

Case Studies

On criminal proceedings relating to PIF
Crimes

Case C-42/17

M.A.S. MB



Case Facts

This case deals with the judgment of the CJEU in December 2017 in response to a preliminary question from the Italian Constitutional Court. Dissatisfied with the outcome of the *Taricco* judgment, the Italian court sought a re-examination of Article 325 TFEU regarding the interpretation of the provisions on national law.

Preliminary question

The referring court asks whether Articles 325 TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to VAT, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the Union, or which lay down shorter limitation periods for cases of fraud affecting those interests than for those affecting the financial interests of the Member State concerned, including where compliance with that obligation would entail a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of that law (para. 29).

Consideration of the question

The case in essence asks whether the Article 325 TFEU requires MS to disapply their national provisions if it goes against the requirements of the aforementioned provision of EU law.

The COJ responded that competent national courts are obliged under Articles 325(1) and (2) TFEU to **disapply national provisions**, including rules on limitations on proceedings concerning serious VAT infringements, **if those national provisions prevent the application and deterrent penalties to counter fraud** (para. 39)

Consideration of the question

However

The COJ clarified that three points on the requirements of

foreseeability

Precision of law

Non-retroactivity

Consideration of the question

foreseeability

The obligation to ensure the effective collection of Union's resources cannot run counter to the principle of legality and proportionality enshrined in Article 49 of the Charter (para. 52)

Precision of law

If the national court ascertains that the provision of national law leads to a situation of uncertainty in the legal system and call into question the preciseness of the law, the national court is not obliged to disapply the provisions

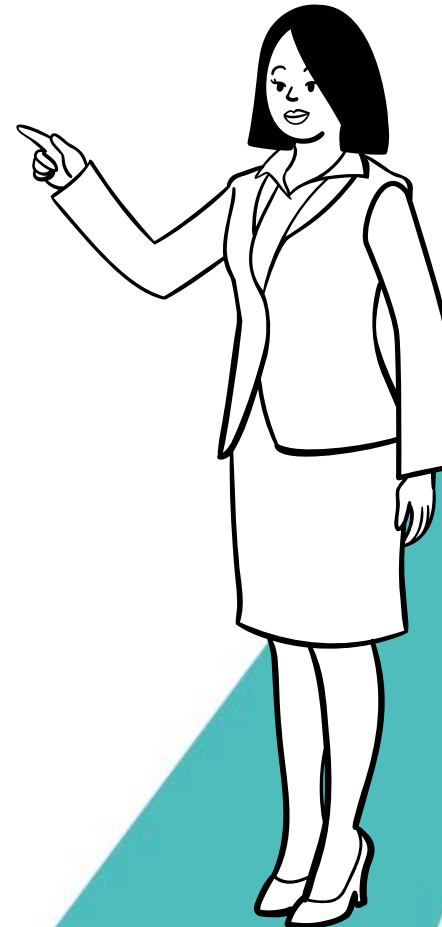
Non-retroactivity

the principle precludes the national court from disapplying the provisions, as its disapplication would subject the involved prsons to conditions of criminal liability that were stricter than those in force at the time the infringement was committed

Conclusion

The court ruled that the provisions in question must be as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed.

Case C-310/16 Dzivev and Others



Case Facts

In 2012 Dzivev and others were charged with tax offences via a trading company. Mr. Dzivev was accused of directing a criminal organisation involving the other three defendants, to profit from not paying the tax due under the law in force at the time.

During the preliminary investigation and after criminal proceedings commenced, authorisations were obtained to intercept their telecommunications. The referring court stated that none of the authorisations at issue was reasoned, with errors that rendered them unlawful. Those granted from November 2011 – January 2012 wrongful indicated who acted while authorisations granted in 2012 lacked jurisdiction. The errors in question led to the applicable law being amended. This has led to contradictions in National Bulgarian law.

Preliminary question

The specialised criminal court of Bulgaria referred the following question to the Court of Justice for a preliminary ruling on:

“whether Article 325(1) TFEU, and Article 1(1)(b) and Article 2(1) of the PFI Convention, read in conjunction with the Charter, must be interpreted to the effect that, in the light of the principle of effectiveness of the prosecution of VAT offences, they preclude a national court from applying a national provision excluding, from a prosecution, evidence such as the interception of telecommunications which requires prior judicial authorisation, where that authorisation was given by a court that lacked jurisdiction, in a situation in which that evidence alone is capable of proving that the offences in question were committed.” (para. 23)

Consideration of the question

Article 325(1) TFEU

MS are required to counter fraud and any other illegal activities affecting the financial interests of the EU through effective deterrent measures

→ *Para. 25 of Kolev and Others, C-612/15*

Article 2(1) PFI Convention

MS shall take the necessary measures to ensure that fraud affecting the financial interests of the EU are punishable by effective, proportionate and dissuasive criminal penalties...

To counter infringements of harmonised VAT rules, MS have the procedural and institutional autonomy to establish penalties and/or criminal procedures relating to those penalties

But that this autonomy is limited by the **principle of effectiveness** which requires such penalties to be effective and dissuasive.

Consideration of the question

This case brings up the issue of whether evidence obtained through unauthorized interception of telecommunications can be utilized for prosecuting VAT offenses.

The court, which did not possess the requisite jurisdiction to authorize it, issued the interception order. According to Bulgarian national law, evidence obtained in this manner is deemed inadmissible.

Considering the provisions, the court asks whether EU law requires such evidence to be admitted given the duty to combat VAT

The court concludes that while there is an obligation to ensure the effective collection of the EU's resources and that it is for the national legislature to take the necessary measures, where necessary to amend the legislation via penalties that are effective and deterrent to counter fraud, this obligation does not dispense the national courts from violating fundamental rights or from observing the principle of legality and rule of law.

Consideration of the question

The interception of telecommunications amounts to an interference with the right to a private life, enshrined in Article 7 of the Charter. Such an interference may be allowed, in accordance with Article 52(1) of the Charter, only if it is provided for by law and if, while respecting the essence of that right and subject to the principle of proportionality, it is necessary and genuinely meets objectives of general interest recognised by the Union

In casu, because the interception of telecommunications was authorised by a court without the necessary jurisdiction, the interception is regarded as not in accordance with Article 52 of the Charter

It thus requires the national court to exclude such evidence and that EU law cannot require a national court to disapply such a procedural rule, even if the use of that evidence gathered unlawfully could increase the effectiveness of criminal prosecutions [...]

Conclusion

The court ruled that the provisions in question must be interpreted to the effect that, in the light of the principle of effectiveness of the prosecution of VAT offences, they do not preclude a national court from applying a national provision excluding, from a prosecution, evidence such as the interception of telecommunications requiring prior judicial authorisation, where that authorisation was given by a court that lacked jurisdiction, in a situation in which that evidence alone is capable of proving that the offences in question were committed.

Case C-574/15 Scialdone



Case Facts

The case deals with criminal proceedings brought against Mr. Mauro Scialdone, as sole director, for failing to pay the VAT resulting from the company's 2012 annual return after a tax inspection was conducted. Criminal proceedings were brought against Mr. Scialdone in May 2015, but in October of the same year amendments of the Italian legislation entered into force that retroactively applied to Mr. Scialdone's case. This new amendment favoured the defendant as the threshold for criminalisation of non-payment of VAT for a given financial year was raised from € 50.000 to € 250,000.

The referring criminal court as a result harboured doubt regarding the amendment and referred this case to the CJEU to examine whether the amendments are compatible with EU law.

Preliminary Question

The referring court asked whether EU law, in particular Article 4(3) TEU, Article 325 TFEU, the VAT Directive and the PFI Convention, precludes national legislation which:

Provides that failure to pay, within the time limit prescribed by law, the VAT resulting from the annual tax return for a given financial year constitutes a criminal offence punishable by a custodial sentence only when the amount of unpaid VAT exceeds a criminal threshold of €250,000

Provides for a criminal threshold of € 150.000 for the offence of failing to pay withholding income tax.

Consideration of the question

The CJEU observed that while MS enjoy procedural and institutional autonomy, this autonomy is limited by two principles of EU Law

Principle of equivalence

Under this principles, penalties established by MS to counter infringements of VAT rules must be analogous to those applicable to infringements of national law of a similar nature and importance that affect national financial interests

The CJEU investigated whether the failure to pay withheld income tax may be seen as an infringement of national law of a similar nature and importance, concluding that the offences defined and penalised in the Italian law are distinguishable by both constituent elements and difficulty of detection. If that were the case, MS concerned are not required to have an identical system of rules for the two categories of offences

Principle of effectiveness

Under this principle, penalties established by MS to counter infringements of VAT rules require that such penalties be effective and dissuasive

The CJEU declared that the penalties provided for by national Italian law may be regarded as sufficiently effective and dissuasive given the high degree of severity with find amounting to 30% of the tax due and effective as it is coupled with the mechanism for reduced payment to encourage the defaulting person to pay the tax as soon as possible

Conclusion

The court ruled that the VAT directive jo. Article 4(3) TEU and Article 325(1) TFEU must be interpreted as **not precluding national legislation** which provides that failure to pay, within the time limit prescribed by law, the value added tax (VAT) resulting from the annual tax return for a given financial year constitutes a criminal offence punishable by a custodial sentence only when the amount of unpaid VAT exceeds a criminalisation threshold of EUR 250000, whereas a criminalisation threshold of EUR 150000 is laid down for the offence of failing to pay withholding income tax.