdone*) as well as of course the outer points of the spectrum (such as *Ispas* and *Kolev*).

95. Again, in such a situation, is the 'primacy, unity and effectiveness' of EU law affected as a result? The less harmonisation there is, the less likely it is that the primacy, unity and effectiveness of EU law could by definition be undermined. Certainly, the application of a national standard of protection means diversity, as opposed to uniformity. However, in the absence of harmonisation, the national standard of protection only applies to the — more or less wide — margin of discretion that is left to the Member States by EU law itself. It is therefore national action, as opposed to EU action, that is measured against the more stringent yardstick of the national constitution. In other words, the wider the Member States' margin of discretion, the less risk there is to the primacy, unity and effectiveness of EU law.

4. The substantive or procedural nature of national rules of criminal law

96. In the judgment in *M.A.S.*, the question arose whether the limitation rule at issue was of a substantive or procedural nature and, therefore, whether the principle of legality also encompassed that rule. Since the Italian legal system recognises such rules to be of a substantive nature, the Court accepted that, in the absence of harmonisation of those rules, the understanding of the legality principle under Italian law applied. In *M.A.S.*, as well as earlier in *Taricco*, that question arose in the specific context of Article 49 of the Charter, and the issue of whether the guarantees of that article concern 'merely substantive' or also 'procedural' criminal rules.

97. However, and also in view of the present case, the broader question is posed, reaching beyond the specific context of the guarantees of Article 49 of the Charter. Would (or should) the reasoning outlined above, relating to the type of limits to 'effective collection of VAT', differ if the national rule in question is of a 'substantive' as opposed to a mere 'procedural' nature? Furthermore, in connection with the next issue as to how any such potential shortcomings at national level ought to be remedied, should the consequences in this regard then also differ, again depending on whether what is being potentially set aside in the individual case is a procedural or substantive rule (of criminal law)?

98. My answer to those questions is a clear 'no', for at least three reasons.

99. First, any such classification is problematic and very difficult to apply. That is already clearly evident within the specific context of Article 49 of the Charter,[61] but becomes even more complex beyond that provision, in relation to other Charter rights. Moreover, would any such classification be subject to national taxonomies, or an EU-wide one? Would the latter then require an 'autonomous EU notion' of any legal rule to be defined?

100. Second, I am rather surprised at the implicit ease with which rules of 'mere procedure' could be cast aside. Are provisions requiring that a public prosecutor must, within a given period of time, either commence court proceedings or discontinue prosecution, so that a person cannot be in the preliminary stage of criminal investigation forever, a mere ancillary 'element of procedure'? Or is, for example, the requirement of a court to have jurisdiction in a criminal trial a mere 'procedural ornament'? In fact, in many cases procedural rules are likely to protect fundamental rights to the

61 Further explored in my Opinion in *Scialdone* (C-574/15, EU:C:2017:553, points 146 to 163).

same extent or even more so than substantive rules. As Rudolf von Jhering once noted, 'form is the sworn enemy of arbitrariness, the twin sister of freedom'.[62] Thus, it is quite difficult to see how national courts could validly invoke EU (case -) law in order to restrict fundamental rights by setting aside such 'procedural' rules of criminal law.[63]

101. Third and above all, for the reasons that I already suggested elsewhere,[64] the study of the finer points of legal taxonomies, whether national or European, is inherently unsuitable for the type of the discussion that ought to take place when discussing limitations to fundamental rights. That discussion should be impact-oriented. That is what effective protection of fundamental rights ought to be about: the individual and the impact a rule has on his position, not the taxonomic labels attached to that rule.

5. Remedies

102. The *M.A.S.* and *Kolev* judgments made clear that, in a case of incompatibility of national rules with EU law, it was *primarily* for the national legislature to deal with that incompatibility,[65] in a way that would avoid a systemic risk of impunity.[66] However, they also stated, with reference to *Taricco*, that as a matter of principle, direct effect of Article 325(1) TFEU, in combination with the principle of primacy, empowered national courts to disapply incompatibles rules.[67] It would appear from *Kolev* that that mandate entails not only the setting aside of those rules, but apparently also some further positive steps to be taken by the national court that have no textual basis in national law, such as prolonging the periods within which the prosecutor must act, or fixing the irregularities in question themselves.[68]

103. For a number of reasons, I am of the view that the role of national courts with regard to national rules potentially impeding the proper collection of VAT, certainly in ongoing (criminal) cases, ought to be understood differently. In a nutshell, any finding of incompatibility ought to be limited only to a declaratory statement to that effect, barred by legal certainty and the protection of fundamental rights of the accused from being applied to ongoing cases. It should be effective only prospectively, on the structural and procedural level potentially coupled with an infringement procedure under Article 258 TFEU.

104. First, it ought to be recalled that on the whole, balancing between the effective protection of the financial interests of the European Union, on the one hand, and fundamental rights, on the other, is a balancing act between objectives and values of (certainly at least) equal standing. Even if the interpretation of those fundamental rights recognised by the Charter must be ensured within the framework of the structure and objectives of the European Union,[69] restrictions to fundamental rights

62 'Die Form ist die geschworene Feindin der Willkür, die Zwillingsschwester der Freiheit', adding: 'Denn die Form hält dem Versucher, der die Freiheit zur Zügellosigkeit zu verleiten sucht, das Gegengewicht, sie lenkt die Freiheitssubstanz in feste Bahnen … und kräftigt sie dadurch nach innen und schützt sie nach außen.' — Rudolf von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Teil 2, Bd. 2. Leipzig, Breitkopf und Härtel, 1858, at p. 497.

63 Also in the view that pursuant to Article 52(1) of the Charter, *any restriction* to fundamental rights must be provided for *by law*. According to the Court's own recent statement, 'only a provision of general application could meet the requirements of clarity, predictability, accessibility and, in particular, protection against arbitrariness' (see judgment of 15 March 2017, *Al Chodor* (C-528/15, EU:C:2017:213, paragraph 43)). I do wonder how the purely judicial and rather 'dynamic' interpretation of requirements under Article 325(1) TFEU would meet those requirements.

64 See my Opinion in *Scialdone* (C-574/15, EU:C:2017:553, points 151 to 152).

65 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 41).

66 Judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraph 65).

67 See judgments of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555, paragraphs 49 and 58), and of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraphs 38 to 39).

68 Judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraphs 68 to 69).

69 See, to that effect, judgments of 17 December 1970, *Internationale Handelsgesellschaft* (11/70, EU:C:1970:114, paragraph 4); of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 281 to 285); and Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014 (EU:C:2014:2454, paragraph 170).

are themselves limited by the Charter, irrespective of the existence of harmonisation. Article 52(1) prohibits any interference with the essence of the rights and freedoms recognised therein. Article 52(3) requires a minimum threshold of protection of human rights corresponding to ECHR standards.

105. Second, as recalled in *M.A.S.*, a court cannot, in the course of criminal proceedings, aggravate the rules on criminal liability against a person facing prosecution.[70] In this context, I fail to see how selectively disapplying national provisions of criminal law or procedure in order to be allowed to continue with, for example, time-barred or illegal prosecution, would not contradict that finding.

106. Third, such outcomes in ongoing criminal procedures are incompatible with any reasonably conceived requirements of foreseeability of the law and legal certainty, with those principles clearly carrying special weight in the context of criminal procedures. The EU judicial system is a diffuse one. Each and every court in the Member States acts as a court ensuring the application of EU law. Within that judicial mandate, any national court can and should draw appropriate procedural consequences from a finding of incompatibility, that it is entitled to make for itself, without a reference to this Court. When extended to the setting aside of national rules of criminal procedure by individual courts in the Member States based on their self-assessment, criminal justice appears to run the risk of becoming a(n EU-sponsored) lottery.

107. This danger is further exacerbated by the fact that even after the ruling in *Kolev*, the catalysing point set by the Court for any such selective disapplication of offending national rules remains unclear. In *Taricco*, where the referring court stated that the duration of the criminal proceedings in Italy is so long that in such type of cases, 'de facto impunity is a normal, rather than exceptional, occurrence', the Court set that catalysing point at the moment where the national court concluded that the application of the national provisions would have such an effect 'in a considerable number of cases'.[71] In *Kolev*, that trigger appears to be termed as 'systematic and continuing contraventions of the customs rules' that appear to result in a 'systemic risk' that acts detrimental to the European Union's financial interests will go unpunished.[72]

108. However, in *Kolev*, the only 'systematic and continuing contravention' in the case in the main proceedings appeared to be that a specific public prosecutor was not able to validly serve with the appropriate documents the accused in one specific criminal procedure. In this sense, the prosecutor was indeed *systemically and continuously* unable to do so. However, for the rest, the entire 'systemic' problem appears to be based on one affirmation of the referring court. It is rather clear what type of problems (this time around genuinely systemic) are created by such 'licence to be disregarded' by the Court in the context of criminal law.[73]

109. Fourth, the (constitutionally tried and tested) answer to that problem and its connected issues is respect for the principle of separation of powers. It is clearly for the national legislature, in the case of incompatibility of national criminal rules with EU law, to step in and prospectively adopt rules of general application, in accordance with the principle of legality. As an expression of the separation of

70 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 57). See also, as regards the applicability of directives, judgments of 8 October 1987, *Kolpinghuis Nijmegen* (80/86, EU:C:1987:431, paragraph 13), and of 22 November 2005, *Grøngaard and Bang* (C-384/02, EU:C:2005:708, paragraph 30).

71 Judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555, paragraphs 24 and 47).

72 Judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraphs 57 and 65).

73 It is certainly correct to counter-suggest that such consequences have always been inherent in the operation of the EU legal order. Any statement of incompatibility made by a national court may be contested by other actors within that Member State, making the law (certainly for some time) less predictable, with the consequence that one person might, in that transitional period, for example, obtain a certain benefit, whereas others will not. I am afraid such a (generally valid) observation encounters clear limits in the specific context of effectively (i) imposing criminal liability, (ii) on the basis of the very 'economically worded' Article 325(1) TFEU. The key difference is again reasonable foreseeability and clarity of the applicable rules. See my Opinion in *Scialdone* (C-574/15, EU:C:2017:553, points 165 to 166 and 173 to 178).

powers in the sensitive field of criminal law, the principle of legality requires the adoption of both procedural and substantive rules by parliament. Apart from the inherent constitutional value of that argument, that approach also has one pragmatic advantage: there will by definition be only *one set* of applicable rules.

110. Fifth, there is what could be called the overall 'where-systemic-deficiencies-in-the-Member-States-may-lead' paradox. In cases like *N.S.*[74] or *Aranyosi and Căldăraru*,[75] the existence of certain systemic deficiencies in the judicial, administrative, or penitentiary systems in a Member State led, in the name of effective fundamental rights protection, to the possibility of temporary suspension of some of the most fundamental principles on which the European Union is founded, such as mutual recognition and mutual trust. However, (apparent) systemic deficiencies in matters concerning the collection of VAT and customs duties, relating to the protection of the European Union's financial interests, are of such superior value as to lead, this time around, to the effective suspension of fundamental rights, coupled with legality and the rule of law. I do wonder what such a stratification of values would imply in terms of hierarchy between Article 2 TEU and Article 325 TFEU.

111. For all these reasons, in my view, the Court's approach to the consequences of a potential incompatibility of national provisions relating to the effective collection of VAT or other own resources of the European Union, in particular concerning criminal procedures pertaining to those issues, should be structured somewhat differently. Even if a national rule applicable in such proceedings were to be declared incompatible with the applicable provisions of EU law, that declaration should produce purely prospective effects. By the operation of the principles of legal certainty, legality, and the protection of fundamental rights (as relevant in the specific case), that finding cannot be applied in ongoing cases, if it were to be to the detriment of the individual accused. Thus, Member States are under a duty to immediately take steps to amend national law in order to ensure compatibility of the national rules with the findings of the Court. The appropriate (structural) remedy for failure to do so, is a, potentially accelerated, infringement procedure under Article 258 TFEU.

112. Finally, whether or not the potential deficiencies are systemic or merely individual should not play a role. Provided that any such deficiencies were indeed structural in the sense of occurring on a large scale and repetitively, that is, in fact, yet another argument why there must also be a 'structured' answer in the form of an Article 258 TFEU procedure, where the Member State in question can also properly defend its point of view.

D. The referring court's question

113. Applying those general suggestions to the present case, the answer to the referring's court specific question of whether or not the effective protection of the European Union's own resources mandates the setting aside of national rules excluding the use of illegally obtained evidence appears rather clear to me: *no*, it *certainly* does not.

114. First, at the material time, it appears that there was no EU harmonisation[76] of the rules on evidence, or on interceptions for the purposes of safeguarding the financial interests of the European Union in the context of VAT or generally. Therefore, Member States retained discretion in shaping their own rules in this respect.

74 Judgment of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraph 86).

75 Judgment of 5 April 2016 (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 82 to 88).

76 In the sense of an EU rule or set of rules that should cover that specific issue, discussed above in points 70 to 80.

115. Second, even in the absence of specific EU rules on the matter, in the sense that the situation at hand is not determined by EU law, it still falls within the scope of EU law. Member States are indeed subject to the overall obligations that derive from Article 325(1) TFEU, Article 2(1) of the PFI Convention and Article 206, Article 250(1) and Article 273 of the VAT Directive, concerning all criminal law rules that touch upon sanctions in the field of VAT.

116. Compared with national rules at issue in the *M.A.S.* or *Kolev* cases, the degree of proximity of the national rules at issue with the applicable rules of EU law is perhaps somewhat remote, but it is certainly not absent.[77] Indeed evidentiary rules, in connection with rules on jurisdiction of courts, and the conditions under which interceptions are authorised have a clear impact upon sanctions, by making the latter more or less likely or effective as a result of their operation. That is clearly evident where the application of evidentiary rules in Bulgaria prevents the use of evidence that would establish the guilt of Mr Dzivev in the main proceedings.

117. Third, it follows that when devising and applying such types of rules, Member States must exercise their discretion within two sets of limits, including fundamental rights limits: those deriving from national law and those deriving from EU law.

118. On the one hand, they must respect their own national law, including the relevant provisions of their constitutions as regards criminal law in general, and evidence and interceptions in particular. It follows, on the basis of *M.A.S.*, that Bulgarian authorities can examine the national rules at issue in the light of specific interpretations of fundamental rights (for instance the principle of legality of penalties), even if the latter are also guaranteed under EU law, provided that the national constitution provides a higher standard of protection for the accused persons. In this regard, it is for the referring court alone to examine whether the national provisions at issue comply with higher national law.

119. On the other hand, because the situation at hand falls within the scope of EU law, the institutional and procedural autonomy enjoyed by the Member States in shaping their evidentiary rules is limited not only by the EU's dual requirement of equivalence and effectiveness, but also by the Charter.[78]

120. The requirement of equivalence limits the freedom of choice of Member States by obliging them to ensure that such penalties satisfy conditions which are analogous to those applicable to infringements of national law of a similar nature and importance.[79] In the present case, however, no issues with equivalence appear to arise.

121. The requirement of effectiveness obliges the Member States to ensure effective collection of VAT, in particular by imposing effective and dissuasive penalties in case of infringements of VAT legislation.[80]

122. The effectiveness of EU law is a questionable argument, because in and of itself, it has no internal limits. If that argument is taken to its fullest extent, then each and every contemplated result can thereby be justified. Certainly, if 'effectiveness of protection of the Union's own resources' were to be equated with 'putting people in prison for committing fraud and not paying VAT',[81] then any national

77 Thus, on the scale outlined and discussed above in point 79, finding itself closer to the *Ispas* or *Kolev* scenarios.

78 See for instance, as regards the respect due to the Charter within the scope of EU law, judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 27), and of 5 April 2017, *Orsi and Baldetti* (C-217/15 and C-350/15, EU:C:2017:264, paragraph 16).

79 See, for example, judgment of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295, paragraph 53).

80 Judgment of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295, paragraph 33).

81 Although, on a deeply cynical level, one could question the factual accurateness of that statement: putting people in prison for failure to pay tax might serve the (more remote) aim of deterrence, but hardly the (perhaps more immediate) aim of forcing them to meet their obligations vis-à-vis the public purse. That is also why debtors' prisons, albeit perhaps also justifiable in terms of deterrence, might have had only limited success in the past in terms of making people pay — see, together with the appropriate literary references, my Opinion in *Nemec* (C-256/15, EU:C:2016:619, points 63 to 65).

rule standing in the way of a conviction should be set aside. But then, would it not also be more effective not to have to ask for a judicial authorisation to tap phones in the first place? Equally, perhaps the effective collection of VAT payments would also increase if the national court would have the competence to order public flogging in the square for VAT fraud?

123. Such clearly absurd examples vividly demonstrate why the potentially limitless argument of 'effectiveness' has to be immediately limited and balanced against arguments and values identified under the previous step: other values, interests, and objectives stemming from EU and national limits, including fundamental rights protection. The potential balancing against limits and procedural rules of national origin is a matter for the national court.

124. As regards EU law and the minimum requirements stemming therefrom, it may again be repeated that EU law not only mandates effective and deterrent sanctions. It also requires respect for fundamental rights in the process of imposing those sanctions. The provisions of the Charter and Article 325(1) TFEU have equal standing as EU primary law provisions. Indeed, as a *dual duty* deriving from EU law within the scope of the latter, Member States must balance effectiveness with fundamental rights. It is therefore paramount, when assessing effectiveness, to take into consideration the requirement of protection of fundamental rights. [82]

125. In the specific circumstance of the present case, it is rather clear that interceptions of communications of whatever sort, including phone tapping, represents a significant interference with respect for the right to a private life (Article 7 of the Charter) [83] and, if used unlawfully in the context of a criminal trial, also with the rights of the defence (Article 48(2) of the Charter).

126. Thus, a national rule that bans the use of evidence obtained pursuant to an incorrectly authorised interception order gives due credit to both sides of the equation: not only to the aim of effectiveness of VAT collection (by allowing for such interferences with the right to private life to occur at all), but also to respect for the fundamental rights involved (by limiting the use of such evidence to a number of conditions, including that it was obtained lawfully on the basis of a judicial order).

127. I think that, in the present case, the analysis could end here. I do not think that in a case like the present one, the issue of whether national rules in question are procedural or not and how many similar problems arise at national level should have any bearing on the assessment of the Court. However, in order to fully assist the Court, the concise answer to the remaining points, applying the general analysis carried out above [84] to the present case, would be as follows.

128. Fourth, although a national rule providing for the court having jurisdiction to authorise phone tapping in an individual case could be understood as being of a 'procedural' nature, the rule stating that an order authorising tapping must be reasoned is slightly more complex. If no (defined, case-specific) reasons for tapping have been given, is such a requirement a 'mere' procedural rule? The difficulty in this and other cases [85] in classifying such borderline rules only underlines, yet again, why that distinction is not really helpful in the context of cases like the present one.

82 See, to that effect, also the judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraphs 65 to 66). The Court insisted in particular that the interception of telecommunications, through which the evidence at issue was collected, should be provided for by law and be necessary in both criminal and administrative contexts. It must also be verified whether, in accordance with the general principle of observance of the rights of the defence, the taxable person had the opportunity, in the context of the administrative procedure, of accessing that evidence and of being heard concerning it.

83 As regards the rights to private life, in the context of interceptions, see, for instance, judgments of the ECtHR of 24 April 1990, *Kruslin v. France* (CE:ECHR:1990:0424JUD001180185); of 18 May 2010, *Kennedy v. the United Kingdom* (CE:ECHR:2010:0518JUD002683905); and of 4 December 2015, *Roman Zakharov v. Russia* (CE:ECHR:2015:1204JUD004714306). In the latter case, the European Court of Human Rights found shortcomings in the Russian law governing interception of communications in the procedures for authorising interceptions. See also, more broadly on the appropriate balance between the fight against crime and the protection of private life and personal data, judgment of 21 December 2016, *Tele2 Sverige and Watson and Others* (C-203/15 and C-698/15, EU:C:2016:970).

84 Above, points 96 to 101 and 102 to 112.

85 For example, is the rule stating that in environmental review procedures, *costs are not to be prohibitively expensive*, a procedural or substantive rule? Further on this point, see my Opinion in *Klohn* (C-167/17, EU:C:2018:387, points 82 to 91).

129. Fifth, I do not think that for the assessment of compatibility of rules, an inquiry into the number of cases in which a rule operates in a certain way, should be of any relevance at all. Even if it were, the structural answer to any such potential shortcomings ought to be only future-oriented and prospective, not applicable in ongoing cases to the detriment of those already criminally prosecuted. However, if the Court were still to decide that systemic deficiencies are relevant in this type of case in the sense contemplated by the judgments in *Taricco* and *Kolev*, I note the following.

130. As suggested by the Commission, it does not follow from the facts of this case, as presented by the referring court, that the application of the national rules at issue would generate a *systemic risk* of impunity within the meaning of *Kolev* or impede the correct collection of VAT in a *considerable number of cases*, in the sense of *Taricco*.

131. Wherever that yardstick could potentially lie, it is fair to assume that 'systemic' and 'considerable' should mean more than one (case). Moreover, in my view, but fully in line with other cases in which systemic failures were discussed, such as *N.S.* or *Aranyosi and Căldăraru*, any such far-reaching proposition ought to be backed up by evidence [86] going beyond what would appear to be individual interpretation of the national rules and practice by one court. [87]

132. In the present case, there are four accused persons. As the referring court noted, the evidence obtained can be relied on to establish the guilt of all the Defendants in the main proceedings except for Mr Dzivev. Thus, it would appear that in three of the four cases, 'despite' the national rules at issue, the prosecution was able to lawfully gather evidence under national law against the other three Defendants. It is thus not clear, on the facts of the present case, how the operation of those rules would seriously impede effective sanctioning on a large scale. In addition, the problem arising from the uncertainty as to the court with jurisdiction to authorise interceptions also appears to be temporary by nature.

V. Conclusion

133. In the light of the aforementioned considerations, I propose that the Court answer the question posed by the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria), as follows:

– Article 325(1) TFEU, Article 1(1) and Article 2(1) of the Convention on the Protection of the European Communities' financial interests, and Article 206, Article 250(1) and Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, interpreted in the light of the Charter of Fundamental Rights of the European Union, do not preclude national legislation, such as that at issue in the main proceedings, that prohibits the use of evidence obtained in breach of national law, such as that acquired by means of interceptions of telecommunications authorised by a court which did not have jurisdiction to do so.

86 In both judgments, that evidence was not only discussed following the submissions of a number of parties and intervening Member States, but also backed up by authoritative statements of the European Court of Human Rights on the matter (see judgments of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraphs 88 to 90), and of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 43 and 60)). I am certainly not suggesting that the claims as to systemic shortcomings would always need such kind or amount of evidence in every case. The comparison made is rather to demonstrate the conceptually very different level of evidence presented.

87 As already mentioned briefly above in points 24 and 44, there appears to be disagreement amongst the national courts as to the correct interpretation of the new law. One might add, diplomatically, that the level of disagreement reflected in the order for reference, between, on the one hand, the referring court, and on the other, the Varhoven kasatsionen sad (Supreme Court of Cassation) and, the Sofiyski gradski sad (Sofia City Court), appears to run even deeper.