

# Effectiveness and Primacy of EU Law v. Higher National Protection of Fundamental Rights and National Identity

## A Look through the Lens of the Taricco II Judgment



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### Abstract

The European Court of Justice (ECJ) finally delivered a judgment that puts an end to the so-called Taricco saga – at least for the time being. More importantly, this Taricco II judgment (Case C-42/17 – M.A.S. & M.B.) deals with the relationship between the principles of primacy, effectiveness, and direct effect of EU law, on the one hand, and the concept of national (and particularly constitutional) identity of the Member States, on the other. It also addresses the extent of the possibility for Member States not to apply EU law if it conflicts with an overriding principle guaranteed by their national constitution. In this context, the article aims to assess, firstly, whether the Court overruled its Melloni doctrine with this judgment. Secondly, the article analyses whether the Court, at least implicitly, answered the sensitive question of who is the ultimate judge responsible for assessing whether the “identity clause” enshrined in Art. 4(2) TEU has been violated or not.

# I. Introduction

On the 5th of December 2017, the European Court of Justice (hereinafter “ECJ”) finally delivered a judgment that put an end to the so-called *Taricco* saga – at least for the time being. More importantly, the judgment (called the *Taricco II*) deals with the relationship between the principles of primacy, effectiveness, and the direct effect of EU law and the concept of national (and particularly constitutional) identity of the Member States (hereinafter “MS”). It also addresses the extent of the possibility for MS not to apply EU law if it conflicts with an overriding principle guaranteed by their national constitution. The solution adopted by the Court is a compromise, which has settled a longstanding dispute with the Italian courts, transforming what could have been a war between courts into a dialogue between them.

In this context, the present article aims at analysing the tension between the primacy and effectiveness of EU law, on the one hand, and the (higher) protection of fundamental rights guaranteed by the national constitutions and respect for the national identity of the MS, on the other hand, through the lens of the *Taricco II* judgment. In order to address these issues, the *Taricco* saga is outlined in the following section (II), in order to understand how the tension between the effectiveness of EU law and the national protection of fundamental rights raised. Section III offers an assessment of *Taricco II*, by analysing whether the ECJ decided to overrule its *Melloni* doctrine and whether the ECJ answered the problematic question as to who is the ultimate judge responsible for assessing whether an obligation deriving from EU law undermines the principles inherent to

the national identity of a Member State. Some conclusions are drawn in the last section (IV).

## **II. Tension between Effectiveness and Fundamental Rights in the *Taricco* Saga**

The *Taricco II* judgment is the last in a back-and-forth between the ECJ and the Italian courts. It is, in particular, the decision taken by the ECJ in response to the question referred to it for a preliminary ruling by the Italian Constitutional Court (hereinafter “ItCC”), which originated by the ECJ’s findings in the first *Taricco* judgment. The latter was delivered in 2015 by the ECJ upon request for a preliminary ruling by an Italian criminal court. The Italian court questioned the compatibility of national rules on limitation periods, such as the fourth paragraph of Art. 160 of the Italian Criminal Code as amended by Law No 251/2005,<sup>1</sup> with Directive 2006/112. According to the above-mentioned Italian provision, the limitation period applicable to value added tax (hereinafter “VAT”) offences, if interrupted, can be extended by only one quarter of its initial duration, after which the proceedings are definitely to be considered time-barred. The referring court asked whether this provision introduced a VAT exemption not laid down in Art. 158 of Directive 2006/112. The ECJ reformulated the referred question in such a way as if the referring court was seeking to ascertain whether the national rule at issue impeded the effective fight against VAT evasion in the MS concerned. As it stood, the national rule had the effect of leading to the *de facto* impunity of the persons accused of VAT fraud in a large number of cases as

a result of the expiry of the limitation period. If the rule amounted to such an impediment, it would be incompatible with Directive 2006/112 and, more generally, with EU law<sup>2</sup>

The ECJ stated that the national authorities should consider the Italian provisions at issue incompatible with EU law (in particular, with Art. 325(1) TFEU, Art. 2(1) of the PFI Convention as well as Directive 2006/112, read in conjunction with Art. 4(3) TEU), if the application of these provisions on the interruption of limitation period had the effect of ensuring the impunity of the perpetrators of serious VAT fraud offences.<sup>3</sup> EU law, and specifically Art. 325 (1) and (2) TFEU, in fact obliges the MS to ensure that cases of serious fraud

“are punishable by criminal penalties which are, in particular, *effective* and dissuasive,” the ECJ argued. Moreover, “the measures adopted in that respect must be the same as those which the Member States adopt in order to combat equally serious cases of fraud affecting their own financial interests.”<sup>4</sup>

The need to ensure the *effective* fight against VAT fraud led the ECJ to equally affirm that “criminal penalties may nevertheless be essential to combat certain serious cases of VAT evasion in an *effective* and dissuasive manner.”<sup>5</sup> It did so despite MS being free to choose the form of the penalties used (at least in theory) in order to effectively protect the Union’s financial interests.

The use of criminal sanctions is thus interpreted by the ECJ in the *Taricco* case – as in its “environment judgments” of 2005 and 2007<sup>6</sup> – in a functional way.<sup>7</sup> This means, as *Mitsilegas* wrote, that “criminal law is not viewed as a self-standing EU policy or field of competence, but rather as a means to an end enabling the Union to achieve

effectiveness with regard to its policies and objectives.”<sup>8</sup> The specific Union policy in this case, the implementation of which should be ensured by the MS, was the protection of the Union’s financial interests and the relevant provision was a primary EU law provision, *i.e.*, Art. 325 TFEU. To this end, the ECJ affirmed the direct effect of Art. 325 TFEU<sup>9</sup> insofar as it obliges the MS 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.” It concluded that national provisions unable to give full effect to Art. 325 TFEU are to be disapplied.<sup>10</sup>

However, provided that the EU is a union of law in which fundamental rights have a prominent role,<sup>11</sup> national authorities must also ensure that the fundamental rights of the persons concerned are protected, if they decide to disapply national provisions conflicting with EU law.<sup>12</sup> Despite stating that it is up to the national authorities to ascertain whether fundamental rights (especially the principle of legality) are violated by disapplication of the national provisions at issue, the ECJ, in its first *Taricco* judgment, assigned itself the task of determining whether disapplication of the limitation period provisions at issue would infringe the principle of legality, as interpreted by itself and by the ECtHR. In this regard, the ECJ played the role of a “quasi-constitutional” court,<sup>13</sup> acting not only as the judicial authority competent to assess the validity of EU law or deciding on the interpretation of EU law but also as the judicial authority competent to assess the consequences of disapplication of national law to the fundamental rights protected at the EU level.

The performance of this role has been eyed by the ItCC, which affirmed that the ultimate control of compliance of EU law with the supreme principles of national legal orders should be entrusted to the national Supreme Courts.<sup>14</sup> Thus, the ItCC submitted a request for a preliminary ruling to the ECJ asking whether the obligation deriving from Art. 325 TFEU, as interpreted in the first *Taricco* judgment, should be applied even if such an obligation conflicts with an overriding principle of the Italian legal system.<sup>15</sup> The ItCC particularly affirmed that, in order for the ItCC not to exert the “counter-limit” doctrine, the ECJ should afford national authorities the possibility to continue applying national provisions, even if they are incompatible with the EU law, in case their disapplication is in contrast with an overriding principle of the national constitutional order and therefore jeopardises the national identity of a given MS.<sup>16</sup> In fact, in the ItCC’s view, the competence to ascertain whether EU law, as interpreted by the ECJ, conflicts with principles pertaining to a MS’ “constitutional identity,”<sup>17</sup> referred to in Art. 4 (2) TEU,<sup>18</sup> belongs to the relevant national authorities.<sup>19</sup>

The compromise solution adopted by the ECJ in the *Taricco II* case nevertheless gives only a partial answer to the questions posed by the ItCC. In fact, in its judgment of 5 December 2017, the ECJ neither refers to Art. 4 (2) TEU, nor expressly addresses the issue of compatibility of the rule set out in the *Taricco* judgment with the overriding principles of the Italian constitutional order. Instead, “Luxembourg” confirms the main findings following from its previous *Taricco* judgment, at least as far as interpretation of Art. 325 TFEU is concerned. Even if not contested by the ItCC, the ECJ particularly reiterates, first, that Art. 325 TFEU is an EU primary law provision that has direct effect.<sup>20</sup> Secondly, the Court reaffirms that “it is for the Member States to ensure

that the Union's financial interests are protected<sup>21</sup> and that, in order to achieve this objective, MS "are free to choose the applicable penalties"; however, at the same time, it stresses that "criminal penalties may be essential to combat certain cases of serious VAT fraud in an effective and deterrent manner."<sup>22</sup> As a result, the Court reaffirms that MS shall be considered "in breach of their obligations under Article 325(1) and (2) TFEU if the criminal penalties adopted to punish serious VAT fraud do not enable the collection in full of VAT to be guaranteed effectively" or if "the limitation rules laid down by national law do not allow effective punishment of infringements linked to such fraud."<sup>23</sup>

As regards the consequences of the incompatibility of national provisions with EU law (in particular with Art. 325(1) and (2) TFEU), the ECJ, in the first place, reiterates that it follows from its case law that it is

"for the competent national courts to give full effect to the obligations under Article 325(1) and (2) TFEU and to disapply national provisions, including rules on limitation, which, in connection with proceedings concerning serious VAT infringements, prevent the application of effective and deterrent penalties to counter fraud affecting the financial interests of the Union."<sup>24</sup>

Secondly, it reinforces the view taken in the first *Taricco* judgment that the Italian authorities, when deciding whether to disapply the provision of the Criminal Code at issue, "are required to ensure that the fundamental rights of persons accused of committing criminal offences are observed."<sup>25</sup> Contrary to the opinion of Advocate General *Yves Bot*,<sup>26</sup> the ECJ went further by affirming that national authorities are not obliged to disapply national provisions incompatible with EU law if such a disapplication "entails a breach of the principle that offences and penalties must be



defined by law.”<sup>27</sup> This also holds true even when, as a result, a national situation incompatible with EU law occurs.<sup>28</sup>

# III. Effectiveness and Primacy of EU Law v. Stronger National Protection of Fundamental Rights and National Identity

Despite the important issue dealt with in the judgment and although a different outcome of the judgment had the potential to jeopardise the entire European legal system – which is based on “a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States”<sup>29</sup>– in the author’s view, the innovative effect of the *Taricco II* judgment is minimal. The ECJ clearly acted with the intention of avoiding a direct conflict with the ItCC and, to this end, avoided dealing with the questions referred to it by the ItCC regarding primacy and national constitutional identity. As pointed out in the previous section, the ECJ did not expressly address the issue of compatibility of the rule set out in the *Taricco I* judgment with the overriding principles of the Italian constitutional order. It also did not pronounce judgment on the question of who is the ultimate judge responsible for assessing whether the MS’s “national identity,” referred to in Art. 4(2) TEU, risks being undermined by obligations deriving from EU law.

# 1. Did *Taricco II* overrule the *Melloni* doctrine?

As regards the relationship between primacy and effectiveness of EU law, on the one hand, and higher national standards of protection of fundamental rights, on the other, in the author's view, *Taricco II* does not represent an overruling of the *Melloni* doctrine. It also does not constitute affirmation by the ECJ of the general principle that higher national standards of protection of fundamental rights prevail over the application of EU law if the latter conflicts with those standards. The interpretation according to which the ECJ did not overrule the *Melloni* doctrine seems the more coherent one and more consistent with a literal and contextual interpretation of *Taricco II*.<sup>30</sup> In this section, the arguments justifying such a position are put forward.

At first reading, one would think that the *Taricco II* judgment reverses the *Melloni* jurisprudence.<sup>31</sup> As is well known, the ECJ stated in the *Melloni* judgment that the principles of primacy, unity, and effectiveness of EU law is undermined if Art. 53 of the Charter is interpreted as allowing a Member State to disapply EU rules "which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution."<sup>32</sup> Art. 53 of the Charter should thus be interpreted as not allowing a Member State to disapply a provision of EU law, even if application of the EU provision is inconsistent with the higher national standard of protection of fundamental rights. In *Taricco II*, however, the ECJ allowed the Italian authorities to apply their national standard of protection of the legality principle, even if it results in "a national situation incompatible with EU law." It thus seems, at first reading, that the ECJ reversed its previous jurisprudence and made

the higher national standards of protection of fundamental rights prevail over the primacy and effectiveness of EU law. However, a careful reading of the judgment proves the contrary. In this regard, I outline at first two existing different opinions ((1) and (2)) before I subsequently propose an own interpretation of this issue ((3)).

(1) In the view of some scholars, the ECJ addressed the issue as to whether it is possible for national authorities not to implement EU law, if the application is at variance with a higher constitutional standard of protection of a fundamental right by providing a new and autonomous interpretation of the principle of legality referred to in Art. 49 of the EU Charter of Fundamental Rights (CFR). In the opinion of these scholars, it is the same principle of legality enshrined in Art. 49 CFR, as interpreted by the ECJ,<sup>33</sup> that prevents the MS from disapplying national provisions conflicting with EU law when such a disapplication conflicts with the fundamental principle of legality. In the opinion of *Bassini and Pollicino*, particularly “it is no longer the national understanding of the principle of legality to be in contrast with the obligations stemming from Art. 325 TFEU,” as “we are no longer facing a counter-limit (a purely Italian doctrine) but a very limit that it is EU law to provide, first of all through Art. 49.”<sup>34</sup>

(2) Other scholars do not think that the Court gave an autonomous European definition of the principle of legality. As *Burchardt* puts it: “the reference to the domestic constitutional law understanding of the principle is [...] a direct reference to a domestic constitutional principle distinct from Art. 49 of the Charter.”<sup>35</sup> As a result of a conflict of two EU provisions, namely Art. 325 TFEU and Art. 49 CFR, it is therefore argued that the ECJ does not construe an exception to the obligation of disapplication of national provisions conflicting with EU law following from the

*Taricco* judgment. On the contrary, an exception to the obligation following from the *Taricco* judgment is *de facto* construed because of the conflict between the understanding of the principle of legality following from a domestic constitutional law and the obligation following from Art. 325 TFEU. *Burchardt* further notes:

“Hence, the exception postulated in *Taricco II* is the result of a conflict between EU law and domestic law – with the CJEU only unconvincingly trying to disguise this.”<sup>36</sup>

Therefore, she states: “for the first time in its jurisprudence, the court thus resolves such a conflict between domestic law and EU law not in favour of EU law primacy but in favour of the domestic constitutional law principle – without basing this outcome explicitly on the higher level of protection rationale in Art. 53 of the Charter.”<sup>37</sup> According to this reasoning, the Court established an exception to the principle of primacy based on the national understanding of the principle of legality. The risky logical consequence of this interpretation is that the principle of primacy of EU law is compromised.

(3) In my view, however, none of these opinions gives a correct interpretation of the Court’s decision. First, the ECJ did not strike a balance between Art. 325 TFEU and Art. 49 CFR, as the two norms are not in fact in conflict. The obligations stemming from Art. 325 TFEU are not limited by Art. 49 CFR. As stated in *Taricco I*,<sup>38</sup> the principle of legality enshrined in Art. 49 CFR is not undermined by disapplication of the Italian provisions on the limitation period, provided that, according to the principle of legality and, as interpreted by the ECJ and the ECtHR, the limitation of offences is an institution of procedural criminal law. Therefore, disapplication of limitation period provisions does not infringe the principle of legality as set out in the Charter.

On the contrary, the problem arises in respect of the Italian understanding of limitation rules as an institution of substantive criminal law, which is thus subject to the principle of legality in criminal matters. For this reason, the opinion referred in point (1) is not shared by the author.

The opinion mentioned in point (2) also does not find the author's agreement, since the ECJ in the *Taricco II* case neither established the prevalence of *national* fundamental rights standards over the *European* ones, nor overruled the *Melloni* doctrine. Two reasons could be put forward. First, immediately after having observed that the fundamental rights of accused persons should be respected by the national authorities when deciding whether to disapply the Italian provisions on limitation rules hampering the effective protection of the Union's financial interests, the ECJ stressed that the rule established in the *Åkerberg Fransson* judgment,<sup>39</sup> and *de relato* in *Melloni*,<sup>40</sup> still applies.<sup>41</sup> As a result, "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*."<sup>42</sup> In this context, it is clear from a literal interpretation of the two paragraphs in the *Taricco II* judgment that paragraph 47 (in which it is established that the rights of the persons concerned should be respected) is further explained and specified by paragraph 48 (in which it is made clear that the primacy, unity, and effectiveness of EU law should not be compromised by the application of different standards of protection of fundamental rights).<sup>43</sup> Such interpretation of the wording of paragraph 48 leads also to coherence, because otherwise paragraph 48 seems contradictory.<sup>44</sup> At least formally, therefore, the ECJ

recognises the validity of the *Melloni* doctrine from the beginning.

A second indicator of the ECJ's lack of willingness to reverse its *Melloni* jurisprudence is the entire judgment's lack of any reference to Art. 53 CFR, the interpretation of which was the focal point of *Melloni*. In the author's view, if the Court had wanted to reverse its jurisprudence, it would have done so expressly, giving a different interpretation of said Art. 53 CFR or, at least, specifying more precisely its previous interpretation of the article, e.g., construing the case at issue as an exception to the general rule.<sup>45</sup> However, this was not the path followed by the ECJ. In fact, the Court in the *Taricco II* judgment expressly decided not to proclaim a general principle regulating the relationship between higher national standards of protection of fundamental rights guaranteed by national constitutions, inherent in their national identity, and European standards of protection of fundamental rights. The Court neither mentioned Art. 53 CFR, nor Art. 4 (2) TEU, which had been expressly articulated by the ItCC.<sup>46</sup>

The formal silence of the ECJ on these issues might not be considered a conclusive argument either. However, even from a *de facto* point of view (unlike the *Berlusconi* case in which the issue was not dealt with at all<sup>47</sup>), in the *Taricco II* case the ECJ implicitly solved the question in the sense that the relationship between the primacy of EU law and higher national standards of the protection of fundamental rights should continue to be regulated according to the *Melloni* doctrine. The different outcome of the two judgments, *i.e.*, *Taricco II* and *Melloni*, results merely from the two different factual situations examined by the ECJ in each case, while the general rule adopted to decide both cases is the same. As has been stated earlier, both judgments "concern the same question (whether national and higher standards of

rights can be applied in EU related issues) but circumstances are not obviously comparable.”<sup>48</sup> It is thus rather obvious that diverging facts and circumstances lead to different outcomes.

The ECJ, in fact, has applied the same *Melloni* rule to different cases, in which the factual circumstances and the legal framework were different. In one case, a specific harmonised legal framework existed,<sup>49</sup> while it did not exist in *Taricco II* concerning the limitation period.<sup>50</sup> In one case (the *Melloni* one), differing interpretations of the same rights to an effective judicial remedy and to a fair trial were given by the ECJ according to EU law, namely Articles 47 and 48(2) of the Charter, and by the Spanish Constitutional Court according to its national law. Yet in another case (*Taricco II*), the interpretation of the principle of legality was not under discussion.

The content of the principle of legality was, in fact, interpreted in the same way both at the European and national levels; in order for it to be respected, provisions of criminal law should comply with the requirements of accessibility and foreseeability, as regards both the definition of the offence and the determination of the penalty. They should also comply with the requirement of precision of the applicable criminal law and with the principle of non-retroactivity of criminal law.<sup>51</sup> The issue debated was instead whether this principle applied to limitation rules for criminal offences relating to VAT or not; in this regard, the ECJ stated that it was for the national authorities to assess – on a case-by-case – whether the principle of legality applied to limitation rules in the Italian system and thus whether a disapplication of the provisions at issue risked infringing it. At the same time, the ECJ affirmed that the national authorities should ensure that the primacy, unity, and effectiveness of EU law were not



compromised. Thus, there was no divergence of interpretation concerning the meaning of the principle of legality at either the EU or the national level. This is why the Court did not refer to Art. 53 of the Charter: because it did not affirm a new and different rule from the rule in *Melloni*. It simply applied the same rule to different cases. The difference between the two cases was ultimately – and this is not a tautology – that they were different cases, involving different fundamental rights, different facts, and different legal frameworks.

## 2. National identity clause

In the author's view, another important implicit statement of the ECJ in *Taricco II* concerns the sensitive question of who is the ultimate judge responsible for assessing whether the "identity clause" enshrined in Art. 4(2) TEU has been violated. Despite being more evident after the entry into force of the Treaty of Lisbon<sup>52</sup> and the inclusion of the identity clause in Art. 4(2) TEU, which is subject to the jurisdiction of the ECJ (as are all EU law provisions to the extent that specific provisions do not provide otherwise<sup>53</sup>), the fact that many domestic constitutional courts claimed violation of their national identity<sup>54</sup> – among them the ItCC in the *Taricco II* case – has called into question this assumption.

In *Taricco II*, despite not pronouncing judgment explicitly on this issue, the ECJ implicitly answered that "the ultimate judge" to assess whether the identity clause has been infringed or not is the ECJ itself for two reasons. First, the ECJ, by not referring to Art. 4(2) TEU excluded its possible violation. Therefore, in a way, the ECJ implicitly pronounced judgment on the issue, thus precluding the ItCC from doing so. Secondly, giving the national court the task of assessing whether the principle of legality had been violated or not in this specific case, the ECJ put forth that it is the ECJ itself which should give national authorities the possibility not to implement EU law if it conflicts with a fundamental right, as interpreted in the national legal order. This conclusion is evident if one compares the judgment at issue with *Melloni*, in which the ECJ explicitly denied the possibility for the national authorities to disapply EU law, even if it conflicts with fundamental principles, as interpreted in the national legal system. It is thus the ECJ which ultimately decides in

which cases national authorities may decide not to apply EU law if it conflicts with overriding principles of their national legal systems. [55](#)

## IV. Conclusion

The foregoing analysis shows that in *Taricco II* the ECJ did not overrule its previous jurisprudence and, in particular, its *Melloni* doctrine. On the contrary, despite leaving many questions unanswered, it applied its *Melloni* jurisprudence to the case at issue. The different outcome of the two judgments is merely due to the different factual circumstances and legal frameworks. Thus, the ECJ, also in order to avoid an open conflict with the Italian Constitutional Court, found a compromise solution, at the same time ensuring respect for the fundamental rights of the individual and not undermining the principle of primacy and effectiveness of EU law. According to the ECJ's reasoning, the assessment as to whether EU legislation may be considered incompatible with overriding national principles should be carried out on a case-by-case basis: in the first instance, by the European Court of Justice and, only at a later stage, by the competent national authorities. The ECJ implicitly affirmed that the ultimate judge responsible for assessing respect for the so-called "identity clause" referred to in Art. 4(2) TEU is the ECJ itself.

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1. Art. 160 of the Italian Criminal Code, as amended by law n. 251/2005, should be read in conjunction with Art. 161 of that same Code. [↵](#)
  2. ECJ, 8 September 2015, case C-105/14, *Ivo Taricco et al.*, para. 35. For a discussion of the *Taricco* case, see E. De Busser, "Court Says Italian Law Liable to Affect Financial Interests of the EU", (2015) *eucrim*, 80; V. Scalia, "Protection of Fundamental Rights and Criminal

Law, The Dialogue between the EU Court of Justice and the National Courts”, (2015) *eucrim*, 100.↵

3. ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), paras. 47, 66.↵
4. ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), para. 43.↵
5. ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), para. 39.↵
6. See ECJ, 13 September 2005, case C-17/03, Commission of the European Communities v Council of the European Union (Environmental crime case) and ECJ, 23 October 2007, case C-440/05, Commission of the European Communities v Council of the European Union (Ship source pollution case). See Art. 83 para. 2 of the TFEU, which has codified the previous jurisprudence of the Court of Justice in the Environmental crime case and Ship source pollution case.↵
7. For the definition of “functional criminalisation,” see V. Mitsilegas, “From Overcriminalisation to Decriminalisation, The Many Faces of Effectiveness in European Criminal Law”, (2014) *New Journal of European Criminal Law*, 416.↵
8. V. Mitsilegas, (2014) *NJECL*, *op. cit.* (n. 7), 416, 419. The same line of reasoning led the ECJ to affirm that national authorities must treat European interests in an equivalent manner to domestic interests (principle of assimilation). For the initial recognition of the principle of assimilation by the ECJ, see the leading case: ECJ, 12 September 1989, case C-68/88, *Commission v Greece (Greek Maize)*. For an analysis of the relationship between the concept of “functional criminalisation” and the principle of assimilation, see V. Mitsilegas, (2014) *NJECL*, *op. cit.* (n. 7), 416.↵

9. ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), paras. 49-52, particularly para. 51. See also ECJ, 5 December 2017, case C-42/17, *M.A.S, M.B. (Taricco II)*, paras. 38-39. For an in-depth and critical analysis on this point, *i.e.*, the recognition of direct effect to Art. 325 (1)(2) TFEU, see V. Mitsilegas, “Judicial dialogue in three silences: Unpacking *Taricco*”, (2018) 9(1) *NJECL*, 38-42; F. Viganò, “Melloni overruled? Considerations on the “*Taricco II*” judgment of the Court of Justice”, (2018) *NJECL*, 18-23; 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)*”, (2018) *NJECL*, 24-30.↵
10. ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), para. 49.↵
11. See ECJ, 23 April 1986, case 294/83, *Parti écologiste “Les Verts” v European Parliament*, para. 23. For a detailed analysis of the rule of law principle in the EU, see L. Pech, “The Rule of Law as a Constitutional Principle of the European Union”, *Jean Monnet Working Paper* 04/09, <<http://www.jeanmonnetprogram.org/>> accessed 12 March 2018.↵
12. See ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), para. 53.↵
13. On the “quasi-constitutional” role of the ECJ in the *Taricco* case, see E. Billis, “The European Court of Justice: A “Quasi-Constitutional Court” in Criminal Matters? The *Taricco* Judgment and Its Shortcomings”, (2016) *NJECL*, 20.↵
14. See Corte Costituzionale Italiana [Italian Constitutional Court] (ItCC), (2017) decision n. 24/2017, 6, last para. ↵
15. See ItCC (2017), *op. cit.* (n. 14), 6, para. 1.↵

16. See ItCC (2017), *op. cit.* (n. 14), 7, para. 3. [↵](#)
17. In this sense, the ItCC made the same reference to national identity as did numerous times the German Constitutional Court. See in particular, Bundesverfassungsgericht (BVerfG) [German Federal Constitutional Court], 2 BvE 2/08, Leitsatz 4 and BVerfG, 2 BvR 2735/14, para. 41. [↵](#)
18. See ItCC (2017), *op. cit.* (n. 14), 6, para. 4. [↵](#)
19. See ItCC (2017), *op. cit.* (n. 14), 7, para. 3. For a detailed analysis of the decision of the Italian Constitutional Court, see F. Viganò, “Supremacy of EU Law vs. (Constitutional) National Identity: A New Challenge for the Court of Justice from the Italian Constitutional Court”, (2017) *European Criminal Law Review*, 103. [↵](#)
20. See ECJ, *Taricco II*, *op. cit.* (n. 9) para. 30. [↵](#)
21. See ECJ, *Taricco II*, *op. cit.* (n. 9) para. 33. [↵](#)
22. See ECJ, *Taricco II*, *op. cit.* (n. 9) para. 34. [↵](#)
23. See ECJ, *Taricco II*, *op. cit.* (n. 9) para. 36. [↵](#)
24. See ECJ, *Taricco II*, *op. cit.* (n. 9) para. 39. [↵](#)
25. See ECJ, *Taricco II*, *op. cit.* (n. 9) para. 46, where reference is made to ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), para. 53. [↵](#)
26. Opinion of AG Bot, delivered on 18 July 2017 in *Taricco II*, *op. cit.* (n. 9). For an analysis of the AG’s Opinion, see T. Wahl, “Follow-up to the Taricco Judgment – AG Calls

for Italy to Disapply Absolute Limitation Periods”, (2017) *eu crim*, 107.↵

27. See ECJ, *Taricco II*, *op. cit.* (n. 9) para. 59-62.↵
28. See ECJ, *Taricco II*, *op. cit.* (n. 9) para. 61.↵
29. See ECJ, 18 December 2014, Opinion 2/13, para. 167.↵
30. In the sense that this decision could “belittle” the principle of primacy of EU law, see D. Burchardt, “Belittling the Primacy of EU Law in *Taricco II*”, *VerfassungsBlog* <<https://verfassungsblog.de/belittling-the-primacy-of-eu-law-in-taricco-ii/>> accessed 12 March 2018.↵
31. In this sense, see M. Bassini, O. Pollicino, “Defusing the *Taricco* Bomb through Fostering Constitutional Tolerance: All Roads Lead to Rome”, *VerfassungsBlog* <<https://verfassungsblog.de/defusing-the-taricco-bomb-through-fostering-constitutional-tolerance-all-roads-lead-to-rome/>> accessed 12 March 2018; D. Burchardt, , *op. cit.* (n. 30), who affirms that: “this reduced and somewhat inconsistent argumentation affects the legal framework of “parallel” human rights protection on the domestic and EU level as established by Art. 53 of the Charter and the Melloni and Åkerberg Fransson jurisprudence.”↵
32. See ECJ, 26 February 2013, case C-399/11, *Stefano Melloni v Ministerio Fiscal*, para. 57-64, and particularly 58.↵
33. For a commentary of Art. 49 of the Charter, see V. Mitsilegas, “Article 49 – Principles of Legality and Proportionality of Criminal Offences and Penalties”, in: S. Peers, T. Hervey, J. Kenner and A. Ward (eds.), *The EU*



*Charter of Fundamental Rights. A Commentary*, 2014, p. 1351.↵

34. M. Bassini, O. Pollicino , *op. cit.* (n. 31), 4.↵
35. D. Burchardt, *op. cit.* (n. 30), 2.↵
36. D. Burchardt, *op. cit.* (n. 30), 3.↵
37. D. Burchardt, *op. cit.* (n. 30), 3.↵
38. See ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), paras. 54-57.↵
39. See ECJ, 26 February 2013, case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, para. 29.↵
40. It should be noted in this regard that the *Åklagaren v Hans Åkerberg Fransson* judgement expressly refers to the *Melloni*'s one and in particular to para. 60 of the judgment (ECJ, 26 February 2013, case C-399/11, *Stefano Melloni v Ministerio Fiscal*, para. 60).↵
41. See ECJ, *Taricco II*, *op. cit.* (n. 9) para. 47.↵
42. See ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), para. 47. Emphasis added.↵
43. A clear indication in this sense is given by the inclusion of the expression "in that respect" at the beginning of paragraph 47. This expression is usually used to explain the meaning of something which was previously stated.↵
44. This reading is supported by the opening phrase of the paragraph, "in particular," which means that what you are saying applies especially to a specific situation (see definition in the Collins dictionary). In the sense that

paragraph 47 is contradicted by paragraph 48, see M. Bassini and O. Pollicino, *op. cit.* (n. 31), 2.↵

45. In the sense that the ECJ created a “hidden exception to primacy”, see D. Burchardt, *op. cit.* (n. 30), 3.↵

46. See ItCC (2017), *op. cit.* (n. 14), 8, paras. 4-5.↵

47. This question was not in fact addressed by the ECJ in the *Berlusconi* judgment, in which the Court affirmed that rendering judgment on this question was not necessary for the purpose of the disputes in the main proceedings (see ECJ, 3 May 2005, Joined cases C-387/02, C-391/02 and C-403/02, *Silvio Berlusconi et al.*, paras. 70-71). On the contrary, see the AG Kokott’s Opinion of 14 October 2004 in the *Berlusconi* case (mentioned above in this same footnote), paras. 167-168.↵

48. See C. Peristeridou and J. Ouwerkerk, “A Bridge over Troubled Water – a criminal lawyers’ response to *Taricco II* – long read”, *VerfassungsBlog* <<https://verfassungsblog.de/a-bridge-over-troubled-water-a-criminal-lawyers-response-to-taricco-ii/>, DOI: <https://dx.doi.org/10.17176/20171213-095140>>.↵

49. See in this regard, ECJ, *Stefano Melloni v Ministerio Fiscal*, *op. cit.* (n. 40).↵

50. See ECJ, *Taricco II*, *op. cit.* (n. 9) paras. 44-45.↵

51. See ECJ, *Taricco II*, *op. cit.* (n. 9) paras. 51-57.↵

52. This was not necessary the case when the identity clause was not included on the list in Art. 46 TEU pre-Lisbon. In that case, according to some authors’ views, the reluctance of the ECJ to cite the national identity

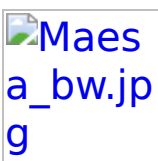
clause in its judgments was caused by the Court's lack of competence; see L.F.M. Besselink, "Respecting Constitutional Identity in the EU. Case Note to Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, judgment of the Court (Second Chamber) of 22 December 2010 (2012) *Common Market Law Review*, 671, 678.↵

53. See Art. 19 TEU and R. Barents, "The Court of Justice after the Treaty of Lisbon", (2010) *Common Market Law Review*, 709.↵

54. On the difference between national and constitutional identity, see E. Clouts, *National identity in EU law*, 2015.↵

55. See contra ItCC, decision n. 115/2018, of the 31st of May 2018.↵

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