Articles

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Supremacy of EU Law vs. (Constitutional) National Identity: A New Challenge for the Court of Justice from the Italian Constitutional Court

Abstract

A recent request by the Italian Constitutional Court to the Court of Justice of the European Union for a preliminary ruling concerning its previous judgment *Taricco* calls into question the still very controversial relationship between the principle of supremacy of EU law and the protection of fundamental rights – as recognised by the national constitutional traditions – in the implementation of EU law by Member States. This paper summarises the most remarkable aspects of this new controversy, highlighting its importance for the future of the EU law and, in particular, for the prospect of a closer cooperation among Union and Member States in criminal law matters.

I. Introduction

Four years after *Melloni*[1], the principle of supremacy of EU law is challenged again by a Member State's constitutional court for the sake of the protection of a fundamental right in its *domestic* dimension. In the wake of the CJEU judgment *Taricco*[2], rendered in 2015 in response to a request made by an Italian lower criminal court, the Italian Constitutional Court has now made a request for a new preliminary ruling[3], calling into question the compatibility of *Taricco* with the principle of legality of criminal offences and penalties, as recognised by Article 25(2) of the Italian Constitution. The Constitutional Court explicitly considers this principle as part of that very "national

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1 CJEU, *Melloni*, case 399/11.

2 CJEU, *Taricco*, case 105/14.

3 Corte cost., decision no. 24/2017, discussed among others by *O. Pollicino, M. Bassini*, When cooperation means request for clarification, or better for 'revisitation', Diritto penale contemporaneo (DPC), 30 January 2017.

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identity" of Italy, which the Union is under an obligation to respect according to Article 4(2) TFEU, and which the same Constitutional Court is in any case determined to protect – if need be – by declaring void the national law of execution of the EU treaties, in as far as this law confers binding effects to those treaties in the domestic legal order.

The CJEU is, therefore, called upon to rule again in the same matter, being faced now with the very sensitive question of whether the primacy, unity and effectiveness of EU law should be reaffirmed even against a domestic constitutional principle, irrespective of the compatibility of the relevant EU legislation with the fundamental rights recognised by the Charter at a European level. As in *Melloni*, the CJEU is certainly aware of the risk to trigger an adverse reaction by a national constitutional court, which could work as a model for future decisions by other national courts, with the ultimate effect of dramatically undermining the most important of the principles – the supremacy of EU law – on which the whole relationship between EU and national law has been based so far.

The aim of this paper is to explain and discuss the fundamental issues at stake now, taking stock of the huge debate that the first *Taricco* judgment has sparked in Italy meanwhile – and which is only partially reflected in the recent referral decision by the Constitutional Court. To this purpose, I will firstly summarise the judgment of the CJEU (*infra*,II) and the reactions sparked by this judgment in Italy, which eventually led to the decision of the Constitutional Court (*infra*, III); I will then briefly discuss some issues that appear as common ground for the two courts (*infra*, IV), and later focus on the controversial points, trying to imagine some possible solutions for the CJEU that could minimise the risks of a negative impact of the case from an EU perspective (*infra*, V), before drawing some brief provisional conclusions (*infra*, VI).

II. The CJEU judgment (Taricco)

In 2014, an Italian criminal court made a request to the CJEU for a preliminary ruling concerning, essentially, the compatibility between EU law and the Italian provisions on the limitation periods applicable to the offences of VAT frauds.

The referring court was proceeding against several defendants, who had been charged with tax frauds that involved VAT evasion. The court observed that, in all likelihood, the offences would have become time-barred before a final judgment could be given, due to the particular features of the legal provisions on limitation periods applicable to such offences. In fact, the ordinary limitation period of six (or, in cases involving a criminal association, seven) years provided for these offences is not suspended while criminal proceedings are ongoing, but is just interrupted – and, in principle, starts running afresh – in correspondence with certain procedural events. Even in case of interruption, however, Articles 160 and 161 of the Italian Criminal Code (hereinafter, ICC) provide for an *absolute* limitation period (running from the time of the commission of the offence to the time when the judgment becomes final), which is just

a quarter longer than the ordinary period. This means that, in practice, an offence subject to an ordinary limitation period of *six* years becomes time-barred, even if a prosecution is brought before the expiry of this term, if a final judgment is not given within *seven and a half* years from the commission of the offence. Since investigations and criminal proceedings concerning these offences are usually complex, and convictions in first and second instance are regularly appealed against, such an outcome is very frequent, with the result of widespread impunity for these crimes.

The referring court wondered whether such a situation is compatible with the obligations to combat against frauds affecting the EU financial interests, which derive from a number of EU instruments and, crucially, from Article 325(1) and (2) TFEU.

In its judgment, rendered in September 2015, the Grand Chamber of the CJEU underlines that Article 325(1) TFEU obliges Member States to effectively fight against VAT evasion, which affects the financial interest of the Union[4]. While in principle, under that treaty provision, Member States remain free to choose the appropriate sanctions to achieve this objective, the use of *criminal* penalties may nevertheless prove essential to combat certain serious cases of VAT evasion in an effective and dissuasive manner[5]. Moreover, Article 2(1) of the PFI Convention calls upon Member States to take the necessary measures to ensure that fraud affecting the EU financial interests is punishable by effective, proportionate and dissuasive *criminal* penalties including, in the most serious cases, penalties involving deprivation of liberty. Hence, it follows that EU law, taken on the whole, imposes on Member States an obligation to provide for effective, proportionate and dissuasive *criminal* sanctions at least for serious cases of fraud affecting the EU financial interests such as the case at issue, where the evaded taxes amounted to several millions euros[6].

Now, the Italian legal order does provide for criminal penalties for VAT evasion, including imprisonment up to seven years in cases of involvement of a criminal association. However, these *prima facie* dissuasive sanctions risk becoming wholly ineffective – at least according to the referring court – as a consequence of Articles 160 and 161 ICC mentioned above, which make it very hard for law enforcement agencies to obtain a final conviction against the perpetrators of these frauds before the offences become time-barred. The CJEU concludes, therefore, that these legal provisions, in as far as they actually lead to a systematic impunity of serious cases of frauds affecting the EU financial interests, including VAT evasion, are to be considered incompatible with Article 325(1) TFUE and Article 2(1) PFI, read in conjunction with the general obligation to sincere cooperation between Union and Member States laid down in Article 4(3) TEU[7].

In addition, the referring court had pointed out that the absolute limitation period laid down in Articles 160 and 161 ICC does not apply to the offence of criminal asso-

4 CJEU, *Taricco* (fn. 2), § 36-37. The point had already been made by the Court, *inter alia*, in *Åkerberg Fransson*, case 617/10, § 25.
5 CJEU, *Taricco* (fn. 2), § 39.
6 CJEU, *Taricco* (fn. 2), § 43.
7 CJEU, *Taricco* (fn. 2), § 47.

ciation aiming at evasion of duties on tobacco products, which only affects the national financial interests. In the view of the CJEU, such discrimination is also incompatible with the general obligation established in Article 325(2) TFEU, which calls upon Member States to take the same measures for the protection of the EU financial interests as they take to counter fraud affecting their own interests[8].

What consequences, though, should the referring court – and any other domestic court in the same position – draw from this incompatibility of Articles 160 and 161 ICC with EU law?

The Grand Chamber's answer to this crucial question is straightforward, and somehow surprising. Should the national court conclude, after a careful analysis of the domestic legislation, that the relevant provisions on limitation periods are actually incompatible with the obligations arising from Article 325 – i.e., form a provision that forms part of the EU *primary* law and sets forth precise obligations as to the result to be achieved –, the same court would be under a duty to give full effect to the EU obligations, if need be by *disapplying* the incompatible provisions in the domestic legislation, without having to request or await the prior repeal of those provisions by way of legislation or other constitutional procedure[9].

Since the fulfilment of this obligation will likely lead to the final conviction of defendants, which would otherwise have benefitted of the rules on limitation laid down in Articles 160 and 161 ICC, a further question arises as to whether such an outcome is compatible with the fundamental rights of the defendants, and in particular with the principle of legality of criminal offences and penalties guaranteed by Article 49 of the Charter of Fundamental Rights.

The solution by the Grand Chamber is, again, straightforward: since the defendants would be convicted of an offence which was already in force at the time of the facts, and sentenced to a penalty which was already provided for at that time, the principle of legality would be fully respected. Admittedly, the effect of the disapplication of the provisions at issue would be the extension of the limitation periods originally provided for by the law in force at the time of the commission of the offence. However, this effect is in no way precluded by the *nulla poena* principle. As it is shown by the well-established case law of the ECtHR in relation to Article 7 ECHR, a retroactive extension of limitation periods – i.e.,their application to defendants who had committed the offence at a time when the law provided for a shorter period – does not entail any infringement of the *nulla poena*[10].

In conclusion, the Grand Chamber rules that, insofar as the national court verifies that Articles 160 and 161 ICC actually prevent "the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interest of the European Union", or provide "for longer limitation periods in respect

8 CJEU, *Taricco* (fn. 2), § 48.

9 CJEU, *Taricco* (fn. 2), § 49. The Court quotes here, *inter alia*, its previous judgment *Kücükdeveci*, case 555/07, no. 51,.

10 CJEU, *Taricco* (fn. 2), § 54-57.

of cases of fraud affecting the financial interest of the Member States concerned than in respect of those affecting the financial interests of the European Union", then "the national court [will have to] give full effect to Article 325(1) and (2) TFEU, if need be by disapplying the provision[s] of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under Article 325(1) and (2) TFEU"[11].

III. The Italian response to Taricco

1. The reactions against the CJEU ruling in the Italian jurisprudence and doctrine

Just a few days after the delivery of the CJEU's judgment, a ruling by the Italian Court of Cassation duly applied the *Taricco* judgment, observing that Articles 160 and 161 ICC actually prevent the Italian legal order from fulfilling the obligations flowing from Article 325(1) and (2) TFEU as interpreted by the CJEU, with the consequence that both Italian provisions must be disapplied by national courts[12].

Almost simultaneously, however, the Milan Court of Appeal decided, in a proceeding concerning several defendants already convicted in first instance of VAT frauds amounting to millions of euros, to refer to the Constitutional Court the question on the constitutionality *in parte qua* of the Italian law authorising the ratification of the TFEU in its current version, in respect of Article 325 as interpreted by the CJEU in *Taricco*[13].

In essence, the Milan court asked whether the obligation upon national criminal courts to disapply two provisions on limitation periods at the defendants' detriment is compatible with Article 25(2) of the Italian Constitution, which guarantees at a domestic level the *nulla poena* principle and ought to be counted among the "fundamental principles of the constitutional legal order and inalienable rights of the human being" that should be preserved even against the principle of supremacy of EU[14].

Several months later, another panel of the Court of Cassation referred a second preliminary question to the Constitutional Court as to the possible unconstitutionality of the TFEU *in parte qua*[15]. This new referral significantly extends the scope of the scrutiny, by calling into question not only the *nulla poena* principle in respect of the retroactive effect of *Taricco*[16], but also a number of *other* constitutional principles – in

11 CJEU, *Taricco* (fn. 2), from the *dispositif*.
12 Cass. pen., 15 September 2015/20 January 2016, no. 2210, discussed by *F. Viganò*, La prima sentenza della Cassazione post *Taricco*, Diritto penale contemporaneo (DPC), 22 January 2016.
13 Corte app. Milano, 18 September 2015, discussed by *F. Viganò*, Prescrizione e reati lesivi degli interessi finanziari dell'UE: la Corte d'appello di Milano sollecita la Corte costituzionale ad azionare i 'controlimiti', Diritto penale contemporaneo (DPC), 21 September 2015.
14 See, in particular, C. cost., judgment no. 174/1984.
15 Cass. pen., 30 March 2016/8 July 2016, no. 28346.
16 Cass. pen., 30 March 2016/8 July 2016 (fn. 15), § 4.2 and 4.3.

part unrelated to the principle of legality in criminal matters –, identified as possible "counter-limits" to the limitation of sovereignty, accepted by Italy while entering the EU legal system according to Article 11 of the Italian Constitution.

The Court of Cassation assumes, firstly, that the obligation laid down by the CJEU runs contrary to the principle – enshrined in the *nulla poena* in its domestic dimension according to Article 25(2) of the Constitution – that reserves to the *legislative* power the choices as to the establishment of criminal offences and penalties. In the case at issue, the criminal responsibility of an individual would instead be based on a ruling of a *jurisdictional* instance, which has exercised – moreover – a power to directly determine detrimental consequences to individuals in the context of criminal trials, which had never been conferred by Member States to the European Union[17].

Secondly, the obligation to disapply the internal provisions set forth in *Taricco* is couched in too *vague* terms, in as far as it remains subject to the verification by national courts whether those provisions do preclude the imposition of effective and dissuasive criminal penalties "in a significant number of cases of serious fraud affecting the financial interest of the European Union". According to the Court of Cassation, such a clause does not clearly identify the conditions under which the national provisions should be disapplied, and is, therefore, incompatible with the *nulla poena* principle in its dimension of individual guarantee against arbitrary interpretation and application of the criminal law by judicial authorities[18].

Thirdly, precisely the wide discretion conferred by the CJEU to national criminal courts would also lead to a violation of the principle of *equality before the law* (Article 3 of the Italian Constitution), as a consequence of the inevitable disparity of treatment resulting from the different appreciations of the requirements set forth in *Taricco* by each proceeding court[19].

Fourthly, the same wide margin of discretion left to criminal courts runs contrary, in the Court of Cassation's opinion, to the fundamental principles of *separation of powers* and *subjection of judges to the law* enshrined in Article 101(2) of the Italian Constitution[20].

Fifthly, also the necessary orientation of the penalty to th e*rehabilitation*of the convict, as prescribed by Article 27(3) of the Constitution, would allegedly be affected by the obligation set forth in *Taricco*. Actually, this obligation aims at modifying the legal regime of the statute of the limitation for reasons of general deterrence unrelated to the rehabilitation principle, which should instead govern the rules on criminal penalties[21].

Finally, the interpretation of Article 325 TFEU adopted by the CJEU in fact implies, according to the Court of Cassation, a self-attribution of a *direct* competence of the EU on criminal law matters, which has never been conferred to the EU by the Member States through the treaties currently in force, and which would exceed as such

17 Cass. pen., 30 March 2016/8 July 2016 (fn. 15), § 4.4.
18 Cass. pen., 30 March 2016/8 July 2016 (fn. 15), § 4.5.
19 Cass. pen., 30 March 2016/8 July 2016 (fn. 15), § 4.6.
20 Cass. pen., 30 March 2016/8 July 2016 (fn. 15), § 4.7.
21 Cass. pen., 30 March 2016/8 July 2016 (fn. 15), § 4.8 and 4.9.

the limits to the Italian national sovereignty in favour of the EU's laws and institutions set by Article 11 of the Constitution[22].

This firm position by the Court of Cassation had been preceded by an intense academic debate, which had inflamed meanwhile among Italian scholars. The majority of them had taken the view that the obligation set forth in *Taricco* should be rejected, being incompatible with all or some of the Constitutional "counter-limits" later invoked by the Court of Cassation[23]. Only a comparatively small number of scholars had spoken in favour of the acceptance of the CJEU ruling, or at least had stressed the opportunity for the Constitutional Court to avoid an open conflict with the Luxembourg Court on a question of principle concerning – after all – a national legislation which was itself clearly in breach of the obligations of effective protection of the EU financial interests laid down by Article 325 TFUE[24].

2. The new referral to the CJEU decided by the Constitutional Court

In January 2017, the Italian Constitutional Court delivered its decision on the two questions of constitutionality referred, respectively, by the Milan Court of Appeal and

22 Cass. pen., 30 March 2016/8 July 2016 (fn. 15), § 4.10.

23 See, among many others, *M. Luciani*, Il brusco risveglio. I controlimiti e la fine mancata della storia costituzionale, in: A. Bernardi (ed.), I controlimiti, Primato delle norme europee e difesa dei principi costituzionali, 2017, p. 63 et seq.; *S. Manacorda*, Le garanzie penalistiche nei rapporti con il diritto dell'Unione e il problematico ricordo al rinvio pregiudiziale: una lettura contestualizzata del caso *Taricco*, *ibidem*, p. 177 et seq.; *V. Manes*, La "svolta" *Taricco* e la potenziale "sovversione di sistema": le ragioni dei controlimiti, *ibidem*, p. 203 et seq.; *F. Palazzo*, Armonizzazione europea e costituzionalismo penale tra diritto e politica, *ibidem*, p. 273 et seq.; *R. Bin*, *Taricco*: una sentenza sbagliata: come venirne fuori?, *ibidem*, p. 291 et seq.; *C. Cupelli*, Il caso *Taricco* e il controlimite della riserva di legge in materia penale, *ibidem*, p. 331 et seq.; *C. Sotis*, Il limite come controlimite. Riflessioni sulla vicenda *Taricco*, *ibidem*, p. 495 et seq.; *L. Eusebi*, Nemmeno la Corte di giustizia può erigere il giudice a legislatore, Diritto penale contemporaneo – Rivista trimestrale (DPC – RT), no. 2/2015, p. 40 et seq.; *D. Pulitanò*, La posta in gioco nella decisione della Corte Costituzionale sulla sentenza *Taricco*, Diritto penale contemporaneo – Rivista trimestrale (DPC-RT), no. 1/2016, p. 228 et seq.

24 See, among others, *A. Bernardi*, Presentazione. I controlimiti al diritto dell'Unione europea e il loro discusso ruolo in ambito penale, in: A. Bernardi (ed.), I controlimiti, Primato delle norme europee e difesa dei principi costituzionali, 2017, p. VII et seq.; *F. Viganò*, Il caso *Taricco* davanti alla Corte costituzionale: qualche riflessione sul merito delle questioni, e sulla reale posta in gioco, *ibidem*, p. 233 et seq.; *P. Faraguna*, Il caso *Taricco*: controlimiti in tre dimensioni, *ibidem*, p. 359 et seq.; *L. Picotti*, Riflessioni sul caso *Taricco*: dalla "virtuosa indignazione" al rilancio del diritto europeo, *ibidem*, p. 445 et seq. See also, cautiously speaking in favour of a request by the Constitutional Court for a new preliminary ruling of the CJEU, *M. Caianiello*, *Dum Romaw (et Brucsellae) consulitur…* Some Considerations on the *Taricco* Judgment and Its Consequences at National and European Level, European Journal of Crime, Criminal Law and Criminal Justice, 24 (2016), p. 1 et seq.

the Court of Cassation, making itself a new request for preliminary ruling to the CJEU[25].

The Constitutional Court declined, therefore, to follow the suggestions by the majority of the legal doctrine, who had urged the Court to immediately oppose the constitutional "counter-limits" to the obligations set forth in *Taricco* and, consequently, to take the unprecedented step to declare void the national law giving effect in the domestic legal order to the very TFEU *in parte qua*, because of its incompatibility with the "fundamental principles" or the "unalienable rights of the human being" enshrined in the Italian Constitution. The Constitutional Court took, instead, an apparently more dialogic approach, and invited the CJEU to clarify its position – in a future judgment *Taricco II* – in the light of the arguments raised by the Italian constitutional judges.

Unlike the Court of Cassation, the constitutional judges choose here to focus only on the principle of legality of criminal offences and penalties as laid down in Article 25(2) of the Constitution, which is considered in this decision as the sole relevant "counter-limit". Actually, the Court does not even mention here the expression "counter-limit", and prefers instead speaking of the preservation of the Italian "constitutional identity", thereby echoing the language of the German Constitutional Court in similar well-known occasions[26].

First of all, the decision qualifies the *nulla poena* as a fundamental principle of the Italian legal order that is functional to the protection of an unalienable individual right. This right shall be protected, if need be, against any obligation flowing from EU law, in spite of the principle – which the Court does not dispute *per se* – of the primacy of EU law[27].

According to the Court, the *nulla poena* principle – as recognised by the *national* constitutional traditions – encompasses the provisions concerning the statute of limitation, such as Articles 160 and 161 ICC. These rules, indeed, have an immediate impact on the application of penalties, and must as such be established by a provision that was

25 Corte cost., decision no. 24/2017 (fn. 3). The decision has meanwhile been discussed, among others, by *O. Pollicino, M. Bassini*, When cooperation means request for clarification, or better for 'revisitation', Diritto penale contemporaneo (DPC), 30 January 2017; *V. Manes*, La Corte muove e, in tre mosse, dà scacco a "Taricco", Diritto penale contemporaneo (DPC), 13 February 2017; *M. Caianiello*, Processo penale e prescrizione nel quadro della giurisprudenza europea. Dialogo tra sistemi o conflitto identitario?, Diritto penale contemporaneo (DPC), 24 February 2017; *R. Kostoris*, La Corte Costituzionale e il caso Taricco, tra tutela dei 'controlimiti' e scontro tra paradigmi, Diritto penale contemporaneo (DPC), 23 March 2017; *F. Viganò*, Le parole e i silenzi. Osservazioni sull'ordinanza n. 24/2017 della Corte costituzionale sul caso *Taricco*, Diritto penale contemporaneo (DPC), 27 March 2017; *C. Sotis*, Tra Antigone e Creonte io sto con Porzia, Diritto penale contemporaneo (DPC), 3 April 2017; *D. Pulitanò*, Ragioni della legalità. A proposito di Corte Cost. n. 24/2017, Diritto penale contemporaneo (DPC), 19 April 2017; *R. Sicurella*, Oltre la *vexata quæstio* della natura della prescrizione. L'*actio finium regundorum* della Consulta nell'ordinanza *Taricco*, tra sovranismo (strisciante) e richiamo (palese) al rispetto dei ruoli, Diritto penale contemporaneo (DPC), 19 April 2017.

26 See in particular BVerfG, 2 BvE 2/08, *Leitsatz* 4, and, more recently, BVerfG 2 BvR 2735/14, § 41.

27 Corte cost., decision no. 24/2017 (fn. 3), § 2.

already in force at the time of the commission of the offence. It is true – continues the Court – that some Member States, and apparently the ECtHR, consider the rules on limitation as mere *procedural* conditions for the prosecution of a particular offence, thereby excluding them from the scope of the principle of legality and non-retrospectivity of criminal provisions, which are traditionally thought to be *substantive* criminal law guarantees. In the Court's opinion, however, there is no need for uniformity in this respect at a European level: every Member State should be left free to embrace its own concept on the nature of limitation rules, in conformity with its own constitutional traditions. The fact that Article 49 of the Charter – interpreted in conformity with the case law of the ECtHR on Article 7 ECHR – does not include those rules within the scope of protection of the *nulla poena* is not determinative either, since the aim of the Charter is to set a *minimum* standard of protection of fundamental rights, while allowing Member States to afford a higher level of protection according to their own constitutional traditions[28].

Hence, it follows that a rule arising from a CJEU judgment, the effect of which would be the application to a particular defendant of a longer limitation period than that provided for at the moment of the commission of the offence, would run counter to the *nulla poena* principle as recognised by the *Italian* constitutional law, which sets in this respect a *higher* level of guarantee than Article 7 ECHR or Article 49 of the Charter do.

Furthermore, the Constitutional Court denounces the *insufficient precision* of the rule set forth by the CJEU in *Taricco*. On the one hand, this rule – established for the first time in that judgment, on the basis of an innovative interpretation of Article 325 TFEU – was surely *not foreseeable* for the perpetrator at the time of commission of the offence. On the other hand, as the Court of Cassation had already pointed out, the rule set in *Taricco* leaves an intolerably wide margin of *discretion* to criminal courts, which are called upon to perform evaluations on criminal policy objectives (such as the determination whether the current Italian discipline leads to the impunity of serious frauds "in a significant number of cases"), which should fall into the sole responsibility of the legislator. Such a burden, according to the Constitutional Court, would blur the basic distinction between the functions of the different branches of power; and this in a sector of the legal system – the criminal law – where the separation of powers should be instead especially preserved[29].

It remains to be examined what consequences should be drawn from this demonstrated incompatibility between the rule established in *Taricco* and the fundamental principles and rights recognised by the Italian Constitution. The Italian Court recalls that, according to Article 4(2) TEU, the "national identities" of Member States "inherent in their fundamental structures, political and constitutional" shall in any case be respected by EU law and institutions. As a consequence, neither EU law nor the CJEU judgments that interpret it should ever be intended to impose on a Member State a du-

28 Corte cost., decision no. 24/2017 (fn. 3), § 4.
29 Corte cost., decision no. 24/2017 (fn. 3), § 5.

ty to renounce to principles that are essential to its own national identity[30]. The same *Taricco* judgment, by the way, has possibly accepted the point, in a passage – duly quoted by the Constitutional Court[31] – where emphasis was put on the point that domestic courts should in any case, while disapplying the domestic provisions on limitation periods, "ensure that the fundamental rights of the person concerned are respected"[32].

Therefore, before taking the dramatic step of triggering for the first time the "counter-limits" against the CJEU ruling in *Taricco*, the Court esteems it convenient to refer to the CJEU the question whether its ruling should be really deemed binding on a Member State, even in the event that such a ruling clashes against the fundamental principles and rights enshrined in the *domestic* traditions.

More precisely, the Constitutional Court asks the CJEU whether Article 325(1) and (2) TFEU should be interpreted as imposing on national criminal courts the obligation to disapply the relevant provisions of the ICC on limitation periods applicable to VAT frauds even *a)* when this obligation lacks any sufficiently *precise* legal basis, *b)* when the statute of limitation is considered by the Member State concerned to be a part of its*substantive* criminal law, and *c)* when the disapplication of the provisions on limitation periods would prove to be *incompatible with the fundamental constitutional principles or the inalienable rights of the human being* recognised by that Member State.

The threat remains implicit, but sounds nevertheless crystal clear: should the answer by the CJEU to one of these questions be affirmative, the Constitutional Court will have no other choice than trigger the "counter-limits", and declare void the national law executing the TFEU *in parte qua*, i.e. in as far as it confers binding force, in the Italian legal order, to the CJEU judgment interpreting Article 325.

IV. The common ground

Before focussing on the controversial issues, on which the CJEU will have to rule upon in its next *Taricco II* judgment, it is worth emphasising a couple of points where there seems to be a certain agreement between the two courts.

1. The Italian rules on limitation periods and their impact on the fulfilment of the obligation laid down in Article 325 TFEU

The first point concerns the dysfunctional effects of the provisions on limitation periods set forth in Articles 160 and 161 ICC in respect of the fulfilment of the EU obliga-

30 Corte cost., decision no. 24/2017 (fn. 3), § 6.
31 Corte cost., decision no. 24/2017 (fn. 3), § 7.
32 CJEU, *Taricco* (fn. 1), no. 53. But see the paragraphs which immediately follow, where the CJEU precisely denies that the rule established in *Taricco* runs contrary to the defendants' fundamental rights as they are recognised at a *European* level, with which the CJEU is uniquely concerned.

tion, laid down in Article 325 TFEU, to counter frauds affecting the financial interests of the Union. The Italian Constitutional Court itself concedes that, irrespective of the solution of the controversy on the direct effect of the *Taricco* ruling in criminal cases, a responsibility of Italy before the EU could arise as to its failure to comply with obligations set out in the treaty, and more precisely as a consequence of the enactment and maintenance of those provisions on limitation periods[33]. Such a responsibility could obviously be established through an infringement procedure launched by the Commission.

Indeed, there cannot be any doubt about the oddity of the Italian legislation on the criminal statute of limitation, in as far as it does not provide any effective mechanism of suspension or interruption of the limitation term during the criminal trial, once the prosecution has been brought *timely*. This legislation very frequently leads to the anticipated death of criminal proceedings, initiated well before the expiry of the original term. As a consequence of this, defendants have no incentive to enter simplified proceedings, even if they are fully aware of their guilt: the prospect of a penalty reduction, which is granted in such proceedings, does not outweigh the much more attractive prospect of a full acquittal thanks to the limitation rules – a goal, that can be easily reached in the context of an ordinary trial and the following appeals against the first instance conviction. The result is a widespread *impunity* for tax frauds – as well as for many other offences – with the further collateral consequence of a systematic waste of energies for the whole criminal justice system, which keeps on producing ordinary criminal trials against defendants who will eventually be acquitted[34].

A sector of the Italian criminal law doctrine has been denouncing this oddity for at least two decades[35]. However, nothing is likely to change in this respect, at least in the immediate future: the current limitation rules, as irrational as they might appear, are pugnaciously defended by a criminal lawyers' lobby, which seems to be very powerful in the Italian Parliament and which is currently opposing any proposal to allow criminal courts more time to deal with prosecutions brought within the original term of limitation.

The Constitutional Court leaves now open the door for the EU Commission to launch an infringement procedure against Italy, which could eventually force the Italian Parliament – at some indefinite point in the future – to modify those rules, in such a way as to allow the criminal proceeding on tax frauds affecting the EU financial interests to come to their 'natural' end (the defendant's conviction, or his/her acquittal

33 Corte cost., decision no. 24/2017 (fn. 3), § 7.

34 See, in general on the dysfunctionality of the Italian regulation of the statute of limitation in criminal matters, *F. Viganò*, Riflessioni *de lege lata* e *ferenda* su prescrizione e tutela della ragionevole durata del processo, Diritto penale contemporaneo – Rivista trimestrale (DPC – RT), no. 3/2013, p. 32 et seq.

35 See, among many others, *V. Grevi*, Prescrizione del reato ed effettività del processo tra sistema delle impugnazioni e prospettive di riforma, in Sistema sanzionatorio: effettività e certezza della pena, 2002, p. 19 et seq.; *G. Giostra*, La prescrizione: aspetti processuali, in: Per una giustizia penale più sollecita: ostacoli e rimedi ragionevoli, 2006, p. 84 et seq.

on the merits). It is a pity, though, that the Court –by taking such a hard stance against *Taricco* – has in the end backed the preservation of such an unsatisfactory state of the law, not taking advantage of a worthwhile opportunity for the Italian legal order to get rid *now* - at least as far as the protection of EU financial interests is concerned – of the provisions that mostly impair the effectiveness of the criminal response to tax frauds.

2. Direct effect of Article 325 TFEU by the CJEU in national criminal proceedings

A second point, where it seems there is no actual disagreement between the Italian and the European court, is much more relevant from a broader EU perspective. In its decision, the Constitutional Court explicitly declares that it is not its purpose to call into question the meaning derived from Article 325 TFEU by the CJEU[36].

Such a statement has, as far as I can see, several remarkable implications.

First and foremost, *Taricco* has essentially attributed a *direct effect* to Article 325 TFEU, at least in the sense that such a provision should have the effect of neutralising, in the domestic criminal proceedings, a conflicting national provision. While arguing *i)* that such an effect is precluded, according to the Italian constitutional principles, at the detriment of defendants who have committed the offences *previous* to the CJEU judgment, and *ii)* that the condition under which the criminal courts should disapply the national rules on limitation have not been set out in a *sufficiently precise* way by the European judgment, the Constitutional Court has, nevertheless, *neither* disputed *per se* the possible *direct effect* of Article 325 TFU, *nor* – what is even more important – has assumed, as many Italian scholars had called it upon to do[37], that the principle of legality of criminal offences and penalties enshrined in Article 25(2) of the Italian Constitution requires a *national law* as a sole possible legal basis for the individual criminal responsibility[38].

As far as the direct effect of Article 325 TFEU is concerned, it is worth stressing that the solution adopted in *Taricco* by the CJEU was far from banal. It is true that the *second* paragraph of the provision, establishing an obligation to "take the same measures" to counter frauds affecting EU financial interests as those taken to counter frauds affecting the corresponding domestic interests, can easily be read also as a *clear and unconditional prohibition* to treat the two categories of frauds differently. But the obligation set out in the *first* paragraph of Article 325 TFUE definitely seems to lack the traditional requirements for the direct effect, as laid down in *Van Gend en Loos* and in the subsequent case law[39]: the obligation imposed on Member States to "counter fraud" affecting the financial interests of the Union necessarily requires measures taken at a domestic level for this purpose, the content of which is not determined

36 Corte cost., decision no. 24/2017 (fn. 3), § 8.

37 In fact, almost all the authors mentioned at fn. 23.

38 The Court's silence on these aspects is underlined among others – from opposite perspectives – by *V. Manes* (fn. 25), p. 12-13 and *F. Viganò* (fn. 25), p. 9 et seq.

39 See, on this point, the extensive discussion by *P. Craig, G. De Búrca*, EU Law. Text, Cases and Materials, VI ed., 2015, p. 187 et seq.

in any way by the treaty provision, except for the generic requirements of their deterrent capacity and effectiveness. The obligation cannot, therefore, be viewed as unconditional, nor has it a purely negative content, as it was the case in *Van Gend en Loos*.

This conceptual obstacle was disregarded by the CJEU, which – without even explaining the reasons of its decision on the point of the direct effect of Article 325(1) TFEU – probably considered that the mere fact of the existence of a domestic provision making ineffective the overall criminal response to frauds affecting the financial interests of Union was already a blatant violation of the EU obligation, which should be redressed by a criminal court through the simple removal of the obstacle – i.e., by disapplying that provision.

The problem with this argument is probably not its possible inconsistency with the *ratio decidendi* in the well-known judgment *Berlusconi*, discussed at some length in the Advocate General's opinion in *Taricco*[40]. In that case, the ECJ had held that a *directive* can never determine or aggravate, *per se*, the individual criminal liability, which will always depend on the national criminal laws[41] – a principle, by the way, that is fully coherent with the idea that a directive can only produce *vertical* direct effects by recognising an individual a *right*, which the legislation of the Member State has still failed to recognise, contrary to the obligations set forth in the directive[42]. However, *Taricco* can be easily distinguished from *Berlusconi*, precisely because the provision at stake *here* is not a directive, but a treaty provision: i.e., a *primary* norm, which apparently might produce, as such, even a *detrimental* effect for the individual concerned[43].

The real problem at stake here is, instead, how far the principle of direct effects of treaty provisions could go in *criminal law* matters, once the CJEU has admitted – as it apparently has in *Taricco* – that even non-unconditional norms such as Article 325(1) TFEU can *determine* the criminal responsibility of an individual beyond the limits established by the domestic criminal legislation, through the mechanism of disapplication of some provisions of the same legislation.

A new pending case arising from a request for preliminary ruling from an Italian criminal court, *Scialdone*, vividly illustrates this problem[44]. The referring court asks here, in essence, whether Article 325(1) TFEU precludes a national legislation setting various limits (other than those resulting by the statute of limitation) to a criminal re-

40 Opinion of Advocate General Kokott, *Taricco*, case 105/14, § 116-118.

41 CJEU, *Berlusconi and o.*, cases 387/02, 391/02 and 403/02, § 74, quoting also CJEU, *Kolpinghuis Nijmegen*, case 80/86, § 13, and *X*, aase C-60/02, § 61.

42 See, again, *P. Craig, G. De Búrca* (fn. 39), p. 200 et seq.

43 As it seems to happen in the sphere of horizontal relationships between individuals, where an individual right is derived from a treaty provision, with the inevitable consequence of recognizing a *duty* upon another individual, derived as well from the treaty provision at stake. See, for an interesting example of this mechanism, CJEU, *Kücükdeveci* (fn. 9).

44 Request for a preliminary ruling from the Tribunale di Varese (Italy) lodged on 9 November 2015, *Scialdone*, case 574/15. The whole request has been published in Diritto penale contemporaneo (DPC), with note by *L. Zoli*, La disciplina dei reati tributari al vaglio della Corte di giustizia UE, 15 April 2016. See also, on this pending case, *A. Bernardi* (fn. 24), p. CXX et seq.

sponsibility for tax frauds affecting the financial interests of the Union: e.g., by imposing *higher financial thresholds* for criminal liability than the threshold of 50,000 euros which, according to the PFI convention, qualifies a fraud as "serious"; or by exempting the defendant from liability to punishment in case of *partial or late payment of the due amounts of VAT*. According to the referring court, the incompatibility of such provisions with Article 325(1) TFEU should lead to an obligation for criminal courts in Italy to disapply the same provisions, with the effect of directly *expanding* the criminal liability established in general for VAT evasion in the Italian criminal legislation. The claim is, in other words, that the general obligation to adopt effective and dissuasive measures against frauds affecting the financial interests of the Union, as laid down by the EU primary law, should *directly* entail negative consequences for the individual, as far as his criminal responsibility is concerned.

A possible distinction between this case and *Taricco* is admittedly that, according to the referring court, the domestic jurisdiction should be required here to apply a criminal penalty, *inter alia*, for a fact that was not even considered a criminal offence at the time of its commission, since it concerned a sum that did not reach the threshold established, at that time, for a VAT evasion to constitute a crime. Such a claim by the referring court will likely be dismissed by the CJEU because of its inconsistency with the *nulla poena* principle, even in its European dimension. However, the CJEU might still rule that Article 325(1) TFEU could lead to an obligation for Italian courts to disapply the domestic threshold, in favour of the 50,000 euros threshold established by the PFI convention, at least in *future* cases, thereby modifying *de facto* the Italian criminal provisions in such a way as to encompass more cases than those originally included in it. A retroactive effect of the ruling would, thereby, be excluded. Moreover, as to the provision about extinction of the criminal liability due to partial or late payment of the evaded sums, the CJEU might possibly argue that the relevant offence and penalty were already established by the Italian law at the time of the commission of the offence, and that Article 325(1) TFEU would here – exactly as the Advocate General put it in *Taricco*, speaking of the disapplication of the rules on limitation periods – "simply […] release the national prosecution authorities from the shackles which are contrary to EU law"[45] – namely, from the paralysing effect of criminal liability produced by the provision on extinction of the offence in case of partial or late payment of the fiscal debt.

Such possible further developments, which can be easily envisaged as logical consequences of the *Taricco I* ruling, could raise serious concern not only in Italy, but also in many other legal orders, since they would allow the CJEU to unilaterally *manipulate*, through the instrument of the direct effect of treaty provisions, the criminal legislations in force in the different Member States, through the modification of the conditions discretionally set out by any Member State for the criminal liability of the individual within its own jurisdiction[46].

45 Opinion of the Adocate General Kokott (fn. 39), § 118.
46 See *V. Manes* (fn. 23), p. 216 warning against this risk.

Contrary to the expectations (and the hopes) of many Italian scholars, and unlike the Court of Cassation in its previous referral, the Constitutional Court has not raised any particular objection about the use of Article 325 TFEU by the CJEU as a tool to expand the conditions for the criminal responsibility of the individual, provided of course that the new conditions *i)* are not applied retroactively, and *ii)* are shaped in a sufficiently precise way. The idea underlying the self-restraint by the Constitutional Court was probably that the interpretation of the treaties solely falls into the CJEU responsibility. Nor has the Constitutional Court raised any objection, based on the *nulla poena sine lege* as a possible "counter-limit" or on an *ultra vires* argument, against the possibility that EU law *as a whole* could directly determine or co-determine, together with the domestic legislation, the conditions for the criminal responsibility of an individual. I will come back to the silence of the Constitutional Court on these crucial aspects later on.

V. The controversial issues

The object of the disagreement between the two courts is instead restricted, as anticipated, to two major points: the possible retrospective effect of *Taricco*, and the lack of precision of its ruling.

1. Lack of precision

It is convenient to start the discussion from the latter point, which is probably easier to deal with.

The objection raised by the Constitutional Court as to the (in)sufficient precision of the *Taricco* ruling has, as we have seen, two limbs: on the one hand, the lack of foreseeability of the ruling from the defendants' perspective; on the other hand, the improper delegation to the judicial power of criminal policy tasks.

As to the first limb, the argument does not overlap – as it might appear at first sight – with the objection concerning the possible retrospective effect of the rule: the point made by the Constitutional Court here is that, even in case of an application only *pro futuro* of the *Taricco* ruling, the conditions mentioned in the judgment for the disapplication of Article 160 and 161 ICC – and, consequently, for the possible conviction of the defendants – are described by the CJEU in a way that would not enable an individual to predict, at the time of the commission of the offence, the possible adverse consequences of his conduct. And this because of the same flaws of the ruling which are related to the second limb of the objection: criminal courts would be vested with a discretionary power to decide whether or not to convict the defendant, according to their evaluation of the impact of the provisions concerning limitation periods on the effectiveness and dissuasiveness of the overall response by the Italian criminal law to the frauds affecting the financial interests of the Union. Not only does such an evaluation

fall outside the boundaries of the judicial power, according to the Constitutional Court, but its outcome is also unpredictable, *ex ante,* for the individuals concerned.

In order to overcome this concern, however, a rather straightforward strategy could now be put in place by the CJEU: the solution would be just to reformulate the previous ruling in a *more precise* manner. The Luxembourg court might, for example, directly rule that the current Italian legislation on limitation periods does have a negative impact on the effectiveness of the fight against frauds affecting the financial interests of the Union, without imposing on national courts the burden of making themselves such an assessment; and conclude, as a consequence, that Article 325 TFEU precludes the application of Articles 160 and 161 ICC in *any* case of fraud involving sums that overcome the threshold of 50,000 euros established in the PFI convention for a fraud to be considered as serious. Such a (slightly modified) rule would sound, indeed, as perfectly precise even to the demanding Constitutional Court's ears.

On the other hand, the CJEU might simply reiterate, without any modification, its ruling concerning the incompatibility with Article 325(2) TFEU of a stricter regulation on limitation periods for criminal associations aimed at carrying out offences against purely Italian financial interests (such as the revenues from tobacco taxes) than that in force for criminal associations pursuing frauds against financial interests of the Union. Indeed, this part of the *Taricco I* ruling – which, remarkably, was not questioned by the Constitutional Court – was flawless as to its precision[47]: the (more favourable) treatment reserved by the Italian legal system for the latter case is clearly in breach of Article 325(2) TFEU, and no further evaluation is required from the criminal courts, which will simply have to disapply the more favourable provisions, applying instead those already provided for the associations carrying out offences against the national financial interests.

2. Retroactivity

Much more complex is the issue concerning the possible retrospective effect of the *Taricco I* ruling. In fact, the two courts embrace here completely different theoretical approaches.

Whilst the CJEU, relying on the Strasbourg jurisprudence on Article 7 ECHR[48], considers the limitation rules to be merely procedural and, as such, extraneous to the *nulla poena* guarantee, the consistent case law of the Italian Constitutional Court has always included these rules into the scope of Article 25(2) of the Constitution[49]. Therefore, a retrospective application of a more detrimental rule on limitation periods – such as that resulting from *Taricco I* – would run counter to the principle of legality

47 As already underlined, soon after the CJEU judgment, by *E. Lupo*, La *primauté* del diritto dell'UE e l'ordinamento penale nazionale (Riflessioni sulla sentenza *Taricco*), Diritto penale contemporaneo – Rivista trimestrale (DPC – RT), no. 1/2016, p. 221-222.

48 See especially ECtHR, *Coëme v. Belgium* (22 June 2000), § 149-150.

49 See *inter alia* Corte cost., judgments no. 143/2014 and 23/2013.

in criminal matters in its domestic dimension. And this would be, of course, a sufficient reason for the Court to pull the brake, and oppose – for the first time in its history, and for the first time among the founder States of the European Communities – the constitutional "counter-limits" against EU law.

I have argued elsewhere[50], previous to the Constitutional Court's decision, that the Court should have abandoned its established case law, and adopted instead the same approach as the ECtHR in respect of the nature of the rules on limitation periods. I definitely cannot see why a person should have been granted the fundamental right to know, at the very time at the commission of a fact that was clearly described as a crime by the law then in force, how long law enforcement agencies would be allowed to prosecute him for that crime[51] – or, to put it even more sharply, how long he would have to keep his crime hidden, before it becomes time-barred[52]. From a constitutional law perspective, I would have seen no obstacle in the application of the *Taricco I* ruling even to facts committed *before the CJEU judgment*, provided of course that the offence with which every defendant was charged had not become time-barred yet at *that* moment – exactly as both the CJEU judgment[53] and the Advocate General's opinion[54] had suggested, fully correctly in my view.

As we have seen, however, the Constitutional Court – supported by the overwhelming majority of Italian scholars – has taken a different view, confirming its previous jurisprudence and insisting on banning any possible retroactive effect of any change in the provisions on limitation periods, albeit without any effort to give reasons on why this solution should be imposed by the logic of *nulla poena*.As a consequence, the Constitutional Court has given rise to a serious conflict with the CJEU, potentially very dangerous from an EU perspective.

In spite of the efforts by the Constitutional Court to differentiate the present case from *Melloni*, the similarities between the two cases are striking. The Italian court, such as the Spanish Constitutional Court in that case, assumes that the protection and furtherance of EU interests – such as its financial interests in *Taricco*, or the judicial cooperation in criminal law matters in *Melloni* – cannot impinge on the Member State's constitutional fundamental principles, and certainly not on those that form part of its "national" (or "constitutional") "identity".

The CJEU, however, moved in *Melloni* from the very opposite principle that, when EU interests are at stake, the fundamental principles which have to be protected – and which limit EU law as well as the law of the Member States in the implementation of EU law – are *only those recognised by the Charter*, in the extension resulting, notably,

50 *F. Viganò* (fn. 24), p. 257 et seq.
51 See also, supporting the same view, *G. Marinucci, E. Dolcini*, Corso di diritto penale, III ed., 2001, p. 263 et seq.; *V. Grevi*, Garanzie individuali ed esigenze di difesa sociale nel processo penale, in: Garanzie costituzionali e diritti fondamentali, 1197, p. 279.
52 So, in the German legal doctrine, *C. Roxin*, Strafrecht. Allgemeiner Teil, I, IV ed., 2006, p. 168.
53 CJEU, *Taricco* (fn. 2), § 57.
54 Opinion of the Adocate General Kokott (fn. 39), § 120-121.

from the ECtHR jurisprudence on the ECHR corresponding guarantees. With the consequence – which might sound very unpleasant from Member States' perspective, but which is directly derived, in *Melloni*, from the principle of supremacy of EU law – that Member States are not allowed to oppose to EU law the higher level of protection of fundamental rights resulting from their own constitutional tradition, when this would impair the primacy, unity and effectiveness of EU law in the protection of the EU interests at stake[55].

As it is well known, the Spanish Constitutional Court eventually came to terms with the obligation set forth by the CJEU in *Melloni*, giving effect – *nolens volens* – to its ruling concerning a European arrest warrant in spite of the doubts about the compatibility of the delivery of the concerned person with the fair trials rights, as recognised by its own case law[56]. It is, however, very unlikely that the Italian Constitutional Court would follow the same complacent path of its Spanish counterpart, should the CJEU adopt the same tough stance as in *Melloni*.

The Italian Constitutional Court tries now to offer the CJEU an escape route, by distinguishing *Melloni* and *Taricco* on the ground that the former was concerned with a special need of uniformity in the application of the EU law, resulting from the principle of mutual recognition of judicial decisions in the whole European space[57]. It is hard to see, however, why such a need should not exist when it comes to the protection of the financial interests of the Union, especially when – according to the CJEU's evaluation – a Member State is failing to comply with the obligations, flowing from Article 325 TFEU, to effectively protect those interests.

VI. Some (provisional) conclusions

One of the things I regret in the Constitutional Court's decision is the fact of having launched a battle with unpredictable consequences, for a completely *wrong cause*.

I do not intend to dispute in principle the existence of constitutional limits – or "counter-limits", as they are commonly called in the Italian experience[58] – to the supremacy of EU law, for the sake of the "national identity" of each Member State, which the national constitutional courts have an obvious vocation to protect. But the assumption that such a "national identity" is at stake as a consequence of *Taricco* seems to me rather bizarre.

On the one hand, the current Italian legislation on limitation periods is indefensible, and actually leads to a blatant violation of the obligation set out in Article 325 TFEU, so that the Constitutional Court's belligerent attitude could be too easily understood,

55 CJEU, *Melloni* (fn. 1), § 60.

56 Tribunal Constitucional de España, judgment 13 February 2014, *Melloni*. See on this judgment *F. Viganò*, Obblighi di adeguamento al diritto UE e 'controlimiti': la Corte costituzionale spagnola si adegua, bon gré mal gré, alla sentenza dei giudici di Lussemburgo nel caso Melloni, Diritto penale contemporaneo (DPC), 9 March 2014.

57 Corte cost., ord. n. 24/2017 (fn. 3), no. 9.

58 On this doctrine see, extensively, *P. Faraguna*, Ai confine della Costituzione, 2015.

beyond the Italian national borders, as an unfortunate attempt to relieve Italy from its responsibility arising from the very principle *pacta sunt servanda*. On the other hand, the idea that the rules on the statute of limitation are a part of the *substantive* criminal law (and are, as such, subject to the principle of legality in criminal matters) is, in my opinion, wrong, and should not- in any case – have been considered by the Court among the (few)*fundamental* principles, co-essential to the very Italian national identity, which are worth to be protected at any cost, even taking into account the prospect of waging a war against the Court of Justice on the principle of supremacy of EU law. Such a war would have definitely deserved a nobler cause.

The approach by the Italian Constitutional Court appears to me as an expression of what Mireille Delmas-Marty has called "souveranisme"[59], related here to the recognition and protection of fundamental rights and principles; an approach which is coupled with a basic distrust towards the EU institutions and *their* ability to ensure a satisfactory level of protection of those rights and principles at a European level. Yet, the Constitutional Court should have been aware that, without sharing a *uniform* level of guarantees among the 28 (or 27) Member States, a *common* strategy in matters of *common* interests – such as the protection of the EU financial interests, or the criminal policies in the various areas mentioned in Article 83 TFEU – will be simply impossible to pursue. To this aim, every Member State is necessarily required to give up something of its constitutional traditions and accept to work on the basis of *common* standards of protection of fundamental principles and rights.

Precisely *this* is, by the way, the mission of the Charter. An opposite claim that every Member State should always be left free to adopt, while implementing EU law, its *own* standards of protection of fundamental principles and rights according to their *own* constitutional traditions, would undermine the effectiveness of any common strategy and policy decided at a EU level. Exceptions could possibly be admitted, as far as the (national) principles and rights at stake are *really* so important, as to put into question the very "national identity" of a Member State; but this was definitely not the case, at least in my view.

Having said that, one might wonder what could be, *now*, the best – and safer – strategy for the Court of Justice to adopt, in response to the challenge launched by the Italian Constitutional Court. Reaffirming, adamantly, the *Melloni* ruling, or trying instead a compromising approach?

My opinion is that it could probably be wise now, from the CJEU's perspective, to somehow soften its approach in respect to *Melloni*, and find some way to renounce at least to the retroactive application of its previous ruling, paying thereby some respect to the preservation of the Italian "national identity", allegedly put in jeopardy by *Taricco I*.

59 *M. Delmas-Marty*, L'integration européenne, entre pluralisme, souveranisme et universalisme, in: A. Bernardi (ed.), I controlimiti, Primato delle norme europee e difesa dei principi costituzionali, 2017, p. 165 et seq.

Such a strategic move would, first of all, avoid a traumatic reaction by the Italian Constitutional Court, which – by creating a dangerous precedent in a moment of acute political weakness of the Union – might in the end undermine the principle of supremacy of EU law much more profoundly than a compromising CJEU judgment, cautiously limiting the scope of the obligation set forth in *Taricco I*, would probably do.

Secondly, a partial limitation of the scope of its previous ruling for the sake of a friendly settlement with the Italian Court would allow the CJEU to treasure the implicit recognition by the Constitutional Court of the direct effect of Article 325 TFUE – including its possible effects of neutralising, albeit only *pro futuro*, a domestic provision concerning limitation periods. This recognition would indirectly work as a legitimation of the possible expansion of criminal liability of individuals beyond the boundaries originally set by the national law, as a consequence of the direct effect of a treaty provision merely establishing a (generic) obligation to take effective and dissuasive measures for the protection of a particular EU interest. A remarkable result, which was certainly not self-evident before *Taricco I*.

More generally, the CJEU would, by this way, also secure the result – which was not self-evident either – of an (implicit) recognition by the constitutional court of a founder State that the principle of *legality* of criminal offences and penalties does not preclude the possibility that the criminal liability of an individual could be based, at least in part, on a EU provision *directly applicable* to him. Such a recognition could also pave the way to a future adoption of *regulations* containing criminal provision directly applicable to individuals, possibly based on the same Article 325 TFEU.

All this would be *per se* a historic achievement, which it would be a pity for the Court of Justice to miss, at this point.