

# ARTICLES

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## ECJ's Recent Case-Law on Criminal Matters: Protection of Fundamental Rights in EU Law and its Importance for Member States' National Judiciary

### *Abstract*

This paper attempts to highlight the main features of ECJ case-law on safeguarding fundamental rights through an overview of the most nodal recent judgments in criminal cases. The objective is to specify their importance to member states' judiciaries, intending to serve the proper administration of justice in an institutionally multilevel and highly sensitive judicial area. In this context, the paper discusses: (a) the Grand Chamber judgment in *Åklagaren v. Hans Åkerberg Fransson* (C-617/10, 26.2.2013) for the enforcement of the *ne bis in idem* principle between "administrative" and criminal sanctions, together with the recent convictions of Greece by the ECtHR and the relevant national Supreme Administrative Court case-law, (b) the Grand Chamber judgment in the *Taricco* case (C-105/14, 8.9.2015) on the non-application of national provisions on the statute of limitations to ensure effective protection of the EU financial interests in view of the Union law primacy, and (c) the Grand Chamber judgment in joined cases *Aranyosi, Căldăraru* (C-404/15 and C-659/15, 5.4.2016) with regard to the restriction of the mutual recognition principle to ensure the warranty of fundamental rights while executing European Arrest warrants. The overview offers support to national judges for an effective protection of fundamental rights in their national laws, but also an opportunity for vigilance in their further activation to this direction in collaboration with the competent bodies of the EU legal order.

### *1. The focal starting point*

Since December 2009, member states' criminal law has been co-defined more than ever by EU action in fields of paramount importance. Implementation of the Lisbon Treaty has completely altered the field of criminal repression in all areas where the Union has

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competence to intervene in member states' national law<sup>1</sup>. It is self-evident that this intervention also affects *the application of the law*.

As a result, judicial practice should highlight the practical importance of Union law in the field of criminal repression, bearing in mind three pivotal facts:

*First:* In the field of substantive criminal law, divergence of national law from EU law is only tolerable when national legislation criminalizes *more*, and not less, than what the Union designated. In contrast, in the field of criminal procedure, divergence is only accepted if national law provides a *higher* level of protection for procedural rights. However, this higher level of protection for these kinds of rights is only relevant to the national legal order. This stems from the notion of *minimum rules* which the Union introduces by means of directives (articles 82 par.2 and 83 par.2 TFEU)<sup>2</sup>, which aim to serve the principle of mutual recognition and which do not have an identical function in substantive criminal law and in criminal procedure<sup>3</sup>. As a result, *members of the national judiciary should not be exclusively interested in their own national law*.

*Second:* National legislation which transposes into national law Union provisions should be interpreted according to the latter. In case of doubt, it is not the national courts which are competent to interpret the Union provision, but rather the ECJ (article 19 TEU) to which they should submit a request for a preliminary ruling. It should be noted, though, that in the case of incorrect transposition of a Union provision into national law, a national judge may under no circumstances interpret the relevant provision in a manner leading to extended criminal liability over the national provisions' wording in order to attain the result which the Union law pursues<sup>4</sup>. This is dictated by the n.c.n.p.s.l. principle, which is guaranteed by the EU-Charter of Fundamental Rights (article 49).

*Third:* The institutionally binding protection of fundamental rights by means of their inclusion in the Charter not only requires national members of the judiciary to directly apply the Charter<sup>5</sup>, but also brings into the forefront the relationship between primary Union law and national law, and in particular national constitutional law. De-

1 See in detail *M. Kaiafa-Gbandi*, European criminal law and the Treaty of Lisbon [in Greek], 2011, pp. 22 et seq.

2 See *P. Asp*, The Substantive Criminal Law Competence of the EU, 2012, pp. 110 et seq., *A. Giannakoula*, Crime and Penalty in the European Union [in Greek], 2015, pp. 32 et seq. and 435 et seq., *H. Satzger*, International and European Criminal Law, 2012, pp. 78-79, 128-131.

3 *Kaiafa-Gbandi*, European criminal law and the Treaty of Lisbon [in Greek], pp. 29 et seq. and 43 et seq.

4 The ECJ has ruled that a directive may not by itself (i.e. lacking transposition via national law) "establish or escalate criminal responsibility of defendants" [see indic. Judgment of 3.5.2005 in cases C-387/02, C-391/02 and C-403/02 (Berlusconi a. others), particularly para. 77].

5 See ECJ judgment of 26.2.2013 in case C-617/10 (Hans Åkerberg Fransson), paras. 45, 48.

spite all the different views on the subject<sup>6</sup> and according to the ECJ<sup>7</sup>, primary EU law is superior to national constitutions. This position may have extremely important practical implications for the judiciary, as the example of the *ne bis in idem* principle showcases. According to the ECJ<sup>8</sup>, the latter principle (as analyzed below) is applicable in the case of 'administrative' and criminal penalties concerning the same kind of behavior<sup>9</sup>, provided that the foreseen administrative penalties bear the characteristics of a penalty. Consequently, differentiated judgments by national (including supreme) courts may not void the protection offered to a fundamental right by the EU-Charter of Fundamental Rights, even if they invoke rules of a constitutional order. On the other hand, it is evident that the relationship between primary Union law and national constitutions poses the question of whether any *limits* exist to the primacy of the Union's founding treaties over rules of national constitutional orders. This question recently resurfaced due to the view adopted by the ECJ regarding limitation periods for criminal offences affecting the financial interests of the European Union, which will also be addressed further below<sup>10</sup>.

Finally, the above-mentioned new institutional reality of criminal repression in EU member states with its practical implications for the application of law should be incorporated into the wider institutional framework of the Union edifice, in which criminal law belongs. From this viewpoint, it is important to note that criminal law has a dual identity in democratic societies, functioning not only as the means to protect certain legal interests, but also as a civil liberties standard<sup>11</sup>. A country's participation in a supranational organization should not corrode this identity<sup>12</sup>. After all, in the Union edifice, criminal law is part of the area of freedom, security and justice (article 67 TFEU), which, according to par.1 of article 67 TFEU and articles 2, 3 and 6 of TEU, should respect the fundamental rights guaranteeing civil liberties<sup>13</sup>.

- 6 *L. Papadopoulou*, National Constitution and Community law: the issue of primacy [in Greek], 2009, particularly pp. 218 et seq. and 568 et seq., *K. Chrysogonos*, Constitutional Law (2<sup>nd</sup> Ed.) [in Greek], 2014, pp. 190 et seq.
- 7 The principle of the primacy of Community Law was established by ECJ's familiar Judgment of 15.7.1964 on Case 6/64 (*Costa v. E.N.E.L.*), and particularly over the national constitutions in its Judgment of 17.12.1970 on Case 11/70 (*International Handelsgesellschaft*). See also indic. *E. R. Sachpekidou*, *European Law* (2<sup>nd</sup> Edition), 2011, pp. 501 et seq.
- 8 See ECJ judgment of 26.2.2013 in case C-617/10 (*Hans Åkerberg Fransson*) and its rundown below (under 2.1.).
- 9 See, e.g., the field of smuggling or tax evasion.
- 10 See the Italian Constitutional Court's reaction against the ECJ ruling over the *Taricco* case and its rundown below (under 2.2.).
- 11 See *I. Manoledakis*, *General Theory* [in Greek], 2004, pp. 26 et seq. Cf. also *P.-A. Albrecht*, *Die vergessene Freiheit, Strafrechtsprinzipien in der europäischen Sicherheitsdebatte*, 2003, pp. 47 et seq.
- 12 *Kaiafa-Gbandi* *European criminal law and the Treaty of Lisbon* [in Greek], pp. 11-12, *European Criminal Policy Initiative (ECPI)*, *The Manifesto on European Criminal Policy*, ZIS 2009, p. 748.
- 13 Cf. *W. Weiß/H. Satzger*, Art. 67, Rn 24ff., in *Streinz*, *EUV/AEUV, Vertrag über die Europäische Union und über die Arbeitsweise der Europäischen Union*, Kommentar, 2. Aufl. 2011.

In this broader context, ECJ jurisprudence in criminal matters is interesting, especially when it comes to the Court's approach towards fundamental rights guaranteed by the Charter as national courts may be required to directly implement the ECJ's relevant interpretational perceptions<sup>14</sup>. On this note, it is quite useful to look into some relatively recent and extremely significant judgments issued by the ECJ which outline the Court's position on the effects that the protection of fundamental rights offered by Union law may have on the application and enforcement of criminal law in the various member states.

## 2. *Important, recent and ECJ judgments in cases of protection of fundamental rights in criminal matters*

### 2.1. Judgment of the Court (Grand Chamber) in the case of Hans Åkerberg Fransson (C-617/10, 26.2.2013): the ne bis in idem principle regarding 'administrative' and criminal penalties

The first out of the important relatively recent rulings of the ECJ in the field of criminal matters was issued in the case of Hans Åkerberg Fransson. In this case, the ECJ recognized the application of the ne bis in idem principle (also) when both 'administrative' and criminal penalties are imposed for the same illegal behavior<sup>15</sup>. In particular, the Court found in a Swedish case of tax evasion partly linked to the levying of value added tax, that tax penalties and criminal proceedings for tax evasion constitute implementation of Articles 2, 250 and 273 of Directive 2006/112/EC on the common system of value added tax and of Article 325 TFEU<sup>16</sup>, and, therefore, of European Union law. Since Union law is applicable, it follows that so are the fundamental rights guaranteed by the EU's Charter. Consequently, as the ECJ found that it had jurisdiction to answer the questions referred to it, it ruled the following:

- Article 50 of the Charter does not preclude a member state from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties (para. 34).
- It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter, and has become final, that that provision precludes criminal proceed-

14 See fn. 7 and below under 2.1.

15 On the principle's importance where administrative and criminal sanctions concur, see *I. Dimitrakopoulos*, Administrative sanctions and fundamental rights [in Greek], 2014, pp. 160 et seq., also Ne bis in idem and the presumption of innocence in cases of tax or customs violations following the Greek Supreme Administrative Court's 2<sup>nd</sup> Chamber judgments 1992/2016, 1993/2016, 434/2017, 680/2017 [in Greek], Presentation in the 17.3.2017 conference on tax law hosted by the National Academy of Judges, [Http://www.esdi.gr/nex/images/stories/pdf/dimodieyseis/2017/forodiagifi/dimitrakopoulos.pdf](http://www.esdi.gr/nex/images/stories/pdf/dimodieyseis/2017/forodiagifi/dimitrakopoulos.pdf).

16 See paras. 24–27.

ings in respect of the same acts from being brought against the same person (para. 34, last sentence).

- Three well-known criteria established by the ECtHR are relevant for the purpose of assessing whether tax penalties are criminal in nature<sup>17</sup>: the first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (para. 35).
- It follows from the foregoing considerations that the *ne bis in idem* principle does not preclude a member state from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine (para. 37).
- On the other hand, the ECHR, as long as the European Union has not acceded to it, does not constitute a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law (para. 44).
- A national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, *if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means* (para. 45). In other words, European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully and with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter (para. 48).

The above mentioned ECJ judgment is of critical importance as it clarifies three important facts relevant both to Union and national law:

First, according to ECJ's settled – although incorrect in my opinion -- view<sup>18</sup>, Union law is applicable in cases of non-compliance with declaration obligations in the field of VAT, as the Union's financial interests are affected<sup>19</sup> and need to be effectively

17 Commonly known as “Engel criteria” from the homonymous ECJ decision *Engel and others v. The Netherlands* (Plenary), 8.6.1976.

18 See particularly ECJ's judgment (Grand Chambre) in *Taricco* (C-105/14), 8.9.2015, paras. 37 et seq.

19 See contra *Th. Papakyriakou*, in St. Pavlou & Th. Samios, *Special penal laws* [in Greek], Tax offenses I, Introductory Remarks, 5<sup>th</sup> update, November 2016, pp. 12-13.

protected by Union law according to article 325 TFEU. As a result and according to the ECJ, VAT fraud should be punished according to the PIF Convention. However, the reason why this has not happened so far and while the PIF Convention was in force<sup>20</sup> is that the Convention's explanatory report, stating member states' views, expressly excluded its application in VAT cases<sup>21</sup>. Today, under the recent Directive 2017/1371 (article 2 par.2), the Court's view seems to be confirmed. Nevertheless, in respect of fraud with regard to VAT criminalization only covers acts or omissions in cross-border fraudulent schemes connected with the territory of two or more member states of the Union involving a total damage of at least 10 000 000 EUR.

Second, without further ado, national courts should disapply (i.e. without having to await the prior repeal of the provision by way of legislation or any other constitutional procedure) any provision contrary to a fundamental right guaranteed by the EU-Charter when ruling over matters governed by Union law,<sup>22</sup> as is the *ne bis in idem* principle (for example and according to the ECJ, as in the case of non-compliance with declaration obligations in the field of VAT). In practice, this also means that when a Directive is transposed into the national legal order and the former is contrary to the fundamental rights laid out in the Charter or to the general principles of primary EU law, such as the principle of proportionality, the national court is obliged to set aside national legislative provisions which infringe upon these rights or principles, and ask in case of doubt for the ECJ's assistance in the interpretation of Union law by means of a preliminary ruling.

Third, as a fundamental right laid out in article 50 of the Charter<sup>23</sup>, the *ne bis in idem* principle does not preclude a member state from imposing for the same acts of non-compliance with declaration obligations in the field of VAT a combination of tax penalties and criminal penalties, provided that the first are not criminal in nature. This should be determined by the national court based on the three well-known criteria established by the ECtHR. In contrast, if the tax penalties are criminal in nature, they cannot be imposed for the same acts of non-compliance with declaration obligations in the field of VAT for which the criminal court has already reached a judgment not subject to an appeal.

Of course, the level of protection offered by the *ne bis in idem* principle is affected by the corresponding ECtHR jurisprudence on the subject. Although it may not yet be binding for the European Union legal order, its importance for the member states of the Union is evident and may affect them even directly, such as in the case of Greece.

20 Replaced by the latest Directive 2017/1371/EU, 5.7.2017; see arts. 16 and 19 on PIF's replacement and the Directive's entry into force, respectively.

21 See explanatory report to the PIF Convention (approved by the Council), 26 May 1997, EEC 191/ 23.6.1997.

22 See in this regard judgment of 9.3.1978, case 106/77 (Simmenthal), paras. 21, 24 and 32, judgment of 19.11.2009, case C-314/08 (Filipiak), para. 81, and judgment of 22.6.2010, cases C-188/10 and C-189/10 (Melki κατ' Abdeli), para. 43.

23 See indic. *M. Böse*, Fundamental Rights of the EU Charter, in *M. Böse/F. Mezer/A. Schneider*, Conflicts of Jurisdiction in Criminal Matters in The European Union, Volume II: Rights, Principles and Model Rules, 2014, pp. 129 et seq.

In the cases of *Kapetanios and others v. Greece*<sup>24</sup> and *Sismanidis and Sitaridis v. Greece*<sup>25</sup>, the Strasbourg Court found that the institution of administrative proceedings against the applicants for smuggling—despite the fact that the criminal courts had already irrevocably acquitted them of the same facts—violated article 4 of Protocol No. 7 to the European Convention on Human Rights, which guarantees the right not to be tried or punished twice. These ECtHR judgments against Greece sparked a series of judgments by the Greek Supreme Administrative Court, regarding the *protective span* and the *procedural function* of the *ne bis in idem* principle.

In the first national case before the Greek Supreme Administrative Court, a plenary session judgment (ΟΛΣΤΕ 1741/2015) was delivered only a few days (8.5.2015) after the ECtHR's judgment on the *Kapetanios and others v. Greece* case (30.4.2015). The Greek Supreme Administrative Court found, with only two members dissenting<sup>26</sup> and, in contrast to the ECtHR ruling, that a certain tax penalty foreseen by the Greek Customs Code does not constitute a criminal penalty, but rather an administrative one. According to the Greek Supreme Administrative Court, this penalty serves a different purpose and is set to secure the collection of Union and national revenue and to guarantee the smooth application and enforcement of customs rules by making their violation uneconomic. As a result of the above and in view of the non-criminal nature of the tax penalty, the Greek Supreme Administrative Court in a plenary session found that there is no ground for the application of the *ne bis in idem* principle (para. 14).

This view is incorrect. This is because the tax penalty in question for smuggling could (according to the then in place provision of the Greek Customs Code) be as high as ten times the amount of unpaid duties and taxes<sup>27</sup>. Therefore, it had a self-evident gravity in terms of substance, regardless of the classification of the penalty in the relevant national law. Moreover, its imposition was accompanied (and still is) by goals of deterrence and repression, as are criminal penalties in general. Finally, the penalty in question shares the main characteristics of a criminal penalty according to the ECtHR, as it is not directed towards a given group of persons in breach of their obligations<sup>28</sup>. It should be also noted, that according to ECtHR case-law, the Court considers the criteria as being alternative.<sup>29</sup> This means that the highest level of the tax penalty in

24 *Kapetanios and others v. Greece*, 30.4.2015, paras. 55-56, 62-75.

25 *Sismanidis and Sitaridis v. Greece*, 9.6.2016, paras. 35, 40, 41-47.

26 Namely, Councillors *E. Naki* and *I. Mazou*.

27 Currently, the multiple charges imposable may end up corresponding to five times the owed customs and tax surcharges.

28 See in that regard the minority opinion; with respect to the Engel criteria, see indic. *L. Margaritis*, *Advanced Criminal Procedural Law* [in Greek], 2016, pp. 79 et seq., *L. Margaritis/Ch. Satlanis*, *The concept and content of res judicata in ECtHR case-law* [in Greek], *Poiniki Dikaiosyni* 2014, pp. 724 et seq.

29 See ECtHR's deliberation in *Kapetanios and others v. Greece*, 30.4.2015, para. 52: "The Court reiterates its settled case-law according to which, in order to determine the existence of a "criminal charge", it is necessary to have regard to three criteria: the legal characterization of the measure at issue in national law, and the nature and severity of the sanction (*Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22). These criteria are alterna-

question could already be decisive for a judgment regarding its eventual criminal nature.

Thankfully, the above-mentioned plenary session judgment of the Greek Supreme Administrative Court was not adopted by the chambers of the Court. Soon enough, the Second Chamber of the Greek Supreme Administrative Court<sup>30</sup> kept its distance from the plenary session ruling by means of a series of judgments. In these judgments by the Second Chamber of the Council of State, the Court, taking into account the Engel criteria, found that high level tax penalties for smuggling are 'criminal' in nature, according to the autonomous concept adopted by the ECtHR<sup>31</sup>. On the other hand, in the meantime the plenary session ruling in judgment 1741/2015 was brought to ECtHR'S attention, due to the Greek Government's request of 1.7.2015 that the applications of individuals against Greece for which the *Kapetanios and others* judgment was reached should be heard by the Grand Chamber. However, the plenary session ruling was indirectly but clearly overruled by the ECtHR as the Greek Government's request was denied, and in the subsequent ECtHR judgment of 9.6.2016 in the case of *Sismanidis and Sitaridis v. Greece*, the Court confirmed its settled position on the 'criminal' nature of high tax penalties for smuggling, thereby rejecting Greece's counter-arguments<sup>32</sup>.

At the end of the day, the *substantive* question of whether high tax sanctions for smuggling constitute a 'criminal' penalty based on the Engel criteria and the concomitant application of the *ne bis in idem* principle were correctly addressed by the Greek

ative and non-cumulative: in order to determine the existence of a "criminal charge", it is sufficient that the offense in question is by its nature "criminal" under the Convention, and the person concerned is subject to a penalty which, by its nature and degree of seriousness, falls in general to "criminal matters". This does not preclude the adoption of a cumulative approach if the separate analysis of each criterion does not lead to a clear conclusion as to the existence of a "criminal charge" (Jussila v. Finland [GC], No. 73053/01, §§ 30 and 31, ECHR 2006-XIII, and Zaicevs v. Latvia, No. 65022/01, § 31, ECHR 2007-IX (extracts)).

30 Greek Supreme Administrative Court 1992/2016, 680/2017, 1778/2017.

31 Greek Supreme Administrative Court 1992/2016, para. 21.

32 Greek Supreme Administrative Court 1992/2016, para. 20. The 2<sup>nd</sup> Chamber's judgments also stressed that, contrary to what was previously acknowledged by the Greek Supreme Administrative Court in its judgment 2067/2011, where both administrative and criminal sanctions are envisaged for the same infraction, the adoption and application of provisions foreseeing the impact of the irrevocably terminated criminal procedure or trial for tax evasion or smuggling on the corresponding administrative procedure is not obstructed. In particular, it was deemed that Article 94 (1) of the Greek Constitution does not exclude the application of Article 4 (1) of the 7th Protocol to the ECHR in cases of multiple charges on smuggling, as this provision -as interpreted by the ECtHR- does not affect the allocation of competence between administrative and criminal courts, but has a different substance and scope. In other words, it seeks to establish a fundamental guarantee in favor of the defendant, which -in the event of his/her prosecution for criminal smuggling and the subsequent irrevocable termination of the criminal proceedings- may, *inter alia*, influence the legality of the administrative act imposing multiple charges on the same person, and consequently impact the merits of the legal action brought against it, or of further legal remedies filed (Greek Supreme Administrative Court 1992/2016, para. 16).

Supreme Administrative Court, in agreement with the relevant ECJ and ECHR case-law.

The question, though, of whether the *ne bis in idem* principle should be fully applied in *all cases* where both administrative and criminal penalties are prescribed in respect of the same offense is still open for Greece. First of all, because there so far has not been legislative action<sup>33</sup> implementing in a clear manner ECtHR's position on article 4 of Protocol No. 7 to the ECHR. According to the latter, the *ne bis in idem* principle does not allow for the institution of two parallel repressive proceedings (i.e. administrative and criminal), which, according to criteria of substance and time, cannot be considered to be sufficiently closely connected in an integrated manner forming a coherent whole<sup>34</sup>. Second, because the Greek Supreme Administrative Court in another judgment by its Second Chamber (ΣΤΕ 1993/2016) insists on the existence of *procedural prerequisites* for the application of the *ne bis in idem* principle. In particular, the Court is of the view that the party against whom an administrative penalty has been imposed bears the burden of invoking and proving in time before an administrative judge that an irrevocable criminal judgment of acquittal has been issued. In fact, the Greek Supreme Administrative Court rejected an application for judicial review following the ECtHR ruling against Greece which found that the imposition on a cumulative basis of administrative and criminal penalties for smuggling constitutes a violation of the *ne bis in idem* principle. In particular, the Greek Supreme Administrative Court (para. 15) found that the ECtHR judgment was *clearly inadequately justified* for a number of reasons, and most importantly, for reasons of *procedural identity*<sup>35</sup> and

33 For relevant proposals on the necessitous legislative reform in Greece, see A. Zachariadis, A.-T. Kazanas, M. Kaiafa-Gbandi, Y. Naziris, Th. Papakyriakou, K. Chatzikostas, N. Chatzinikolaou in M. Kaiafa-Gbandi (*acad. supervisor*), Financial crime and corruption in the public sector – 3. A cohesive model to counteract financial crime and corruption in the public sector [in Greek], 2015, pp. 449 et seq., and O. Tsolka, The relationship between administrative and criminal proceedings in the model to counteract financial crime and corruption in the public sector-commentary, in M. Kaiafa-Gbandi (*acad. supervisor*), Financial crime and corruption in the public sector – 3. A cohesive model to counteract financial crime and corruption in the public sector [in Greek], 2015, pp. 658 et seq.

34 It is worth mentioning the most recent ECtHR case-law on the adherence to the *ne bis in idem* principle, where particular emphasis is ascribed to the element of the close link (substantive and temporal), between the applicable diverse sanctioning procedures for the same behavior, on the basis of which they could be adjudicated as a coherent unity (: sufficiently closely connected in substance and in time in an integrated manner forming a coherent whole), see Cases A and B v. Norway, 15.11.2016, paras. 130 et seq., and Johannesson and Others v. Iceland, 18.5.2017, paras. 49 et seq.

35 The first (irrevocably) terminated "criminal" procedure needs to be disclosed to the court before which the second "criminal" procedure is pending; the Greek Supreme Administrative Court as a court of cassation, cannot be encumbered with an ex-officio obligation to investigate such issues.

*procedural particularity* of national law<sup>36</sup>, reasons that the ECtHR paid attention to in previous judgments on the same subject<sup>37</sup>.

The above-mentioned judgment (1993/2016) of the Greek Supreme Administrative Court is considered to have *paved the way for a new relationship between the Court and the ECtHR*, to the extent that the Greek Supreme Administrative Court seems to be sending the message that it won't accept inadequately justified Strasbourg Court judgments<sup>38</sup>. Nevertheless, the said judgment of the Greek Supreme Administrative Court was also misguided. The judgment does not pay enough attention to the fact that the *ne bis in idem* principle is expected to function irrespective of the particular kind of proceedings in question. It follows that, while there is still room for a judicial decision, like in the said case, it is only logical for an irrevocable judgment by a criminal court to be taken into account by the administrative judge in order to assess whether the applicant committed the offence of smuggling even if the judgment was not brought to his attention on time, so that the *essence* of the *ne bis in idem* principle is served. The need to serve the *essence* of the principle is clearly highlighted in the ECtHR judgment and is adequately justified. That's because its justification does not need to point out more than the possible negative consequences for the applicant, in case the administrative judge would not consider the findings of the prior criminal proceedings.

This same dynamic of *servicing the essence of the fundamental right stemming from the ne bis in idem principle* can be found in the ECJ's position which calls national courts to set aside without further ado (i.e. without having to await a legislative or constitutional reform) any provision contrary to a fundamental right guaranteed by the EU-Charter when ruling over matters governed by Union law (as in the case of smuggling against the EU). Hence, despite any procedural reservations by the member states' supreme courts, it is clear that the *essence* of the fundamental right stemming from the *ne bis in idem* principle must be served.

36 A misinterpretation of the fundamental principle foreseeing the procedural autonomy of Member States.

37 Greek Supreme Administrative Court 1993/2016, para. 16.

38 See *Dimitrakopoulos*, <http://www.esdi.gr/nex/images/stories/pdf/dimodieyseis/2017/forodiafigi/dimitrakopoulos.pdf>, p.22. See in particular para. 9 of the decision, where the Greek Supreme Administrative Court establishes prerequisites for the reopening of proceedings pursuant to Article 105A of the Code of Administrative Procedure, following Greece's conviction by the ECtHR, and especially subpara. (e): "(e) the ECtHR decision asserting that institutions of the Hellenic Republic infringe one or more ECHR provisions is not apparently deficient, ambiguous and/or arbitrary as to its legal (and/or actual) grounds, taking into account the assessment criteria drawn from the relevant case-law of ECtHR itself (and, particularly, of its plenary), but also from the Court of Justice of the European Union (ECJ), the fundamental principle of (procedural and substantive) subsidiarity of ECtHR's review, as well as its related obligation to adequately justify its decisions when ascertaining a breach of the European Convention on Human Rights (ECHR) by a Member State of the Council of Europe, ...".

2.2. Judgment of the Court (Grand Chamber) in the case of *Taricco* (C-105/14, 8.9.2015): disapplication of the provisions of national law (rules on limitation periods) at the expense of the citizen in order to effectively protect the financial interests of the EU in light of the Union law's supremacy

In contrast to the ECJ's judgment in the case of *Hans Åkerberg Fransson* which demonstrated an obvious positive attitude towards the protection of fundamental rights, the *Taricco* judgment is an extremely problematic decision by the EU Court<sup>39</sup> with important practical effects<sup>40</sup>.

The judgment was issued following a request for a preliminary ruling by an Italian court in a case where the accused were charged with having formed criminal organization to commit various offences in relation to VAT, and in which, despite the extension of the limitation period, the offences were expected to become time-barred (the latest by 8.2.2018) before a final criminal judgment could be delivered as regards the accused. According to Italian law, the interruption of criminal proceedings in relation to VAT offences has the effect of extending the limitation period by only a quarter of its initial duration, with the result that the accused persons were liable to enjoy de facto impunity for a multi-million VAT fraud<sup>41</sup>. Criminal proceedings in relation to tax evasion such as that which the accused were alleged to have committed usually involve very complex investigations. Consequently, the duration of the entire proceedings is such that in that type of case in Italy, de facto impunity is a normal rather than exceptional occurrence. As a result, the referring court took the view that the national provisions at issue indirectly authorize unfair competition (article 101, 107 TFEU) and infringe the guiding principle that member states must ensure that their public finances are sound (article 119 TFEU), as well as Directive 2006/112/EC on VAT. Furthermore, the Italian court considered that if it were able to disapply the national provisions at issue, it would be possible to ensure the effective application of EU law, and thus referred the case to the ECJ for a preliminary ruling. In particular, the question to the Court was whether the Italian provisions in question providing for the limitation period to be extended by only a quarter following interruption unlawfully added a further exemption to those exhaustively listed by Article 158 of Council Directive 2006/112/EC, and, in the event that the response to that question is in the affirmative, whether the national court may disapply the national provisions on limitation periods (para. 27).

The Court of Justice took the view that the referring court asked, in essence, whether a national rule in relation to limitation periods for criminal offences such as that laid down by the national provisions at issue amounts to an impediment to the effective fight against VAT evasion. The Court, after stressing once again that revenue

39 Cf. indic. relevant criticism by *Emm. Billis*, PoinChr 2016, pp. 478-480.

40 For an account of these upshots within the Italian legal order and for EU law in general, see *F. Viganò*, Supremacy of EU Laws. (Constitutional) National Identity: A New Challenge for the Court of Justice from the Italian Constitutional Court, EuCLR 2017, pp. 107 et seq.

41 On the Italian provision, see ECJ's decision paras. 11-17 and especially 15, and *Viganò*, EuCLR 2017, pp. 104-105.

from application of a uniform rate to the harmonized VAT assessment bases is related to the EU budget and to the concept of fraud as defined in the PIF Convention<sup>42</sup>, responded that it is for the national court to verify whether the national provisions in question satisfy the requirement of EU law that measures to counter VAT evasion be effective and dissuasive. If that is not the case, that court would have to ensure that EU law is given full effect, if need be by disapplying those provisions without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure (para. 49)<sup>43</sup>. The ECJ, though, added that if the national court decides to disapply the national provisions at issue, it must also ensure that the fundamental rights of the persons concerned are respected (para. 53). However, according to the Court, such a disapplication of national law would not infringe the rights of the accused as guaranteed by Article 49 of the Charter, as the sole effect of the disapplication of the national provisions at issue would be to not shorten the general limitation period in the context of pending criminal proceedings (para. 55). The Court reasoned that according to ECHR'S case-law, the extension of the limitation period and its immediate application do not entail an infringement of the rights guaranteed by Article 7 of that convention (n.c.n.p.s.l.), since that provision cannot be interpreted as prohibiting an extension of limitation periods where the relevant offences have never become subject to limitation (para. 57)<sup>44</sup>.

Without exaggeration, these ECJ standpoints deconstruct the rule of law, in addition to being dogmatically erroneous. It is therefore no coincidence that the Italian courts following the issuance of the above mentioned judgment referred questions similar with the *Taricco* cases this time to the Italian Constitutional Court. The latter referred a new question for a preliminary ruling to the ECJ related to the Court's judgment on the *Taricco* case. The ECJ has not yet delivered a judgment<sup>45</sup>.

The Italian Constitutional Court based its question for a preliminary ruling on the *principle of legality*, according to which only the law can define a crime and prescribe a penalty, a principle guaranteed by article 25 par.2 of the Italian Constitution. According to the view adopted by the Constitutional Court judges, this principle also covers the rules on limitation periods as they constitute a notion of substantive criminal law. As a result, national law provides a higher level of protection to rules on limitation periods compared to the ECHR and to the ECJ when they interpret article 7 ECHR and article 49 of the Charter of Fundamental Rights of the EU, respectively. In view of the above, the Italian Constitutional Court taking into consideration that the principle of

42 As the Convention's wording does not provide for the inclusion of its revenues to its budget that these are collected directly on behalf of the Union (para. 41).

43 On the basis of the primacy of EU Law, Article 325 TFEU results to automatic inapplicability of any conflicting provision of national laws (para. 52).

44 In support of this argument, see the following ECtHR decisions evoking the *Taricco* judgment: *Coëme v. Belgium*, 22.6.2000, paras. 149-150; *Scoppola v. Italy* (n°2), 17.9.2009, para. 110 and *Neftyanaya Kompaniya Yukos v. Russia*, 20.9.2011, paras. 563, 564 and 570.

45 See Corte Const., no 24/2017, and *Viganò*, EuCLR 2017, pp. 107. For the widespread criticism against this decision in the Italian criminal law theory, see also *Viganò*, op. cit., p. 110 fn. 25.

legality constitutes a fundamental constitutional principle and an absolute human right according to national law, which defines the constitutional identity of the Italian Republic, relied on article 4 par.2 TEU, which requires the respect of member states' national identities as defined among other places in their constitutions, openly stated that it is of the opinion that these kinds of principles must be protected by national legal orders, and if need be even against any obligation to the contrary stemming from Union law and despite the supremacy of the latter<sup>46</sup>. In light of the above, the Constitutional Court referred to the ECJ the question of whether the *Taricco* judgment should be considered as binding for a member state, even if such a judgment were to infringe upon fundamental rights and principles guaranteed by national traditions<sup>47</sup>.

Based on the above, it is clear that the Italian Constitutional Court has put before the ECJ the extremely delicate question of whether the supremacy, the unity and effectiveness of Union law may still be supported in cases where Union law conflicts with a national constitutional order and despite the compliance of the Union legislation with the protection offered to fundamental rights by the Charter. The Italian Constitutional Court also subtly, but in clarity, stated its expected reaction (actually its threat) to consider the national law void to the extent it recognizes the ECJ's competence to interpret article 325 TFEU, in case the ECJ insists on its above mentioned views<sup>48</sup>. Although an ECJ judgment on this crucial question<sup>49</sup> from a Rule-of-Law, political and institutional point of view and especially in this period of general political instability in the EU is still pending<sup>50</sup>, it is clear, in my view, that the arguments of the Italian Constitutional Court have a superior soundness.

In particular and with respect to ECJ's view on the *Taricco* case, one must note the following:

First of all, the Court's view that the national Italian provisions on limitation periods breach Union law is not correct. That's because it's not the provisions per se that conflict with Union law, but the fact that *in practice* criminal proceedings in such complicated cases take too long.

Second, the ECJ does not seem to have taken into consideration that its adopted view on the subject creates a very serious problem. It is easy to say that the national

46 Corte Const., no 24/2017, paras. 2, 6.

47 Corte Const., no 24/2017, dictum.

48 *Viganò*, EuCLR 2017, p. 112.

49 See, however, *Viganò*, op. cit., p. 119, who notes that, in standing so toughly against the ECJ's decision, the Italian Constitutional Court essentially reinforced an actual state of affairs which is in every sense reprehensible, as the current provisions on the statute of limitations in Italy do not allow the prosecution of serious cases of fraud against the financial interests of the EU. Cf., however, his concurrent reference that the majority of the Italian theoreticians argued that the Italian Constitutional Court should have taken an even more decisive step: instead of submitting a preliminary inquiry to the ECJ, it should have declared void the national law which gave the ECJ competence to interpret Article 325 TFEU, due to the incompatibility between the ECJ's interpretation of the specific provision and the fundamental principles and inalienable human rights enshrined in the Italian Constitution, op. cit., fn. 25.

50 Advocate General Yves Bot has already submitted an opinion on the case, as of 18.7.2017.

provision for limitation periods should be set aside by the national court without awaiting any legislative or constitutional amendment because it does not satisfy the requirements of EU law, but what does this really mean? In practice, it means that the offence does not become time-barred, as the judge may not set longer limitation periods for a particular case. The judge, though, is also not competent to introduce this de facto state where the prosecution of the offence is not subject to any time limitation, as this violates the *separation of powers principle*. As the Italian Constitutional Court correctly pointed out, the latter principle is also violated when the national judge, in accordance with the ECJ ruling, has to decide himself whether the national provisions at issue do not satisfy the requirement of EU law that measures to counter VAT evasion be effective and dissuasive, and if need be disapply these provisions. This decision gives a wide margin of discretion to the judge, which is not compatible with the necessary foreseeability that the rules on limitation periods should have at the time the accused person performed the act. In addition, this decision involves an appraisal linked to *political objectives*, something which falls under the legislator's exclusive competence. As a result, ECJ's view is blurring the line between the separated powers when especially in the field of criminal law this line should be upheld<sup>51</sup>.

Third, the ECJ does not seem to have also taken into consideration the fact that in many national legal orders the rules on limitation periods constitute a ground precluding punishment, i.e. constitute a *notion of substantive criminal law*. This means that the *principle of the retroactive application of the more lenient penalty* must apply to any change of the national provisions in force in relation to limitation periods, even if this change is based on a new interpretation by the national court as a result of the above mentioned ECJ view. This fundamental principle is laid out in primary Union law and in particular in the Charter of Fundamental Rights of the EU (article 49 par.1 last sentence)<sup>52</sup>. Consequently, even if one were to accept ECJ's view, this view could under no circumstances be applied to pending proceedings.

Fourth and finally, the EU, as well as the international community, have undoubtedly recognized that national constitutional law may offer a higher level of protection to fundamental rights, given that the legal instruments of the first seek to establish a *minimum level* of protection for fundamental rights. Moreover, it's only logical for the principle of legality to cover the rules on limitation periods when these rules form, according to national law, a part of substantive criminal law and, in particular, in view of the identity of the statute of limitations as an institution that abolishes the punishment

51 Corte Const., no 24-2017, para. 5: it is precisely because the violation of the separation of powers arises –as abovementioned– from ECJ's outlook that empowers judges to eradicate the statute of limitations for relevant cases, that Viganò's solution (EuCLR 2017, p. 118) for a preferred rewording by the ECJ in the awaited decision following the query of the Italian Constitutional Court, where the inefficiency of the Italian legal system to protect EU's financial interests will be determined by the ECJ itself, cannot resolve the impasse.

52 On the application of the more lenient criminal provision according to ECJ case-law, see judgment of 3.5.2005 in joined cases C-387/02, C-391/02 and C-403/02 (Berlusconi, a. others) and judgment of 6.10.2016, case C-218/15 (Paoletti, a. others).

of the offense. As the statute of limitations forbids the imposition of a criminal penalty, it abolishes the offence in itself. It follows that the foreseeability of the limitation periods can only be as important for citizens as is the foreseeability of the prescribed penalty. To support this, let's think of another ground precluding punishment, such as the offender's active repentance. We can easily understand that if the foreseeability of the prescribed penalty for a certain offence is important for the application of the legality principle, the moment when that offence can no longer be punished, because the state no longer considers that it holds a claim to punish (in the case of factual repentance because the damage was restituted by the offender before being interrogated by the competent authorities), cannot but be equally important. Therefore, irrespectively of the particular reasons that support the abolition of the punishment as a result of limitation periods, as long as a national legal order links an institution to a certain consequence, it is not right to exclude the rules on limitation periods from the scope of the legality principle<sup>53</sup>. This should have been accepted by the ECJ, which is required to act in a *unifying manner*<sup>54</sup> for the national legal orders of EU member states when defining the context of the Union's fundamental rights, even if the individual member states adopt a different identity for the various institutions that may affect these rights. This is the case of the statute of limitations, as some member states consider it as substantive in nature, others as procedural, while others attribute to it a mixed nature.

Consequently, an ECJ judgment in response to the Italian Constitutional Court's request for a preliminary ruling concerning its previous judgment on *Taricco* case is expected to be of key importance. However, even if the Court restates its judgment on the *Taricco* case without any substantive deviation<sup>55</sup>, Greek judges, for example, are not, in my view, bound by ECJ's interpretation. That is because the Court of Justice's

53 See contra *Viganò*, EuCLR 2017, p. 119, who questions whether a person's awareness during the *tempus delicti* on how long it will take for competent authorities to prosecute his/her offense (in other words, on how long he/she should conceal the act to evade prosecution) should be acknowledged as a fundamental right. The question, however, encompasses not only prosecution, but also the prospect to punish the act, as well as any aspect that affects sentencing, and much more the act's punishability in general, all of which need to be predictable in democratic societies structured as States governed by the rule of law. Furthermore, *Viganò*'s alternative wording seems to fathom that the defendant has at any rate committed the crime (as it refers to the length of time during which the individual should conceal his/her deeds) despite the presumption of innocence; this deduction confirms that the foundation of this approach is not acceptable.

54 Even more than the ECtHR in view of EU's structure as a supranational organization.

55 See already in this direction the opinion by Advocate General Y. Bot (18.7.2017): although he admits that the ECJ judgment in the *Taricco* case did not touch on critical issues, such as the fact that the statute of limitations in Italian law aims on one hand to appreciate the procedure's reasonable duration, and on the other to safeguard the defendants' rights, he argues that: (i) the national court should not enforce the national provisions on limitation if they impede the effective healing of serious fraud cases violating EU's financial interests in accordance with Article 325 TFEU, in view of the primacy of Union law, (ii) the interruption of the limitation period must be understood as an independent notion of EU law, under which every prosecuting act and every associated necessary extension interrupts the deadline, which shall revive anew and shall be equal to the initial, (iii) Article 49 of the EU Charter is

decision on the *Taricco* case directly infringes upon fundamental principles of criminal law guaranteed by the Greek constitutional order, and, in my opinion as previously stated, by the Charter of Fundamental Rights of the EU as well. According to the settled ECJ case-law, the national judge is required to respect and to directly apply such principles. Besides, Greek courts, being competent to inspect the conformity of all national laws with the Greek constitution, may legitimately deviate from the application the ECJ would dictate for the relevant EU fraud provisions based on its *Taricco* judgment, by invoking principles established in the Greek constitution (e.g. legality principle, principle of separation of powers). These principles constitute the cornerstone of the criminal justice system and form the basis for providing a higher level of protection to fundamental rights compared to ECJ and ECtHR jurisprudence. After all, this is conserved by article 28 of the Greek constitution, by means of which Greece entered in the European Communities<sup>56</sup>. Paragraph 3 of the above-mentioned article stipulates that Greece may limit the exercise of national sovereignty, insofar as this is dictated by

seen as undisputed by the non-application of the national law on the statute of limitations in pending proceedings, in accordance with the ECJ rationale in the *Taricco* case, (iv) Article 53 of the EU Charter of Fundamental Rights does not allow Member States' judicial authorities to reject the implementation of the obligation introduced by the ECJ in its judgment on the *Taricco* case on the grounds that it does not comply with the highest level of protection of fundamental rights guaranteed by the State's constitution, as the discretion granted to Member States for application of a higher level of protection applies under the condition that this level of protection guarantees the primacy and effectiveness of EU law, (v) Article 4(2) TEU not allow Member States' judicial authorities to reject the implementation of the obligation introduced by the ECJ in its judgment on the *Taricco* case on the grounds that the direct application of a longer statute of limitations than the one envisaged at the *tempus delicti* in pending proceedings may affect the national identity of the specific Member State, as it has been consistently held by the ECJ that evoking infringement of fundamental rights either as enshrined in a Member State's Constitution or by national constitutional authorities cannot influence the validity of an act on behalf of EU institutions, as the latter is only assessed under EU law. Moreover, in this case the direct application of a longer statute of limitations does not convincingly affect the national identity of the Italian Republic. The Advocate General's opinions are inaccurate, for the following reasons: a) in addition to the reasonable objections on the content itself, the interruption of the statute of limitations according to Union law -as invoked by the Advocate General- is outright undefined, including in the recent directive to criminalize fraud against EU's financial interests; therefore, any relevant interpretative invocation cannot affect pending cases; b) it cannot be accepted that Member States' discretion for a higher level of protection of fundamental rights by them is under the condition that this level guarantees the primacy and effectiveness of EU law, especially when it comes to fundamental rights which express the constitutional identity of Member States, and this is why -in promoting its primacy- EU law itself is compelled to respect the constitutional identity of its Member States by defining the protection of fundamental rights; c) the persistence on the ECtHR (and ECJ) line as to the exclusion of the statute of limitations from the legality principle is an ill-advised, "non-unifying" approach at an EU level, as it completely ignores the statute of limitations as an institution -partially or wholly- of substantive criminal law in many Member States; d) whether the national identity of a Member State is affected by the application of EU law -as interpreted by the ECJ- is under the exclusive decisive competence of the Member State itself, and not the ECJ. Therefore, the expected ECJ judgment hopefully dissociates itself from the Advocate General's opinion.

56 See interpretative declaration under art. 28 of the Greek Constitution.

an important national interest and *does not infringe upon the human rights and the foundations of democratic government*<sup>57</sup>.

If this underlying initial thought is not accepted, it is not unlikely that the ECJ will end up concluding with the member states' tolerance and based on its position on the direct effect of Directives, that in case a Directive is not correctly transported into the national legal system, the national judge in order to guarantee the effective protection of EU financial interests (article 325 TFEU) should apply, for example, the prescribed by Union law level of sentence, which the national legislator failed to correctly transport into the national legal system by directly invoking the relevant Directive<sup>58</sup>. However and as already mentioned, primary Union law should not be viewed as superior to the fundamental constitutional principles which form the basis of a criminal justice system in a democratic state of law. On the other hand, settling for a *fictional* for citizens 'foreseeability' of the penalty cannot be enough. First of all, the very nature of the legal instrument of a Directive presupposes its transposition into national legal systems for it to achieve its intended effects. Second, we could not say (at least not yet) that the required by the democratic principle proximity of citizens to the legal order which criminalizes certain acts is existent in the case of the relation of EU citizens to Union legislation<sup>59</sup>.

### 2.3. The Court's Grand Chamber Judgment in joined cases *Aranyosi, Căldăraru* (C-404/15 and C-659/15, 5.4.2016): restriction of the principle of mutual recognition to safeguard fundamental rights

The last judgment worth remarking on in the context herein is the one issued by ECJ's Grand Chamber in joined cases *Aranyosi, Căldăraru*. The preliminary queries referred to the ECJ by German courts regarding the interpretation of the framework decision on the European arrest warrant [Article 1(3)], and in particular whether it is permissi-

57 On restrictions, see indic. *Papadopoulou*, National constitution and community law: the issue of primacy [in Greek], pp. 427 et seq., *A. Manidakis*, 'Transferring competence in the European Union and the sovereignty reservation under article 28 paras. 2, 3 of the Constitution [in Greek]', *EEED* 2003, pp. 741 et seq.

58 Cf. to this direction *Viganò*, *EuCLR* 2017, pp. 115-116, 122.

59 E.g., it is not by chance that in federal criminal justice systems which coexist with their individual State counterparts (as in the USA), the complexity of federal provisions and the granted detachment of federal law from the citizens has led the US Supreme Court to take a much more favorable approach to intent as regards federal financial offenses (see *M. Kaiafa-Gbandi*, The EU and US criminal law as two tier models – A comparison of their central axes with a view to addressing challenges for the EU criminal law and for the protection of fundamental rights, 2016, pp. 78 et seq.), while similar problems and proposed solutions can be as well traced in EU Law (see *H. Satzger*, *Europäisierung des nationalen Strafrechts*, in *Sieber/Satzger/v. Heinschell/Heinegg*, *Europäisches Strafrecht*, pp. 257 et seq., and *S. Gless*, *Legal certainty in a European area of freedom, security and justice*, in *Piraeus Bar Association, Hellenic Criminal Bar Association, Centre of International and European Economic Law* (edit.), *Current developments in European Economic Law [in Greek]* (Conference minutes, November 27-28, 2009), 2010 pp. 23-34).

ble or not to surrender the concerned person on grounds of criminal prosecution or sentence execution in the issuing Member State (in this case, Hungary and Romania respectively), for which there are serious indications that the detention conditions violate his/her fundamental rights and the general principles of law (due to inhuman or degrading treatment), as enshrined in Article 6 TEU (given that both countries have been accordingly convicted by the ECtHR), or whether the Court may or ought to link the surrender to the receipt (by the issuing Member State) of information suitable to provide guarantees as to the compliance of these conditions with fundamental rights.

The ECJ subsequently deemed (para. 104) that Articles 1(3), 5 and 6(1) of the Framework Decision must be interpreted as meaning that where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates deficiencies, which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

This ECJ decision is of fundamental importance:<sup>60</sup>

60 For a general reference to ECJ judgments on the European Arrest Warrant, cf. agreeable approach by *St. Peers*, Human rights and the European Arrest Warrant – Has the ECJ turned from poacher to gamekeeper, <http://eulawanalysis.blogspot.de/2016/11/human-rights-and-european-arrest.html>. See also *D. Halberstam*, The judicial battle over Mutual Trust in the EU: Recent cracks in the Façade, *VerfBlog*, 2016/6/09, <http://verfassungsblog.de/the-judicial-battle-over-mutual-trust-in-the-eu-recent-cracks-in-the-facade/>, *M. Hongs*, Human dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: *Solange III* and *Aranyosi*, *European Constitutional Law Review*, 12:549-563, 2016, *A. Willems*, Improving detention conditions in the EU – *Aranyosi's* contribution, *EuSA Fifteenth Biennial conference*, May 4-6 2017, Miami, FL, file:///C:/Users/user/Downloads/A.%20Willems-Improving%20Detention%20Conditions%20in%20the%20EU%20-EUSA%20Conference%20Paper-.pdf, *C. Rizcallab*, European and International Cooperation: A matter of trust? Department of European Legal Studies-Case Notes 1/2017, file:///C:/Users/user/Downloads/case\_note\_1\_2017\_cecilia\_rizcallab.pdf, *M. Perakis*, C-404/15 and C-659/15 PPU (5.4.2016) – *Aranyosi* and *Căldăraru*, *Commen-*

First, because it introduces an *explicit restriction of the mutual recognition principle*<sup>61</sup> whenever its implementation could infringe fundamental rights protected by the EU Charter, and particularly the absolute prohibition of inhuman and degrading treatment in view of the conditions of detention.

Second, because this limitation is introduced *exceptionally and without envisaging a system for non-execution of the European Arrest Warrant in cases similar to the ones so decided by the ECJ*.

Third, because the decision *determines the process* under which the judicial authority of the executing State should operate when it has evidence indicating the existence of such a risk.

Fourth, because it clarifies that, in the existence of such a risk, the warrant's execution is initially suspended, but if that risk cannot be excluded within reasonable time, the judicial authority of the executing State decides *whether to terminate the process of surrender*. This may be an acknowledgment by the ECJ of a "postponement" and not of a refusal of enforcement,<sup>62</sup> but it results in a de facto denial of execution when the risk cannot be ruled out within reasonable time.

Fifth, because given all the aforementioned, the judgment clarifies that *the principle of trust between member states cannot apply abstractly*, but should be checked on the basis of specific empirical data in relation to the protection of fundamental rights in the individual Member States, upon which it is based. The empirically ascertained respect for fundamental rights in each Member State is ultimately the only aspect that can justify the mutual trust between Member States and uphold the implementation of the principle of mutual recognition.<sup>63</sup>

Of course, this ECJ judgment prompts further questions on how judges in a member state can evaluate the conditions of detention in another. This has already led German

tary: The protection of fundamental rights as an exception to the enforcement of the European Arrest Warrant and the crucial role of the national judge [in Greek], Efarmoges Dimosiou Dikaiou 2016, pp. 202 et seq.

61 For the necessity to envisage restrictions in the functioning of the mutual recognition principle in general see already *European Criminal Policy Initiative (ECPI)*, A Manifesto on European Criminal Procedure Law, ZIS 2013, pp. 430 et seq.

62 *Sz. Gáspár-Szilágyi*, 'Joined Cases Aranyosi and Căldăraru. Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant', <https://acelg.blogactiv.eu/2016/06/01/joined-cases-aranyosi-and-caldararu-converging-human-right-s-standards-mutual-trust-and-a-new-ground-for-postponing-a-european-arrest-warrant/>.

63 Cf. analysis by *K. Bovend Eerdt*, The joined cases Aranyosi and Căldăraru: A new limit to the mutual trust presumption in the Area of Freedom, Security and Justice?, *Utrecht Journal of International and European Law*, 32(83), pp. 112-121, who highlights more interesting questions left open to discussion by the judgment: (a) whether the restriction of the mutual recognition principle will be acceptable for non-absolutely safeguarded fundamental rights, (b) whether the judgment affects other legal instruments whose provisions are expressly prohibited from affecting the respect for fundamental rights, and (c) whether this judgment signifies a convergence of ECJ case-law with asylum law (Dublin system), as the latter employs the threshold of non-inhumane/degrading treatment to disallow the transportation of an asylum applicant to a competent Member State.

courts to file further preliminary queries to the ECJ<sup>64</sup>. Concurrently, the following risk may arise with respect to this ECJ outlook: offenders may relocate to another Member State to increase their chances to dodge criminal prosecution.<sup>65</sup> However -and apart from the issues raised above, this ECJ judgment is of broader particular significance with respect to EU law. First, because in accepting a two-tier assessment for the protection of fundamental rights in Member States (specifically and not only abstractly) it approaches the standards set by the ECtHR.<sup>66</sup> Second, because it is integrated within a historical context where, although the Court endorsed that the proposed scheme for EU's accession to the ECHR is not without institutional barriers, it did not ignore dynamic reactions from Member States for the protection of fundamental rights in the EU context, such as the German Constitutional Court's<sup>67</sup> opinion on compatibility issues between the European arrest warrant and the guilt principle, considering that the latter is enshrined in the German Constitution as one of the fundamental principles relating to the protection of human dignity in cases of executing decisions in absentia. Third, finally, because the ECJ's ruling in *Aranyosi, Căldăraru* could prompt the mobilization of EU institutions to fulfil the longstanding petition to improve the EU institutional framework, in order to prevent the empirically documented abuses during pre-trial detention in Member States,<sup>68</sup> some of which are linked -at least to some Member States- not only to prison overpopulation, but also to significant abuses of fundamental rights relating to the deprivation of liberty, and to decide an extensive re-shaping of the institutional framework on the European Arrest Warrant, in response to already articulated pleas for improvement.<sup>69</sup>

64 Request for a preliminary ruling from the Hanseatisches Oberlandesgericht in Bremen (Germany) lodged on 16 September 2016 – Criminal proceedings against Pál Aranyosi (Case C-496/16), 2.12.2016, C 475/11 ff., 19.12.2016. The preliminary questions were: 1. Are art. 1 para. 3 and arts. 5 and 6 para 1 of Framework Decision 2002/584/JHA on the European arrest warrant interpreted under the notion that during the issuing of a judgment to surrender a defendant a propos his/her criminal prosecution the executing Member State ought to rule out the actual risk of his/her inhumane or degrading treatment under art. 4 of the EU Charter of Fundamental Rights, due to the detention conditions in the first penitentiary where he/she will be transferred after his surrender to the issuing Member State? 2. During its relevant assessment, should the executing Member dismiss the actual risk of inhumane or degrading treatment due to detention conditions that shall apply if the defendant is convicted to serve a custodial penalty? 3. Should the executing Member State dismiss such a risk in the possibility of his/her transference to other penitentiaries?

65 See Peers, op. cit.

66 Cf. ECtHR *Soering v UK*, 7.7.1989, paras. 90-91; *M.S.S. v Belgium and Greece*, 21.1.2011, para. 365; *Tarakhel v Switzerland*, 4.11.2014, para. 93.

67 BVerfG, Beschluss des Zweiten Senats vom 15. Dezember 2015 – 2 BvR 2735/14 – Rn. (1-126), known as *Solange III*.

68 See FRA report (European Agency for Fundamental Rights), *Criminal detention and alternatives: Fundamental rights aspects in EU cross-border transfers*, <http://fra.europa.eu/en/publication/2016/criminal-detention-and-alternatives-fundamental-rights-aspects-eu-cross-border>.

69 See Peers, op. cit., who proposes -among others- a check under the proportionality principle as a prerequisite for issuing a European arrest warrant, incorporation of provisions on the transportation of convicts, etc.

For Member States and their judiciaries, the ECJ judgment has great practical importance when the judicial authority executing the European arrest warrant receives a surrender request by an issuing State for which there is evidence of non-conformity with the respect of fundamental rights as to detention conditions. In such a case, the execution of the European arrest warrant is no longer taken for granted, and may be suspended or even be terminated.<sup>70</sup> On the other hand, the judgment is also important for Member States scoring poorly in detention conditions:<sup>71</sup> when being issuing States, they may also need to provide relevant information, and face warrant suspension or termination of execution. This situation surely is not satisfactory for the effectiveness of the criminal repression in the EU and it should be changed. However, the way to change it should be through the improvement of the fundamental rights' protection and not through blind trust in the criminal law systems of other member states. This is the actual added value of the Aranyosi, Căldăraru judgement of the ECJ, which makes it so important. Hopefully this distinguishing feature of it won't be reversed by the new expected position of the Court on the matter<sup>72</sup>.

### 3. Conclusion

By comparing the individually selected ECJ judgments with reference to the recent case law relating to the protection of fundamental rights presented above, we can see two conflicting ECJ trends of general importance for modern developments in EU criminal law:

The first concerns EU's financial interests, whose notional content the Court persists not only to expand (by incorporating VAT), but in order to ensure their effective protection it also leads to the exclusion of application of national laws relating to core aspects of criminal justice systems, such as the statute of limitations. These viewpoints are devoid of any dogmatic foundation and acutely violate the fundamental principles of criminal law, proving once again that the ECJ is the steam engine that drives the progression of EU law,<sup>73</sup> especially in the field of protecting EU's legal interests, and

70 Cf. *T. Dieben/J. Ravmakers*, The implementation of Aranyosi and Caldaru (ECLI:EU:C:2016:198) in the Netherlands, <https://www.jahae.nl/wp-content/uploads/2017/03/DELFIN-EWSLETTER-3.pdf>, on how Amsterdam's judicial authorities tackle the issue. See also the positive overview in *EU Law Blog (UKAEL)*, European Arrest Warrant: The CJEU tries to find a balance between efficiency and protection of human rights (27.5.2016), <https://ukaellblog.wordpress.com/2016/05/27/european-arrest-warrant-the-cjeu-tries-to-find-a-balance-between-efficiency-and-protection-of-human-rights/>, where noted that the cancellation of surrender must be accompanied by an obligation to execute the conviction that would be imposed by the issuing Member State.

71 See, e.g., Greece's recent conviction in the case *Singh and others v. Greece*, 19.4.2017.

72 See the CJEU's judgement on the matter C-496/16 of November 15<sup>th</sup> 2017, in which the Court decided not to answer the questions asked by the German court, because the EAWs of Hungary in the case referred to were annulled, and thus the questions became hypothetical.

73 See indic. *T. Horsley*, Reflections on the role of the Court of Justice as the "motor" of European integration: Legal limits to judicial lawmaking, *Common Market Law Review* 2013, pp. 931 et seq.

in particular its financial interests, for the effective protection of which the ECJ seems qualm-less in promoting the unrestricted primacy of EU primary law over the constitutional orders of Member States.

The other trend recorded both in the decision on the enforcement of the *ne bis in idem* principle and the limitation of the mutual recognition principle in the frame of the basic instrument of the European arrest warrant which expresses it, highlights the growing ECJ attention to the protection of fundamental rights, particularly in view of the Charter's now binding cogency. This trend is really promising, as it may pave the road to restrict mutual recognition in other legal instruments that produce similar upshots, such as the mutual recognition of decisions on confiscation of criminal proceeds.<sup>74</sup> It remains to be hoped that this ECJ trend will prevail over the other and become a catalyst for further improvements to the EU institutional framework on criminal matters and, in particular, on that which relates to the protection of crucial individual fundamental rights.

Based on the analysis above, one could confidently argue that a trend is currently apparent to reinforce and enlarge criminal repression in many areas where modern developments in EU criminal law occur, which is not always balanced with respect to guaranteeing civil liberties. Nonetheless, there is still room for some optimism even within such developments. What remains important within such a context is that any further enhancements in the field can be promoted not only by lawmakers, but also by the *judiciaries of individual Member States*, via preliminary queries to the ECJ which compel it to express its opinion on EU legal instruments that do not appropriately safeguard the warranty of freedoms. There is no better proof for this than ECJ's judgment in case *Aranyosi, Căldăraru*. It suffices that the national judge is convinced that securing the rule of law requires daily efforts, and that -as far as EU law is concerned- this toil typically requires synergies with the competent bodies of EU's legal order.

74 See proposal for a regulation on the mutual recognition of freezing and confiscation orders COM (2016) 819 final, 21.12.2016, and relevant criticism by the *Meijers Committee*, in <http://www.statewatch.org/news/2017/jun/eu-meijers-committee-freezing-orders.pdf>.