The '*Taricco* Saga': the Italian Constitutional Court continues its European Journey

Italian Constitutional Court, Order of 23 November 2016 no. 24/2017; Judgment of 10 April 2018 no. 115/2018 ECJ 8 September 2015, Case C-105/14, *Ivo Taricco and Others*; 5 December 2017, Case C-42/17, *M.A.S. and M.B.*

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WHY A 'SAGA' (AND WHY THAT NAME)?

Between 2015 and 2018, a chain of judicial decisions by the European Court of Justice and the Italian Constitutional Court (hereinafter '*Corte Costituzionale*', 'the Italian Court', or simply 'the Court') drew significant attention in academic and judicial circles. At the core of the legal dispute, in constitutional terms, there was the possibility of the first application of so-called 'counter-limits' by a founding Member State. Partially overlapping with the conclusion of the *Gauweiler* case,[1] the Brexit negotiations, and the turmoil caused by the rule of law crisis in some Central European states, the '*Taricco* saga' further stressed this difficult moment for European integration.

The case arose from a question of interpretation of the Member States' commitment to countering frauds that affected the financial interests of the Union and the inability of Italian domestic law to properly attain that aim. Revolving around this original issue, the focus slightly changed in each passage to capture broader topics such as the competence of the EU to intervene in the substantive criminal law of member states, the dialogue between the European Court of Justice and national constitutional courts and, ultimately, some of the most fundamental principles of EU law (i.e. primacy, uniformity, direct effect). The interest and suspense induced by every new decision along this chain made it seem, in terms of

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[1] ECJ 16 June 2015, *Peter Gauweiler and Others* v *Deutscher Bundestag*, followed by the decision by the German Constitutional Court, Second Senate, 21 June 2016 - 2 BvR 2728/13.

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form and rhetoric, more and more like a real 'saga' – with plot twists, new protagonists and an uncertain ending that still left room for further evolution.

The main passages of the 'saga' consisted of (at least) four judicial decisions, two issued by the Court of Justice and two by the Italian Constitutional Court: (1) a first preliminary ruling decision by the Court of Justice,[2] whose application in the Italian legal order triggered (via a twofold question of constitutionality) (2) a preliminary reference by the *Corte Costituzionale*;[3] (3) the subsequent decision in Luxembourg;[4] and (4) the 'last' word of the Italian Court[5] on the aforementioned questions of constitutionality.

The saga is named after Mr Ivo Taricco, although he was actually the protagonist in only the first episode; he was one of the accused persons in the case that provoked the first preliminary reference to the Court of Justice by an Italian lower court. The further chapters originated from different cases involving other private parties. Nonetheless, all of them have been labelled with the *Taricco* name, independent of the individuals involved, showing the continuity of the underlying legal problems.

This note, after a brief summary of the saga, will adopt the perspective of the Italian Constitutional Court. Specific attention will be paid to the saga's novelties with regard to the relationship between the domestic and European legal orders, also considering the more comprehensive adjustment that the same Court has given to its role in the system of constitutional adjudication at the national and European levels.[6] In the last few years the Italian Constitutional Court has begun progressively recentralising its scrutiny of fundamental rights, reversing previous trends that empowered both ordinary courts and supranational ones (i.e. with regard to both the European Court of Justice and the European Court of Human Rights).

Before doing this, a premise needs to be established: as in all classical sagas, the epilogue is connected with the origins of the world in which it is set. And, since the question in the background is the application of 'counter-limits' against EU law, it seems necessary to go back to the roots and the very meaning of that concept in order to better understand why so much emphasis has been put on this case.

[2] ECJ (Grand Chamber) 8 September 2015, Case C-105/14, *Ivo Taricco and Others* released upon a reference by an Italian criminal court, the Tribunal of Cuneo.

[3] Italian Constitutional Court, order of 23 November 2016, no. 24/2017, also available in English at <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf>, visited 2 November 2018.

[4] ECJ (Grand Chamber) 5 December 2017, Case C-42/17, *M.A.S. and M.B.*, also known as *Taricco II.*

[5] Italian Constitutional Court, decision of 31 May 2018, no. 115, also available in English at <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_2018_115_EN.pdf>, visited 2 November 2018.

[6] On this topic *see* now the special issue 'Constitutional adjudication in Europe between unity and pluralism', 10(2) *Italian Journal of Public Law* (2018), edited by P. Faraguna et al.

The 'counter-limits' in the 'European journey' of the Italian constitutional Court

The most valuable contribution that the Italian Constitutional Court has made to the judicial and scholarly debate on EU law, together with the instrument of the preliminary reference,[7] is probably the doctrine of 'counter-limits'.[8] As is commonly known, that doctrine aims to reconcile the inherent openness of the contemporary state with an acknowledgement of its boundaries so as to allow a nation-state to take part in European integration and, at the same time, secure its most fundamental values, such as the inviolable rights of its citizens.

As odd as it may sound, it was not the *Corte Costituzionale* that coined the expression 'counter-limits'. Actually, its first and only use of that expression (*controlimiti*) was in decision no. 238/2014, which did not even concern EU law.[9] It was the constitutional law scholar Paolo Barile who introduced the expression in a debate on the relationship between domestic and community law; reference is generally made to his case note on the *Frontini* case in 1973.[10] The formula works as a brilliant summary of that judgment: on the one hand, Italian participation in the European Communities was found to be not merely based on the ordinary law authorising the ratification of (and giving execution to) the Rome Treaties, but as having constitutional relevance, being rooted in Article 11 of the Constitution,

[7] It is now acknowledged that the instrument of the preliminary reference was inspired by the question of constitutionality under Italian law. The 'inspiration' was also due to the work of Nicola Catalano, Italian representative in the working group for the drafting of the EEC Treaty (and future judge of the ECJ). *See* M. Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006) p. 61; D. Tamm, 'The History of the Court of Justice of the European Union since its Origins', in *The Court of Justice and the Construction of Europe: Analyses and Perspective on Sixty Years of Case-law* (Springer 2013) p. 19.

[8] For an early theoretical exposition targeted to the English-speaking audience, *see* M. Cartabia, 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community', 12(1) *Michigan Journal of International Law* (1990) p. 173.

[9] In judgment no. 238/2014, the Italian Constitutional Court upheld the balance of substantive values of the Italian Constitution against specific rulings of the International Court of Justice related to actions for reparations of damages caused by war crimes and crimes against humanity. *See* D. Lustig and J.H.H. Weiler, 'Judicial review in the contemporary world – Retrospective and prospective', 16(2) *International Journal of Constitutional Law* (2018) p. 352.

[10] P. Barile, 'Il cammino comunitario della Corte' [*The European Journey of the Court*], 18 *Giurisprudenza costituzionale* (1973) p. 2406 ff. It is often overlooked that he had also actually used the expression before, in the essay 'Ancora sul diritto comunitario e diritto interno' [*Again on community and domestic law*], in *Studi per il ventesimo anniversario dell'Assemblea costituente*, VI (Vallecchi Florence 1969) p. 35 at p. 49. Even earlier – in 'Rapporti fra norme primarie comunitarie e norme costituzionali e primarie italiane' [*Relationships between primary community law and constitutional and primary domestic law*], 21(1) *La Comunità internazionale* (1966) p. 14 at p. 23 – he elaborated on the 'limits to limitations of sovereignty'.

which allows 'limitations to sovereignty' in order to participate in supranational organisations. On the other hand, the Constitutional Court had warned[11] that the EU law could not violate supreme values of the domestic legal order such as the inalienable rights of the human person. Thus, elaborating on the wording of the constitutional provision, Barile suggested that the limitations to sovereignty allowed by Article 11 of the Italian Constitution were not absolute, but faced several 'counter-limits'[12] (in a certain sense echoing the *Schranken-Schranken*[13] of the German constitutional debate).

The same case note introduced yet another expression that has deeply influenced the domestic debate on the approach of the Italian Court to European integration: Barile qualified the progress of the Court in dealing with EC law as its 'European journey' (*Il cammino comunitario [della Corte]*) in order to suggest dynamism and evolution. The narrative of the Italian Court gradually opening up to European integration is now something generally accepted in the Italian literature, and the metaphor of the 'steps' has been widely adopted in commentary on every innovation in this field.[14]

There is no doubt that the '*Taricco* saga' is representative of the most recent stage of this journey, and it was a separate journey unto itself. Each successive decision of the saga enriched it with new themes and implications. Its cross-sectoral potential sparked unprecedented academic debate, stimulating a plethora of seminars and research by constitutional lawyers, EU lawyers, criminal and criminal-procedural scholars and practitioners.[15]

[11] *See* Italian Constitutional Court, judgment no. 183/1973, §9.

[12] In the case note quoted *supra* n. 10 he actually uses 'counter-limitations' (*controlimitazioni*), which is more faithful to the lexicon of the constitution.

[13] K.A. Bettermann, *Grenzen der Grundrechte* (De Gruyter 1968) introduced the idea that there are limits to the constitutionally permissible restriction of fundamental rights.

[14] *See also* O. Pollicino, 'From Partial to Full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court', 10(1) *EuConst* (2014) p. 143.

[15] Just to give an idea, apart from dozens of case notes, it is possible to list no less than four edited collections exclusively focused on this saga: one containing the proceedings of seminars organised to comment on the first decision of the ECJ (A. Bernardi (ed.), *I controlimiti. Primato delle norme europee e difesa dei principi costituzionali* [*Counter-limits. Primacy of EU norms and defence of constitutional principles*] (Jovene 2016)); two specifically related to the questions of constitutionality raised after it (A. Bernardi and C. Cupelli (eds.), *Il caso Taricco e il dialogo tra le corti* [*The Taricco case and the dialogue among courts*] (Jovene 2017) and I. Pellizzone (ed.), *Principio di legalità penale e diritto costituzionale* [*The Legality Principle in Criminal Matters and Constitutional Law*] (Giuffrè 2017)); and one up-to-date with the second decision of the Italian Constitutional Court (C. Amalfitano (ed.), *Primato del diritto dell'Unione europea e controlimiti alla prova della 'saga Taricco'* [*Primacy of EU Law and Counter-limits Tested in the 'Taricco Saga'*] (Giuffrè 2018)).

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A (brief) summary of the 'saga'

The saga started with criminal proceedings before the *Tribunale di Cuneo* in which a systemic misalignment between the Italian legal order and the obligation to counter VAT-fraud deriving from EU law emerged.[16] The judge faced the likely *de facto* impunity enjoyed by tax evaders due to the practical impossibility under Italian law to effectively prosecute so-called 'VAT carousel' fraud. The latter consists of purchasing goods VAT free, thanks to the creation of shell companies and the use of false documents. In order to identify such crimes, it is necessary to conduct long and complex cross-border investigations, which are extremely difficult to carry out within the absolute time limit set by the criminal code, as modified in 2005, for the prosecution of crimes (*prescrizione*). The regulation of this time limit is, however, under Italian law considered to be an integral part of substantive criminal law. The *Tribunale* therefore asked the Court of Justice to clarify the meaning of the relevant EU norms imposing the duty to counter fraud affecting the financial interests of the EU with the undisguised intention of gaining authorisation to disapply the interfering domestic norms.[17] Interestingly, the *Tribunale* relied only on secondary EU law, without making reference to Article 325 TFEU that would take centre stage in the following decisions of the saga.

The subsequent ruling of the European court[18] resulted in a muscular yet quite weakly motivated decision. It did not consider the domestic dynamics of criminal law (and the limited EU competence in such matters), also because those elements had not been brought to the attention of the Court in the preliminary reference. The European Court seemed to be guided by the sole purpose of protecting the financial interests of the Union. The main aim of the ruling was in fact the necessity to ensure 'effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union'.[19] The necessary consequence was the order of disapplication of the interfering domestic provisions[20] (this is the so-called '*Taricco* rule').[21]

[16] Council Directive 2006/112/EC of 28 November 2006.

[17] *Tribunale di Cuneo*, order of 17 January 2014.

[18] *Taricco and Others*, *supra* n. 2.

[19] §1 of the ruling.

[20] Arts. 160 and 161 of the Criminal Code, which set the maximum limitation period for criminal offences.

[21] The ECJ also raised the level of sources of law involved: whereas the preliminary reference had focused mainly on interpretation of the VAT directive, the ruling shifted its answer to Art. 325 TFEU, deriving from its (quite vague) wording a direct, clear and immediate obligation for the Member States (*see* M. Bonelli, 'The Taricco saga and the consolidation of judicial dialogue in the European Union', 25(3) *Maastricht Journal of European and Comparative Law* (2018) p. 357).

Italian domestic courts were thus called to apply the decision of the Court of Justice. Some proceeded as ordered by Luxembourg.[22] Others shifted their focus from criminal legislation to the constitutional level, stressing that the principle of legality in criminal matters included non-retroactivity and 'determination' (i.e. the precise description of the crime which allows individuals to foresee the consequences of their conduct and also restricts judicial discretion), and concluding that the principle of legality in criminal matters was part of the inviolable core of the constitution.[23] In short, two ordinary judges, including the Court of Cassation, claimed that by giving primacy to EU law (and, therefore, disapplying national legislation concerning the maximum limitation period for criminal offences) they would be violating one of the most fundamental principles of the domestic legal order. Consequently, they asked the Constitutional Court to activate the counter-limits.

In its order no. 24/2017, the Constitutional Court substantially shared the concerns of the referring judges, but it also gave Luxembourg a last chance to take a step back: lodging a request for a preliminary ruling before the Court of Justice, the Italian Court pointed out a potential clash of the '*Taricco* rule' with the constitutional identity of Italy and, among other things, asked the Court of Justice to balance the interpretation of Article 325 TFEU with the limit to the primacy and scope of EU law as set out in Article 4(2) TEU. In other words, the Italian Constitutional Court gave the Court of Justice an opening that would allow it to put its previous judgment in perspective, otherwise threatening to apply the counter-limits.[24]

The Court of Justice did not accept the exception for Italy alone, and proposed a more nuanced version of the principles already stated in the previous decision. First of all, the European Court ignored the conclusions of the Advocate General, which were extremely invasive with regard to the sphere of domestic constitutional law and even frankly confusing, as they attempted to give an interpretation of the

This element, even without any specific formal significance, symbolically opened the way to the escalation seen in the subsequent decisions of the saga.

[22] Court of Cassation, Third Criminal Section, judgment of 15 September 2015.

[23] Court of Appeal of Milan, order of 18 September 2015, and the same Court of Cassation, Third Criminal Section, order of 30 March 2016.

[24] A. Ruggeri, 'Ultimatum della Consulta alla Corte di giustizia su Taricco, in una pronunzia che espone, ma non ancora oppone, i controlimiti' [*Ultimatum by the ICC to the CJEU on Taricco, in a decision that shows, and not yet applies, counter-limits*], and G. Piccirilli, 'L'unica possibilità per evitare il ricorso immediato ai controlimiti: un rinvio pregiudiziale che assomiglia a una diffida' [*The only chance to avoid the immediate application of counter-limits: a preliminary reference that looks like a formal notice*], both in *Consulta online* (2017), 1. The choice of issuing a preliminary reference and, at the same time, pointing out the possibility of applying counter-limits in the event the decision of the ECJ is not 'satisfying' would seem to be not all that different from the reasoning provided by the *Bundesverfassungsgericht* in the *OMT* saga.

Constitutional Court's position on counter-limits from outside the Italian legal order.[25] Then, it introduced at least two legal novelties, both aimed at toning down the dispute, also in order to take a position generally valid and not necessarily specific to the Italian case.[26] On the one hand, it shifted the focus from the constitutional problem to the concrete application of the norms involved: (i) by accepting, in the name of the principle of non-retroactivity, that the disapplication of conflicting domestic law could be limited to cases that occurred *after* its previous decision;[27] and (ii) by underlining that at the material time for the main proceedings, the limitation rules had not yet been harmonised by the new (EU) Directive 2017/1371.[28] On the other, it re-elaborated the framework of the dispute, presenting it not as a conflict between national and EU law, but fully as an EU law problem, stressing that the principle of legality in criminal matters has robust European roots.[29] Thus, instead of following the reasoning of the Italian Court, which was based on the protection of national constitutional identity, the Court of Justice opted for an approach grounded in the common constitutional traditions of the Member States, as guaranteed by Article 49 CFREU,[30] and narrowed the order of disapplication in a milder and more reconciling way. In the light of this new interpretation, the Court of Justice left it up to national courts, in each individual case, to scrutinise respect for the principle of determination of penalties, in order to avoid any possible clash with the higher level of protection attributed to the principle of legality in criminal matters in the Italian legal order.[31]

[25] Opinion of AG Bot, delivered on 18 July 2017, Case C-42/17, §181: 'I note that in the Italian Constitution the principles classified as "fundamental" are set out in Articles 1 to 12, and the principle that offences and penalties must be defined by law is therefore *a priori* not included in that category'. According to C. Rauchegger, 'National constitutional rights and the primacy of EU law: M.A.S.', 55(5) *Common Market Law Review* (2018) p. 1521 at p. 1542, the AG was 'wrong' to 'interpret the constitution of a Member State'.

[26] B. Guastaferro, 'Derubricare i conflitti costituzionali per risolverli: sezionando il caso Taricco' [*Reduce constitutional conflicts in order to solve them: analysing the Taricco case*], 38(2) *Quaderni costituzionali* (2018) p. 441.

[27] *M.A.S. and M.B.*, *supra* n. 4, §60: 'the [principle of non-retroactivity of the criminal law] preclude the national court, in proceedings concerning persons accused of committing VAT infringements before the delivery of the *Taricco* judgment, from disapplying the provisions of the Criminal Code at issue'.

[28] *M.A.S. and M.B.*, *supra* n. 4, §44.

[29] *M.A.S. and M.B.*, *supra* n. 4, §53: 'the principle that offences and penalties must be defined by law forms part of the constitutional traditions common to the Member States'.

[30] G. Repetto, 'Quello che Lussemburgo (non) dice. Note minime su Taricco II' [*What Luxemburg does (not) say. A first comment on Taricco II*], in *Diritti comparati*, 21 December 2017.

[31] *M.A.S. and M.B.*, *supra* n. 4, §61: 'If the national court were thus to come to the view that the obligation to disapply the provisions of the Criminal Code at issue conflicts with the principle that offences and penalties must be defined by law, it would not be obliged to comply with that

Finally, the Constitutional Court closed the saga with its judgment no. 115/2018.[32] In light of the new interpretation given by the Court of Justice, there was no longer reason to apply counter-limits in the concrete case. However, the questions of constitutionality could be answered in at least three different ways, depending on the role that the Court wanted ordinary judges to play in the application of the residual part of the '*Taricco* rule': (i) the Constitutional Court could have sent the questions of constitutionality back to the referring judges, as it typically does when new elements of law are involved (so-called *ius superveniens*), asking the referring judges to check whether the questions of constitutionality were still meaningful in the light of the new decision of the Luxemburg court; (ii) the same questions could have been declared inadmissible, signalling that – after the new decision of the Court of Justice, and without further examination by the ordinary judges – the doubts concerning constitutionality had been eradicated and the concrete application of the narrowed rule emerging from *Taricco II* had to be decided on a case-by-case basis; (iii) finally, the Constitutional Court could, more significantly, have declared the questions to be groundless in substance, centralising the evaluation of the consequences of the latest Court of Justice decision and showing that the threat to supreme national constitutional principles had been resolved.

The Court opted for this last solution and rejected the doubts of constitutionality held by the referring judges, providing a detailed motivation that went quite a bit beyond a mere reception of the Court of Justice decision. The Constitutional Court began by clarifying that the '*Taricco* rule', also in its new and milder version, was not applicable independent of the material time of the offence (whether before or after the *Taricco* decision, and with no mention of the new directive yet to be implemented).[33] The Court went on to affirm that the principle of determination regarding the criminal charge can not be jeopardised by a case-by-case application. After having confirmed that determination is part of the principle of legality in criminal matters (which in turn is one of the supreme principles of the Constitution) the Italian Constitutional Court reaffirmed its monopoly on deciding on the supreme principles, thereby preventing intrusions by ordinary courts that could harm the integrity of its jurisdiction over counter-limits.[34]

obligation, even if compliance with the obligation allowed a national situation incompatible with EU law to be remedied'.

[32] The opinion that this is the 'final' word on the saga is supported by P. Faraguna, 'Roma locuta, Taricco finita', *Diritti comparati*, 5 June 2018.

[33] Italian Constitutional Court, judgment no. 115/2018, §10: 'Regardless of whether the facts occurred before or after 8 September 2015, the referring ordinary courts cannot apply the '*Taricco* rule' to them because it contradicts the principle of legal certainty in criminal matters enshrined in Article 25(2) of the Constitution'.

[34] Italian Constitutional Court, judgment no. 115/2018, §8.

The legacy of the saga: two innovations and two elements of consolidation of long-lasting trends in Italian constitutional justice.

In order to provide some consideration that goes beyond the mere reconstruction of the individual chapters of the saga, it would seem appropriate to highlight a few of the cross-elements that emerge from it. Some are quite novel, underlining points of discontinuity in the previous case law of the *Corte Costituzionale*, while others confirm or restate principles that were already present on the previous steps of its European journey. All, however, would seem to be attempts to accelerate certain ongoing trends in the orientation of the Italian Court, including an evident recentralisation of the scrutiny of fundamental rights questions, attempts by the Court to have the last word in the emerging 'competition' with supranational courts.

A new approach to preliminary references

The first element of innovation is a further evolution in the approach of the Court to issuing preliminary references. Its position had already changed several times, with some early (abstract) declarations of 'openness'[35] and more concrete refusals to make preliminary references, as in the past the Italian Constitutional Court refused to include itself among the 'courts or tribunals of a Member State' enabled by the Treaties to issue preliminary references.[36] Furthermore, up to the early 2000s, 'dual preliminarity' cases, namely situations entailing both the question of constitutionality and doubts concerning the interpretation of EU law,[37] were typically dismissed by the Constitutional Court. In general, they were either declared inadmissible when the EU norms concerned had direct effect,[38] or sent back to the referring judges to proceed with a preliminary reference to the Court of Justice as a step before the question of constitutionality.[39] The clarification of the interpretation of EU law by a preliminary ruling of the European Court

[35] For instance, in decision no. 168/1991 the Italian Constitutional Court implicitly referred to the 'possibility' of directly submitting a preliminary reference.

[36] Italian Constitutional Court, Order no. 536/1995, decided on the basis of earlier case law related to the identification of judicial bodies (judgment no. 13/1960).

[37] For a general discussion of 'dual preliminarity', a topic that has been highly debated, also in France, *see* G. Martinico, 'Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order', 10(2) *International Journal of Constitutional Law* (2012) p. 871.

[38] *See* Italian Constitutional Court, decisions nos. 284/2007, 415/2008 and 100/2009.

[39] The Italian Constitutional Court, in order no. 319/1996, returned the case to the ordinary judge, thereby nudging a previously submitted preliminary reference before introducing the question of constitutionality. In order no. 108/1998, the Italian Constitutional Court invited the judge to 'provoke' the 'certain and reliable' interpretation by the ECJ.

was considered to be a 'logical and legal' necessity *vis-à-vis* the question of constitutionality.[40]

Before order no. 24/2017, there were only two – quite different – previous preliminary references made by the Italian Constitutional Court.[41]

The first reference was issued with order no. 103/2008 in a case brought before the Constitutional Court via *principaliter* proceedings, that is, initiated by a region or the state (mainly) concerning the division of legislative competences.[42] Indeed, in such proceedings there is no role for ordinary judges. In that case, the Court finally considered itself a 'court or tribunal of a Member State' and thus a body able to send preliminary references under Article 267 TFEU, albeit remarking on its 'particular role as supreme constitutional guarantor of the national legal order'. The necessity of directly lodging preliminary references was at the time based on two considerations: the Court's position as a 'court of first and last instance', with 'its decisions [not] subject to appeal'; and, in consequence, the fact that the Court was the *only* judge involved in the dispute. As a further supporting motivation, the Constitutional Court added an apagogic argument related to the fact that 'were it not possible to make a preliminary reference […] in constitutionality proceedings where the court has been seized directly, the general interest in the uniform application of Community law […] would be harmed'.[43]

The second preliminary reference arrived with order no. 207/2013 in the framework of *incidenter* proceedings, that is, a case introduced by an ordinary judge. However, a closer look at the elements of the case demonstrates that the judge of the principal proceedings could not issue a preliminary reference directly: the question of interpretation hinged on EU law lacking direct effect, which only becomes relevant during the judicial review of legislation conducted by the Italian Constitutional Court. In other words, whereas in previous cases of dual preliminarity the Constitutional Court dismissed the case because a prior clarification of the meaning of the European provision(s) could have neutralised the question of constitutionality, in the 2013 case a preliminary ruling by the European Court of Justice was needed in order to define the boundaries within which the question of constitutionality had to be decided.

[40] *See* Italian Constitutional Court, judgment no. 284/2007.

[41] G. Repetto, 'Pouring New Wine into New Bottles? The Preliminary Reference to the CJEU by the Italian Constitutional Court', 16 *German Law Journal* (2015) p. 6, special issue on The Preliminary Reference to The Court of Justice of The European Union by Constitutional Courts, edited by M. Dicosola et al., p. 1449 ff.

[42] The impossibility for the Court to avoid preliminary references in *principaliter* proceedings was pointed out with foresight already by M. Cartabia and J.H.H. Weiler, *L'Italia in Europa: profili istituzionali e costituzionali* [*Italy in Europe: institutional and constitutional profiles*] (il Mulino 2000) p. 194 ff.

[43] Italian Constitutional Court, order no. 103/2008.

The decision to issue a preliminary reference with order no. 24/2017 has both similarities with and differences from its two precedents.

This case also had to do with dual preliminarity. Moreover, the Constitutional Court regarded the European provisions concerned (Article 325(1) and (2) TFEU) as having direct effect,[44] partly due to the previous ruling issued by the Court of Justice.[45] However, unlike in previous dual preliminarity cases concerning the direct effect of European provisions, the Constitutional Court neither dismissed the case nor could it return the case to the referring judge who had required the prior involvement of the Court of Justice, as it was called to intervene in different proceedings. As for the conditions to be fulfilled in order to submit a preliminary reference, the Constitutional Court was quite brief, if not blunt. It simply referred to Article 267 TFEU as a sufficient basis for making a preliminary reference, without revisiting the discussion on its inclusion among the 'courts or tribunals of a Member State'. The fact that the same decision had already been taken (twice) in the past seemed to provide sufficient justification for issuing a new reference.

As for the rest, the Court once again stressed the interplay between the question of constitutionality and the interpretation of a European norm. More specifically, it noted that, if the Court of Justice were to adhere to its own interpretation of Article 325 TFEU, i.e. more limited and more contextual, the questions of constitutionality would have been overcome,[46] thus confirming the logic and legal priority of the interpretation of the European norm over the solution of the question of constitutionality.

However, from a more comprehensive point of view, a thorough examination of order no. 24/2017 paints quite a different picture than do the two other precedents. In departure from past practice, Article 325 TFEU as interpreted by the European court was precisely the subject of constitutional review: its interpretation was not needed in order to define the constitutionality review of a domestic norm; on the contrary, it was *the* legal provision whose constitutionality was under scrutiny (albeit indirectly, since the object of scrutiny formally identified by the referring judges was the law authorising the ratification of the European Treaties). Therefore, acceptance of the questions of constitutionality

[44] Italian Constitutional Court, order no. 24/2017, §7.

[45] *Taricco and Others*, *supra* n. 2, §58. Critically on the possibility of acknowledging the direct effect of the quoted Treaty provisions, *see* E. Cannizzaro, 'Sistemi concorrenti di tutela dei diritti fondamentali e controlimiti costituzionali' [*Concurring systems of protection of fundamental rights and constitutional counter-limits*], in Bernardi, *supra* n. 15, p. 46. Even more drastically, *see* D. Gallo, 'La Corte costituzionale chiude la 'saga Taricco': tra riserva di legge, opposizione de facto del controlimite e implicita negazione dell'effetto diretto' [*The ICC closes the Taricco saga: riserva di legge, de facto opposition of counter-limits and implicit negation of the direct effect*] in *European papers* (2018).

[46] Italian Constitutional Court, order no. 24/2017, §10.

would have been tantamount to declaring Italian membership in the EU to be contrary to a core principle of the Constitution. And, before taking such a drastic step, the Italian Court offered the Court of Justice an opportunity to reconsider its own decision.

The first application of the identity clause

A further novelty introduced by the *Taricco* saga is related to the lexicon of the Constitutional Court with regard to the interrelationship between the domestic and EU legal orders. Notwithstanding the fact that the core of the dispute has been about threats to apply counter-limits, the very expression 'counter-limits' was not openly used by the Italian Constitutional Court (as it was, however, not long before in judgment no. 238/2014).[47] On the other hand, and for the very first time in the case law of the Constitutional Court, both order no. 24/2017 and judgment no. 115/2018 insisted on referring to the protection of 'national constitutional identity', also by directly mentioning Article 4(2) TEU.[48]

The specific way the Court made use of the identity clause triggers at least two different considerations related to its link with the pre-existing 'counter-limits' doctrine and, more generally, to the specific kind of identity review emerging from these judgments, also in comparative perspective.

As for the first issue, the Constitutional Court put the new lexicon of constitutional identity in perfect continuity with the doctrine of counter-limits. Ultimately, the protection of 'constitutional identity' seems to coincide with the idea of counter-limits as constituting the external dimension of the supreme principles of the constitution.[49] The latter are the core values of the legal order to be considered as permanent and unmodifiable by any means, including constitutional amendment. The counter-limits secure them, also, against external threats, namely threats coming from outside the Italian legal order.[50] This approach can be found in order no. 24/2017, in which the Constitutional Court stressed its duty to 'prevent' the incorporation into the legal order of rules at

[47] *See supra* n. 9 and accompanying text.

[48] For the sake of completeness: similar language was used in an older decision, although it was not related in any way to EU law. In decision no. 262/2009, the expression 'constitutional identity' generically referred to the equality principle and the impossibility of unequal treatment before courts of persons serving in supreme constitutional court offices.

[49] Extensively on this topic, P. Faraguna, *Ai confini della costituzione. Principi supremi e identità costituzionale* [*At the boundaries of the constitution. Supreme principles and constitutional identity*] (FrancoAngeli 2015) p. 60.

[50] Italian Constitutional Court, judgment no. 238/2014, §3.2, which clearly states that the counter-limits represent the external dimension of the supreme principles of the constitution, previously identified by judgment no. 1146/1988.

odds with the (supreme) principle of legality in criminal matters; this was later confirmed by judgment no. 115/2018, in which the Court again refers to 'constitutional identity' with regard to 'unavoidable requirement[s]' of the legal order concerned.[51]

Moving on to the second issue, it is worthy of mention that in order no. 24/2017 the Constitutional Court made use of Article 4(2) TEU, without however including it in the preliminary questions addressed to the European Court of Justice. The Court did not ask for clarification of the meaning of the identity clause in the Treaties. On the contrary, it interpreted and applied Article 4(2) TEU as if it were a domestic norm. And, in doing so, the Italian Constitutional Court seems to have adhered to its interpretation of Article 4(2) TEU as a form of Europeanisation of counter-limits,[52] instead of seeing it as a provision with a more 'ordinary' function, related to distribution of competences between EU and the Member States, as well as to the prevention of normative conflicts between EU law and domestic law.[53]

To put it in comparative perspective, the Constitutional Court's interpretation of the constitutional text has led to conclusions that are not far from what Article 23 of the German Basic Law explicitly states (and the German Constitutional Court quite recently confirmed).[54] That provision was amended in view of the ratification of the Maastricht Treaty and now indicates parallel limits to constitutional amendment and to innovation via EU treaty reform, precluding in both cases modification of the core principles of the Constitution, enshrined in Germany in Article 79 of the same Basic Law. The Italian Constitution was not amended in order to introduce a specific European clause, but the evolution of the counter-limits doctrine in the case law of the Constitutional Court seems to have arrived at a very similar result.

This approach to Article 4(2) TEU seems to be consistent with the spirit of the Treaties in affirming the respect given, under EU law, to the national constitutional identities of the Member States. This may avoid the risk of an overbroad interpretation of the same concept and its consequent transformation into an indeterminately open clause, something that would risk jeopardising the very idea of legal integration and its constitutional relevance. Recent judgments by

[51] Italian Constitutional Court, judgment no. 115/2018, §11.

[52] In this sense, *see* A. von Bogdandy and S. Schill, 'Overcoming absolute primacy: respect for national identity under the Lisbon Treaty', 48(5) *Common Market Law Review* (2011) p. 1417.

[53] *See* B. Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts. The Ordinary Functions of the Identity Clause', 31 *Yearbook of European Law* (2012) p. 263, and E. Cloots, *National Identity in EU Law* (Oxford University Press 2015) p. 210.

[54] *See supra* n. 1.

the constitutional courts of other EU member states (such as Hungary[55] and Belgium[56]), however, seem to understand the identity review as a sovereignty claim, in the sense of limiting the primacy and the field of application of EU law in order to reserve specific areas to national law, without comparable parallel restrictions on attaining the same results by domestic legal means.

The confirmation of exclusive jurisdiction over the supreme principles

These innovations related to access to the preliminary reference and the use of constitutional identity actually seem functional with respect to the consolidation of an existing trend in the case law of the Italian Court: its absolute jurisdictional monopoly over counter-limits.

The Constitutional Court now considers itself able to issue preliminary references and to that purpose it is now equal to every other 'court or tribunal of a Member State'. Differently, when it comes to scrutinising supreme principles (and therefore, the constitutional identity of Italy), it has confirmed its role as a body of a different and unique nature, excluding ordinary judges from interfering in this field. This monopoly also excludes the Court of Justice; in the opinion of the Constitutional Court, the Court of Justice has to leave 'to the national authorities' [but in the end only to the Constitutional Court itself] 'the ultimate assessment concerning compliance with the supreme principles of the national order'.[57]

The exclusivity of the Court in the interpretation of the supreme principles of the Constitution and, as the case may be, in the application of counter-limits, emerges clearly from both its decisions in the '*Taricco* saga'.

First, in order no. 24/2017, the Court stressed that the Constitution vests the ultimate assessment concerning compliance with the supreme principles of the national order '*exclusively* in this Court'.[58] Similarly, in judgment no. 115/2018, the Court reaffirmed its role as '*the* competent authority to carry out the verification described by the Court of Justice, since it *alone* is entitled to ascertain whether EU law contrasts with the supreme principles of the constitutional system

[55] Hungarian Constitutional Court, decision of 30 November 2016 no. 22/2016 (XII. 5) AB, on the quota of migrants whose asylum applications were to be processed by Hungarian authorities.

[56] Belgian Constitutional Court, judgment of 28 April 2016, no. 62/2016, on the law of 18 July 2013 approving the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, with an interesting *obiter dictum* on the possibilities for attributing new competences to EU institutions (and the consequent limits on those possibilities deriving from the Belgian constitutional identity): para. B.8.7.

[57] Again, Italian Constitutional Court order no. 24/2017, §6: 'the Court of Justice is not exempt from the task of defining the scope of EU law and cannot be further encumbered by the requirement of assessing in detail whether it is compatible with the constitutional identity of each Member State'.

[58] *Ibid.*

and, in particular, with the inalienable rights of the person'.[59] This makes it impossible for any other judge – including the two referring courts – to elaborate on the clash between EU norms and the supreme principles of the Constitution.

In this sense, we can safely say that the most distinctive feature of the '*Taricco* saga' is the interplay between constitutional interpretation and counter-limits on the one hand and preliminary reference and supreme principles of the Constitution on the other. This twofold combination distinguishes it from both the two previous preliminary references to the European Court of Justice and the other cases in which the clash between EU and domestic law had been considered.

The crucial role of the 'riserva di legge' *in the European journey of the Constitutional court*

One further element of continuity present in the '*Taricco* saga' is the role played by the '*riserva di legge*' in shaping the latest refinement of the relationship between domestic and European law.[60] The '*riserva di legge*' (or *reserve de loi*, *reserva de ley*, *Gesetzesvorbehalt*) is an instrument typical of the civil law tradition that interprets the principle of legality as attributing to parliamentary legislation (with the consequent exclusion of other sources of law) the protection and the discipline of fundamental rights. Born of the nineteenth century legislative state (if not earlier[61]), its role changed with the advent of rigid constitutions and constitutional courts.[62] Although its role in the European journey of the *Corte Costituzionale* has often been overlooked, the '*riserva di legge*' played a central role in several decisions that contributed to defining the relationship between domestic and EU legal orders. My claim is that the Constitutional Court 'used' it instrumentally – in conjunction with Article 11 of the Constitution – in order to regulate the degree of openness of the legal system to Community law.

As noted, the *Frontini* case was a crucial step in the evolution of the European journey of the Court, systematising the fundamental framework of the counter-limits doctrine. Among its further merits, *Frontini* also definitely established that Article 11 of the Constitution was *the* 'enabling clause' for the application of

[59] Italian Constitutional Court, judgment no. 115/2018, §8.

[60] I have decided to leave the Italian wording instead of attempting a translation, which would imply a conceptual and not a mere linguistic exercise. Also, A. Türk decided to give up on translating the name of this institution (just mentioning that it could be only 'roughly' transposed as 'legislative reservation') in his review of the book by H. Rieckhoff, *Der Vorbehalt des Gesetzes im Europarecht* (Mohr Siebeck 2007), 47(1) *Common Market Law Review* (2010) p. 278.

[61] Some even trace its origins back as far as the medieval idea of limiting royal power by requiring legislative authorisation for war expenditures.

[62] *See also* N. Lupo and G. Piccirilli, 'The Relocation of the Legality Principle by the European Courts' Case Law', 11(1) *EuConst* (2015) p. 58.

European law in Italy: before that decision, European law was deemed to have assumed the rank of law authorising the ratification of (and giving execution to) the European treaties, therefore having the status of ordinary legislation; with (and since) the *Frontini* case, the intervention of 'external' sources has been considered to be part of the 'limitation to sovereignty' allowed by Article 11 of the Constitution. The specific reason for this change was to grant EU law constitutional status in order to derogate from the further constitutional provisions establishing '*riserve di legge*', which would otherwise exclude sources other than parliamentary legislation from intervening in certain matters. Only by raising the rank of the enabling clause to the constitutional level was it then possible, at the same time, to allow the application of European law in the domestic legal system and to derogate from the constitutional provisions reserving specific matters to parliamentary legislation.[63] This approach was confirmed by subsequent decisions,[64] and it contributed to the progressive opening of the Italian legal system to the direct applicability of EU law.

The reasoning followed in these precedents left open the possibility of *revirement* in individual cases. As the sole judge entitled to interpret Article 11 of the Italian Constitution, it was up to the Constitutional Court to confirm that the conditions envisaged therein had been met or, if not, to apply counter-limits, thereby preventing the relevant EU law from entering the domestic legal system.

In line with this approach, the Constitutional Court was able to 'close' the legal system (or to threaten to do so) in the '*Taricco* saga'. Although the '*riserva di legge*' did not play any significant role in order no. 24/2017,[65] it took centre stage in judgment no. 115/2018. In the final chapter of the saga, the '*riserva di legge*' was evoked in order to stress the impossibility of the '*Taricco* rule' from *ever* being able to satisfy the constitutional requirement of the determination of criminal charges that – according to the Court – could only be attained by invoking a *praevia lex scripta*,[66] and also in the name of the fundamental importance of certainty in criminal law.[67] Thus, the '*riserva di legge*' worked as a special kind of

[63] Italian Constitutional Court, judgment no. 183/1973, in particular §8-9. On this decision *see* F. Sorrentino, 'Regolamenti comunitari e riserva di legge' [*EC regulations and riserva di legge*], 44 *Diritto e pratica tributaria* (1974) p. 245 ff.

[64] Italian Constitutional Court, judgment no. 399/1987, §2.

[65] I. Pellizzone, 'Il ruolo del giudice penale nella tutela degli interessi finanziari dell'Unione (e nazionali): battaglia di retroguardia o principio ineludibile da esporre a controlimite del diritto dell'Unione europea?' [*The role of the criminal judge in protecting the financial interest of the EU (and the MS): rearguard action or unavoidable principle to be used as counter-limit to EU law?*], in Bernardi and Cupelli, *supra* n. 15, p. 323.

[66] Italian Constitutional Court, judgment no. 115/2018, §12.

[67] C. Cupelli, 'La Corte costituzionale chiude il caso Taricco e apre a un diritto penale "certo"' [*The ICC closes the Taricco case and opens to a "certain" criminal law*], 6 *Diritto penale contemporaneo* (2018) p. 232 and p. 235.

'counter-limit': an 'implicit, generalised and *pro futuro*' one.[68] In sum, while the Constitutional Court had not formally applied counter-limits, it had used them *de facto*, more or less with the same effect as if it had fully accepted the questions of constitutionality. In other words, the Italian Constitutional Court formally rejected the questions of constitutionality, and thus did not declare a violation of Article 11 of the Constitution by the law authorising the ratification of the European Treaties, in the part in which it allowed the '*Taricco rule*' to enter in the domestic legal order. However, it stated that the same rule, even the 'milder' version affirmed in the second decision of the European Court, could not be applied anyway in the Italian legal order.

Conclusions: towards the recentralisation of the constitutional review of fundamental rights

All elements emerging from the '*Taricco* saga', both those that innovate and those that consolidate the previous case law, have contributed not only to the European journey of the Constitutional Court with regard to the conflict between national and EU law, but also to several broader ongoing processes over the last few years. In particular, the Court seems to be very keen on recentralising the scrutiny of cases related to fundamental rights after a long period during which 'other' courts had taken on a significant role in that respect.

For many years, not in the least to reduce the number of questions submitted for its attention, the Court asked ordinary judges to attempt to interpret legislation in a manner consistent with the Constitution. Moreover, as already mentioned, questions of constitutionality in the event of 'dual preliminarity' could be submitted to the Constitutional Court only after preliminary references had been issued to the Court of Justice. Both these elements contributed to a reduction in the role played by the Constitutional Court, due, paradoxically, to its own decisions and thereby increasing the role of ordinary and European courts.[69]

A parallel process headed in the same direction concerned the disparate relationship with the European Convention of Human Rights. The potential for the latter to 'destroy' traditional approaches to state-based adjudication[70] had been

[68] In these terms, Gallo, *supra* n. 45, p. 8.

[69] G. Scaccia, 'Giudici comuni e diritto dell'Unione europea nella sentenza della Corte costituzionale n. 269 del 2017' [*Ordinary judges and EU law in the ICC judgment no. 269/2017*], 62 (6) *Giurisprudenza costituzionale* (2017) p. 2948, describes the context before this decision as featured by the progressive 'drying' of constitutional review and the corresponding empowerment of ordinary judges (because of their authority to disapply domestic law following the preliminary ruling of the ECJ without the involvement of the Italian Constitutional Court).

[70] This is the position of A. Stone Sweet, 'A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe', 1(1) *Global Constitutionalism* (2012) p. 53 at p. 68.

overamplified by Protocol 11 to the Convention, which allowed applications to be lodged directly by individuals. This element, combined with the acquired supra-legislative status of the Convention, led to a short-circuit in the system of protection of fundamental rights as originally designed by the drafters of the Constitution. The fact that individuals could apply directly to the Court of Strasbourg (and not to the Constitutional Court), and the need for the Italian legal order to comply with its case law, put the role of the Constitutional Court as guarantor of fundamental rights at risk as it could be cut off by this long-distance interaction between ordinary judges and the Strasbourg Court. In reaction to such a scenario, the Constitutional Court issued the so-called twin judgments of 2007,[71] stating that the European Convention of Human Rights was to be considered an interposed norm in the constitutional review of legislation, which meant – ultimately – that it was up to the Constitutional Court (and only the Constitutional Court) to scrutinise domestic legislation on the basis of the level of protection that had been set by Strasbourg.

Somewhat similarly, with regard to its relationship to the protection of fundamental rights in the EU, the Constitutional Court changed its attitude on the order of issuing preliminary references (to the Court of Justice) versus questions of constitutionality on matters related to the application of the Charter of Fundamental Rights of the EU. Another recent judgment of the Constitutional Court (no. 269/2017) included a controversial *obiter dictum*, according to which the Court inverted the priority between the two remedies in cases involving fundamental rights protected by both the Italian Constitution and the EU Charter of Fundamental Rights. Consequently, in cases related to the latter, the priority between preliminary reference to the European Court and question of constitutionality will be different than in the past. Until this judgment, ordinary courts had to first resolve any doubt of interpretation of the relevant European law and only later, and in the light of the decision of the Luxemburg Court, questions of constitutionality would have been admissible. Now, on the basis of decision no. 269/2017, ordinary judges should first submit questions of constitutionality, or, as the case may be, preliminary references to the Court of Justice, only after (and in the light of) the decision of the Constitutional Court.[72] In making this impressive breakthrough, the Constitutional Court specifically referred both to *Melki*[73] and

[71] Italian Constitutional Court judgments nos. 348 and 349/2007. *See* O. Pollicino, 'Italy: Constitutional Court at the crossroads between constitutional parochialism and co-operative constitutionalism', 4(2) *EuConst* (2008) p. 363 ff.

[72] This innovation seems, however, not to fully convince all members of the Italian Constitutional Court, at least considering the not completely homogeneous views that have been given by Judges Amato, Cartabia, de Pretis and Sciarra in the interviews collected in the special issue of the *Italian Journal of Public Law*, *supra* n. 6.

[73] ECJ 22 June 2010, joined Cases C-188/10 and C-189/10.

A. v. *B. and others*,[74] with the aim of making the innovation as coherent as possible with the principles of the same EU legal order.[75] Ordinary courts seem to have welcomed this innovation and some questions of constitutionality have been already submitted in cases of dual preliminarity.[76] Only the future practice by ordinary courts will show the actual impact on the legal system (and on its relationship with the European one) of this breakthrough.

The *Corte Costituzionale*'s renewed protagonism, pursued via a recentralisation of the scrutiny of matters related to fundamental rights, seems to observe many of the elements that emerge from the *Taricco* saga. The proactive attitude to the preliminary reference, the interpretation of EU clauses (such as Article 4(2) TEU) as further development of the original doctrine of counter-limits, the emphasis on exclusively domestic tools (such as the '*riserva di legge*'), and the restatement of its monopoly in dealing with supreme principles of the Constitution are all elements that seems to strengthen the role of the Constitutional Court, pushing it more toward the centre of the stage in the Italian system of fundamental rights' protection. The reasons behind such a dynamic role can probably be found in both the lack of political initiative for fine-tuning the relationship between vertical levels of government, and in the wish to maintain some balance with the forced activism of the same Constitutional Court in the purely domestic 'arena' (i.e. in electoral matters).[77]

In conclusion, with the '*Taricco* saga' the Constitutional Court has confirmed once more its pivotal role in overseeing the relationship between the Italian legal order and the EU: its journey continues, with some slight change of direction but apparently with a certain consistency with its robust Euro-friendly past. The greatest cause for concern is that the European Court of Justice has not been able to support the Constitutional Court in a more cooperative manner when it might still have been fruitful to do so, while the subsequent opening of the second preliminary ruling in the *Taricco* saga arrived too late, at a point when it was no longer possible for the Constitutional Court to withdraw without losing face.[78]

[74] ECJ 11 September 2014, Case C-112/13.

[75] Italian Constitutional Court, judgment no. 269/2017, §5.2.

[76] *See* for example the order of 16 February 2018, no. 3831, by the II civil section of the Court of Cassation, with a detailed motivation of the innovation brought by judgment no. 269/2017 of the Italian Constitutional Court on the basis of submitting the question of constitutionality prior to the preliminary reference to the ECJ (*see* in particular §11.3.6.7).

[77] *See* P. Faraguna, '"Do You Ever Have One of Those Days When Everything Seems Unconstitutional?": The Italian Constitutional Court Strikes Down the Electoral Law Once Again', 13(4) *EuConst* (2017) p. 778.

[78] G. Riccardi, 'La Corte di giustizia tra 'dialogo' e 'monologo' nella 'saga Taricco': silenzi, fraintendimenti e surrettizie appropriazioni di competenze penali dirette' [*The ECJ between dialogue and monologue: silences, misunderstandings and underhand appropriation of direct criminal*

The hope is that clashes like these (which will no doubt have follow-ups, e.g. at the moment of implementation of a new directive, or when the Commission initiates an infringement procedure[79]) will not precipitate even harsher confrontations in the future.

competences], in Amalfitano, *supra* n. 15, casts doubt on the very idea that the entire saga was an example of dialogue between the two Courts; it was more a confrontational mix of two monologues.

[79] The trust in a solution by the national legislature (suggested by Rauchegger, *supra* n. 25, p. 1547) cannot be shared. Paradoxically, only the Italian Constitutional Court could have a say (with a frankly unlikely overruling), whereas the Parliament cannot: since the dispute between the Italian Constitutional Court and CJEU involves the supreme principles of the Italian Constitution, neither legislation, nor a constitutional amendment – as said – can be admitted in modifying the understanding of the principle of legality in criminal matters away from the interpretation given by the same Italian Constitutional Court in the cases at hand.