Provisional text

OPINION OF ADVOCATE GENERAL
BOT
delivered on 18 July 2017 (1)

Case C-42/17

Criminal proceedings
against
M.A.S.,
M.B.

(Request for a preliminary ruling from the Corte costituzionale (Constitutional Court, Italy))

(Reference for a preliminary ruling — Protection of the financial interests of the European Union — Article 325 TFEU — Criminal proceedings concerning value added tax (VAT) offences — Potential effect on the financial interests of the European Union — National legislation providing for absolute limitation periods capable of entailing the impunity of the offences — Judgment of 8 September 2015, Taricco and Others (C-105/14, EU:C:2015:555) — Principles of equivalence and effectiveness — Unacceptability of the legislation at issue — Obligation of the national court to disapply that legislation where it would prevent the imposition of effective and dissuasive penalties 'in a significant number of cases of serious fraud' affecting the financial interests of the Union — Immediate application of that obligation to pending proceedings in application of the principle tempus regit actum — Compatibility with the principle that offences and penalties must be defined by law — Scope and rank of that principle in the legal order of the Member State concerned — Inclusion of the limitation rules in the scope of that principle — Substantive nature of those rules — Article 4(2) TEU — Respect for the national identity of the Member States concerned — Charter of Fundamental Rights of the European Union — Articles 49 and 53)

I. Introduction

1. In the context of the present reference for a preliminary ruling, the Corte costituzionale (Constitutional Court, Italy) asks the Court about the extent to which the national courts are required to fulfil the obligation, identified by the Court in the judgment of 8 September 2015, Taricco and

Others, (2) to disapply, in pending criminal proceedings, the rules in the last subparagraph of Article 160 and the second subparagraph of Article 161 of the codice penale ('the Penal Code').

2. In that judgment, and following the judgment of 26 February 2013, Åkerberg Fransson, (3) the Court asserted that fraud in relation to value added tax (VAT) is liable to constitute serious fraud affecting the financial interests of the European Union.

3. The Court observed that the provisions laid down in the Penal Code, by introducing, in particular, in the event of interruption of the limitation period, the rule that the limitation period may in no case be extended by more than a quarter of its initial duration, have the effect, given the complexity and duration of the criminal proceedings initiated in respect of serious fraud in relation to VAT, of *de facto* impunity for such fraud, as those offences are usually time-barred before the criminal penalty laid down by law can be imposed by a judicial decision which has become final. The Court held that such a situation has an adverse effect on the fulfilment of Member States' obligations under Article 325(1) and (2) TFEU.

4. In order to ensure the effectiveness of the fight against fraud affecting the financial interests of the Union, the Court therefore asked the national courts, if need be, to disapply those provisions.

5. In the context of the present reference for a preliminary ruling, the Corte costituzionale (Constitutional Court) maintains that such an obligation is capable of infringing an overriding principle of its Constitutional order, the principle that offences and penalties must be defined by law (nullum crimen, nulla poena sine lege), laid down in Article 25(2) of the Costituzione (Constitution, 'the Italian Constitution'), and thus of affecting the constitutional identity of the Italian Republic.

6. The Corte costituzionale (Constitutional Court) states that the principle that offences and punishments must be defined by law, as interpreted in the Italian legal order, guarantees a higher level of protection than that resulting from the interpretation of Article 49 of the Charter of Fundamental Rights of the European Union, (4) in so far as it extends to the determination of the limitation periods applicable to the offence and therefore precludes the national courts from applying to pending proceedings a longer limitation period than that envisaged at the time when the offence was committed (the principle that a more severe criminal law must not be retroactive).

7. However, the Corte costituzionale (Constitutional Court) states that the obligation identified by the Court in the judgment in *Taricco and Others* requires the Italian criminal courts to apply to offences committed before the publication of that judgment, on 8 September 2015, which are not yet time-barred, limitation periods which are longer than those initially envisaged on the date on which those offences were committed. It observes, moreover, that that obligation has no precise legal basis and, furthermore, is based on criteria which it deems vague. That obligation therefore confers on the national courts a discretion which may entail a risk of arbitrariness and which, moreover, exceeds the limit of their judicial function.

8. In so far as the Italian Constitution guarantees a higher level of protection of fundamental rights than that recognised in EU law, the Corte costituzionale (Constitutional Court) maintains that Article 4(2) TEU and Article 53 of the Charter therefore allow the national courts to refuse to fulfil the obligation identified by the Court in the judgment in *Taricco and Others*.

9. By the three questions which it has referred for a preliminary ruling, the Corte costituzionale (Constitutional Court) therefore asks the Court whether Article 325 TFEU, as interpreted by the Court

in the judgment in *Taricco and Others*, requires the national courts to disapply the rules on limitation at issue even if (i) those rules come, in the legal order of the Member State concerned, within the principle that offences and penalties must be defined by law and, as such, within substantive criminal law; (ii) whether such an obligation lacks a sufficiently precise legal basis; and, last, (iii) whether that obligation is contrary to the overriding principles of the Italian constitutional order or to the inalienable rights of the individual as recognised by the Italian Constitution.

10. In its order for reference, the Corte costituzionale (Constitutional Court) not only submits those questions for a preliminary ruling to the Court, but also advises the Court on the answer that should be given in order to avoid initiating what is known as the 'counter-limits' procedure. (5) In that regard, the order for reference reminds me of the question for a preliminary ruling submitted by the Bundesverfassungsgericht (Federal Constitutional Court, Germany) in the case that gave rise to the judgment of 16 June 2015, Gauweiler and Others. (6) The Corte costituzionale (Constitutional Court) states, in effect, in very clear terms, that if the Court should maintain its interpretation of Article 325 TFEU in the same terms as those employed in the judgment in *Taricco and Others*, it might then declare the national law ratifying and implementing the Treaty of Lisbon — in so far as it ratifies and implements Article 325 TFEU — contrary to the overriding principles of the Italian Republic's constitutional order, thus releasing the national court from their obligation to comply with the judgment in *Taricco and Others*.

11. In this Opinion, I shall set out the reasons why there is no question of undermining the very principle identified by the Court in that judgment, namely the principle that the national court is required, if need be, to disapply the rules contained in the final subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code in order to ensure an effective and dissuasive penalty in respect of fraud affecting the financial interests of the Union.

12. First, I shall explain that the overly restrictive interpretation of the concept of interruption of the limitation period and of the acts that interrupt it that results from the provisions in question, when read together, in that it deprives the prosecution authorities and the judicial authorities of a reasonable time to complete the proceedings initiated against VAT fraud, is manifestly incompatible with the requirement of a penalty in respect of acts affecting the financial interests of the Union, nor does it have the necessary dissuasive effect to prevent the commission of further offences, and it thus infringes the substantive aspect and also what I might describe as the 'procedural' aspect of Article 325 TFEU.

13. In that regard, I shall explain that, having regard to the wording of Article 49 of the Charter and to the case-law established by the European Court of Human Rights concerning the scope of the principle that offences and penalties must be defined by law, enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, (7) there is nothing to prevent the national court, when fulfilling its obligations under EU law, from disapplying the provisions laid down in the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code to the proceedings pending before it.

14. In order to do so I shall clarify the criteria on the basis of which the national court is bound by such an obligation. Like the Corte costituzionale (Constitutional Court), which is in agreement with me on this point, I consider that, in order to ensure the necessary foreseeability, both in criminal proceedings and in substantive criminal law, the terms of the judgment in *Taricco and Others* must be clarified. In that regard, in place of the findings made in that judgment, I shall propose a criterion based solely on the nature of the offence.

15. I shall set out, last, the reasons why in my view the construction of an area of freedom, security and justices requires that the prevention of offences affecting the financial interests of the Union be accompanied nowadays by a harmonisation of the rules on limitation periods in the Union and, in particular, of the rules governing the interruption of limitation periods.

16. Second, and along the lines of the principles identified by the Court in the judgment of 26 February 2013, Melloni, (8) I shall explain that Article 53 of the Charter does not in my view allow the judicial authorities of a Member State to refuse to fulfil the obligation identified by the Court in the judgment in *Taricco and Others* on the ground that that obligation does not meet the higher standard of protection of fundamental rights guaranteed by the Constitution of that State.

17. Third, and last, I shall set out the reasons why the immediate application of a longer limitation period that would result from the performance of that obligation is not in my view of such a kind as to affect the national identity of the Italian Republic and thus to infringe Article 4(2) TEU.

II. **Legal context**

A. **EU law**

1. *The EU Treaty*

18. Article 4(2) TEU provides that the Union is to respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional. Under paragraph 3 of that article, the Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. The Member States are thus to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

19. Pursuant to Article 325 TFEU, the Union and the Member States are to combat ‘fraud and any other illegal activities affecting the financial interests of the Union’ and to afford ‘effective protection’ to those interests.

2. *The Charter*

20. The second paragraph of Article 47 of the Charter provides:

‘Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. …’

21. Article 49 of the Charter, entitled ‘Principles of legality and proportionality of criminal offences and penalties, provides in paragraph 1:

‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

22. According to Article 52(3) of the Charter:

In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the

meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

23. Article 53 of the Charter states:

'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR] and by the Member States' constitutions.'

B. **Italian law**

1. *The Italian Constitution*

24. The second paragraph of Article 25 of the Italian Constitution provides that 'no person may be punished except under a law already in force before the offence was committed'.

2. *The provisions of the Penal Code relating to the limitation periods for offences*

25. Limitation is one of the grounds on which criminal offences may be extinguished (Book I, Title VI, Chapter I of the Penal Code). Its regulation was significantly altered by the Legge No 251, 5 dicembre 2005 (Law No 251 of 5 December 2005). (9)

26. In accordance with Article 157(1) of the Penal Code, an offence is to be time-barred after a period equivalent to the duration of the maximum penalty provided for by law has elapsed, provided that that period is not less than six years for more serious offences and four years for minor offences.

27. Article 158 of the Penal Code sets the starting point of the limitation period as follows:

'Time shall start to run, where an offence has been committed, from the day on which it was committed; in the case of an attempted offence, from the day on which the offender's activity ceased; in the case of a continuous offence, from the day on which the offence ceased to be continuous.

…'

28. In the words of Article 159 of that Code, on the rules concerning the suspension of the limitation period:

'The limitation period shall be suspended in all cases where the suspension of the proceedings, of the trial or of the period prescribed for pre-trial detention is provided for by a special legislative provision, and also in the following cases:

(1) where leave is granted to initiate proceedings;

(2) where the case is transferred to another court;

(3) where the proceedings or the trial is suspended because the parties or the lawyers are unable to attend, or upon application by the accused or his lawyer …

…

Time shall begin to run anew from the day on which the reason for its suspension ceases to exist.

…’

29. Article 160 of the Penal Code, which governs interruption of the limitation period, provides:

‘The limitation period shall be interrupted by the judgment or order convicting the accused.

An order applying personal interim measures … and an order fixing the preliminary hearing … shall also interrupt the limitation period.

Where the limitation period is interrupted, it shall start to run anew from the day of the interruption. Where there is more than one interruption, the limitation period shall start to run from the last such interruption; however, the periods laid down in Article 157 may not, in any circumstances, be extended beyond the periods referred to in the second subparagraph of Article 161 [of the Penal Code], except in respect of the offences referred to in Article 51(3a) and (3c) of the [codice di procedura penale (Code of Criminal Procedure)].’

30. In the words of Article 161 of the Penal Code, concerning the effects of suspension and interruption:

‘The suspension and interruption of the limitation period shall take effect for all those who committed the offence.

With the exception of the prosecution of offences provided for in Article 51(3a) and (3c) of the Code of Criminal Procedure, an interruption of the limitation period can in no circumstances lead to an increase of that period by more than one quarter of the maximum prescribed period ...’.

III. **The facts**

A. **The judgment in** *Taricco and Others*

31. The request for a preliminary ruling submitted by the Tribunale di Cuneo (District Court, Cuneo, Italy) concerned the interpretation of Articles 101, 107 and 119 TFEU and Article 158 of Directive 2006/112/EC (10) in the light of the national rules on limitation periods for criminal offences, such as that laid down in the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code.

32. That request was submitted in the context of criminal proceedings brought against a number of individuals accused of having formed an organised a conspiracy in order to commit various offences in relation to VAT.

33. In that judgment, which was delivered on 8 September 2015, the Court ruled that a national rule such as that at issue, which provided, at the material time in the main proceedings, that the interruption of criminal proceedings concerning serious fraud in relation to VAT has the effect of extending the limitation period by only a quarter of its initial duration, is liable to have an adverse effect on fulfilment of the Member States’ obligations under Article 325(1) and (2) TFEU if that 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 Union, or 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 Union.

34. In fact, the Court found that the provisions at issue, by introducing, in the event of interruption of the limitation period, the rule that the limitation period may in no case be extended by more than one quarter of its initial duration, have the effect, given the complexity and duration of the criminal proceedings leading to the adoption of a final judgment, of neutralising the temporal effect of an event interrupting the limitation period. The Court observed that, for that reason, in a considerable number of cases the commission of serious fraud escapes criminal punishment.

35. The Court therefore considered that, in order to ensure that Article 325(1) and (2) TFEU is given full effect, the national court is required, if need be, to disapply the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under that provision.

B. The questions of constitutionality addressed to the Corte costituzionale (Constitutional Court) by the Corte suprema di cassazione (Court of Cassation, Italy) and by the Corte d'appello di Milano (Court of Appeal, Milan, Italy)

36. The Corte suprema di cassazione (Court of Cassation) and the Corte d'appello di Milano (Court of Appeal, Milan), before which proceedings concerning serious fraud in relation to VAT were pending, considered that the non-application of the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code to situations predating the publication of the judgment in *Taricco and Others* would entail the retroactive imposition of a harsher regime of dealing with offences, which would be incompatible with the principle enshrined in Article 25(2) of the Italian Constitution that offences and penalties must be defined by law.

37. They therefore addressed to the Corte costituzionale (Constitutional Court) a question of constitutionality referring to Article 2 of the Legge No 130, 2 agosto 2008 (Law No 130/2008 of 2 August 2008), (11) in that it authorises the ratification of the Treaty of Lisbon and the implementation, in particular, of Article 325(1) and (2) TFEU, on the basis of which the Court identified the obligation in question. (12)

IV. The order for reference

A. The scope and rank in the Italian legal order of the principle that offences and penalties must be defined by law

38. In its order for reference, the Corte costituzionale (Constitutional Court) emphasises, in the first place, that in the Italian legal order the principle that offences and penalties must be defined by law precludes the national courts from disapplying the provisions laid down in the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code to pending proceedings.

39. In fact, the Corte costituzionale (Constitutional Court) points out that, unlike other legal systems in which the rules on limitation in criminal matters are characterised as procedural rules, (13) in the Italian legal order those rules are substantive rules, forming an integral part of the principle that offences and penalties must be defined by law, and they cannot therefore be applied retroactively to the detriment of the accused.

40. The Corte costituzionale (Constitutional Court) observes that Article 25(2) of the Italian Constitution therefore confers on the principle that offences and penalties must be defined by law a

wider scope than that recognised by the sources of EU law, since it is not limited solely to the definition of the offence and the applicable penalties, but extends to all material aspects relating to the penalty and, in particular, to the determination of the limitation rules applicable to the offence. In accordance with that principle, the penalty incurred and the limitation period must therefore be defined in clear, precise and binding terms in a law that is in force at the time when the offence is committed. According to the referring court, observance of that principle must thus allow anyone to know the criminal consequences of his conduct and preclude any arbitrariness in the application of the law.

41. In the context of the main proceedings, the Corte costituzionale (Constitutional Court) maintains that the individuals concerned could not reasonably foresee, on the basis of the legal framework in place at the material time, that EU law, and in particular Article 325 TFEU, would require the national court to disapply the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code, thus extending the applicable limitation periods. Consequently, the obligation identified by the Court in the judgment in *Taricco and Others* is contrary to the requirements referred to in Article 7 of the ECHR.

42. The Corte costituzionale (Constitutional Court) emphasises, moreover, that the principle that offences and penalties must be defined by law governs the inalienable rights of individuals and must be regarded, in all its aspects, as an overriding principle of the Italian constitutional order, which therefore prevails over the conflicting rules of EU law.

43. As regards the classification of the limitation rules in criminal matters, the Corte costituzionale (Constitutional Court) asserts that such classification is a matter not of EU law but of the constitutional tradition of each of the Member States.

44. Since the Italian legal order confers a higher standard of protection of fundamental rights than that arising from the interpretation of Article 49 of the Charter and Article 7 of the ECHR, the Corte costituzionale (Constitutional Court) adds that Article 53 of the Charter therefore authorises the national courts to disapply the obligation laid down by the Court in the judgment in *Taricco and Others*.

45. The Corte costituzionale (Constitutional Court) thus distinguishes the present case from the case that gave rise to the judgment in *Melloni*, (14) in which the application of the constitutional provisions of the Kingdom of Spain had a direct impact on the primacy of EU law, and in particular on the scope of Framework Decision 2009/299/JHA, (15) and put an end to the uniformity and unity of EU law in an area based on mutual trust between Member States.

46. In the second place, the Corte costituzionale (Constitutional Court) maintains that the obligation identified by the Court in the judgment in *Taricco and Others* is based on criteria which are vague and contrary to the principle of legal certainty, in so far as the national court is unable to define unequivocally the situations in which the fraud affecting the financial interests of the Union may be characterised as ‘serious’ and the cases in which the application of the limitation rules at issue has the effect of conferring impunity in a ‘significant number of cases’. Such criteria therefore give rise to a significant risk of arbitrariness.

47. In the third place, the referring court considers that the rules laid down by the Court in the judgment in *Taricco and Others* are incompatible with the principles governing the separation of powers.

48. The referring court submits, in that regard, that limitation periods and the method whereby they

are calculated must be defined by the national legislature by means of precise provisions and that it is therefore not for the judicial authorities to decide, case by case, on their content. The Corte costituzionale (Constitutional Court) considers that the principles laid down in the judgment in *Taricco and Others* do not make it possible to fetter the discretion of the judicial authorities, which are therefore free to disregard the legislative provisions at issue whence they consider that those provisions constitute an obstacle to combating the offence.

B. **The constitutional identity of the Italian Republic**

49. In its order for reference, the Corte costituzionale (Constitutional Court) maintains, last, that Article 4(2) TEU allows the national court to disregard the obligation laid down by the Court in the judgment in *Taricco and Others*, in so far as that obligation breaches an overriding principle of its constitutional order and, consequently, is capable of affecting the national, and in particular the constitutional, identity of the Italian Republic.

50. The referring court emphasises that EU law and the Court's interpretation thereof cannot be regarded as requiring the Member State to abandon the overriding principles of its constitutional order, which define its national identity. Thus, the execution of a judgment of the Court is always dependent on the compatibility of that judgment with the constitutional order of the Member State concerned, which falls to be assessed by the national authorities and, in Italy, by the Corte costituzionale (Constitutional Court).

V. **The questions for a preliminary ruling**

51. In the light of those considerations, the Corte costituzionale (Constitutional Court) decided to stay proceedings on the constitutionality of Article 2 of Law No 130 of 2 August 2008 on the ratification and implementation of the Treaty of Lisbon and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 325(1) and (2) of the Treaty on the Functioning of the European Union to be interpreted as requiring the criminal court to disapply national legislation on limitation periods which precludes, in a significant number of cases, the punishment of serious fraud affecting the financial interests of the European Union, or which imposes shorter limitation periods for fraud affecting the financial interests of the European Union than for fraud affecting the financial interests of the State, even where there is no sufficiently precise legal basis for such disapplication?

(2) Is Article 325(1) and (2) of the Treaty on the Functioning of the European Union to be interpreted as requiring the criminal court to disapply national legislation on limitation periods which precludes, in a significant number of cases, the punishment of serious fraud affecting the financial interests of the European Union, or which imposes shorter limitation periods for fraud affecting the financial interests of the European Union than for fraud affecting the financial interests of the State, even where, in the legal system of the Member State concerned, limitation periods form part of substantive criminal law and are subject to the principle of the legality of criminal proceedings?

(3) Is the judgment [in Taricco and Others] to be interpreted as requiring the criminal court to disapply national legislation on limitation periods which precludes, in a significant number of cases, the punishment of serious fraud affecting the financial interests of the European Union, or which imposes shorter limitation periods for fraud affecting the financial interests of the European Union than for fraud affecting the financial interests of the State, even where such disapplication is at variance with the overriding principles of the

constitution of the Member State concerned or with the inalienable rights of the individual conferred by the Constitution of the Member State?'

VI. **Preliminary observations**

52. I consider it appropriate, before addressing the questions submitted by the Corte costituzionale (Constitutional Court), to make a number of preliminary observations concerning, first of all, the context in which the judgment in *Taricco and Others* was delivered, and then the approach taken by the parties and by the European Commission at the hearing.

53. First, I would point out that the impact of the limitation rules provided for in the Penal Code on the effectiveness of the judicial proceedings, whether they are brought because of a serious offence or a minor offence against the person or whether they fall within the framework of economic and financial crime, is not a novel issue. It has already been the subject of numerous reports and recommendations addressed to the Italian Republic in which criticism was directed, inter alia, at the rules and calculation methods applicable to limitation and, in particular, the restrictive interpretation of the reasons for interrupting the limitation period and the existence of an absolute limitation period which can be neither interrupted nor suspended.

54. The difficulties highlighted by the Court in the judgment in *Taricco and Others* as regards the impact of the limitation rules laid down in the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code on the effectiveness of the prevention of VAT fraud are not new.

55. At the national level, first of all, the judicial authorities alerted the national legislature at a very early stage that the limitation periods in force did not allow a final judicial decision to be obtained in the majority of serious and complex corruption cases, (16) which led to the creation of a working group (ad hoc committee) to study the existing possibilities of a reform of the limitation rules, whose proceedings were delivered on 23 April 2013. (17)

56. At EU level, next, the European Commission devoted a special study in 2014 to the consequences of the Italian limitation rules for the effective fight against corruption. (18) It thus observed that 'the issue of the statute of limitations has been a constant serious concern [in that Member State]' and emphasised that 'the prescription period applicable under Italian law, in combination with lengthy court proceedings, the rules and calculation methods applicable to [the] statute of limitations, the lack of flexibility regarding the grounds for suspension and interruption and the existence of an absolute time-bar that cannot be interrupted or suspended led and continue to lead to the dismissal of a considerable number of cases'. (19)

57. In line with the recommendations addressed to the Italian Republic by the Council on 9 July 2013, (20) the Commission then requested that Member State to review the existing rules governing limitation periods in such a way as to enhance the legal framework of the prevention of corruption.

58. At the level of the Council of Europe, at present, the European Court of Human Rights, in the judgments in *Alikaj and others v. Italy* (21) and *Cestaro v. Italy*, (22) also held that the mechanism governing limitation, as provided for in Articles 157 to 161 of the Penal Code, is apt to have effects contrary to those required by the protection of the fundamental rights of the ECHR, under their criminal head, since that mechanism results in serious offences going unpunished. It then deemed that legislative framework inadequate (23) for preventing and punishing offences against life and acts of torture and ill-

treatment.

59. Thus, in the judgment in *Cestaro v. Italy*, (24) delivered only a few months before the judgment in Taricco and Others, the Italian Republic was found to have committed a violation of Article 3 of the ECHR not only under its substantive head but also under its procedural head; the European Court of Human Rights pointed to the existence of a 'structural problem', namely the 'inadequacy' of the limitation rules laid down in the criminal code to punish the acts of torture and to ensure a sufficiently dissuasive effect. (25) After observing that those limitation rules may in practice prevent those responsible from being tried and punished, in spite of all the effects expended by the prosecuting authorities and the trial courts, the European Court of Human Rights held that the Italian criminal legislation applied to offences of that type was 'inadequate' in terms of the requirement to punish the offences in question and devoid of any dissuasive effect capable of preventing similar future offences. The European Court of Human Rights then invited the Italian Republic to introduce into its legal system legal mechanisms capable of imposing appropriate penalties on those responsible for those infringements and of preventing them from benefiting from measures incompatible with its case-law, as the manner in which the limitation rules are applied must be compatible with the requirements of the ECHR. (26)

60. On a more political level at present, the Council of Europe Group of States against Corruption (GRECO) has observed, moreover, in its Evaluation Reports of the First (June 2008), Second (October 2008) and Third (October 2011) Evaluation Rounds on the Italian Republic, (27) that although the length of the statute of limitations on paper does not significantly deviate from that in other GRECO Member States, the way in which the limitation period is calculated and the role that other factors play in the investigation of corruption offences (for example, the complex nature of corruption investigations, the lapse of time that may occur between the date on which the offence is committed and the day on which it is reported to law enforcement authorities, the available appeal channels, the delays and overload in criminal justice), significantly undermine the sanctioning regime in force in Italy.

61. Last, at international level, the Organisation for Economic Cooperation and Development (OECD) has also recommended, in the framework of its assessments on the implementation of the anti-bribery convention, (28) that the Italian Republic should extend the duration of the absolute limitation period provided for in the Penal Code, in such a way as to ensure the effectiveness of prosecutions for transnational bribery and thus comply with the requirements laid down in Article 6 of that Convention. (29) That is what the Italian Republic appears to have undertaken to do in a draft law approved by the Senato (Italian Senate) on 15 March 2017. (30)

62. Those factors seem to me to be important for a proper understanding of the national, but also European, context of which the judgment in *Taricco and Others* forms part.

63. Second, in the light of the discussion at the hearing, I consider it important to correct the unequivocal approach taken by the parties and the Commission, by referring to the specificity that constitutes the very nature of criminal law.

64. Criminal law is a punitive law which is related to the very concept of public order and, in this instance, the public order of the European Union. Criminal law must therefore strike a balance between respect for the public order, the equality of citizens before the law when they commit offences and the guarantee of the procedural rights of the persons prosecuted. In no case can reliance on those guarantees by one of the parties, whether prosecutor or accused, lead to a subjective right either to punish in an arbitrary manner or to escape the normal and considered consequence of the unlawful acts committed.

VII. **Analysis**

65. In the context of its first two questions, the Corte costituzionale (Constitutional Court) questions the compatibility of the principles and criteria identified by the Court in the judgment in *Taricco and Others* with the principle that offences and penalties must be defined by law. In the Italian legal order, that principle requires that the limitation period be determined precisely in a provision in force at the time when the offences were committed and cannot in any circumstances be applied retroactively where such application is detrimental to the accused.

66. The Italian Constitution thus guarantees that every individual has the right to know, before he commits a wrongful act, whether that act is an offence, the penalty and the limitation period applicable to it, and none of those elements can be subsequently altered to the detriment of the person concerned.

67. The Corte costituzionale (Constitutional Court) maintains that, by requiring the national court to disapply the provisions laid down in the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code in proceedings pending before it, thus extending the applicable limitation period, the obligation identified by the Court in the judgment in *Taricco and Others* is at variance with that principle.

68. In support of its approach, the Corte costituzionale (Constitutional Court) contends that the provisions at issue were adopted with the aim of ensuring respect for the reasonable length of the proceedings and for the rights of the accused. In that regard, it must be acknowledged that the judgment in *Taricco and Others* does not in itself provide an answer to the referring court's criticisms.

69. Nonetheless, it would be unfair to be too critical of the Court for not having provided such an answer, in so far as neither the Tribunale di Cuneo (District Court, Cuneo), which made the first reference for a preliminary ruling, nor the Italian Government, in its written and oral observations in the case that gave rise to the judgment in *Taricco and Others*, referred to the particular features linked with the nature and the rules governing the limitation regime in the Italian legal order, which is nonetheless at the heart of the reference for a preliminary ruling, and which have now been raised by the Corte costituzionale (Constitutional Court).

70. It is therefore in response to this further reference by the Italian courts that I shall propose that the Court should supplement its first answer.

71. It is not a matter of calling in question the actual principle identified by the court in the judgment in *Taricco and Others*, namely the principle that the national court is required to disapply the rules in the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code in order to ensure an effective penalty that will deter fraud affecting the financial interests of the Union, but rather of clarifying the criteria on the basis of which that obligation must be fulfilled.

A. **The principle identified by the Court in the judgment in** *Taricco and Others*

72. The position expressed by the Corte costituzionale (Constitutional Court) is built around concepts the elements of which, as defined by that court, conflict with the principle of the effectiveness of EU law and are therefore incompatible with that principle.

73. Before I embark on my analysis of the questions referred, it is therefore appropriate to identify very precisely the points which lead to that outcome.

74. As regards, first, the principle that offences and penalties must be defined by law, also known as the principle of criminal legality or penal legality, it is one of the essential principles of modern criminal law. The principle was identified in particular by the Italian criminologist Cesare Beccaria, who referred in his famous treatise *On crimes and punishments* (31) to the works of Montesquieu. (32)

75. It is traditionally accepted that, in accordance with that principle, no one can be accused of having committed an offence and no penalty can be imposed unless both offence and penalty were provided for and defined by the law before the acts took place.

76. In the context of the present case, that principle is problematic only because the Italian legislation adds to that definition by Beccaria that the limitation rules form part of that principle and that the offender therefore has a vested right that the entire proceedings should take place according to the limitation rules as they existed on the day on which he committed the offence.

77. As regards, second, limitation, it is not the principle of limitation but the rules applicable to it that are incompatible with EU law in this instance, again because of the specific features introduced by the Italian legislation, considered in the interplay between the two procedures consisting in suspension and interruption of the limitation period.

78. As regards interruption of the limitation period, the provisions at issue restrict the situations in which the limitation period may be interrupted by confining such interruption to procedural measures which are few in number and, if necessary, taken at a late stage in the proceedings and which, moreover, have limited effects. Thus, where an act interrupting the limitation period takes place, it does not have the consequence of causing a new period, identical to the initial period, to run, but solely of extending that period by only a quarter of its initial duration: in addition, that extension of the limitation period cannot be suspended anew or interrupted anew and can therefore occur only once during the proceedings.

79. The combination of the provisions laid down in the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Italian Penal Code therefore has the effect of setting an absolute limit on the applicable limitation period. The limitation period therefore becomes intangible and assumes in that regard the aspect of a strict time limit, traditionally defined as the time-limit for bringing an action determined by law, the course of which, unlike a limitation period, can be neither suspended nor interrupted (33). That concept is incompatible with the very concept of limitation and the two concepts are contrasted in the literature.

80. Faced with the approach defended by the Corte costituzionale (Constitutional Court), which, in order to substantiate its approach, relies on the desire to ensure that the proceedings take place within a reasonable time, and on the guarantee of the rights of the accused, the judgment in *Taricco and Others*, as I have said, does not contain all the elements that enable that approach to be challenged.

81. It is necessary in reality to examine the source of the incompatibility between the limitation rules provided for in the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Italian Penal Code and the requirement to respect the effectiveness of EU law.

82. The law is effective only if any infringement thereof is subject to sanctions.

83. If, in order to ensure its protection, EU law requires that any infringement be subject to sanctions, any system which is intended to implement EU law which in fact leads to the absence of a sanction or to

a clear and major risk of impunity is by definition contrary to the principle of the primacy of EU law and to the principle of effectiveness on which Article 325 TFEU, in particular, is based.

84. Is that the case here?

85. My answer is in the affirmative and is based on findings relating in particular to the very nature of offences against the financial interests of the Union and, in particular, to their essentially transnational nature.

86. The investigations carried out in the context of that economic and financial crime must allow the significance of the fraud to be determined, in terms of its duration, its size and the profit which it has generated. Let us imagine the time required to investigate a VAT carousel fraud, (34) involving bogus companies spread across the territory of several Member States, joint offenders and accomplices of different nationalities, requiring technical investigations, multiple hearings and confrontations, and significant accounting and financial expertise and the use of measures of international judicial and police cooperation. During the judicial proceedings, the judicial authorities must conduct a complex criminal procedure in order to establish, while observing the guarantees of a fair trial, the individual liability borne by each of the accused and must also deal with the defence strategy adopted by lawyers and other specialist experts, which consists in spinning out the proceedings until they are time-barred.

87. In cases of that type, the deadline imposed on the investigation and trial procedure is therefore well known to be insufficient and the different reports drawn up at national and international levels effectively demonstrate the systemic nature of the powerlessness found. The risk of impunity is not attributable here to the procrastination, complacency or negligence of the judicial authorities, but to the inadequacy of the legislative framework for punishing VAT fraud, as the national legislature has established a trial period that is unreasonable, because it is too short and inviolable, and does not allow the national courts, in spite of all their efforts, to impose in respect of the offences committed the usual penalties which they attract.

88. I am perfectly aware that one of the concerns of the national legislature at the time of the amendments to the limitation rules by the ex-Cirielli Law was to combat the procedural delays often denounced by the European Court of Human Rights and thus to ensure, in the interest of the accused, that the proceedings would take place within a reasonable time.

89. Paradoxically, that amendment, inspired by the desire to ensure that judicial proceedings would take place within a reasonable time, constitutes a breach of the very concept of a ‘reasonable time’ and ultimately an obstacle to the proper administration of justice. (35)

90. In fact, in the context of Article 6(1) of the ECHR, the European Court of Human Rights defines a ‘reasonable time’ as requiring that the trial period be proportionate to the objective complexity of the case, what is at stake in the dispute and also to the attitude of the parties and the competent authorities. (36)

91. It must be stated that a strict time limit is by nature the precise opposite of that principle.

92. The right to a reasonable time is not a right to impunity and must not preclude an effective conviction for the offence.

93. Yet the strict time limit may have that perverse effect.

94. In that regard, I believe that I should draw attention to the text of the Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, (37) which includes serious VAT fraud in its scope. Whereas the PFI Convention did not address the issue of limitation periods, Article 12 of the proposal for a PFI Directive introduces a new set of binding detailed rules concerning prescription for offences affecting the Union's budget. The Member States are thus required to ensure a limitation period.

95. While the proposal for a PFI Directive does provide for limitation periods that are extended in such a way as to allow the law enforcement agencies to take action during a period that is sufficiently long to combat offences effectively, it also establishes a maximum and absolute period for the trial.

96. I therefore cannot but express my lack of comprehension on seeing that that proposal recommends a system of limitation based on the procedural regime at issue in the present case, the effects of which are identical to the effects of the combination of the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code and which therefore seems to call for the same criticism, as in reality it entails the same dangers.

97. In fact, provisions of that type lead in reality to liability for failure to bring trials to completion being passed on to the judicial institutions. It is thus forgotten that the effectiveness of the procedures depends on the means made available to the courts and that failure to provide such means will always provide a possible loophole for the obligations arising under EU law. The risk is then that what are regarded as the most serious and most complex cases are directed towards 'short circuits' that will not ensure that an effective and dissuasive penalty is imposed in respect of the offence and, in particular, will not allow the offenders to be removed within sufficient time. Thus, with the best intentions in the world, we may well facilitate money laundering or the financing of illegal activities that are particular harmful for the Union and its citizens, whose interests will always be harmed at the end of the day.

98. While it therefore appears to me to be perfectly lawful to prescribe a limitation period which begins on the date on which the offence is committed and beyond which no prosecution can be initiated if no investigation for that purpose has been carried out by the time that period expires, it seems to me, on the other hand, to be absolutely essential that once criminal proceedings have been initiated they must be able to continue until they come to an end, each investigative act constituting an act that interrupts the limitation period and causing a new period to start to run, in its entirety, the only limit and possible reference being respect for the 'reasonable time' principle as defined by the European Court of Human Rights.

99. That reference to the 'reasonable time' principle is to my mind a requirement for all Member States.

100. In fact, in the context of the protection of the financial interests of the Union, those Member States implement EU law and are therefore bound by the provisions of the Charter. As Article 47 of the Charter and Article 6(1) of the ECHR contain provisions drafted in identical terms as regards the principle that the proceedings must take place within a reasonable time, the Member States are bound by the definition provided by the European Court of Human Rights, which was recently stated again.

101. Consequently, it seems to me that the Court should consider that the concept of interruption of the limitation period is an autonomous concept of EU law and should define it as meaning that each investigative act and each act which necessarily extends it interrupts the limitation period, that act then causing a new period, identical to the initial period, to begin, while the limitation period which has

already elapsed will then be cancelled.

102. Only that type of definition will make it possible to ensure the prosecution of offences of that nature.

103. Although the negotiations for the adoption of the proposal for a PFI Directive and the establishment of the European Public Prosecutor's Office seek to arrive at a common definition of fraud and of the level of applicable penalties, such harmonisation cannot lead to satisfactory results unless it is accompanied and supported by effective measures in relation to investigations and prosecutions and, in particular, by a uniform limitation regime throughout the European Union.

104. Were that not the case, the European Public Prosecutor's Office (38) would in reality be still-born, as would the proper functioning of the area of freedom, security and justice.

105. In effect, how can it be accepted, within the single area that the area of freedom, security and justice is designed to be, that the same offence against the financial interests of the Union should be time-barred in one Member State when it can lead to a final conviction in the State next door?

106. Because such a situation has already come about, it is therefore essential to arrive at a harmonisation of the limitation rules in order to ensure a protection of the financial interests of the Union that is equivalent and uniform throughout the Member States and thus to ensure that offenders do not enjoy virtual impunity by taking advantage of criminal laws that are most favourable to their interests, which would lead to the risk of *forum shopping*. (39)

107. For a number of years, moreover, the Commission has consistently pointed to the shortcomings in the present system, characterised by a legal framework that is extremely fragmented owing to the diversity of the traditions and the legal systems, to the ratification or non-ratification of the PIF Convention (40) and to the political priorities adopted by the Member States in criminal matters. (41) Having regard to the mobility of offenders and the profits to be made from illegal activities affecting the financial interests of the Union, and to the complexity of the cross-border investigations which that entails, the Commission considers that the national limitation periods applicable in such matters are unacceptable in this day and age. (42)

108. In the light of all of those factors, and following the principle identified by the Court in the judgment in *Taricco and Others*, I consider that Article 325(1) and (2) TFEU must be interpreted as meaning that it requires the national court, acting as an ordinary court in matters of EU law, to disapply the absolute limitation period resulting from the combined provisions of the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code where such a rule prevents the imposition of effective and dissuasive penalties in a case of serious fraud affecting the financial interests of the European Union or lays down longer limitation periods for cases of serious fraud affecting the financial interests of the Member State concerned than for those affecting the financial interests of the Union.

109. I also consider that the concept of interruption of the limitation period must be considered to constitute an autonomous concept of EU law and must be defined as meaning that each investigative act and any act necessarily extending it interrupts the limitation period, that act then causing a new period, identical to the initial period, to run, while the limitation period which has already elapsed will then be cancelled.

B. **The circumstances in which the national courts are required to disapply the combined provisions**

of the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code

1. *The criteria to be applied*

110. According to the principles identified by the Court in the judgment in *Taricco and Others*, the national courts are required to disapply the provisions of the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code if they prevent 'the imposition of effective and dissuasive penalties *in a significant number of cases of serious fraud* affecting the financial interests of the European Union'. (43)

111. The criteria on the basis of which the national courts are supposed to disapply the particular provisions of their penal code are, as the Corte costituzionale (Constitutional Court) observes, vague and generic. In the absence of any guidelines or of any other detail in the judgment in *Taricco and Others*, the national courts on their own are unable to define, unequivocally, the situations in which the harm to the financial interests of the Union must be characterised as 'serious' and the cases in which the application of the limitation rules at issue would have the effect of preventing 'the imposition of effective and dissuasive penalties *in a significant number of cases*'. (44)

112. In criminal proceedings that are pending, it is actually difficult to require a national court to meet an objective, such as that of combating VAT offences, by asking it to disapply a substantive rule of its criminal law, relating to limitation periods in respect of offences and penalties, on the basis of a criterion which may admittedly appear to introduce an element of subjectivity in the context of the assessment requested.

113. The criterion identified in the judgment in *Taricco and Others* is based on the existence of a systemic risk of impunity.

114. The assessment of the systemic nature of such a risk may actually be a delicate operation for the national court hearing the case, in so far as, from an external viewpoint, that exercise may appear to include a degree of subjectivity on the part of that court.

115. Admittedly, the assessment of the systemic nature of the risk might result from the application of objective criteria or from an overall assessment carried out by the Italian Supreme Court, which is binding on all national courts. Nonetheless, it is not apparent from the discussions at the hearing that such a solution seems possible in the light of the national legislation. Furthermore, the Italian Republic, whose approach, it should be emphasised, is manifestly influenced from a desire to find an appropriate solution that conforms to EU law, has been unable to provide sufficient guarantees on that point.

116. I therefore propose that that obligation is based solely on the nature of the offence and that the definition of that nature is a matter for the EU legislature.

117. I note that, in the course of the negotiations preceding the adoption of the Proposal for the PFI Directive, the EU legislature defined the concept of serious infringement affecting the financial interests of the Union, which also include VAT fraud, as covering all offences which have a connection with two or more Member States and which cause damage the total amount of which exceeds the threshold of EUR 10 million, that threshold being subject to a review clause. (45)

2. *The effects in time of the obligation identified by the Court in the judgment in Taricco and Others*

118. According to the principles identified by the Court in the judgment in *Taricco and Others*, the

national court is required, if need be, to disapply the combined provisions of the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code in the proceedings pending before it, in order to ensure, in accordance with Article 325 TFEU, that an effective penalty is imposed in respect of the fraud which has been found to exist.

119. As I have pointed out, the Corte costituzionale (Constitutional Court) considers that the national court is unable to fulfil that obligation, given the rank and scope which the principle that offences and penalties must be defined by law occupies in the Italian legal order.

120. In that regard, the Corte costituzionale (Constitutional Court) maintains that Article 53 of the Charter authorises the Italian Republic to apply its own standard of protection of fundamental rights, in so far as it is a higher standard than the standard that arises from the interpretation of Article 49 of the Charter, and thus allows the national court to refuse to fulfil the obligation identified by the Court.

121. The Corte costituzionale (Constitutional Court) also refers to Article 4(2) TEU in support of its contention that EU law cannot force the fulfilment of such an obligation without calling in question the national identity and, in particular, the constitutional identity of the Italian Republic.

122. I do not agree with the interpretation proposed by the Corte costituzionale (Constitutional Court).

(a) *The scope in EU law of the principle that offences and penalties must be defined by law*

123. First, I am aware that the imposition of penalties for offences affecting the financial interests of the Union comes within the scope of EU law and that the national courts are required to ensure the effectiveness of EU law and, in particular, of primary law.

124. In the context of EU law, the principle that offences and penalties must be defined by law is enshrined in Article 49 of the Charter. In accordance with Article 51(1) of the Charter, Article 49 is to be applicable to the Member States when they implement EU law, as is the case here.

125. According to the Explanations relating to the Charter, (46) Article 49(1) (apart from the final sentence) and (2) corresponds to Article 7 of the ECHR. Under Article 52(3) of the Charter, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are to be the same as those laid down by the ECHR, although that provision is not to prevent EU law from providing more extensive protection.

126. In paragraphs 54 to 56 of the judgment in *Taricco and Others*, the Court held that the principle enshrined in Article 49 of the Charter covers only the definition of offences and the level of the penalties applicable to those offences. In so far as that principle does not extend to the determination of the limitation period, the Court therefore held that that principle does not preclude the national court from applying to the proceedings pending before it a longer limitation period than that provided for at the time when the offence was committed.

127. That assessment is consistent with the case-law of the European Court of Human Rights on the scope of the principle that offences and penalties must be defined by law.

128. The general principles relating to the application of the limitation rules were summarised by the European Court of Human Rights in its judgment in *Coëme and others v. Belgium* (47) and recently confirmed in its decisions in *Previti v. Italy* (48) and *Borcea v. Romania*. (49)

129. Article 7 of the ECHR enshrines the principle that offences and penalties must be defined by law 'while it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the working of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. (50)

130. According to the European Court of Human Rights, 'the rules on retroactivity contained in Article 7 of the [ECHR] apply only to the provisions defining offences and the penalties imposed in respect of those offences'. (51) Thus, the European Court of Human Rights considers that it must ensure that 'at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision'. (52)

131. In the judgment in *Coëme and Others v. Belgium*, (53) on the other hand, the ECtHR considered it reasonable that the national courts should apply the principle *tempus regit actum* as regards procedural laws, in that particular instance, the immediate application to pending proceedings of laws amending the limitation rules.

132. According to the European Court of Human Rights, the immediate application of a law extending the limitation period does not entail an infringement of Article 7 of the ECHR 'since that provision cannot be interpreted as prohibiting an extension of limitation periods where the relevant offences have never become subject to limitation'. (54) The European Court of Human Rights therefore characterised the limitation rules as 'procedural laws'. It observes that the limitation rules do not define the offences and the penalties imposed in respect of them and may be interpreted as laying down a simple precondition of the examination of the case. (55)

133. In its decision in *Previti v. Italy*, (56) the European Court of Human Rights therefore classified the new limitation rules introduced by the ex-Cirielli Law as procedural rules. It will be recalled that it was the profound amendments introduced by that law that were at issue in the case that gave rise to the judgment in *Taricco and Others* and with which we are concerned today.

134. In the case that gave rise to the decision in *Previti v. Italy*, (57) the European Court of Human Rights was requested, in particular, to determine whether the conditions in which the new limitation periods had been applied were compatible with the requirements of Article 7 of the ECHR. In that case, the applicant, whose appeal on a point of law was pending, complained that he had been unable to benefit from the reduction of the limitation period laid down for the offence of corruption, from 15 years to eight years. In accordance with the transitional arrangements provided for by the legislature, the new provisions, which were more favourable to the accused as regards limitation, were applicable to all proceedings pending on the date on which the law entered into force, but with the exception of proceedings pending before the Corte suprema di cassazione (Court of Cassation), which meant that the applicant was *de facto* unable to take advantage of those provisions.

135. The question was therefore whether the provisions that determined the limitation periods, in the same way as the provisions defining offences and the penalties imposed in respect of them, were subject to special rules in relation to retroactivity, which include the principle of retroactivity of the less harsh criminal law.

136. In order to answer that question, and therefore to assess the merits of the complaint alleging violation of Article 7 of the ECHR, the European Court of Human Rights therefore considered whether the ex-Cirielli Law contained provisions of substantive criminal law.

137. Its answer was in the negative, as it classified the legislative amendments introduced by the ex-Cirielli Law as 'procedural rules'.

138. In keeping with its consistent case-law, the European Court of Human Rights recalled that the limitation rules, since they do not define offences and the penalties imposed in respect of them, may be interpreted as laying down a simple precondition for the examination of the case and may therefore be classified as 'procedural laws'. (58)

139. The European Court of Human Rights thus held that, unlike the provisions defining offences and the penalties imposed in respect of them, (59) Article 7 of the ECHR does not preclude the immediate application to pending proceedings (*tempus regit actum*) of a law that extends the limitation periods where the alleged offences have never been time-barred (60) and in the absence of arbitrariness. (61)

140. Since the limitation rules introduced by the ex-Cirielli Law were to be classified as 'procedural laws' and since the transitional arrangements did not appear to be either unreasonable or arbitrary, the European Court of Human Rights held that nothing in the ECHR prevented the Italian legislature from regulating the application of those provisions to trials that were pending at the time when the law entered into force.

141. In the light of those factors, I consider that, having regard to the wording of Article 49 of the Charter and the case-law of the European Court of Human Rights relating to the scope of the principle that offences and penalties must be defined by law, there is nothing to prevent the national court, in the context of the fulfilment of the obligations imposed on it by EU law, from disapplying the provisions laid down in the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code in the proceedings pending before it.

142. The Corte costituzionale (Constitutional Court) further maintains that the principles identified in the judgment in *Taricco and Others* are incompatible with the requirements set out in Article 7 of the ECHR and, in particular, with the requirement of foreseeability, in so far as the individuals concerned could not reasonably foresee, on the basis of the legislative framework in force at the material time, that EU law, and in particular Article 325 TFEU, would require the court to disapply the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code. (62)

143. However, it seems to me that the individuals concerned could not fail to be aware that the acts which they are now accused of having committed were likely to render them criminally liable and, in the event of a final conviction, to result in the application of the penalty determined by law. Those acts were offences at the time when they were committed and the penalties will not be any heavier than those applicable at the material time. I do not think that, because that obligation is fulfilled by the national court, the persons concerned will sustain greater harm than that to which they were exposed at the time when the offence was committed.

(b) *The scope of Article 53 of the Charter*

144. The Corte costituzionale (Constitutional Court) then claims that Article 53 of the Charter precludes the implementation of the obligation identified by the Court in the judgment in *Taricco and Others*.

145. It maintains that Article 53 of the Charter should be interpreted as authorising the Italian Republic to apply a standard of protection of fundamental rights guaranteed by the Italian Constitution in so far as that standard is higher than the standard resulting from the interpretation of Article 49 of the Charter and not to fulfil the obligation identified by the Court in the judgment in *Taricco and Others*.

146. That interpretation would allow the national court to avoid that obligation, in that it requires the national court to disapply the limitation rules at issue in the proceedings pending before it.

147. The questions referred to the Court by the Corte costituzionale (Constitutional Court) therefore lead me to examine the margin of discretion which the Member States have when setting the level of protection of the fundamental rights which they wish to ensure when they implement EU law.

(1) *Preliminary observations* (63)

148. Although it is true that the interpretation of the rights protected by the Charter must tend towards a high level of protection, as may be inferred from Article 52(3) of the Charter and from the explanation on Article 52(4) of the Charter, it is nevertheless important to state that this must be a level of protection which 'accords with EU law', as is stated, moreover, in the abovementioned explanation.

149. That is a reminder of a principle that has long guided the interpretation of fundamental rights within the European Union, namely that the protection of fundamental rights within the European Union must be ensured within the framework of the structure and objectives of the European Union. (64) In that regard, it is not irrelevant that the preamble to the Charter refers to the main objectives of the European Union, including the creation of an area of freedom, security and justice.

150. It is therefore not possible to reason only in terms of a higher or lower level of protection of human rights without taking into account the requirements linked to the action of the European Union and the specific nature of EU law.

151. The fundamental rights to be protected and the level of protection to be afforded to them reflect the choices of a society as regards the proper balance to be achieved between the interests of individuals and those of the community to which they belong. That determination is closely linked to assessments which are specific to the legal order concerned, relating particularly to the social, cultural and historical context of that order, and cannot therefore be transposed automatically to other contexts.

152. To interpret Article 53 of the Charter as allowing Member States to apply, in the field of application of EU law, their constitutional rule guaranteeing a higher level of protection for the fundamental right in question, would therefore be tantamount to disregarding the fact that the exercise of determining the level of protection for fundamental rights to be achieved cannot be separated from the context in which it is carried out.

153. Accordingly, even though the objective is to tend towards a high level of protection for fundamental rights, the specific nature of EU law means that the level of protection deriving from the interpretation of a national constitution cannot be automatically transposed to the EU level, nor can it be relied upon as an argument in the context of the application of EU law.

154. As regards the assessment of the level of protection for fundamental rights which must be guaranteed within the legal order of the European Union, the specific interests which motivate the action of the European Union must be taken into account. The same applies, inter alia, to the necessary uniformity of application of EU law and to the requirements linked to the construction of an area of

freedom, security and justice. Those specific interests cause the level of protection for fundamental rights to be adjusted depending on the different interests at stake.

(2) *Assessment*

155. For the same reasons as those stated by the Court in the judgment of 26 February 2013, *Melloni*, (65) the interpretation of Article 53 of the Charter advocated by the Corte costituzionale (Constitutional Court) cannot in my view be upheld.

156. Such an interpretation fails to have regard to an essential characteristic of the EU legal order, namely the principle of primacy of EU law. That interpretation allows a Member State not to fulfil an obligation which has been identified by the Court, and which is perfectly consistent with the Charter, provided that that obligation does not conform to the higher standard of protection of fundamental rights guaranteed by the Constitution of that State.

157. The Court thus pointed out in the judgment of 26 February 2013, *Melloni* (66) that, by virtue of the principle of primacy of EU law, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State. (67)

158. Where an EU legal act calls for national implementing measures, Article 53 of the Charter confirms that national authorities and courts in fact remain free to apply national standards of protection of fundamental rights. Nonetheless, the Court made clear that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law must not be compromised. (68)

159. In my Opinion in Melloni, (69) I differentiated between situations in which there is a definition at EU level of the degree of protection which must be afforded to a fundamental right in the implementation of an action by the Union and those in which that level of protection has not been the subject of a common definition.

160. In the former case, I maintained that if a Member State were to invoke, *a posteriori*, the retention of its higher level of protection, the effect would be to upset the balance achieved by the EU legislature and therefore to jeopardise the application of EU law. The level of protection was determined in such a way as to meet the objectives of the EU action concerned. It then reflects a balance between the need to ensure the effectiveness of European Union action and the need to provide adequate protection for fundamental rights.

161. In the latter case, on the other hand, the Member States have a wider discretion to apply, in the field of application of EU law, the level of protection of fundamental rights which they wish to guarantee within the national legal order. I nonetheless emphasised that that level of protection must then be reconciled with the proper implementation of EU law and must not infringe other fundamental rights protected under EU law.

162. In accordance with Article 325 TFEU, the protection of the financial interests of the Union calls for national implementing measures. Those measures must ensure, in accordance with the principles of equivalence and effectivity, the prevention of offences affecting those interests, by the imposition of penalties that must be effective and dissuasive. In the present case, by requiring the national courts to disapply in the proceedings pending before them the limitation rules at issue, the Court seeks to guarantee that objective in compliance with Article 49 of the Charter and in keeping with the scope afforded to the principle enshrined in Article 7 of the ECHR that offences and penalties must be defined

by law.

163. Admittedly, there is at present no common definition at EU level of the scope that must be afforded to the principle that offences and penalties must be defined by law and of the degree of protection that must be granted, in that context, to the accused where the application of the limitation rules is concerned. (70) Consequently, the Member States enjoy, in principle, a greater discretion to apply a higher level of protection, provided, however, that that level of protection safeguards the primacy and effectiveness of EU law.

164. Three observations must be made.

165. First, while it is true that the limitation rules have not yet been harmonised, the fact nonetheless remains that the 'reasonable time' principle stated in Article 47(2) of the Charter constitutes, in the same way as the instrument which enshrines it, the archetype of the harmonised rule, and can be invoked directly.

166. Second, the application of the standard of protection referred to in Article 25(2) of the Italian Constitution, on which the Corte costituzionale (Constitutional Court) relies, compromises the primacy of EU law in that it allows an obstacle to be placed in the way of an obligation identified by the Court which is not only consistent with the Charter but also in keeping with the case-law of the European Court of Human Rights.

167. Third, and last, that application undermines the effectiveness of EU law in so far as the offences in question, which affect the financial interests of the Union, will not be able to be the subject of a final conviction, having regard to the absolute limitation period, and will therefore go unpunished.

168. I consider, therefore, that Article 53 of the Charter does not allow the judicial authority of a Member State to refuse to fulfil the obligation identified by the Court in the judgment in *Taricco and Others* on the ground that that obligation does not respect the higher standard of protection of fundamental rights guaranteed by the Constitution of that State.

(c) *Respect for the constitutional identity of the Italian Republic*

169. The third question submitted by the referring court concerns the scope of Article 4(2) TEU.

170. The Corte costituzionale (Constitutional Court) maintains that the obligation identified by the Court in the judgment in *Taricco and Others*, in that it infringes an overriding principle of its Constitutional order — the principle that offences and penalties must be defined by law — is capable of affecting the national identity, and in particular the Constitutional identity, of the Italian Republic.

171. The referring court maintains that EU law, like the interpretation of it by the Court, cannot be considered to require a Member State to disapply the overriding principles of its Constitutional order, which define its national identity. Thus, the implementation of a judgment of the Court is always dependent on the compatibility of that judgment with the constitutional order of the Member State, which must be assessed by the national authorities and, in this instance, in Italy, by the Corte costituzionale (Constitutional Court).

172. The position which I propose that the Court should adopt in the present case does not amount to denying the need to have regard to the national identity of the Member States, of which constitutional identity certainly forms a part. (71)

173. I am fully aware that the European Union is required, as Article 4(2) TEU provides, to respect the national identity of the Member States, 'inherent in their fundamental structures, political and constitutional'.

174. I am also fully aware that the preamble to the Charter points out that, in its action, the European Union must respect the national identities of the Member States.

175. Consequently, a Member State which considers that a provision of primary law or secondary law adversely affects its national identity may thus challenge it on the basis of the provisions laid down in Article 4(2) TEU.

176. However, I do not consider that we are faced with such a situation in the present case.

177. First of all, the Court has always considered that reliance on infringements of either fundamental rights as formulated by the Constitution of a Member State or the principles of a national constitutional structure cannot affect the validity of an act adopted by the institutions of the Union or its effect on the territory of that State, and the Court has taken that approach in order to preserve the unity and effectiveness of EU law. According to settled case-law, the validity of those acts can therefore be assessed only in the light of EU law. (72)

178. Next, I am not convinced that the immediate application of a longer limitation period, resulting from the fulfilment of the obligation identified by the Court in the judgment in *Taricco and Others*, would be such as to affect the national identity of the Italian Republic.

179. In fact, a concept demanding protection for a fundamental right must not be confused with an attack on the national identity or, more specifically, the constitutional identity of a Member State. The present case does indeed concern a fundamental right protected by the Italian Constitution, the importance of which should not be underestimated, but that does not mean that the application of Article 4(2) TEU must be envisaged here.

180. Nor does the Corte costituzionale (Constitutional Court) state the reasons why the status of 'overriding' principle of the constitutional order must be conferred on all the aspects of the principle that offences and penalties must be defined by law (73) or the reasons why the immediate application of a longer limitation period would therefore be capable of compromising the constitutional identity of the Italian Republic.

181. I note that in the Italian Constitution the principles classified as 'fundamental' are set out in Articles 1 to 12, and the principle that offences and penalties must be defined by law is therefore a priori not included in that category.

182. I am aware that the scope and rank of a principle in the Italian constitutional order may also be conferred by the constitutional case-law.

183. The Corte costituzionale (Constitutional Court) has already asserted that only the 'hard core' of a fundamental principal may justify the initiation of what is known as the 'counter-limits' procedure, to the exclusion of the various institutes in which that right may actually manifest itself and shape itself throughout history and the requirements of history. (74)

184. In a recent judgment, the Corte costituzionale (Constitutional Court) confirmed that approach and asserted that the 'overriding' or 'fundamental' principles of the constitutional order are those which

identify the constitutional order and represent the ‘hard core’ of the Italian Constitution. (75)

185. Furthermore, in paragraphs 10 and 11 of the observations which it lodged in the case that gave rise to the judgment of 16 June 2015, Gauweiler and Others, (76) and, in particular, of its explanations relating to the initiation of the ‘counter-limits’ procedure, the Italian Republic stated that the overriding or fundamental principles of its Constitutional order, the infringement of which by an act of EU law would justify the initiation of that procedure, (77) correspond to the essential constitutional guarantees, such as the democratic nature of the Italian Republic enshrined in Article 1 of the Italian Constitution or the principle of equality between men referred to in Article 3 of the Constitution, and do not include the procedural guarantees, no matter how important they may be.

186. Having regard to those factors, I am not convinced that the obligation identified by the Court in the judgment in *Taricco and Others*, in that it results in the national court applying immediately to proceedings pending before it a longer limitation period than that provided for by the law in force at the time when the offence was committed, is capable of compromising the national identity of the Italian Republic.

187. In the light of all of the foregoing considerations, I therefore consider that Article 4(2) TEU does not allow the judicial authority of a Member State to refuse to refuse to fulfil the obligation identified by the Court in the judgment in Taricco and Others on the ground that the immediate application to proceedings pending before it of a longer limitation period than that provided for by the law in force at the time when the offence was committed would be capable of affecting the national identity of that State.

VIII. **Conclusion**

188. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Corte costituzionale (Constitutional Court, Italy) as follows:

(1) Article 325(1) and (2) TFEU must be interpreted as meaning that it requires the national court, acting as an ordinary court in matters of EU law, to disapply the absolute limitation period resulting from the combined provisions of the last subparagraph of Article 160 and the second subparagraph of Article 161 of the codice penale (Penal Code) where such a rule prevents the imposition of effective and dissuasive penalties in a case of serious fraud affecting the financial interests of the European Union or lays down longer limitation periods for cases of serious fraud affecting the financial interest of the Member State concerned than for those affecting the financial interests of the Union.

(2) The concept of interruption of the limitation period must be considered to constitute an autonomous concept of EU law and must be defined as meaning that each investigative procedural act and also any act necessarily extending it interrupts the limitation period, that act therefore causing a new period, identical to the initial period, to run, while the limitation period which has already elapsed will then be cancelled.

(3) Article 49 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that it does not preclude the Italian judicial authorities from disapplying, in the proceedings pending before them, the combined provisions of the last subparagraph of Article 160 and the second subparagraph of Article 161 of the Penal Code in accordance with the obligation identified by the Court in the judgment of 8 September 2015, Taricco and Others (C-105/14, EU:C:2015:555).

(4) Article 53 of the Charter of Fundamental Rights does not allow the judicial authority of a Member

State to refuse to fulfil the obligation identified by the Court in the judgment of 8 September 2015, Taricco and Others (C-105/14, EU:C:2015:555) on the ground that that obligation does not respect the higher standard of protection of fundamental rights guaranteed by the Constitution of that State.

(5) Article 4(2) TEU does not allow the judicial authority of a Member State to refuse to fulfil the obligation identified by the Court in the judgment of 8 September 2015, Taricco and Others (C-105/14, EU:C:2015:555) on the ground that the immediate application to proceedings pending before it of a longer limitation period than that provided for by the law in force at the time when the offence was committed would be capable of affecting the national identity of that State.

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1 Original language: English.

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2 C-105/14, 'the judgment in Taricco and Others', EU:C:2015:555.

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3 C-617/10, EU:C:2013:105.

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4 'The Charter.'

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5 That procedure is based on the notion that, whereas the Italian legal order recognises and permits a limitation of its sovereignty by EU law, it also places limits on EU law in order to safeguard the fundamental values on which its legal order is based. See, in that regard, the explanations provided by the Italian republic in its observations in the case that gave rise to the judgment of 16 June 2015, Gauweiler and Others (C-62/14, EU:C:2015:400), and also judgment No 183/73 of the Corte costituzionale (Constitutional Court), which is referred to in paragraph 7 of those observations: 'on the basis of Article 11 of the [Italian] Constitution, limitations of sovereignty were agreed with the sole aim of attaining the objectives stated therein … it must therefore be precluded that such limitations may in any case entail for the bodies of the EEC the unacceptable power to violate the fundamental principles of our constitutional order or the inalienable rights of individuals … it is clear that, if such an erroneous interpretation should ever be placed on Article 189, the guarantee of judicial review by the Corte costituzionale [(Constitutional Court)] of the continuing compatibility of the Treaty with the fundamental principles referred to above would continue to be ensured'.

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6 C-62/14, EU:C:2015:400.

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7 'The ECHR'.

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8 C-399/11, EU:C:2013:107.

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9 GURI No 285, 7 December 2005, p. 5, 'the ex-Cirielli Law'.

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10 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, p. 1).

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11 Ordinary supplement to GURI No 185, du 8 August 2008.

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12 Certain national courts have nonetheless adopted a different position: see judgments No 2210/16 of the Corte suprema di cassazione (Court of Cassation), third Criminal Chamber, of 20 January 2016 (in which the Corte suprema di cassazione (Court of Cassation) implements the principles identified in the judgment in Taricco and Others, as it considers that the limitation system is an intrinsic part of a system of a procedural nature and takes the view that there is no need to refer a question of constitutionality to the Corte costituzionale (Constitutional Court)); No 7914/16 of the Corte suprema di cassazione (Court of Cassation), fourth Criminal Chamber, 26 February 2016 (in which the Corte suprema di cassazione (Court of Cassation) confirms the obligation not to apply the limitation system, solely in cases where the proceedings are not actually time-barred); and, last, No 44584/16 of the Corte suprema di cassazione (Court of Cassation), third Criminal Chamber, of 24 October 2016 (in which the Corte suprema di cassazione (Court of Cassation) identifies the criteria applicable in order to disapply the national provisions at issue).

13 In the Kingdom of Belgium, the Federal Republic of Germany and the French Republic the limitation rules are considered to be procedural rules. In other Member States, such as the Hellenic Republic, the Kingdom of Spain, the Republic of Latvia, or Romania or the Kingdom of Sweden, those rules, as in Italy, form part of substantive criminal law. For the Republic of Poland and the Portuguese Republic, the limitation rules constitute both substantive rules and procedural rules.

14 C-399/11, EU:C:2013:107.

15 Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ 2009 L 81, p. 24).

16 See, inter alia, primo rendiconto della attività 1° luglio 2010-30 giugno 2011, Procura della Repubblica presso il Tribunale ordinario di Milano, Activity Report 2010-2011, p. 12, point 3.4 (Il problema prescrizione) and p. 16, point 5.1 (La criminalità economica), available at the following internet address: http://www.procura.milano.giustizia.it/files/relazione-25-luglio-2011.pdf, and Bilancio di responsabilità sociale, 2011-2012, p. 28, available at the following internet address: http://www.procura.milano.giustizia.it/files/bilancio-sociale-procura-12-dic-2012.pdf.

17 Commissione Fiorella — Per lo studio di possibile riforma della prescrizione, available at the following internet address: https://www.giustizia.it/giustizia/it/mg_1_12_1.page;jsessionid=J2kpebY+SYa6GMnDwpBxPZ+7?facetNode_1=0_10&facetNode_2=3_1&facetNode_3=4_57&contentId=SPS914317&previsiousPage=mg_1_12.

18 Annex 12 to the EU Anti-Corruption Report from the Commission to the Council and the European Parliament — Italy, 3 February 2014 (COM(2014) 38 final).

19 See pp. 8 and 9 of that report. The Commission refers, in particular, to the study '*Timed Out:* Statutes of Limitation and Prosecuting Corruption in EU Countries', of November 2010, in which the non-governmental organisation Transparency International examined the impact of statutes of limitations on prosecution of corruption in the Union: roughly one in 10 proceedings in corruption cases had been closed between 2005 and 2010 owing to the expiry of prescription terms, whereas the average for other Member States was between 0.1% and 2% (p. 8).

20 Council Recommendation on the National Reform Programme 2013 of Italy and delivering a Council on the Stability Programme of Italy, 2012-2017 (OJ 2013 C 217, p. 42), see recital 12 and recommendation 2.

21 ECtHR, 29 March 2011, CE:ECHR:2011:0329JUD004735708. See, in particular, §§ 95 and 97, and also § 108, where the European Court of Human Rights observes that, 'having regard to the need to act quickly and with reasonable care, implicit in the context of the positive obligations in question [Article 2 of the ECHR], it is sufficient to observe that the application of the limitation period indisputably comes within the category of those "measures" which, according to the case-law of the [European] Court [of Human Rights], are not permissible, since it has the effect of preventing a conviction'.

22 ECtHR, 7 April 2015, CE:ECHR:2015:0407JUD000688411.

23 See ECtHR, 7 April 2015, *Cestaro v. Italy*, CE:ECHR:2015:0407JUD000688411, § 225.

24 ECtHR, 7 April 2015, CE:ECHR:2015:0407JUD000688411.

25 See §§ 225, 242 and 245 of the judgment.

26 See §§ 208 and 246 of the judgment.

27 These reports may also be consulted on GRECO's website (http://www.coe.int/en/web/greco/evaluations) — Evaluation by country.

28 See, in particular, Italy: Phase 2, Report on the application of the Convention on combating bribery of foreign public officials in international business transactions and the 1997 Recommendation on combating bribery in international business transactions, of 29 November 2004, point 146 et seq., and Italy: Phase 2, Follow-up report on the implementation of the Phase 2 recommendations, Application of the Convention on combating bribery of foreign public officials in international business transactions, of 23 March 2007, recommendation 7(b), p. 17, and Phase 3 Report on implementing the OECD anti-bribery convention in Italy, point 94 et seq. (reports available on the following website: http://www.oecd.org/daf/anti-bribery/italy-oecdanti-briberyconvention.htm).

29 This provision requires that 'an adequate period of time [shall be allowed] for the investigation and prosecution' of this offence.

30 Proposal for Law No 1844, entitled 'Modifiche al codice penale in materia di prescrizione del reato', available on the website of the Senato (Senate): http://www.senato.it/leg/17/BGT/Schede/Ddliter/45439.htm.

31 1764.

32 Montesquieu, *De l'Esprit des Lois* (Book XI, Chapter VI, de la Constitution d'Angleterre), 1748.

33 See Cornu G., *Vocabulaire juridique*, Presses universitaires de France, Paris, 2011.

34 In its Resolution of 16 May 2017 on the Annual Report 2015 on the protection of the EU's financial interests — Fight against fraud (2016/2097(INI)), the European Parliament observed that carousel fraud alone was responsible for VAT revenue losses of approximately EUR 50 billion in 2014.

35 According to a consistent line of decisions of the European Court of Human Rights recalled in the judgment of 12 October 1992, *Boddaert v. Belgium* (CE:ECHR:1992:1012JUD001291987, § 39), while Article 6 of the ECHR commends that judicial proceedings be expeditious, it also lays down the more general principle of the proper administration of justice. According to the European Court of Human Rights, a fair balance therefore has to be struck between the various aspects of that fundamental requirement.

36 According to the European Court of Human Rights, a case is highly complex where 'white collar' crime, consisting, particularly, in large-scale fraud is suspected, involving several companies or complex transactions designed to avoid detection by the law-enforcement bodies and requiring considerable accounting and financial expertise. See, inter alia, judgment of 1 August 2000, *C.P. and others v. France*, (CE:ECHR:2000:0801JUD003600997, § 26 and the case-law cited), concerning an economic and financial case involving misuse of company assets, abuse of trust, fraud and uttering of forged documents and obtaining by false pretences, implicating a group of several companies and involving several individuals. In that case, the European Court of Human Rights held that the essential characteristic of the case was its very great complexity, in so far as it was a case of large-scale fraud, involving several companies, that that type of offence was committed by means of complex transactions designed to avoid detection by the investigative authorities bodies, that the judicial authorities' primary task consisted in unravelling a network of interconnected companies and in identifying the precise nature of the institutional, administrative and financial relationships between them, and that it had been necessary to arrange international letters rogatory and a significant accounting and financial report.

37 Proposal of 11 July 2012 for a directive, COM(2012) 363 final, 'the proposal for a PFI Directive'. The purpose of the directive is to establish minimum rules for the definition of criminal offences, penalties and limitation periods applicable to the fight against fraud and other illegal activities harmful to the EU's financial interests, in order to contribute more effectively to the better protection against crime detrimental to those interests. It is thus intended to increase the level of protection currently afforded by the Convention drawn up on the basis of Article K.3 TEU, on the protection of the European Communities' financial interests (OJ 1995 C 316, p. 48, 'the PFI Convention'), which will be replaced by that directive for Member States which have ratified that convention.

38 See Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, 17 July 2013 (COM(2013) 534 final), and Draft Regulation on the establishment of the European Public Prosecutors Office, 31 January 2017 (document 5766/17). If the draft regulation is adopted, the European Public Prosecutor's Office will have jurisdiction for all offences adversely affecting the financial interests of the Union, including cross-border VAT fraud. On 3 April 2017, 16 Member States notified their intention to launch an enhanced cooperation to establish a European Public Prosecutor's Office: the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Croatia, the Republic of Cyprus, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic and the Republic of Finland.

39 See also point 93 of Special report No 24/2015 of the Court of Auditors: Tackling intra-Community VAT fraud: More action needed', which states that 'VAT fraud is often linked with organised crime. The proceeds of MTIC [missing trader intra-Community] fraud are usually reinvested in other criminal activities. This calls for the adoption of a common and multidisciplinary approach to tackle … VAT fraud [within the Union]' (p. 36).

40 The PFI Convention *de facto* created a multi-speed regime, culminating in a mosaic of different legal situations depending on whether or not that Convention has legal force in the particular Member State.

41 See Commission Green Paper of 11 December 2001 on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor (COM(2001) 715 final); Communication of 26 May 2011 from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions, on the protection of the financial interests of the European Union by criminal law and by administrative investigations: An integrated policy to safeguard taxpayers' money (COM(2011) 293 final); proposal for the PFI Directive; Communication of 17 July 2013 from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust (COM(2013) 532 final); Communication of 27 November 2013 from the Commission to the European Parliament, the Council and the national parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2 (COM(2013) 851 final) (point 2.3); Proposal of 17 July 2013 for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final) (see, in particular, Legislative financial statement, point 1.5, p. 55), and Draft Regulation on the establishment of the European Public Prosecutors Office, 31 January 2017 (document 5766/17); and, last, Communication of 16 May 2017 from the Commission to the European Parliament pursuant to Article 294(6) TFEU concerning the position of the Council at first reading with a view to the adoption of the Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (COM(2017) 246 final) (point 3).

42 See recital 15 of the Proposal for a PFI Directive, and Commission working document, available only in English, Commission staff working paper to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Accompanying the document communication from the Commission on the protection of the financial interests of the European Union by criminal law and by administrative investigations: An integrated policy to safeguard taxpayers' money (SEC(2011) 621), of 26 May 2011 (pp. 3 and 4). See also Report of 19 July 2012 from the Commission to the European Parliament and the Council, Protection of the European Union's financial interests — Fight against fraud, Annual Report 2011 (COM(2012) 408 final), in which the Commission observed that the conviction rate in cases involving offences against the EU budget varies considerable across the EU from one Member State to another, ranging from 14% to 80%. In its eleventh operational report, the European Anti-fraud Office (OLAF) also analysed the judicial follow-up to its cases in Member States over a period of twelve years and noted 'very substantial differences between countries with respect to their capacity to bring EU budget-related judicial investigations and prosecutions to a conviction within a reasonable time' (pp. 42 to 44 and, in particular, table on p. 43); the report is available at the following internet address: https://ec.europa.eu/anti-fraud/sites /antifraud/files/docs/body/rep_olaf_2010_en.pdf.

43 Paragraph 58 of that judgment. Emphasises added.

44 Paragraph 58 of that judgment. Emphasis added.

45 In recital 14 of its proposal for a PFI Directive, the Commission considered that cases of serious fraud should be

defined ‘by referring to a certain minimum overall damage, expressed in money, which must have been caused by the criminal behaviour to the Union’s … budget’.

46 See Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

47 ECtHR, 22 June 2000, CE:ECHR:2000:0622JUD003249296.

48 ECtHR, 12 February 2013, CE:ECHR:2013:0212DEC000184508.

49 ECtHR, 22 September 2015, CE:ECHR:2015:0922DEC005595914.

50 ECtHR, 22 June 2000, *Coëme and Others v. Belgium*, CE:ECHR:2000:0622JUD003249296, § 145.

51 ECtHR, 22 September 2015, *Borcea v. Romania*, CE:ECHR:2015:0922DEC005595914, § 60.

52 ECtHR, 22 June 2000, *Coëme and Others v. Belgium*, CE:ECHR:2000:0622JUD003249296, § 145.

53 ECtHR, 22 June 2000, CE:ECHR:2000:0622JUD003249296.

54 ECtHR, 22 September 2015, CE:ECHR:2015:0922DEC005595914, § 64.

55 ECtHR, 12 February 2013, *Previti v. Italy*, CE:ECHR:2013:0212DEC000184508, § 80. In order to classify a provision as coming under substantive criminal law or procedural criminal law, the ECtHR considers the extent to which that provision influences the classification of the offence or the severity of the penalty. In the judgment of 17 September 2009, *Scoppola v. Italy*, (CE:ECHR:2009:0917JUD001024903, §§ 110 to 113), the ECtHR, after pointing out that a provision classified as procedural in domestic law had an influence on the severity of the penalty to be imposed, held that that provision in fact came under substantive criminal law, to which the last sentence of Article 7(1) was applicable.

56 ECtHR, 12 February 2013, CE:ECHR:2013:0212DEC000184508.

57 ECtHR, 12 February 2013, CE:ECHR:2013:0212DEC000184508.

58 ECtHR, 12 February 2013, CE:ECHR:2013:0212DEC000184508, § 80.

59 In accordance with the case-law of the European Court of Human Rights, the rules on retroactivity contained in Article 7 of the ECHR apply only to the provisions defining offences and the penalties imposed in respect of them. In principle, they do not apply to procedural laws, the immediate application of which in accordance with the principle *tempus regit actum* was held by the Court to be reasonable.

60 See, in particular, ECtHR, 22 June 2000, *Coëme and Others v. Belgium*, CE:ECHR:2000:0622JUD003249296, § 149.

61 ECtHR, 12 February 2013, *Previti v. Italy*, CE:ECHR:2013:0212DEC000184508, §§ 80 to 85.

62 ECtHR, 22 September 2015, *Borcea v. Romania*, CE:ECHR:2015:0922DEC005595914, § 59.

63 These considerations are set out in points 106 to 112 of my Opinion in Melloni (C-399/11, EU:C:2012:600).

64 See judgment of 17 December 1970, Internationale Handelsgesellschaft (11/70, EU:C:1970:114, paragraph 4).

65 C-399/11, EU:C:2013:107

66 C-399/11, EU:C:2013:107

67 Paragraph 59 of that judgment, and the case-law cited.

68 Paragraph 60 of the judgment of 26 February 2013, Melloni.

69 C-399/11, EU:C:2012:600.

70 We are approaching such harmonisation at that level of protection in the context of the proposal for a PFI Directive and the establishment of a European Public Prosecutor's Office, by the common definition of fraud on the EU's financial interests and the harmonisation of penalties and of the applicable limitation rules. Although those measures do not address the question of the procedural or substantive nature of the limitation rules and therefore do not resolve the question of their retroactivity, that point will necessarily have to be addressed by the EU legislature or by the Court in order to ensure the necessary uniform application of EU law and to take account of the requirements linked with the construction of an area of freedom, security and justice. In that case, the question will be whether we follow the interpretation applied by the European Court of Human Rights, in such a way that the interpretation of Article 49 of the Charter may be in harmony with the meaning conferred on Article 7 of the ECHR, as, it will be recalled, the European Court of Human Rights has held that the limitation rules are procedural rules, which may be the subject of an immediate application to pending proceedings, in accordance with the principle *tempus regit actum*, if that such application is reasonable and not arbitrary.

71 See, in particular, on that subject, Simon, D., 'L'identité constitutionnelle dans la jurisprudence de l'Union européenne', *L'identité constitutionnelle saisie par les juges en Europe*, Éditions A. Pedone, Paris, 2011, p. 27; Constantinesco, V., 'La confrontation entre identité constitutionnelle européenne et identités constitutionnelles nationales, convergence ou contradiction? Contrepoint ou hiérarchie?', *L'Union européenne: Union de droit, Union des droits — Mélanges en l'honneur de Philippe Manin*, Éditions A. Pedone, Paris, 2010, p. 79, and, in the same work, Mouton, J.-D., 'Réflexions sur la prise en considération de l'identité constitutionnelle des États membres de l'Union européenne', p. 145.

72 See judgment of 17 December 1970, Internationale Handelsgesellschaft (11/70, EU:C:1970:114, paragraph 3).

73 The status which a fundamental principle assumes in the constitutional order is notably the work of the Corte costituzionale (Constitutional Court) (see judgments No 183/73 of 17 December 1973 and No 170/84 of 8 June 1984), which sometimes refers to the 'fundamental principles' or the 'overriding principles' of the constitutional order or to the 'inalienable rights of individuals' without clearly differentiating those concepts. However, there seems to be an appreciable difference, since, according to the Corte costituzionale (Constitutional Court), the ratification of an international treaty is conditional on compliance with all the provisions of the Italian Constitution, whereas the primacy of EU law is conditional only on compliance with the overriding principles of that Constitution.

74 See judgment of the Corte costituzionale (Constitutional Court) No 18/82, of 2 February 1982, paragraph 4 of the legal grounds: 'il diritto alla tutela giurisdizionale si colloca al dichiarato livello di principio supremo solo nel suo nucleo più ristretto ed essenziale' e 'tale qualifica non può certo estendersi ai vari istituti in cui esso concretamente si estrinseca e secondo le mutevoli esigenze [in cui] storicamente si atteggia' (free translation: 'the right to judicial protection has the rank of supreme principle only as regards its most restricted and essential core' and 'that characterisation certainly cannot extend to the various institutes in which that right may actually manifest itself and shape itself in the light of the different historical requirements').

75 See, in that regard, judgment of the Corte costituzionale (Constitutional Court), No 238/2014, of 22 October 2014, paragraph 3.2.

76 C-62/14, EU:C:2015:400.

77 It appears that the Corte costituzionale (Constitutional Court) has justified the initiation of what are known as the 'counter-limits' procedure in two situations, one where there is a conflict between a rule of domestic law and the

Concordato (Concordat) (sentenza n. 18/82, 2 febbraio 1982 (judgment No 18/82, of 2 February 1982)) and the other where there is a conflict between a rule of domestic law and international law (sentenza n. 238/2014, 22 ottobre 2014 (judgment No 238/2014, of 22 October 2014)).