Protection of Fundamental Rights and Criminal Law

The Dialogue between the Eu Court of Justice and the National Courts

Valeria Scalia

eucrim
European Law Forum: Prevention • Investigation • Prosecution

AUTHOR

Valeria Scalia

Ricercatore
Università degli Studi di Catania

CITE THIS ARTICLE

Scalia, V. (2015). Protection of Fundamental Rights and Criminal Law : The Dialogue between the Eu Court of Justice and the National Courts. Eucrim - The European Criminal Law Associations' Forum. https://doi.org/10.30709/eucrim-2015-013

Published in eucrim 2015, Vol. 10(3) pp 100 – 111

https://eucrim.eu

ISSN:

I. Preliminary Remarks

Of the most significant innovations of the Treaty of Lisbon, one must refer to the conferral to the EU of a competence in criminal matters,[1] according to which the national legislator, in some cases, is under the obligation to adopt criminal provisions implementing measures regulating criminalization decided at the supranational level. Indeed, according to Art. 83 TFEU, the EU legislative bodies – European Parliament and Council in co-decision – "establish, by means of directives adopted in accordance with the ordinary legislative procedure, minimum rules concerning the definition of criminal offences and sanctions." Such a competence is conferred with respect to two situations: 1) when serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis is at stake; 2) when the approximation of criminal laws and regulations of the Member States proves essential to ensuring the effective implementation of Union policy in an area that is subject to harmonization measures. Therefore, in these cases, it is up to the EU legislative bodies to assess the underlying choice for a criminal protection relying on the special importance of the protected legal interest and the necessity/need of the criminal sanction. The latter concerns the proportionality between the objective to be achieved and the means to achieve it, on the one hand, and the lack of measures less intrusive to the individual's fundamental rights than the criminal sanction (e.g., civil or administrative remedies), on the other.

Some criminal law scholars are very critical of such EU competence, fearing its irrational and excessive use by the European legislator, which could cause, in their opinion, an "over-criminalization" at the supranational level that conflicts with the very fundamental principles of criminal policy. Nevertheless, such a worry is to be considered within the framework of the fundamental rights and guarantees already well established at the EU level, which has an even stronger foundation. According to Art. 6 TEU, which also confirms the importance of constitutional traditions common to Member States and the European Convention on Human Rights (hereinafter ECHR) as EU general principles, the Charter of Fundamental Rights of the European Union (hereinafter the Charter) should be recognized as having binding value not only for European institutions but also for Member States, when they implement EU law (Art. 51, para. 1, of the Charter). As a consequence, fundamental rights become the object and limit for the achievement of the EU objectives, especially within the Area of Freedom, Security and Justice (hereinafter AFSJ).[2] Indeed, respect for fundamental rights at the same time represents a limit to EU legislative action, as it does not allow the adoption of legal rules that are not in compliance with individuals' rights protected by the supranational legal system. It is a crucial means to building a European judicial area, since it constitutes a strong basis for the development of mutual trust, which is necessary for setting up common standards concerning the protection of fundamental rights among Member States' legal systems.

Following the entry into force of the Lisbon Treaty, the Charter became the EU bill of rights, legally binding within the EU legal systems. As a consequence, the European Court of Justice (hereinafter CJEU) received jurisdiction over the respect for such rights in EU legislation (including the former third-pillar legal acts) and in Member States "only when they are implementing Union law."

This contribution focuses on the crucial role played by the Charter as a catalogue of the most important individual rights and guarantees concerning, in particular, criminal law matters (i.e., Arts. 47-50) and their application by the CJEU according to two perspectives.[3]

On the one hand, the rights protected by the Charter are to be considered general principles of criminal law, limiting the exercise of the competence attributed to the EU legislative bodies in this field. In particular, they represent reliable criteria by which to assess the necessity/need of criminal sanctions to be adopted in EU legislation, in line with solutions in the case law of the European Court on Human Rights (hereinafter ECtHR).

https://doi.org/10.30709/eucrim-2015-013

On the other hand, the rights established in the Charter have to be employed by the CJEU as parameters by which to assess compliance with the Charter of Member States criminal law provisions implementing EU law. In this respect, this contribution will focus on the wide interpretation of the wording "only when they are implementing Union law" in Art. 51, para. 1, of the Charter, given by the CJEU in its recent case law, and on the reactions from national courts.[4]

The analysis of this topic will show in a paramount manner the extraordinary contribution of the interaction between the different courts acting within the European area (i.e., CJEU, ECtHR, and national courts) in the attempt to limit the risk of irrational use of competence in criminal matters by the EU legislative bodies and, at the same time, to guarantee a better level of respect for individual rights within the AFSJ, especially when fundamental rights, such as freedom and dignity of individuals, are at stake.[5]

II. Assessment of the Necessity and Proportionality of EU Criminal Legislation

All EU institutions involved in the adoption of legal instruments at the supranational level – Council,[6] Commission,[7] and Parliament[8] – have issued soft law instruments, which show their common consensus on the need to draft criminal policy guidelines, according to which the EU legislator should adopt criminal provisions. In such documents, which for the first time refer to an EU criminal policy, the necessary respect for the fundamental rights, provided for in the Charter,[9] and for the general principles concerning the criminal law represents an essential condition. Some principles, in particular, are recalled as the basis of EU criminal policy: the legality principle, the harm principle, and the guilt principle. The first principle is considered to cover the requirements of the accessibility and foreseeability of criminal provisions. The harm principle requires that criminal behavior must cause effective harm, or at least a serious danger, in order for the legal interest to be protected. The guilt principle implies that, as a general rule, only conduct committed intentionally is to be considered punishable; negligent conduct can be criminalized only in particularly serious cases (e.g., serious negligence endangering human life or causing serious damage).[10] Furthermore, as for the general choice concerning the criminalization of a form of conduct, according to the above-mentioned texts, criminal law must be the last resort and require the European legislator to comply with the principles of necessity and proportionality. They at the same time represent important constraints, even for the identification of the type and quantity of the criminal measures to be adopted.

The functioning of the supranational legal system should ensure that compliance with the above-mentioned general principles on the part of the EU legislator as regards the criminalization of some forms of conduct is tested. However, if the supranational legislator has not respected such principles and rights in a situation that can be considered exceptional or pathological, an *ex post* control should be done by the CJEU, or by the ECtHR, which will act in these cases as a real constitutional court in relation to legal provisions adopted by the EU legislator. In this respect, the criteria at the disposal of CJEU by which to assess compliance with fundamental rights and general principles of the EU legislator's choices concerning the criminalization of some forms of conduct are provided for in the Charter, in the Treaty, and in earlier CJEU case law. As for the parameters established by the Charter, they refer especially to Art. 49, stating the principle of proportionality of criminal sanctions, and to Art. 52, providing restrictions on the enjoyment of some rights (so-called *relative* or, *rectius,* not absolute rights). Furthermore, Art. 83 TFEU expressly refers to the need for the criminal measures. Many CJEU judgments deal with the parameter of proportionality concerning obligations of criminal protection and criminal sanctions.[11]

Although the supranational legal system had already provided criteria for an in-depth assessment by the CJEU of the EU legislator's choices, such criteria often turned out to be quite formalistic and, because of this,

https://doi.org/10.30709/eucrim-2015-013

they were inadequate for ensuring a critical evaluation.[12] However, the CJEU has recently undertaken many efforts to apply these parameters in a stricter and more critical manner in light of the ECtHR case law,[13] as the *Digital Rights* case shows.[14] In particular, the CJEU states in its decision the non-compliance of some restrictions – provided for in Directive 2006/24/EC on data retention[15] on the enjoyment of the right to privacy and the right to protection of personal data (as protected by Arts. 7 and 8 of the Charter) – with the principles of necessity and proportionality, according to Art. 52 of the Charter. The Court's reasoning, in particular, follows an in-depth analysis of the challenged provisions of the Directive, taking into consideration ECtHR case law concerning Art. 8 ECHR, and adopts a critical approach, concretely based on the protection of fundamental rights.

The above-mentioned concerns would also be supported by consideration of the judicial remedies provided for in the European legal system for bringing a case before the CJEU, particularly by an individual. In fact, both the action of annulment (provided for in Arts. 263 and 264 TFEU) and the preliminary ruling (provided for in Art. 267 TFEU) are basically reserved for Member States and EU institutions and for Member States' judicial authorities, respectively. Citizens, as individuals or groups, have access to the former remedy only if the act to be challenged is "addressed to that person;" "is of direct and individual concern to them;" or is "a regulatory act which is of direct concern to them and does not entail implementing measures."[16] Consequently, since the conditions for bringing an application before the CJEU by individuals are very strict according to the Treaty and because general rules unlikely refer individually and directly to single persons, EU citizens very rarely would be able to challenge an act before the Court. The situation concerning the CJEU's assessment of the compliance of Member States' criminal law provisions with the fundamental rights protected by the Charter is probably even more complex, since the wording of its Art. 51, para. 1, is unclear and not easily understandable.

The wording of Art. 51, para. 1, which recognizes CJEU jurisdiction over Member States' legislation but "only when they are implementing Union law," shows the concerns of some Member States about an extension of EU competences, which could result from recognition of the Charter's binding value. This is clearly confirmed by para. 2 of the same article, which aims at preventing an extension of EU competences, and is also reiterated by Art. 6 TEU.

III. The Wording "only when they are implementing Union law" (Art. 51, para. 1, Charter) and the Scope of CJEU Judicial Control over Member States' Criminal Law

To what extent the CJEU can actually check compliance of Member States' criminal law provisions with the fundamental rights guaranteed by the Charter is crucial to a better understanding of the relationships (and eventually the possible conflicts) between the CJEU and national judges. In this respect, attention should be drawn to CJEU case law concerning the interpretation of the wording "only when they are implementing Union law," as provided for in Art. 51 of the Charter. According to traditional CJEU case law, the control of the Court over the respect for fundamental rights covers: a) measures adopted by Member States executing EU law, regardless of the extent of discretion reserved for national legislators; b) measures adopted by Member States, following the derogations expressly concerning fundamental rights and freedoms provided for in the Treaties – the so-called "*overriding requirements*."[17]

In particular, the first category of measures (i.e., execution of EU law) consists of measures implementing provisions of EU regulations[18] and directives,[19] even if they provide a minimum of harmonization.

https://doi.org/10.30709/eucrim-2015-013

Since its earlier decisions, the CJEU has adopted an interpretation of the wording of Art. 51,[20] probably aiming at widening its control over the compliance of the Member States' legislations with fundamental rights, partially overcoming in this way the role of the national constitutional courts in the protection of fundamental rights. Such an approach allowed the Court to keep to a minimum the number of cases in which it had to declare its lack of jurisdiction on the grounds that the challenged acts were not within the scope relating to the implementation of EU law (i.e., purely domestic legislation without any link to supranational law). The judgment in the *Kremzow* case is an important step forward in CJEU case law, since it states that a significant link with EU law exists when specific criminal offences can be connected to a field of EU policy (e.g., if such offences are provided for in order to guarantee the achievement of an important EU objective, as established in EU directives). This is the case even if, as in the decided case, the Court believes that such a link does not exist because the involved criminal law provisions had not been adopted to implement EU legislation.

The wide interpretation of Art. 51, para. 1 is also supported by the *travaux préparatoires*[21] and the updated document "Explanations relating to the Charter," which provide that "the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States *when they act in the scope of Union law.*" The same provision also refers expressly to the judgments *Wachauf* and *ERT*, generally considered leading cases in the field of CJEU control over national legislations (concerning both the execution of EU law and derogations allowed by the Treaty provisions), from the perspective of fundamental rights protection. Actually, according to such an interpretation, the Charter also applies to the latter kind of domestic provisions (i.e., those adopted on the grounds of specific derogations provided for in the Treaty), which could seem *prima facie* not to be covered by the expression "implementation of Union law" provided in Art. 51, para. 1.

Furthermore, the explanations relating to para. 2 of the same provision state that "the Charter may not have the effect of extending the competences and tasks, which the Treaties confer on the Union", so that it prevents the *manipulation* of the Charter as a judicial basis allowing for positive EU actions, with respect to situations not expressly mentioned by the Treaty, or widening (via interpretation) the scope of the Treaty provisions concerning EU competences.

In this respect, the Opinion of Advocate General Sharpston in the *Zambrano* case,[22] is particularly interesting. It stresses that "[...] in the long run, the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on *the existence and scope of a material EU competence.*" This means that, if an EU competence (whether exclusive or shared) exists, EU citizens enjoy EU fundamental rights, even if such a competence has not yet been exercised. This goes beyond the CJEU's wide interpretation in the *Maurin* case.[23]

Such a reading of Art. 51, para. 1 would have important advantages in the opinion of the Advocate General. In particular, this interpretation would significantly improve legal certainty, since it would avoid the need to create or promote fictitious or hypothetical "links with Union law" of the kind that have, in the past, sometimes confused and possibly stretched the scope of application of Treaty provisions. It would also consequently remove possible discrepancies (as far as EU fundamental rights protection is concerned) between fully harmonized and partially harmonized policies. Moreover, fundamental rights protection under EU law would only be relevant when the circumstances leading to it being invoked had fallen within an area of exclusive or shared EU competence. From this perspective, therefore, Member States might be encouraged to move forward with detailed EU secondary legislation in certain areas of particular sensitivity (such as immigration or criminal law), which would *include* an appropriate definition of the exact extent of EU fundamental rights, rather than leaving fundamental rights problems to be solved by the Court on an *ad hoc*

basis, as and when they are litigated. Such a definition of the scope of application of EU fundamental rights would also be coherent with the full implications of citizenship within the Union, which is "destined to become the fundamental *status* of the nationals of Member States."[24]

However, making the scope of EU protection of fundamental rights essentially dependent on the existence of an exclusive or shared EU competence, even if not exercised by means of the adoption of relevant secondary legislation, would, in the opinion of the Advocate General, imply the introduction of an expressly federal element in the structure of the EU judicial and political system. This requires a clear political statement – stressing the new role of fundamental rights within the EU system – by the same EU institutions and by Member State representatives.

The reading proposed, then, cannot be applied at the moment, although it could be desirable for its implications.

IV. The *Fransson* Case: A Step Forward in the CJEU's Controlling Role over the Compatibility of Member States' Criminal Law Provisions with Fundamental Rights

The CJEU seems to have recently stepped forward as to the futuristic scenario outlined by Advocate General Sharpston, by stating that "[...] the fundamental rights guaranteed by the Charter must be complied with where national legislation falls within the scope of European Union law, *situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.*"[25] In its decision, the Court recognized its jurisdiction with regard to assessing the compliance of a domestic criminal law provision with the *ne bis in idem* principle (provided for by Art. 50 of the Charter), since "the tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject *are connected in part* to breaches of his obligations to declare VAT."[26] According to the Court's reasoning, because of the obligation established by Art. 325 TFEU for Member States to counter illegal activities affecting EU financial interests (including those activities detrimental to revenue from the application of a uniform rate to the harmonized VAT assessment bases determined according to EU rules), a direct link exists between the correct and complete collection of VAT revenue and the availability of the correspondent amounts in the EU budget. In other words, illegal activity affecting the collection of VAT directly determines a reduction of EU financial resources; therefore, national criminal law providing for tax penalties and criminal proceedings for tax evasion falls within the field of application of EU law.[27] As a result, it can be scrutinized by the CJEU, which has jurisdiction to check its compliance with fundamental rights protected by the Charter.[28]

According to such an approach, therefore, the interpretation of the wording provided for in Art. 51, para. 1 covers all cases where a linking *tesserae* (as well as only a partial joint) – even if not in terms of actual implementation or execution – exists within EU law.[29] In fact, the bond between already existing EU competences and national law is to be stated whenever inconsistency between domestic legislation and fundamental rights protected at the EU level represents an obstacle for the implementation of EU law in the relevant field. Indeed, the Court stresses the importance of fundamental rights protection as a *conditio sine qua non* of EU law implementation and application.

In a more recent judgment, the Court singled out several criteria to be followed in order to assess whether a connection between the challenged national legislation and EU law exists. Specifically, the elements to be

https://doi.org/10.30709/eucrim-2015-013

checked are a) whether that legislation is intended to implement a provision of EU law; b) the nature of that legislation; c) whether it pursues objectives other than those covered by EU law, even if it can indirectly affect EU law; d) whether there are specific rules of EU law on the matter that can affect it.[30]

The wide approach proposed by the CJEU in the *Fransson* judgment was shared by Advocate General Villalón in his opinion in the *Delvigne* case.[31] There, the Advocate General recognized the CJEU's jurisdiction to check the compatibility of the challenged national legislation (in particular, a French criminal provision concerning the loss of the right to vote, the right to stand for election and, in general, all civil and political rights should a sentence for a serious criminal offence be passed) with fundamental rights (Art. 39 of the Charter concerning the right to vote). He argued that an EU competence exists in this field, according to Art. 223 TFEU, although such a competence has not yet been executed. In the Advocate General's opinion, however, the same provision "reveals the wish of the primary legislature to make the election of the members of the European Parliament a «situation governed by EU law» within the meaning of the *Åkerberg Fransson* judgment, albeit not exclusively but rather with the participation of the laws of the Member States in the context of the uniform procedure established by the Union or, as the case may be, the common principles laid down by it".[32]

Ultimately, it should be borne in mind that the CJEU recognizes its jurisdiction to give preliminary rulings, even concerning the compliance of national legislation with the fundamental rights protected by the Charter. This holds true even in situations in which the facts being considered by the national courts are *outside the scope of European Union law*, i.e., when a) domestic law refers to the content of those provisions of European Union, in order to determine the rules applicable to a situation that is purely internal for the Member State concerned, to ensure that internal situations and situations governed by EU law are treated in the same way, irrespective of the circumstances in which the provisions or concepts taken from EU law apply; b) the provisions of EU law at issue have been made directly and unconditionally applicable to such situations by national law.[33] Such an interpretation – which referred only to the provisions of Treaties and secondary legislation and not to the Charter before the entry into force of the Lisbon Treaty – clearly represents a further widening of the concept of "implementing EU law," as provided by Art. 51, para. 1 of the Charter, since this approach does not restrict the scope of the protection of fundamental rights to the fields expressly covered by EU law. It can, however, also be extended to matters not regulated by EU law, aiming at achieving a more uniform protection of individual rights and guarantees, which is a crucial means of enhancing mutual trust among the Member States' legal systems. However, it is patent that this last approach applies only if the same Member States voluntarily decide to widen the scope of EU influence on their legal systems, extending principles and rights covering fields falling within the scope of EU law to other fields through an express *renvoj* to supranational legal instruments, which has to be direct and unconditional. Therefore, no new competences or obligations for the States arise from this CJEU case law.

Adopting an *a contrario* perspective and in order to have a more reliable overview as to what extent a domestic legislation can be considered falling within the scope of EU law, a look at the CJEU case law concerning national provisions (believed by the same Court as not being governed by EU law) can be particularly interesting. In this respect, the Court first of all states that the mere fact that a field falling within the scope of EU law is indirectly affected is not sufficient to support the conclusion that the situation covered by the national provision producing that effect is governed by EU law.[34] Furthermore, the CJEU has recently pointed out that "the concept of 'implementing Union law', as referred to in Art. 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other"[35]: by stating that the Court excludes such national legislation concerning the protection of archeological and cultural heritage could be considered as falling within the scope of EU law because of its connection with the protection of environment, which is a field surely governed by EU law.

https://doi.org/10.30709/eucrim-2015-013

V. The Direct Effect of the Charter's Provisions on the Member States' Legal Systems according to *Fransson*: The Relevant Consequences of CJEU Scrutiny of Domestic Criminal Legislation

In the *Fransson* judgment, the CJEU also states that "European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, *with, as the case may be, the cooperation of the Court of Justice*, whether that provision is compatible with the Charter."[36]

Therefore, the Court recognized a direct and immediate effect of the Charter provisions, binding national judges to check autonomously the compliance of domestic legislation with fundamental rights and, in case of a conflict, to apply them without any intervention by the Constitutional Court.

Such an approach by the CJEU has raised several concerns, especially relating to those cases in which the Charter includes general provisions, i.e., general principles. Such concerns can be overcome, however, when fundamental rights included in the ECHR are at stake (i.e., all the rights concerning substantive and procedural criminal law), since the explanations relating to Art. 52 of the Charter provide that, in order to interpret such rights reference should be made to ECtHR case law, which often provides criteria that are much more precise than the general formulation of the ECHR provisions. On the contrary, problems could arise for those rights having no direct correspondence in the Strasbourg Convention (e.g., social rights and the so-called fourth generation rights). Even in these cases, however, such problems could be solved by a request for a preliminary ruling to the CJEU by the national judges, in order to have an opinion about the exact interpretation by the same Court, as was stated in the *Fransson* judgment, which expressly *invited* national judges to cooperate with it in the interpretation of the Charter. By this indication of the Court (which can appear useless, as the preliminary ruling provided in the Treaty has currently been used by national judges for a long time), two concerns arise, which are linked to each other: one the one hand, the Court probably foresees the Member States' resistance in leaving their jurisdictions on the control concerning the fundamental rights; on the other hand, the same Court has some doubts about relying only on national judges in respect of the control of fundamental rights.

From this perspective, the CJEU's invitation to the national judges represents a kind of *counter-objection* to the possible objection of the Member States concerning the limitation (in favor of the EU) of the constitutional courts' control relating to a national legislation's compliance with fundamental rights, at least when the domestic rules present a linking *tesserae* with EU law. This limitation of jurisdiction – already accepted for the interpretation of the Treaty and secondary legislation – could be even more controversial for the Charter.

The concern of the CJEU relating to the control in respect of fundamental rights devoted – by the same Court – to national judges seems to be mitigated by such an invitation to the judges to use the preliminary rulings, which represents a kind of *strong reccomendation* but not a real obligation.

According to such an interpretation of Art. 51, para. 1 of the Charter, CJEU scrutiny could be extended to any piece of national law adopted within the scope of Arts. 83, paras. 1 and 2, and 325 TFEU, arguing that fundamental rights protection represents a necessary preliminary condition for the application of EU law, especially in a field such as criminal law, where the most important individual rights can be significantly affected.

https://doi.org/10.30709/eucrim-2015-013

The above-mentioned concerns (i.e., limitation of judicial remedies for EU citizens and vagueness and uncertainty of the criteria elaborated by the CJEU) could be partially overcome by a reference to the ECHR system of human rights protection.[37]

The first concern (i.e., limitation of judicial remedies for EU citizens) could, in fact, be solved by referring to the ECHR individual application (according to Art. 34 ECHR), which can be activated by any individual of the Contracting States, who can prove to be a victim of an effective or potential infringement of a right protected by the Convention. By the recourse to such a remedy, the individuals could ask for a check on compliance with the fundamental rights of national criminal provisions, eventually implementing EU law, before the ECtHR.

As for the second concern (i.e., vagueness and uncertainty of the criteria, concerning the test on necessity and proportionality, elaborated by the CJEU), reference to ECtHR case law would be particularly recommended, in order to have more precise and sure parameters for such an assessment. Indeed, the Court has been dealing with such analysis for a long time and has handled a wide variety of cases. In this respect, a difference can be distinguished within ECtHR case law between: a) the cases in which the Strasbourg Court assesses compliance with human rights of positive obligations coming from the ECHR and incumbent upon the Contracting States; b) the cases in which it makes such an assessment on the negative obligations of the States, in particular under those circumstances concerning alleged violations of rights, whose enjoyment can be subjected to some constraints.[38]

It is not possible here to carry out an in-depth analysis of the complementary and supplementary role played by the ECHR system in the protection of fundamental rights within the EU and its Member States' legal systems. Notwithstanding, it has to be argued that such a role is particularly significant, and the continuous dialogue between the two European Courts – even before a formal accession of the EU to the ECHR system, which at the moment seems in a steady state after the CJEU opinion 2/13[39] – can enhance a general and uniform protection of fundamental rights in the European area. Such protection is a crucial condition for the development of a common value heritage that makes the setting-up of a European criminal law easier, mitigating the Member States' resistance in transferring their sovereignty to the supranational legal system.[40]

VI. The Member States' Reactions to the Widening of the CJEU's Role in the Protection of Fundamental Rights: A New Path of the "*Solange* Doctrine" or an Opportunity to Enhance the Dialogue between CJEU and National Courts?

In issuing the *Fransson* judgment, the CJEU started to widen its jurisdiction concerning its control over the respect for fundamental rights. On the one hand, such an approach strengthens the CJEU's role in checking the choices of criminalization adopted by the EU legislator, from the perspective of compliance with individuals' guarantees and general principles. Consequently, some of the concerns expressed by Member States about the risk of an indiscriminate overcriminalization at the supranational level are overcome. At the same time the CJEU gains more control over domestic criminal law. On the other hand, the CJEU interpretative approach could be perceived by Member States as an undue intrusion by the CJEU into the jurisdiction of domestic tribunals and constitutional courts and, generally speaking, into national constitutional competences in the matter of fundamental rights protection, usually linked to the most sensitive fields covered by Member States' sovereignty (i.e. criminal law). In this respect, indeed, the German Constitutional Court has already reiterated the so-called "*Solange* doctrine" by excluding the existence of a link between national law – in particular concerning the exchange of information stored in a database (between police and intelligence), relating to persons suspected to be terrorists – and EU law, although EU competence in the field of data protection has been clearly established, according to Art. 16 TFEU and other secondary legislation (Directive 95/46/EC and Framework Decision 2005/671/JHA, actually dealing with the exchange of information and cooperation in the field of terrorism).[41] In the opinion of the *Bundesverfassungsgericht*, the

judgment in the *Fransson* case has binding value only for the decided case. Consequently, the interpretation of Art. 51, para. 1 Charter proposed in such a decision is not to be considered a general interpretation valid beyond the specific case, since such a generalization would be contrary to Germany's constitutional identity. [42]

Such a judgment patently shows the will of the German Constitutional Court to hinder CJEU interpretation concerning its jurisdiction on national law, in particular when criminal law is at stake – especially concerning the fight against terrorism. The *Bundesverfassungsgericht* in fact made no attempt to open a dialogue with the CJEU by activating the preliminary ruling and trying to find a mutual solution.

Ultimately, the CJEU, in the *Taricco* case,[43] stated that a number of Italian rules concerning the limitation period (in particular the mechanism for its interruption) for some criminal offences can have an adverse effect on the fulfilment of obligations under Art. 325, paras 1 and 2 TFEU when specific circumstances exist. [44] In such cases, therefore, the domestic courts have to disapply the challenged rules, since they would prevent Italy from fulfilling its EU obligations. This judgment shows the prominent role that the CJEU wishes to keep in the development of EU criminal law and of the harmonization of national criminal law provisions. It also remarks that there would be no violation of the principle of legality (*nullum crimen, nulla poena sine lege*) provided for in Art. 49 of the Charter, although disapplication of the challenged domestic rules by the national judge could have the effect of preventing the application of a more favorable provision concerning the limitation period for the sentenced. In the opinion of the Court and Advocate General Kokott, this conclusion should be based on the circumstance that the acts allegedly committed by the accused constituted, at the time they were committed, the same offences and were punishable by the same criminal penalties as those applicable at present. Therefore, according to the relevant ECtHR case law concerning Art. 7 ECHR (basically corresponding to Art. 49 of the Charter), the extension of the limitation period and its immediate application would not entail an infringement of the principle of legality, if the relevant offences have never become subject to limitation.[45]

Advocate General Kokott also expressly stressed that "the domestic provisions concerning limitation period simply – at a procedural level – release the national prosecution authorities from shackles which are contrary to EU law." Therefore, "it cannot be inferred from the principle of the legality of penalties that the applicable rules on the length, course and interruption of the limitation period must of necessity always be determined in accordance with the statutory provisions that were in force at the time when the offence was committed. No legitimate expectation to that effect exists."[46]

Such a judgment immediately elicited strong reactions by Italian courts and scholars, since the conclusions elaborated by the CJEU are basically not consistent with the settled case law of the Italian Supreme *Corte di Cassazione* and Constitutional Court. They regularly include provisions concerning the limitation period within the scope of substantive criminal law, consequently fully covered by the principle of legality and non-retroactivity of criminal law.[47] Several days after the CJEU judgment, however, the Supreme *Corte di Cassazione* declared the domestic criminal provisions concerning the limitation period (i.e., Arts. 160 and 161 Italian Criminal Code) inapplicable according to the CJEU's statement.[48] The day after, the Court of Appeal of Milan brought an application before the Constitutional Court concerning compatibility of the national rules ratifying the EU Treaties with the principle of legality, provided for in Arts. 25, para. 2 of the Italian Constitution. In particular, the Court of Appeal asked the Constitutional Court to activate a mechanism, elaborated in the *Frontini* and *Granital* cases,[49] allowing the Court to exclude the application of EU law when such legislation is not consistent with the core principles protected by the same Constitution (the so-called *controlimiti* doctrine). It is not easy to foresee what the decision of the Constitutional Court will be, since the question represents a crucial point of conflict between the national and supranational judicial authorities. In other words, a general application of the principles formulated in the *Taricco* judgment could imply the ap-

plication of a *softened* version of the principle of legality. This would be completely different from the principle currently well established in Italy's legal culture, which also covers all rules on the limitation period (considered substantive, not procedural, criminal law).

In this situation, a preliminary ruling on the interpretation of Art. 49 of the Charter would be highly desirable. The Italian Constitutional Court could try to obtain a clear statement from the CJEU on whether the discipline concerning the limitation period has to be considered substantive or procedural criminal law and, consequently, whether it is covered by the principle of *nullum crimen, nulla poena, sine lege*.[50] In this respect, a specific focus not only on ECtHR case law, but also on the constitutional traditions common to Member States, could be a possible means for the CJEU to find an interpretation that is more acceptable to a large number of Member States.[51] Put differently, this would be an interpretation that could represent a fair balance between the conflicting interests at stake. Such a balance should be struck, considering the different rank that fundamental rights can have in an integrated system of protection like the potential supranational system.

Such a clarification would also be particularly important, not only in order to solve the material case but also to identify the exact scope and content of the principle of legality at the supranational level.

A different approach from that of the Italian Constitutional Court (i.e., a closing position, looking only at the "constitutional identity" of the State) would be detrimental in a wider sense, since it would represent an obstacle to the development of a new understanding of the general principles concerning criminal law. This new understanding requires the availability of the CJEU and the national courts to *listen* to each other, in order to develop new concepts simultaneously including the common trends of Member States' constitutional traditions, the criteria established by the ECHR system, and the specific characteristics of the EU legal system, according to Art. 6, para. 3, TEU.[52] This solution would be also consistent with the requirements expressed by the CJEU in the *Melloni* judgment,[53] in which it interpreted the wording of Art. 53 of the Charter as allowing Member States to provide a standard of protection for fundamental rights higher than the one ensured at the supranational level, unless such a provision is detrimental to the uniform and correct application of EU law.

VII. Concluding Remarks

The recent CJEU judgments *Fransson* and *Melloni* show the strong commitment of the Court in Luxembourg to widen and strengthen the scope and the binding value of the Charter. Indeed, the Court is fully aware of the importance and sensitiveness of its role in the scrutiny of the criminalization choices of the EU legislator and of the relevant national criminal provisions. It tries to have an independent position from the ECtHR, even in the light of future accession to the ECHR.

However, comparing the material facts in *Melloni* (application of the European Arrest Warrant) and in *Taricco* (fight against the offences affecting the EU's financial interests), one could conclude that, when security needs are at stake, the CJEU is more likely to lower the standard of protection for fundamental rights.

Such an opinion cannot be agreed with for various reasons. In the *Fransson* case, where the protection of EU financial interests was at stake, the Court provided a wide interpretation of the scope of Art. 50 of the Charter. But, it should be stressed more that strong efforts were made by CJEU in the protection of fundamental rights, even when security needs were at stake (as in the last judgment issued in the *Kadi* case[54] and in the decision on the *Schrems* case).[55] The necessity of judicial control concerning the respect for individual fundamental rights is starkly reiterated as well as for acts issued by international organizations, even in cases dealing with European security in the face of the threat of terrorism.

https://doi.org/10.30709/eucrim-2015-013

It must be borne in mind that the CJEU, as the judicial body of the EU legal system, has as a primary goal: the strengthening and development of such a system and not the mere protection of fundamental rights and principles. Therefore, the future accession of the EU to the ECHR will be able to guarantee that scrutiny of the respect for fundamental rights on the part of the EU and national law will be external and impartial, since the ECtHR has as a primary goal: the protection of fundamental rights in the European area. In this respect, the necessity for a preliminary ruling by the CJEU, before the ECtHR issues a decision on the compliance of an EU act with the ECHR – which is one of the conditions required by the CJEU in its opinion on the EU accession to the ECHR[56] – could guarantee the uniform application and interpretation of fundamental rights in the European area, on the one hand, and, on the other, the possibility for the CJEU to save its autonomous jurisdiction concerning the scrutiny of EU law, taking into particular consideration the special needs linked to the conservation of the EU legal system.

Such integration of a different level of protection of fundamental rights will not represent a chaotic and inefficient system or a loss of individual guarantees but instead an opportunity to set up a system of protection in which different legal instruments and different courts (aiming at different goals) could enhance the enjoyment of individual fundamental rights. Attention would be paid to the necessity of a regular and precious dialogue among these different judicial bodies, in order to prevent conflicts or closing positions, which can only be detrimental to the protection of fundamental rights.[57]

These considerations apply, in particular, to the field of criminal law, since such a system of protection based on the integration of different levels could guarantee an in-depth control of the choices of criminalization adopted by the EU legislator, according to Arts. 83, paras. 1 and 2, and could represent an important basis for the development of an AFSJ founded on mutual trust among Member States' legal systems.

---

1. See, in this respect, G. Grasso, *La «competenza penale» dell'Unione europea nel quadro del Trattato di Lisbona*, in G. Grasso, L. Picotti and R. Sicurella, *L'evoluzione del diritto penale nei settori d'interesse europeo alla luce del Trattato di Lisbona*, Milan, 2011, p. 694; R. Sicurella, *Setting up a European Criminal Policy for the Protection of EU Financial Interests: Guidelines for a Coherent Definition of the Material Scope of the European Public Prosecutor's Office*, in K. Ligeti (ed.), *Toward a Prosecutor for the European Union*, Oxford and Portland, Oregon, 2013, p. 870 and p. 892; R. Sicurella, *Questioni di metodo nella costruzione di una teoria delle competenze dell'Unione europea in materia penale*, in *Studi in onore di Mario Romano*, Milano, 2011, p. 2629; L. Picotti, *Limiti garantistici delle incriminazioni penali*, in G. Grasso, L. Picotti and R. Sicurella , *L'evoluzione del diritto penale nei settori d'interesse europeo alla luce del Trattato di Lisbona*, op. cit., p. 216, who distinguishes between "direct competences," provided for in Art. 83, par. 1 TFEU and "accessory competences," provided for in Art. 83, par. 2 TFEU; Art. 325 TFEU provides an obligation incumbent for Member States not only to approximate their legislation but also to provide efficient and equivalent measures aiming at the fight against fraud, even adopting regulations (pp. 223-224).↩
2. L. Picotti, *I diritti fondamentali come oggetto e limite del diritto penale internazionale*, in *Indice Penale*, 2003, p. 259 ff.; V. Militello, *I diritti fondamentali*, N. Parisi, *"Spazio di libertà, sicurezza e giustizia" e principio di legalità. Qualche riflessione a partire dal principio del mutuo riconoscimento in campo penale*, in E. Castorina (ed.), *Profili attuali e propsettive di diritto costituzionale europeo*, Turin, 2007, pp. 410-411.↩
3. S. Manacorda, *Le contrôle des clauses d'ordre public: la «logique combinatoire» de l'encadrement du droit pénal*, in G. Giudicelli-Delage, S. Manacorda (direction) and J. Tricot (coordination), *Court de Justice et jusitce pénale en Europe*, Paris, 2010, p. 57 and p. 71; B. Favreau, *La politique pénale eurpéenne et l'enjeu des droits fondamentaux*, in G. Grasso and R.Sicurella (ed.), *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale*, Milan, 2008, p. 584; D. Ruiz-Jarabo Colomer, *Quel rôle pour la CJCE dans la définition de l'action de l'Union en matière pénale? Perspective d'amélioration institutionelle et affirmation de concepts communs*, in G. Grasso and R.Sicurella (ed.), *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penal,* op. cit., p. 635.↩
4. F. Viganò, *Les interactions en droit pénal de fond: la perturbation des hiérarchies internes,* in G. Giudicelli-Delage, S. Manacorda (direction) and J. Tricot (coordination), *Court de Justice et jusitce pénale en Europe*, op. cit., p. 137; see in the same volume A. Nieto Martin, *Architectures judiciaires du droit pénal européen*, p. 271 and p. 299.↩
5. U. Sieber, *The future of European criminal law: a new approach to the aims and models of the European criminal law system*, in G. Grasso and R.Sicurella, *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale*, op. cit., p. 733.↩
6. See *Council Conclusions on model provisions, guiding the Council's criminal law deliberations* – 2979th Justice and Home Affairs Council meeting, Brussels, 30 November 2009.↩
7. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "*Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*", Brussels, 20.9.2011, COM(2011) 573 final.↩
8. European Parliament, Resolution of 22 May 2012 on an EU approach to criminal law (2010/2310(INI)).↩
9. See, in this respect, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "*Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*", op. cit.: "Criminal law measures comprise intrusive rules, which can result in deprivation of liberty. This is why the Charter of Fundamental Rights –

made legally binding by the Lisbon Treaty – provides important limits for EU action in this field. The Charter, being the compass of all EU policies, provides for a binding core of rules that protects citizens.", p. 4. See also *A Manifesto on European Criminal Procedure Law. European Criminal Policy Initiative*, in *ZIS* 2013, p. 430.↩

10. See *Council Conclusions on model provisions, guiding the Council's criminal law deliberations*, op. cit., pp. 2-3.↩
11. A. M. Maugeri, *Il principio di proporzione nelle scelte punitive del legislatore europeo: l'alternativa delle sanzioni amministrative comunitarie,* in G. Grasso, L. Picotti and R. Sicurella (ed.), *L'evoluzione del diritto penale nei settori d'interesse europeo alla luce del Trattato di Lisbona*, op. cit., p. 75 and p. 93; A. M. Maugeri, *I principi fondamentali del sistema punitivo comunitario: la giurisprudenza della Corte di Giustizia e della Corte europea dei diritti dell'uomo*, in G. Grasso and R.Sicurella (ed.), *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale,* op. cit., p. 102; S. Van Drooghenbroeck, *La proportionalité dans le droit de la Convention européene des droits de l'homme – Prendre l'idée simple au sérieux*, Brussels, 2001.↩
12. A. Bernardi, *Ombre e luci nel processo di armonizzazione dei sistemi penali europei*, in G. Grasso, G. Illuminati, R. Sicurella andS. Allegrezza (eds.), *Le sfide dell'attuazione di una Procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni*, 2013, p. 221 and p. 250; C. Sotis, *I principi di necessità e proporzionalità della pena nel diritto dell'Unione europea dopo Lisbona*, in *Diritto penale contemporaneo*, 2012, 1, p. 111.↩
13. See, in this respect, R. Sicurella and V. Scalia, *Data Mining and Profiling in the Area of Freedom, Security and Justice. State of Play and New Challenges in the Balance between Security and Fundamental Rights Protection,* in *New Journal of European Criminal Law*, 2013, 4, p. 669.↩
14. CJEU, judgment of 8 April 2014, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others* **and** *Kärntner Landesregierung and Others*, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.↩
15. Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (O.J. 2006 L 105, p. 54).↩
16. Art. 263, para. 4, "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."↩
17. See, in this respect, CJEU judgment of 18 June 1991, *Elliniki Radiophonia Tiléorassi (ERT) AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, Case C-260/89, *European Court Reports*, 1991 I-02925; CJEU judgment of 11 July 1985, *Cinéthèque SA and others v. Fédération nationale des cinémas français*, joined cases 60 and 61/84, *European Court Reports*, 1985 I-02605, para. 26; CJEU judgment of 30 September 1987, *Meryem Demirel v. Stadt Schwäbisch Gmünd*, Case 12/86, *Reports of Cases*, 1987, 03719, para. 28; CJEU judgment of 26 June 1997, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, Case C-368/95, *Reports of* Cases, 1997, I-03689.↩
18. CJEU judgment of 13 July 1989, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, case 5/88, *European Court reports* 1989, p. 02609, paras. 19-22; CJEU judgment of 24 March 1994, *The Queen v. Ministry of Agriculture, Fisheries and Food,* ex parte *Dennis Clifford Bostock*, case C-2/92, *European Court reports* 1994, p. I-00955, para. 16; CJEU judgment of 13 April 2000, *Kjell Karlsson and Others*, case C-292/97, *European Court reports* 2000, p. I-02737, para. 37.↩
19. CJEU judgment of 12 December 2002, *Ángel Rodríguez Caballero v. Fondo de Garantía Salarial (Fogasa)*, Case C-442/00*,* Reports of Cases, 2002 I-11915, paras. 40 and 41; CJEU judgment of 10 July 2003, *Booker Aquacultur Ltd and Hydro Seafood GSP Ltd v The Scottish Ministers*, joined cases C-20/00 and C-64/00, *Reports of Cases*, 2003, I-07411, paras. 88 and 93; CJEU, judgment 6 November 2003, *Criminal proceedings against Bodil Lindqvist*, case C-101/01, *Reports of Cases*, 2003 I-12971, concerning national criminal legislation implementing Directive 95/46 (relating to a derogation expressly provided in the same Directive). In particular, the CJEU interpretation of the wording "activity which falls outside the scope of Community law" is interesting within the meaning of the first indent of Art. 3(2) of Directive 95/46, which is relevant in order to check whether processing of personal data does not fall under the application of such Directive. In this respect, the Court points out that recourse to Art. 100a, as a legal basis, does not presuppose the existence of an actual link with free movement between Member States in every situation referred to by the measure founded on that basis (para. 40).
Such an opinion is reiterated by the Court in the judgment of 20 May 2003, *Rechnungshof v. Österreichischer Rundfunk and Others*, joined cases C-465/00, C-138/01 and C-139/01, *Reports of Cases* 2003 I-04989, paras. 41 and 42, which also represents a case concerning control by the Court of the compliance of domestic legislation implementing Directive 95/46 with fundamental rights, as such considered to fall within the field of application of EU law. See also CJEU judgment of 25 March 2004, *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, case C-71/02, *Reports of Cases*, 2004 I-03025, para. 49, concerning national provisions implementing Directive 84/450; CJEU judgment of 22 November 2005, *Werner Mangold v. Rüdiger Helm*, case C-144/2004, *Reports of Cases*, 2005 I-09981, para. 75; CJEU judgment of 27 June 2006, *European Parliament v Council of the European Union*, case C-540/03, *Reports of Cases*, 2006 I-05769, para. 105.
In the literature, see J. Nusser, *Die Bindung der Mitgliedstaaten an die Unionsgrundrechte,* Tübingen, 2011, in particular on the *excursus* of CJEU case law in this field, see p. 9; N. Lazzerini, *Il controllo della compatibilità del diritto nazionale con la Carta dei diritti fondamentali alla luce della sentenza McB.*, in *Rivista di Diritto Internazionale*, 2011, 1, p. 139; J. Kokott and C. Sobotta, *The Charter of Fundamental Rights of European Union after Lisbon*, EUI Working Papers, Academy of European Law, 2010/6, p. 6; A. Ferraro, *Le disposizioni finali della Carta di Nizza e la* multiforme *tutela dei diritti dell'uomo nello* spazio giuridico europeo, in *Rivista italiana di Diritto Pubblico Comunitario*, 2005, p. 508; R. A. García, *Le clausole orizzontali della Carta dei diritti fondamentali dell'Unione europea*, in *Rivista di Diritto Pubblico Comunitario*, 2002, p. 4; P. Eeckhout, *The EU Charter of fundamental rights and the federal question*, in *Common Market Law Review*, 2002, p. 945.↩
20. In some cases, the Court interpreted in a wide way the provisions of the Treaty, in order to prove the existence of the link between national legislation and EU law and, consequently, to recognize its jurisdiction: CJEU judgment of 11 July 2002, *Mary Carpenter v. Secretary of State for the Home Department*, C-60/00, *Reports of Cases*, 2002, I-06279; CJEU judgment of 23 September 2003, *Secretary of State for the Home Department v. Hacene Akrich*, Case C-109/01, *Reports of Cases*, 2003, I-09607; CJEU judgment of 25 July 2002, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v. Belgian State*, C-459/99, *European Court Reports*, 2002, I-06591; CJEU judgment of 17 September 2002, *Baumbast and R v. Secretary of State for the Home Department*, C-413/99, *European Court Reports*, 2002, I-07091; CJEU judgment of 29 April 2004, *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Württemberg*, joined cases C-482/01 and C-493/01, *Reports of Cases*, 2004, I-05257; CJEU judgment of 27 April 2006, *Commission of the European Communities v. Federal Republic of Germany*, C-441/02, *Reports of Cases*, 2006, I-03449. In the judgment of 19 January 2010, *Seda Kücükdeveci v. Swedex GmbH & Co. KG*, C-555/07, *Reports of Cases*, 2010, I-00365, the Court scrutinized a national legislation, which did not strictly execute EU law, in the light of the general principle of non-discrimination on the grounds of age. In particular, the Court found the linking *tesserae* between national legislation and EU law in the circumstance that the domestic provision dealt with

a matter regulated by an EU Directive ("that directive had the effect of bringing within the scope of European Union law the national legislation at issue in the main proceedings, which concerns a matter governed by that directive, in this case the conditions of dismissal" para. 25).↩

21. See, in this respect, the analysis of P. Eeckhout, *The EU Charter of fundamental rights and the federal question*, op. cit., p. 954.↩
22. CJEU judgment of 8 March 2011, *Gerardo Ruiz Zambrano v. Office national d'emploi*, case C-34/09, Opinion of the Advocate General E. Sharpston, *European Court Reports,* 2011 I-01177, para. 163.↩
23. CJEU judgment of 13 June 1996, *Criminal proceedings against Jean-Louis Maurin*, case C-144/95, paras. 11 and 12.↩
24. CJEU judgment of 8 March 2011, *Gerardo Ruiz Zambrano v. Office national d'emploi*, case C-34/09, Opinion of the Advocate General E. Sharpston, cit., paras. 166-170.↩
25. CJEU judgment of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, case C-617/10, *European Court Reports 2013*, para. 21 (emphasis added). For comments on such judgment, see V. Skouris, *Developpements récents de la protection des droits fondamentaux dans l'Union européenne: les arrêts M*elloni *et* Åkerberg Fransson, in *Diritto dell'Unione europea,* 2, 2013, p. 229; S. Manacorda, *Dalla Carta dei diritti fondamentali ad un diritto "*à la carte*" – Note a margine delle sentenze Fransson e Melloni della Corte di Giustizia*, in *www.penalecontemporaneo.it*. From a critical perspective, see F. Fontanelli, *Fransson and the application of the EU Charter of Fundamental Rights to State measures – nothing new under the sun of Luxembourg*, http://www.diritticomparati.it/2013/03/fransson-and-the-application-of-the-eu-charter-of-fundamental-rights-to-state-measures-nothing-new-u.html; S. Montaldo, *L'ambito di applicazione della Carta dei diritti fondamentali dell'Unione europea e il principio del ne bis in idem,* in *Diritti umani e diritto internazionale*, 2013, n. 2, p. 574.↩
26. CJEU judgment of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, op. cit., para. 24 (emphasis added).↩
27. In particular, it constitutes the implementation of Arts. 2, 250(1) and 273 of Directive 2006/112 (previously Arts. 2 and 22 of the Sixth Directive) and of Art. 325 TFEU.↩
28. CJEU judgment of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, op. cit., paras. 25 and 26.↩
29. See, in this respect, G. Grasso, *La protezione dei diritti fondamentali nella Costituzione per l'Europa: spunti di riflessione critica*, in G. Grasso and R.Sicurella (eds.), *Lezione di diritto penale europeo*, Milan, 2007, p. 663 and p. 664.↩
30. CJEU judgment of 6 March 2014, *Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, C-206/13, not yet published, para. 25.↩
31. Opinion of Advocate General P. C. Villalón, 4 June 2015, *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde*, C-650/13, not yet published, paras. 95 and 96. It is also interesting to note that the preliminary ruling proposed by the French judge also dealt with the question of compatibility of the same national criminal provision with Art. 49 of the Charter (relating, in particular, to the right to retroactive application of the more favorable criminal law), since there was a legislative amendment of the national criminal law that can undoubtedly be categorized as a case of *reformatio in mitius*, but that was excluded from applying to convictions before the law entered into force. Before proceeding to analyze the scope of the guarantee afforded by Art. 49 of the Charter and, in particular, whether that guarantee also extends to convictions made by a final judgment already delivered when the amendment entered into force, the Advocate General examines whether the criminal sentence in question was passed "in implementation of EU law." The Advocate General believes that the CJEU has no jurisdiction to scrutinize such a question, in contrast to that concerning Art. 39 of the Charter, since the "Member State's *ius puniendi* was exercised in a field completely outside the Union's competence, that is to say, in relation to the imposition of a penalty for the offence of murder. Therefore, in the present case there is no provision of EU law that would make it possible to assert that the penalty was imposed thereunder." (para. 82). He further points out that the circumstance that "a different interpretation of the scope of the right to *reformatio in mitius*, in the terms proposed by Mr Delvigne, could have given rise to the application to him of the legislative reform which took place after his conviction, with consequences, ultimately, for his enjoyment of the right to vote, is not sufficient to alter that conclusion," as it would represent only an indirect affect of a field falling within the scope of EU law, not sufficient to state that the challenged national legislation was governed by EU law (paras. 83 and 84). The CJEU judgment (6 October 2015, *Thierry Delvigne v Commune de Lesparre-Médoc and Préfet de la Gironde*, Case C-650/13, ECLI:EU:C:2015:648) recognized its jurisdiction, referring to Art. 14(3) TEU and Art. 1(3) of the 1976 Act concerning the election of the members of the European Parliament by direct universal suffrage and not to Art. 223 TFEU. It also stated that the challenged French legislation did not represent undue interference into the enjoyment of the right to vote protected by Art. 39 of the Charter and did not violate the principle of retroactivity of the most favorable legislation provided for by Art. 49, para. 2 of the Charter.↩
32. Opinion of Advocate General P.C. Villalón, 4 June 2015, *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde*, op. cit., para. 96.↩
33. See CJEU, 7 November 2013, *Giuseppa Romeo v. Regione Siciliana*, C-313/12, *European Court Reports,* 2013, paras. 21 and 22 concerning, in particular, a question on the compliance of a national legislation with Art. 41 of the Charter. See also CJEU, 21 December 2011, *Teresa Cicala v Regione Siciliana*, C-482/10, *Reports of Cases*, 2011, I-14139, paras. 17-19, also concerning the same provision of the Charter. The following judgments basically refer to provisions of the Treaties and secondary legislation: CJEU, 16 March 2006, *Poseidon Chartering BV v. Marianne Zeeschip VOF and others*, C-3/04, *European Court Reports*, 2006, I-02505, para. 15; CJEU judgment of 11 December 2007, *Autorità Garante della Concorrenza e del Mercato v. Ente tabacchi italiani – ETI SpA and Others and Philip Morris Products SA and Others v. Autorità Garante della Concorrenza e del Mercato and Others*, paras. 22 and 26; CJEU judgment of 18 October 2012, *United States of America v Christine Nolan*, C-583/10, ECLI:EU:C:2012:638, paras. 45-48.↩
34. CJEU judgment of 18 December 1997, *Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio*, C-309/96, *European Court Reports*, 1997 I-07493, paras. 21-23.↩
35. CJEU judgment of 6 March 2014, *Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, op. cit., para. 24.↩
36. CJEU judgment of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, op. cit., para. 48 (emphasis added). The Court, in particular, remarks that, since the rights protected by the Charter are in fact EU law as well as the Treaties and the secondary legislation, "the conclusions to be drawn by a national court from a conflict between provisions of domestic law and rights guaranteed by the Charter, it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means" (para. 45), reiterating the same conclusions adopted in its previous case law (e.g., CJEU, *9 March 1978, Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, Case 106/77, *European Court Reports* 1978, 00629, paras. 21 and 24; CJEU, 19 November 2009,

Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu, C-314/08, *Reports of Cases,* 2009, I-11049, para. 81; CJEU, 22 June 2010, *Aziz Melki and Sélim Abdeli*, joined cases C-188/10 and C-189/10, *European Court Reports*, 2010, I-05667, para. 43).↩

37. The *Fransson* judgment also stresses the distinction between the case of incompatibility between a right protected in the Charter and a national criminal law provision and the differing case of conflict between a right protected by the ECHR and the national provisions. In the latter case, the national judge has no power to declare the conflicting national provision inapplicable, since "it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law", CJEU, judgment 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, op. cit., para. 44.↩
38. These constraints, however, must comply with some standards. They have to be provided for in specific legal texts. The pursued goals must be legitimate. They have to be necessary in a democratic society and proportionate to the sacrificed interests (e.g., the case law concerning the interpretation of Arts. 8, 9, 10, and 11 ECHR). See, in this respect, V. Scalia, *Controllo giurisdizionale su necessità e proporzione delle scelte di criminalizzazione del legislatore europeo: uno sguardo sulle possibilità di dialogo tra le Corti europee*, in G. Grasso, G. Illuminati, R. Sicurella, S. Allegrezza (eds.), *Le sfide dell'attuazione di una Procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni*, Milan, 2013, p. 366; A. M. Maugeri, *Fundamental Rights in the European Legal Order, both as a Limit on Punitive Power and as a Source of Positive Obligations to Criminalise*, in *New Journal of European Criminal Law*, 2013, 4, p. 374; M. Klatt, *Positive obligation under the European Convention on Human Rights*, in *ZaöRV*, 2011, 71, p. 692; F. Viganò, *Il diritto penale sostanziale davanti ai giudici della CEDU*, in *Giurisprudenza di merito*, 2008, 12, p. 81; G. De Vero, *La giurisprudenza di Strasburgo*, in G. De Vero and G. Panebianco, *Delitti e pene nella giurisprudenza delle Corti europee*, Turin, 2007, p. 28.↩
39. Opinion of the Court (Full Court), 18 December 2014, n. 2/13, not yet published (Court reports – general).↩
40. See, in this respect, S. Allegrezza, *The interaction between the CJEU and the ECtHR with respect to the protection of procedural safeguards after Lisbon: the accession of the EU to the ECHR*, in K. Ligeti (ed.), *Toward a Prosecutor for the European Union*, Portland, 2013, p. 937.↩
41. See BverfG, 1 BvR 1215/07, 24 April 2013, available at http://www.bverfg.de/entscheidungen/rs20130424_1bvr121507.html↩
42. Ibid., paras. 88-91.↩
43. CJEU judgment of 8 September 2015, *Criminal proceedings against Ivo Taricco and Others*, C-105/14, not yet published. On this judgment, see S. Peers, *The Italian Job: the CJEU strengthens criminal law protection of the EU's finances*, available at the website http://eulawanalysis.blogspot.it/2015/09/the-italian-job-cjeu-strengthens.html; F. Viganò, Disapplicare le norme vigenti sulla prescrizione nelle frodi in materia di IVA? Primato del diritto UE e *nullum crimen sine lege* in una importante sentenza della Corte di giustizia (8 September 2015 (Grande Sezione), Taricco, causa C-105/14), available at the website www.penalecontemporaneo.it; S. Manacorda, *Note minime a prima lettura della sentenza Taricco*, available at the website http://www.academia.edu/16035018/Note_minime_a_prima_lettura_della_sentenza_Taricco.↩
44. Art. 160 of the Italian Penal Code, as amended by Law n. 251/2005, read in conjunction with Art. 161 of that Code, which provided, at the time in question in the main proceedings, that the interruption of criminal proceedings concerning serious fraud in relation to value added tax had the effect of extending the limitation period by only a quarter of its initial duration. The specific circumstances identified by the CJEU refer, in particular, to two conditions: a) if the considered national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or b) if it provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, which it is for the national court to verify.↩
45. The CJEU recalls some specific very important ECtHR relevant judgments, such as *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96, and 33210/96, § 149, ECHR 2000-VI; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 110 and the case law cited, 17 September 2009, and *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, §§ 563, 564, and 570 and the case law cited, 20 September 2011.↩
46. Opinion of Advocate General J. Kokott, delivered on 30 April 2015, *Criminal proceedings against Ivo Taricco and Others*, C-105/14, ECLI:EU:C:2015:293, paras. 118-119.↩
47. The majority of Italian criminal law scholars share the same opinion as that in the case law (*Corte di Cassazione* and Constitutional Court), stressing especially that the retroactive application of the mechanisms concerning the limitation period does not comply with the constitutional principle of legality (Art. 25, para. 2, Italian Constitution) and does not represent a means to solve the inefficiency of the domestic criminal justice system (e.g., the length of the criminal trial, the lack of effective application and execution of penalties); see, in this respect, M. Nobili, L. Stortoni, M. Donini, M. Virgilio, M. Zanotti, N. Mazzacuva, *Prescrizione e irretroattività fra diritto e procedura penale*, in *Foro italiano*, 1998, V, 317; M. Romano, *Art. 157*, in M. Romano, G. Grasso, T. Padovani, *Commentario sistematico del Codice Penale*, vol. III, Milan, 2011, p. 65. G. Marinucci and E. Dolcini, *Corso di diritto penale*, Milano, 2003, p. 262, have a different opinion, since they recognize a retroactive application of the rule concerning the limitation period if the limitation period has not yet expired. In these cases, in their opinion, there would be no violation of the principle of legality, as the individual's expectation in terms of criminalized conduct, nature, and quantity of the sanction would not be affected.↩
48. See Cassazione penale, sez. III, 17 September 2015, *Pennacchini*. The reasoning of the judgment has not yet been published.↩
49. Italian Constitutional Court, 18 December 1973, n. 183, and 5 June 1984, n. 170, in *www.cortecostituzionale.it*↩
50. In these terms, see the Opinion of Advocate General J. Kokott, delivered on 30 April 2015, *Criminal proceedings against Ivo Taricco and Others*, C-105/14, ECLI:EU:C:2015:293.↩
51. See C. Safferling, *Der EuGH, die Grundrechtecharta und nationales Recht: Die Fälle Åkerberg Fransson und Melloni*, in *Neue Zeitschrift für Strafrecht*, 10, 2014, p. 545, who stresses that, in recent CJEU case law and particularly in the *Fransson* and *Melloni* judgments, the Court neither considers nor mentions the constitutional traditions common to Member States (p. 550).↩
52. See, in this respect, R. Sicurella, *Diritto penale e competenze dell'Unione europea. Linee guida di un sistema integrato di tutela dei beni giuridici sovrannazionali e dei beni giuridici di interesse comune*, Milan, 2005, pp. 519-521.↩
53. CJEU judgment of 26 February 2013, *Stefano Melloni v. Ministerio Fiscal*, not yet published, ECLI:EU:C:2013:107. On this judgment, see C. Safferling, *Der EuGH, die Grundrechtecharta und nationales Recht: Die Fälle Åkerberg Fransson und Melloni*, op. cit., p. 545; A. Ruggeri, *La Corte di giustizia e il bilanciamento mancato (a margine della sentenza Melloni)*, in *Il Diritto dell'Unione Europea*, 2, 2013, p. 399.↩

54. CJEU judgment of 18 July 2013, *European Commission and Others v. Yassin Abdullah Kadi*, joined cases C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518.↩
55. CJEU judgment of 6 October 2015, 06/10/2015, *Maximillian Schrems v. Data Protection Commissioner,* C-362/14, ECLI:EU:C:2015:650.↩
56. Opinion of the Court (Full Court), 18 December 2014, n. 2/13, not yet published (Court reports – general).↩
57. See, in this respect, A. Ruggeri, *La Corte di giustizia e il bilanciamento mancato (a margine della sentenza Melloni)*, op. cit., pp. 407-408.↩

ABOUT EUCRIM
eucrim is the leading journal serving as a European forum for insight and debate on criminal and “criministrative” law. For over 20 years, it has brought together practitioners, academics, and policymakers to exchange ideas and shape the future of European justice. From its inception, eucrim has placed focus on the protection of the EU’s financial interests – a key driver of European integration in “criministrative” justice policy.
Editorially reviewed articles published in English, French, or German, are complemented by timely news and analysis of legal and policy developments across Europe.
All content is freely accessible at https://eucrim.eu, with four online and print issues published annually.

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases.
The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union