Procedural Law and Substantive Law in the Case Law of the CJEU – Where to draw the line and what follows from this qualification

Edoardo Traversa/Emanuele Ceci

I. Introduction

The distinction between procedural and substantive law echoes one classical distinction in EU law, between '*EU norms of substantive law (the so-called material EU law) and national systems of norms aimed to 'sanction' the respect of the EU substantive law*'.[1] This dichotomy, however, is not always easily circumscribable as this distinction at the EU level is broader than the national concept of procedural law:[2] The EU Procedural Law concept appears to encompass all of the national legal provisions ensuring the respect of EU rules thus including the 'substantive' measures 'sanctioning' the 'misapplication' of EU law or merely implementing it.

This distinction also articulates the separation of powers between EU institutions and Member States based on the primacy and uniform application of EU law and the procedural autonomy to the Member States. EU law does not generally provide for harmonized procedural provisions[3], and there is no clear EU competence regarding procedural matters.[4]

According to the principle of procedural autonomy, in the absence of specific applicable EU law provisions, every Member State must provide procedural rules in order to ensure the correct implementation of EU law (i.e., substantive law) by the national administration and the courts.[5] More specifically, Member States are free to determine the competent authority to apply EU law, the applicable procedural provisions, and the adequate measures to '*sanction the respect of EU law*'.[6]

The procedural autonomy of the Member States is firmly anchored in the case law of the Court of Justice.[7] It was confirmed for the first time by the Court of Justice

1 D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?: A Study on the "Functionalized Procedural Competence" of EU Member States*, (Berlin Heidelberg: Springer, 2010), p. 1.

2 D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?: A Study on the "Functionalized Procedural Competence" of EU Member States*, (Berlin Heidelberg: Springer, 2010), p. 2.

3 See M. Dassesse, 'Autonomie procédurale des Etats membres et droit européen', *R.G.F.*, 2014, n° 4, p. 5.

4 D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?: A Study on the "Functionalized Procedural Competence" of EU Member States*, (Berlin Heidelberg: Springer, 2010), pp. 12 and 13.

5 See a.o. X. Taton/O. Van Der Haegen, 'Le droit européen des recours juridictionnels en matière de regulation: un recul de l'autonomie procédurale des Etats membres', *J.D.E.*, 2011, n° 180, p. 158; A. Adinolfi, 'The Procedural Autonomy of the Member States and the constraints stemming from the ECJ's case law: is judicial activism still necessary?', *in* H-W. Micklitz/B. De Witte, *The European Court of justice and the autonomy of the member states*, (Anvers, Intersentia, 2011), p. 281.

6 D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?: A Study on the "Functionalized Procedural Competence" of EU Member States*, (Berlin Heidelberg: Springer, 2010), p. 13. See also X. Taton/O. Van Der Haegen, 'Le droit européen des recours juridictionnels en matière de regulation: un recul de l'autonomie procédurale des Etats membres', *J.D.E.*, 2011, n° 180, p. 158

7 A. Adinolfi, 'The "Procedural Autonomy of the Member States and the constraints stemming from the ECJ's case law: is judicial activism still necessary?', *in* H-W. Micklitz/B. De Witte, *The European Court of justice and the autonomy of the member states*, (Anvers, Intersentia, 2011), p. 281.

of the European Union ("CJEU") in 1968 in the *Lück* case, where the Court provided that national courts are granted the power '*to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting the individual rights conferred by Community law*'.[8] This procedural autonomy, therefore, is materialized in the plausibility of the Member States to use discretionary methods to ensure the respect of EU provisions.

However, this principle is eroded in an increasing number of cases of the CJEU,[9] by other EU law principles such as the direct effect, the primacy, the effectiveness, and the uniform application of the EU law. This phenomenon is not only observed in taxation[10] but also as in other areas of law.[11] It is likely that, in the future, the respect of human rights will further restrain the scope of the principle of procedural autonomy.

This trend is even more visible in VAT matters considering its European nature. This chapter aims at determining whether the distinction between procedural law and substantive law in VAT matters impacts the Member States' procedural autonomy in consideration of the most recent CJEU case law.

II. The Limits to the Procedural Autonomy of the Member States in the CJEU VAT Case Law

A. Introduction

In VAT, as in other areas, the procedural autonomy of the Member States is, according to CJEU case law, limited by the principle of effectiveness and the principle of equivalence. These limits where originally developed in the cases C-33/76, *Rewe* and C-45/76, *Comet*[12] and can be summarized as follows:[13]

- The principle of effectiveness requires every Member State to avoid that the implementation of the rights conferred by EU law makes it impossible in practice or excessively difficult by national procedural rules;

8 CJEU, 4 April 1968, Case C-34/67, *Lück*, ECLI:EU:C:1968:24.

9 A. Adinolfi, 'The "Procedural Autonomy of the Member States and the constraints stemming from the ECJ's case law: is judicial activism still necessary?', *in* H-W. Micklitz/B. De Witte, *The European Court of justice and the autonomy of the member states*, (Anvers, Intersentia, 2011), p. 282.

10 See M. Dassesse, 'Autonomie procédurale des Etats membres et droit européen', *R.G.F.*, 2014, n° 4, p. 5; D. Deak, 'Procedural Versus Substantive Law: A Balancing Act in the EU', Tax Notes International, February 22, 2010, pp. 683-694.

11 For more information, see D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?: A Study on the "Functionalized Procedural Competence" of EU Member States*, (Berlin Heidelberg: Springer, 2010), pp. 14-19; A. Adinolfi, 'The "Procedural Autonomy of the Member States and the constraints stemming from the ECJ's case law: is judicial activism still necessary?', *in* H-W. Micklitz/B. De Witte, *The European Court of justice and the autonomy of the member states*, (Anvers, Intersentia, 2011), p. 291.

- The principle of equivalence implies that the procedural requirements imposed by the Member States to ensure the respect of EU law cannot be less favorable than the requirements imposed in similar domestic circumstances. In particular, '*The Member State shall not discriminate between claims based on national law and claims arising out of EU law.*'[14]

The evolution of CJEU case law demonstrates an increasing importance placed on these principles to the extent that, according to a number of authors, the CJEU now requires the abolition of every procedural obstacle to the concrete and effective application of EU law.[15]

These principles have multiple implications on VAT rights and obligations. In the current state of harmonization, the majority of the (substantive) provisions determining VAT liability and VAT taxpayers' rights (deduction, exemption, refund, etc.) are contained in the EU VAT Directive. Every Member State is obligated to correctly implement those provisions with more or less flexibility as needed. They are afforded the opportunity to impose additional conditions in order to benefit from some VAT rights guaranteed by the VAT Directive or to deny them in certain situations subject to specific procedural requirements. For instance, Art. 273 VAT Directive provides that the Member States may impose those administrative 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*'.

12 CJEU, 16 December 1976, Case C-33/76, *Rewe*, ECLI:EU:C:1976:188 and CJEU, 16 December 1976, Case C-45/76, *Comet*, ECLI:EU:C:1976:191. See also X. Taton/O. Van Der Haegen, 'Le droit européen des recours juridictionnels en matière de regulation: un recul de l'autonomie procédurale des Etats membres', *J.D.E.*, 2011, n° 180, p. 158; D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?: A Study on the "Functionalized Procedural Competence" of EU Member States*, (Berlin Heidelberg: Springer, 2010), pp. 7 and 8; M. Bobek, 'Why there is no principle of « Procedural Autonomy » of the Member States', *in* H-W. Micklitz/B. De Witte, *The European Court of justice and the autonomy of the member states*, (Anvers, Intersentia, 2011), p. 306.

13 For more information, see a.o. D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?: A Study on the "Functionalized Procedural Competence" of EU Member States*, (Berlin Heidelberg: Springer, 2010), pp. 16-32; M. Bobek, 'Why there is no principle of « Procedural Autonomy » of the Member States', *in* H-W. Micklitz/B. De Witte, *The European Court of justice and the autonomy of the member states*, (Anvers, Intersentia, 2011), pp. 312-318.

14 See M. Bobek, 'Why there is no principle of « Procedural Autonomy » of the Member States', *in* H-W. Micklitz/B. De Witte, *The European Court of justice and the autonomy of the member states*, (Anvers, Intersentia, 2011), pp. 312 and 313.

15 For more information, see X. Taton/O. Van Der Haegen, 'Le droit européen des recours juridictionnels en matière de régulation: un recul de l'autonomie procédurale des Etats membres', *J.D.E.*, 2011, n° 180, pp. 158 and 159.

However, the division between substantive law and procedural law is not always easy in VAT situations. In several cases,[16] the Court recalled that, in the absence of EU Law, the Member States can establish procedural rules to ensure the respect of EU Law and for '*safeguarding rights which individuals derive from [EU] law, provided, first, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by [EU] law (the principle of effectiveness)*'.[17] The Court has also confirmed that the Member States can enact specific rules or procedures in order to ensure the respect of objectives applicable in VAT, such as the correct perception of VAT or the fight against VAT fraud or abuse.[18]

Moreover, the measures adopted by the Member States must be established in the respect of the overarching EU Law and its general principles such as the principle of neutrality (specifically for VAT) or the principle of proportionality.[19] Moreover, these measures cannot go beyond what is necessary to respect the abovementioned rules, objectives, and principles.[20]

B. Substantive VAT Rules and Formal Conditions Imposed by Member States

Although the VAT Directive enables Member States (hereafter MS) to impose formalities to ensure the application of VAT rules and rights, such as the exercise of the right to deduct input VAT or the application of a VAT exemption, the CJEU has regularly limited this MS power considering the effectiveness of (substantive) rules provided by the directive. The CJEU has indeed deliberated that substantive VAT rights must be guaranteed by a MS despite the disrespect of pro-

16 See a.o. CJEU, 11 July 2002, Case C-62/00, *Marks & Spencer*, ECLI:EU:C:2002:435, para. 34, and the case law mentioned; CJEU, 19 July 2012, Case C-591/10, *Littlewoods Retail*, ECLI:EU:C:2012:478, paras. 27 and 28, and the case law mentioned; CJEU, 15 December 2011, Case C-427/10, *Banca Veneta*, ECLI:EU:C:2011:844, para. 22.

17 See CJEU, 11 July 2002, Case C-62/00, *Marks & Spencer*, ECLI:EU:C:2002:435, para. 34.

18 See a.o. CJEU, 6 December 2012, Case C-285/11, *Bonik*, ECLI:EU:C:2012:774, paras. 35 and 36; CJEU, 12 July 2012, Case C-284/11, *EMS*, ECLI:EU:C:2012:458, para. 47; CJEU, 21 February 2006, Case C11_ZYXUNICODEXYZ_11255/02, *Halifax and Others*, ECLI:EU:C:2006:121, para. 71; CJEU, 6 July 2006, Joined Cases C11_ZYXUNICODEXYZ_11439/04 and C11_ZYXUNICODEXYZ_11440/04, *Kittel and Recolta Recycling*, ECLI:EU:C:2006:446, para. 54; CJEU, 21 July 2012, Joined Cases C11_ZYXUNICODEXYZ_1180/11 and C11_ZYXUNICODEXYZ_11142/11, *Mahagében and Dávid*, ECLI:EU:C:2012:373, para. 41.

19 See a.o. CJEU, 19 July 2012, Case C-263/11, *Ainārs Rēdlihs*, ECLI:EU:C:2012:497.

20 Which is in accordance with the principles of equivalence and effectiveness. See a.o. CJEU, 6 December 2012, Case C-285/11, *Bonik*, ECLI:EU:C:2012:774, paras. 35 and 36; CJEU, 12 July 2012, Case C-284/11, *EMS*, ECLI:EU:C:2012:458, para. 47; CJEU, 27 September 2007, Case C-146/05, *Collée*, ECLI:EU:C:2007:549, para. 26; CJEU, 8 May 2008, Joined Cases C-95/07 and C-96/07, *Ecotrade*, ECLI:EU:C:2008:267, para. 66; CJEU, 21 July 2012, Joined Cases C-80/11 and C-142/11, *Mahagében and Dávid*, ECLI:EU:C:2012:373, para. 48.

cedural obligations by taxable persons.[21] Such an approach tends to exhibit a type of prevalence for (EU) substantive provisions on (domestic) procedural provisions.

C. Equoland Case

In the *Equoland* case[22], an Italian company had imported a consignment of goods from a third country destined, as stated by Equoland in its customs declaration, for a tax warehouse which implied the application of a VAT exemption[23]. The goods, however, were never physically stored in the warehouse but were placed there 'virtually', to wit, by including them in the warehouse register.[24] Equoland immediately corrected this situation, and the VAT previously exempted was paid under the reverse charge mechanism.[25] The tax administration considered that the absence of the physical presence in the warehouse implied that Equoland had not paid the VAT and thus required the payment of the VAT on importation plus a 30 % penalty from Equoland.[26]

Equoland challenged that decision, claiming that the situation had been regularized by the payment of VAT under the reverse charge mechanism and that the condition of the 'physical' placing of those goods in a warehouse in order to benefit from the concerned VAT exemption was illegal.[27]

Noting that the disrespect of this domestic condition implied that the VAT taxable person was required to pay the VAT twice, the referring court decided to ask for a preliminary ruling on the following issues:[28]

- Can a national measure frame the benefit of an exemption (the exemption of the VAT on the importation of goods placed in a tax warehouse) on the condition that the concerned goods are physically placed in a tax warehouse?
- Can a national legislation, in that situation, require the payment of the VAT on importation even if the incorrect VAT situation was regularized by the concerned VAT taxable person?

For the first question, the CJEU recalled that EU law provides two substantive conditions to the exemption of the VAT on importation regarding goods placed in a tax warehouse, '*namely, first, that the goods to be exempted upon importation*

21 See a.o. CJEU, 8 May 2008, Joined Cases C-95/07 and C-96/07, *Ecotrade*, ECLI:EU:C:2008:267, para. 63; CJEU, 12 July 2012, Case C-284/11, *EMS*, ECLI:EU:C:2012:458, para. 62.
22 CJEU, 17 July 2014, Case C-272/13, *Equoland*, ECLI:EU:C:2014:2091.
23 CJEU, 17 July 2014, Case C-272/13, *Equoland*, ECLI:EU:C:2014:2091, paras. 9 and 10.
24 CJEU, 17 July 2014, Case C-272/13, *Equoland*, ECLI:EU:C:2014:2091, para. 11.
25 CJEU, 17 July 2014, Case C-272/13, *Equoland*, ECLI:EU:C:2014:2091, para. 11.
26 CJEU, 17 July 2014, Case C-272/13, *Equoland*, ECLI:EU:C:2014:2091, para. 12.
27 CJEU, 17 July 2014, Case C-272/13, *Equoland*, ECLI:EU:C:2014:2091, paras. 13-15.
28 CJEU, 17 July 2014, Case C-272/13, *Equoland*, ECLI:EU:C:2014:2091, paras. 18 and 19.

are not aimed at final use or consumption and, secondly, that the amount of VAT due upon cessation of the arrangements to which those goods were subject corresponds to the amount of VAT which would have been due had each of the transactions been taxed within the territory of the country'.[29] In addition to these conditions, the VAT Directive affords a number of possibilities to the Member States to provide for procedural requirements for the benefit of the abovementioned exemption. These requirements must respect EU law and its general principles.[30]

The CJEU considered that the condition imposed by the national authorities (i.e., the 'physical' placing of those goods in a warehouse) '*notwithstanding its formal nature, is likely to be an efficient way to achieve the objectives pursued, namely to ensure correct collection of VAT and to prevent evasion of that tax, and does not, as such, go beyond what is necessary in order to achieve those objectives*'.[31] The CJEU, therefore, decided that the national procedural requirement in the indicated case was acceptable.

Regarding the second question, the CJEU recalled that it is normal for a Member State that, in order to '*ensure the correct collection of VAT on importation and to prevent evasion*', certain appropriate sanctions are provided. However, these sanctions must not '*go further than is necessary to attain those objectives*'.[32] Based on that situation, the Court noted that, in the concerned case, there was no risk of evasion or attempted evasion. Therefore, a sanction requiring a second payment of already paid VAT without granting any possibility for the right to deduct this second payment is not consistent with the principle of neutrality and goes beyond what is necessary.[33] The same analysis is provided regarding an increase of the tax and the payment of default interest.[34]

In the *Equoland* case, the CJEU recognized the procedural autonomy of the Member States but acknowledged limitations based on the disrespect of EU law and its general principles, particularly the principle of proportionality.

1. Idexx case

The *Idexx* case[35] addresses the requirements applicable for the granting of the right to deduct VAT. Idexx was an Italian company that made intra-community acquisitions from a French company and a Dutch company. However, Idexx did not respect the formalities established by the Italian authorities regarding recording invoices, and the Italian authorities imposed a neatly amounting to 100 % of

29 CJEU, 17 July 2014, Case C-272/13, *Equoland*, ECLI:EU:C:2014:2091, para. 24.
30 CJEU, 17 July 2014, Case C-272/13, *Equoland*, ECLI:EU:C:2014:2091, paras. 25–27.
31 CJEU, 17 July 2014, Case C-272/13, *Equoland*, ECLI:EU:C:2014:2091, para. 29.
32 CJEU, 17 July 2014, Case C-272/13, *Equoland*, ECLI:EU:C:2014:2091, paras. 33 and 34.
33 CJEU, 17 July 2014, Case C-272/13, *Equoland*, ECLI:EU:C:2014:2091, para. 43.
34 See CJEU, 17 July 2014, Case C-272/13, *Equoland*, ECLI:EU:C:2014:2091, paras. 44–48.
35 CJEU, 11 December 2014, Case C-590/13, *Idexx*, ECLI:EU:C:2014:2429.

the VAT due.[36] Idexx challenged the position of the Italian tax authorities while in the presence of the Italian jurisdictions. Idexx considered that the power to impose formal obligations does not allow national tax authorities '*to reassess the purchaser's VAT return and to claim from it payment of a tax which is merely theoretical by ignoring the right to deduct which, in the present case, cannot be disputed*'.[37] The case was brought before the Italian Supreme Court ('Corte di cassazione') which decided to refer several questions to the CJEU.[38]

The questions asked by the Corte di cassazione can be summarized as follows.

Since some provisions in the VAT Directive afford the possibility to the Member States to introduce formalities regarding the exercise of the right to deduct VAT[39] and concerning the application of VAT and its inspection by the tax authorities,[40] these provisions must '*be interpreted as containing formal requirements relating to the right to deduct or, by contrast, as containing substantive requirements governing that right, failure to comply with which, in circumstances such as those at issue in the main proceedings, would result in the loss of that right*'?[41]

The CJEU first recalled its standing case law according to which the right to deduct VAT is '*a fundamental principle of the common system of VAT established by EU legislation*' which cannot, in principle, be '*limited*'.[42] Regarding the possibilities provided by the VAT Directive (in this case, the former Sixth VAT Directive) for the Member States to establish formal requirements for the application of VAT rules, the CJEU recalled that these measures cannot '*go further than is necessary to attain such objectives and must not undermine the neutrality of VAT*'.[43] This neutrality principle requires the granting of the right of deduction '*if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements*'.[44] This granting could only be refused in the event of a violation of the formal requirements if this violation '*effectively prevents the production of conclusive evidence that the substantive requirements have been satisfied*'.[45]

The Court provided elements of distinction between substantive and formal requirements:[46] '*[…] it must be stated that the substantive requirements for the right*

36 See CJEU, 11 December 2014, Case C-590/13, *Idexx*, ECLI:EU:C:2014:2429, paras. 15–18.
37 CJEU, 11 December 2014, Case C-590/13, *Idexx*, ECLI:EU:C:2014:2429, paras. 23 and 25.
38 CJEU, 11 December 2014, Case C-590/13, *Idexx*, ECLI:EU:C:2014:2429, paras. 19–28.
39 Former Art. 18(1)(d) Sixth VAT Directive.
40 Former Art. 22 Sixth VAT Directive which '*provides for the imposition of certain obligations on the taxable persons liable for that tax, such as the obligations to keep accounts and to submit a VAT return*'. See CJEU, 11 December 2014, Case C-590/13, *Idexx*, ECLI:EU:C:2014:2429, para. 36.
41 CJEU, 11 December 2014, Case C-590/13, *Idexx*, ECLI:EU:C:2014:2429, para. 29.
42 See CJEU, 11 December 2014, Case C-590/13, *Idexx*, ECLI:EU:C:2014:2429, paras. 30 and 31.
43 CJEU, 11 December 2014, Case C-590/13, *Idexx*, ECLI:EU:C:2014:2429, para. 37.
44 CJEU, 11 December 2014, Case C-590/13, *Idexx*, ECLI:EU:C:2014:2429, para. 38.
45 CJEU, 11 December 2014, Case C-590/13, *Idexx*, ECLI:EU:C:2014:2429, para. 39.

to deduct are those which govern the actual substance and scope of that right, […]. The formal requirements for that right, by contrast, regulate the rules governing its exercise and monitoring thereof and the smooth functioning of the VAT system, such as the obligations relating to accounts, invoicing and filing returns […]. So far as concerns taxable intra-Community acquisitions of goods, the substantive requirements stipulate […] that those acquisitions must have been effected by a taxable person, that that person must also be liable for the VAT payable on those acquisitions, and that the goods in question must be used for the purposes of his taxable transactions'.

The CJEU then confirmed that the requirements contained in the discussed articles of the former Sixth Directive (Arts. 18 and 22) are formal requirements and not substantive requirements.[47]

Finally, the Court noted that, in the *Idexx* case, the tax administration disposed of all of the necessary information in order to ensure that the substantive requirements (for the application of the VAT deduction) were fulfilled. The CJEU, therefore, concluded that the right to deduct could not be denied to Idexx '*on the ground that it did not satisfy the formal requirements laid down by national law*'.[48]

In the *Idexx* case, the CJEU reconfirmed the limitation of the procedural autonomy of the Member States by subjecting this autonomy to the respect of EU substantive and procedural requirements (the CJEU acknowledged that the VAT Directive contained both). The position of the Court in the *Idexx* case is unambiguous: the CJEU indeed appears to consider that, if the substantive conditions are respected, the VAT right to deduct cannot be denied on the basis of the absence of compliance with formal requirements.

D. Issues Related to VAT Fraud or Abusive Practice

The area of VAT fraud or abusive practice also offers beneficial examples of limits to the autonomy to the Member States. Indeed, as previously mentioned and unequivocally stressed by the CJEU in its case law,[49] the VAT Directive encourages – and even prescribes – Member States to adopt substantive and procedural meas-

46 CJEU, 11 December 2014, Case C-590/13, *Idexx*, ECLI:EU:C:2014:2429, paras. 41-43.

47 CJEU, 11 December 2014, Case C-590/13, *Idexx*, ECLI:EU:C:2014:2429, para. 42.

48 CJEU, 11 December 2014, Case C-590/13, *Idexx*, ECLI:EU:C:2014:2429, paras. 44 and 45. See also CJEU, 8 May 2008, Joined Cases C-95/07 and C-96/07, *Ecotrade*, ECLI:EU:C:2008:267, para. 66, according to which '*[MS] measures may not therefore be used in such a way that they would have the effect of systematically undermining the right to deduct VAT, which is a fundamental principle of the common system of VAT established by the relevant Community legislation*'.

49 See a.o. CJEU, 21 February 2006, Case C11_ZYXUNICODEXYZ_11255/02, *Halifax and Others*, ECLI:EU:C:2006:121, para. 71; CJEU, 6 July 2006, Joined Cases C11_ZYXUNICODEXYZ_11439/04 and C11_ZYXUNICODEXYZ_11440/04, *Kittel and Recolta Recycling*, ECLI:EU:C:2006:446, para. 54; CJEU, 21 July 2012, Joined Cases C11_ZYXUNICODEXYZ_1180/11 and C11_ZYXUNICODEXYZ_11142/11, *Mahagében and Dávid*, ECLI:EU:C:2012:373, para. 41.

ures in order to prevent possible tax evasion, avoidance, and abuse.[50] The CJEU also recalled that this power granted to Member States also derives from the fact that EU law '*cannot be relied on by individuals for abusive or fraudulent ends*'.[51]

1. Firin Case

The *Firin* case[52] deals with the flexibility of the Member States in the application of the traditional VAT rules, most specifically the right to deduct VAT and possible denial of that right. Firin was a Bulgarian company active in the production and marketing of bread and pastries.[53] At the end of 2010, Firin ordered 10,000 tons of wheat fromAgra Plani EOOD, a company owned by one of the shareholders of Firin. An invoice of 3,600,000 BGN (with 600,000 BGN of VAT) was established in that respect with the amount payable in advance. The tax administration, however, denied the deduction of the 600,000 BGN VAT, justifying it with the fact that the operation was fictitious and the related invoice was an element of VAT fraud. The tax administration has also considered that Firin should have been aware of this fraudulent scheme.[54]

Bulgarian law stipulates a liability for unpaid VAT regarding the VAT taxable person who deducted input VAT either directly or indirectly related to the unpaid VAT. This liability is applicable when the VAT taxable person who deducted input VAT '*knew or should have known that the tax would not be paid and this is proved by the investigating authority*'[55] on the basis of criteria established by Art. 177 Bulgarian VAT Code.[56] In the aforementioned case, the Bulgarian authorities denied the right of deduction based on those domestic law presumptions.

Firin challenged the decision of the tax administration considering that it had fulfilled all of the conditions for benefitting from the deduction of input VAT and also that the motivation for the denial of the deduction was not related to the

50 As previously mentioned, Art. 273 VAT Directive provides the possibility for the Member States to foresee some obligations in order to prevent VAT evasion.

51 See CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, para. 43. See also CJEU, 6 July 2006, Joined Cases C11_ZYXUNICODEXYZ_11439/04 and C11_ZYXUNICODEXYZ_11440/04, *Kittel and Recolta Recycling*, ECLI:EU:C:2006:446, para. 54; CJEU, 3 March 2005, Case C-32/03, *Fini H*, EU:C:2005:128, para. 32; and CJEU, 13 February 2014, Case C 18/13 *Maks Pen*, EU:C:2014:69, para. 26.

52 CJEU, 13 March 2014, Case C-107/13, *Firin*, ECLI:EU:C:2014:151.

53 CJEU, 13 March 2014, Case C-107/13, *Firin*, ECLI:EU:C:2014:151, paras. 19-26.

54 Agra Plani EOOD was apparently not authorized to trade in grain under Bulgarian law, and some suspicious financial transfers were made between Agra Plani EOOD and Firin, without convincing justifications from Firin. See CJEU, 13 March 2014, Case C-107/13, *Firin*, ECLI:EU:C:2014:151, para. 22.

55 See CJEU, 13 March 2014, Case C-107/13, *Firin*, ECLI:EU:C:2014:151, para. 18.

56 See CJEU, 13 March 2014, Case C-107/13, *Firin*, ECLI:EU:C:2014:151, para. 18.

right of deduction itself but to the liability mechanism provided by the Bulgarian domestic law.

The domestic court decided to ask the CJEU several questions.[57] Among these, the most relevant to our subject are the following:

- In the event of immediate and effective deduction of input VAT associated with a payment made in advance for a future supply, can it be considered that the right of deduction must be refused for objective and/or subjective reasons if a failure occurs with the concerned supply,?
- Can the right of deduction be refused by the application of national criteria related not to the right of deduction itself but to the abovementioned liability mechanism being aware that the final tax outcome would be different if the rules established by the Member State had been respected?
- Can a national legislation provide a liability mechanism which used suppositions not based on objective facts, and is this compatible with the principles of effectiveness and proportionality?

The CJEU decided to collectively analyze all of these questions by verifying if the input VAT deduction can be 'adjusted' (otherwise stated, how to determine the right to deduct) in the circumstances where the supply was not made.[58]

The Court first recalled that the VAT principle required, in order to charge VAT, that *'all the relevant information concerning the chargeable event, namely, the future supply of goods or services, must already be known and therefore, in particular, the goods or services must be precisely identified at the time when the payment on account is made'*.[59] In the indicated case, the Court noticed that, when Firin paid on account, the concerned goods were undoubtedly identified[60]. However, the CJEU invoked the EU general principle of prevention of VAT fraud and abuse and the fact that *'the national courts and judicial authorities [must] refuse the right of deduction if it is shown, in the light of objective factors, that that right is being relied on for fraudulent or abusive ends'*.[61]

The Court did not deem it acceptable to sanction a person by the denial of the right of deduction '*who did not know, and could not have known, that the transaction concerned was connected with fraud*'.[62] The CJEU, therefore, considered that such a refusal implies that the national authorities sufficiently establish 'the objective evidence needed' to preclude to the participation of a person in VAT fraud. This assessment of the evidence is not within the realm of the CJEU's responsibil-

57 CJEU, 13 March 2014, Case C-107/13, *Firin*, ECLI:EU:C:2014:151, para. 27.
58 CJEU, 13 March 2014, Case C-107/13, *Firin*, ECLI:EU:C:2014:151, para. 33.
59 CJEU, 13 March 2014, Case C-107/13, *Firin*, ECLI:EU:C:2014:151, para. 36.
60 CJEU, 13 March 2014, Case C-107/13, *Firin*, ECLI:EU:C:2014:151, para. 38.
61 CJEU, 13 March 2014, Case C-107/13, *Firin*, ECLI:EU:C:2014:151, para. 40.
62 CJEU, 13 March 2014, Case C-107/13, *Firin*, ECLI:EU:C:2014:151, paras. 42 and 43.

ity but belongs to the national authorities and courts which should perform '*an overall assessment of all the facts and circumstances of that case*'.[63] Based on all of these elements,[64] the CJEU concluded that the deduction of VAT must be '*adjusted where, in circumstances such as those in the main proceedings, that supply is ultimately not made, even if the supplier remains liable for that tax and has not refunded the payment made on account*'.[65]

In this current case, the CJEU affords opportunity to the Member States. The CJEU recalls that a VAT deduction can be refused by national authorities in the event of participation in fraud. Moreover, the Court acknowledges that this denial depends on a review of the facts of the case by the Member States' authorities. This could prima facie be perceived as a recognition of the procedural autonomy of the Member States. However, in this case, the Court does not really provide many occasions to the Member States in regards to the determination of procedural rules: rather, it merely – just as other domestic supreme courts would do – refuse to enter into an assessment of the factual evidence brought before the referring court.

2. Italmoda Case

The *Italmoda* case is also related to VAT fraud issues.[66] This case is interesting to analyze as the CJEU appears to significantly limit the autonomy of the Member States in the application of the VAT rules. Italmoda was a Dutch company that traded shoes.[67] In 1999 and 2000, Italmoda was also supplying computer equipment. This equipment was acquired in the Netherlands and in Germany by Italmoda under a Netherlands VAT identification number and was traded to customers established in Italy. The goods acquired in Germany were supplied directly from Germany to Italy. Italmoda had respected all of its VAT requirements regarding the goods acquired in the Netherlands. However, concerning the goods purchased in Germany, Italmoda did not declare any intra-Community acquisition (neither in the Netherlands nor in Germany). Moreover, no intra-Community acquisitions were reported by the Italian customers in Italy.

63 See CJEU, 13 March 2014, Case C-107/13, *Firin*, ECLI:EU:C:2014:151, paras. 44-46.

64 The Court has also considered that it is irrelevant for the analysis of the present case regarding the denial of the right of deduction that the VAT payable by the supplier has not been adjusted. See CJEU, 13 March 2014, Case C-107/13, *Firin*, ECLI:EU:C:2014:151, para. 53.

65 CJEU, 13 March 2014, Case C-107/13, *Firin*, ECLI:EU:C:2014:151, para. 58.

66 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455. The facts regarding the other companies concerned by the other joined cases (C-163/13, *Turbu*; C-164/13, *TMP*) will not be analysed as the requests for a preliminary ruling in these cases have been declared inadmissible.

67 See CJEU, 18 December 2014, joined cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, paras. 9-14.

The Italian authorities decided to collect the VAT due by the Italian clients of Italmoda and denied their right to deduct input VAT. On the other hand, the Dutch tax authorities considered that Italmoda '*had knowingly participated in fraudulent activity designed to evade VAT in Italy*'.[68] Therefore, they refused '*the right to exemption in respect of the intra-Community supplies effected in that Member State, the right to deduct input tax and the right to a refund of the tax paid in respect of the goods originating in Germany, and consequently issued three additional assessments to Italmoda*'.[69]

The Dutch Court of Appeals, however, decided that 'there was no justification for departing from the normal system of VAT collection and for refusing to apply the exemption or the right to deduct VAT'.[70] The case was then brought before the Supreme Court of the Netherlands (the Hoge Raad der Nederlanden) which noted that, during the concerned period (1999-2000), 'The application of the exemption or the right of deduction was not subject, under Netherlands law, to the condition that the taxable person must not have deliberately participated in VAT evasion or in a tax avoidance arrangement.'[71] This, however, was the reason invoked by the national authorities to deny the concerned VAT rights. The Dutch Supreme Court, therefore, decided to refer the matter to the CJEU.[72] The two questions which are of interest regarding the subject of this article can be summarized as follows:

- On the basis of the EU law, should the national authorities and courts refuse to apply certain VAT rights (in this present case, exemption of intra-Community supply, right to deduct VAT, or VAT refund) when VAT evasion has been established, and the concerned taxable person was aware of or should have known that he was participating therein even if the national law does not provide any rule to refuse the application of those VAT rights?
- If the answer is positive, should these concerned VAT rights also be refused (i) if the VAT evasion occurred in a Member State other than the Member State dispatching the goods and (ii) if the concerned taxable person has satisfied all of the formal conditions imposed by the Member State of dispatching to benefit from the VAT rights and always provided to the concerned Member State

68 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, para. 11.

69 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, para. 11.

70 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, para. 13. The Gerechtshof te Amsterdam took account, in particular, of the fact that the tax evasion had taken place not in the Netherlands, but in Italy, and that Italmoda had, in the Netherlands, satisfied all the formal statutory conditions for the exemption to be applied.

71 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, para. 14.

72 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, para. 15.

all of the required information in respect to the goods, the dispatch and the persons acquiring the goods in the Member State of arrival of the goods?

Regarding the first question, the CJEU first recalled that the prevention and the wage against fraud and abuse is '*an objective recognised and encouraged*' by the VAT Directive and that a taxable person cannot rely on the application of EU Law for fraudulent or abuse purposes.[73] The Court thus considered that these fundamental principles of the possibility to deny the application of VAT rights guaranteed by the VAT Directive must always be taken into account when a Member State is evaluating an application of its procedural autonomy[74]. In application of these principles, the CJEU decided that the national authorities and courts must refuse the application of VAT rights '*when they are claimed fraudulently or abusively, irrespective of whether those rights are rights to a deduction, to an exemption or to a VAT refund in respect of intra-Community supplies*'.[75] The Court, therefore, not only recognizes that Member States, in the exercise of their procedural autonomy, may deny those rights granted by EU law but further elaborates and states that EU law itself requires MS to do so.[76] The CJEU also recalled that this denial is not only applicable '*where tax evasion has been carried out by the taxable person itself but also where a taxable person knew, or should have known, that, by the transaction concerned, it was participating in a transaction involving evasion of VAT carried out by the supplier or by another trader acting upstream or downstream in the supply chain*'.[77] The effective participation, therefore, does not prevail. With evidence of fraudulent elements (active or 'conscious' participation), the benefit of VAT rights can be denied. This position was previously supported by CJEU in prior case law.[78]

Even more interesting is that the Court considered that, even if Dutch national law did not contain any provision granting the possibility to deny the right to de-

73 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, paras. 42 and 43.

74 The CJEU has indeed clearly stated in the Italmoda case that the denial of VAT rights '*is the responsibility, in general, of the national authorities and courts, irrespective of the VAT right affected by the fraud*'. See CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, para. 46.

75 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, para. 49.

76 CJEU, 13 February 2014, Case C-18/13, *Maks Pen*, ECLI:EU:C:2014:69; CJEU, Order of 6 February 2014, Case C-33/13, *Marcin Jagiełło*, ECLI:EU:C:2014:184; CJEU, Order of 16 May 2013, Case C-444/12, *Hardimpex Kft*, ECLI:EU:C:2013:318.

77 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, para. 50.

78 See a.o. CJEU, 6 July 2006, Joined Cases C11_ZYXUNICODEXYZ_11439/04 and C11_ZYXUNICODEXYZ_11440/04, *Kittel and Recolta Recycling*, ECLI:EU:C:2006:446, para. 55; CJEU, 6 December 2012, Case C-285/11, *Bonik*, ECLI:EU:C:2012:774, para. 37; CJEU, 13 February 2014, Case C-18/13, *Maks Pen*, ECLI:EU:C:2014:69, para. 26; CJEU, 7 December 2010, Case C11_ZYXUNICODEXYZ_11285/09, *R.*, ECLI:EU:C:2010:742, para. 55; CJEU, 6 September 2012, Case C11_ZYXUNICODEXYZ_11273/11, *Mecsek-Gabona*, ECLI:EU:C:2012:547, para. 54.

duct, EU law – and, in particular, the EU principle of prohibition of abuse and fraud[79] – required Member States to refuse the benefit of VAT rights.[80] The CJEU also indicated that, with respect to these general principles, the denial of rights '*does not amount to imposing an obligation on the individual […] but is merely the consequence of the finding that the objective conditions required [by the VAT Directive] for obtaining the advantage sought […] have, in fact, not been satisfied*'.[81] Therefore, the CJEU decided that the national authorities and courts must deny a taxable person the benefit of the concerned VAT rights '*even in the absence of provisions of national law providing for such refusal, if it is established, in the light of objective factors, that that taxable person knew, or should have known, that, by the transaction relied on as a basis for the right concerned, it was participating in VAT evasion committed in the context of a chain of supplies*'.[82]

The CJEU appears to consider that, far from being an issue of procedural law falling within the purview of the MS, this was a situation where (substantive) conditions provided by the EU VAT Directive (i.e., the substantive law) have not been respected and that the denial of the right to deduct could not be considered as an (improper) procedural sanction but as a direct application of EU provisions.

The CJEU had to subsequently decide if this denial of VAT rights in the case of a fraudulent situation is dependent upon certain circumstances, i.e., regarding the *Italmoda* case from the fact that '*first, the VAT evasion was committed in a Member State other than that in which the benefit of those various rights has been sought and, secondly, the taxable person concerned has, in the latter Member State, complied with the formal requirements laid down by national legislation for the purpose of benefiting from those rights*'.[83]

The Court then considered that there is no objective reason to conclude that the treatment should be different in the event of VAT evasion concerning different Member States or because formal requirements provided by national law to benefit from VAT rights had been respected. The Court reiterated the prevalence of the general EU principle of prohibition of fraud and abuse in that respect.[84] Therefore, the CJEU decided to confirm the refusal by national authorities and the courts to grant the concerned VAT rights to a taxable person '*notwithstanding*

79 The importance of the fight and the prevention of tax fraud and abuse and the impossibility to benefit from EU provisions for fraudulent or abusive ends.

80 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, paras. 51-56.

81 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, para. 57.

82 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, para. 62.

83 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, para. 63.

84 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, paras. 64-68.

the fact that the evasion was carried out in a Member State other than that in which the benefit of those rights has been sought and that taxable person has, in the latter Member State, complied with the formal requirements laid down by national legislation for the purpose of benefiting from those rights'.[85]

The *Italmoda* case is interesting regarding the existing balance between the procedural autonomy of the Member States and the weight given by the CJEU to the principle of prevention of fraud and abuse. The Court confirmed that this principle applies to VAT independent of any implementing measures whether in EU or domestic law. Indeed, not only the Court has provided that the Member States must refuse the benefit of VAT rights in when there is active or conscious fraudulent participation, and this obligation is valid even if the legal system of the concerned Member State does not contain any national provisions in that respect even if fraud has actually occurred in another Member State.

3. Surgicare Case

Another recent and interesting case related to the concerned issues is the *Surgicare* case.[86] This case concerns an issue related to the denial of the right to deduct VAT because of the suspicion of abusive practice.

Surgicare was a Portuguese company active in '*on the one hand, the construction, operation and management of healthcare establishments that belong either to it or to third party entities, public or private; and, on the other hand, the supply of medical and surgical services in general, domiciliary and outpatient care, diagnostic and therapeutic activities and other related or additional activities*'.[87]

During the years 2003 to 2007, Surgicare constructed a hospital and supplied it with medical equipment.[88] After the construction of the hospital, the latter was transferred to another company belonging to the same group as Surgicare (*Espirito Santo Saude* group). This transaction was considered as a taxable operation by Surgicare, therefore, Surgicare deducted the input VAT related to the construction of the hospital and its supply of equipment.[89]

After a tax review conducted by the Portuguese administration, the latter determined that Surgicare had abused the right of VAT refund. According to the administration, '*the transfer of the operation of the hospital to a company created for that purpose by the same group of companies was concluded with the sole aim of*

85 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, para. 69.
86 CJEU, 12 February 2015, Case C-662/13, *Surgicare*, ECLI:EU:C:2015:89.
87 CJEU, 12 February 2015, Case C-662/13, *Surgicare*, ECLI:EU:C:2015:89, para. 7.
88 CJEU, 12 February 2015, Case C-662/13, *Surgicare*, ECLI:EU:C:2015:89, paras. 7–14.
89 The construction of the hospital and the supply of medical equipment were indeed not taxable transaction, implying that Surgicare accumulated VAT credit.

subsequently enabling Surgicare to establish the existence of a right to deduct the input VAT paid during the period when the building was constructed and fitted, even though Surgicare would not have been able to benefit from that right if it had operated the hospital itself, since that activity is exempt from VAT'.[90]

Surgicare contested this decision by alleging that the assessment made by the administration was illegal. One of Surgicare's arguments in that respect was that the administration had not applied the mandatory special procedure provided by Art. 63 'Código de Procedimento e de Processo Tributário (CPPT)' which foresaw that 'the payment of taxes on the basis of any anti-abuse provision laid down in the codes and other tax laws shall be subject to the initiation of a special procedure relating thereto'.

The 'tribunal tributário de Lisboa' (Tax Court in Lisbon) decided that the action of Surgicare was unfounded. Surgicare appealed to the referring court who considered that the special procedure of Art. 63 CPPT must be applied if there is suspicion of abusive practice.[91] The referring court, however, being uncertain regarding the concrete application of this type of procedure in an EU law origin matter such as VAT, decided to raise the following question in front of the CJEU:[92]

> 'When the tax authorities suspect the existence of an abusive practice designed to obtain a VAT refund and Portuguese law provides for a mandatory preliminary procedure applicable to abusive practices in taxation matters, is that procedure to be regarded as inapplicable to VAT, given the Community origin of that tax?'

In other words, is the VAT Directive precluding '*the mandatory preliminary application of a national administrative procedure, such as that laid down by Article 63 of the CPPT, in the event that the revenue authorities suspect the existence of an abusive practice*'?[93]

In its judgment, the CJEU recalled the existence of an EU principle of prevention of tax evasion, avoidance and abuse, as well as Art. 273 VAT Directive authorizing the Member States to take '*the necessary measures to ensure the correct collection of VAT and to prevent evasion*'.[94] In that respect, the Court mentioned that the specific national procedure (i.e., the special procedure provided by Art. 63 CPPT) does not appear to be contrary to this EU principle.[95]

The CJEU also stressed that the procedural autonomy of the Member States and the application of the principles of effectiveness and equivalent regarding VAT

90 CJEU, 12 February 2015, Case C-662/13, *Surgicare*, ECLI:EU:C:2015:89, para. 11.
91 CJEU, 12 February 2015, Case C-662/13, *Surgicare*, ECLI:EU:C:2015:89, para. 14.
92 CJEU, 12 February 2015, Case C-662/13, *Surgicare*, ECLI:EU:C:2015:89, para. 15.
93 CJEU, 12 February 2015, Case C-662/13, *Surgicare*, ECLI:EU:C:2015:89, para. 24.
94 CJEU, 12 February 2015, Case C-662/13, *Surgicare*, ECLI:EU:C:2015:89, paras. 19 and 20.
95 CJEU, 12 February 2015, Case C-662/13, *Surgicare*, ECLI:EU:C:2015:89, para. 33.

fraud and abuse issues: '*In the absence of any EU rules in the area, the means of preventing VAT fraud falls within the internal legal order of the Member States under the principle of procedural autonomy of the latter. In that regard, it is apparent from the Court's settled case-law that it is for the domestic legal system of each Member State, in particular, to designate the authorities responsible for combatting VAT fraud and to lay down detailed procedural rules for safeguarding rights which individuals derive from EU law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness).*'.[96]

Regarding the application of the principle of effectiveness, the CJEU recalled that the analysis must take the role of the concerned provisions into consideration '*in the procedure, its progress and its special features, viewed as a whole, before the various national bodies*'.[97] It must, therefore, take into account '*the basic principles which lie at the basis of the domestic judicial system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct procedure*'.[98]

With respect to the *Surgicare* case, the CJEU noted that the special procedure provided by Art. 63 CPPT is characterized by numerous elements that are favorable for the individual suspected of abusive practice as these elements guarantee the respect of fundamental rights.[99]

Concerning the principle of equivalence, the Court mentioned that, as this principle means the application of the national rule without distinction between EU Law issue or national issue, there could be no consideration that the concerned special procedure should not be applicable in the present situation.

Considering all of these arguments, the CJEU then decided that the VAT Directive '*must be interpreted as meaning that it does not preclude the mandatory preliminary application of a national administrative procedure, such as that laid down by Article 63 of the CPPT, in the event that the revenue authorities suspect the existence of an abusive practice*'.[100]

In the *Surgicare* case, the CJEU made an application of the principles related to the procedural autonomy of the Member States. However, it is interesting to see

96 CJEU, 12 February 2015, Case C-662/13, *Surgicare*, ECLI:EU:C:2015:89, para. 26.
97 CJEU, 12 February 2015, Case C-662/13, *Surgicare*, ECLI:EU:C:2015:89, para. 28.
98 CJEU, 12 February 2015, Case C-662/13, *Surgicare*, ECLI:EU:C:2015:89, para. 28.
99 For instance, it can be mentioned that the concerned person is heard during a preliminary hearing, the possibility for the individual to submit evidence or the fact that the decision of the administration must be reasoned. See CJEU, 12 February 2015, Case C-662/13, *Surgicare*, ECLI:EU:C:2015:89, para. 29.
100 CJEU, 12 February 2015, Case C-662/13, *Surgicare*, ECLI:EU:C:2015:89, para. 34.

that the position of the CJEU seems to be less intrusive than the approach developed in *Italmoda* case.

Indeed, in the *Surgicare* case, the CJEU has obviously supported the procedural autonomy of the concerned national authorities by considering that the latter have the possibility, in the event of abusive practice, to foresee a special procedure which will determine the existence of the abuse and, therefore, the applicable sanction (in the *Surgicare* case, the denied VAT refund).

4. Taricco Case

Finally, the *Taricco* case also represents an interesting and recent case addressing the concerned issues.[101] The CJEU analyzed the application of the VAT fraud fight principle with respect to limitation period rules.

This case concerns Italian proceedings related to VAT carousel fraud[102] involving bottles of champagne. Following numerous procedural matters and objections raised by the accused, the concerned jurisdiction was required to deal with time-barred issues.[103] Due to national provisions, the limitation period in Italy can only be extended by a quarter of its initial duration following an interruption. The concerned national jurisdiction indicated that this national situation implies that, in criminal cases, '*de facto impunity is a normal, rather than exceptional, occurrence*'.[104] In that context, the national jurisdiction decided to raise different questions to the CJEU. The primary issue was summarized by the Court as follows: '*The referring court essentially seeks to ascertain whether a national rule such as that established by the provisions at issue amounts to an impediment to the effective fight against VAT evasion in the Member State concerned, in a manner incompatible with Directive 2006/112 and, more generally, with EU law.*'[105]

First, the CJEU recalled that the Member States have the obligation to fight against tax evasion. Moreover, Art. 325 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. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.*'[106]

101 CJEU, 8 September 2015, Case C-105/14, *Taricco*, ECLI:EU:C:2015:555.
102 CJEU, 8 September 2015, Case C-105/14, *Taricco*, ECLI:EU:C:2015:555, para. 18.
103 CJEU, 8 September 2015, Case C-105/14, *Taricco*, ECLI:EU:C:2015:555, paras. 20–23.
104 CJEU, 8 September 2015, Case C-105/14, *Taricco*, ECLI:EU:C:2015:555, para. 24.
105 CJEU, 8 September 2015, Case C-105/14, *Taricco*, ECLI:EU:C:2015:555, para. 35.
106 CJEU, 8 September 2015, Case C-105/14, *Taricco*, ECLI:EU:C:2015:555, paras. 36 and 37.

In that respect, criminal penalties are an essential tool to combat VAT fraud in an effective and dissuasive manner.[107] However, as the Italian provisions forbid the extension of the limitation period by more than a quarter of its initial duration, criminal penalties are never applied in practice. The national provisions that are made to fight VAT fraud are, therefore, not effective and discouraging.[108]

Hence, the CJEU has concluded that national legislation such as the abovementioned Italian provisions *'is liable to have an adverse effect on the fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, which it is for the national court to verify'*.[109]

The Court also stated that the national court must fully and effectively apply itself to Art. 325(1) and (2) TFEU (therefore, to the concrete fight against VAT fraud), which can imply employing *'the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under Article 325(1) and (2) TFEU'*.[110]

In the Taricco case, the CJEU is reconfirming that EU law and its general principles (in the indicated case, the fight against VAT fraud) must prevail against any type of national procedural rules which could impact their effective application.

III. Conclusions

The evolution of the position of the CJEU in its recent VAT case law demonstrates that, despite the general recall of the Member States' procedural autonomy, this principle is undermined, sometimes drastically, by a rather broad interpretation of EU VAT substantive rules or by EU general principles such as primacy, effectiveness, or the prevention of fraud and abuse.

The analysis of a number of recent cases also indicates that CJEU case law is becoming a significant source of EU VAT procedural law, which reaches even beyond the review of domestic procedural provisions. It could be questioned whether this trend is in accordance with the traditional division of powers between EU and MS authorities. Indeed, in some of the cases referred to above (and in particular *Italmoda*), the CJEU appears to dictate the attitude to be adopted by

107 CJEU, 8 September 2015, Case C-105/14, *Taricco*, ECLI:EU:C:2015:555, para. 39.
108 CJEU, 8 September 2015, Case C-105/14, *Taricco*, ECLI:EU:C:2015:555, paras. 46 and 47.
109 CJEU, 8 September 2015, Case C-105/14, *Taricco*, ECLI:EU:C:2015:555, para. 58.
110 CJEU, 8 September 2015, Case C-105/14, *Taricco*, ECLI:EU:C:2015:555, para. 58.

the Member States. Regarding these decisions, the CJEU is usually considering that the Member States must grant or deny VAT rights despite the presence and/ or the existence of national procedural measures that are taken to 'sanction' the respect of the EU law/principles. In a certain way, the CJEU defines the 'sanctions' which should be applied by the Member States (such as the denial of the right to deduct VAT). However, it must be stressed that, besides the fact that the competence regarding criminal penalties belongs to the Member States and not the EU institutions,[111] the procedural autonomy should allow Member States to be able to decide how to sanction violations of the VAT Directive.

The dividing line between procedural law and substantive law in EU VAT law has always been ambiguous, and the recent evolution of the CJEU case law makes it even more so. Procedural law in the area of VAT also seems be working towards harmonization. This cannot be perceived negatively: the fact that the CJEU is acting to ensure a similar application of VAT rights and principles across 28 procedural systems must be encouraged both from the point of view of the tax administrations, considering objectives such as the fight against VAT fraud and abuse and the perspective of the taxpayers' protection. To a certain extent, it could be questioned whether this limitation of the procedural autonomy is not an inevitable consequence in order to ensure successful harmonization.

111 See the position of the Court on the *Italmoda* case, CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, ECLI:EU:C:2014:2455, para. 61; See also CJEU, 26 February 2013, Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 35 ('*three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur*').