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Enforcement of EU Law: Effectiveness and Fundamental Rights as Limits to the *Ius Puniendi* Exercised by Member States in Fiscal (Criminal) Proceedings

Abstract: This article analyses the limits to Member States' powers in the field of enforcing (criminal) penalties for infringements of EU law, with particular focus on the protection of the EU's financial interests. The article addresses the issue of the broad interpretation of the concept of 'fraud' within the meaning of Article 1(1) of the PFI Convention, which resulted in imposing an obligation on Member States to establish criminal penalties for certain serious VAT fraud. Next, the article analyses the requirements of effectiveness and equivalence of penalties established in domestic law for infringements of EU law, which may affect not only the severity of penalties, but also the rules of criminal procedure (limitation periods in pre-trial and judicial proceedings). Finally, the article presents the main developments in the context of limitations of *ius puniendi*, which stem from the obligation to protect fundamental rights under the Charter of Fundamental Rights.
Keywords: enforcement of EU law, EU criminal law, effectiveness of EU law, protection of fundamental rights, PFI Convention, PFI Directive, protection of financial interests of the EU

Introduction

The enforcement of EU law is a topic which has been discussed for many years and is always very important and relevant for the EU.[1] The notion of 'enforcement'

1 See in particular C. Harding, B. Swart (eds.), Enforcing European Community Rules, Dartmouth 1996; J.A.E. Vervaele (ed.), Compliance and Enforcement of European Community Law, The Hague/London/Boston 1999.

adopted in this article means a 'process that requires action from either the State or the Commission in order to force other actions to fulfill the obligations imposed on them by Community law'.[2] Generally, two models of enforcement are distinguished, direct and indirect, where enforcement based on the actions of Member States is also called decentralised or delegated enforcement.[3] In many fields of EU law and policies, the effectiveness of EU law depends on the actions of Member States. Gradual development of the EU law in this field has resulted in Member States' obligation to introduce penalties in their national law for infringements of the EU rules regarding the single market and accompanying EU policies (such as labour, environmental protection, etc.) in order to ensure that they are effectively applied and observed by its addressees. The evolution began with the *Greek Maize* judgment of the Court of Justice of the EU (CJEU, Court of Justice), in which the requirements for such penalties were formulated.[4] Next, the Court of Justice reconstructed the implied powers of the EU to impose criminal penalties for infringements of environmental protection law in the cases C-173/03 *Commission v. Council* and C-440/05 *Commission v. Council*.[5] Finally, the Treaty of Lisbon incorporated the above line of reasoning, confirming the competence of the EU to require Member States to introduce minimum rules with regard to criminal offences and penalties , '[i]f the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures'.[6]

There is one specific field of EU policy which combines administrative and criminal law methods; this is the protection of the EU's financial interests. The evolution of EU law in this area was marked by the adoption of the Convention on the Protec-

2 A.J. Gil Ibanez, The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits, Oxford/Portland 1999, p. 15; as the author explains, the terms 'application' and 'compliance' imply the active behaviour of addressees, while 'enforcement' steps down when non-compliance exists. In a similar vein, see M. Scholten's recent EU (Shared) Law Enforcement: Who Does What and How? (in:) S. Montaldo, F. Costamagna, A. Miglio (eds.) EU Law Enforcement: The Evolution of Sanctioning Powers, London/New York 2021, pp. 7–23.

3 For the typology and general outline see C. Harding, Models of Enforcement: Direct and Delegated Enforcement and the Emergence of a 'Joint Action' Model, (in:) C. Harding, B. Swart (eds.), Enforcing…, *op. cit.*, pp. 22–42; K. Mortelmans, General Aspects of Europeanization and Horizontalization of Enforcement, (in:) J.A.E. Vervaele (ed.), Compliance and Enforcement…, *op. cit.*, pp. 51–69.

4 Judgment of the CJEU of 21 September 1988, *Commission v. Greece*, 68/88, EU:C:1989:399.

5 Judgment of the CJEU of 13 September 2003, *Commission v. Council*, C-176/03, EU:C:2005:542; judgment of the CJEU of 23 October 2007, *Commission v. Council*, C-440/05, EU:C:2007:625.

6 Article 83(2) TFEU. For further discussion of this evolution, see in particular M. Dougan, From Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law, (in:) M. Cremona (ed.), Compliance and Enforcement of EU Law, Oxford 2012, pp. 74–131; and in the Polish literature, M. Szwarc-Kuczer, Kompetencje Unii Europejskiej w dziedzinie harmonizacji prawa karnego materialnego [EU Competence to Harmonise Substantive Criminal Law], Warsaw 2011.

tion of the European Communities' Financial Interests (PFI Convention) in 1995.[7] The Convention determined the scope of 'fraud affecting the European Communities' financial interests' (Article 1(1)). Additionally, Member States were obliged to take necessary measures to ensure that such fraud is punishable by criminal penalties, in particular in cases of serious fraud, by penalties involving deprivation of liberty, which can give rise to extradition.[8] The PFI Convention was replaced with Directive 2017/1371 (for the Member States bound by it) from 6 July 2019.[9] Still, the case law scrutinised in this article concentrates on the provisions of the Treaty on functioning of the EU (TFEU) and the PFI Convention. Therefore, the PFI Directive will be invoked only to present legal developments and its effect on the interpretations made by the CJEU.

The direct legal grounds for the protection of the EU's financial interests can also be found in primary law. The Union and the Member States are obliged 'to counter fraud and any other illegal activities affecting financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union institutions, bodies, offices and agencies' (Article 325(1) TFEU), and Member States 'shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests' (Article 325(2) TFEU). Still, it must be underlined that nothing in Article 325(1) or (2) could lead to the conclusion that the Member States must necessarily introduce penalties of a criminal nature.

The most interesting and challenging rulings of the CJEU in the field of the enforcement of EU law have been delivered in the context of interpretation of rules concerning harmonised VAT and the protection of the EU's financial interests. The developments commenced in 2013 with the judgment of the Court of Justice in the case of *Fransson*, which concerned the possibility (under EU law) of the duplication of criminal and administrative proceedings in order to make a punishment for VAT fraud.[10] The ruling must be considered as an important step in the evolution of the repressive EU law. Firstly, it clarified the scope of application of the Charter of Fundamental Rights to actions initiated by Member States, in particular in the field of estab-

7 Convention drawn up on the basis of Article K.3 TEU, on the protection of the European Communities' financial interests, signed in Luxembourg on 26 July 1995, O.J. C 316, 27.11.1995, pp. 49–57.

8 Article 2(1) of the PFI Convention.

9 Article 16 of 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 (O.J. L 198, 28.07.2017, pp. 29–41); the PIF PFI Directive has been adopted on the basis of Article 83(2) TFEU.

10 Judgment of the CJEU of 26 February 2013, *Fransson*, C 617/10, EU:C:2013:105.

lishing penalties (including criminal ones) for infringements of EU law.[11] Secondly, it clarified the meaning of the *ne bis in idem* principle by establishing the interpretation of notions important for the application of the principle (such as 'criminal penalty'). Thirdly, the Court of Justice admitted that in general, Member States have discretion to choose the most appropriate penalties for infringements of EU law (in cases where EU law does not harmonise this aspect). The case law that followed has developed all the above aspects of the reasoning adopted in the *Fransson* ruling.

This article focuses on the third aspect, namely on the question of to what extent the declared discretion of Member States to choose the most appropriate penalties, in terms of their nature and scope, has been restricted by the Court of Justice since the *Fransson* ruling.

The gradual limitation of Member States' discretion in the exercise of *ius puniendi* as regards establishing penalties for infringements of EU law is particularly visible in the combatting of offences committed in breach of VAT regulations and offences against the financial interests of the EU. In the cases of *Taricco* and *M.A.S.*, the Court of Justice answered questions referred by the Italian courts concerning the possibility of applying national provisions on limitation periods in criminal proceedings, which, if applied, would result in the impunity of persons accused of conspiracy to commit various offences in relation to VAT.[12] These two rulings, resulting from the questions of the Tribunale of Cuneo and of the Italian Constitutional Court of Italy respectively and often called the '*Taricco* saga',[13] brought about important new developments on the issue of mutual relations between EU law and Member States' *ius puniendi*, in particular in the context of the effectiveness of EU law.[14] This line of case law found its continuation in *Scialdone*, in which the Court of Justice again

11 See in particular E. Hancox, The Meaning of 'Implementing' EU Law under Article 51(1) of the Charter: *Åkerberg Fransson*, 'Common Market Law Review' 2013, vol. 50, no. 5, pp. 1411–1431.

12 Judgment of the CJEU of 8 September 2015, *Taricco*, C-105/14, EU:C:2015:555; judgment of the CJEU of 5 December 2017, *M.A.S.*, C-42/17, EU:C:2017:936.

13 For extensive commentaries, see in particular S. Manacorda, The *Taricco* Saga: A Risk or Opportunity for European Criminal Law, 'New Journal of European Criminal Law' 2018, no. 1, pp. 4–11; V. Manes, Some Lessons from the *Taricco* Saga, 'New Journal of European Criminal Law' 2018, no. 1, pp. 12–17; V. Mitsilegas, Judicial Dialogue in Three Silences: Unpacking *Taricco*, 'New Journal of European Criminal Law' 2018, no. 1, pp. 38–42.

14 Note that these two rulings were discussed mostly for their constitutional implications, including the principle of the primacy of EU law and mutual relations between EU law and national (constitutional) laws of the Member States; M. Timmerman, Balancing Effective Criminal Sanctions with Effective Fundamental Rights Protection in Cases of VAT Fraud: *Taricco*, 'Common Market Law Review' 2016, pp. 792–795; M. Bonelli, The *Taricco* Saga and the Consolidation of Judicial Dialogue in the European Union, 'Maastricht Journal of European and Comparative Law' 2018, no. 3, pp. 357–373; G. Piccirilli, The '*Taricco* Saga': The Italian Constitutional Court Continues Its European Journey, 'European Constitutional Law Review' 2018, no. 4, pp. 814–833; C. Rauchegger, National Constitutional Rights and the Primacy of EU Law: *M.A.S.*, 'Common Market Law Review' 2018, no. 5, pp. 1521–1548.

interpreted EU law in the context of Italian provisions establishing criminal and non-criminal tax penalties in the field of direct taxation, value added tax and tax collection, from the perspective of effectiveness and non-discrimination principles.[15] In *Kolev*, the CJEU was asked to interpret EU law in the context of criminal proceedings against persons accused of having committed various offences as customs officers, where the national provisions setting time limits on the pre-trial stage of criminal proceedings were adequate to ensure the full effectiveness of EU law.[16]

Another group of cases before the CJEU concerned the interpretation of EU law in the context of the duplication of administrative and criminal proceedings. In *Menci*, the questions referred by the national court were addressed in proceedings concerning VAT fraud, and in *Garlsson* were in the context of combatting insider dealing and market manipulation.[17] Here, the considerations touched upon the admissibility of duplication of criminal and administrative proceedings, which, due to the nature and severity of administrative penalties, were to be recognised as criminal.

This specific field of the judicial dialogue between the CJEU and national courts in the fields of EU economic law and penalties established by Member States for infringement is important for businesses across the European Union. The general rule is that when no harmonised rules on definitions of offences and penalties have been adopted, Member States enjoy a wide margin of discretion as regards the nature, scope and severity of such penalties, yet the limitations of these powers must be noticed and explained. This article focuses on the limitations of Member States' *ius puniendi*, as shown in the recent case law of the Member States, resulting from the extensive definition of fraud adopted by the CJEU and then to some extent codified in the PFI Directive (Section 1), and from the EU standard for penalties, in particular requirement of effectiveness of penalties (Section 2), as well as from the obligation to protect the fundamental rights of individuals, as long as their situation falls within EU law (Section 3).

1. Interpretation of 'fraud' in the context of the protection of the EU's financial interests resulting in the obligation to impose criminal sanctions

The extensive interpretation of the concept of 'fraud' within the meaning of Article 1 of the PFI Convention was the first important development resulting from the case law of the CJEU. In turn, such interpretation resulted in the obligation for Mem-

15 Judgment of the CJEU of 2 May 2018, *Scialdone*, C-574/15, EU:C:2018:295.

16 Judgment of the CJEU of 6 June 2018, *Kolev*, C-612/15, EU:C:2018:392.

17 Judgment of the CJEU of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197; judgment of the CJEU of 20 March 2018, *Garlsson*, C-537/16, EU:C:2018:193. The national provisions, which were the ground for national proceedings, implemented provisions of Directive 2003/6/EC on insider dealing and market manipulation (market abuse) (O.J. L 96, 12.4.2003, pp. 16–25).

ber States to introduce into their national laws criminal offences accompanied by criminal penalties. The Court of Justice already ruled in *Fransson*, and later upheld in *Taricco* and *M.A.S.*, that Article 325 TFEU required Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliged them to take the same measures to counter fraud affecting the EU's financial interests as they take in respect of frauds affecting their own interests.[18]

In the following step, the CJEU recognised the existence of the direct link between the collection of the EU's own resources[19] and revenues from the application of a uniform rate to the harmonised VAT assessment bases determined according to European Union rules and decided that collection of VAT revenue is directly linked with the availability of VAT resources for the EU budget.[20] The existence of such a link was also confirmed in the context of revenues from the Common Customs Duties, as the any failure in their collection may potentially cause a reduction in the EU budget.[21]

Such a standpoint allowed the CJEU to recognise the wide scope of the concept of 'fraud' within the meaning of the PFI Convention. In *Taricco*, it was decided that under Article 1(1) of the PFI Convention, the notion of 'fraud' covers revenue derived from applying a uniform rate to the harmonised VAT assessment bases determined according to the EU rules.[22] As a consequence, 'conspiracy to commit offences in relation to VAT and VAT evasion amounting to several million euros' was considered as serious fraud affecting the EU's financial interests. Therefore, the Member States must ensure that such fraud is punishable by criminal penalties, which in particular are effective and dissuasive.[23] Thus, including such offences concerning VAT into the scope of application of Article 1(1) of the PFI Convention resulted in the imposition of an obligation on the Member States to criminalise them. It is also contended that the most important result of such a ruling was that the Court created an obligation to criminalise not only VAT fraud, but also the instigation and attempt thereof, as well as the participation therein.[24] For the sake of completeness of the reasoning, it is worth mentioning that the PFI Directive applies only in cases of serious

18 *Fransson*..., *op. cit.*, para. 26; *Taricco*..., *op. cit.*, para. 37; *M.A.S.*..., *op. cit.*, para. 30; confirmed also in *Kolev*..., *op. cit.*, para. 50.

19 Within the meaning of Article 2(1) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (O.J. L 163, 23.6.2007, pp. 17–21).

20 *Fransson*..., *op. cit.*, para. 26; *M.A.S.*..., *op. cit.*, paras 30–31; *Menci*..., *op. cit.*, para. 19.

21 *Kolev*..., *op. cit.*, para. 51.

22 *Taricco*..., *op. cit.*, para. 41.

23 *Ibidem*, paras 42–43; *M.A.S.*..., *op. cit.*, para. 35; *Scialdone*..., *op. cit.*, para. 35; *Kolev*..., *op. cit.*, para. 54.

24 M. Timmerman, Balancing…, *op. cit.*, p. 789; this author also brings attention to the fact that the negotiations concerning the new PFI Directive took place in parallel to the proceedings before the CJEU, where the Member States wished to exclude VAT fraud from the scope of this directive, pp. 789–790.

offences against the common VAT system, where their 'seriousness' is explicitly defined in terms of the amount of total damage and any cross-border dimension.

Still, not all offences in relation to VAT are to be classified as 'fraud' within the above meaning. This is a case of a plain failure to pay a declared VAT. In *Scialdone* it was decided that such an act did not amount to 'fraud' within the meaning of the PFI Convention, but it was classified as 'illegal activities' liable to affect the financial interests of the EU, within the meaning of Article 325 (1) TFEU.[25] Nonetheless, in *Kolev*, the Court did not distinguish between fraud (requiring introduction of criminal penalties) and other illegal activities (requiring non-criminal penalties), and ruled that 'participation in a criminal undertaking for more than a year by demanding bribes from those crossing the border between Bulgaria and Turkey in order not to carry out customs inspections and not to document any irregularities identified', which under national law constituted offences punishable by custodial sentences to of six or to ten years' imprisonment, could be categorised as serious fraud or any other serious illegal activity affecting the financial interests of the EU within the meaning of Article 325(1) TFEU.[26]

Admittedly, the classification of actions as 'fraud' within the meaning of the PFI Convention or the PFI Directive (depending on which act was in force at the moment of the offences being committed) will result in the obligation of the Member States to introduce criminal penalties, thus limiting their discretion as to the nature of the legal reaction for a particular infringement. However, this discretion may be affected also in terms of the severity of penalties, as well as in terms of procedural aspects of their enforcement.

2. The EU standard for (criminal) penalties

As already explained, when the matter of choice has not been harmonised under Article 83 TFEU, such as in the field of VAT, Member States retain discretion in choosing applicable penalties: administrative, criminal or a combination of both.[27] Still, notwithstanding their nature, penalties for infringements of EU law must fulfil the requirements that stem from the so-called *Greek Maize* case. The CJEU then ruled that Member States were bound to ensure 'that infringements of Community law are penalised under conditions, both procedural and substantive, which are anal-

25 *Scialdone*..., *op. cit.*, paras 39 and 44; judgment of the CJEU of 15 September 2022, on the case of *UAB 'HA.EN'*, C-227/21, EU:C:2022:687, para. 32.

26 *Kolev*..., *op. cit.*, para. 57.

27 *Fransson*..., *op. cit.*, para. 34. This was in the context of declaring that Article 50 of the Charter, the *ne bis in idem* principle, does not preclude such a combination of administrative and criminal sanctions; this discretion was confirmed also in *M.A.S.*..., *op. cit.*, para. 33; *Menci*..., *op. cit.*, para. 20; and *Scialdone*..., *op. cit.*, para. 34.

ogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive' and that 'national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws'.[28] These requirements, also referred to as the principles of effectiveness and equivalence (assimilation, or non-discrimination), were later codified in Article 325 (1) and (2) TFEU. In *Scialdone*, the Court of Justice upheld, that they are still valid, in the context of infringements of the VAT Directive, for all penalties for infringements of EU law, notwithstanding their nature (administrative or criminal).[29]

In *Taricco* and *M.A.S.*, the CJEU interpreted the above EU requirements for penalties in the context of national provisions on limitations in criminal proceedings, which raised concerns of referring courts as to their impact on the effectiveness of the EU law. These limitation periods, amounting to seven years and six months and or, in the case of conspiracy, eight years and nine months, had the effect that the proceedings would be time-barred and persons accused of such crimes (which were to be regarded as 'fraud' affecting the financial interests of the EU) would not be punished, which in turn would render the EU law ineffective, because their application would result in the impunity of the accused.[30] Answering these doubts, the CJEU decided that:

> [I]f the national court concludes that the application of the 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 offences will usually be time-barred before the criminal penalty laid down by law can be imposed by a final judicial decision, 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, which would be incompatible with Article 325(1) TFEU, Article 2(1) of the PFI Convention as well as Directive 2006/112, read in conjunction with Article 4(3) TEU.[31]

The ruling of the CJEU in *Taricco* provoked a vivid reaction among academics, but more importantly in the Italian courts. The Court's declaration that national rules on limitation periods in criminal proceedings would be contrary to the EU requirement of effective and dissuasive penalties, could result in the necessity to disapply

28 *Commission v. Greece*, *op. cit.*, paras 23, 24, 26.

29 *Scialdone...*, *op. cit.*, paras 28–29; judgment of the CJEU of 17 January 2019, *Dzivev*, C-310/16, EU:C:2019:30, para. 30.

30 As has been clarified in *Taricco*, the referring court explained that 'the duration of the entire proceedings is such that in Italy, in that type of case, de facto impunity is normal rather than [an] exceptional occurrence', para. 24.

31 *Taricco...*, *op. cit.*, para. 47.

such national rules. Such a standpoint amounted to a considerable interference with the criminal procedural law. Furthermore, as the Italian rules on limitation periods were classified as substantive criminal law (and not of criminal procedure), the ruling provoked serious doubts from the perspective of the Italian constitutional principle of legality. Therefore, in *M.A.S.*, in response to questions referred by the Italian Constitutional Court, the CJEU had the opportunity, firstly, to uphold the decision it made in *Taricco*,[32] and secondly, to admit that it is primarily for the national legislature to lay down rules on limitation that enable compliance with the obligation under Article 325 TFEU.[33] At this point of reasoning, it seems important to underline that the EU requirements for effective and dissuasive penalties may reach as far as the criminal law and procedure affecting the enforcement of repression. The implications of the declaration that national criminal law provision is incompatible with the EU requirement of effectiveness are explored below.

In *Kolev*, the Court of Justice went even further when it declared that the obligation to ensure the protection of the EU's financial interests requires the Member States to adopt such measures which guarantee the effective and comprehensive collection of customs duties, and, further, which guarantee the proper execution of customs inspections.[34] According to the CJEU, the Member States must also ensure that 'the rules of criminal procedure permit effective investigation and prosecution of offences linked to such conduct'.[35] After the analysis of the provisions of the national criminal procedure on the limitation period in respect of the pre-trial proceedings, the Court declared that 'they are liable to impede the effectiveness of criminal prosecution and the punishment of acts' classified as serious fraud, or other illegal activities within the meaning of Article 325 (1) TFEU. In *Dzivev* it was upheld that 'in criminal law, those rights and those principles must be respected not only during the criminal proceedings, but also during the stage of the preliminary investigation, from the moment when the person concerned becomes an accused'.[36]

The requirement of equivalence has not been such a controversy as that of effectiveness. In *Taricco*, the CJEU ordered that criminal penalties 'must be the same as those which the Member States adopt in order to combat equally serious cases of fraud affecting their own financial interests'.[37] The disuassiveness of the penalties was not at issue. The requirement of equivalence is explicitly stated in Article 325 (2) TFEU and was also upheld by the Court of Justice.[38] The question whether penalties

32 'The Member States must also ensure that the limitation rules laid down by national law allow effective punishment of infringements linked to such fraud', *M.A.S...*, *op. cit.*, para. 36.
33 *Ibidem*, para. 41.
34 *Kolev...*, *op. cit.*, paras 52–53.
35 *Ibidem*, para. 55.
36 *Dzivev...*, *op. cit.*, para. 33.
37 *Taricco...*, *op. cit.*, para. 43.
38 *M.A.S...*, *op. cit.*, para. 37.

established in national law are non-discriminatory was analysed in *Scialdone*, and the CJEU decided that the non-discrimination principle was not infringed.[39]

3. Fundamental rights as a restriction to the exercise of *ius puniendi*

Following the *Fransson* ruling, it is clear that when establishing and enforcing penalties for infringements of EU law, the Member States 'are implementing European Union law' within the meaning of Article 51(1) of the Charter of Fundamental Rights.[40] It was also confirmed that use of national administrative procedures in order to apply national provisions transposing Directive 2003/6 on insider dealing and market manipulation 'amounts to an implementation of EU law within the meaning of Article 51(1) of the Charter'.[41]

Nevertheless, the *Taricco* saga exemplifies a situation where the requirement of effectiveness of penalties enforced due to the EU law infringements clashes with the fundamental rights of an individual. The Court of Justice declared Article 325(1) and (2) TFEU to be directly effective and imposed the obligation on national courts to give full effect to these Treaty provisions, 'if need be by disapplying the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligation under Article 325(1) and (2) TFEU'.[42] The issue in this particular procedural configuration before the Italian court where the main proceedings took place was that disapplication of national rules on limitation periods would result in the possibility of continuing proceedings up to the imposition of a criminal penalty, which would not otherwise be imposed under the Italian law. This would allow ensuring the full effectiveness of rules on the protection of the financial interests of the EU, but at the same time, would raise considerations based on the protection of the fundamental rights of individuals.

It must be underlined that such a standpoint will would lead to the situation that Article 325(1) TFEU, requiring disapplication of a national rule on the limitation of criminal pre-trial proceedings or court proceedings, would possibly result in determining the criminal liability of the accused. Such a result would be contrary to the well-established case law of the CJEU, in which the direct effect of a directive's provision must be excluded if it could lead to establishing criminal liability or aggrava-

39 *Scialdone*..., *op. cit.*, paras 53–60.

40 *Fransson*..., *op. cit.*, para. 27, confirmed in *Menci*..., *op. cit.*, para. 21; *Kolev*..., *op. cit.*, para. 68.

41 *Garlsson*..., *op. cit.*, para. 23.

42 *Taricco*..., *op. cit.*, paras 52 and 58; *M.A.S.*..., *op. cit.*, para. 39; *Kolev*..., *op. cit.*, paras 64 and 76; *Dzivev*..., *op. cit.*, para. 32; criticised in regard of Article 325(1) TFEU, which was assessed as lacking the traditional requirements for the direct effect; F. Viganò, *Melloni* Overruled? Considerations on the '*Taricco II*' Judgment of the Court of Justice, 'New Journal of European Criminal Law' 2018, vol. 9, no. 1, p. 19.

tion of such liability.[43] However, R. Sicurella argues that such exclusion of detrimental consequences for an individual refers only to secondary legislation and is the consequence of the lack of the EU competence in criminal law (at the time these rulings were delivered). In contrast, in the case of treaty provisions, such detrimental effects could not be precluded, because they are adopted via national law.[44]

The CJEU upheld in *Taricco* that when a national court decides to disapply national provisions on the limitation period in criminal proceedings, it is under an obligation to ensure that the fundamental rights of the person concerned are respected.[45] This is an important conclusion, as it imposes an obligation on the national court to balance the effectiveness of EU law and the protection of the fundamental rights of the interested person. In response to parties in the proceedings, the Court considered Article 49 of the Charter of Fundamental Rights, guaranteeing the principles of legality and proportionality of criminal offences and penalties, and concluded that disapplication of national law would not infringe the rights of the accused.[46]

The exercise of balancing between effectiveness and fundamental rights appeared to be more sophisticated. The Italian Constitutional Court explained in questions referred to the CJEU in *M.A.S.* that the requirement to disapply national rules on limitation periods in criminal proceedings is substantive in nature and as a consequence falls within the scope of the principle of legality (Article 25 of the Italian Constitution). This may be considered incompatible with the 'overriding principles of the Italian constitutional order and with observance of the inalienable rights of the individual' and in particular with 'the principle that offences and penalties must be defined by law, which requires that rules of criminal law are precisely determined and cannot be retroactive'.[47]

The response of the CJEU expressed in the *M.A.S.* judgment has been extensively commented on and interpreted in the academic literature, in particular from the perspective of the constitutional implications for the EU and the Member States. For the purposes of this article, it seems important to note that the Court confirmed that it is for the national legislature to amend national legislation when necessary, in order to ensure that procedural rules conform with the requirements of effectiveness on the one hand and of fundamental rights protection on the other.[48] Nevertheless,

43 Judgment of the CJEU of 8 October 1987, *Kolpinghuis Nijmegen*, C-80/86, EU:C:1987:431, in the context of EU directives; judgment of the CJEU of 7 January 2004, *X*, C-60/02, EU:C:2004:10, in the context of EU regulation.

44 R. Sicurella, Effectiveness of EU Law *and* Protection of Fundamental Rights: The Questions Settled and the New Challenges after the ECJ Decision in the *M.A.S. and M.B.* Case (C-42/17), 'New Journal of European Criminal Law' 2018, vol. 9, no. 1, p. 26.

45 *Taricco*..., *op. cit.*, para. 53.

46 *Ibidem*, para. 55.

47 *M.A.S.*..., *op. cit.*, para. 13.

48 *Ibidem*, para. 41; *Kolev*..., *op. cit.*, para. 65; *Dzivev*..., *op. cit.*, para. 31.

the Court did not abandon the duty of national courts to disapply national provisions and strived to allow the Italian court to apply the relevant constitutional domestic standard. While confirming that disapplication of national rules on limitation periods does not, in principle, infringe the principle that offences and penalties must be defined by law, the Court admitted that the protection of the EU's financial interests by the imposition of criminal penalties falls within the shared competence of the EU and the Member States.[49] Moreover, the Court reasoned that limitation rules at the time were not harmonised under EU law.[50] It was also recalled that as long as the rules were not harmonised, 'the national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter […] and the primacy, unity and effectiveness of EU law are not thereby compromised'.[51] It seems that balancing EU law effectiveness (the imposition of penalties for infringements of EU law) and the fundamental rights of the interested persons (the accused) will follow exactly the reasoning of both the *Fransson* and the *Melloni* rulings. Member States enjoy more discretion to apply their own constitutional standard of protection when the harmonisation of EU law has not been put into effect (as in *Fransson*, *Taricco* and *M.A.S.*). Such discretion is more and more restricted when EU law establishes common standards of protection, such as the non-execution of the European arrest warrant in *Melloni* and, now, rules on limitation periods established in the PFI Directive. Still, it is worth noticing that the Court of Justice in *M.A.S.* delivered elaborate reasoning to persuade the national court that the domestic (constitutional), conventional (ECHR) and EU (Charter) standards are in fact complementary and not in competition.[52]

The legal reasoning was not so controversial in the *Kolev* case, where the CJEU confirmed that in the course of criminal proceedings, it is necessary to ensure respect for the right of defence, as guaranteed by Article 48(2) of the Charter. In particular, the Court invoked 'the right of an individual to be informed of the charges against him and to have access to the case materials'.[53] Similarly to the reasoning applied in *Taricco* and *M.A.S.*, the CJEU required the national court to balance the full effectiveness of Article 325(1) TFEU (by disapplication of national rules on the limitation periods of pre-trial proceedings) and the protection of the right of the accused person to have their case heard within a reasonable time.[54]

The rulings in the cases of *Menci* and *Garlsson* exemplify a different procedural configuration, where the effectiveness of EU law may clash with the protection of

49 *M.A.S...*, *op. cit.*, para. 42.
50 *Ibidem*, paras 43–44.
51 *Ibidem*, para. 47, referring to the standpoint in *Fransson...*, *op. cit.*, para. 29.
52 *M.A.S...*, *op. cit.*, paras 49–61.
53 *Kolev...*, *op. cit.*, para. 69.
54 *Ibidem*, para. 70.

fundamental rights. Whereas in *Taricco*, *M.A.S.* and *Kolev* the protection of fundamental rights had to be ensured when national law was disapplied, in *Menci* and *Garlsson* this protection had to be ensured during the application of national rules, which envisaged a duplication of criminal and administrative proceedings triggering the enforcement of a criminal penalty. Despite being explained and discussed elsewhere, for the completeness of this reasoning it is important to recall that the CJEU considered the duplication of proceedings (a criminal proceedings and an administrative proceedings leading to the imposition of a criminal penalty) as a limitation of the fundamental right guaranteed under Article 50 of the Charter.[55] Next, the Court analysed whether the requirements of such a limitation, as enshrined in Article 52(1) of the Charter, were met. It also ruled that under certain conditions, such duplication of proceedings and penalties was compliant with the Charter.[56] This leads to the conclusion that in certain situations, the effectiveness of EU law, i.e. effective combatting of VAT fraud, prevails over the fundamental rights of individuals. Such reasoning was repeated and upheld in the *Garlsson* judgment, in the context of the duplication of proceedings with the view to enforcing national provisions implementing Directive 2003/6.[57]

Conclusions

The case law of the CJEU of the last ten years in the field of broadly understood EU criminal law brings about several important conclusions concerning Member States' competence to introduce criminal law and procedure, both as regards the legislature and the national courts. Whereas it is consistently contended that Member States enjoy a certain margin of discretion as regards the choice of penalties to be established in national law for infringements of EU law (when such a choice of the nature of penalties, and their scope or severity, has not been harmonised at Union level), it is also visible that this sphere is subject to gradual limitation.

Firstly, the evolution and extensive interpretation of the concept of 'fraud' within the meaning of Article 1(1) of the PFI Convention brought under its scope certain offences in relation to VAT and VAT evasion (*Taricco*, *M.A.S.*, *Kolev*). Nevertheless, this

55 *Menci*..., *op. cit.*, para. 39; K. Baranowski , Ograniczenie stosowania zasady ne bis in idem na podstawie art. 52 ust. 1 Karty praw podstawowych Unii Europejskiej. Glosa do wyroku TS z dnia 20 marca 2018 r., C-524/15, 'Europejski Przegląd Sądowy' 2020, no. 2, pp. 33–46.

56 *Ibidem*, para. 63.

57 *Garlsson*..., *op. cit.*, para. 41 (on the existence of the limitation of rights guaranteed by Article 50 of the Charter), paras 55–56 (on requirements). For further reading, see G. Lo Schiavo, The Principle of *Ne Bis in Idem* and the Application of Criminal Sanctions: Of Scope and Restrictions, 'European Constitutional Law Review' 2018, vol. 14, no. 3, pp. 644–663; M. Szwarc, Effectiveness of EU Law and Protection of Fundamental Rights: In Search of Balance in the Context of the *Ne Bis in Idem* Principle, 'Studia Prawnicze' 2019, no. 4, pp. 37–58.

judicial evolution took place in parallel with the discussion concerning the proposal for the PFI Directive, which to some extent harmonised the definition of 'fraud' in relation to VAT.

Secondly, and even more importantly, it is justified to conclude that EU law may affect not only the choice of penalties (administrative, criminal or both), but also national criminal procedure, such as time limits before the court (*Taricco*, *M.A.S.*) or pre-trial proceedings (*Kolev*). The impact stems from the requirements that the enforcement of EU rules is effective, and so must be the penalties and the procedure for their imposition. Such an impact has been upheld by the CJEU in the field of the protection of the financial interests of the EU. Still, the spillover effect, in terms of other EU policies or other aspects of criminal procedure, cannot be excluded.

Thirdly, the CJEU confirmed that in the case of conflict between the EU requirement of effective and dissuasive penalties and the national rules of criminal law or procedure, the national court is under an obligation to disapply such national rules. As a consequence, this provoked doubts about whether such disapplication would not amount to disregarding the fundamental rights of the accused, such as the principle of legality (*Taricco*, *M.A.S.*) or respect of their rights of defence (*Kolev*). In general, it is clear that a national court adjudicating in a particular case must, while deciding on the disapplication of national provision(s), also respect the fundamental rights of the accused. This is an exercise in balancing the effectiveness of EU law (which requires disapplication of national rules which restrict such effectiveness) and the fundamental rights of an individual (which require the national court to apply national rules, otherwise these rights will not be protected). The search for balance is perfectly visible in cases such as *Menci* and *Garlsson*. The *Taricco* and *M.A.S.* cases confirm that EU law imposes the obligation on national courts to balance these two aspects. What is still discussed is the issue of which sources could inspire a national court to reconstruct the standard of protection. In *M.A.S.* and *Kolev*, the CJEU strived to reconstruct this standard from the EU and ECHR acquis, while leaving the national court some margin of discretion in order to apply its national standard. The discussion seems to be directed to making the possibility of applying a national standard of protection dependent on the degree of harmonisation of the protection under EU law.

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