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National constitutional rights and the primacy of EU law: *M.A.S.*

Case C-42/17, *M.A.S. and M.B.*, Judgment of the Court of Justice (Grand Chamber) of 5 December 2017, EU:C:2017:936.

1. Introduction

Since *Internationale Handelsgesellschaft*, we know that EU law enjoys primacy over the constitutional law of the Member States.[1] Article 53 of the Charter of Fundamental Rights did not change this longstanding principle, as the ECJ clarified when it gave precedence to EU law over a Spanish constitutional right in *Melloni*.[2]

In *M.A.S.*, the ECJ was once more asked to resolve a conflict between a rule of EU law that was compatible with the Charter and a national constitutional right, this time in response to a preliminary reference from the Italian Constitutional Court. The conflict emerged from the Court's previous judgment in *Taricco*, in which it had identified a duty for national courts to disapply national rules on statutory limitation that had the effect of leaving serious VAT fraud unpunished. This duty was compatible with the principle of legality in criminal matters enshrined in Article 49 of the Charter, as this provision did not extend to limitation rules according to the Court. However, the Italian Constitutional Court warned that the disapplication of the national limitation rules in question was incompatible with the principle of legality in the Italian Constitution, which did extend to limitation rules. Thus, a conflict arose due to the different scopes of the principle of legality in the EU and in the Italian legal order. This conflict attracted widespread scholarly attention in Italy.[3]

The ECJ's judgment in *M.A.S.* merits an equal amount of attention, not only in Italy, but in the entire EU. It is the first judgment in which a conflict between EU law that was compatible with the Charter and a national fundamental right was decided in favour of the national right.

1. Case 11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114.

2. Case C-399/11, *Stefano Melloni* v. *Ministerio Fiscal*, EU:C:2013:107, paras. 58–61. See e.g. de Boer, "Addressing rights divergences under the Charter: *Melloni*", 50 CML Rev. (2013), 1083–1104.

3. See e.g. the more than 30 contributions in Bernardi and Cupelli (Eds.), *Il caso Taricco e il dialogo tra le corti: l'ordinanza 24/2017 della Corte costituzionale* (Jovene, 2017).

2. Background

2.1. *The ECJ's judgment in Taricco*

The background to the present case lies in the ECJ's 2015 judgment in *Taricco*.[4] Taricco and others were accused of having organized a conspiracy to commit VAT fraud of several million euros. The Italian court that heard the case asked the ECJ whether the domestic regime of statutory limitation applicable to this case was compatible with EU law.

The offences committed by Taricco and others were subject to limitation periods corresponding to the maximum length of imprisonment.[5] Under Italian law, these limitation periods can be interrupted, but they cannot be extended by more than a quarter of their initial duration in total.[6] For example, an offence with a limitation period of six years is time-barred after seven years and six months at the latest. As criminal proceedings relating to tax evasion usually involve long and complex investigations, this limitation regime means that it is often impossible to convict offenders. According to the referring court, the offences committed by Taricco and others would become time-barred before the criminal penalty could be imposed, leading to *de facto* impunity.[7]

The Grand Chamber of the ECJ recalled its judgment in the *Åkerberg Fransson* case, in which it had held that the Member States must combat VAT evasion through effective deterrent measures.[8] Collection of VAT affects the financial interests of the EU since VAT revenue forms part of the EU's own resources.[9] Serious VAT offences that affect the financial interests of the EU – such as those committed by Taricco – must be punishable by dissuasive criminal penalties.[10] This duty would be violated if serious VAT fraud escaped criminal punishment in a considerable number of cases due to offences being time-barred before the criminal penalty could be imposed.[11] In the event that the national court concluded that the domestic limitation rules had this effect, it would have to disapply them.[12] The ECJ found that disapplication of the

4. Case C-105/14, *Criminal proceedings against Ivo Taricco and Others*, EU:C:2015:555. See e.g. Timmerman, "Balancing effective criminal sanctions with effective fundamental rights protection in cases of VAT fraud: *Taricco*", 53 CML Rev. (2016), 779–796.

5. Italian Criminal Code, Art. 157.

6. Ibid., Art. 160 read in conjunction with Art. 161.

7. Case C-105/14, *Taricco*, paras. 22–24.

8. Ibid., paras. 36–37. See Case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson*, EU:C:2013:105, paras. 25–26.

9. Case C-105/14, *Taricco*, para 38; Case C-617/10, *Åkerberg Fransson*, para 26.

10. Case C-105/14, *Taricco*, paras. 39–43.

11. Ibid., para 47.

12. Ibid., para 49.

limitation periods in question would not infringe the principle of legality of criminal offences and penalties enshrined in Article 49 of the Charter.[13] Under this provision, individuals have a right to know, at the time they commit an act or omission, whether that act or omission is an offence and what penalty is applicable to it. The limitation period, however, may subsequently be changed.[14]

2.2. *The preliminary reference of the Italian Constitutional Court*

In Italy, several courts found that the domestic regime of statutory limitation did indeed have the effect of leaving serious VAT fraud unsanctioned in a considerable number of cases.[15] However, the Court of Cassation and the Appellate Court of Milan feared it would be contrary to the Italian Constitution to disapply the limitation rules in question. For this reason, they stayed proceedings and referred questions of constitutionality to the Italian Constitutional Court. The latter, in turn, decided to refer to the ECJ. Order 24/2017 is the third preliminary reference of the Italian Constitutional Court.[16]

In its preliminary reference, the Italian Constitutional Court confirmed that the obligation to disregard domestic limitation rules that the ECJ had identified in *Taricco* was contrary to Italian constitutional law. According to the principle of legality in criminal matters of the Italian Constitution, all have a right to know the limitation period applicable to an offence at the time that he or she commits it.[17] The limitation period cannot be retroactively altered to the detriment of the individual concerned. In Italy, limitation rules are therefore considered substantive rules that fall within the scope of the principle of legality in criminal matters.[18] In contrast, the ECJ had given a more restrictive interpretation to the principle of legality enshrined in

13. Ibid., paras. 54–57.

14. See ibid., para 56.

15. Tega, "Narrowing the dialogue: The Italian Constitutional Court and the Court of Justice on the prosecution of VAT frauds", 14 Feb. 2017, *Int'l J. Const. L. Blog*, available at <www.iconnectblog.com/2017/02/narrowing-the-dialogue-the-italian-constitutional-court-and-the-court-of-justice-on-the-prosecution-of-vat-frauds/>, (all websites last visited 1 July 2018).

16. Italian Constitutional Court, 26 Jan. 2017, Order 24/2017. An English translation of the preliminary reference is available on the website of the Italian Constitutional Court, <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf>. For an analysis of the judgment in English, see e.g. Paris, "Carrot and stick: The Italian Constitutional Court's preliminary reference in the case *Taricco*", (2017) *Questions of International Law*, 5–20. The other two preliminary references were Italian Constitutional Court, 13 Feb. 2008, Order 103/2008; Italian Constitutional Court, 18 July 2013, Order 207/2013.

17. Italian Constitution, Art. 25(2); Order 24/2017, section 4.

18. Ibid.

Article 49 of the Charter; it had treated limitation rules as procedural rules that fall outside the scope of the principle of legality.[19] Hence, the disapplication of the Italian limitation rules in question was compatible with the right enshrined in the Charter, but incompatible with the equivalent Italian constitutional right.

The Italian Constitutional Court intensified this conflict further by declaring that the principle of legality was a supreme principle of the Italian constitutional order.[20] This meant that it took precedence over conflicting EU law according to the longstanding *controlimiti* doctrine of the Italian Constitutional Court.[21] The characterization of the Italian principle of legality as a supreme principle was therefore an implicit threat to the ECJ. If the ECJ did not resolve the conflict between the Charter right and the Italian constitutional right in its preliminary ruling, the Constitutional Court would rule that the domestic statute giving effect to EU law in Italy is unconstitutional with regard to the *Taricco* obligation.[22] In effect, this would mean that the ECJ's *Taricco* judgment would be declared incompatible with the supreme principles of the Italian Constitution. Besides, the Italian Constitutional Court also equated the supreme principles of the Italian Constitution with the constitutional identity of the Republic of Italy.[23]

In the Italian Constitutional Court's own view, EU law itself did not require national courts to observe the *Taricco* obligation, if by doing so they infringed the supreme principles of the Italian Constitution.[24] A number of arguments were advanced in the preliminary reference to support this claim. In essence, the Italian Constitutional Court argued that both EU law in general and the *Taricco* judgment specifically permitted the application of domestic standards of fundamental rights protection that are higher than that of the Charter.

To support the claim that EU law in general allowed for higher national standards of fundamental rights protection, the Italian Constitutional Court drew on several provisions of primary EU law. It maintained that the diversity of Member States' core values was protected by Article 2 TEU (pluralism as a value on which the EU is founded), Article 4(2) TEU (respect of national identities), Article 4(3) TEU (principle of sincere cooperation) and Article 6(3) TEU (recognition of domestic constitutional traditions).[25] Moreover, according to the Italian Constitutional Court, Article 53 of the Charter

19. Case C-105/14, *Taricco*, paras. 54–56.
20. Order 24/2017, section 2.
21. Ibid.
22. Ibid.
23. Ibid., section 8.
24. Ibid., section 6.
25. Ibid.

authorized Member States to apply standards of fundamental rights protection that are higher than that of the Charter.[26]

The Constitutional Court also argued that this interpretation of EU primary law was not called into question by *Taricco*. Most notably, paragraph 53 of the judgment asserted that "if the national court decides to disapply the national provisions at issue, it must also ensure that the fundamental rights of the persons concerned are respected".[27] This could only mean that it fell to the competent national authorities to uphold domestic fundamental rights.[28] Furthermore, according to the Constitutional Court, *Taricco* was clearly distinct from the *Melloni* case because it "does not entail any sacrifice to [sic] the primacy of EU law" to give precedence to Italian constitutional law in the present case.[29] Finally, in *Taricco*, the ECJ examined the principle of legality of Article 49 of the Charter only in relation to the prohibition of retroactivity; it did not examine whether the disapplication of limitation provisions was governed by legal provisions that are sufficiently precise.[30]

In conclusion, the Italian Constitutional Court asked the ECJ to confirm the interpretation of EU law that it had presented in its preliminary reference and to eliminate the conflict between EU law and Italian constitutional law in this way.[31] It assured that this solution would not alter the obligation of the Italian legislature to take action urgently in order to ensure the efficacy of proceedings for VAT fraud.[32] The Italian Constitutional Court also requested that the case be dealt with under the expedited procedure.

3. Opinion of Advocate General Bot

Advocate General Bot proposed that the ECJ should not alter the obligation set out in *Taricco*, but that it should, rather, clarify when this obligation applies. The Opinion makes five main claims.[33] First, the Advocate General confirmed and substantiated the *Taricco* obligation.[34] Second, he acknowledged that the criteria for the disapplication of the limitation provisions were too vague.[35] Third, Advocate General Bot agreed with the

26. Ibid., section 8.
27. Case C-105/14, *Taricco*, para 53. Cited by Order 24/2017, section 7.
28. Ibid.
29. Ibid., section 8. See Case C-399/11, *Melloni*.
30. Order 24/2017, section 9.
31. Ibid., section 10.
32. Ibid., section 7.
33. Opinion of A.G. Bot in Case C-42/17, *M.A.S. and M.B.*, EU:C:2017:564.
34. Ibid., paras. 72–109.
35. Ibid., paras. 110–117.

ECJ that the immediate disapplication of domestic limitation rules was compatible with the Charter and the ECHR.[36] Fourth, he argued that national courts could not rely on Article 53 of the Charter to refuse to fulfil the obligation set out in *Taricco*.[37] Fifth, the Advocate General questioned whether the immediate disapplication of domestic limitation rules affected Italy's national identity.[38]

As regards, first, the obligation identified in *Taricco*, the Advocate General confirmed that domestic courts should disapply domestic limitation periods that prevent the effective and dissuasive penalization of serious VAT fraud.[39] He also investigated the specific Italian limitation provisions in question and concluded that they were incompatible with the effectiveness of EU law.[40] The ECJ had left this assessment to the Italian courts. Moreover, according to Advocate General Bot, the limitation rules violated the requirement of Article 6(1) ECHR and Article 47 of the Charter according to which proceedings should take place within a reasonable time.[41] This is a curious argument, which the ECJ had not made in *Taricco*. The Advocate General proceeded to suggest that the ECJ should treat the concept of interruption of the limitation period as an autonomous concept of EU law; another idea that the ECJ had not considered.[42]

In the second part of his analysis, the Advocate General examined the circumstances in which national courts are required to disapply national limitation rules. He agreed with the Italian Constitutional Court that the criteria identified by the ECJ in *Taricco* were too "vague and generic".[43] Only the seriousness of the offence, to be defined by the EU legislature, and not the number of cases should determine the obligation to disapply national rules.[44]

Third, the Advocate General confirmed that the immediate disapplication of domestic limitation rules was compatible with Article 49 of the Charter and Article 7 ECHR, as interpreted by the European Court of Human Rights.[45]

In the fourth part of the Opinion, Advocate General Bot argued that Article 53 of the Charter did not allow national courts to disregard the obligation identified by the ECJ in *Taricco* on the grounds that domestic constitutional law provided for a higher standard of protection.[46] Repeating his observations in *Melloni*, the Advocate General emphasized that the specific nature of EU

36. Ibid., paras. 123–143.
37. Ibid., paras. 144–168.
38. Ibid., paras. 169–187.
39. Ibid., para 188.
40. Ibid., paras. 85–87.
41. Ibid., paras. 89 and 100.
42. Ibid., paras. 100–102.
43. Ibid., para 111.
44. Ibid., paras. 14 and 116–117.
45. Ibid., paras. 126–140.
46. Ibid., paras. 16 and 188.

law meant that the level of protection under the Charter had to be determined autonomously for the specific context of EU law.[47] Under the principle identified by the ECJ in *Melloni*, the Member States were free to apply national standards of fundamental rights protection only if the primacy, unity and effectiveness of EU law were not thereby compromised, and these conditions were not fulfilled in the present case.[48]

In the fifth and final part of the analysis, the Advocate General claimed that the immediate application of longer limitation periods did not affect Italy's constitutional identity.[49] The Italian Constitutional Court had not given convincing reasons to substantiate why the immediate application of longer limitation periods concerned its national identity.[50]

4. The judgment

The ECJ processed the *M.A.S.* case under the expedited procedure of Article 105(1) of the Rules of Procedure, as the Italian Constitutional Court had requested. The judgment was delivered about a year after the preliminary reference of the Italian Constitutional Court. The reasoning of the ECJ, summarized here, can be criticized for its lack of clarity.[51]

The central finding of the judgment is that Article 325 TFEU does not require national courts to disapply limitation rules that are part of national substantive law if this would breach the principle of legality.[52] This principle could be infringed "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".[53]

The ECJ started with some preliminary observations on the preliminary ruling procedure of Article 267 TFEU. It emphasized that this procedure consists in "a dialogue" between itself and the courts of the Member States and that it is an "an instrument of cooperation".[54] When answering questions for a preliminary ruling, the ECJ must rely on the factual and legal context as

47. Ibid., paras. 148–153. See Opinion of A.G. Bot in Case C-399/11, *Melloni*, EU:C:2012:600, para 109.
48. Opinion, paras. 158–163.
49. Ibid., para 17.
50. Ibid., para 180.
51. On this criticism, see section 5.5. *infra*.
52. Judgment, paras. 61–62.
53. Ibid., para 62.
54. Ibid., paras. 22–23.

described in the order for reference.[55] The Court noted that the Italian understanding of the principle of legality in criminal matters had not been drawn to its attention in the *Taricco* case.[56] Thus, in the present case, it had to clarify the interpretation of the obligation set out in *Taricco* with respect to the principle of legality of the Italian Constitution.

Next, the ECJ repeated its findings in *Taricco*. It recalled that the Member States must counter illegal activities affecting the financial interests of the EU through effective and deterrent measures.[57] Serious VAT fraud must be punishable by dissuasive criminal penalties.[58] In *Taricco*, the ECJ had drawn these obligations from Article 325 TFEU, the VAT Directive, read in conjunction with Article 4(3) TEU, and the PFI Convention.[59] In *M.A.S*, it invoked only Article 325 TFEU, which obliges the Member States to counter fraud and any other illegal activities affecting the financial interests of the Union through effective and deterrent measures. As in *Taricco*, the ECJ found that this provision of primary law had direct effect.[60] It was therefore for the national courts to give full effect to it by disapplying conflicting national limitation rules.[61]

The ECJ noted that the protection of the financial interests of the EU through criminal penalties fell within the shared competences of the EU and the Member States.[62] Since the EU legislature had not harmonized the limitation rules applicable to criminal proceedings relating to VAT at the material time of the main proceedings, Italy was free to ensure that these rules formed part of substantive criminal law for the purpose of the principle of legality.[63] The national courts, for their part, have to ensure that the fundamental rights of the accused are upheld when disapplying domestic limitation rules for violation of EU law.[64] As the ECJ had already held in *Åkerberg Fransson* and the case law cited there, "national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as

55. Ibid., para 24.
56. Ibid., para 28.
57. Ibid., para 30. See Case C-617/10, *Åkerberg Fransson*, paras. 25–26; Case C-105/14, *Taricco*, paras. 36–37.
58. Judgment, para 34. See Case C-105/14, *Taricco*, paras. 39–43.
59. Council Directive 2006/112/EC (VAT Directive), O.J. 2006, L 347/1; Convention drawn up on the basis of Article K.3 of the TEU, on the protection of the European Communities' financial interests (PFI Convention), O.J. 1995, 316/49.
60. Judgment, para 38. See Case C-105/14, *Taricco*, para 51.
61. Judgment, paras. 39–40.
62. Ibid., para 43.
63. Ibid., paras. 44–45.
64. Ibid., para 46.

interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised".[65]

Moreover, the ECJ re-examined the principle that offences and penalties must be defined by law. It recalled that this principle of EU law was protected by Article 49 of the Charter and by the common constitutional traditions of the Member States.[66] According to the Explanations related to the Charter, Article 49 of the Charter had the same meaning and scope as the equivalent ECHR right, namely Article 7(1) ECHR.[67] The scope of this ECHR provision did not extend to limitation rules, as the case law of the ECtHR showed.[68] The ECJ also referred to its own case law, which suggested that both safeguards inherent in the principle of legality – the requirement that the applicable law must be precise and the principle of non-retroactivity – did not extend to limitation rules.[69]

However, in the Italian legal system, these safeguards did apply to limitation rules for criminal offences relating to VAT.[70] Therefore, the national court would not have to comply with the obligation set out in *Taricco*, if it considered that this obligation conflicted with the principle of legality.[71] It would then be the task of the Italian legislature to lay down limitation rules that are compatible with EU law.[72]

5. Comment

The judgment in *M.A.S.* is remarkable because the ECJ allowed Italian courts to breach an obligation of EU law in order to uphold the principle of legality as it is interpreted in the Italian legal order. This comment focuses on the constitutional issues arising from the judgment, as the criminal punishment of VAT fraud affecting the financial interests of the EU has already been addressed in other case notes.[73] It examines five key issues: the distinction

65. Ibid., para 47. See Case C-617/10, *Åkerberg Fransson*, para 29; Case C-399/11, *Melloni*, para 60.
66. Judgment, paras. 52–53.
67. Ibid., para 54.
68. Ibid., para 55.
69. Ibid., paras. 56–57.
70. Ibid., para 58.
71. Ibid., para 61.
72. Ibid., paras. 61 and 41–42.
73. See especially Timmerman, op. cit. *supra* note 4; Billis, "The European Court of Justice: A 'quasi-constitutional court' in criminal matters? The *Taricco* judgment and its shortcomings", (2016) NJECL, 20–38; Giuffrida, "The limitation period of crimes: Same old Italian story, new intriguing European answers: Case note on C-105/14, *Taricco*", (2016) NJECL, 100–112.

between complete and partial determination by EU law that is relevant for the applicability of national fundamental rights within the scope of EU law (5.1.), the role of the Charter as a minimum standard of protection (5.2.), the techniques the ECJ used to avoid the impression that it overruled *Taricco* (5.3.), the reasons why the ECJ did not need to discuss constitutional identity in this case (5.4.) and the quality and persuasiveness of the Court's reasoning and decision (5.5.).

5.1. *Complete v. partial determination by EU law*

The problem in *M.A.S.* was that an obligation of EU law that was in line with the Charter conflicted with a national constitutional right. The ECJ had made some general statements on how such conflicts are to be resolved in its 2013 judgments in *Melloni* and *Åkerberg Fransson*.[74] In particular, it had distinguished two types of situations, one in which national fundamental rights can be applied within the scope of EU law and another in which only the Charter rights can be applied. This distinction remains valid. In *M.A.S.*, the national court was permitted to apply a national standard of fundamental rights protection because the national measure at issue was not completely determined by EU law in the view of the ECJ (5.1.1.). It seemed to matter that the national limitation rules in question had not been harmonized by the EU legislature (5.1.2.). However, *M.A.S.* is fundamentally different from other cases in which the ECJ permitted the application of a higher domestic standard of fundamental rights protection. In the present case, there was a direct conflict between EU law and the Italian constitutional right. The Court resolved this conflict by exceptionally allowing a breach of EU law to persist in the interest of the overriding principle of legality (5.1.3.).

5.1.1. *Melloni, Åkerberg Fransson and the primacy, unity and effectiveness of EU law*

In *Melloni*, the ECJ held that Article 53 of the Charter did not alter the primacy of EU law over domestic constitutional law.[75] As it is well known, EU law prevails over conflicting constitutional law of Member States, pursuant to the principle of primacy.[76] The Charter did not introduce an exception to this longstanding principle when it became legally binding with the entry into force of the Treaty of Lisbon in 2009.[77] *Melloni* made clear that Article 53 of

74. Case C-399/11, *Melloni*; Case C-617/10, *Åkerberg Fransson*.

75. See Case C-399/11, *Melloni*, paras. 58–61.

76. Case 11/70, *Internationale Handelsgesellschaft*. See also Case C-409/06, *Winner Wetten GmbH* v. *Bürgermeisterin der Stadt Bergheim*, EU:C:2010:503, para 61.

77. Art. 6(1) TEU provides that the Charter has the "same legal value as the Treaties".

the Charter does not authorize Member States to give precedence to a domestic standard of fundamental rights protection that is higher than that of the Charter.[78]

In return, the ECJ acknowledged that national fundamental rights could be applied within the scope of application of the Charter under certain circumstances. It reassured the Member States that the applicability of the Charter did not automatically entail that national fundamental rights could not be applied. In particular, it found:

> "It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts 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."[79]

The ECJ repeated this statement almost word-for-word in its judgment in *Åkerberg Fransson*, which is famous for establishing that the Charter is applicable whenever EU law is applicable.[80] Furthermore, it added that national authorities remained free to apply domestic fundamental rights "in a situation where action of the Member States is not entirely determined by European Union law".[81] Arguably, this meant that the application of domestic fundamental rights affected the primacy, unity and effectiveness of EU law, only if the national measure at issue was completely determined by EU law. However, the ECJ did not specify what it meant by "not entirely determined" by EU law and it did not explain under what circumstances the primacy, unity and effectiveness of EU law would be compromised.

In *M.A.S.*, the ECJ remarked that Member States are free to apply national fundamental rights provided the level of protection of the Charter and the primacy, unity and effectiveness of EU law are not thereby compromised and it referred to *Åkerberg Fransson* and *Melloni* in this context.[82] It did so after having pointed out that the national limitation rules at issue had not been harmonized by the EU legislature at the time in question.[83] This suggests that

78. Case C-399/11, *Melloni*, paras. 56–57.

79. Ibid., para 60.

80. Case C-617/10, *Åkerberg Fransson*, para 29. *Åkerberg Fransson* established that the Charter is a "shadow" of EU law. Lenaerts and Gutiérrez-Fons, "The place of the Charter in the EU constitutional edifice" in Peers et al. (Eds.), *The EU Charter of Fundamental Rights* (Hart Publishing, 2014), pp. 1559–1594, pp. 1567–1568.

81. Case C-617/10, *Åkerberg Fransson*, para 29.

82. Judgment, para 47. The Court referred to Case C-617/10, *Åkerberg Fransson*, para 29 and the case law cited. The only case cited there is C-399/11, *Melloni*, para 60.

83. Judgment, paras. 44–45.

the primacy, unity and effectiveness of EU law were left intact in the present case. The standard of protection provided for by the Charter was obviously respected, as the Italian principle of legality offered higher protection for the individual than the equivalent Charter right.[84] Hence, the ECJ presented *M.A.S.* as an example of a case in which the application of a higher domestic standard of fundamental rights protection was permissible under EU law. It did not modify the conflict rules it had developed in *Melloni* and *Åkerberg Fransson*, but it presented *M.A.S.* as a specific application of these rules.[85]

The ECJ therefore abstained from reconsidering or nuancing its ruling in *Melloni,* according to which Article 53 of the Charter does not affect the primacy of EU law over domestic constitutional law. The Italian Constitutional Court had invited the ECJ to depart from this finding by claiming that this provision – read in the light of the related Explanation – provided that a higher domestic level of fundamental rights protection must be safeguarded.[86] However, the ECJ did not follow this request.

5.1.2. *The criterion of harmonization by secondary legislation*

Unfortunately, the ECJ did not explain why the national court was allowed to apply the national standard of fundamental rights protection in the present case. However, the Court's reasoning suggests that the absence of harmonization by EU secondary legislation was a significant reason for the concession to the national court. It mattered that the EU legislature had not introduced common standards for limitation rules in criminal proceedings for VAT fraud affecting the EU's own financial interests.

Before it referred to *Åkerberg Fransson* and *Melloni*, the ECJ noted that the enactment of criminal penalties for the protection of the financial interests of

84. But see Burchardt, "Kehrtwende in der Grundrechts- und Vorrangrechtsprechung des EuGH? Anmerkung zum Urt. des EuGH vom 5.12.2017 in der Rechtssache *M.A.S. und M.B*.", (2018) EuR, 248–263, 255. Burchardt argues that paras. 58–45 might mean that not only a higher national standard of fundamental rights protection, but every national standard of protection could prevail over the Charter.

85. See also Pollicino and Bassini, "Defusing the *Taricco* bomb through fostering constitutional tolerance", 5 Dec. 2017, *Verfassungsblog*, available at <verfassungsblog.de/defusing-the-taricco-bomb-through-fostering-constitutional-tolerance-all-roads-lead-to-rome/>; Sarmiento, "To bow at the rhythm of an Italian tune", 5 Dec. 2017, *Despite our Differences Blog*, available at <despiteourdifferencesblog.wordpress.com/2017/12/05/to-bow-at-the-rhythm-of-an-italian-tune/>. But see Burchardt, op. cit. *supra* note 84, 254; Krajewski, "'Conditional primacy' of EU law and its deliberative value: An imperfect illustration from *Taricco II*", 18. Dec. 2017, *European Law Blog*, available at <europeanlawblog.eu/2017/12/18/conditional-primacy-of-eu-law-and-its-deliberative-value-an-imperfect-illustration-from-taricco-ii/>. Burchardt and Krajewski doubt that the ECJ gave effect to the *Melloni* and *Åkerberg Fransson* doctrine in *M.A.S.*

86. Order 24/2017, section 8.

the EU fell within the shared competence of the EU and the Member States within the meaning of Article 4(2) TFEU.[87] Moreover, it stated: "in the present case, at the material time for the main proceedings, the limitation rules applicable to criminal proceedings relating to VAT had not been harmonized by the EU legislature, and harmonization has since taken place only to a partial extent …".[88]

Rather than by EU secondary legislation, the national limitation rules were governed by a directly effective provision of primary legislation, namely Article 325 TFEU.[89] This provision does not specifically regulate limitation rules in criminal proceedings relating to VAT. It stipulates only a general obligation for the Union and the Member States to counter fraud and other illegal activities affecting the financial interests of the EU through effective and deterrent measures. In *Taricco*, the ECJ found that Article 325 TFEU established a concrete duty for national courts to disapply national limitation rules that had the effect of leaving serious VAT fraud unpunished in a considerable number of cases.[90] Yet, this duty, resulting from the broadly termed Article 325 TFEU, was apparently not sufficient to consider the national limitation rules in question as being completely determined by EU law for the purpose of the application of national fundamental rights. The national court was allowed to apply the higher domestic standard of fundamental rights protection because the national limitation periods had not been harmonized by specific secondary legislation.

The lack of harmonization by the EU legislature distinguishes *M.A.S.* from *Melloni*. The Italian Constitutional Court argued that *M.A.S.* was "clearly distinct" from *Melloni.*[91] It found that, in the present case, giving precedence to Italian constitutional law "does not entail any sacrifice to [sic] the primacy of EU law", although it did not provide any convincing reason for this claim.[92] The ECJ, for its part, did not explicitly distinguish *M.A.S.* from *Melloni*. Nevertheless, its emphasis on harmonization by the EU legislature points to an important difference between the two cases. In *Melloni*, the standard of protection of fair trial rights for trials in absence was harmonized at the EU level by secondary legislation. Article 4a(1) of the European Arrest Warrant (EAW) Framework Decision governed the execution of EAWs in case of a conviction *in absentia* and it demanded the surrender of Mr Melloni to Italy,

87. Judgment, para 43. In contrast, the Italian Constitutional Court considered that limitation rules are not a matter of EU competence. Order 24/2017, section 6.

88. Judgment, para 44.

89. Direct effect of Art. 325(1) TFEU: ibid., para 38. See also Case C-105/14, *Taricco*, para 51.

90. Case C-105/14, *Taricco*, paras. 47–49. See section 2.1. *supra*.

91. Order 24/2017, section 8.

92. Ibid.

since he had been aware of his trial.[93] The Spanish Constitutional Court could not oppose this surrender, even though that is what would have been required to give effect to Mr Melloni's fair trial rights under the Spanish Constitution.[94] In *M.A.S.*, on the other hand, the standard of fundamental rights protection had not been harmonized by the EU legislature; the national limitation rules were governed directly by Article 325 TFEU.

However, the absence of specific harmonization of the national measure in question by secondary legislation is not the only difference between *M.A.S.* and *Melloni*. First, the function of criminal law in the two areas of EU law at issue can be distinguished. The VAT law of the EU serves the economic and financial interests of the EU; criminal law is used merely as an instrument to promote these interests.[95] In the Area of Freedom, Security and Justice, and in particular as far as the EAW is concerned, the goal is cooperation between Member States in the field of criminal justice.[96] This difference could be another explanation for the different treatment of *M.A.S.* and *Melloni.* Second, *M.A.S.* was an internal case, whereas *Melloni* – as any EAW case – involved a cross-border element. In *Melloni*, a uniform standard of fundamental rights protection was crucial for the overall efficacy of the EAW system, which is based on mutual recognition.[97]

5.1.3. *Breach of EU law allowed to persist*

M.A.S. was the first ECJ case in which a conflict between EU law that was compatible with the Charter and a national fundamental right was decided in favour of the national right.[98] According to the ECJ's interpretation of Article 325 TFEU in *Taricco*, there was a clear conflict between this directly effective provision of primary law and the Italian limitation rules in question.[99] In the event of such a conflict, the principle of primacy would require that the national legal provision is disapplied, irrespective of the form or time of entry of this national provision.[100] Nevertheless, the Court found that the national court was not obliged to comply with the *Taricco* obligation, if it came to the conclusion that this obligation was incompatible with the principle that

93. Council Framework Decision 2002/584/JHA (EAW Framework Decision), O.J. 2002, L 190/1; Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, O.J. 2009, L 81/24; Case C-399/11, *Melloni*, paras. 35–64.

94. Case C-399/11, *Melloni*, paras. 55–64.

95. See e.g. VAT Directive, cited *supra* note 59, recitals 4 and 8.

96. See e.g. EAW Framework Decision, cited *supra* note 93, recital 6.

97. See Case C-399/11, *Melloni*, para 63.

98. See also Burchardt, op. cit. *supra* note 84, 256.

99. See also Timmerman, op. cit. *supra* note 4, 794; Burchardt, op. cit. *supra* note 84, 256.

100. See Avbelj, "Supremacy or primacy of EU Law: (Why) does it matter?", 17 ELJ (2011), 744–763, 751.

offences and penalties must be defined by law.[101] The ECJ also accepted that the effectiveness of EU law was adversely affected, as VAT fraud affecting the financial interests of the EU might not be punished in a considerable number of cases.

The judgment differs from the Advocate General's Opinion in this regard. Bot argued that the primacy of EU law was compromised by the application of the limitation rules in question, because an obstacle was placed in the way of an obligation, identified by the ECJ, that was compatible with the Charter.[102] Moreover, the effectiveness of EU law was compromised, insofar as the offences in question affected the financial interests of the EU.[103] The Advocate General therefore concluded that the national court could not refuse to fulfil the obligation identified by the ECJ in *Taricco*.[104]

As there was a conflict between EU law and national law, *M.A.S.* was fundamentally different from *Jeremy F.*, another case in which the ECJ permitted the application of a higher domestic standard of fundamental rights protection. In this case, the national authorities were free to provide for an appeal with suspensive effect against decisions relating to an EAW to uphold domestic constitutional rights, because the EAW Framework Decision left them a degree of discretion in this regard.[105] However, they could apply the domestic standard of fundamental rights protection only on the condition that the requirements of the EAW Framework Decision were not frustrated.[106] This meant that the Member States were free to apply national standards of fundamental rights protection only insofar as an instrument of EU secondary legislation left them a degree of discretion.[107] The *Taricco* obligation, however, did not leave any discretion to the national courts; it was in direct conflict with the Italian principle of legality in criminal matters.

The implications of the ruling in *M.A.S.* for future cases remain unclear because the ECJ failed to clarify its motivations. According to one interpretation of the judgment, the ECJ introduced a new exception to the primacy principle.[108] Combined with the interpretation according to which specific harmonization by secondary legislation is a significant criterion, this reading would imply the following rules: firstly, if a national measure is only

101. Judgment, para 61.
102. Opinion, para 166.
103. Ibid., para 167.
104. Ibid., para 168.
105. Case C-168/13 PPU, *Jeremy F.* v. *Premier ministre*, EU:C:2013:358, paras. 51–53.
106. Ibid., para 53; EAW Framework Decision, cited *supra* note 93.
107. Millet, "How much lenience for how much cooperation? On the first preliminary reference of the French Constitutional Council to the Court of Justice", 51 CML Rev. (2014), 195–218, 213.
108. This is the interpretation favoured by Burchardt, op. cit. *supra* note 84, 256.

partially determined by EU law, a higher domestic standard of fundamental rights protection can be applied without compromising the primacy, unity and effectiveness of EU law and second, partial determination can take two forms: EU secondary law leaves a degree of discretion to Member States, as in *Jeremy F.*; or the national measure at issue is determined merely by a broadly termed provision of primary legislation and has not been harmonized by secondary legislation.

Another interpretation would be that the ECJ, exceptionally, allowed a breach of EU law to persist because this was justified by the overriding principle of legality. *M.A.S.* was not the first case in which the ECJ accepted that national rules are applied, even though their disapplication would have ended a situation that was incompatible with EU law. Under certain circumstances, the full effect of the principle of primacy in the Member States can be moderated to uphold other primary interests of EU or national law.[109]

The ECJ itself referred to *Impresa Pizzarotti*, a judgment in which it had allowed a breach of EU law to persist in order to safeguard the principle of *res judicata*, which was protected both in the EU and the national legal orders, according to the Court.[110] In this case and in a number of others, the Court held that EU law did not require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if this meant allowing a breach of EU law to persist.[111] Moreover, *Winner Wetten* suggested that the principle of legal certainty could justify a national provision that was incompatible with EU law continuing to be applied during a transitional period so as to avoid a legal vacuum, albeit only under narrowly defined conditions.[112] Building on *Winner Wetten*, the ECJ held that overriding considerations linked to environmental protection could exceptionally justify maintaining the effects of national law that conflicts with EU law.[113] It makes sense to read *M.A.S.* in light of this case law and to assume that a breach of EU

109. For a more extensive discussion of the relevant case law, see Sowery, "Reconciling primacy and environmental protection: *Association France Nature Environnement*", 54 CML Rev. (2017), 1157–1177, at 1163–1170; Kaczorowska-Ireland, *European Union Law* (Routledge, 2013), pp. 287–292.

110. Judgment, para 61. The ECJ referred to Case C-213/13, *Impresa Pizzarotti & C. SpA* v. *Comune di Bari and Others*, EU:C:2014:2067, paras. 58–59.

111. Case C-213/13, *Impresa Pizzarotti*, paras. 59–60. See also Case C-126/97, *Eco Swiss China Time Ltd* v. *Benetton International N.V.*, EU:C:1999:269, paras. 46–47; Case C-234/04, *Rosmarie Kapferer* v. *Schlank & Schick GmbH*, EU:C:2006:178, paras. 20–21; Case C-40/08, *Asturcom Telecomunicaciones SL* v. *Cristina Rodríguez Nogueira*, EU:C:2009:615, paras. 35–37. For restrictions imposed on the precedence of the principle of *res judicata*, see e.g. Case C-453/00, *Kühne & Heitz*, EU:C:2004:17; Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato* v. *Lucchini SpA*, EU:C:2007:434.

112. Case C-409/06, *Winner Wetten*, para 66.

113. Case C-41/11, *Inter-Environnement Wallonie ASBL and Terre wallonne ASBL* v. *Région wallonne*, EU:C:2012:103, para 58; Case C-379/15, *Association France Nature*

law was exceptionally allowed to persist to respect the overriding principle of legality, in particular because the Court explicitly referred to *Impresa Pizzarotti*.

5.2. *The Charter as a minimum standard*

The ECJ referred to both the principle of legality of the Charter and the principle of legality of the Italian legal order. However, it failed to clarify how the two variants of the principle of legality related to each other in this case and on which of them the national court could rely.[114] After a number of observations on the meaning and scope of Article 49 of the Charter, the ECJ suddenly switched to discussing only the Italian principle of legality, without explaining this transition.[115] Although the Court's reasoning in this part of the judgment is particularly opaque, it seems to imply that the national court should combine Article 49 of the Charter and the Italian principle of legality by extending the scope of the Charter right to limitation rules, in this specific case. In this way, the Charter was used as a minimum standard of protection.

The ECJ apparently maintained its previous interpretation of Article 49 of the Charter and refrained from extending the scope of this provision to limitation rules. It emphasized that the Charter right had the same meaning and scope as Article 7(1) ECHR and noted that the scope of the ECHR right extended to the definition of offences and the determination of the penalty.[116] This indicates that neither Article 7(1) ECHR, nor Article 49 of the Charter, extended to limitation rules in the ECJ's view. The Court also recalled two of its own judgments, suggesting that only the definition of the offence and the determination of the penalty were subject to the principle of legality of the Charter.[117]

Thus, the ECJ did not Europeanize the Italian interpretation of the principle of legality by giving Article 49 of the Charter a more extensive scope than Article 7(1) ECHR.[118] It would have had the option to do so on the basis of Article 52(3) of the Charter, which stipulates that the EU can provide more

Environnement v. *Premier ministre and Ministre de l'Écologie, du Développement durable et de l'Énergie*, EU:C:2016:603, para 43.

114. Burchardt, op. cit. *supra* note 84, 252; Wegner, "Vorhang zu und alle Fragen offen? Zum Verhältnis von nationalem Verfassungsrecht und unmittelbar anwendbarem Unionsrecht nach *Taricco II*", 20 Dec. 2017, *JuWiss Blog*, available at <www.juwiss.de/143-2017/>.

115. Start of the observations on the Italian principle of legality: Judgment, para 58.

116. Ibid., paras. 54–55.

117. Ibid., paras. 56–57.

118. In favour of this alternative approach: Rossi, "How could the ECJ escape from the *Taricco* quagmire?", 21 Apr. 2017, *Verfassungsblog*, available at <verfassungsblog.de/how-could-the-ecj-escape-from-the-taricco-quagmire/>, Bassini and Pollicino, "The opinion of Advocate General Bot in *Taricco II*: Seven 'deadly' sins and a modest proposal", 2 Aug.

extensive protection than the ECHR for a corresponding right. To justify the sudden change of its interpretation of Article 49 of the Charter, the Court could have invoked Article 52(4) of the Charter, arguing that its new knowledge of the Italian principle of legality motivated a different interpretation of the common constitutional traditions of the Member States and therefore of Article 49 of the Charter. A constitutional tradition does not have to be common to the majority of the Member States to guide the interpretation of a Charter right.[119] Alternatively, the Court could have argued that Article 49 of the Charter provided for a broader principle of legality in criminal matters, which goes beyond the prohibition of retroactivity discussed in *Taricco,* and that this principle generally requires that all rules must be clear, precise and foreseeable.[120] However, the ECJ preferred to give Article 49 of the Charter the same scope as it had given it in *Taricco;* this was a reasonable choice. First, it thereby avoided contradicting *Taricco.* Second, the standard of fundamental rights protection of one Member State is not necessarily best suited for the EU as a whole.[121]

Instead of extending the scope of Article 49 of the Charter, the ECJ permitted the national court to use the Charter as a minimum, rather than maximum, standard of protection by combining it with the Italian principle of legality.[122] The national court had to respect the requirements of foreseeability, precision and non-retroactivity inherent in the principle of legality, derived from the Court's own case law.[123] It seems that the national court was instructed to apply these requirements of the Charter to limitation

2017, *Verfassungsblog*, available at <verfassungsblog.de/the-opinion-of-advocate-general-bot-in-taricco-ii-seven-deadly-sins-and-a-modest-proposal/>.

119. Schumann, "Grenzenlose Freiheit für den EuGH? Zur legitimierenden und bindenden Kraft wertender Rechtsvergleichung", 18 *Journal für Rechtspolitik* (2010), 240–245, 244; Obwexer, "Funktionalität und Bedeutung der Rechtsvergleichung in der Rechtsprechung des EuGH" in Gamper and Verschraegen (Eds.), *Rechtsvergleichung als juristische Auslegungsmethode* (Jan Sramek Verlag, 2013), pp. 115–139, p. 130.

120. See Opinion of A.G. Bobek in Case C-574/15, *Criminal proceedings against Mauro Scialdone*, EU:C:2017:553, paras. 146–161.

121. See already Weiler, "Fundamental rights and fundamental boundaries" in Neuwahl and Rosas (Eds.), *The European Union and Human Rights* (Martinus Nijhoff Publishers, 1995), pp. 51–76, p. 59. The A.G. mentioned some Member States in which limitation rules are considered procedural rules and others in which they are considered substantive criminal law. Opinion, note 13.

122. On floors and ceilings in multi-layered systems of protection, see Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (OUP, 2014), pp. 37–47.

123. Judgment, paras. 55–58. See Case C-72/15, *PJSC Rosneft Oil Company* v. *Her Majesty's Treasury and Others*, EU:C:2017:236, para 162; Case C-554/14, *Criminal proceedings against Ognyanov*, EU:C:2016:835, paras. 63–64. The requirement of foreseeability was developed by the ECtHR and it overlaps with the requirements of precision

rules.[124] The Charter and the national right had to be applied in parallel through a combination of the meaning of Article 49 of the Charter and the scope of the Italian principle of legality. This combination ensured the best protection for the individuals concerned by giving effect to the national standard of protection, while respecting the minimum level of protection provided for by the Charter, as required by *Melloni* and *Åkerberg Fransson*.[125]

Even though the requirement of precision seemed to derive from the Charter, the ECJ did not itself determine whether the *Taricco* obligation was precise enough. It left this determination entirely to the national court.[126] *Taricco* does not provide guidance in this regard either. As the Italian Constitutional Court noted in its reference, in *Taricco*, the ECJ had examined the principle of legality of Article 49 of the Charter only in relation to the prohibition of retroactivity, but not in relation to the principle of precision.[127]

5.3. *Reinterpretation of Taricco*

In *Taricco*, the ECJ had found that the national court would have to disapply national limitation rules that had the effect of leaving serious VAT fraud unpunished in a considerable number of cases, and that this duty was in conformity with Article 49 of the Charter.[128] In *M.A.S.*, it held that the national court could continue to apply national limitation rules that had this effect, if they conflicted with the principle that offences and penalties must be defined by law.[129] The Court obviously changed its approach and gave greater weight to the principle of legality in *M.A.S.* At the same time, it sought to avoid the impression that it overturned *Taricco*. Even though not all the arguments advanced by the Court with this aim are equally convincing, it is true that *M.A.S.* does not directly contradict *Taricco*. Moreover, the Court rightly emphasized that it would have been for the referring court in *Taricco* to point out the constitutional obstacles that were later articulated by the Italian Constitutional Court.

To emphasize that the duties of the Member States under Article 325 TFEU had not changed, the ECJ repeated the relevant findings of *Taricco* almost

and non-retroactivity of the Charter. Mitsilegas, "Principles of legality and proportionality of criminal offences and penalties" in Peers et al., op. cit. *supra* note 80, pp. 1351–1372, pp. 1360–1361.

124. Judgment, paras. 59–60.

125. Case C-399/11, *Melloni*, para 60; Case C-617/10, *Åkerberg Fransson*, para 29. See section 5.1.1. *supra*.

126. Judgment, para 59.

127. Order 24/2017, section 9.

128. Case C-105/14, *Taricco*, paras. 49–57.

129. Judgment, para 61.

verbatim.[130] As mentioned above, it also maintained its previous interpretation of Article 49 of the Charter and it presented *M.A.S.* as a specific application of the *Melloni* and *Åkerberg Fransson* doctrine.[131]

Furthermore, the Court cited its holding in *Taricco* that the competent national courts "must also ensure that the fundamental rights of the persons concerned are respected".[132] The Italian Constitutional Court had interpreted this statement to mean that national fundamental rights need to be respected when giving effect to the *Taricco* obligation.[133] It had therefore shown the ECJ a way out of its dilemma. However, it is doubtful whether the ECJ was actually referring to national fundamental rights in this passage of *Taricco*. It did not mention national fundamental rights at all in this paragraph, and it devoted all of its attention to Article 49 of the Charter in the subsequent paragraphs. Moreover, the operative part of *Taricco* suggested that the obligation to disapply national limitation rules had to be observed unconditionally.[134] Yet, the ECJ did not explicitly exclude that national fundamental rights could hinder the enforcement of the *Taricco* obligation. For this reason, the ECJ changed its approach, but it did not directly overturn *Taricco*.[135]

The ECJ explained its lack of consideration of national fundamental rights in *Taricco* by blaming the referring court in this case. It emphasized that the preliminary ruling procedure consists of a "dialogue" between itself and the courts of the Member States.[136] In particular, it noted that the specific understanding of the principle of legality under Italian constitutional law had not been drawn to its attention by the referring court in *Taricco*.[137] Likewise, Advocate General Bot maintained that "it would be unfair to be too critical of the Court" for not having considered the impact of its *Taricco* ruling in Italy, since neither the referring court nor the Italian Government, in its written and oral observations, had referred to the particular features of the Italian principle of legality.[138]

It is hard to believe that the ECJ was completely unaware of the scope of the principle of legality under Italian constitutional law, since some of the questions at the oral hearing had related to the substantive or procedural character of limitation rules in Italy. Nevertheless, the ECJ was right to insist

130. Ibid., paras. 30–40.
131. See sections 5.1.1. and 5.2. *supra*.
132. Judgment, para 46. See Case C-105/14, *Taricco*, para 53.
133. Order 24/2017, section 7.
134. Timmerman, op. cit. *supra* note 4, 794; Krajewski, op. cit. *supra* note 85.
135. See also Sarmiento, op. cit. *supra* note 85. Against, Pollicino and Bassini, op. cit. *supra* note 85. The authors argue that the ECJ's conclusion in *M.A.S.* is in conflict with its position in *Taricco*.
136. Judgment, paras. 22–23.
137. Ibid., para 28.
138. Opinion, para 69.

that the preliminary reference procedure relies on cooperation between itself and national judges. It was, indeed, the task of the referring court in *Taricco* to describe the relevant legal background in the order for reference.[139]

The referring court's failure to discuss eventual constitutional obstacles to the enforcement of EU law can be explained by the distribution of responsibilities between courts in Italy. In Member States that adhere to a centralized system of constitutional review, such as Italy, ordinary courts are not the ultimate guardians of the constitution, but this role falls to constitutional courts.[140] Besides, national governments are not the best advocates for national constitutional law either, in particular because the latter imposes limits on their own actions.[141] A sensible way to address this concern would be to change the Statute of the ECJ to allow constitutional courts to intervene as third parties.[142] However, it would have to be ensured that such a change does not disadvantage Member States that do not have a constitutional court.

5.4. *Constitutional identity*

The Italian Constitutional Court claimed that the principle of legality was a supreme principle of the Italian constitutional order, which meant that it took precedence over EU law according to the *controlimiti* doctrine.[143] Moreover, it equated the supreme principles of the Italian constitutional order with Italy's constitutional identity and it noted that Article 4(2) TEU aimed to preserve the national identity of the Member States.[144] By adopting the terminology of constitutional identity, the Italian Constitutional Court followed the example of the German Federal Constitutional Court.[145] It was obviously looking to find a legal basis for its own *controlimiti* case law in EU primary legislation.

139. Art. 94(b) of the Rules of Procedure of the ECJ.

140. De Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing, 2014), p. 54; Mayer, "Multilevel constitutional jurisdiction" in von Bogdandy and Bast (Eds.), *Principles of European Constitutional Law* (Hart Publishing, 2010), pp. 399–440, at 400–401.

141. Rauchegger, "The interplay between the Charter and national constitutions after *Åkerberg Fransson* and *Melloni*" in de Vries et al. (Eds.), *The EU Charter of Fundamental Rights as a Binding Instrument* (Hart Publishing, 2015), pp. 93–131, at 117.

142. De Visser, "National constitutional courts, the Court of Justice and the protection of fundamental rights in a post-Charter landscape", 15 *Human Rights Review* (2014), 39–51, 48. See Art. 23 of the Statute of the ECJ.

143. Order 24/2017, section 2.

144. Ibid., sections 6 and 8.

145. BVerfG, 30 Jun. 2009, 2 BvE 2/08, *Treaty of Lisbon*; BVerfG, 15 Dec. 2015, 2 BvR 2735/14, *Solange III.*

However, as in *Melloni*, the ECJ did not discuss constitutional or national identity at all.[146] It did not need to do so because it resolved the conflict between the *Taricco* obligation and the Italian principle of legality by treating the Charter as a minimum standard of protection. It seems that the ECJ is not prepared to accept that the constitutional identity of a Member State justifies exceptions to the principle of primacy.

Although it is unfortunate that the ECJ did not address the correct interpretation of Article 4(2) TEU, it rightly avoided resolving the conflict between EU law and Italian constitutional law by introducing an exception to primacy in favour of national constitutional identity. First, Article 4(2) TEU should not be interpreted as a derogation clause to the primacy principle, on which national courts can rely to disregard EU law.[147] The identity clause is addressed to the EU, not to Member States; it requires EU institutions, including the ECJ, to respect the national identity of Member States.[148] The ECJ certainly complied with this requirement by allowing the national court to apply the principle of legality to limitation provisions.

Second, the ECJ would have needed to rely on the assessment of the Italian Constitutional Court, according to which the specific Italian understanding of the principle of legality in criminal matters was part of the national identity of this Member State. Even though a number of Italian scholars did in fact question this assessment, it would not have been the task of the ECJ to interpret the constitution of a Member State.[149] The Advocate General was wrong to do so.[150]

Third, in the current political climate, it would be risky to encourage national authorities to rely on Article 4(2) TEU as an exception to primacy, as the example of the Hungarian Constitutional Court illustrated.[151] The advantage of the approach chosen by the ECJ in *M.A.S.* is that it will be for the Court itself to determine whether the conditions for the application of the national standard of fundamental rights protection are fulfilled in future cases.

146. Case C-399/11, *Melloni*.

147. Cloots, *National Identity in EU Law* (OUP, 2015), pp. 181–182; Claes, "Negotiating constitutional identity or whose identity is it anyway?" in Claes et al. (Eds.), *Constitutional Conversations in Europe* (CUP, 2012), pp. 205–233, at 207.

148. Cloots, ibid., p. 183.

149. E.g. Faraguna, "The Italian Constitutional Court in re *Taricco*: Gauweiler in the Roman campagna", 31 Jan. 2017, *Verfassungsblog*, available at <verfassungsblog.de/the-italian-constitutional-court-in-re-taricco-gauweiler-in-the-roman-campagna/>; Bassini and Pollicino, op. cit. *supra* note 118.

150. Opinion, para 180.

151. Hungarian Constitutional Court, 30 Nov. 2016, Decision 22/2016. See Halmai, "Abuse of constitutional identity: The Hungarian Constitutional Court on interpretation of Article E)(2) of the Fundamental Law", 43 *Review of Central and East European Law* (2018), 23–42.

This is not to say that the Italian Constitutional Court was wrong to invoke its *controlimiti* doctrine, or to warn the ECJ that it would be prepared to declare the *Taricco* obligation unconstitutional. This threat certainly influenced the ECJ's approach to the benefit of individual right holders.[152] Moreover, from a conceptual perspective, the approaches of the ECJ and the Italian Constitutional Court are in line with theories of constitutional pluralism; both courts indicate that their own legal orders are ultimately superior, but, at the same time, they recognize the authority of the other legal order and make a number of concessions to reflect this recognition.[153]

5.5. *Intransparent reasoning, but a welcome outcome*

The ECJ's reasoning in *M.A.S.* was rightly criticized for its lack of clarity.[154] Considering the constitutional importance of the ruling, the Court should have made its reasoning more transparent. It can be speculated that the reasoning remained vague because the Grand Chamber had to reach a compromise on a controversial issue. The fact that it took almost a year for the judgment to be delivered points in the same direction. Under the expedited procedure, judgments are usually delivered, on average, within four months.[155] Another reason might be that the ECJ preferred to leave open in which direction it will develop the relationship between EU and national fundamental rights in future cases.[156]

While the reasoning was not transparent enough, the outcome of the case is to be welcomed. The ECJ is sometimes criticized for prioritizing the effective enforcement of EU law over fundamental rights protection.[157] In the present case, however, it took fundamental rights protection seriously by permitting the national court to apply a higher level of fundamental rights protection than

152. For another example of the effect that national constitutional limits to primacy can have on the case law of the ECJ, see Case C-404/15, *Aranyosi and Căldăraru*, EU:C:2016:198. The ECJ's judgment in this case is seen as a reaction to the *Solange III* judgment of the German Federal Constitutional Court. Hong, "Human dignity, identity review of the European Arrest Warrant and the Court of Justice as a listener in the dialogue of courts: *Solange-III* and *Aranyosi*", 12 EuConst (2016), 549–563, 549.

153. On the common denominator of the theories of constitutional pluralism: Jaklic, *Constitutional Pluralism in the EU* (OUP, 2014), p. 170.

154. See e.g. Krajewski, op. cit. *supra* note 85; Pollicino and Bassini, op. cit. *supra* note 85; Wegner, op. cit. *supra* note 114.

155. CJEU, Annual report 2016, QD-AP-17-001-EN-N (2017), 82.

156. On the minimalist methodology of the ECJ: Sarmiento, "Half a case at a time: Dealing with judicial minimalism at the European Court of Justice" in Claes, op. cit *supra* note 147, pp. 13–40.

157. See e.g. Besselink, "The parameters of constitutional conflict after *Melloni*", 39 EL Rev. (2014), 531–552, 551; Barnard, "A proportionate response to proportionality in the field of collective action", 37 EL Rev. (2012), 117–135, 117.

that of the Charter.[158] Individuals in Italy who are accused of VAT fraud benefit from the most protective interpretation of the principle of legality in criminal matters. *M.A.S.* will make its mark in the same way as other landmark rulings that showed respect to national fundamental rights protection, such as *Omega* and *Schmidberger*.[159]

The ECJ can also be commended for taking into account the concerns brought forward by its Italian counterpart.[160] The Italian Constitutional Court has a special and longstanding expertise as a fundamental rights court and as guardian of the Italian Constitution. At the same time, it showed commitment to European integration by requesting a preliminary ruling and by extensively engaging with EU law in its reference. The ECJ was therefore right to place trust in the assessment of this court and to answer the preliminary questions accordingly.

The dialogue between the two courts was certainly more successful than in some other cases. For example, the *Melloni* judgment was strongly criticized for being exclusively self-referential.[161] Regarding the *Ajos* case, it was argued that the main problem was that the ECJ and the Danish Supreme Court "were unable to find common ground, i.e. to listen genuinely, to explain properly, and to seek compromises".[162] In *M.A.S.*, on the other hand, both courts were receptive to the arguments of the other and willing to make compromises. The preliminary reference and the preliminary ruling are therefore examples of a successful multilevel cooperation of constitutional courts.[163]

158. In 1992, Coppel and O'Neill criticized the ECJ's selective use of fundamental rights. Coppel and O'Neill, "The European Court of Justice: Taking rights seriously?", 29 CML Rev. (1992), 669–692, 670.

159. Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH* v. *Oberbürgermeisterin der Bundesstadt Bonn*, EU:C:2004:614; Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge* v. *Republik Österreich*, EU:C:2003:333.

160. Several arguments of the ECJ are reminiscent of the Italian Constitutional Court's reasoning. See e.g. the statement that it is primarily for the national legislature to lay down rules on limitation that enable compliance with the obligations under Art. 325 TFEU. Judgment, para 41; Order 24/2017, section 7. See also Judgment, paras. 59–60.

161. E.g., Vecchio, "I casi *Melloni* e *Akerberg*: Il sistema multilivello di protezione dei diritti fondamentali", (2013) *Quaderni costituzionali*, 454–456, 456; Levade, "Mandat d'arrêt européen: Quand confiance et reconnaissance mutuelle font obstacle au 'sauf si'", (2013) *Constitutions*, 184–187, 187; Besselink, op. cit. *supra* note 157, 550.

162. Holdgaard et al., "From cooperation to collision: The ECJ's *Ajos* ruling and the Danish Supreme Court's refusal to comply", 55 CML Rev. (2018), 17–53, 18.

163. On the concept of "multilevel cooperation of the European constitutional courts" or "*Europäischer Verfassungsgerichtsverbund*", see Voßkuhle, "Multilevel cooperation of the European constitutional courts: Der Europäische Verfassungsgerichtsverbund", 6 EuConst (2010), 175–198, 183.

The decision taken by the ECJ does not pose a substantial threat to the effective implementation of EU law. Admittedly, a significant number of individuals that committed VAT fraud affecting the financial interests of the EU might escape punishment. However, the ECJ allowed for a breach of EU law to persist only exceptionally, in a specific and narrowly confined situation. In the event of a future conflict between a national fundamental right and an obligation of EU law, it will be for the ECJ to determine whether the conditions for applying a higher national standard of fundamental rights protection are fulfilled. Besides, *M.A.S.* was different from *Melloni* because the uniform application of EU law is more important in an EAW case.[164]

Moreover, it is justified that the lack of harmonization of the national limitation rules by the EU legislature appeared as a significant criterion for the ECJ's decision. The Court has developed the doctrine of direct effect as a kind of sanction against negligent Member States that was meant to benefit individuals; it rejected reverse vertical direct effect and horizontal effect of directives.[165] However, in the field of criminal law, direct effect can have considerable negative consequences for individuals, as the present case illustrated.[166] Rules of EU law with direct effect that have such an adverse impact on the position of individuals should fulfil the requirements of clarity, precision and foreseeability that are enshrined in EU law and national constitutional law. A very generally termed provision of EU primary legislation, such as Article 325 TFEU, is unlikely to fulfil these requirements.[167] Furthermore, to respect the separation of powers at the EU level, the EU legislature should have had the chance to undertake a fundamental rights balancing exercise in such cases. It might even be questioned more generally whether broadly termed provisions of primary law should have direct effect if they have significant adverse effects on individuals.

If the requirements for an immediate judicial disapplication of the national limitation rules are not fulfilled, it is for the national legislature to bring the national regime of statutory limitation in line with EU law. In contrast to the national courts, the national legislature can remedy the present breach of EU law in a way that is compatible with the national principle of legality, by enacting provisions that are clear, precise and foreseeable. The ECJ and the

164. See section 5.1.2. *supra.*

165. Rossi, op. cit. *supra* note 118. See Case C-148/78, *Criminal proceedings against Tullio Ratti*, EU:C:1979:110; Case C-91/92, *Paola Faccini Dori* v. *Recreb Srl.*, EU:C:1994:292.

166. Rossi, op. cit. *supra* note 118.

167. See also Opinion of A.G. Bobek in Case C-574/15, *Scialdone*, para 166.

Italian Constitutional Court rightly took into account this division of responsibilities at the national level.[168]

While it is to be welcomed that the ECJ allowed the national court to respect the national principle of legality, it is a pity that it completely avoided assessing the clarity of the *Taricco* obligation from the perspective of EU law. It could have done so by reviewing this obligation in light of the requirements of foreseeability and precision of Article 49 of the Charter that the national court was meant to apply to limitation rules. It is highly questionable whether the criterion that serious VAT fraud escaped criminal punishment "in a considerable number of cases" is actually precise enough. Even the Advocate General acknowledged that the criteria identified by the ECJ in *Taricco* were too "vague and generic".[169] The Court apparently wanted to avoid criticizing its own judgment.

6. Conclusion

The ECJ did not change its longstanding principle that EU law enjoys primacy over domestic constitutional law. Member States cannot give precedence to a domestic standard of fundamental rights protection because it offers better protection for individuals or because it is part of their national identity. However, they are free to apply a national standard of protection within the scope of application of EU law, if the minimum standard of the Charter and the primacy, unity and effectiveness of EU law are not thereby compromised; these conditions were fulfilled in the present case.

The ECJ's reasoning suggests that the national court was allowed to apply the principle of legality as it is interpreted in Italy because the national limitation rules in question had not been harmonized by specific provisions of EU secondary legislation. Instead, they were determined by Article 325 TFEU, a very general provision of primary legislation with direct effect. As argued above, it makes sense to use the lack of harmonization by the EU legislature as a significant criterion.

So far, Member States have been able to apply national standards of fundamental rights protection when EU law left them a degree of implementing discretion, but this was not the case in *M.A.S.* Instead, there was a direct conflict between the obligation of EU law identified by the ECJ in *Taricco* and the principle of legality of the Italian Constitution. For this reason, *M.A.S.* can be seen as a landmark judgment. It is the first in which a conflict between an obligation of EU law, compatible with the Charter, and a national

168. Judgment, paras. 41 and 61; Order 24/2017, section 7.
169. Opinion, para 111.

fundamental right was resolved in favour of the latter. Nevertheless, this decision does not imply that the ECJ introduced a new exception to the principle of primacy that can be relied upon by Member States in the future. In a number of previous cases, the ECJ had accepted that national rules continue to be applied even though their immediate disapplication would have ended a situation that was incompatible with EU law. *M.A.S.* should be read in line with this case law and interpreted as an exceptional permission to moderate the full effect of EU law, which was justified by the overriding principle of legality.

Apparently, the ECJ instructed the national court to give effect to both the principle of legality of the Charter and the principle of legality of the Italian Constitution by treating the Charter right as a minimum standard of protection. The requirements of precision, foreseeability and non-retroactivity, which were enshrined in Article 49 of the Charter according to the ECJ, could be extended to limitation rules by the national court.

This comment welcomed the ECJ's decision, arguing that the Court was right to take fundamental rights protection seriously and to trust the assessment of the Italian Constitutional Court. Unlike some other cases, *M.A.S.* is an example of a successful multilevel cooperation of constitutional courts. The outcome does not pose a substantial threat to EU law, in particular because it will be for the ECJ to determine whether the conditions for applying a higher national standard of fundamental rights protection are fulfilled in future cases. What is regrettable, however, is that the reasoning of the ECJ was opaque, and that the Court did not assess the clarity of the *Taricco* obligation from a perspective of EU law.

On 31 May 2018, the Italian Constitutional Court handed down its final judgment in the *M.A.S.* case.[170] It ruled that the national courts that had referred the questions of constitutionality did not have to disapply the limitation rules in question because the *Taricco* obligation was incompatible with the principle of legality of the Italian Constitution. The domestic principle of legality was infringed irrespective of whether the facts took place before or after the *Taricco* judgment was delivered. Neither Article 325 TFEU nor the *Taricco* judgment itself were sufficiently clear. It is now for the national legislature to bring the national regime of statutory limitation in line with EU law.

Clara Rauchegger*

170. Italian Constitutional Court, 31 May 2018, Order 115/2018.

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