EUROPEAN CRIMINAL LAW REVIEW

EuCLR

EDITORIAL

ARTICLES

VARIA

1 2019

Volume 9
Pages 1–135
ISSN 2191-7442

Nomos

www.euclr.de

C.H.BECK

EuCLR
European Criminal Law Review

1/2019
Volume 9
Page 1–135

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EuCLR European Criminal Law Review

Editor-in-chief: Prof. Dr. Helmut Satzger

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Publication: three times a year

Subscription prices 2019: Annual subscription: incl. online-access (Private subscriber) 158,– €, for institutions incl. online-access 269,– €; Single issues: 57,– €. Prices do not include postage and packing.

Orders: Subscriptions and orders should be sent to: Nomos Verlagsgesellschaft mbH, D-76520 Baden-Baden, Germany.

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Production and Publishing: Nomos Verlagsgesellschaft mbH & Co. KG, Waldseestr. 3-5, D-76484 Baden-Baden, Telephone (07221) 2104-0/Fax (07221) 2104-27, E-Mail: nomos@nomos.de

Advertisement: Sales friendly Verlagsdienstleistungen, Pfaffenweg 15, 53227 Bonn, Telefon (0228) 978980/Fax (0228) 9789820, E-Mail: roos@sales-friendly.de.

ISSN 2191-7442

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Towards a New Chapter of the Taricco Saga

Abstract

Recently, the conflict between the Italian Constitutional Court (ICC) and the European Court of Justice (ECJ) in the so-called Taricco Saga came to an end. In fact, the dialogue between the courts, which began in 2015 after the decision of the Grand Chamber of the ECJ in the Taricco case and was followed by the dispute between the ICC and the ECJ in the M.A.S. case, was finally concluded by the ICC. At first glance, peace seems to have been preserved. Nevertheless, a definite end to the Taricco conflict is not yet in sight. On the one hand, the ECJ did not make a turnaround on both the principle of primacy of EU Law and the general admissibility of the Taricco rule. On the other hand, even the ICC was equally uncompromising in its final decision by refusing any national implementation of the Taricco rule. Therefore, the national judgment defuses the Taricco bomb only at first sight, still holding enough ammunition for a new conflict regarding the Taricco rule. Beyond the individual national case of Taricco, however, fundamental issues regarding the separation of powers remain. Therefore, in the not too distant future, new chapters of the Taricco Saga will probably have to be added.
Keywords: Principle of legality; Separation of powers; Taricco judgment; Time limitation regime; Value-added tax frauds

I. Introduction

"United in diversity" – The motto of the European Union[1] seems to be particularly controversial in criminal law. It has traditionally been regarded as a discipline that shows a straight relationship to national values and traditions.[2] But since the judgment

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1 See in particular *A. Haratsch*, Nationale Identität aus europarechtlicher Sicht, EuR Europarecht 2016, 131, 132 et seq.; and *A. von Bogdandy*, Grundprinzipien, in: A. von Bogdandy/J. Bast (eds.), Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge, 2nd ed. 2009, p. 13, 54.

2 See German Constitutional Court [Bundesverfassungsgericht] judgment of 30.6.2009 in case 2 BvE 2/08 et al., BVerfGE 123, 267 (359), ECLI:DE:BVerfG:2009:es20090630.2bve000208 (so-called Lissabon judgement).

DOI: 10.5771/2193-5505-2019-1-59

of the European Court of Justice (ECJ) in the Greek Maize Case[3], the European Union (EU) is more and more willing to use the national structures of Criminal Justice, not only to develop the area of freedom, security and justice, but even more so for the protection of its financial interests.[4] The so-called Europeanisation of criminal law, which has now been under way for several decades,[5] is progressing,[6] even though not only several member states of the EU[7], but also the scientific community in criminal matters are critical of such tendencies.[8]

The Taricco Saga is one of the more recent judicatures that has revealed the conflict of being "united in diversity", crucially influencing the further development of European criminal law.[9] The dialogue between the Italian Constitutional Court (ICC) and

3 ECJ judgment of 21.9.1989 in case C-68/88 (Commission v Greece), ECLI:EU:C:1989:339; see *R. Sicurella*, EU competence in criminal matters, in: V. Mitsilegas / M. Bergström / T. Konstadinides (eds.), Research Handbook on EU Criminal Law, 2016, p. 49, 51.

4 For an overview of the developments in European criminal law since the Greek Maize case see *L. Staffler*, Schutz der finanziellen Interessen der Union mittels Strafrecht, Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung 2018, 52, 53 et seq; for an overview of the ECJ's jurisprudence in criminal matters see *R. Stotz*, Aktueller Bericht aus der Rechtsprechung des Gerichtshofs der Europäischen Union, Zeitschrift für Internationale Strafrechtsdogmatik (ZIS) 2018, 443 et seq. According to *V. Mitsilegas*, From Overcriminalisation to Decriminalisation: The Many Faces of Effectiveness in European Criminal Law, NJECL 5 (2014), p. 416, 419, "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.".

5 See in particular *U. Sieber*, Europäische Einigung und Europäisches Strafrecht, Zeitschrift für die Gesamte Strafrechtswissenschaft 103 (1991), p. 957 et seq.; *M. Böse*, Strafen und Sanktionen im Europäischen Gemeinschaftsrecht, 1996, *passim*; *G. Dannecker*, Die Entwicklung des Strafrechts unter dem Einfluss des Gemeinschaftsrechts, Jura 1998, 79 et seq. *H. Satzger*, Europäisierung des Strafrechts, 2001, *passim*.

6 In fact, one of the most controversial projects in European criminal law was recently realised. See Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ 2017 L 283, p. 1; for further details see *D. Brodowski*, Strafrechtsrelevante Entwicklungen in der Europäischen Union – ein Überblick, Zeitschrift für Internationale Strafrechtsdogmatik (ZIS) 2018, 493, 496; and *A. Jour-Schröder*, Aktuelle Entwicklungen im Europäischen Strafrecht, Zeitschrift für Internationale Strafrechtsdogmatik (ZIS) 2018, 438 et seq; Nevertheless, it should be noted that many Member States were skeptical of the establishment of the European Public Prosecutor's Office, which is why it could ultimately only be achieved through the legal instrument of enhanced cooperation: *F. Meyer/S. Van der Stroom*, Die Europäische Staatsanwaltschaft, Zeitschrift für Europarecht (EuZ) 2018, 40, 41.

7 See in particular *K. Ligeti*, The European Public Prosecutor's Office, in V. Mitsilegas / M. Bergström / T. Konstadinides (eds.), Research Handbook on EU Criminal Law, 2016, p. 480 et seq.

8 See in particular *B. Schünemann*, Das Strafrecht im Zeichen der Globalisierung, Goltdammer's Archiv für Strafrecht 2003, 299, 306 et seq.; *B. Noltenius*, Strafverfahrensrecht als Seismograph der Europäischen Integration. Verfassung, Strafverfahrensrecht und der Vertrag von Lissabon, Zeitschrift für die Gesamte Strafrechtswissenschaft 122 (2010), p. 604, 620.

9 ECJ judgment of 8.9.2015 in case C-105/14 (*Taricco*), ECLI:EU:C:2015:555; *M. Kaiafa-Gbandi*, ECJ's Recent Case-Law on Criminal Matters: Protection of Fundamental Rights in EU Law and its Importance for Member States' National Judiciary, EuCLR 2017, p. 219, 229.

the ECJ[10] addressed essential principles of national criminal law and their application in the European multi-level system. Basically, the sovereignty of interpreting fundamental national principles in criminal law was at stake and gave the Taricco Saga an extraordinary explosiveness.[11] The dialogue between the Courts in the Taricco case, namely between the ICC and the ECJ, was recently concluded. In fact, with judgment no. 115 of 2018, the ICC responded to the M.A.S. judgment of the ECJ[12], bringing the Taricco Saga to its conclusion, but leaving room for a further sequel in this matter.

This article provides an overview of the Taricco Saga. Therefore, the study will enlighten the key arguments of the first Taricco judgment (under II.), before investigating the subsequent legal developments that brought up the Taricco issue to the ICC (under III.). Next, this contribution will pay attention to the essential contents of the second Taricco judgment, namely the M.A.S. decision of the ECJ (under IV.). Moreover, the article will deal with the core statements of the final judgement of the ICC (under V.). Finally, it will provide an outlook on further likely developments (under VI.).

II. Chapter One: Taricco Ante Portas

The starting point of the Taricco Saga constituted the 2015 judgment of the Grand Chamber of the ECJ in a preliminary ruling procedure under Art. 267 TFEU.[13] The referring national court of Cuneo (*Tribunale di Cuneo*) was required to rule on a case in which a criminal organisation was at trial for a large number of serious value-added tax (VAT) fraud offences. Referring to the ECJ, the national court assumed that, due to the complexity of white-collar crime cases and considering the short period of national

10 See *A. Ruggeri*, "Dialogue" Between European and National Courts, in the Pursuit of the Strongest Protection of Fundamental Rights (with Specific Regard to Criminal and Procedural Law), in: S. Ruggeri (ed.), Human Rights in European Criminal Law. New Developments in European Legislation and Case Law after the Lisbon Treaty, 2015, p. 9 et seq.

11 In fact, *S. Manacorda*, The Taricco saga: A risk or an opportunity for European Criminal Law?, NJECL 9 (2018), p. 4, 10 identifies in the conflict between the two courts a serious threat to "the future of European Criminal Law".

12 ECJ judgment of 5.12.2017 in case C-42/17 (*M.A.S. and M.B.*), ECLI:EU:C:2017:936.

13 *ECJ, Taricco* (fn. 9), commented by *E. Billis*, The European Court of Justice: A „quasi-constitutional court" in criminal matters?, The Taricco Judgment and Its Shortcomings, NJECL 8 (2017), p. 20; *J. Bülte*, Anwendungsvorrang und Gesetzlichkeitsprinzip im europäisierten Strafrecht und Strafverfahrensrecht, Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht (NZWiSt) 2015, p. 396; *K. Gaede*, Das Erwachen der Macht? Die europäisierte Funktionstüchtigkeit der Strafrechtspflege, wistra 2016, p. 89; *G. Hochmayr*, Unionstreue trotz Verjährung, Onlinezeitschrift für Höchstrichterliche Rechtsprechung zum Strafrecht (HRRS) 2016, p. 239; *M. Kubiciel*, EuGH zur Außerkraftsetzung nationaler Verfahrensvorschriften, Strafverteidiger (StV) 2017, p. 69; *N. Perlo*, L'affaire Taricco: la voie italienne pour préserver la collaboration des juges dans l'Union européenne, Revue trimestrielle de droit européen 2017, p. 739; *M. Timmerman*, ‚Balancing effective criminal sanctions with effective fundamental right protection in cases of VAT fraud: Taricco, Common Market Law Review 53 (2016), p. 779; *L. Staffler*, Kriminalpolitische Kontrollbefugnis von Tatgerichten beim Schutz finanzieller Interessen der EU im Lichte der Gewaltenteilung, Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung (ZfRV) 2016, p. 4.

laws regarding the absolute limitation period, this case would probably end with a closure of the proceeding. Thus, the national court revealed that the offences would be ultimately time-barred after eight years and nine months.[14] As the Italian legal system seems unable to reach a final verdict by that deadline, the referring court wanted to clarify whether the Italian rules on the statute of limitation grant an inadmissible "de facto impunity" for VAT offences, since the limitation period would stand in the way of effective prosecution. The referral court therefore suggested to examine the national criminal provisions in the light of the EU law, specifically the VAT Directive[15] and some basic provisions on public funding (Art. 119 TFEU) and competition law (Art. 101, 107 TFEU).

1. The Decision of the ECJ

The ECJ stated that the limitation rules of Italian criminal law for VAT offences could not be assessed in the light of the provisions invoked by the national court. Therefore, the ECJ based its verdict on Article 325 TFEU, which had been put forward by Advocate General *Kokott*.

As mentioned in the Åkerberg Fransson[16] judgment, the ECJ stated that the member states are obliged to take effective, proportionate and dissuasive measures in order to fight illegal activities against the financial interests of the EU. As the funding of the EU budget also depends on VAT revenues collected by the national states, there is evidently a direct link between the collection of VAT revenue and the financial interests of the EU.

Since only the compatibility of national laws with EU law is under the scrutiny of the ECJ, it ordered the national Italian court to examine the Italian provisions regarding the time barrier of VAT offences in two different contexts. The national court should take as well "into account all relevant facts and points of law, whether the applicable national provisions allow the effective and dissuasive penalisation of cases of serious fraud affecting the financial interests of the European Union".[17] Furthermore, the national court of Italy should investigate whether "the application of national provisions in relation to the interruption of the limitation period has the effect that, in a considerable number of cases, the commission of serious fraud will escape criminal punishment, since the offence will usually be time-barred before the criminal penalty laid down by law can be imposed by a final judicial decision". Secondly, the national

14 *Billis*, NJECL 8 (2017), p. 20, 27 et seq. criticises the admissibility of the decision because of its speculative character of the preliminary ruling request. However, according to *Schima*, the Court of Justice may express an opinion on questions of a hypothetical nature: *B. Schima*, comment to Art. 267 TFUE, in: Mayer/Stöger (eds.), Kommentar zu EUV/AEUV, april 2012, rdb-Database, margin no. 130 et seq.

15 Council directive 2006/112 EC of 28 November 2006 on the common system of value added tax, OJ 2006 L 347, p. 1.

16 See *Kaiafa-Gbandi*, EuCLR 2017, p. 219, 222 et seq.

17 *ECJ, Taricco* (fn. 9), para. 44.

court must verify "whether the national provisions in question apply to cases of VAT evasion in the same manner as they apply to fraud affecting the Italian Republic's own financial interests". If that is the case, "it would be necessary to find that the measures laid down by national law to combat fraud and any other illegal activity affecting the financial interests of the European Union could not be regarded as being effective and dissuasive".[18] In this case, the Italian national rules would be incompatible with Article 325(1) TFEU, Article 2(1) of the PFI Convention[19] as well as the VAT Directive, read in conjunction with Article 4(3) TFEU.

If the national court were to conclude that the limitation statute does not satisfy the effective and dissuasive character of the measures to combat VAT fraud, it "would have to ensure that EU law is given full effect, if need be by disapplying those provisions and thereby neutralising the consequences … without having to request or await the prior removal of those articles by legislation or any other constitutional procedure."[20]

Finally, the ECJ stated that "subject to verification by the national court, the sole effect of the disapplication of the national provisions at issue would be to not shorten the general limitation period in the context of pending criminal proceedings, to allow the effective prosecution of the alleged crimes, and to ensure, if necessary, that penalties intended to protect the financial interests of the European Union and those intended to protect the financial interests of the Italian Republic are treated in the same way. Such a disapplication of national law would not infringe the rights of the accused, as guaranteed by Article 49 of the Charter."[21]

As a result, the national provisions of the Italian criminal code on the limitation period should not be applied where they prevent the imposition of effective and dissuasive sanctions in a significant number of serious cases of fraud detrimental to the financial interests of the EU. In the ECJ's view, these parameters should be reviewed immediately by the national court in charge of the offence, even if national law would prescribe submission obligations to the constitutional court for a norm control proceeding.

2. "The Force Awakens"

At first glance, the decision on the Taricco case could be perceived to only affect Italy,[22] but it has fundamental implications for the development of the European crimi-

18 *ECJ, Taricco* (fn. 9), para. 47, 48.
19 Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, OJ 1996 C 316, p. 48.
20 *ECJ, Taricco* (fn. 9), para. 49.
21 *ECJ, Taricco* (fn. 9), para. 55.
22 See *Kubiciel*, StV 2017, p. 69, 70; where as *Bülte* states that the Taricco judgment is not only of significance for criminal tax law, but of elementary relevance to the entire development in European criminal law and justice: *Bülte*, NZWiSt 2015, p. 396, 397.

nal law. In fact, a lot of commentators placed Taricco in a larger context.[23] According to them, the Taricco ruling is a continuation of the ECJ's previous case law, which was drafted in the cases of Akerberg Fransson and Melloni.[24] The essence of the ECJ's decision is the affirmation of the principle of effectiveness.[25]

Since the EU depends on national VAT revenues, there is a direct dependency between national tax law and EU interests.[26] In addition, the ECJ firmly insists on its claim to apply criminal law for EU financial interests as well. Moreover, the ECJ does not see any negative implications concerning fundamental rights in the Taricco judgment. One commentator, in fact, describes the Taricco decision as the "awakening of force".[27]

In this way, the ECJ judgment put national criminal prosecution under considerable pressure.[28] The ECJ not only demands an appropriate legislative framework to protect the financial interests of the EU, but also the actual practice of criminal prosecution must be examined by the national courts in order to establish whether it satisfies the requirements of the principle of effectiveness of EU law. In the light of the Taricco decision, this applies not only to procedural law but also to substantive criminal law. If such a legal development gained momentum, there would hardly be any limits to a criminal *effet utile*, causing significant disadvantages concerning the further development of fundamental rights.[29]

23 *Hochmayr*, HRRS 2016, p. 239 criticises the application of the primacy of EU law regarding national limitation rules; *Gaede*, wistra 2018, p. 89 focuses his criticism on the functionalistic approach of the ECJ to the criminal justice system without regarding fundamental rights.

24 ECJ judgment of 26.2.2013 in case C-617/10 (*Åkerberg Fransson*), ECLI:EU:C:2013:105; ECJ judgment of 26.2.2013 in case C-399/11 (*Melloni*), ECLI:EU:C:2013:107; according to *V. Mitsilegas*, Judicial dialogue in three silences: Unpacking Taricco, NJECL 9 (2018), p. 38 the Taricco litigation has generated a number of fundamental questions regarding the relationship between EU law and national constitutional law, and the impact of EU law on domestic criminal justice systems; as stated by *V. Manes*, Some lessons from the Taricco saga, NJECL 9 (2018), p. 12 the Taricco saga "represents a fundamental step into the evolution of 'EU criminal law' as for the relationship between the court of Justice and national constitutional courts."; *I. Rodopoulos*, The dialectical function of the principle of proportionality: a European prospective, Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 2017, p. 201, 212 identifies in the Taricco proceeding crucial questions regarding the limits of the legitimate primacy of EU law.

25 See *F. Viganò*, Melloni overruled? Considerations on the 'Taricco II' judgment of the Court of Justice, NJECL 9 (2018), p. 18, 21: "The main concern of EU law is, everywhere, effectiveness – 'effet utile' being the true keyword to understand its logic. […] EU law has, since its birth, always aimed at being effective, even when unity, or at least harmonization of domestic regulations, was still far away in the European horizon."; for further information see *E. Herlin-Karnell*, Effectiveness and Constitutional Limits in European Criminal Law, NJECL 5 (2014), p. 267 et seq. and *C. Di Francesco Maesa*, Effectiveness and Primacy of EU Law vs. Higher National Protection of Fundamental Rights and National Identity. A Look through the Lens of the Taricco II Judgment, eucrim 1/2018, p. 50, 52 et seq.

26 See *Sicurella* (fn. 3), p. 49, 64 et seq.

27 *Gaede*, wistra 2017, p. 89.

28 According to *Manes*, NJECL 9 (2018), p. 12, 14, the Taricco judgment inter alia shows that the ECJ is jealously safeguarding the efficiency of judicial cooperation in criminal matters.

29 *Gaede*, wistra 2016, p. 86, 93 et seq.

3. Assessment

In my opinion, the Taricco judgment contains two fundamental weaknesses which go beyond the individual case, because they have nothing to do with the limitation period under Italian law. Both weak points relate to the ECJ's mandate of investigation granted to national courts. On the one hand, the national court must investigate whether VAT offences are de facto not punishable in a considerable number of cases because of national regulations, which leads to systematic impunity. On the other hand, the national court should ignore internal constitutional structures and give direct precedence to EU law.

Both aspects of the Taricco rule are highly problematic regarding the principle of the separation of powers.

Indeed, it is not clear how exactly the national courts should quantify the considerable number of cases. Should empirical data be used or only assumptions be made? If an empirical analysis is required, the question is how far this data collection should go. In addition, the mandate of the ECJ ignores the fact that any legal changes make any empirical result meaningless. In short, the ECJ leaves the investigation process to the discretion of the national courts, which is why the investigative mandate faces a serious problem concerning the certainty of law. However, my criticism goes beyond that. It is essentially the task of the legislator, firstly, to identify such problems and, secondly, to remedy them. The executive and legislative authorities have the statistical capacities to carry out such criminological assessments for the purpose of legal intervention. And ultimately, it is not the courts, but only the democratic legislator that have the political mandate to make such a deep cut in criminal law regulations. Therefore, this constitutes a considerable problem of the separation of powers.[30]

I also take a critical view regarding the immediate disapplication of national criminal provisions by national courts for the sake of EU interests. It is true that the ECJ's mandate is fully in line with the logic of effectiveness. In my opinion, however, it ignores the limit of EU law as laid down in Art. 4 TEU. The EU institutions have to respect the essential structures of the national constitutions of the Member States. Of course, this also applies to the structural task profile of the judiciary. Because the courts are not producers of norms, they cannot change the essence of criminal provisions. On the contrary, the courts are norm users. They are allowed to interpret the criminal law within the limits of the wording. By no means, they must interfere with the very essence of the legal provision. In fact, the States have defined specific mechanisms and proceedings to provide a check and balance system. This system of separation of powers differs considerably from State to State. In my opinion, however, it is essential that these sensitive constitutional structures, which are closely linked to the national legal tradition, should also be respected by a supranational institution such as the EU. That's the kind of fundamental respect I miss in the Taricco decision.

30 See my comment on the ECJ's Taricco judgment in *Staffler*, ZfRV 2016, 4 et seq.

For these reasons, the Taricco judgment has, in my opinion, a much wider reach and is not limited to the individual case.

III. Chapter Two: Italian Rebellion

The decision of the Luxembourg Court was received with astonishment in Italy.[31] The main reason for this reaction was that, according to unanimous Italian opinion, the limitation period under criminal law is of substantive nature.[32] Therefore, this legal institute falls entirely under the guarantees of the principle of legality in criminal matters, so that the prohibition of retroactivity in malam partem applies.[33] This legal background regarding the substantive nature of limitation was not raised in the original Taricco proceedings before the ECJ.

Occasionally, some Italian courts followed the instructions from Luxembourg without objection. But soon after the Taricco judgment, the Milan Court of Appeal and the Supreme Court of Cassation brought some cases before the ICC for the purpose of a constitutional review. They argued that the principles of the Taricco judgment should be applied in the respective pending criminal proceedings, but there were certain doubts as to the constitutional conformity of the investigative mandate that came from the ECJ.

1. The Preliminary Reference of the ICC

The ICC took up the input of the two referring courts, but decided in turn to refer the matter to the ECJ via an accelerated preliminary ruling procedure (Art. 105 of the ECJ Regulation).[34] Nevertheless, in their referral order the Italian judges took a clearly neg-

31 For references to the reception of the Taricco judgment in Italian literature and case-law see my analysis in *L. Staffler*, Controlimiti als Integrationsfaktor für die Europäisierung von Strafrecht, in: Jahrbuch für Italienisches Recht, vol. 31, 2019, p. 167, 171 et seq.

32 See *D. Paris*, Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case Taricco, Questions of International Law (QIL) 37 (2017), p. 5, 8 et seq.

33 See *M. Ronco* and *G. Caruso*, in: M. Ronco / E. Ambrosetti / E. Mezzetti (ed.), La legge penale, 3rd ed. 2016, p. 1 et seq. (in particular with regard to the Taricco I decision on p. 30 et seq.); *G. Toscano*, The Principle of Nullum Crimen Sine Lege in the Construction of European Criminal Law, in: S. Ruggeri (ed.), Human Rights in European Criminal Law. New Developments in European Legislation and Case Law after the Lisbon Treaty, 2015, p. 31 et seq.; *V. Manes*, 'Common law-ization of criminal law'? The evolution of nullum crimen sine lege and the forthcoming challenges, NJECL 8 (2017), p. 334, 336 et seq., 338 et seq.

34 ICC order of 26.1.2017, no. 24 commented, inter alia, by *F. Viganò*, Supremacy of EU Law vs. (Constitutional) National Identity: A New Challenge for the Court of Justice from the Italian Constitutional Court, EuCLR 2017, p. 103 et seq.; see the English summary published on the official website of the ICC: "In this case the Court heard references concerning the ruling contained in an ECJ judgment, according to which the rule on the statutory limitation of offences should be disregarded under certain circumstances, on the grounds that to follow that rule might result in a situation in which the application of EU law resulted in a breach of fundamental rights provided for under the Italian Constitution. Specifically, whilst

ative position on the so-called Taricco rule.[35] The ICC created this term to represent the ECJ's mandate to the national courts. The ICC expressly stated that such a rule doesn't comply with the fundamental principles of predictability and sufficient certainty guaranteed by the Italian Constitution (IC).[36] In Italy, the statute of limitation is of a substantive nature and therefore falls within the full range of the principle of legality.[37] In this respect, the IC guarantees to every individual the subjective right to know, before committing the offence, whether the conduct is a punishable offence on the one hand, and which sanction and limitation period are applicable to this offence on the other hand, and none of these elements may be subsequently modified to the disadvantage of the person concerned.

The ICC posed three preliminary questions regarding the Taricco rule[38], adding the threat of a so-called controlimiti-procedure[39]. These questions were intended to determine whether, in the light of Art. 325(1) and (2) TFEU, the Taricco rule is still mandatory for the national court,

- if there is no sufficiently specific legal basis for non-application;
- if the statute of limitation under the law of the Member State is part of substantive criminal law and falls under the principle of legality guaranteed by the IC;
- if such non-application is incompatible with the fundamental principles of the constitutional law of the Member State or with the inalienable fundamental rights recognised in the Constitution of the Member State.

the Taricco case excluded the rules on the limitation of offences from the scope of Article 49 of the Nice Charter, it 'did not assert that the Member States must disregard any of their own rules and constitutional traditions that prove to be more beneficial for the accused compared to Article 49 of the Nice Charter and Article 7 ECHR'. The Court therefore sought a preliminary reference from the ECJ according to an expedited procedure.".

35 See in particular *C. Franzius*, Strategien der Grundrechtsoptimierung in Europa, Europäische Grundrechte Zeitschrift 2015, p. 139, 144.

36 For the interpretation of the principle of legality in Italian legal practice see *A. Di Martino*, Das Gesetzlichkeitsprinzip "zwischen zwei Welten". Formelles nationales vs. materielles Gesetzlichkeitsprinzip der EMRK in der jüngsten Rechtsprechung Italiens, Zeitschrift für die Gesamte Strafrechtswissenschaft 128 (2016), p. 270, 273 et seq.

37 ICC order 24/2017 (fn. 34), para. 8; English translation is available on the ICC's website: www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf.

38 See *L. Staffler*, Strafgesetzlichkeit im Dialog zwischen Verfassungs- und Unionsrecht, Zeitschrift für die Gesamte Strafrechtswissenschaft (ZStW) 130 (2018), p. 1147 et seq.

39 Controlimiti means that supreme principles of the Constitution and fundamental rights form a barrier that prevents the entry of (unconstitutional) norms from legal orders outside the state (such as that of the EU). The ICC's Controlimiti-procedure would mean that the Italian Ratification Act of the Treaty of Lisbon would be declared unconstitutional with respect to the part that would require compliance with the Taricco ruling of the ECJ. For further details see *Manacorda*, NJECL 9 (2018), p. 4, 6; *M. Cartabia*, The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community, Michigan Journal of International Law 12 (1990), p. 173; and – more generally from a constitutional prospective – *D. Paris*, Limiting the 'Counter-limits': National Constitutional Courts and the Scope of the Primacy of EU Law, Italian Journal of Public Law 2018, 205, p. 210 et seq.

a) No Sufficient Legal Basis

The ICC dedicated most of its attention to the first question referred. Here, the ICC saw an "inconsistency [of the Taricco rule] with the highest principles of the constitutional order of the Member State or with the indispensable rights of the person guaranteed by the Constitution of the Member State".

The ICC developed this question on the basis of Art. 4(2) TEU, according to which the EU must respect the national identity of the member states in their fundamental political and constitutional structures.[40] At the same time, it developed its own proposal for a solution. Accordingly, relations between the EU and its Member States would be based on the principle of loyal cooperation, which would require mutual respect and support. Here the duty of the institutions of the EU to preserve a minimum level of diversity necessary to maintain national identity in the basic structures of the Member State should be asserted.[41] In this respect, the ICC did not assume an abstract primacy of the national constitutional values, but interpreted Art. 4(2) TEU as an inherent characteristic of the European legal order based on mutual respect for national, constitutional and European traditions.[42]

40 Criticism regarding the argumentation focusing the "national identity of states" comes from Judge *Pinto de Albuquere* in his Partly Concurring, Partly Dissenting Opinion to ECtHR, judgment of 28.6.2018 in case of G.I.E.M. s.r.l. and Others v. Italy, application no. 1828/06 and others, para. 88 et seq.: According to *Pinto de Albuquerque*, the "'national identity' is a bon à tout faire, which is easily confounded with the opportunistic assessment of the 'national interest' in the particular political and social context of a given case. The status of statutory limitations is a good example of this. How can the same State argue in Luxembourg the opposite of what it defends in Strasbourg? How can the same Constitutional Court argue before the Court of Justice of the European Union that the statute of limitations is a substantive guarantee of criminal law, subject to the principle of legality – a distinct, major feature of the "supreme constitutional principles of the constitutional order of a member State" and of the "inalienable rights of the person recognised by the Constitution of a member State", in sum, of the Italian "national identity" – and at the same time plead before the Strasbourg Court that it is an irrelevant feature of Italian law for the purposes of the legality principle, which does not even preclude non-conviction-based confiscation in matters of site development where the offence is statute-barred? Why does the mechanism of the right to be forgotten (meccanismo del tempo dell'oblio) represent a crucial characteristic of Italian constitutional law to oppose the application of a penalty in Luxembourg, but not in Strasbourg?

41 ICC order 24/2017 (fn. 34), para. 6.

42 According to *Paris*, QIL 37 (2017), p. 5, 13 et seq., this understanding of constitutional identity, developed by the ICC, would bring a paradigmatic change to the concept of primacy of EU law, by turning the constitutional identity into a request to the ECJ to endorse national authorities power' to pick and choose which EU law provision and which ECJ judgment they are willing to comply with; the assessment of *M. Bonelli*, The Taricco saga and the consolidation of judicial dialogue in the European Union, Maastricht Journal of European and Comparative Law 25 (2018), p. 357, 365, 370, is unclear, however. The author criticises the approach of the ICC because it would imply that EU law could only be implemented in a national constitutional order if it does not violate the constitutional identity of the Member State. But indeed, is it not such that the real essence of the provision of Art. 4(2) TFUE calls for respect for the "national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government"?

b) Strengthening Fundamental Rights

Considering the ECJ rulings in the Åkerberg Fransson and Melloni case[43], which evoked a certain marginalisation of national constitutional identity[44], the ICC developed a second line of arguments based on Art. 53 of the EU Charter of Fundamental Rights (CFREU). According to the ICC, this provision is to be regarded as a mandate to maximise the level of protection of fundamental rights in the EU. This said, the ICC stated that the principle of legality and the inherent principle of certainty is recognised both in the national constitutional traditions and in the case law of the European courts.[45] But since the Italian provisions on limitation fall under substantive criminal law and therefore are covered by the full scope of protection of the principle of legality guaranteed by the IC, the level of protection under constitutional law is higher than under EU law. Thus, in the light of Art. 53 CFREU the principle of legality of the IC is to be given priority over EU law because in this respect constitutional law provides a higher level of protection of fundamental rights.

After this preliminary clarification, the ICC examined whether the non-application of the absolute limitation periods based on Art. 325 TFEU was reasonably foreseeable for an individual. This investigation did not only look into the question whether a person could neither foresee the criminal relevance of his action nor the duration of the limitation period at the time of the offence. According to the ICC, the principle of certainty constitutes, among other issues, a barrier against judicial arbitrary decisions. In this context, the Italian judges developed the right for every criminal offender to know the moment of extinction of criminal liability. Under these conditions, the ICC assumed that the Taricco rule does not meet the requirements of necessary predictability of criminal liability.

The ICC also came to a negative verdict regarding the Taricco rule in the light of the ban on juridical arbitrariness, which is imposed on courts by the principle of legality. While the national courts are not entitled to carry out discretionary evaluations of criminal policy, the Taricco ruling of the ECJ does not provide sufficiently specific parameters to the national courts for carrying out the requested examinations.

Overall, the ICC stated that the principle of legality in Art. 25(2) IC offers a higher level of protection than the corresponding guarantees in Art. 49 CFREU and Art. 7 ECHR. Regarding Art. 53 CFREU, this would entail the necessity of interpreting EU law in conformity with the Italian constitutional law. Consequently, Art. 25(2) IC should be given priority over EU law.[46] In order to prevent any objections from the

43 *ECJ*, *Åkerberg Fransson* and *Melloni* (fn. 24).

44 See *C. Safferling*, Der EuGH, die Grundrechtecharta und nationales Recht: Der Fall Åkerberg Fransson und Melloni, Neue Zeitschrift für Strafrecht 2014, p. 545, 551.

45 ICC, order 24/2017 (fn. 34), para. 5 referring to ECJ judgment of 12.12.1996 in case C-74/95 and. C-129/95 (*X*), ECLI:EU:C:1996:491.

46 The considerations of the ICC on the higher level of protection are based on its established case law on the so-called "principle of maximum extension of guarantees" [*principio di massima espansione delle garanzie*]. Thus, in a multi-level governance system, the interpretation

Melloni ruling of the ECJ, the ICC pointed out a crucial difference to the Taricco case: While the Melloni case concerned an (ultimately inadmissible) curtailment of EU law requirements, the Taricco case concerns a field of law which neither falls under the application of primary EU law nor creates a contradiction between the national and EU law. In fact, the statute of limitation is a field of law completely outside EU law with essential significance for (Italian) national law.

c) The Need of Legal Certainty

Finally, the ICC developed a third line of arguments by emphasising specifically the principle of certainty.[47] The ICC looked into Art. 325 TFUE concerning the protection of the financial interests of the EU, stressing the principle of legal certainty under Art. 49 CFREU. In this way, the ICC developed a European approach to the Italian problem.

In the Taricco judgment provided in 2015, the ECJ would only have examined the singular aspect of retroactivity in the light of Art. 49 CFREU, without going into detail on the principle of certainty. According to the ICC, the CFREU's requirement of legal certainty would oblige the national court to apply only criminal provisions that are sufficiently specified by the legislator. Conversely, national courts are not allowed to pursue objectives outside the legal framework defined by the legislator, thus creating judge-made criminal regulations.

Furthermore, Art. 325 TFEU does not provide sufficiently determined rules for the national court to protect the financial interests of the EU by disapplying national provisions. Indeed, the main purpose of the Taricco rule seems to be the principle of effectiveness of EU law. Thus, the Taricco rule could potentially undermine any normative element on criminal liability or criminal procedural law, if it is seen as an obstacle to efficient prosecution. Such an interpretation of Art. 325 TFEU does not comply with Art. 49 CFREU.[48]

2. Harsh Rejection by the Advocate General

The fierce criticism of the Italian constitutional judges was harshly rejected by the Advocate General *Yves Bot*.[49] Indeed, AG *Bot* suggested a strong emphasis on the principle of effectiveness of EU law, particularly in relation to criminal offences against the financial interests of the EU. The national legal system would contradict the *effet utile*

of guarantees of fundamental rights must be performed according to the maximum extension of the guarantees: ICC judgment of 30.11.2009, no. 317.

47 See *Paris*, QIL 37 (2017), p. 5, 11 who affirms that the reasoning of the ICC is based on the principle of the separation of powers.

48 ICC, order 24/2017 (fn. 34), para. 9.

49 Opinion of Advocate General *Yves Bot* delivered on 18 july 2017 in case C-42/17, ECLI:EU:C:2017:567.

if, in the course of application of EU law, "the absence of a sanction or [...] an obvious and substantial risk of impunity" were imminent. Particularly in the field of economic and financial crimes, the national legal system has to ensure that both the investigating authorities and the courts are enabled to conduct their proceedings in accordance with the complexity of the facts.[50] Hence, AG *Bot* suggested a radical solution by considering the interruption of the limitation period under criminal law as an autonomous concept of EU law. According to him, "the Court should consider that the concept of interruption of the limitation period is an autonomous concept of EU law and should define it as meaning that each investigative act and each act which necessarily extends it interrupts the limitation period, that act then causing a new period, identical to the initial period, to begin, while the limitation period which has already elapsed will then be cancelled."[51] If the ECJ had expressly followed his proposal, the threatened controlimiti-procedure would probably have been applied by the ICC, since criminal law is generally seen as having strong roots in national culture and traditions, which is why Members States feel reluctant to share competences in criminal matters with the EU.[52]

AG *Bot* also rejected the proposal of the ICC to interpret Art. 53 CFREU as a most-favoured clause for fundamental rights, because this could ultimately undermine the primacy of EU law.[53] Contrary to the ICC, AG *Bot* expressly suggested to continue the path defined in the Melloni judgment, which limits the applicability of national fundamental rights in the light of the principle of effectiveness. Regarding the level of protection by Art. 53 CFREU, AG *Bot* made it clear that the CFREU strives for a high level of protection, which must, however, be commensurate with the nature, the objectives and the specific scopes of EU law.[54] Where an EU legal act calls for national implementing measures, the national authorities and courts remain free to apply national standards of protection of fundamental rights. However, the level of protection provided by the CFREU and the primacy, unity and effectiveness of EU law must not be compromised.[55]

IV. Chapter Three: Taricco Reloaded

In the light of the tension between the irreconcilable positions of the ICC and the AG, the ECJ developed a very diplomatic[56] solution, which was surprisingly brief in its rea-

50 AG *Bot*, Opinion (fn. 49), para. 83, 86 focuses in particular on the "defence strategy adopted by lawyers and other specialist experts, which consists in spinning out the proceedings until they are time-barred.".
51 AG *Bot*, Opinion (fn. 49), para. 101.
52 For further information see *K. F. Gärditz*, Europäisierung des Strafrechts und nationales Verfassungsrecht, in: M. Böse (ed.), Europäisches Strafrecht mit polizeilicher Zusammenarbeit. Enzyklopädie Europarecht, vol. 9, 2013, para. 6 margin no. 15.
53 AG *Bot*, Opinion (fn. 49), para. 155.
54 AG *Bot*, Opinion (fn. 49), para. 148 et seq.
55 AG *Bot*, Opinion (fn. 49), para. 158.
56 *F. Viganò*, NJECL 9 (2018), p. 18, 19 describes the judgment as a "Solomon-like decision"; *Bonelli*, Maastricht Journal of European and Comparative Law 25 (2018), p. 357, 365 as-

soning.[57] Probably in view of the controlimiti-procedure threat the ECJ took a conciliatory path in its ruling (at least in language), honouring the spirit of a dialogue between the highest courts.[58]

1. Responsibility of the National Legislator

The ECJ decided to deal only with the questions on sufficient certainty and the principle of legality in the light of Art. 49 CFREU, while not responding to the submissions on Art. 4(2) TEU. In this respect, it developed its solution exclusively on the ground of EU law.

First, the ECJ underlined the importance of Art. 325 TFEU for Member States in the combat against fraud affecting the financial interests of the EU. Thus, it clarified that the collection of VAT revenue and the provision of VAT resources to the EU budget are directly linked, as failure to collect VAT could potentially lead to a reduction in the EU budget. Although the Member States are free to choose the adequate instruments to protect the EU's financial interests, the use of criminal law in cases of serious VAT fraud seems essential in order to punish such acts in an effective and deterrent manner.[59] The ECJ emphasised that it is the task of the national legislator to develop criminal regulations in order to protect the financial interests of the EU – such as the provisions on the limitation period under criminal law – in correspondence to Article 325(1) and (2) TFEU.[60]

2. Harmonisation Through PIF Directive?

With regard to the central problem of the classification of limitation statute as an institute of substantive law under Italian criminal law, the ECJ stated that the relevant legal provisions on VAT offences had not yet been harmonised at the time of the Taricco proceedings. This harmonisation had only partly been accomplished by Directive (EU) 2017/1371.[61] For this reason, Italy was free at the time of the Taricco case to assign the

sumes that the ECJ decision in M.A.S. was very much welcomed by the ICC as well as other constitutional courts.

57 *ECJ, M.A.S. and M.B* (fn. 12).

58 *ECJ*, *M.A.S.* and *M.B.* (fn. 12), para. 22; see *A. Lucifora*, The role of national courts between EU obligations and national standards of protection of fundamental rights, NJECL 9 (2018), p. 216 ff.

59 *ECJ*, *M.A.S.* and *M.B.* (fn. 12), para. 32 et seq.

60 *ECJ*, *M.A.S.* and *M.B.* (fn. 12), para. 40 et seq.

61 According to *Perilongo*, the Taricco judgment affected the negotiations on the PIF Directive Proposal: *G. F. Perilongo*, Much Ado About Something? The PIF Directive Proposal and its Impact on the Italian Legal System, EuCLR 2016, p. 265, 273; see also *J. Ouwerkerk*, The Potential of Mutual Recognition as a Limit to the Exercise of EU Criminalisation Powers, EuCLR 2017, p. 5, 14.

limitation period to substantive criminal law, so that it is subsequently subject to the principle of legality.[62]

With this brief statement, the ECJ wanted to defuse the burning conflict without going into the particularities of national law in greater detail. However, the reasoning of the ECJ remains unclear. In fact, the PIF Directive[63] itself doesn't contain any explicit reference to the legal nature of the criminal limitation period. The ECJ only suggested that the PIF Directive may have led to a paradigm shift regarding the nature of limitation period. At the same time, the ECJ refrained from making a clear statement whether the limitation period under the PIF Directive is now of a procedural nature (and thus no longer covered by the guarantees of non-retroactivity) or whether it remains free for the Member States to determine the legal nature of this legal institute. Indeed, only the systematic collocation of the limitation period rules, which are regulated in the PIF Directive following the jurisdiction rules, could be interpreted as an indicator of its procedural nature.[64]

3. Fundamental Rights and Common Constitutional Principles

The ECJ finally emphasised the respect for the fundamental rights of accused persons in the light of the EU law. According to the Åkerberg Fransson judgment, national standards of protection of fundamental rights should not affect neither the level of protection of the EU fundamental rights nor the primacy, unity or effectiveness of EU law. Since the statute of limitation was not harmonised under EU law at the time of the ECJ's Taricco judgment, the national courts have to ensure that the defendant's rights under the principle of legality are guaranteed by incorporating national standards of protection. According to the ECJ, the predictability, certainty and non-retroactivity are expressions of the principle of legality and therefore of great importance both in EU law and in national legal systems.[65] The obligation of the Member States under Art. 325 TFEU to ensure the effective collection of EU funds must therefore not run counter to the principle in Art. 49 CFREU.[66]

If – as in the specific case – the principle of legality in a national legal order precludes the extension of the limitation period in respect of VAT offences, the national courts are not required to comply with the Taricco rule regarding the non-application

62 *ECJ*, *M.A.S.* and *M.B.* (fn. 12), para. 44 et seq.

63 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ 2017 L 198, p. 29; see in particular *F. Giuffrida*, The Protection of the Union's Financial Interests after Lisbon, in: R. Sicurella / V. Mitsilegas / R. Parizot / A. Lucifora (eds.), General Principles for a Common Criminal Law Framework in the EU. A Guide for Legal Practitioners, 2017, p. 265 et seq.

64 *F. Meyer*, Juristenzeitung 2018, p. 304, 307.

65 In fact, *Bonelli*, Maastricht Journal of European and Comparative Law 25 (2018), p. 357, 372 underlines that the ECJ didn't use the word "identity" in his decision but develops its solution by emphasising "common constitutional traditions".

66 *ECJ*, *M.A.S.* and *M.B.* (fn. 12), para. 48, 51, 52.

of the limitation period, even if that could remedy a national situation which is incompatible with EU law: in that case it is for the national legislator to take the appropriate measures.[67]

4. Assessment

In the scientific literature, the M.A.S. Judgment was positively received.[68] For example, according to *Helmut Satzger*, the ECJ accepted the primacy of national constitutional identity over the general duty of loyalty, as elaborated in the "Greek Maize" Judgment.[69] Furthermore, the author identifies in the M.A.S. Decision a case of application for the so-called principle of minimally invasive treatment of criminal law.[70] However, other authors doubt the "half-life" of the judgment and consider it as an ad-hoc solution to avoid the imminent controlimiti-procedure. *Frank Meyer*, for example, regrets that the ECJ failed to develop the principle of legality as a European legal principle.[71]

Taking a further look to the judgment, it seems that the ECJ did not provide an overall revision of the previous Taricco judgment. On the contrary, the M.A.S. Judgment confirms the validity of the Taricco rule and its very essence.[72] Nonetheless – and probably in view of the controlimiti threat – the ECJ found a tactful compromise by ruling that the Taricco rule was inapplicable to all the facts that had been issued before the Taricco judgment. In addition, the ECJ not only confirmed the principle of legality

67 *ECJ*, *M.A.S.* and *M.B.* (fn. 12), para. 61.

68 According to *Manacorda*, NJECL 9 (2018), p. 4, 10, the conflict between the two courts has transformed into an opportunity and has led to a positive outcome. *Viganò*, NJECL 9 (2018), p. 19, 22 identifies an opportunity for the development of fundamental rights; for *L. Bachmaier*, Fundamental Rights and Effectiveness in the European AFSJ. The Continuous and Never Easy Challenge of Striking the Right Balance, eucrim 1/2018, p. 56, 59, the Taricco judgment is an example of a balanced approach towards the difficult dialogue between the supreme courts and for avoiding an open clash of courts on issues regarding the level of protection of fundamental rights.

69 *H. Satzger*, Internationales und Europäisches Strafrecht, 8th ed. 2018, para 9 margin no. 30b, para. 10 margin no. 26b.

70 *Satzger*, Strafrecht (fn. 69), para. 9 margin no. 9: National criminal law is particularly shaped by social-ethical and socio-political values, which is why a far-reaching Europeanisation of criminal policy bears the risk of EU law losing its acceptance within the population. That is why European integration in criminal law must be pursued as gently as possible.

71 See *Meyer*, Juristenzeitung 2018, p. 304 et seq. According to *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), NJECL 9 (2018), p. 24, 28, the approach of the ECJ is not fully convincing since the solution does not rely on a direct widening of the scope of Art. 49 CFREU. Indeed, the ECJ developed its reasoning on the basis Art. 53 CFREU.

72 According to *Sicurella*, NJECL 9 (2018), p. 24, 25 et seq., the ECJ "confirms the pivotal role of the domestic courts and the obligation to them to guarantee the effectiveness of EU law."; *Bonelli*, Maastricht Journal of European and Comparative Law 25 (2018), p. 357, 372 underlines that the M.A.S. decision does not contain any general exception to the principle of primacy for national constitutional principles or national standards for the protection of fundamental rights.

in criminal matters as a common constitutional tradition of the Member States, but also abolished the national court's mandate of disapplication of national rules, if such non-application were contrary to the principle of legality in criminal matters.[73] Overall, it seems that the ECJ developed in its M.A.S. case a face-saving solution. Hence, the ECJ neither withdraw from the principle of effectiveness of EU law, nor overruled its important case law as established in the Melloni case.[74] And still, the ECJ recognised an essential prerogative of constitutional law and developed a tailor-made solution for the individual case.

V. Chapter Four: The Final Verdict of the ICC

Since the ECJ clarified some aspects in the individual case but refused to investigate on fundamental questions referred by the ICC regarding the development of European criminal law pro future, the ECJ left some important questions unanswered. In fact, the question of the legal nature of the limitation period under criminal law with a particular focus on criminal offences regarding the financial interests of the EU under the new PIF Directive remains open. Moreover, the ECJ did not answer the question of how the national courts should respond to the Taricco rule after the dates specified in its M.A.S. judgement.

However, the ICC filled this void by reaffirming its position previously expressed in the referral decision.[75]

73 *ECJ*, *M.A.S.* and *M.B.* (fn. 12), para. 60, 61.

74 See *Staffler*, ZStW 130 (2018), p. 1147, 1175 et seq.; *Di Francesco Maesa*, eucrim 1/2018, p. 50, 52 et seq. agrees with this conclusion. Indeed, the author reveals that the ECJ recognises the validity of the Melloni doctrine from the beginning.

75 ICC judgment of 31.5.2018, no. 115; see the English summary published on the official website of the ICC: "This decision followed a 'dialogue between courts,' between the European Court of Justice (Court of Justice) and the Italian Constitutional Court (Court), spanning multiple cases. In this case, the Court considered two referral orders challenging a provision Italian law incorporating into the Italian system some provisions of international law from which the Court of Justice, in its preliminary rulings on this and an earlier case, Taricco, had inferred the so-called 'Taricco rule.' The 'Taricco rule' called for Italian courts to disapply certain provisions of Italian law concerning statutes of limitations (or limitations periods) in tax evasion cases involving the value added tax (VAT), where certain conditions were met. The effect of the 'Taricco rule' was that some cases which were time-barred under Italian law would still be able to be prosecuted in Italian courts, through the disapplication of the Italian provisions. The present case involved two cases of VAT-related fraud in which the conditions were met for the 'Taricco rule' to apply. The Italian Court made a reference for a preliminary ruling to the Court of Justice, and both courts agreed that, since the defendants were charged with crimes allegedly committed prior to the date of publication of the Taricco ruling, the 'Taricco rule' could not apply under the principle of non-retroactivity of harsher criminal punishments. The Italian Court held, however, that even if the matters were time-barred, the questions raised by the referring courts were not irrelevant. The Court then held that the 'Taricco rule' could not, in any case, apply to these cases, nor could it have any place in the Italian legal system because it violated the constitutional principle of legal certainty in criminal matters. Starting from the premise that limitation periods are a part of substantive criminal law in the Italian system, the Court held that the rule violated the principal of legal cer-

1. Claiming a Monopoly Position

First, the ICC pointed out its own understanding of the new ECJ ruling by taking into consideration the ECJ's arguments on the retroactivity in criminal matters[76] and on the principle of certainty[77]. According to the ICC, the non-application of the Taricco rule to those facts which occurred before the date of the Taricco judgment, could be derived not only from national criminal law but also directly from EU law. Thus, regarding these cases the national courts did not have to carry out any examination concerning the Taricco rule at all. The ECJ's mandate to review the compliance of the Taricco contents with the constitutional principle of legality would remain exclusively within the competence of the ICC. On the one hand, the ICC emphasised its monopoly to determine whether aspects of EU law conflict with any of the supreme constitutional principles or the fundamental rights of the person,[78] on the other hand, the ICC stated that in the case of a conflict between national and EU law, the national courts should initiate a referral proceeding to the ICC regarding constitutional norm control concerning the national provisions implementing EU law into national law.

2. No future for the Taricco Rule

Consequently, the ICC dealt with the Taricco rule itself and criticised the position of the ECJ set out in its M.A.S. judgment. Since the ECJ gave central importance to the temporal dimension of the case-facts regarding the applicability of the Taricco rule, the ICC feared that this approach could lead to the wrong conclusion that the Taricco rule

tainty in criminal matters. The Court held that the rule was overly vague, in that it applied to offenses impacting an indefinite 'considerable number of cases' and required judges to pursue criminal policy objectives. Above all, the rule did not meet the substantive criminal law requirement that individuals be able to foresee the consequences of their actions based on the written law, with judges playing a clarifying role limited by the options that a person may envision in reading the relevant text. The Court held that the 'Taricco rule' was not among the options a person could envision based on a reading of the legal provisions from which it was inferred, and thus, interested persons could not be aware of the legal consequences of their actions by reading the text of the relevant laws. Because the violation of the principle of legal certainty in criminal matters served as an absolute bar on the introduction of the 'Taricco rule' into the Italian legal system, the Court held that the Italian legal provisions that would otherwise work to incorporate the rule into the Italian system did not do so, and, therefore, the questions raised by the referring courts were unfounded."; see also *G. Piccirillo*, The 'Taricco Saga': the Italian Constitutional Court continues its European journey, European Constitutional Law Review 4/2018, p. 814, 821; *M. Lochmann*, Taricco I – ein Ultra-vires-Akt? Zur Rechtsfortbildung durch den EuGH, Europarecht 2019, p. 61, 67 et seq. and my analysis in *L. Staffler*, Verfassungsidentität und strafrechtliche Verjährung. Das (vorläufige) Ende des Konflikts zweier Höchstgerichte in der Rechtssache Taricco, Europäische Grundrechte Zeitschrift 2018, p. 613 et seq.

76 *ECJ*, *M.A.S.* and *M.B.* (fn. 12), para. 60.

77 *ECJ*, *M.A.S.* and *M.B.* (fn. 12), para. 59.

78 For further information on the monopoly of constitutional courts see *Paris*, Italian Journal of Public Law 2018, p. 205, 213 et seq.

could still be applied within given time limits. Therefore, the ICC made a clear statement: The Taricco rule can never be applied by national courts because of its non-compliance to the principle of certainty guaranteed in Art. 25(2) IC. The ICC pointed out that the mandate to investigate the existence of a large number of cases of impunity is of criminal policy nature. Thus, the ICC emphasised the essential division of roles for the rule of law between the law-making power of the legislator and the law-applying power by the judiciary.[79] According to the ICC, the wording of Art. 325 TFEU does not contain any indication that the Taricco rule might be derived from it. Even if legal texts are often not directly accessible and only become clearer by legal interpretation, the decision on the fundamental punishability of conducts must independently derive from the legal text. This condition is not fulfilled by the Taricco rule in the light of Art. 325 TFEU.[80]

In the end the ICC held that there was no possibility of incorporating the Taricco rule into Italian law.

3. Assessment: Separation of Power and Principle of Certainty

First, the ICC verdict seems plausible in that it highlighted the problem of the Taricco rule by stressing the separation of powers. Due to the separation of the law-making (legislator) and law-applying power (courts), the criminal policy mandate given to the national courts, as formulated in Taricco, is incompatible with the fundamental principles of the constitutional system. The problem remains even after the M.A.S. decision, because the ECJ did not remove critical aspects of the Taricco rule.

However, the ICC seems to misjudge the fact that Art. 325 TFEU per se is not a criminal provision, but a legal frame for the EU competence in criminal matters in the so-called European multi-level system.[81] In the light of the principle of certainty, a legal frame of jurisdiction shows different requirements than a criminal rule in the narrower sense. In fact, with regard to standards of competence in multi-level systems, the principle of certainty is intended to ensure that the destination of the competence is clearly defined. Furthermore, the allocation of the competence should ensure that the operative frame of the competent legislator is sufficiently clearly defined.[82] This is undoubtedly the case with Art. 325 TFEU.

79 ICC judgment 115/2018 (fn. 75), Considered in law, margin no. 11.
80 See ICC judgment 115/2018 (fn. 75), Considered in law, margin no. 12 and 13.
81 See *K. Ambos*, Internationales Strafrecht, 5th ed. 2018, para. 9 margin no. 22; *F. Meyer*, Systematischer Kommentar zur Strafprozessordnung, vol. X: EMRK, 5th ed. 2019, Art. 7 margin no. 19.
82 *Staffler*, ZStW 130 (2018), p. 1147, 1152 et seq.

VI. Towards a New Chapter in Taricco?

At first glance, it seems that the ruling of the ICC has drawn a final line under the Taricco conflict. But this assumption is misleading. In fact, already in the M.A.S. decision, the ECJ stated that it was not willing to completely abandon its Taricco jurisprudence. This impression is reinforced by recent legal developments.

1. ECJ: Taricco Rule Remains Intact

In the recent Kolev decision, the Grand Chamber of the ECJ had to examine national rules for the closure of criminal proceedings relating to customs offences.[83] Here, the ECJ emphasised the primary responsibility of the national legislator to adopt the necessary measures to meet the obligations of Art. 325(1) TFUE.[84]

Nevertheless, it confirmed its previous Taricco jurisprudence: "For its part, the referring court must also, without waiting until the national legislation at issue is thus amended by legislation or by any other constitutional procedure, give full effect to those obligations by interpreting that legislation so far as at all possible in the light of Article 325(1) TFEU, as interpreted by the Court, or, as necessary, disapplying that legislation".[85] In fact, only the controversial investigation mandate of criminal policy, which was given in the Taricco verdict, was consequently abandoned by the ECJ.

Thus, the national courts no longer have to examine whether there is a significant number of cases that leads to de facto impunity of serious VAT fraud because of national legislation. Instead, the national courts are still obliged under certain conditions to immediately disapply criminal provisions, without interfering with other constitutional organs or in respect to institutional paths drawn by national constitutions, which is highly problematic in the light of the principle of separation of powers.

2. Possible developments

Two opposing positions come to light: On the one hand, the ICC clearly rejects any implementation of the Taricco rule, on the other hand, the ECJ does not deviate from the Taricco rule. Thus, there is enough substance for another case of conflict between the courts and therefore for a continuation of the Taricco Saga[86] – even if the disputed regulations on the limitation period, as they were examined in the original proceedings

83 See *F. Giuffrida*, Taricco principle beyond Taricco: Some thoughts on three pending cases (Scialdone, Kolev and Menci), NJECL 9 (2018), p. 31, 34 et seq.
84 ECJ judgment of 5.6.2018 in case C-612/15 (*Kolev*), para. 65.
85 *ECJ, Kolev* (fn. 84), para. 66.
86 See *Mitsilegas*, NJECL 9 (2018), p. 38, 42: "a new raft of questions and constitutional controversies may arise to the future concerning the questions of who will ultimately have the final say on the compatibility of EU law requirements with national constitutional provisions: national courts or the CJEU.".

on Taricco, have meanwhile been changed by the Italian legislator.[87] It is not clear yet, how the ECJ will interpret the rules on limitation in the PIF Directive. In other words, it remains to be seen whether the statute of limitations for tax offences affecting the financial interests of the EU will actually be regarded as autonomous concepts of EU law and will now be regarded as of procedural nature. In this way, the ECJ would have harmonised the limitation period of offences to the detriment of EU financial interests for all legal systems in the Member States in such a way that any objections based on the principle of legality and the non-retroactivity would no longer be relevant.

At the same time, resistance from national legal systems would probably have to be expected,[88] because this approach would result in unequal treatment. While in some Member States the limitation period under criminal law for general offences would still be considered as of substantive nature, the offences to the detriment of the EU financial interests would be of a procedural nature.

Even more challenging, however, would be the demarcation of crimes affecting EU financial interests. It becomes evident by the far-reaching jurisdiction of the European Public Prosecutor's Office (EPPO).[89] According to Art. 22(3) of the EPPO-Regulation, the jurisdiction of the EPPO extends to all other criminal offences which are inseparably linked to the criminal offences of the PIF Directive. The inseparable link with PIF offences constitutes an autonomous term of EU law. It is neither necessary that the associated offences are based on financial motives, nor that the offences are functionally related to PIF offences. The literature therefore lists an exemplary case in which even a murder for reasons of covering up a financial offence would fall under this category.[90] In light of this, the autonomous definition of the statute of limitation could expand its influence on national criminal law extensively. However, these developments at the EU legislative level, in combination with developments at the jurisdictional level (ECJ), do hold considerable potential for conflict. It is not only the sovereignty to interpret national criminal law that is at stake here, but also revolves around essential human rights.[91]

87 In fact, the Italian legislator had already changed the criminal statute of limitations at the time of the Taricco I proceedings. According to *Karsten Gaede*, the ECJ did not to miss this opportunity to send out a powerful signal: *Gaede*, wistra 2017, p. 89, 94 et seq.

88 In the light of the above mentioned controlimiti-procedure, *Paris*, Italian Journal of Public Law 2018, p. 205, 224 pleads for a "clearly delimited power [of the constitutional courts] to review compliance of the acts of the EU institution with the most fundamental principles of domestic law".

89 See, inter alia, *Bachmaier*, eucrim 1/2018, p. 56, 57 et seq.

90 See *D. Brodowski*, Die Europäische Staatsanwaltschaft – Eine Einführung, Strafverteidiger 2017, p. 684, 687.

91 According to *Billis*, NJECL 8 (2017), p. 20, 38, the ECJ has an autonomous responsibility to evolve human rights norms "in a careful and consistent way and must be able to propose concrete and uniform practical solutions to the national courts in order to maintain legal certainty and social peace".

3. Concluding: The Saga is Not Over Yet

In sum, there still remains a conflict between the ECJ and the ICC, which will have to be resolved through dialogue between the two courts.[92] At the same time, the fundamental problem of the separation of powers is not solved yet. The ECJ does not seem to deviate from its Taricco rule. The Taricco judgment may be expedient in the light of the principle of effectiveness. However, some aspects of the Taricco rule ignore essential aspects of the national constitutional structure, whose respect for the EU institutions is laid down in Article 4 TEU.

Therefore, it seems that the last chapter of the Taricco Saga has not yet been written. However, it is possible that the ECJ will learn the lesson from the latest chapter of the Taricco Saga, according to which Constitutional Courts, as the ICC, will fill any gaps in the ECJ's case-law in order to clarify their own positions, even if they do not correspond with the core content of the ECJ's ruling.

92 As stated by *Bonelli*, Maastricht Journal of European and Comparative Law 25 (2018), p. 357, 373, the Taricco case can be seen as a message, sent by the ECJ, to other constitutional courts to engage in direct dialogues via the preliminary reference procedure under Art. 267 TFUE.