

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).

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.icconnectblog.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.*

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.

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.

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.

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 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.*

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.

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 I*", 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.

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.

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. Rauchegeger, "The interplay between the Charter and national constitutions after *Akerberg 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*.

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.

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.

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.

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

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