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The Melloni saga and the balance between EU law primacy and human rights protection principles

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Table of Abbreviations

ABBREVIATION	DEFINITION
AG	Advocate General
AFSJ	Area of Freedom, Security and Justice
CJEU	Court of Justice of the European Union
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
EU	European Union
ICC	Italian Constitutional Court
TEU	Treaty on the European Union
The Charter	Charter of Fundamental Rights of the European Union
TFEU	Treaty on the Functioning of the European Union

Abstract

The protection of fundamental rights constitutes a value of the EU legal order of equal significance with the other EU principles, values and objectives, as laid down in the text of the Treaties and as interpreted by the CJEU. Among them, special reference has to be made to the EU objective of establishing an internal market and of a common Area of Freedom, Security and Justice. Despite the fact that within the EU, a *sui generis* international legal order of autonomous nature which enjoys primacy over national law in the fields of its conferred competences, all its principles and values have the character of primary law and are to be respected equally, quite often those principles contradict and it is then when the CJEU, as the guardian of the uniform application of EU law, needs to interpret them properly and find the most suitable and effective way to balance them.

This dissertation aims to examine the balance between the EU law primacy and its expressions, such as the need for uniform application of EU law which pressuposes the mutual trust between the Member States, with the fundamental rights protection principles. In the first part, this balance will be examined in the light of a landmark judgment of the CJEU, the one in Melloni case, and in relation to the fields of law that have been fully integrated so far. The judgment will be discussed in depth from the aspect of the concerned national court , the opinion of the AG and most of all from the sight of the CJEU. Furthermore, it will be examined how a possible accession of the EU to the ECHR would affect this balance, in the light of Opinion 2/13 of the CJEU. Finally, the so-called counter-limits doctrine will be observed, as the instrument to handle the conflicts between EU and national constitutional principles of the protection of fundamental rights.

The second part will focus to the areas of law that have a connection with the EU legal order but however, they are not, at least until the present day, totally harmonized by EU law. In that respect, the Fransson Akerberg judgment will be analyzed, as the one that clarified the scope of the EU Charter of Fundamental rights. Secondly, the subject-matter of the dissertation will be discussed in the framework of the so-called Taricco saga, which can be considered as the continuation of the Melloni saga. Again, the constitutional principles and the national identity of the Member States in regard of the fundamental rights protection will complement the findings of the CJEU.

In the end, some personal comments and thoughts will be expressed concerning the future of fundamental rights protection within the EU legal order.

Introduction

The principle of primacy of EU law as established by the CJEU

In order to approach such a sensitive issue, namely the balance between European Union (hereinafter EU) law primacy and the protection of fundamental rights, it is essential to go back in time and examine, at a preliminary level, the fundamentals of the EU legal order. At the moment, the EU Charter of Fundamental Rights is the instrument which regulates that balance, in the way that it will be analyzed in the main part of this dissertation; however, it wasn't always the same and that is why it is interesting to begin from the introduction of the principle of primacy of EU law in parallel with the development of fundamental rights' s protection at the EU level.

The starting point is the famous judgment of the Court of Justice of the European Union (hereinafter CJEU) in *Costa v. ENEL* case[1] where the CJEU, interpretating the spirit of the Founding Treaties for the very first time ruled that " *(...) the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question ".* The rationale of the CJEU was that in order for the Community law (back then) to be given the same uniform and effective application across the Member States and the objectives of the EC to be accomplished, it was necessary that it would enjoy precedence over national law, in the fields of law in which the States have conferred their competences to the EC, even though there was no (and still there isn't) provision establishing explicitly the primacy of EU law.

The following years in its subsequent judgments the CJEU not only affirmed the supremacy of EU law but it even developed its notion. Special reference should be made to the CJEU' s judgment in *Simmenthal* case [2] when the CJEU held that even constitutional norms of the Member States should be set aside in case of conflict with Community law. While, in general, the principle of primacy has been accepted by the Member States and most of them have included in their Constitutions explicit provisions giving precedence to EU primacy, the same cannot be said for primacy over national constitutional rules, which the Member States find difficult to digest. What has sparkled through the years the most conflicts, in that regard, is the protection of fundamental rights.

The Founding Treaties did not provide any system of fundamental rights protection. It was the judgment in *Internationale Handels*esellschaft case [3]which put fundamental rights in the microscope of the CJEU, when the CJEU for the very first time had to balance EU law and the protection of a fundamental right by a national constitution. On the one hand, the CJEU ruled that EU law enjoys precedence over domestic law, even of constitutional nature, but on the other hand, stated that fundamental rights constitute an integral part of the EU legal order.

As inspiration for the development of an EU standard of human rights protection the CJEU declared that it would use the national constitutional traditions of the Member States but also the

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[1] Case C-6/64 Costa v. ENEL ECLI:EU:C:1964:66

[2] Case 106/77 Simmenthal ECLI:EU:C:1978:49

[3] Case 11/70 Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, ECLI:EU:C:1970:114

international human rights treaties, on which the Member States are parties, mainly the European Convention on Human Rights (hereinafter ECHR). Thus, EU law concerning fundamental rights was judge-made law. Despite the absence of explicit provisions, the CJEU showed its attention to human rights protection even in circumstances of contradiction with another EU objective. The CJEU' s judgment in *Omega* case4 is characteristic because the CJEU accepted a limitation to the functioning of the internal market in order for the right to human dignity to be adequately protected. However, without legally binding provisions, the field of fundamental rights protection was remaining under legal uncertainty.

What changed that situation was the codification of the EU human rights though the adoption of the Charter of Fundamental Rights of the European Union (hereinafter the (EU) Charter), which is one of the most significant constitutional steps in the history of the EU, towards to the European integration. The first version of the EU Charter was proclaimed with the Treaty of Nice [5], but it became legally binding only with the Lisbon Treaty when it acquired the status of primary EU law, as provided by Article 6(1) of the Treaty on the European Union (hereinafter TEU)[6]. What was clear since the first judgment of the CJEU regarding human rights protection until now, is that the CJEU is not a Human Rights Court but instead the Supreme Court of the EU legal order, whose objectives are not limited solely to the protection of fundamental rights, like the ECHR. [7]

Part 1: Standards of protection of fundamental rights in areas fully harmonized by EU law.

Chapter 1: The Melloni judgment: The system of mutual recognition of judgments and the interpretation of Article 53 of the Charter.

The recognition of the legally binding force of the Charter with the Lisbon Treaty and the existence of a codified bill of rights in EU law has raised questions about the legal relationship between the EU and the national constitutional standards of protection of human rights. Without any doubt, the judgment of the Court of Justice of the European Union in the Melloni case[8] was at the time and remains until today the most significant one in that respect as it concerned directly the interpretation of Article 53 of the EU Charter. The provision of that Article together with those of Articles 51 and 52 of the Charter regulate the scope of application of this instrument and determine its relationship with other European norms as well as with the constitutional principles of human rights protection of the Member States. The Melloni case, related to the issuance of a European Arrest Warrant (hereinafter EAW), is the perfect example to use from the jurisprudence of the CJEU in order to examine how the best possible protection of fundamental rights can be provided

[4] Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn ECLI:EU:C:2004:614

[5] Charter of Fundamental Rights of the European Union, [2012] O.J. C

[6] Consolidated Version of the Treaty on European Union , 2012 O.J. C

[7] Besselink, Leonard F.M, ‘The ECJ as the European “Supreme Court”: Setting Aside Citizens’ Rights for EU Law Supremacy’ (2014/8/18), VerfBlog

[8] *C*ase C-399/11, Stefano Melloni v Ministerio Fiscal ECLI:EU:C:2013:107

in parallel with the preservation of primacy and effectiveness of EU law towards the European integration. Before entering to the details of this landmark judgment, some preliminary points about the system of mutual recognition of judgments, in particular the criminal ones, would be useful.

Mutual trust and mutual recognition initially have been developed in the context of the internal market (Cassis de Dijon case)[9] but with the expansion of the competences of the EU legislator within the field of migration and the one of criminal law, the principle of mutual trust has become quite significant for the development of the judicial cooperation between Member States, which is a condition *sine qua non* for the creation and preservation of a common Area of Freedom, Security and Justice, as provided by Article 3(2)TEU and Articles 67-89 of the Treaty on the Functioning of the European Union (hereinafter TFEU). The successful operation of the system of mutual recognition implies that Member States shall trust each other and presume that the rest have indeed complied with EU principles of fundamental rights protection.

Nevertheless, mutual recognition does not mean absolute and unconditional recognition. The CJEU in its case-law has identified situations where this fundamental EU principle can find its limits. For Instance, in the field of recognition of criminal judgments, the margin of discretion that has been given to Member States, if any, can pose limits to the automatic recognition. EAW Framework Decision 2002/584, as amended by Framework Decision 2009/299, provides for cases of mandatory non-execution of an EAW and for cases of optional non- execution, thus allowing Member States to refuse to execute an EAW. The matter will be further examined in Melloni case, which was proved not to belong to those categories.

Moreover, the EU legislation has provided for exceptions to the system of mutual recognition and enforcement of judgments based on the public policy of the Member States. As specified by the CJEU, under exceptional circumstances, public policy exception "*can be envisaged only where recognition of enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of* ***a right recognised as being fundamental within that legal order***". The CJEU, in that respect, has ruled that the right to be defended in the criminal trial, as part of the fundamental right to a fair trial in general, belonged to the common constitutional traditions of the Member States (now its protection is explicitly provided by the Charter) and its breach constitutes a reason for a Member State to abstain from the system of mutual recognition.[10] This kind of exception to the principle of mutual recognition of judgments, and therefore to the more general framework of the principle of mutual trust, has some similarities with the counter-limits doctrine that, as it will be examined below, Member States have developed in order to protect the hard core of their national identity and the fundamental rights which form part of it, from the absolute and unconditional application of the principle of primacy of EU law.

The Melloni saga revealed the necessity to find a proper balance between the protection of the fundamental right to a fair trial and the EU principles concerning the system of mutual recognition of (criminal) judgments.

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[9]Case C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein. ECLI:EU:C:1979:42
[10]Case-7/98 Dieter Krombach v Andre Bamberski ECLI:EU:C:2000:164

Facts of the Melloni case

The case concerned Mr. Melloni, a suspect of bankruptcy fraud in Italy, but resident of Spain. The *Tribunale di Ferrara* of Italy issued two arrest warrants for his extradition in 1993 and the competent criminal division of High Court of Spain (Sala de lo penal de la audiencia nacional) authorized his extradition to Italy on that basis. After he was released on bail Mr. Melloni fled and as a result his trail before the Italian Courts was held *in absentia* and finally, he was condemned to ten years of imprisonment for bankruptcy fraud. His conviction was confirmed on appeal and a further appeal before the Supreme Court of Italy (*Corte Suprema di cassazione)* was also rejected. Thus, the Italian Public Prosecutor Office issued a European Arrest Warrant for the execution of his sentence in 2004.

When Melloni was finally arrested in Spain, he challenged the decision of his surrender to Italy with an individual complaint (recurso de amparo) before the Spanish Constitutional Court. His basic argument was that his surrender to Italian authorities would constitute an infringement of his right to a fair trial based on the Article 24(2) of Spanish Constitution because he was convicted *in absentia* without having the option to challenge this conviction. Indeed, Article 24(2) of Spanish Constitution, as interpreted by the Spanish Constitutional Court establishes that the possibility of a review of a judgment issued *in absentia* was a condition for surrender in cases of serious criminal offences, such as the one in this specific case, in order for the essence of the right to a fair trial to be protected. [11] Moreover, case-law of the Spanish Constitutional Court made clear that the above rule on the right to a fair trial did apply to circumstances covered by the scope of Framework Decision 2002/584 on the European Arrest Warrant. [12]

However, Framework Decision 2002/584 on the EAW itself, and more specifically, Article 4(1a), provided for a possibility for a national authority to refuse to execute a EAW in case of absence of the person concerned but not in the case when the absent person was aware of his trial and "had given a mandate to a legal counselor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counselor at the trial". Mr. Melloni was aware of his trial, and he had indeed two lawyers to represent him in all the procedural stages of his trial. Thus, according to the provisions of the applicable Framework Decision, it seemed that he could not challenge his surrender because of his physical absence.

Under the above circumstances the Spanish Constitutional Court decided to stay the proceedings and to refer three questions to the CJEU for a preliminary ruling. The first was whether Article 4a (1) of the above mentioned Framework Decision precluded the competent national authority from making the execution of an EAW conditional on the possibility of a review of a trial on order for the rights of defense of the person concerned to be ensured. The second was whether, in the event that the first question was to be answered in the affirmative, the provision of Article 4a (1) is compatible with the rights to an effective judicial remedy and to a fair trial provided by Article 47 of the Charter and with the rights of defense provided by Article 48 of the Charter.

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[11]Nik de Boer, 'Addressing Rights Divergences under the Charter: Melloni' (27 May 2013) <https://papers.ssrn.com/abstract=3763939> accessed 8 September 2022.

[12] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O J L

Last but not least, in the event that the second question would also be answered in the affirmative, the referring court asked whether Article 53 of the Charter gives the Member States the option to make the surrender of a person convicted *in absentia* conditional upon a possibility for a review of the trial in the State which issued the EAW, in other words if Article 53 allows a Member State to apply a higher standard of protection than the one deriving from EU law, in order for a restriction of a fundamental right recognized by its own Constitution to be avoided. It is evident, that especially the third preliminary question about the interpretation of Article 53 of the Charter gave to the CJEU the opportunity to clarify the scope of the Charter and to give some light, not only in that specific case, but generally in the underlying conflict between different levels of protection of rights in a pluralist framework, in other words how primacy of EU law and human rights can coexist.

The Opinion of the Advocate General and the subsequent CJEU' s judgment

Regarding the first preliminary question raised by the Spanish Constitutional Court, Advocate General (hereinafter AG) Bot held that the execution of an EAW cannot be conditional on the availability of a retrial in the situations covered by Article 4a (1) of the EAW Framework Decision. According to him, such thing would be contrary to the explicitly stated intention of the EU legislator to "*provide an exhausted list, for reasons of legal certainty, of the circumstances in which it must be considered that the procedural rights of a person who has not appeared in person at his or her trial have not been infringed"*. The Advocate General pointed out, in that regard, that in fact the EU legislature by adopting Framework Decision 2009/299[13], aimed to improve the legal framework established by Article 5(1) of the Framework Decision 2002/584 in order to achieve a better balance between two, sometimes conflicting, objectives, meaning the objective of enhancing the rights of defense of persons subject to penal proceedings and the objective of improving the system of mutual recognition of judicial decisions between Member States and for the common Area of Freedom, Security and Justice (hereinafter AFSJ) to be preserved. Under the previous regime of the Framework Decision 2002/584 there was given the discretion to Member States to make surrender conditional on the possibility of a retrial, which was tended to provoke legal uncertainty, as significant differences in legal traditions of Member States concerning trials *in absentia* were observed[14] . After the amendment, the surrender of a person convicted in his absence after the issuance of an EAW could not be refused in the following circumstances: a) if the concerned person was unequivocally aware of the scheduled trial and of the fact that a conviction may follow and b) if that person was represented by a legal counselor either appointed by him or by the State itself.[15] As already mentioned, Mr. Melloni did fulfill the above requirements.

As far as the second preliminary question was concerned, the Advocate General referred to Article 52(3) of the Charter that requires for the rights which correspond to rights guaranteed by the ECHR

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[13]2009/299/JHA Council Framework Decision 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 2009 (OJ L).

[14]'John Vervaele, 'The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU', Review of European Administrative Law 2013-2, 40. < https://www.researchgate.net/publication/262583864_The_European_Arrest_Warrant_and_Applicable_Standards_of_Fundamental_Rights_in_the_EU > accessed 10 September 2022

[15]Leonard FM Besselink, 'The Parameters of Constitutional Conflict after Melloni' (25 April 2014) <https://papers.ssrn.com/abstract=2345143> accessed 11 August 2022.

at least the same meaning and level of protection as the one provided by the ECHR. He then elaborated on relative case-law about trials *in absentia* of the ECHR, citing, among other cases, *Sejdovic v.Italy,* and showed how Article 4a (1) of the Framework Decision 2009/299 not only is compatible with the right to a fair trial, as interpreted by the ECHR, but also codifies and gives legal certainty to the situations in which the execution of an EAW should be denied. It is worth mentioning that the Advocate General not only found no reason to differentiate the interpretation of the Charter based on the jurisprudence of the ECHR but also pointed out that the Spanish standard of the protection of the right to a fair trial was not part of the common constitutional traditions of the Member States. What led him to this evaluation was the fact that the Framework Decision 2009/299 was the result of an initiative by seven Member States and it has been adopted unanimously by all Member States. The CJEU followed the Advocate General's Opinion concerning the first two preliminary questions justifying its position with references to its own case-law as well as that of the ECHR.

However, the most important part of the Melloni judgment is, without any doubt, the Advocate General' s opinion and the CJEU 's ruling about the third preliminary question of the Spanish Constitutional Court regarding the interpretation of Article 53 of the Charter. Under its provision, it is declared that:

"*Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, 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 European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member State' s Constitutions".*

The wording of the above provision, which it has been characterized as "*an unsolved enigma of the European Constitutional Law* and particularly the phrase "*in their respective fields of application"* has left unanswered issues about the scope of the Charter. It can be read as a non-regression clause[16] which guarantees the autonomous character of the EU legal order. The comparison with the provision of Article 53 of ECHR is inevitable since Article 53 of the Charter is titled "*Level of protection*" while Article 53 of the ECHR is titled "*Safeguard for existing human rights"*. Nevertheless, the above-mentioned phrase "*in their respective fields of application"*, according to the Melloni judgment, seems to make all the difference between those two similar provisions.

The referring Court, as mentioned before, essentially asked if it could retain, when implementing the Framework Decision 2009/299, its own interpretation of the right to a fair trial, as established in Article 24(2) of the Spanish Constitution. In other words, it asked if Article 53 of the Charter leaves room for the implementation of a higher standard of protection of fundamental rights than the one provided by the Charter. The referring Court not only posed that preliminary question but also offered three possible interpretations.[17] According to the first one, Article 53 of the Charter is considered to be a clause ensuring only a minimum standard of protection of human rights, just

[16] Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights", European Constitutional Law Review, 8: 375-403, 2012, p.402

[17] Aida Torres Pérez, 'Spanish Constitutional Court, Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011' (2012) 8 European Constitutional Law Review 105.

like other relative international law instruments, such as the ECHR. In that case, Member States are allowed to apply a higher standard of protection. The same interpretation has, also, been expressed in the literature, described as the *minimalist* interpretation. [18]

The provision of Article 53 is, according to that interpretation, more symbolic than legally important. The drafters of the Charter meant to clarify that the Charter would not in any way lower any other standards of human rights protection, national or not. The reference to "*their respective fields of application*" indicates that the EU legal order and the domestic ones of the Member States operate in parallel and they do not overlap and as a result no conflict regarding the protection of rights arise. The standard of protection of human rights established in each legal order prevails and that means that if in a specific Member State, the standard of protection is higher, then in that State, this standard should apply. *Jonas Bering Liisberg* agrees that Article 53 of the Charter enjoys "*extremely limited legal significance"* [19]; however, he rejects the above interpretation as a whole and argues that in no way it empowers the CJEU or domestic courts to apply national constitutional rules concerning fundamental rights over EU law in case of conflict.

The second interpretation brought by the Spanish Constitutional Court was that the provision of Article 53 of the Charter defines, in conjunction with Article 51 of the Charter, the level of protection of fundamental rights when EU law applies, and that level is the one established by the Charter itself. On the contrary, outside of the scope of EU law, Member States are free to apply their domestic level of human rights protection. Therefore, that approach implies that there is a possibility of conflict between multiple sources of protection of fundamental rights and in that sense Article 53 of the Charter is an instrument for the competent court to use in order to determine which standard of protection should apply in each specific case. The Charter, in that case, is not just the floor for the protection of fundamental rights but also the ceiling, which cannot be surpassed.

According to the referring Court, though, this interpretation can be problematic as in that way Article 53 of the Charter has no different legal effect from Article 51 of the Charter and it is deprived by its own legal substance and furthermore the Charter, interpreted in this way could lead to a reduction of the level of fundamental rights protection provided by the constitutional norms of each Member State. Nevertheless, that is not totally accurate. Lenaerts has characterized Article 53 as an expression of constitutional pluralism, which puts the CJEU in a position to enter into a judicial dialogue with national courts in order to define the level of fundamental rights that it should apply in each individual case [20]. Therefore, Article 53 of the Charter does not sacrifice the EU law primacy in the name of higher standards of protection of human rights, deriving from the national Constitutions, but neither it provides for an EU law primacy that takes into account the common constitutional traditions of the Member States. From this point of view, the opinion of

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[18]François-Xavier Millet, 'Why Article 53 of the Charter Should Ground the Application of National Fundamental Rights in Fully Harmonised Areas' (1 March 2020) <https://papers.ssrn.com/abstract=3922841> accessed 13 September 2022.

[19]Jonas Bering Liisberg "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?" (2001) Jean Monnet Working Paper 4/01, p.42

[20]Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights", European Constitutional Law Review, 8: 375-403, 2012, p.398, citation "123 L.Azoulai, 'L' article II-113', in Burgorgue-Larsen, supra n.69, at p. 689".

the referring court that this interpretation of Article 53 would undermine the constitutional protection of fundamental rights, is not valid.

At last, the referring Court proposed a third interpretation according to which either the first or the second interpretation should be applied depending on the specific characteristics of the fundamental right that is at stake at any given moment. Compared to the other two possible interpretations, the third one concentrates more to the best possible protection of human rights *per se* and less to the source of protection. Therefore, the relationship between the different sources of human rights protection, i.e. EU law, national standards, ECHR, seems to be rather horizontal than hierarchical one (vertical). [21] Under that perception, Article 53 of the Charter does not constitute a rule of conflict, but on the contrary, it seeks for the highest possible protection of fundamental rights to be applied. Even in fully harmonized by EU law cases, the human rights protection cannot be sacrificed in the name of primacy and full effectiveness of EU law. A similar approach has been endorsed by Torres Perez, who is in favour of a development of the judicial dialogue which would not discourage the CJEU to apply a national standard of human rights protection in case that no other EU law interest is at stake. [22] According to her, the relation between the CJEU and national courts is not hierarchical, as this perception does not comply with the nature of the EU legal order. In any way, according to Article 19 TEU, national courts are also considered to be EU courts.

The AG firmly rejected the first interpretation simply because it infringes the principle of primacy of EU law. According to him, it is indisputable and derives from the settled case-law of the CJEU, which I referred to before, that not even constitutional norms of the domestic legal orders cannot jeopardize the effectiveness and uniformity of EU law. The reference to "*their respective fields of application*" has the meaning that the Charter cannot lower the level of protection of human rights outside the field of EU law but in circumstances covered by EU law it would replace the constitutions. On the other hand, accepting the first interpretation of Article 53 of the Charter would inevitably mean that, at least in some cases, national constitutions providing higher protection to a specific human right than the EU standard would be given priority and that would certainly pose threats to the principle of legal certainty. Indeed, it would be highly possible that many offenders would find refuge in the Member States, whose constitutional rules assure greater protection of human rights than the EU standard, such as Spain in that specific situation. Those Member States might turn into *safe heavens* jeopardizing the grant of justice through the Union and the system of mutual recognition of judgments.

On the contrary, the AG Bot preferred the second interpretation proposed by the Spanish Constitutional Court and concluded regarding Article 53 that "*it does not allow the executing judicial authority, pursuant to its national constitutional law, to make the execution of a European arrest warrant subject to the condition that the person who is subject to the warrant be entitled to a retrial in the issuing Member State, where the application of that condition is not authorized by Article 4a(1) of the Framework Decision*". He saw Article 53 as a supplement of Articles 51 and 52 of the Charter, which did not intend to become the sole instrument of human rights protection but to coexist with other sources of protection of fundamental rights in a pluralist system, such as the European legal order. It is not supposed to affect the different legal traditions of the Member

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[21] Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 European Constitutional Law Review 375.

[22] Aida Torres Pérez "Conflicts of Rights in the European Union: A Theory of Supranational Adjudication", published to Oxford Scholarship Online: September 2009

States in situations that their domestic law is applicable and lower the level of fundamental rights protection. It essentially is a provision of symbolic and mainly political importance: in Liisberg's words "*It is a politically useful inkblot meant to serve as an assurance to Member States, and eventually the electorate, that the Charter does not replace national constitutions and that it does not, by itself, threaten, other, better or different human rights"*[23]. However, when the primacy and effectiveness of EU law is at stake, there is no room for differentiation from the level of protection of human rights provided by the Charter as interpreted by the CJEU.

The CJEU on its subsequent judgment essentially followed the Opinion of the AG as it also rejected the interpretation of Article 53 that would empower the Member States' courts to set aside EU measures that would be contrary to its higher constitutional standard of human rights protection. This would jeopardize the principle of primacy. However, its ruling wasn't totally identical with the Advocate General's Opinion because the CJEU held that "*Article 53 of the Charter confirms that, where an EU act calls for implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised".*

Therefore, the CJEU accepted that the Charter and the domestic constitutional standards of protection can be combined within the field of EU law [24] and that the national courts shall apply their domestic standard of protection arising from their Constitutions, but on two conditions: a) that the protection deriving from the interpretation of the Charter is not undermined, b) that the primacy, uniformity and effectiveness of EU law is not put into jeopardy. Those conditions need to be satisfied cumulatively meaning that the Charter does not constitute only a floor below which the Member States cannot fall when implementing EU law but at the same time a ceiling which the Member States cannot overpass when the primacy of EU legal order is at stake. Thus, from both the Opinion and the Judgment in Melloni case, two situations can be distinguished: on the one hand, the situations which have been fully harmonized in the EU level and on the other hand, the situations in which the level of protection of human rights has not been subject to a common definition within the EU legal order. In the first situation, no room for maneuver is left for the authorities and courts of the Member States while in the second situation the Member States are given a much wider margin of discretion. It was held that the under-examination Melloni case belonged to the first category as the adoption of the above-mentioned Framework Decision 2009/299 aimed to harmonize the conditions for the execution of an EAW in cases of convictions rendered *in absentia* and that harmonization has been the result of a consensus achieved by all Member States. If the Member States were given the opportunity to defy the goals of that Framework Decision, then its efficiency would be jeopardized and the system of mutual recognition of judgments, fundamental for the existence of the EU legal order, would probably collapse. Therefore, the CJEU explicitly ruled that "*Article 53 of the Charter of Fundamental Rights of the European Union does not allow the executing judicial authority, pursuant to its national constitutional law, to make the execution of a European arrest warrant conditional upon the person who is the subject of the warrant being entitled to a retrial in the issuing Member State,*

[23]Jonas Bering Liisberg "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?" (2001) Jean Monnet Working Paper 4/01, p.57

[24]Ladenburger Clemens, 'The Interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions', FIDE 2012 Institutional Report, p. 24

where the application of such a condition is not authorized by Article 4(a) of Framework Decision 2002/584, as amended by Framework Decision 2009/299".

Indeed, the arguments presented by the AG Bot and the CJEU in relation to the importance of the preservation of the Area of Freedom, Security and Justice and the above interpretation of Article 53 of the Charter, are quite logical, given the significance of the uniformity of judgments to the road to European integration, as exposed before. It seems, though, that mainly the CJEU and the AG (less) should justify more their deductions given the importance and the sensitivity of the protection of fundamental rights. And that's because the fact that a consensus of all Member States, or to be more accurate a consensus of all governments of the Member States, has been achieved at the EU level does not guarantee that the provided protection of human rights is enough, and that the primacy is adequate reason to defy that protection. Otherwise, State governments would be able to put aside their own Constitutional principles regarding human rights enacting EU legislation.[25] The CJEU itself came to a similar conclusion in one of its subsequent judgments[26]. However, in the Melloni judgment, the CJEU gave a quite brief ruling, accepting an absolute conception of primacy without further elaborating to its distinction between the situations that permit the application of a national standard of human rights protection and those that do not. And for that, the Melloni judgment can be criticized given the necessity for Article 53 of the Charter to be interpreted after the Lisbon Treaty and its legal equivalence with primary EU law.

Opinion 2/13 and the relationship between the CJEU' s observations and Article 53 of the Charter

The Melloni precedent had its impact on the subsequent Opinion 2/13 of the CJEU regarding the accession of the EU on the ECHR on the basis of the provision of Article 6 TEU. The accession, beyond the fact that it was explicitly provided by Article 6 of the TEU, would be of great symbolic importance as it would send the message that fundamental rights are adequately protected at an EU level, in parallel with the recognition of the Charter as source of primary EU law. Nevertheless, the CJEU rejected the draft agreement of the accession, finding it incompatible with the autonomy of EU law. Its key objections had to do with the principle of mutual trust and the interaction between the EU Charter and the ECHR. The CJEU was preoccupied that mutual trust, fundamental for construction of the common Area of Freedom, Security and Justice, would be jeopardized if the ECHR required from the Member States to observe the compliance of other Member States with the human rights protection principles deriving from the jurisprudence of the ECHR. In that respect, the CJEU found that there was no provision in the draft agreement to prevent this from happening and thus, the accession in that terms should not take place.

Furthermore, the draft agreement, according to the CJEU, did not determine the relationship between Article 53 of the ECHR with Article 53 of the Charter in a way that would be compatible with the interpretation of Article 53 of the Charter that the CJEU itself had already given in Melloni judgment. Article 53 of the ECHR essentially reserves the discretion for the Contracting States to

[25].Reestman Jan Herman and Besselink Leonard , 'Editorial', 9 EuConst (2013) p. 169, p. 173-175.

[26]Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd v Minister of Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, ECLI:EU:C:2014:238

apply higher standards of protection of human rights than the standards provided by the Convention itself. It is more than evident that it comes in direct conflict with the Melloni doctrine and thus, for the draft agreement to be acceptable, there should be an adjustment providing for the possibility of a raise of the level of fundamental rights protection, provided by the Charter, only to the extent that this raise does not jeopardize the primacy, unity and effectiveness of EU law. In CJEU's words, "*Article 53 of the ECHR} should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited-with respect to the rights recognized by the Charter that correspond to those guaranteed by the ECHR"*.

However, it seems that the above arguments of the CJEU were such that not only rejected this draft agreement but also made any future accession quite difficult, as the CJEU seemed to preserve an absolute conception of primacy that might pose threats to the future of fundamental rights protection.[27]

First of all, the argument of the CJEU that Article 53 ECHR would jeopardize the Melloni doctrine and the supremacy of EU law is not quite valid, given that it provides discretion to Member States to apply higher standards of protection of human rights and not an obligation. It does not oblige the opposite of what is obliged by Article 53 of the Charter, but it solely permits it. Therefore, a clash between Article 53 of the ECHR and Article 53 of the Charter would be quite unlikely and the principle of primacy in fully harmonized by EU law areas would still prevail. To embrace such a wide notion of conflict, means that the accession to the ECHR probably would never be feasible, as also any participation of the EU to the international level.

As far as the principle of mutual trust in the Area of Freedom, Security and Justice is concerned, the CJEU recalled its permanent position that Member States are not only obliged to assume that the other Member States respect fundamental rights principles but also to avoid checking in each specific case if the EU level of fundamental rights protection has actually been observed,[28] save in exceptional circumstances, such as the ones that were mentioned before. An example could be the N.S case,[29] where the CJEU permitted an exception to the principle of mutual trust, because of the systemic violations of human rights of asylum seekers in Greece.

Given that, the CJEU ruled that, as long as the accession would require from the Member States to control each other's compliance with fundamental rights, even in situations where there is an obligation of mutual trust, then "*the accession is liable to upset the underlying balance and undermine the autonomy of EU law"*[30]. No difference with the CJEU' s judgment in Melloni case is observed; the CJEU essentially states that the accession with the terms of that draft agreement could lead to a collision of the system of mutual recognition of judgments and to legal uncertainty, for Instance in Melloni case the Spanish Constitutional Court taking advantage of the provisions of the ECHR would have denied the extradition of Mr. Melloni to Italy. Once again, it seems reluctant to engage in judicial dialogue, this time with the ECHR, embracing an absolute notion of

[27]Piet Eeckhout, "Opinion 2/13 on EU accession to the ECHR and Judicial Dialogue:Autonomy or Autarky" {2015}, Fordham International Law Journal, Volume 38 issue 4

[28]Opinion 2/13 of the CJEU, ECLI:EU:C:2014:2454, para. 192.

[29]Joined Cases C–411/10 and C–493/10, N. S. (C-411/10) v Secretary of State for the Home Department and M. E. A. S. M., M. T., K. P., E. H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform,ECLI: EU:C:2011:865.

[30]Opinion 2/13, ibid, para. 194

primacy and of the principle of mutual trust. Notwithstanding, mutual trust and primacy are not the only "*special characteristics*" of EU law; the protection of fundamental rights constitutes a foundational EU value, as laid down in Article 2 TEU, which is to be respected within the AFSJ, as it is explicitly provided by the wording of Article 67(1). The Melloni judgment and the CJEU 's Opinion regarding the accession of the EU to the ECHR indicated us that the CJEU, in the sensitive area of human rights protection, after the equation of the Charter to EU primary law, cannot accept to be bound by any other interpretation, coming either by the ECHR or the national courts, than its own. This could be justified in the light of Article 19 TEU, according to which the CJEU is competent to observe the interpretation and application of the EU Treaties, but without sacrificing at the same time the fundamental rights of EU citizens.

Chapter 2: The counter-limits doctrine as an exception of the principle of primacy in areas fully harmonized by EU law

"*The Union shall respect the equality of Member States before the Treaties as well as their* ***national identities,*** *inherent in their fundamental structures, political and constitutional..".* The provision of Article 4(2) TEU, providing for an identity clause, has been widely discussed and still hasn't been totally clarified. It does not belong to the context of the present paper to analyze in general the above provision, but as certain fundamental rights belong to the constitutional tradition and identity of Member States, it is essential to examine if and in what extent the meaning of that fundamental rights may constitute an exception to the principle of primacy even in fully harmonized areas. Of course, since the famous *Internationale Handelsgesellschaft* judgment, the CJEU has always maintained its initial ruling that "*allowing rules of national constitutional law to override EU law is tantamount to calling into question the legal basis of the Community itself*"[31].

On the contrary, most Constitutional and Supreme Courts of the Member States have developed their relative jurisprudence in that respect, each one expressing its own perception of the counter-limits (*controlimiti)* doctrine, as it's called.[32]The first judgment ever coming from a national constitutional court providing for a constitutional reservation to primacy was the *Frontini* judgment [33] of the Italian Constitutional Court. Nevertheless, it was the German Federal Court that played (and still does) the most significant role to the development of the counter-limits doctrine with a series of judgments through the years: *Solange I, Solange II,*[34] *Maastricht.*[35] The idea behind the counter-limits doctrine is that the national identity of each State consists of a core that cannot be modified, not even by its own constitutional amendments. Subsequently, it also puts a limit to the European integration and the level of protection of those specific human rights that are considered to be part of the national identity of each Member State cannot be reduced, not even in the name of primacy and unity of EU law. In principle, the Constitutional Courts accept the primacy of EU law, even over their constitutional provisions, but they have introduced an exception to this rule, regarding the fundamental constitutional principles and the fundamental rights, that are the hard core of their national identity. Despite of the differences that may arise

[31]See fn. 3

[32]The term "*controlimiti*" was coined by the Italian contitutional law scholar Paolo Barile, in *Ancora su diritto comunitario e diritto interno*, in *Studi per il XX anniversario dell'Assemblea costituente*, vol. VI (1969) 45.

[33]Corte Costituzionale, sentenza n.183, 18 Dicembre 1973

[34]BVerfG, 2BvR 2134/92, Oct. 12, 1993.

[35]BVerfG, 2BvR 197/83, Oct. 22, 1986

between the Member States, they all share this idea and they have developed their own counter-limits doctrine. The Spanish Constitutional Court has excluded from the EU competence the issues related to "*the values, principles or fundamental rights of our Constitution"* in its decision concerning the establishment of the Constitutional Treaty[36], while the French *Conseil Constitutionelle* has ruled that primacy of EU law has no effect to "*a rule or principle inherent to the constitutional identity of France".* The Italian Constitutional Court has referred to "*the supreme principles of the Italian constitutional order and inalienable rights"* whereas for the Czech Constitutional Court the limit of EU law primacy can be found to "*the foundations of materially understood constitutionality and the essential requirements of a democratic, law based, State that are, under the Constitution of the Czech Republic, seen as inviolable (Article 9 par.2 of the Constitution)"*[37]

The Bundesverfassungsgericht, the German Federal Court, expressed its approach in that regard, for the first time in the above-mentioned *Solange I and Solange II* judgments. In the first one, it explicitly ruled that it was competent to review EU acts as long as (Solange in German) fundamental rights protection in the EU legal order was less adequate than the one provided by the Basic Law [38]. However, in the second judgment of 1986, the German Federal Court reversed its previous approach. It observed that the level of protection of human rights within the EU has been increased in a way that it complied with the standard of Basic law and therefore, it would not review anymore EU acts as long as this level of human rights protection remained at least equivalent with the minimum standard of Basic Law.[39] This perception was affirmed on its subsequent *Maastricht* [40]*and Banana*[41] judgments.

Furthermore, as the European integration is evolving, the gap between the protection of fundamental rights at the EU level and the level of protection of human rights belonging to the hard core of constitutional law of the Member States, becomes quite rare. The Italian Constitutional Court, already in its older case-law, has characterized the possibility of the Community to violate the inalienable human rights of the Italian legal order, as "*aberrant and unlikely"*[42]. However, it came a few years later, in the *Fragd* case [43], to re-evaluate the counter-limits doctrine and to state that the above possibility wasn't that unlikely after all. In that respect, the Spanish Constitutional Court has also considered "*difficult to conceive (dificilmente concebible)"* a clash between EU law and Spanish constitutional identity in practice [44], although in Melloni case such a differentiation was observed and, as we will examine in the next pages, it led the Spanish Supreme Court to change its previous jurisprudence. This point of view is common to the German legal order as it has been expressed both by the academic literature and the German

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[36]DTC 1/2004, para. 3.
[37] Pl. ÚS 29/09 , judgment of 2009/11/03 para. 216
[38]BverfG, BvL 52/71, 29 May 1974
[39] BverfG, 2 BvR 197/83, 22 October 1986

[40] BVerfG, 12 October 1993, 2 BvR 2134, 2159/92 *Treaty of Maastricht*, BVerfGE 89, 155

[41]7 June 2000, 2 BvL 1/97 *Bananas*, BVerfGE 102, 147.

[42]See, respectively, Corte costituzionale, judgment *Frontini*, cit. at 2, para. 9; and judgment of 8 June 1984, n. 170 (*Granital*), para. 7

[43]Corte costituzionale, judgment of 21 April 1989, n. 232 (*Fragd*), para. 3.1
[44]DTC 1/2004, para. 4.

Federal Court at the below examined *Solange III* case. [45] To be more specific, the German Federal Court held that the protection of fundamental rights at the EU level, as provided by the Charter and interpreted by the CJEU, is effective enough. Thus, the *Solange II* condition, that the German Federal Court can review EU measures which do not ensure equivalent to the constitutional standard protection of fundamental rights, doesn't seem to have any practical importance. It is worth mentioning that this identity clause, is explicitly stated to Article 23(1) of the Basic Law.

However, in *Solange III* judgment, which concerned the execution of an EAW, the German Federal Court turned the identity clause of Article 4(2) TEU into a safeguard mechanism of the fundamental right of human dignity, which was claimed to belong to the constitutional core of German legal order and needs to be protected in every case. Human dignity is guaranteed by Article 1 and Article 79(3) of the Basic Law and therefore it is one of its constitutive fundamental rights [46]. And as it belongs to that category of German Basic Law, it has priority over EU law primacy even in areas entirely harmonized and therefore sets a limit to the European integration.[47]

In order for us to understand better the ruling of the German Federal Court, it is essential to refer to the facts of that specific case, which, like Melloni, had to do with the execution of an EAW. It is also interesting to observe the differences between the judgments of the two Supreme Courts, the Spanish Constitutional Court and the German Federal Court.

In 1992, a north American citizen was convicted *in absentia* in Italy for drugs trafficking and he was finally arrested in 2014 in Germany due to an EAW issued by the competent Italian authorities. Similarly to the Melloni case, the convicted person alleged that, according to Italian law, he wouldn't have the possibility of a retrial even though he was convicted *in absentia.* The Members of the second department of the German Federal Court ruled, by unanimity, that under the above circumstances the fundamental right of the convicted to defend himself, which constitutes a specific expression of the right to human dignity, had been violated and as a result, it annulled the decision authorizing the surrender of the convicted person to Italy and it ordered the re-examination of the case in order to be checked if the necessary guarantees concerning the right to human dignity had been respected by the Italian authorities. In other words, it introduced a direct exception to the principle of mutual trust and recognition of judgments, which obliges the Member States to take as a given that the appropriate level of protection of fundamental rights has been maintained by the rest Member States. In this way, it gives an answer to the absolute perception of EU law primacy and creates new dimensions to the judicial dialogue between the CJEU and national courts in the field of fundamental rights protection while in the Melloni judgment the matter of Article 4(2) TEU remained almost untouchable.

More specifically, to go back to Melloni judgment, the Spanish Constitutional Court, when it posed to the CJEU its preliminary question, had indeed interpreted the right to a fair trial in conjunction with human dignity and had argued that, according to Article 24(2) of Spanish Constitution, the physical presence at the trial belonged to the core of that right. However, as already mentioned, the CJEU didn't refer at all at the identity clause and completely ignored the relative arguments of the Spanish Constitutional Court. Only the Advocate General in its Opinion has taken it into consideration, arguing that secondary EU law can actually be challenged on the basis of Article

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[45]BVerfG, 2 BvR 2735/14 *Solange III, 15 December 2015,* para 46.

[46]BVerfG, ibid, paras 48–49

[47]BVerfG, ibid, paras 40-42

4(2) TEU. But, according to him, this was not the case there because, in his view, the right to a fair trial did not belong to the notion of national constitutional identity of the State of Spain. He justified this point of view on the basis of the fact that, during the hearings, the Spanish government had not defended that idea, expressed by the Spanish Constitutional Court.[48] This justification is not very convincing given that the Courts are responsible to interpret fundamental rights and clauses such as the one of Article 4(2) TEU and not the governments, and especially the Spanish government which, according to the Constitutional Court, had infringed such a fundamental right. Although not in a convincing way, at least the Advocate General had referred to this important issue and didn't remain silent, as the CJEU did. On the contrary, the CJEU could have elaborated more to the balance between the primacy of EU law and the obligation for respecting the national identity of the concerned Member State, Spain in the case at stake, which is provided directly by the Treaties. Instead, it preferred not to enhance the judicial dialogue (that is provided by the preliminary ruling procedure of Article 267 TFEU itself) but to cut it short[49] and to use primacy as the only criterion for the interpretation of Article 53 of the Charter and for the determination of the level of fundamental rights protection.[50]

In order to conceive better the importance of the *Solange III* judgment, we need to compare it with the reaction of the Spanish Constitutional Court after the Melloni judgment, which came almost a year later. The Spanish Constitutional Court stated as a preliminary point that it had to balance the response of the CJEU to its preliminary question with the doctrine that itself had established in Declaration 1/2004 regarding the Constitutional Treaty.[51] This doctrine was nothing else but the Spanish version of the *controlimiti* doctrine which made a distinction of terms between the primacy of EU law and the supremacy of the Constitution. [52] In accordance with the counter-limits doctrine, as developed in other Member States, the Spanish Constitutional Court had declared that the primacy of EU law is not absolute and it finds its limits to the effective protection of fundamental rights which operates as a precondition for primacy. [53] In that respect, the Spanish Constitutional Court repeated its opinion given in Declaration 1/2004 and more specifically it stated that in case of incompatibility between EU law and the constitutional principles regarding the protection of fundamental rights, itself could be competent to resolve the existing conflicts.[54] It characterized, though, this situation "*difficult to conceive" (dificilmente concebible)* which remind us of the conclusion of the German Federal Court in *Solange II* judgment, when it declared that the protection of fundamental rights at the EU level has become efficient enough leaving few possibilities for incompatibility with national constitutions.

However, it turned out that the Spanish version of the counter-limits doctrine did not apply to the Melloni case, according to the judgment of the Spanish Constitutional Court. It is quite peculiar,

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[48] Opinion of AG Bot in Case C-399/11, Stefano Melloni v Ministerio Fiscal, ECLI:EU:C:2012:600

[49] Besselink Leonard F.M., 'The parameters of constitutional conflict after Melloni', European Law Review, August 2014, nr 3, p. 16.

[50] Nik de Boer, Addressing rights divergences under the Charter: Melloni, Common Market Law Review 50: 1083–1104, 2013, p. 1091.

[51] STC 26/2014,judgment of 13 February 2014 para. 3.

[52] Castillo Antonio Lopez et al., 'Constitución española y Constitución europea (Centro de Estudios Políticos y Constitucionales' 2005

[53] DTC 1/2004,ibid ,para. 2

[54] DTC 1/2004, ibid , para. 4

though, given that, when introducing its own *controlimiti* doctrine in Declaration 1/2004, the Constitutional Court had interpreted Article 53 of the Charter as a clause providing for a minimum standard of protection and quoting again its controlimiti doctrine, it would be expected that it would apply it in that specific case. Nevertheless, it did not refer at all to the interpretation of Article 53 of the Charter despite the fact that it had asked specifically the CJEU for that interpretation. Instead of that, the Constitutional Court essentially complied with the CJEU's judgment and adjusted to it its own interpretation of the right to a fair trial. It presented this reversal, though, as an autonomous decision and not as compliance to the CJEU. More specifically, it used both previous ECHR judgments and the Melloni judgment as hermeneutic tools of great utility ("gran utilidad") and concluded that indeed the core of the right to a fair trial is not infringed in such circumstances, as those of the Melloni case. [55] However, in this way, not only it failed to support its own *controlimiti* doctrine as introduced in Declaration 1/2004 but at the same time, considering the CJEU' s judgment solely as an interpretative tool, it failed to acknowledge the autonomous nature and the primacy of the EU legal order, which dictates the compliance to the preliminary rulings of the CJEU. Revising in this way its previous jurisprudence, not only it lowered the constitutional standard of human rights protection in situations covered by EU law but it did so even in purely domestic ones.

Having examined the above judgment of the Spanish Constitutional Court, the importance of the *Solange III* judgment to the reconciliation of the primacy and fundamental rights protection is more than evident. On the one hand, the ruling guarantees the effective protection of the right to human dignity, which belongs to those whose protection cannot be lowered, not even for primacy's sake, and especially in the sensitive field of mutual recognition of criminal judgments, which has been challenged the most by the constitutional Courts of the Member States.[56]

On the other hand, it showed no disrespect for the primacy of EU law as it declared that the human dignity condition would not pose a significant threat to the uniform application of EU law. It would emerge only in exceptional situations in order to safeguard the core of this fundamental right. In that regard, as mentioned before, the German Federal Court acknowledged that generally the Charter and its interpretation provides for adequate protection of fundamental rights, so cases of conflict would not be common. In this way, the *Solange III,* essentially complements rather than overrules the *Solange II* judgment. [57] If we would like to codify both of them, we would conclude that in areas entirely harmonized, EU law enjoys absolute primacy over the German Basic Law on two conditions: as long as the EU standard of fundamental rights protection is, in general adequate enough and secondly, as long as the protection of the fundamental right to human dignity, as part of the constitutional identity of Germany, is not jeopardized.

The impact of the judgment to the protection of fundamental rights cannot pass unnoticed. Although primacy was recognized, the German Federal Court pressured the CJEU to take more seriously a possible infringement of a human right that might belong to the "heart" of national

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[55]STC 26/2014, ibid , para. 4.

[56]J Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of the "Contrapunctual Principles"' [2007] Common Market Law Review 9.

[57]E Uría Gavilán, 'Solange III? The German Federal Constitutional Court Strikes Again' (22 April 2016) European Papers, http://www.european papers.eu/it/europeanforum/solange-iii-german-federal-constitutional-court-strikesagain.

identity of the Member States, as it would prefer to avoid a direct conflict with a national Supreme Court, and especially the Federal Court with such rich jurisprudence, in that respect.58 The CJEU, indeed, seemed to have taken it into account in its subsequent judgment in the joined cases *Aranyosi and Caldararu*[59], which concerned again the execution of a European Arrest Warrant. What the CJEU ruled in those cases, was that, in an exceptional way, the Member States are allowed to refuse to execute an EAW if there is the possibility that the extradited person would face degrading detention conditions on the Member State, which has asked for his extradition. The differentiation in the approach of the CJEU in comparison with the Melloni judgment is more than evident; the CJEU showed that it can actually take advantage of the judicial dialogue between courts and that sometimes primacy and the need for unity within the EU legal order can be sacrificed in order to ensure that basic principles of fundamental rights protection will not be jeopardized. It indicated that the mutual trust between States cannot be blind without, at least, minimum preconditions[60]. This approach was confirmed in most recent cases, concerning EAW procedures, in which the State issuing the arrest warrants was Poland. [61] It is essentially, however, to point out that the CJEU in the relevant judgments held that the right to a fair trial is not compromised solely by the fact that the State which issued the EAW (Poland) has been judged to have undermined the rule of law but a concrete violation in each specific case should be proved. Obviously, the application of this exceptional rule would be unlikely to take place and so the activation of the national identity clause, since the CJEU hasn't affirmed it explicitly.

To sum up the already examined issues, after the establishment of the Charter and its equation with primary EU law, the CJEU, as it was shown in the Melloni judgment, seemed to consider it as the prevailing source of fundamental rights protection in situations entirely determined by EU law and interpreted it in such way that would secure the preservation of the autonomy and uniformity of EU legal order. However, the necessity, explicitly stated in the Treaties, to respect the national identity of Member States and to ensure the best possible protection of fundamental rights are capable of setting limits to primacy without jeopardizing the road towards to the European integration as the *Solange III* judgment clearly manifested.

Part 2: the balance between primacy and human rights protection principles in areas partially governed by EU law

Chapter 1: The Fransson judgment: clarifying the scope of the Charter (Article 51)

[58]X. Arzoz, “Karlsruhe rechaza la doctrina Melloni del Tribunal de Justicia y advierte con el control de la identidad constitucional” {2015}, Revista Espanola de Derecho Europeo 58, pag.109-141

[59]Case C-404/15, Aranyosi and Căldăraru, EU:C:2016:198.

[60]G Anagnostaras, ‘Mutual Confidence is Not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: Aranyosi and Căldăraru’ [2016] Common Market Law Review 1675.

[61]Case, C-216/18 PPU,Minister for Justice and Equality ECLI:EU:C:2018:586, Joined cases C-562/21 PPU, C-563/21 PPU, ECLI:EU:C:2022:100

As already examined, the CJEU in Melloni case interpreted Article 53 of the Charter in conjunction with Articles 51 and 52 of the Charter. The three Articles together determine the way fundamental rights are protected within the EU legal order. And, as in the Melloni judgment both the Advocate General and the CJEU made a distinction between situations fully harmonized and situations only partially governed by EU law, it is evident that we cannot totally understand the balance between EU law primacy and fundamental rights protection if we do not examine the aspects of Article 51 of the Charter. Article 51 defines the scope of the Charter and more specifically it is declared that:

"1. *The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to Member States* ***only when they are implementing Union law.****(...).*

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks, as defined in the Treaties".

The competence clause can also be found in Article 6(1) TEU, where the provision of Article 51(2) of the Charter is repeated almost verbatim and it is, also, declared that neither the accession on the ECHR would change EU competences. In other words, Article 51 is an affirmation that the already existing scope of EU fundamental rights would be preserved. However, that doesn't mean that the extent to which EU fundamental rights are applied and the areas, in which Member States are considered to implement EU law, were already well defined and thus, the establishment of the Charter wouldn't pose interpretative issues.

In order for the exact meaning of the term "***implementing Union law***" to be clarified, the explanations relating to Article 51 of the Charter can be of great use. [62] They are based on the relevant case-law of the CJEU until the Lisbon Treaty and cite judgments such as the ones in Wachauf, ERT and Annibaldi cases[63]. In light of this case-law of the CJEU, two different categories of obligations for the Member States deriving from EU law, can be distinguished. On the one hand, EU obligations that requires from a Member State to take action (Wachauf case); on the other hand, EU obligations with which Member States must comply even when they derogate from EU law (ERT case) and in those situations is where the standard of fundamental rights protection provided by the Charter applies. On the contrary in the explanations concerning Article 51 it is, also, cited previous case-law of the CJEU where was found that no EU obligation was imposed on the Member States (Annibaldi judgment) in order for the situations in which the Charter shall not apply to be specified. Before proceeding to the interpretation of Article 51 by the CJEU after the Lisbon Treaty, it would be useful to refer, at least a bit, to that previous case-law.

The Akerberg judgment: clarifying the scope of the Charter

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[62]*See*, the explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17 ("the explanations relating to the Charter")

[63]Case C-5/88,Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft, ECLI:EU:C:1989:321, Case C-260/89 Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others, ECLI:EU:C:1991:254 and Case C-309/96, Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio, ECLI:EU:C:1997:631

The very same day (26 February of 2013) that the Melloni judgment was published, the CJEU, also, delivered the Fransson Akerberg judgment[64], which is no coincidence. On the contrary, those two judgments were particularly awaited and they have been examined since that day always together, as the CJEU, for the first time since Charter became legally binding, interpreted the so - called horizontal provisions of the Charter, meaning Articles 51,52 and 53.

As introductory points, I will briefly refer to the facts of the case. It concerned Mr. Fransson, a self-employed worker whose main activities were fishing and the sale of fishes. His fishing activity was carried out in Sweden but his sale activities both in Sweden and Finland. In 2004 and 2005 he was found by the Swedish tax authorities to have failed to provide tax information and an administrative fine was imposed to him. In that regard, on the same factual and legal basis, criminal proceedings have been brought against him in 2009. What needed to be clarified by the CJEU, after the preliminary question that was posed to it, was whether the EU principle of *ne bis in idem* provided by Article 50 of the Charter was applicable to the above circumstances. And for that to be clarified, an interpretation of Article 51 was necessary, too; was Sweden implementing Union law? And if it was implementing Union law, was the standard of fundamental rights protection provided by the Charter the only one that should be applied?

In that respect, during the submissions to the CJEU, all governments were of the opinion that the issue at stake was a purely domestic issue, clearly outside the scope of EU law and thus, accordingly to the previous case-law of the CJEU (Annibaldi case) the Charter and generally, the EU principles concerning human rights had no effect there. Following a cautious approach, the European Commission as well as the AG Cruz- Villalon adopted the same interpretation of Article 51(1) of the Charter. Respectively, the Advocate General stated that: "*the competence of the Union to assume responsibility for guaranteeing the fundamental rights vis-a-vis the exercise of public authority by the Member States when they are implementing Union law must be explained by reference to a specific interest of the Union in ensuring that that exercise of public authority accords with the interpretation of the fundamental rights by the Union".*[65] In order for such a specific interest of the Union to exist, Union law needs to have the principal role in each individual case, meaning that the connection of each case with EU law must be so close that the Union should have the responsibility of ensuring the protection of fundamental rights and not the Member States. The AG, having assessed all the factual circumstances of the case, concluded that an interpretation of the *ne bis in idem* principle in the Swedish legal order was an issue completely different than the collection of VAT, which constitutes an EU law matter, and therefore, the case at stake didn't belong to the scope of Article 51(1) of the Charter and it would be disproportionate for the CJEU to claim its jurisdiction and provide for an interpretation that would prevail the one deriving from Sweden's constitutional structure in a situation with such a weak connection with EU law. [66] Respectively, Judge Rosas has distinguished between cases where an EU norm applies *in concreto* and cases where it applies *in abstracto*[67]. The second condition would mean that even an indirect and insignificant relevance of EU law with each individual case would activate the protection provided by the Charter and that would take place in almost every situation, since gradually more and more areas are related to EU law, even slightly.

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[64]Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105

[65]See. Opinion of A.G Cruz-Villalon in Case C-617/10 Akerberg ECLI:EU:C:2012:340 para.40

[66]Ibid, paras. 61-63.

[67]A. Rosas , When is the EU Charter of Fundamental Rights Applicable at National Level? Vol 19, No 4(2012) Jurisdprudence, p.1276 at p.1278

However, the CJEU ruled differently. From its point of view, the tax penalties and criminal proceedings against Mr. Fransson were directly connected with the obligation to declare VAT, an obligation that derived from Council Directive 2006/112/EC and from Article 4(3) TEU. Moreover, according to the CJEU, the provision of Article 325 TFEU, obliging the Member States to take the appropriate measures in order to protect the financial interests of the Union, was relevant to the case at hand. Furthermore, it referred to its own case-law, the one that has been included in the explanations regarding Article 51 of the Charter, and explicitly to the *ERT* case and the derogation case, and it found that, indeed, the situation at stake was within the scope of EU law and since in its own wording "*the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter"* it held that it enjoyed jurisdiction to interpret whether the national legislation at stake and the measures against Mr. Fransson were compatible with the *ne bis in idem* laid down in Article 50 of the Charter.

Despite the "homogeneity" clause provided by Article 52(3) of the Charter, in *Ajerberg,* the CJEU, in order to examine the compatibility of the Swedish measures with Article 50 of the Charter, made no reference to the ECHR case-law at all but instead formed its own autonomous interpretation of the *ne bis in idem* principle. That made sense, especially if we combine it with the observation of AG Cruz-Villalon that many States had not ratified the Protocol No. 7 ECHR, in which the corresponding right to the one of Article 50 of the Charter was included. The CJEU, taking into consideration three criteria and more specifically a) the legal classification of the offence under national law, b) the very nature of the offence and c) the nature and degree of severity of the penalty imposed, concluded that the *ne bis in idem* principle, as laid down in Article 50 of the Charter does not preclude a Member State, in this case Sweden, from imposing for the same acts of non-compliance with declaration obligations in the field of VAT, both a tax and a criminal penalty, as long as the first one is not determined by national courts as of criminal nature.

Having seen how the CJEU determines the situations that fall within the scope of EU law, and as a result within the scope of the Charter, and that after the establishment of the Charter tries to provide for an autonomous protection of fundamental rights at the EU level, it is interesting to examine the intersection between the Melloni and Fransson judgments, which is nothing else but Article 53. Paragraph 29 of the Akerberg judgment essentially repeats paragraph 60 of the Melloni judgment since it is stated that: "*where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised".* In other words, it repeats and confirms the Melloni distinction between fully and partially harmonized by EU law areas. From that distinction derives the absolute application of the standard of the Charter on the first condition and the room for discretion for the Member States on the second. That is the situation in Akerberg and its differentiation in comparison with Melloni. For that to be understood, paragraph 29 of the judgment should be read in parallel with paragraph 36 where it is ruled that "*It is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards as referred to in paragraph 29 of the present judgment, which could lead it, as*

the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive".

Together, the Melloni and Akerberg judgments give us a more complete image of how the CJEU understands the relationship between primacy and fundamental rights principles. From an optimistic point of view, one can observe that the CJEU' s jurisdiction does not turn the Charter into a substitute of the human rights protection provided by the national Constitutions but the two standards can coexist as long as the primacy and the EU objectives, deriving from the Treaties, are preserved. That is why, for some authors, the Charter in fact is not deprived of legal importance[68] but it can be considered as a "*best protection*" clause with unity of EU law as a limit. [69] On the other hand, from a pessimistic point of view, one might consider that the CJEU interpreted Article 53 of the Charter in a way that indicates that for EU law primacy and effectiveness' s sake, it has no hesitation to undermine[70] the significance of constitutional rights of EU citizens. Similarly, *Aida Torres Perez* made a reference to the aforementioned *Omega* judgment, according to which the CJEU permitted the derogation from primary EU law in order for the protection of a human right, as interpreted at the national level, to be safeguarded.[71] The fact that in Akerberg case, the CJEU allowed the application of the national standard does not make any difference since if it was for a fully harmonized area, it would again sacrifice human rights in the name of primacy. And since we referred to the Omega case when the CJEU had ruled for a derogation from a provision of EU primary law, the examination of the judgments that constitute the so-called Taricco saga would shed some light in order to achieve a better understanding of subject-matter.

CHAPTER 2: The Taricco saga: An application of the Melloni criteria or an exception of the principle of primacy?

Once again, a preliminary question referred to the CJEU by a national Constitutional Court, and more specifically by the Italian one, gave the opportunity for a further examination of the interaction of the Charter with national constitutional human rights. The so-called *Taricco saga* is considered, by most authors of EU law, to be the continuation of the CJEU's previous case-law regarding the interpretation of the Charter, meaning the above examined judgments in Melloni and Akerberg cases.[72] It constitutes the most recent judicial example that has demonstrated the controversity of the EU motto of "unity in diversity", especially in the field of EU criminal law, which is proved to be the most problematic one in the field of fundamental rights.

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[68]Bruno de Witte, Article 53 –Level of Protection, in S. Peers, T. Hervey, J. Kenner and A. Ward, The EU Charter of Fundamental Rights –A Commentary, Oxford, Hart, 2014, p. 1533.

[69] Groussot, X. and Olson, I., (2013) Clarifying or Diluting the Application of the EU Charter of Fundamental Rights?- The Judgments in Åkerberg and Melloni, Vol II LSEU, pp7-35, p. 25.

[70] Leonard F.M. Besselink, THE PARAMETERS OF CONSTITUTIONAL CONFLICT AFTER *MELLONI,* European Law Review, August 2014, nr 3.

[71]*Aida Torres Pérez,* Melloni in Three Acts : From Dialogue to Monologue, European Constitutional Law Review, 10: 308–331, 2014, p. 327.

[72]*V. Mitsilegas*, Judicial dialogue in three silences: Unpacking Taricco, NJECL 9 (2018), p. 38,

The Taricco saga consists in two CJEU' s judgments and in the middle, the response of the Italian Constitutional Court. The examination of the posed arguments will allow us to determine whether the Taricco saga reversed the Melloni doctrine and changed the balance between primacy and the existing sources of human rights protection, as this balance had been shaped in the previous case-law of the CJEU.

The starting point was a preliminary question posed by the national court of Kuneo in Italy (Tribunale di Cuneo) in relation to a case in which several persons, including Taricco, were accused of having organized a conspiracy and committed a series of serious value-added tax (VAT) fraud offences. The preoccupation of the referring court had to do with the short limitation period, provided by the Italian legal system. Under this system, it could be quite possible that eventually the actions of Taricco and of the other suspects would be time-barred by the time of a final convicting decision. That situation, from the point of view of the referring court would be equal with de facto legal impunity[73] Thus, what was basically the question of the referring court was whether the domestic regime of the statutory limitation period, applicable to that specific case, was compatible with EU law, and precisely with the VAT Directive [74], the same that applied in Fransson case.

The CJEU, following the proposal of the AG Kokott, based its ruling to Article 325 TFEU and reiterated its position from the Fransson judgment that the Member States are obliged to take effective, proportionate and dissuasive measures in order to protect the financial interests of the Union.[75]. The connection of Article 325 TFEU with this case is more than evident since VAT revenue forms part of the EU's own resources[76] and as a result VAT offences, such as the ones in this specific case, should be dealt with criminal measures that fulfill the above three criteria [77]. Therefore, it was up to the referring court to examine whether the relevant national rules indeed permitted a permanent situation of legal impunity and if so, to disapply them[78], without infringing the principle of legality laid down in Article 49 of the Charter. What can be observed here, is that the CJEU, in order to protect the effectiveness of EU Law in an absolute way, does not even hesitate to connect the domestic criminal procedures with the EU financial interests and to circumvent the principle of legality. It essentially puts the referring court, and therefore any national court, to the position to disrespect the constitutional principles of its own legal order and to proceed to a contra legem interpretation of national law. It is important to point out here that, within the Italian legal order, the limitation period rules are considered to be of substantive and not procedural nature[79]. Given that, the CJEU' s ruling totally contradicted with the principle of legality since it had interpreted the limitation rules as purely procedural so that their disapplication,

[73]Case C-105/14, Criminal proceedings against Ivo Taricco and others, ECLI:EU:C:2015:555 paras. 22–24.
[74]council directive 2006/112 EC of 28 November 2006 on the common system of value added tax, OJ 2006 L 347, p. 1.

[75]See Case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson*, EU:C:2013:105, paras. 25–26

[76]Case C-105/14, *Taricco*, para 38; Case C-617/10, *Åkerberg Fransson*, para 26
[77]Ibid, paras. 39–43.
[78]Ibid, *Taricco*, para. 49
[79]Paris David, 'Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case Taricco'(2017), Questions of International Law (QIL) 37, p. 5, 8 et seq.

even though it would be contrary to the Italian legislation, would be compatible with the interpretation of the principle of legality, as laid down in Article 49 of the Charter.

The above points led some Italian courts, after the Taricco judgment, to bring a series of case before the Italian Constitutional Court (hereinafter ICC) for constitutional review of the disapplication of the limitation period rules. The ICC decided to refer the matter to the CJEU with three preliminary questions[80] invoking its own version of the counter-limits doctrine.[81] More specifically, it claimed that predictability and sufficient certainty constitute fundamental principles of the Italian Constitutional order and it confirmed that limitation period rules are of substantive nature and therefore protected by the principle of legality[82]. Under those circumstances, it asked whether the national courts were obliged to conform with the Taricco obligation even if by doing so they would infringe supreme constitutional principles.

In its point of view, the EU institutions should accept a minimum level of diversity in order for the national identity of each Member State to be preserved. [83]. To support this idea, it invoked a series of provisions of EU primary law, such as Article 2 TEU, based on which pluralism is an EU value, Article 4(2) TEU (respect of national identities) and Article 6(3) TEU (respect for constitutional traditions). Moreover, it referred to previous case-law of the CJEU to point out the fundamental importance of the principles of legality and legal certainty. [84]It even interpreted Article 53 of the Charter as if that allowed the application of a higher standard of human rights protection than the one provided by the Charter and in order to prevent any objections from the CJEU, it differentiate the case at stake with the Melloni case since the statute of limitation period does not fall within the EU competences but instead it is a matter of great significance for the Italian legal order.

The above arguments of the ICC were firmly rejected by the AG of the case, Mr. Yves Bot[85] which is no surprising at all, given that he was, also, the AG in Melloni where he had denied an interpretation of Article 53 of the Charter that would qualify it as a clause providing for minimum standards of human rights protection. In this case, he defended the necessity of the effectiveness of EU law, and more specifically of Article 325 TFEU and the protection of EU financial interests, and the ruling of the CJEU in Taricco case. He interpreted the interruption of the limitation period as an autonomous concept of EU law and not as a purely national issue: "*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*".[86] As we shall find out when examining the new judgment, the CJEU did not endorse this radical position. Otherwise, the ICC surely would have activated its controlimiti doctrine since the field of criminal law is considered to be a matter of national sovereignty and that is why Member States remain, until now, quite reluctant to share their relevant competences with the EU. As far as the meaning of Article 53 of the Charter is concerned, the AG recalled its findings from the Melloni case and

[80]ICC order, no. 24, of 26.1.2017

[81]Order 24/2017, section 2.

[82]Ibid, para. 8;

[83]Ibid, para. 6.

[84] Ibid, para. 5 referring to ECJ judgment of 12.12.1996 in case C-74/95 and. C-129/95 (*X*), ECLI:EU:C:1996:491

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

[86]AG *Bot*, Opinion (fn. 83), para. 101

once again stated that the Charter provides for a satisfying level of human rights protection, which however balances with the specific objectives of EU law. In areas only partially harmonized, Member States are allowed to apply higher standards of protection, if there are any, but always the primacy and effectiveness of EU law must not put into jeopardy. And, according to the AG, in this specific case exactly that would happen and therefore, the circumstances here were not fulfilling the Melloni criteria. [87]. Last but not least, the AG found that no adequate justification had been given by the ICC regarding its claim that the status quo of the limitation periods concerned the preservation of its national identity. Thus, he concluded that the Italian constitutional order would not be compromised in case longer limitations periods applied, as derived from the Taricco judgment.

The Judgment

In its judgment of 5 December 2017,[88] the CJEU avoided to refer to Article 4(2) TEU and to deal with the controlimiti argument that was posed by the ICC and instead it preferred a more diplomatic approach. It recalled the interpretation of Article 325 TFEU that had been given in Taricco judgment, according to which Member States are obliged to take the appropriate deterrent measures to give full effect to the protection of EU financial interests. Although they enjoy discretion in order to achieve that purpose, the CJEU ruled that the use of criminal penalties in cases of serious VAT offences, such as the one in the examined case, seems essential and it is up to Member States to develop the appropriate criminal norms.[89] Then, it proceeded to examine the statute of limitation period rules, which within the Italian legal order are considered to be of substantive rather than procedural nature, and it held that the relevant to VAT offences legislature had not been fully harmonized until that time, but only partially by Directive (EU) 2017/1371,[90] since criminal law fell under the shared competence of the EU and Member States.

Therefore, Italy was free to interpret limitation period rules as substantive ones and make them subject to the principle of legality. And in this case, according to the doctrine established by the CJEU in Melloni and Akerberg judgments, the Italian courts were free to apply their national standards of protection of human rights only with the precondition that the standard of the Charter and the primacy and effectiveness of EU law would not be compromised. However, it did refer to its own settled case-law about the principle of legality, which gives to Article 49 of the Charter the same meaning that the case-law of the ECHR has given to the corresponding Article 7(1) ECHR. Based on that, the principle of legality and to be more precise, the principle of non-retroactivity do not apply to limitation rules. As a result, because of the fact that the matter at stake had not been totally harmonized by EU law, Italian courts weren't obliged to comply with the Taricco obligation, as long as they considered that the principle of legality was in danger but at the same time, it was up to the Italian legislature to provide for limitation period rules which would be compatible with EU law.[91]

[87]Ibid, paras. 158-163
[88] Case C-42/17, Criminal proceedings against M.A.S and M.B., ECLI:EU:C:2017:936
[89]Ibid, para. 32 et seq.
[90]Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017
[91]Case C-42/17, Criminal proceedings against M.A.S and M.B., ECLI:EU:C:2017:936, para. 61.

Assessment of the M.A.S judgment in the light of the balance between EU primacy and human rights principles

The importance of the CJEU' s judgment in the *M.A.S* case for determining the interaction between EU law primacy and human rights protection principles cannot be underestimated. Since its publication, it has been subject to different and contradictory interpretations by the legal literature.

More specifically, for some authors the Taricco Saga constituted a reversion of the Melloni doctrine, a sign that the CJEU has decided to adopt a more pluralistic understanding of fundamental rights protection since in this situation it had accepted that the principle of legality could be an obstacle to the EU obligations deriving from Article 325 TFEU and that its own ruling in Taricco I judgment, where it had opted for a more limited framework of the ne bis in idem principle, might not have taken into consideration the fundamental rights of the persons involved. [92]. This could open the way for other Member States to apply their own standards of protection, even if they are higher than the EU one, since the CJEU seemed to have introduced an exception to the absolute conception of primacy, that has developed in the past. As *Burchardt* pointed out in that respect, "*for the first time, in its jurisprudence, the court thus resolves such a conflict between domestic law and EU law not in favour of EU law primacy but in favour of the domestic constitutional law principle – without basing this outcome explicitly on the higher level of protection rationale in Article 53 of the Charter".* [93]. In case of such a conflict, normally it would be required, because of the primacy, that the national rule to be disapplied. [94] Thus, on the one side, the CJEU either opted for an interpretation of the principle of legality that is based on the common constitutional traditions of the Member States or opted for the national interpretation of the principle of legality, which was in direct conflict with the provision of Article 325 TFEU.

On the contrary, from a different point of view that has been expressed to the literature, the M.A.S judgment not only it did not establish an exception to primacy declaring the prevalence of domestic standards of human rights protection over European ones, but instead of that, it actually confirmed the Taricco I ruling and the previous jurisprudence from Melloni and Fransson cases. What it did, was in fact to repeat once again that the national courts always are obliged to ensure the effectiveness of EU law [95] and the fact that it repeated almost verbatim its findings from the Taricco I judgment regarding the obligations of the Member States deriving from Article 325 TFEU shows that indeed it hasn't reversed its previous jurisprudence. Moreover, the ICC when it referred to the CJEU for a preliminary ruling, it had explicitly asked for a statement that Article 53 of the Charter actually provides for the application of a national standard that guarantees higher protection of human rights, thus to reconsider the Melloni doctrine.[96]

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[92]Defusing the Taricco Bomb through Fostering Constitutional Tolerance: All Roads Lead to Rome' (no date) *Verfassungsblog*. Available at: https://verfassungsblog.de/defusing-the-taricco-bomb-through-fostering-constitutional-tolerance-all-roads-lead-to-rome/ (Accessed: 28 October 2022).

[93]Belittling the Primacy of EU Law in Taricco II' (no date) *Verfassungsblog*. Available at: https://verfassungsblog.de/belittling-the-primacy-of-eu-law-in-taricco-ii/ (Accessed: 28 October 2022).

[94]See Avbelj, "Supremacy or primacy of EU Law: (Why) does it matter?", 17 ELJ (2011), 744–763, 751.

[95]*Sicurella*, NJECL 9 (2018), p. 24, 25 et seq

[96]ICC Order 24/2017, section 8.

However, the CJEU did not satisfy this request, which is something that it would have done if it wished to establish such an exception to primacy. It seems, instead, that the CJEU evaluated the case at issue as a specific expression of the distinction, elaborated in Melloni and Akerberg judgments, between fully and partially harmonized by EU law areas. The circumstances of the case indicated that a higher standard of human rights protection, provided by national law, was in fact permissible under EU law as the national limitation period rules have not been harmonized and specified by EU secondary legislation. That is the differentiation with Melloni case; within the common Area of Freedom, Security and Justice, part of which is the system of recognition of judgments, the EU objective is the cooperation between Member States in the field of criminal justice, among others. That is why the area is entirely determined by EU primary and secondary law; on the other side, Article 325 TFEU has to do with the promotion of EU financial interests and criminal law can be only an instrument for the satisfaction of this objective and in this way, limitation period rules are relevant only by reflex. Furthermore, M.A.S was basically a matter of domestic (Italian) interest while Melloni case contained a cross-border element and therefore, it was necessary for the CJEU to assure the uniformity and effectiveness of EU law.[97]

We have referred multiple times to the distinction of the CJEU between fully and partially harmonized by EU law areas. What areas belong to those that are only partially determined has not been totally clarified by the CJEU but the M.A.S judgment indicates us that partial determination can take two forms: a) when the EU legislation, and by that I mean the secondary EU law that specifies primary EU law, leaves a margin of discretion to Member States so they can apply domestic principles and standards of protection of human rights. For Instance, we can refer to the *Jeremy F.* case[98], another case related to a EAW where the application of the domestic standard of human rights protection was permitted and the right for an appeal with suspensive effect against the decision issuing the arrest warrant was given because the EAW Framework Decision did indeed leave such a possibility open.

The Taricco obligation provided by Article 325 TFEU, on the other hand, left no discretion to Italy. How can the prevalence of the national constitutional standard of principle of legality over EU law could then be explained? The reference of the CJEU in the judgment to *Impresa Pizzarotti* case [99] has enlightened the situation a bit. Under the circumstances of that case, the CJEU has accepted a breach an EU law obligation in order to guarantee the protection of the principle of *res judicata,* a fundamental principle that both the EU legal order and the national ones share. This case, of course, does not enjoy uniqueness; it is part of settled case-law of the CJEU [100]. Taking into consideration the fact that the CJEU has referred to it, it makes sense to examine the M.A.S judgment in the light of this case-law and conclude that the CJEU' s ruling that allowed Italy to apply its domestic standard neither overruled the Melloni doctrine neither put into jeopardy the principle of primacy but simply it "sacrificed" the full effect of primacy in order to safeguard another primary principle of both the EU legal order and the national ones, namely the principle of legality. It is worth

[97]C. Rauchegger, "National Constitucional rights and the primacy of EU law: M.A.S., {2018}, Common Market Law Review 55, pag.1521-1548

[98]Case C-168/13 PPU, *Jeremy F.* v. *Premier ministre*, EU:C:2013:358, paras. 51–53.

[99]Case C-213/13, *Impresa Pizzarotti & C. SpA* v. *Comune di Bari and Others*, EU:C:2014:2067, paras. 58–59.

[100]Case C-126/97, *Eco Swiss China Time Ltd* v. *Benetton International N.V.*, EU:C:1999:269, paras. 46–47; Case C-234/04, *Rosmarie Kapferer* v. *Schlank & Schick GmbH*, EU:C:2006:178, paras. 20–21; Case C-40/08, *Asturcom Telecomunicaciones SL* v. *Cristina Rodríguez Nogueira*, EU:C:2009:615, paras. 35–37

mentioning that the CJEU did not extend the meaning and scope of the principle of legality, as provided by Article 49 of the Charter and interpreted by itself, in other words it did not overturn its own ruling in Taricco I. That is why it permitted the referring court to determine whether the legal nature of limitation period rules belong to the notion of principle of legality but under the obligation that the latter would uphold the requirements of foreseeability, precision and non-retroactivity, that belong to the core of the principle of legality, according to settled case-law of the CJEU. [101] and that the Italian legislator would make the limitation rules compatible with EU norms. (which has indeed taken place). Another proof that the CJEU did not mean to reverse its previous jurisprudence was the fact that it did not refer at all to Article 53 of the Charter, which essentially determines when the EU protection of fundamental rights enjoys primacy over national or other sources of human rights protection. Interpreting Article 49 of the Charter as a minimum standard was only the result of a combination between a situation partially governed by EU law and the need for the common to the EU and the Member States, principle of legality to be safeguarded. In any way, the Melloni and the Taricco saga were two totally distinct situations; they were involved with different fundamental rights, under different factual circumstances on different legal frameworks and under different level of harmonization by EU law.

The assessment of the Taricco saga in the light of the national identity clause

As already mentioned, the ICC, when it referred to the CJEU for a preliminary ruling, it argued that the principle of legality constituted part of the Italian constitutional identity and that, according to its own version of the *controlimiti* doctrine, based on the provision of Article 4(2) TEU, it enjoyed prevalence over conflicting EU law [102]. It essentially followed the example of the German Federal Court which, as examined in the first part, it invoked the national identity clause on the basis of the fundamental right of human dignity [103]. The CJEU, similarly to Melloni judgment, didn't refer at all to the clause of Article 4(2) TEU and, as explained, it solved the conflict interpretating Charter as minimum standard. In this way, it once again showed its reluctance to interpret or even comment the meaning of national identity clause, which we should not forget that is contained in the Treaties. It solely clarified that, in the light of its responses to the first two preliminary questions of the ICC, there was no need for it to answer the third one, which was the one related to the *controlimiti* doctrine.

The permanent reluctance of the CJEU to examine the notion of the national identity clause, and especially in regard of the fundamental rights that are part of it, is not surprising. Answering national identity questions and entering in such a judicial dialogue with national courts could give Member States the opportunity to doubt primacy in many future cases, only by invoking a human right that is supposed to be part of the hard core of their national identity. In this case, the principle of primacy, that the CJEU has fought through the years to safeguard it, and therefore the very substance of the EU legal order could be jeopardized. Nor the CJEU would desire to initiate a direct and explicit conflict with a national Constitutional Court, especially if we take into account the fact that Polish and Hungarian supreme courts had already at that time started to challenge the

[101]See Case C-72/15, *PJSC Rosneft Oil Company* v. *HerMajesty's Treasury and Others*, EU:C:2017:236, para 162; Case C-554/14, *Criminal proceedings against Ognyanov*, EU:C:2016:835, paras. 63–64.

[102]Order 24/2017, section 2

[103]BVerfG, 15 Dec. 2015, 2 BvR 2735/14, *Solange III.*

EU law primacy – not on the basis of a domestic standard of human rights protection but on the basis of the *ultra vires* argument, meaning that the EU acted outside of its given competences. In a quite similar way, the German Federal Court has, also, challenged the EU competences in its judgment of 5 May of 2020.

Therefore, the CJEU quite logically did not devote any arguments to the national identity clause argument so it would be for itself to determine in future cases the conditions under which Article 4(2) TEU would be satisfied and not to the discretion of Member States. In that respect, we can refer to the example of the Hungarian Constitutional Court, which without activating the preliminary reference procedure, provided by Article 267 TFEU, adopted on its own a wide interpretation of Article 4(2) TEU and ruled for the disapplication of EU migration policy measures [104], which by the literature was considered to be an abuse of the national identity clause.[105]

For some authors, however, the CJEU's silence regarding the national identity clause, even in situations only partially governed by EU law, such as the ones in the Taricco case, is not satisfying at all. It has been argued that, after all, the provision of Article 4(2) TEU is not addressed to Member States, in a way that they could challenge it in order to derogate from an EU obligation and defy primacy[106]. On the contrary, it is addressed to the EU institutions, including the CJEU; it provides for the requirement that they should respect the national identity of Member States.[107] And as a matter of fact, although the CJEU did not make any explicit reference, it did respect this requirement since it allowed Italy to consider limitation rules as substantive ones and subsume them under the notion and scope of the principle of legality given that the relevant area had not been harmonized by EU law at "*the material time"*.[108].

However, as mentioned before, a first attempt to harmonize, among others, the VAT area has been made with Directive 2017/1731 that was adopted in July 2017 with deadline for transposition until July of 2019. Given that the M.A.S judgment of the CJEU was released in December 2017, it seems quite possible that the reasoning of the CJEU had been influenced by that. The CJEU wouldn't have reason to initiate a conflict with a supreme court, such as the ICC, for a matter only partially governed by EU law when it knew that soon enough the issue at stake was going to be further harmonized by EU legislation [109]

Despite the criticism about the reasoning of the CJEU in M.A.S judgment, the outcome creates optimism for the future of the judicial dialogue between the CJEU and national courts, in the field of fundamental rights protection. As it was observed in the Melloni judgment, the CJEU has the tense to worry more about the uniformity and effectiveness of EU law, than the individual rights per se, which has given the impression, especially before the establishment of the Charter, that it

[104]Hungarian Constitutional Court, Decision 22/2016. (XII. 5.) AB (30 November 2016)

[105]Halmai, G. (2018) 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article 4 (2) of the Fundamental Law', *Review of Central and East European Law*, 43(1), pp. 23–42

[106]Cloots, *National Identity in EU Law* (OUP, 2015), pp. 181–182

[107]Cloots, ibid., p. 183

[108]*C*riminal proceedings against M.A.S and M.B, para. 44

[109]Bruggeman, R. and Larik, J. (2020) 'The Elusive Contours of Constitutional Identity: *Taricco* as a Missed Opportunity', *Utrecht Journal of International and European Law*, 35(1), pp. 20–34.

wasn't taking human rights seriously.[110] Nevertheless, in this case it permitted the application of a domestic standard of protection and the lack of total harmonization of the limitation rules and the reluctance of the CJEU to clarify Taricco I judgment do not change the fact that the CJEU indeed took into serious consideration the arguments, brought forward by the ICC.

The ICC, in its final judgment in the M.A.S case,[111] essentially repeated the position that it had expressed in its referral decision and ruled that the national courts that had brought the preliminary questions shouldn't disapply the limitation period rules at stake because the obligation deriving from the Taricco I judgment was incompatible with the principle of legality, as interpreted within the Italian legal order and irrespective of the time of the facts. In other words, the ICC, taking advantage of the fact that the CJEU hadn't clarified the Taricco obligation in the M.A.S judgment, stated that under no circumstances the Taricco obligation could be applied because of its incompatibility with the principle of legal certainty laid down in Article 25(2) IC. Thus, although the Italian courts were permitted to apply their domestic standard of protection, the fact that the ICC rejected the Taricco obligation in its totality and on the contrary, the CJEU avoided to reverse its previous judgment and to examine the national identity clause, may indicate that the saga of the balance between EU law and human rights protection principles could continue in the future. [112] As far as the matter of limitation rules in criminal cases is concerned, it is up to the CJEU to interpret the Directive 2017/1371 in the future and clarify the situation. It is worth mentioning that the Italian legislator, already before the M.A.S judgment was delivered, had changed the statute of limitation period rules, in compliance with the CJEU' s demand.

Personal comments and conclusion

The aim of this dissertation was to examine, in the light of the Melloni saga, how the well-established, since the inception of the EU, principle of primacy can be balanced with the existing and sometimes contradicting sources of fundamental rights in order for the best possible protection to be achieved. The key points are, on the one hand, the level of harmonization of a specific field of law by EU norms and on the other hand, the effectiveness of the judicial dialogue between the CJEU and national courts, in particular with constitutional ones, as laid down in Article 267 TFEU.

As far as the level of harmonization and its importance for the human rights protection are concerned, the CJEU' s jurisdiction is clear; the Charter constitutes the codification of the human rights that are protected at the EU level and thus, it is, according to Article 51, which defines its scope, and the interpretation given by the CJEU in Fransson Akerberg judgment, the sole instrument to be used for the protection of human rights in any situation that is covered by EU law. Which situations exactly belong to the scope of EU law and therefore, of the Charter, is not always easy to specify; however the Fransson judgment has shed some light in that regard.

Given that, the level of harmonization determines whether the Charter, as primary EU law since the Treaty of Lisbon, will be the only source of fundamental rights or whether the Member States

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[110]Coppel and O'Neill, "The European Court of Justice: Taking rights seriously?", 29 CML Rev. (1992), 669–692, 670

[111]Italian Constitutional Court, 31 May 2018, Order 115/2018.
[112]*Mitsilegas*, NJECL 9 (2018), p. 38, 42

are allowed to apply other sources, such as the ones that derive from their constitutional order or from international instruments, such as the ECHR. The CJEU in its landmark decisions in Melloni and Taricco cases clarifies that on the condition that full harmonization has been achieved , EU law, part of which is the interpretation of the rights codified in the Charter, enjoys absolute precedence over national constitutional law. (Melloni case). On the contrary, in areas that are only partially governed by EU law, a discretion has been given to Member States to apply the standards of fundamental rights protection they wish but in that case two criteria must be satisfied cumulatively; a)the level of protection should be higher or, at least, the same with the one provided by the Charter, meaning that the Charter isn't always the ceiling but is always the floor of human rights protection, and b) the primacy, unity and effectiveness of EU law shouldn't be jeopardized.

The importance given by the CJEU to the level of harmonization is justified. Without harmonization, the EU objectives, as laid down in the text of the Treaties, cannot be accomplished. The establishment of an internal market, with the free movement of persons, goods, services and capital, and of a common Area of Freedom, Security and Justice demands uniformity and legal certainty, thus, it is quite logical for the CJEU to prevent derogations from the EU harmonized legislation. In Lenaerts' s words"*from the fact that the Charter is now legally binding it does not follow that the EU has become a 'human rights organization'.* Thus, it cannot be its only preoccupation the human rights protection but the best possible protection in accordance to the common objectives.

In any way, the EU fundamental rights and their interpretation are the result of a settled jurisprudence of the CJEU through the years, which was based on the case-law of the ECHR and the common traditions of the Member States, and therefore it is more likely that the EU standard will be the same with the national ones, than the opposite. Member States, in most situations, accept that but, on the basis of Article 4(2) TEU, which explicitly obliges the EU institutions to respect their national identities, have developed the so-called counter-limits doctrine, to except the hard core of their constitutional principles, including the fundamental rights, from the effects of EU law primacy.

That lead us to the second key point of the dissertation, which was mentioned before, meaning the judical dialogue between the CJEU and national constitutional courts. The CJEU in Melloni was criticized of being too absolute and as a matter of fact it was; the fact that in Fransson and M.A.S judgments, gave to the Member States the option to derogate from the EU standard it does change anything in reality because it essentially applied the Melloni distinction between fully and partially harmonized areas and it did not establish any exception to primacy, from the point of view of the author nor promoted the judicial dialogue. The CJEU has repeatedly avoided to confront the counter-limits doctrine and has preferred to deal with fundamental rights issues in a hierarchical way, rather than an pluralistic way. From a personal glance, the fact that the CJEU, in Melloni judgment, has denied to evaluate the national identity clause solely based on the fact that, for the system of mutual recognition of (criminal) judgments to be constructed with the adoption of Framework Decisions, a consensus from all the governments of the Member States has been achieved, creates justified preoccupation. In no way, decisions adopted exclusively by the executive power without the interference of the legislative and judicial powers, should be considered to guarantee the protection of fundamental rights without the chance to be controlled. This creates democratic issues. Nor the mutual trust, which is, without any doubt, a fundamental EU principle, should be blind, particularly the current period that the rule of law seems to be jeopardized even within the EU territory. The CJEU has noted, in that regard, some progress, with

the above examined judgments, in which it exceptionally allowed derogations from primacy balancing the need for better human rights observation, but that is no sufficient. Without primacy and mutual trust, indeed there is no integration, there is no EU legal order. Notwithstanding, the EU has ceized to be just a common economic area, the human rights protection needs to be a number one priority.

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