NJECL

New Journal of European Criminal Law
1–13

DOI: 10.1177/2032284418778144
njecl.sagepub.com
SAGE

The role of national courts between EU obligations and national standards of protection of fundamental rights

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Abstract
This article focuses on the role of national courts in the implementation of the EU legal system. Since *Simmenthal* and *Costa v. E.N.E.L.*, these courts are called upon, as part of their duty of sincere cooperation, to ensure the full application of EU law in all Member States and to protect the rights which that law confers on individuals. The duty to set aside conflicting provisions may be problematic in criminal cases. The issue has recently been put in the spotlight again by the *Taricco* case, which shows how the removal of an inconsistency between domestic legislation and EU law could sometimes lead to an infringement of constitutional criminal law principles. The *Taricco* case also calls into question the relationship between the primacy of EU law and the protection of fundamental rights.

Keywords
National courts, EU obligations, fundamental rights, *Taricco* case

Preliminary remarks. The issues at stake after the "*Taricco*" saga

One of the critical issues raised by the process of European integration is the role of national courts, which are priority vehicles of EU law in national legal orders. Their actions can occasionally take forms which may unhinge the balance of the systems in which they operate, especially when they are called upon to fulfil EU obligations in cases where there has been a lack of intervention by the legislature. The complexity of this issue has recently been put in the spotlight again by the *Taricco* case, which has certainly played a part in fostering doubts regarding the increasing expansion of the role of national courts in the enforcement of EU law in national legal systems. Since the well-

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known *Simmenthal*[1] and *Costa v. E.N.E.L.*[2] judgments, these courts are required, as part of their duty of sincere cooperation laid down in Article 4(3) TEU, to review national legislation and to set aside any domestic provision which is in contradiction to directly applicable EU provisions, without awaiting a decision from the Constitutional Court attesting the existence of any incompatibility between them.[3]

Applying this to the *Taricco* case, the Court of Justice of the European Union (hereinafter CJEU), in the ruling issued on 8 September 2015, stated that in the event that a national court concludes that the domestic provisions on limitation period do not satisfy the requirement of EU law to provide effective protection to the financial interests of the EU, then the court will have to ensure that EU law is given full effect, even if this necessitates overriding the national legislation, thus amending in fact the previous regime on limitation by worsening the position of the accused. This may be done without having to request or await the prior repeal of those provisions by way of legislation or any other constitutional procedure.[4] In particular, in para. 58 the Court reaffirmed that, where a 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'', that court must give full effect to EU law, ''if need be by disapplying 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.[5]

In the case at hand, subject to verification by the national court, the obligation to disapply will have concerned the rules on limitation in the Italian Penal Code, which according to the well-established case-law of the Italian Constitutional Court are substantive in character and consequently fall within the scope of the principle of legality referred to in Article 25 of the Constitution. Therefore, the imposition of a specific obligation of a Member State as an ''obligation as to the result to be achieved''[6] which arises from EU primary law, could cause an infringement of the legality principle, and this in turn could conflict with the basic fundamental principles of the Italian legal system.

As highlighted by the Italian Constitutional Court in its request for a new preliminary ruling concerning the interpretation of Article 325(1) and (2) TFEU,[7] there was a risk of a violation of the

1. CJEU, 9 March 1978, C-106/77, *Simmenthal*, ECLI: EU: C:1978:49.
2. CJEU, 15 July 1964, C-6/64, *Costa v. E.N.E.L.*, ECLI: EU: C:1964:66.
3. On the role played by national courts in the EU legal system, see R. Sicurella, *Diritto penale e competenze dell'Unione Europea. Linee guida di un sistema integrato di tutela dei beni giuridici sovrannazionali e dei beni giuridici di interesse comune* (Milan, Italy: Giuffrè, 2005), p. 28.
4. CJEU, 8 September 2015, C-105/14, *Taricco*, ECLI: EU: C:2015:555, para 49.
5. Article 325(1) and (2) TFEU require the Member States to counter illegal activities affecting the financial interests of the European Union through dissuasive and effective measures and to take the same measures to counter fraud affecting those interests as they take to counter fraud affecting their own financial interests. These provisions arise from different modifications to Article 209A TCE, which had been introduced by the Maastricht Treaty in the first instead of the third pillar, in order to take into account the principles expressed in the famous Greek maize judgment of 1989 (CJEU, 21 September 1989, C-68/88, *Commission v. Hellenic Republic*, EU: C:1989:339).
6. CJEU, *Taricco*, para 51.
7. Italian Constitutional Court, order no. 24/2017.

legality principle in the disapplication imposed by the CJEU, as it could have led to uncertainty and imprecision on the applicable limitation rules, as well as to a widening of the power of the judge, called upon to identify the circumstances where disapplication may take place following vague and ambiguous criteria. Indeed, as it was also pointed out in the literature,[8] Article 325 TFEU did not indicate in sufficient detail the path which criminal courts are required to follow, nor did the CJEU set up any criteria to establish when the number of cases is significant enough to justify disapplication or what serious fraud constitutes. For these reasons, the Constitutional Court, through an expert use of the instrument of reference for preliminary rulings, and using an apparently conciliatory tone, asked the CJEU to better clarify the scope of its decision in *Taricco* with respect to the obligation on the judge to disapply national legislation.[9]

By its judgment issued on 5 December 2017 in the *M.A.S. and M.B.* case,[10] unlike the Advocate General (hereinafter AG) Bot in his conclusions, the CJEU directly confronted the issues raised by the Constitutional Court in the search for a balance between the obligation to protect EU financial interests and the legality principle as considered in the Italian legal system. Furthermore, it reached a conclusion that may succeed in defusing the risk of a clash with the Constitutional Court, since it subordinates the obligation on the judge to set aside Italian legislation on the limitation period to the scrutiny by the same judge of the compliance of the consequence of disapplying national legislation with the principle of legality. The CJEU indeed, after recalling the importance given to this principle, with regard to requirements concerning the foreseeability, precision, and non-retroactivity of the applicable criminal law, both in the EU legal order and in national legal systems, shows greater sensitivity to the issues at stake, affirming that "the obligation to ensure the effective collection of the Union's resources cannot therefore run counter to that principle."[11]

Moreover, the CJEU allows limitation rules in the Italian legal order to be covered by the legality principle. As highlighted by the CJEU, the protection of the financial interests of the EU through criminal law is a competence shared between the EU itself and the Member States and, at the time the offence in question was committed, there was no harmonizing legislation on the limitation rules applicable to criminal proceedings relating to VAT. As a consequence, Italy had some room for manoeuvre in this field. However, the Court also points out that this could not be the same, after the adoption of Directive (EU) 2017/1371 of 5 July 2017 because of the harmonization, albeit partial, achieved by the same instrument.

8. G. Salcuni, 'Legalità europea e prescrizione del reato', *Archivio Penale* 3 (2015), pp. 1–15; M. Caianiello, 'Dum Romae (et Brucsellae) Consulitur . . . Some Considerations on the Taricco Judgment and Its Consequences at National and European Level', *European Journal of Crime, Criminal Law and Criminal Justice* 24 (2016), pp. 1–17; V. Manes, *La "svolta" Taricco e la potenziale "sovversione di sistema": le ragioni dei controlimiti*. Available at: https://www.penalecontemporaneo.it/upload/1462376539MANES_2016a.pdf, p. 9 (accessed 15 January 2018).
9. On the apparently "friendly" tone of the Constitutional Court see R. Sicurella, *Oltre la vexata quaestio della natura della prescrizione. L'actio finium regundorum della Consulta nell'ordinanza Taricco, tra sovranismo (strisciante) e richiamo (palese) al rispetto dei ruoli*. Available at: http://www.penalecontemporaneo.it/d/5360-oltre-la-vexata-qustio-della-natura-della-prescrizione-lactio-finium-regundorum-della-consulta-nell, p. 2 (accessed 15 January 2018); R. Kostoris, *La Corte Costituzionale e il caso Taricco, tra tutela dei 'controlimiti' e scontro tra paradigmi*. Available at: https://www.penalecontemporaneo.it/upload/6213-kostoris317.pdf (accessed 15 January 2018); V. Manes, *La Corte muove e, in tre mosse, dà scacco a Taricco. Note minime all'ordinanza della Corte Costituzionale n. 24 del 2017*. Available at: https://www.penalecontemporaneo.it/d/5215-la-corte-muove-e-in-tre-mosse-da-scacco-a-taricco, p. 333 (accessed 15 January 2018).
10. CJEU, 5 December 2017, C-42/17, *M.A.S. and M.B.*, ECLI: EU: C:2017:936.
11. CJEU, *M.A.S. and M.B.*, para 52.

It follows that if the Italian judge were to come to the view that the obligation to disapply the provisions on limitation conflicts with the principle of legality, "it would not be obliged to comply with that obligation, even if compliance with the obligation allowed a national situation incompatible with EU law to be remedied"[12]. The CJEU thus requires the national courts to conduct a close examination of the factual conditions which may justify the priority given to the principle of legality, and in no case or situation allowing criminal rules without the requirement of specificity nor their retroactive application. In doing this, the judges of the CJEU confirmed the pivotal role of the national courts, while the Constitutional Court, in its order 24/2017, seemed to want to reaffirm its own role.

This overview of the *Taricco* case thus clearly shows the crucial role of the national court as the connecting element within the integrated legal order. However, it also shows the possible breaking of the domestic balance that such a role can provoke and suggests the urgent need to investigate the EU obligations that are placed upon national courts (§ 2). The impact that such obligations may sometimes have on a national system calls for a reflection on the opportunity to introduce some limits, especially in criminal matters (§ 3). The *Taricco* case is also a timely opportunity to meditate on the scope of the duty to ensure the effectiveness of EU law within the framework of a multilevel system of protection of fundamental rights (§ 4).

The foundations of EU obligations on national courts

According to the principle of sincere cooperation laid down in Article 4(3) TEU, Member States are required to ensure the application of EU law and to take any appropriate measure to ensure the fulfilment of the obligations that arise out of the Treaties or those resulting from the acts of the institutions of the European Union. These EU obligations affect not only legislatures of the Member States[13] but also domestic judges, who can be considered as the "guardians" and the "ordinary courts" of the EU legal order. Indeed, it is first for the national courts supported by the CJEU to ensure sincere cooperation and thus the effectiveness of EU law in all Member States, as well as judicial protection of an individual's rights under that law. As highlighted by the CJEU with respect to the preliminary ruling procedure *ex* Article 267 TFEU, "the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties."[14]

To this end, the main instruments used by domestic judges are the disapplication of national provisions which conflict with European provisions and consistent interpretation,[15] which may sometimes be preceded by a request for a preliminary ruling from the CJEU. The use of these

12. CJEU, *M.A.S.* and *M.B.,* para. 61.
13. For a wider overview of the obligations stemming from the principle of sincere cooperation in relation to the legislature at MSs level, see V. Scalia, 'Sincere Cooperation and the Legislature', in R. Sicurella, V. Mitsilegas, R. Parizot and A. Lucifora, eds., *General Principles for a Common Criminal Law Framework in the EU. A Guide for Legal Practitioners* (Milan, Italy: Giuffrè, 2017, in press), pp. 295–324.
14. Opinion 1/09 delivered on 8 March 2011 by the CJEU pursuant to Article 218(11) TFEU on the compatibility of the Draft Agreement creating a unified patent litigation system with the TEU and the TFEU, para 85.
15. For a wider overview on the main instruments used by the national courts to ensure sincere cooperation and a uniform application of EU law, please see A. Lucifora, 'Sincere Cooperation and the Judiciary', in R. Sicurella, V. Mitsilegas, R. Parizot and A. Lucifora, eds., *General Principles for a Common Criminal Law Framework in the EU. A Guide for Legal Practitioners* (Milan, Italy: Giuffrè, 2017, in press), pp. 327–351.

instruments makes the national judge the first guarantor of the primacy of EU law.[16] In fact, the effectiveness of EU law would be seriously threatened if national courts were prevented from promptly applying EU law in accordance with the case-law of the Court. Therefore, it follows that since the famous *Simmenthal* judgment, every national court "must [. . .] apply Community law in its entirety and protect rights which the latter confers on individuals" and "set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule"[17].

The CJEU had already affirmed, in *Costa v. Enel*, that the terms and the spirit of the Treaty "make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity"[18]; however, this judgment did not draw any distinction between pre-existing and subsequently adopted national law. Instead, in Simmenthal, the CJEU clarified the consequences of the principle of supremacy, affirming that the provisions in the Treaty and directly applicable measures of the institutions "not only by their entry into force render automatically inapplicable any conflicting provision of current national law" but "also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions"[19].

The CJEU also pointed out that it is not necessary for the national courts to request or await the actual setting aside of any incompatible national provisions by legislation or other constitutional means.[20] For this reason, many considered that national constitutional courts are placed at the margin of the EU legal order.[21] Indeed, looking at the EU legal system, it is for the ordinary judges to play the main role in the daily application of EU law. These judges indeed are the only ones that can guarantee the continuous implementation of EU law provisions (having direct effect) in the legal orders of the Member States, because of their function and ordinary activity itself. However, Constitutional Courts also play a crucial role in enforcing EU law. In particular, they must guarantee that the general conditions established at the constitutional level as the basis for participation in the EU by the respective State are fulfilled. More precisely, they have to check on the respect by the national authorities of the "European clauses" that can be found in any constitution, and because of that are also constitutional obligations.[22]

Moreover, as mentioned above, the primacy of EU law also implies that the domestic judge is obliged to interpret national law in conformity with the rule of EU law, in order to ensure that EU rulings are brought into effect.[23] This duty is "inherent in the system of the Treaty,"[24] since it requires national courts to provide effective legal protection to individuals and to ensure the full

16. M. Claes, *The National Court's Mandate in the European Constitution* (Oxford, UK: Hart Publishing, 2006), p. 3.
17. CJEU, *Simmenthal*, para 21.
18. CJEU, *Costa v. E.N.E.L*, p. 1144.
19. CJEU, *Simmenthal*, para 17.
20. CJEU, Simmenthal, para 26.
21. J. Komárek, 'The Place of Constitutional Courts in the EU', *European Constitutional Law Review* 9(3) (2013), pp. 420–450.
22. M. Cartabia, Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling. Available at: https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56c188ce4d088efd4cc0b875/1455524046903/PDF_Vol_16_No_06_20+CJEU+Preliminary+References+Interdependence.pdf (accessed 15 January 2018).
23. See the leading case *Von Colson and Kamann* (CJEU, 10 April 1984, C-14/83, ECLI: EU: C:1984:153), where the Court expressly connects the duty of consistent interpretation to Article 249(3) EC and to the principle of sincere cooperation laid down in Article 10 EC (now Article 4(3) TEU).
24. CJEU, 5 October 2004, C-397/01, *Pfeiffer*, ECLI: EU: C:2004:584, para 114.

effectiveness of EU law. The interpretative obligation, originally developed to ensure full effectiveness of directives—while excluding any "horizontal direct effect" of the same[25]—has subsequently been extended by the CJEU also with regard to any EU law which is directly applicable or has direct effect, such as regulations[26] and Treaty provisions[27]; to EU acts of a non-binding nature, such as recommendations[28]; and to Third Pillar acts, such as Framework Decisions.[29] For all these acts, in any cases of potential conflict with a domestic norm, national judges are, in any case when there are several interpretations of an internal rule, required to choose the one that does not lead to a conflict with EU provisions.

The activity of the domestic judge is therefore essential in ensuring the effectiveness of EU law. Moreover, the above-mentioned obligations on the judiciary are expected to foster a spirit of mutual trust and cooperation between the national judges and the CJEU. The same dynamics cannot be found in the relationship between the national judges and the European Court of Human Rights. This depends on the fact that the latter only enters the scene after the exhaustion of domestic remedies. The different function within the system of protection of rights is also to be taken into consideration.[30] The special nature of the EU legal order that, since the *Van Gend and Loos*[31] and *Costa v. E.N.E.L.*[32] judgments, transformed from purely interstate law to a body of law which includes the rights and responsibilities of individuals, is attested to by the significance of the judiciary at EU constitutional level. If the European Union is the "integration of law, through the law," then the judiciary should have a singular voice, since, as highlighted by AG Colomer, "it is isolated from the political sphere and linked only to the will of the law."[33]

National judges are called upon to play a crucial role in the enforcement of EU law regardless of whichever specific branch of law is involved in the national proceedings before them. Indeed, the primacy of the provisions of EU law which are directly applicable must be understood in a comprehensive manner. Otherwise, if certain branches of national law such as criminal law were

25. As the CJEU affirmed in *Marshall* (CJEU, 26 February 1986, C-152/84, ECLI: EU: C:1986:84) and confirmed in *Faccini Dori* (CJEU, 14 July 1994, C-91/92, ECLI: EU: C:1994:292) a directive may not have "horizontal direct effect" between two individuals: it cannot be used as the basis for a legal action aimed at enforcing the rights contained in it, as against another private party.
26. CJEU, 7 January 2004, C-60/02, *X*, ECLI: EU: C:2004:10.
27. CJEU, 4 February 1988, C-157/86, *Murphy/An Bord Telecom Eireann*, ECLI: EU: C:1988:62.
28. CJEU, 13 December 1989, C-322/88, *Grimaldi*, ECLI: EU: C:1989:646, where the Court states that "national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law". However, it is still an open issue whether and to what extent domestic law is subject to the duty of consistent interpretation with respect to recommendations.
29. CJEU, 16 June 2005, C-105/03, *Pupino*, ECLI: EU: C:2005:386. At para 43 the Court states that "the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2) (b) EU".
30. R. Conti, La giurisdizione del giudice ordinario e il diritto Ue. Available at: http://www.questionegiustizia.it/articolo/la-giurisdizione-del-giudice-ordinario-e-il-diritto-ue_12-05-2017.php (accessed 3 January 2018).
31. CJEU, 5 February 1963, C-26/62, *Van Gend en Loos*, ECLI: EU: C:1963:1. According to the CJEU, EU law "not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage".
32. See footnote 2.
33. Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 25 June 2009, Case C-205/08, ECLI: EU: C:2009:397, para 29.

excluded, this could result in a restriction in the field of application of EU law "by camouflaging as criminal law certain areas of the law which have an effect in the economic sphere,"[34] with results that would be incompatible with the concept of the common market and the uniform application of EU law. The duty to set aside conflicting legislation thus applies in criminal as well as in civil cases; however, with respect to criminal matters, it may turn out to be problematic. This is due to the possibility that the removal of an inconsistency between domestic legislation and EU law could conceivably lead to an infringement of constitutional criminal law principles. This requires attentive investigation in situations where such a duty must be reconciled with the fundamental guarantees in criminal law.

Limits to disapplication in criminal matters

The obligation of national courts to ensure the primacy of the EU law finds its limit in the principle of legality (*nullum crimen, nulla poena sine lege*), which is recognised as a fundamental right both in the European Convention on Human Rights (Article 7) and in the EU Charter of Fundamental Rights (Article 49). It is a general principle of EU law, common to the constitutional traditions of the Member States, to ensure that no one can be convicted for an act which did not constitute a criminal offence under national law at the time when it was committed, and that no penalty should be applied, which, at the time of the offence, was not laid down by national law. This limit to the implementation of EU law by the Member States has been invoked by the CJEU whenever the obligation on the judiciary to set aside any conflicting provision led to a retrospective application of a criminal provision or an application by analogy, as well as whenever the duty of consistent interpretation had the effect of extending the criminal liability of the individual. Indeed, in both cases, by virtue of the legality principle, the CJEU has repeatedly stated that the application of requirements under EU law cannot determine or aggravate the liability in criminal law of individuals.[35] Such a situation was the result of the lack, before the Treaty of Lisbon, of the full competence of the EU legislature to adopt criminal provisions.[36]

However, since the *Tombesi*[37] and *Niselli*[38] judgments, the CJEU seems to admit possible detrimental effects resulting from EU law. In *Niselli*—where the introduction of a new provision which restrictively defined the notion of waste involved, in fact, a reduction of the corresponding incriminating provisions which were based on that concept, in contrast with the EU obligations of adequate protection—the conflict with the principle of legality was excluded since it was evident to the Court that, at the time of the events which gave rise to criminal proceedings, these could constitute offences under criminal law. Therefore, in this case, the direct application of EU law had the effect of reviving the existing national law and consequently individual criminal liability.

34. Opinion of Advocate General Roemer delivered on 23 February 1972, Case C-82/71, ECLI: EU: C:1972:10.
35. See CJEU, 11 June 1987, C-14/86, *Pretore di Salò*, ECLI: EU: C:1987:275, para 20; CJEU, C-80/86, *Kolpinghuis Nijmegen*, paras. 13-14; CJEU, 26 September 1996, C-168/95, *Arcaro*, paras. 35-37; CJEU, 3 May 2005, C-387/02, *Berlusconi*, para 74, ECLI: EU: C:2005:270; CJEU, *Pupino*, para 45; CJEU, *X*, para 61.
36. See, in this respect, G. Grasso, 'Relazione introduttiva', in G. Grasso and R. Sicurella, eds., *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale* (Milan, Italy: Giuffrè, 2008), p. 5; R. Sicurella, 'Setting up a European Criminal Policy for the Protection of EU Financial Interests: Guidelines for a Coherent Definition of the Material Scope of the European Public Prosecutor's Office', in K. Ligeti, ed., *Toward a Prosecutor for the European Union* (Oxford, UK: Hart Publishing, 2013), pp. 870–904.
37. CJEU, 25 June 1997, C-304/94, *Tombesi*, ECLI: EU: C:1997:314.
38. CJEU, 11 November 2004, C-457/0, *Niselli*, ECLI: EU: C:2004:707.

The *Niselli* judgment was greeted with some puzzlement in the literature, and it was precisely in relation to it that the possibility of having recourse to the counter-limits began to be proposed. In any case, less than a year later, the judgment in *Berlusconi* seemed to raise a bulwark against any possible stiffening of the internal criminal system in the absence of a contribution to this by the national legislator.[39] In this ruling, the CJEU highlighted that if the new provisions of the Italian Civil Code were to remain unapplied by reason of their incompatibility with the First Companies Directive, the result could be to render applicable a manifestly more severe criminal penalty, such as that provided for under the former Article 2621 of that Code, which was in force at the time when the acts were committed. Such a possibility was excluded since it would have been "contrary to the limits which flow from the essential nature of any directive."[40]

The issue came to the fore again in the *Taricco* case. In its judgment issued on 8 September 2015, the CJEU originally stated that the disapplication of Italian limitation rules would not have infringed *nulla poena sine lege*.[41] Indeed, although such a disapplication would have allowed for the imposition of a criminal sanction in circumstances that were not permissible under national law, the CJEU and AG Kokott considered it would in no way have led "to a conviction of the accused for an act or omission which did not constitute a criminal offence under national law at the time when it was committed, nor to the application of a penalty which, at that time, was not laid down by national law."[42] Given that in this case the main effect of the disapplication would have been to not shorten the general limitation period in the context of pending criminal proceedings, the CJEU excluded the possibility of an infringement of the rights of the accused, as guaranteed by Article 49 of the EU Charter (para. 55). Therefore, according to the CJEU ruling in *Taricco*, the legality principle could not be invoked to preclude the obligation upon the national courts to ensure the full effectiveness of EU law.

Some scholars have pointed out that in this way the CJEU has strongly affirmed that national sovereignty in criminal matters may be limited in order to assure the effective enforcement of EU law.[43] According to this opinion, the *Taricco* ruling has given a clear indication in respect to disapplication, since it required the referring court to disapply the domestic provisions on the limitation period, even where it would have led to detrimental consequences for the defendant.

However, the judgment in *Taricco* could lead to a different reading. Indeed, a significant mitigation could arise from para. 53, in which the CJEU expressly referred to the verification by the national court of respect for the fundamental rights of the accused. For this reason, some authors have highlighted that this decision, far from imposing an automatic obligation to disapply the national rules at issue, required the domestic court not only to assess the incompatibility of that legislation in terms of the effectiveness of the protection afforded but also to ensure that the

39. CJEU, *Berlusconi*. This case dealt with an amendment of the *substantive* provisions of the national criminal law, that gave rise, *inter alia*, to more lenient penalties and thus had an indirect impact on the limitation period for proceedings.
40. CJEU, *Berlusconi*, para 77.
41. On the possible effects of the *Taricco* ruling on the principle of legality, see Sicurella, *Oltre la vexata quaestio della natura della prescrizione*, p. 5; F. Giuffrida, 'The Limitation Period of Crimes: Same Old Italian Story, New Intriguing European Answers: Case Note on C-105/14, Taricco', *New Journal of European Criminal Law* 7 (2016), p. 100. Any infringement of the *nulla poena* does not exist for Viganò; in this sense, see F. Viganò, 'Supremacy of EU Law vs. (Constitutional) National Identity: A New Challenge for the Court of Justice from the Italian Constitutional Court', *EuCLR* 7 (2017), pp. 103–122.
42. CJEU, *Taricco*, para 56.
43. V. Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Oxford, UK: Hart Publishing, 2016), p. 79.

fundamental rights of the persons concerned were respected in cases of disapplication of the national provisions at issue.[44] These authors, specifically in order to solve the problem of unfavourable retroactivity, had proposed the possibility of referring to other rights enshrined in the EU Charter, such as the right to a fair trial pursuant to Article 47, through which the individuals could see their trust in the fact that the State does not change the rules regarding the conditions of relevance and treatment of the punishment fulfilled.[45]

In its judgment in the *M.A.S. and M.B.* case, the CJEU clearly intended to somehow reconcile its position with the *Berlusconi* jurisprudence. Enhancing what it had already stated in para. 53 of its decision in *Taricco* I, the CJEU affirmed that the principle of legality prevents a full and unconditional disapplication.[46] Indeed, such an obligation is not to be enforced if it entails a:

> breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed.[47]

In particular, the CJEU affirms, on the one hand, that it is for the national court to assess whether the so-called *Taricco* rule leads to a situation of uncertainty as regards the determination of the applicable limitation rules; if this is the case, that court is not obliged to disapply the provisions of the Criminal Code at issue.[48] In this way, the CJEU, albeit indirectly, deals with the problem of the limits of the judicial function, which had been addressed both in doctrine and in the order of the Constitutional Court. On the other hand, the CJEU clearly overcomes the critics concerning the possible retroactive application of a harsher treatment, by limiting the temporal effects of the *Taricco* rule to offences committed after the judgment, thus ensuring the "foreseeability" of the applicable limitation regime for those subject to criminal law.[49]

The CJEU therefore acknowledges that the duty of the national court to set aside conflicting legislation may become problematic in criminal cases where the removal of an inconsistency between domestic legislation and EU law could sometimes lead to an infringement of constitutional principles. Such a risk had after all been adequately pointed out and highlighted by the Constitutional Court which, in its order 24/2017, had expressed serious doubts around the compliance of the obligation that came out of the *Taricco* judgment with the principle of legality, implicitly threatening the so-called "counter-limits."

These counter-limits could also be invoked in the *Scialdone* case involving the introduction of more lenient criminal provisions for VAT fraud.[50] The question could be raised whether the CJEU,

44. Sicurella, *Oltre la vexata quaestio della natura della prescrizione*, p. 18.
45. Sicurella, *Oltre la vexata quaestio*, p. 20.
46. In this sense also M. Bassini and O. Pollicino, 'Defusing the Taricco Bomb through Fostering Constitutional Tolerance: All Roads Lead to Rome', *VerfBlog*, Available at: http://verfassungsblog.de/defusing-the-taricco-bomb-through-fosteringconstitutional-tolerance-all-roads-lead-to-rome/ (accessed 7 December 2017).
47. CJEU, *M.A.S. and M.B.*, para 62.
48. CJEU, *M.A.S. and M.B.*, para 59.
49. CJEU, *M.A.S. and M.B.*, para 60, affirming that the legality principle precludes the national court, in proceedings concerning persons accused of committing VAT infringements before the delivery of the *Taricco* judgment, from disapplying the provisions of the Criminal Code at issue.
50. CJEU, C-574/15, *Scialdone*, still pending. The case arises from a request for a preliminary ruling from the Court of Varese in order to know whether the amendments made by Legislative Decree 158/2015 regarding failure to pay declared VAT are compliant with EU law.

if it considers the incompatibility of such provisions with Article 325(1) TFEU to be well-founded, would require the national courts to disapply the same provisions, with the effect of directly expanding the criminal liability provided generally for VAT evasion in the Italian legal system. As it has already been pointed out,[51] in this way, in fact, the principle of legality would be violated, not only with respect to the extension that this principle has in the Italian legal system but also with respect to that adopted by the ECHR system and the EU system.

Effectiveness of EU law versus protection of fundamental rights

The CJEU ruling in *Taricco* was deeply criticized in Italian legal literature and provoked a firm response by the Constitutional Court, since it seemed to allow the possibility that the requirement to ensure the effectiveness of EU law could lower the safeguards in place for individuals in criminal law. Two different duties of domestic judges were at stake in the case: on the one hand, the obligation stemming from Article 325 TFEU, as interpreted by the CJEU in the *Taricco* decision, which called for the disapplication of national provisions if these could compromise the protection of the financial interests of the EU; on the other hand, the obligation stemming from the principle of legality as enshrined in Article 25 of the Constitution, which requires the judge to always comply with the principle of non-retrospective application of criminal law and also with the principle according to which an offence must be clearly defined in the law.

The *Taricco* case has thus raised the issue of how to manage the risk that national fundamental rights could be afforded with a lower protection when confronted with the topic of effectiveness of EU law. This risk was keenly felt following the *Melloni* ruling,[52] where the CJEU excluded that the different level of protection granted (by the EU legal system and the Spanish constitutional order) in areas related to the European Arrest Warrant fell within the scope of Article 53 EU Charter.[53] In that case, however, the decision of the CJEU took into consideration the special nature of the arrest warrant and the need to protect the rationale of mutual recognition.[54] As highlighted by AG Bot in his Opinion, the level of protection of fundamental rights must be fixed not in the abstract, but rather in a manner adapted to the requirements connected with the construction of an area of freedom, security, and justice.[55]

The differences from the *Melloni* case had been highlighted by the Constitutional Court which, in order 24/2017, had pointed out that such a case put into play the incompatibility of the higher national standard of protection with EU law and that it was an incompatibility which, if invoked through Article 53 of the Charter, would have "compromised the unity of EU law, most notably in a field based on mutual trust." On the contrary, in the *Taricco* case the primacy of EU law was not

51. A. Bernardi, 'Presentazione. I controlimiti al diritto dell'Unione europea e il loro discusso ruolo in ambito penale', in A. Bernardi, ed., *I controlimiti. Primato delle norme europee e difesa dei principi costituzionali* (Napoli, Italy: Jovene editore, 2017), p. CXXIII.
52. CJEU, C-399/11, 26 February 2013, *Melloni*, ECLI: EU: C:2013:107.
53. Article 53 states that the nothing in the Charter should be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law, and international law, and by international agreements to which the Union or all the Member States are party, and by the Member States' constitutions.
54. R. Sicurella, 'Du mal peut-il venir le bien? Les droits fondamentaux "nouvelle" voie pour l'identité européenne dans l'ère de la crise', in (collectif) *Humanisme et Justice, Mélanges en l'honneur de Geneviève Giudicelli-Delage* (Paris, France: Dalloz, 2016), pp. 989–990.
55. Opinion of Advocate General Bot delivered on 2 October 2012, Case C-399/11, ECLI: EU: C:2012:600, para 113.

called into question. Indeed, as pointed out by the Italian Court, the ruling arising from the *Taricco* judgment was not challenged, but rather "the existence of a constitutionally mandated bar to the direct application of the same."[56] This bar, for the Court, is represented by the fact, which falls outside the scope of EU law that, in the Italian legal order, limitation period provisions are considered part of substantive criminal law and are therefore subject to the principle of legality. As a result, the Union is called upon to respect this higher level of protection of human rights, both following Article 53 of the Charter and also because, otherwise, according to the Constitutional Court, "the process of EU integration would have the effect of undermining the national achievements in the area of fundamental freedoms and would depart from its path of unification whilst guaranteeing respect for human rights (Article 2 TUE)."

However, doubts were raised about the fact that, according to the Italian Constitutional Court, the regime of limitation falls outside the scope of EU law.[57] Indeed, the EU legal order cannot be considered "indifferent" to domestic rules on limitation. Despite the lack of harmonizing measures of the EU in the field, given that the limitation regime affects criminal proceedings dealing also with behaviour which is detrimental to EU interests, and therefore affects the effective protection of these interests, then limitation does fall within the scope of the obligation on the Member States not to adopt measures that can create obstacles to the achievement of the EU goals.

To this end, the CJEU decision in the *M.A.S. and M.B.* case is not fully convincing, since the Court, on the one hand, accepts that limitation is considered as part of the substantive law and then is covered by the legality principle, but on the other hand, limits this possibility until the entry into force of the PIF Directive. To this end, some authors have highlighted that the reference to this directive is quite ambiguous given that it does not clarify whether the limitation regime is to be covered by the principle of legality.[58]

Moreover, the CJEU in the *M.A.S. and M.B.* case, without any express reference to Article 6(3) TEU, recalled that fundamental rights, as they result from the constitutional traditions common to the Member States, "shall constitute general principles of the Union's law." Therefore, even if in one sense the CJEU avoids confrontations with constitutional identities, in another it allows reference to common constitutional traditions. This reference, together with the "concession" that the limitation can be covered by the principle of legality, allows the CJEU in *M.A.S. and M.B.* to find a solution within the EU legal order and to deftly avoid a clash with the Constitutional Court without having to revisit the primacy of EU law. In fact, in this way, the obligation arising from Article 325 TFEU is not in conflict with a national fundamental principle, but rather with an EU law limitation.

In contrast to the opinion of AG Bot, the CJEU has been able to preserve its dialogue with the Italian Constitutional Court and come up with a solution which seems to confirm what was affirmed in *Aranyosi/Căldăraru*[59]: the protection of fundamental rights can represent a real limit to the obligation of ensuring the effectiveness of EU law.

56. Constitutional Court, order 24/2017, para 8.
57. In this sense, Sicurella, *Oltre la vexata quaestio della natura della prescrizione*, p. 16.
58. R. Sicurella, 'Effectiveness of EU Law and Protection of Fundamental Rights: The Questions Settled and the New Challenges after the ECJ Decision in the M.A.S. and M.B. Case (C-42/17)', *New Journal of European Criminal Law* 9(1) (2018), p. 5.
59. CJEU, 5 April 2016, C-404/15, *Aranyosi and Căldăraru*, ECLI: EU: C:2016:198.

Conclusions

The most recent decisions of the CJEU have put under the spotlight the very special role of the judiciary in the European legal order in its very essence of an integrated legal order. In particular, they have shown the inexorable increasing judicial dimension of the law. It is first for the ordinary national judges to guarantee not only the effectiveness of EU law but also the right balance between the European and the national dimensions of protection of fundamental rights. The CJEU recalled this basic topic in its decisions both in the *Taricco* case and also in the more recent *M.A.S. and M.B.* case when it referred to the obligation on the national judge to assess whether in the concrete case, when disapplying the relevant national legislation, the fundamental rights of the individual are respected. In particular, in the *M.A.S. and M.B.* case, the national courts are called upon to assess whether the so-called *Taricco* rule leads to a situation of uncertainty as to the applicable national rules that would finally infringe the legality principle. Should this be the case, the national judge is released from the obligation to disapply.

The decision in the *M.A.S. and M.B.* case was also an opportunity for the CJEU to recall the primary importance of the cooperation between the CJEU and the national courts as the way to achieve the smooth implementation of a multilevel system of law. Such a perspective requires a "joined effort"[60] by all the actors involved, each participating in a process of mutual learning aimed at the improvement in the guarantees of fundamental rights.

Indeed, a fair balance can be achieved in the EU legal order between the primacy, unity, and effectiveness of EU law, on the one side, and the protection of fundamental rights of the individual, on the other. On this point, one must consider that a quite complete and advanced system of protection of fundamental rights has progressively been established at EU level, which is aimed at finally strengthening and expanding the overall level of protection of individual rights, by going further than the national standards of protection.[61]

The many crucial tasks on the national courts require their full awareness of the EU-law relevance of a case, how to deal with it, and finally the capacity, or better, the will, to act as a *juge communautaire* and invoke, where appropriate, the intervention of the CJEU through the preliminary ruling procedure.[62] Indeed, it is undeniable that a better knowledge of EU sources, a more attentive consideration of supranational case-law, and a more frequent use of references for preliminary rulings to the CJEU could be very useful in bringing about a qualitative raising of the hermeneutical activity of the judges and, more generally, an improvement of the law in action.[63]

As for the national Constitutional Courts, compliance with the obligation stemming from the principle of sincere cooperation should refrain them from any initiative aimed at weakening the role of the internal judge, by at the same time guaranteeing that (only) the essential features of the national system are maintained. But it is not an easy task to fulfil, as the effects of the EU integration process can sometimes raise problems of compliance with national constitutions.

60. A. Ruggeri, 'La Corte di giustizia e il bilanciamento mancato (a margine della sentenza Melloni)', *Il Diritto dell'Unione Europea* 2 (2013), p. 403.
61. In this respect, see V. Scalia, 'Protection of Fundamental Rights and Criminal Law', *The Dialogue between the EU Court of Justice and the National Courts Eucrim* 3 (2015), p. 108.
62. S. Prechal and van B. Roermund, *The Coherence of EU Law. The Search for Unity in Divergent Concepts* (Oxford, UK: Oxford University Press, 2008), p. 369.
63. Bernardi, *Presentazione*, p. XXXIV.

Moreover, maintaining a smooth and fair relationship between the National Constitutional or Supreme Courts and the CJEU is far from being established once and forever. On the contrary, it needs a continuous effort in the perspective of a European-wide constitutional dialogue.

In this respect, another recent decision by the Italian Constitutional Court (no. 269 of 14 December 2017) issued a few days after the decision of the CJEU in the *M.A.S and M.B.* case can raise some concerns. Indeed, *obiter dictum*, the Italian Constitutional Court seems to claim its own competence for a centralized control of the compliance of national law with fundamental rights, not only as regards the Italian Constitution but also with respect to the EU Charter, thus limiting the power—or duty—of the ordinary judges to refer to the CJEU for a preliminary ruling on the interpretation of the Charter. In particular, the Court states that violations of individuals' rights "postulate the need for an erga omnes intervention of this Court." Moreover, it states that the Court "will judge in the light of internal and subsequently EU parameters (. . .) according to the order appropriate to the situation,"[64] thus suggesting that the question of possible infringement of the Constitution will be dealt with first. According to the Court, this is required because the EU Charter constitutes "part of the EU law with peculiar characteristics due to its typically constitutional content." Therefore, it may happen that "the violation of individuals' rights infringes, at the same time, both the guarantees enshrined in the Italian Constitution, and those provided for by the Charter," as occurred in the *Taricco* case. However, the Constitutional Court, in the same decision, expressly refers to *Melki* and *A.c.b.* cases, where the CJEU stated that the priority question of constitutionality would be incompatible with EU law were it to prevent national courts from referring a question to the CJEU, or from adopting interim relief if necessary, or from setting aside conflicting national law.[65]

Therefore, despite the express statement by the Italian Constitutional Court concerning the need "to ensure that the rights enshrined in the EU Charter be interpreted in compliance with the constitutional traditions," the pivotal role of the national courts seems not to be finally called into question. Also with regard to the interpretation of the EU Charter, the activity of the national courts is confirmed to be essential in the enforcement of EU law. Indeed, the effectiveness of the *acquis* and the protection of fundamental rights are strengthened through the dialogue and mutual cooperation between the national courts and the CJEU aimed at ensuring that in the interpretation and application of the Treaties the law is observed.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

64. Constitutional Court, no. 269 of 14 December 2017, para 5.2.
65. CJEU, 22 June 2010, C-188/10, *Melki and Abdeli*, ECLI: EU: C:2010:363; CJEU, 11 September 2014, C-112/13 – A, *A v B and Others*, ECLI: EU: C:2014:2195.