



INSIGHT

# THE “PATH TOWARDS EUROPEAN INTEGRATION” OF THE ITALIAN CONSTITUTIONAL COURT: THE PRIMACY OF EU LAW IN THE LIGHT OF THE JUDGMENT NO. 269/17

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**ABSTRACT:** The interaction between European sources and national provisions has increased the degree of uncertainty with regard to the nature of time limitation in criminal law in the Italian system. In this respect, in case *M.A.S. & M.B.* (judgment of 5 december 2017, case C-42/17) the Grand Chamber of the CJEU answered the question referred for a preliminary ruling by the Italian Constitutional Court concerning the connection between the internal principle of legality in criminal matters and EU law. Afterwards, the Italian Constitutional Court replied, with judgment no. 269/17, by taking a stance over the primacy of EU law. In this *Insight* the issue of what kind of conflicts is at stake in the context of multilevel dialogue between supranational and constitutional courts will be considered, with special focus on the Italian Constitutional Court judgment no. 269/17. Particularly, in this judgment, the Italian Constitutional Court questioned the Court of Justice competence in interpreting the Charter of Fundamental Rights of the European Union and the constitutional traditions common to the Member States provided for by Art. 6, para. 3, TEU. Finally, the Author will introduce some new legal developments that could arise from this multilevel exchange of viewpoint and will further illustrate their relevance to the whole community.

**KEYWORDS:** preliminary ruling procedure – *Taricco* – Italian Constitution – Italian Constitutional Court – primacy of EU law – Charter of Fundamental Rights of the European Union.

## I. INTRODUCTION

The CJEU, in its judgment of 8 September 2015, in case C-105/14 (s.c. *Taricco*),<sup>1</sup> has reopened the debate on the relationship between EU and domestic criminal law, especially

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<sup>1</sup> The decision of the CJEU in the *Taricco* case ruled that the Italian courts must give full effect to Art. 325, paras 1 and 2, TFEU, by disapplying Arts 160, last sub-para., and 161, second sub-para., of the Italian Criminal Code, as amended by law no. 251 of 5 December 2005 (s.c. “legge ex Cirielli”), in relation to the

in Italy. The CJEU stated that the national rules in relation to limitation periods for criminal matters<sup>2</sup> – in the present case, serious VAT frauds<sup>3</sup> – such as those provided for in Italian criminal law, shall be disapplied since such legislation does not allow the effective protection of the EU financial interests.<sup>4</sup> However, the Italian Constitutional Court (the “ICC”) argued that the disapplication of such national legislation risks running counter to the fundamental principles of the Italian legal order, significantly the principle of legality. Hence, the ICC submitted a request for a preliminary ruling to the Court of Luxembourg,<sup>5</sup> in order to obtain further guidance.<sup>6</sup>

Published in December 2017, the *Taricco II* judgment of the CJEU upheld the principles enshrined in the previous decision, though it explained that the disapplication of national law may not result in a violation of the principle of legality.<sup>7</sup> Moreover, the role of national judges as interpreters is fostered in order to coordinate EU principles and domestic legislation. This is the reason why the CJEU entrusts to national judges the task of checking whether the *Taricco* rule application “leads to a situation of uncertainty in the Italian legal system as regards the determination of the applicable limitation rules”.<sup>8</sup> In this respect, many commentators provided their opinion.<sup>9</sup>

rules on limitation in criminal matters if Member States’ obligation to counter fraud affecting the Union budget is impaired by these rules.

<sup>2</sup> See M. CAIANIELLO, *Criminal process and limitation period's provisions in the EU jurisprudence framework. Dialogue between systems or identity conflict?*, in *Revista Brasileira de Direito Processual Penal*, 2017, p. 967 *et seq.*

<sup>3</sup> See O. FOUQUET, *L'administration fiscale a-t-elle les moyens juridiques de lutter contre la fraude "carrousel" à la TVA intracommunautaire?*, in *La revue administrative*, 2006, p. 44 *et seq.* and F. GRISOSTOLO, L. SCARCELLA, *Trouble Always Comes in Threes: The Taricco Case Saga and the Italian Limitation Period in VAT Fraud*, in *Intertax*, 2017, p. 701 *et seq.*

<sup>4</sup> See M. TIMMERMAN, *Balancing effective criminal sanctions with effective fundamental rights protection in cases of VAT fraud*, in *Common Market Law Review*, 2016, p. 779 *et seq.*

<sup>5</sup> For the third time in its history.

<sup>6</sup> The ICC triggered a preliminary ruling procedure with its order of 26 January 2017 no. 24. In this regard, see among others A. BERNARDI, C. CUPELLI, *Il caso Taricco e il dialogo tra le corti: l'ordinanza 24/2017 della Corte costituzionale*, Napoli: Jovene, 2017; C. SOTIS, *Il limite come controlimite: riflessioni sulla vicenda Taricco, con una postilla sulla ordinanza 24 del 2017 della Corte costituzionale "tra Antigone e Creonte io sto con Porzia"*, in I. PELLIZZONE (ed.), *Principio di legalità penale e diritto costituzionale: problematiche attuali*, Milano: Giuffrè, 2017, p. 185 *et seq.*; F. VIGANÒ, *Le parole e i silenzi*, in *Diritto Penale Contemporaneo*, 27 March 2017, [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it); A. BERNARDI, *La Corte Costituzionale sul caso Taricco: tra dialogo cooperativo e contro limiti*, in *Quaderni Costituzionali*, 2017, p. 109 *et seq.*; I. PELLIZZONE, *La Corte Costituzionale sul caso Taricco: principio di determinatezza, separazione dei poteri e ruolo del giudice penale*, in *Quaderni Costituzionali*, 2017, p. 112 *et seq.* and R. CALVANO, *Una questione pregiudiziale al quadrato... o forse al cubo: sull'ordinanza n. 24/17 della Corte costituzionale*, in *Diritti umani e diritto internazionale*, 2017, p. 301 *et seq.*

<sup>7</sup> Court of Justice, judgment of 5 December 2017, case C-42/17, *M.A.S. & M.B.*

<sup>8</sup> *Ibidem*, para. 59.

<sup>9</sup> On *Taricco II*, see among others M. BASSINI, O. POLLICINO, *The opinion of Advocate General Bot in Taricco II: Seven "Deadly" Sins and a Modest Proposal*, in *Verfassungsblog*, 2 August 2017, [verfas](http://verfas)

On this point, only nine days later the *Taricco II* judgment, the ICC once again intervened on the antinomies between internal rules, EU law and constitutional rights.<sup>10</sup> Particularly, the ICC handed down on this issue with an *obiter dictum* that questions CJEU competence in interpreting the Charter of Fundamental Rights of the European Union ("the Charter")<sup>11</sup> and the constitutional traditions common to the Member States provided for by Art. 6, para. 3, TEU.

The *Taricco* saga symbolizes one of the crucial challenges of EU law concerning the relationship between the European Union and national criminal justice systems.

## II. LIMITATION AND PRINCIPLE OF LEGALITY IN CRIMINAL MATTERS ACCORDING TO THE CJEU

The *Taricco* judgment has provoked extensive doctrinal debates<sup>12</sup> and induced both the Italian Court of Cassation<sup>13</sup> and the Court of Appeal of Milan to raise an issue of consti-

sungsblog.de; ID., *Defusing the Taricco bomb through fostering constitutional tolerance: all roads lead to Rome*, in *Verfassungsblog*, 5 December 2017, verfassungsblog.de; C. PERISTERIDOU, J. OUWERKERK, *A Bridge over Troubled Water – a Criminal Lawyers' Response to Taricco II*, in *Verfassungsblog*, 12 December 2017, verfassungsblog.de; A. MASSARO, *Taricco 2 – Il ritorno (sui propri passi?)*. *I controlimiti come questione che "spetta ai giudici nazionali": cambiano i protagonisti, ma la saga continua*, in *Giurisprudenza Penale Web*, 5 December 2017, www.giurisprudenzapenale.com; E. LUPO, *La sentenza europea c.d. Taricco-bis: risolti i problemi per il passato, rimangono aperti i problemi per il futuro*, in *Diritto penale contemporaneo*, 2017, www.penalecontemporaneo.it, p. 109 *et seq.*; D. BURCHARDT, *Belittling the Primacy of EU Law in Taricco II*, in *Verfassungsblog*, 7 December 2017, verfassungsblog.de; G. VITALE, *L'attesa sentenza "Taricco bis": brevi riflessioni*, in *European Papers*, Vol. 3, 2018, No 1, www.europeanpapers.eu, p. 445 *et seq.*; R. BIN, *Taricco Tango. Quale sarà il prossimo passo?*, in *Forum Costituzionale*, 3 February 2018, www.forumcostituzionale.it and A.O. Cozzi, *Diretta applicabilità e sindacato accentrativo di costituzionalità relativo alla violazione della Carta europea dei diritti fondamentali*, in *Forum Costituzionale*, 1 February 2018, www.forumcostituzionale.it.

<sup>10</sup> See P. FARAGUNA, *Constitutional Identity in the EU – A Shield or a Sword?*, in *German Law Journal*, 2017, p. 1587 *et seq.*

<sup>11</sup> See C. PAULUSSEN, *Fundamental rights in international and European law*, The Hague: T.M.C. Asser Press, 2016.

<sup>12</sup> On *Taricco*, *ex multis*, see A. BERNARDI, *I controlimiti: primato delle norme europee e difesa dei principi costituzionali*, cit.; I. PELLIZONE, *Principio di legalità penale e diritto costituzionale: problematiche attuali*, Milano: Giuffrè, 2017; D. PARIS, *Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case Taricco*, in *Questions of International Law*, 31 March 2017, www.qil-qdi.org, p. 5 *et seq.*; G. REPETTO, *Una ragionevole apologia della supremacy*, in *Diritto pubblico*, 2017, p. 229 *et seq.*; G. CIVELLO, *Il "dialogo fra le quattro corti: dalla sentenza "Varare" (2013) della CEDU, alla sentenza "Taricco" (2015) della CGUE*, in *Archivio Penale*, 2015, p. 783 *et seq.*; F. VIGANÒ, *Disapplicare le norme vigenti sulla prescrizione nelle frodi in materia di IVA? Primato del diritto UE e nullum crimen sine lege in una importante sentenza della Corte di giustizia*, in *Diritto penale contemporaneo*, 14 September 2015, www.penalecontemporaneo.it, 2015; M.L. FERRANTE, *Il tentativo di erodere il principio di legalità in alcune sentenze "multilivello"*, in *Archivio Penale*, 2016 and E. LUPO, *La primauté del diritto dell'UE e l'ordinamento penale nazionale (riflessioni sulla sentenza Taricco)*, in *Diritto penale contemporaneo*, 29 febbraio 2016, www.penalecontemporaneo.it.

tutional legitimacy to the Italian Constitutional Court regarding the law of ratification and execution of the Lisbon Treaty with respect to the Art. 325 TFEU, as interpreted by the CJEU. The Italian courts argued that this law violated the principle of legality, laid down by the Art. 25 of the Italian Constitution.

Notably, the ICC clarified that

“in the Italian legal system the rules on limitation in criminal matters are substantive in character, and consequently fall within the scope of the principle of legality referred to in Article 25 of the Italian Constitution. Those rules must therefore be established by provisions that are precise and are in force at the time when the offence in question was committed”.<sup>14</sup>

Thus, the ICC – by applying Art. 267 TFEU – decided to start a preliminary ruling procedure with reference to the meaning of Art. 325 TFEU, as interpreted by the CJEU on the first *Taricco* judgment.

The ICC considered that the CJEU misinterpreted Art. 325 TFEU. According to the ICC, the Italian courts shall not apply the principle obtained from Art. 325 TFEU in case of conflict with a fundamental principle of the Italian legal system. If this were not the case, the ICC threatened to use its “counter-limits” weapon,<sup>15</sup> as declared by both judgment of 27 December 1973, no. 183 (case *Frontini*) and judgment of 8 June 1984, no. 170 (case *Granital*). Under the “counter-limits” rule, “EU law infringing fundamental principles of the national legal order or human rights as protected under the Constitution should not be enforced by Italian courts”.<sup>16</sup>

Nonetheless, while the ICC expressed no doubt on the existence of such a contrast, the constitutional judges did not immediately activate the “counter-limits” mechanism, but rather decided to “solicit a new clarification by the CJEU on the meaning to be attributed to the Art. 325 TFEU on the basis of the *Taricco* judgment”.<sup>17</sup>

### III. THE *TARICCO II* JUDGMENT

As is well known, the Grand Chamber of the CJEU, in its judgment of 5 December 2017, in case C-42/17, *M.A.S. & M.B (Taricco II)*,<sup>18</sup> took a stand on prejudicial questions re-

<sup>13</sup> The effect of this judgment on the internal jurisprudence was immediate. In fact, the third penal section of the ICC, in the hearing of 15 September 2015, applied the *Taricco* rule for the first and only time.

<sup>14</sup> *M.A.S. & M.B.*, cit., para. 14.

<sup>15</sup> See D. GALLO, *Controlimiti, identità nazionale e i rapporti di forza tra primato ed effetto diretto nella saga Taricco*, in *Il diritto dell'Unione Europea*, 2017, p. 249 *et seq.*

<sup>16</sup> L. DANIELE, *Il seguito del caso Taricco: l'Avvocato generale Bot non apre al dialogo tra Corti*, in *European Papers*, Vol. 2, 2017, No 3, www.europeanpapers.eu, p. 987 *et seq.*

<sup>17</sup> Italian Constitutional Court, order of 26 January 2017, no. 24, para. 3.

<sup>18</sup> This could be called “*Taricco II*” to express the close connection with the previous judgment against Ivo Taricco and others, but with the awareness that the second CJEU judgment refers to trials and defendants other than those affected by the first one.

ferred by the ICC in January 2017 concerning the interpretation of both Art. 325 TFEU and *Taricco*.<sup>19</sup>

First and foremost, it is worth mentioning that the *Taricco II* judgment does certainly epitomise a key moment in the interaction between the ICC and the CJEU. This is especially evident in the field of criminal law, which was previously the preserve of states' domestic jurisdiction but which is currently witnessing an extension of the EU law.<sup>20</sup>

The *Taricco II* judgment emphasizes the dialogue instrument – between the CJEU and the courts of the Member States – that, using the preliminary ruling procedure, "has the object of securing uniform interpretation of EU law,<sup>21</sup> thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties".<sup>22</sup> Hence, the procedure under Art. 267 TFEU serves as a cooperation instrument between the CJEU and the national courts. In fact, thanks to that, the CJEU provides to the national courts the elements of interpretation of EU law they need in order to settle their disputes.

The Luxembourg judges have proceeded with the maximization of protection of fundamental rights enshrined by the Charter as general principles of the EU law provided for by Art. 6, para. 3, TEU, even though it was facing both a situation of impunity caused by the Italian legislation on limitation periods for economic crimes and a serious disregard by the Italian Government of its obligations under Art. 325 TFEU. According to the CJEU the fundamental rights laid down by the Charter and resulting from the constitutional traditions common to the Member States prevails over the First Treaties. Consequently the superiority of the Charter over the treaties is confirmed.<sup>23</sup>

In fact, the CJEU points out that

"in the main proceedings, the Corte costituzionale (Constitutional Court) raises the question of a possible breach of the principle that offences and penalties must be defined by law which might follow from the obligation stated in the *Taricco* judgment to disapply the provisions of the Criminal Code at issue, having regard, first, to the substantive nature of the limitation rules in the Italian legal system, which means that those rules must be reasonably foreseeable by individuals at the time when the alleged offences are committed and cannot be retroactively altered in peius, and, second, to the requirement

<sup>19</sup> See G. RUGGE, *The Italian Constitutional Court on Taricco*, in *Questions of International Law*, 31 March 2017, [www.qil-qdi.org](http://www.qil-qdi.org), p. 21 *et seq.* and M. LUCIANI, *Intelligenti pauca*, in *Giurisprudenza costituzionale*, 2017, p. 21 *et seq.*

<sup>20</sup> See P. BEAUVAIS, *Droit pénal de l'Union européenne*, in *Revue trimestrielle de droit européen*, 2016, p. 787 *et seq.*

<sup>21</sup> See Court of Justice, judgment of 5 February 1963, case 26/62, *van Gend & Loos*.

<sup>22</sup> Court of Justice, opinion 2/13 of 18 December 2014, para. 176.

<sup>23</sup> See F. EMMERT, C. PICHÉ CARNEY, *The European Union Charter of Fundamental Rights vs. the Council of Europe Convention on Human Rights and Fundamental Freedoms*, in *Fordham international law journal*, 2017, p. 1047 *et seq.*

that any national rules on criminal liability must be founded on a legal basis that is precise enough to delimit and guide the national court's assessment".<sup>24</sup>

That being said, the CJEU further states that "the protection of the financial interests of the Union by the enactment of criminal penalties falls within the shared competence of the Union and the Member States".<sup>25</sup>

Moreover,

"in the present case, at the material time for the main proceedings, the limitation rules applicable to criminal proceedings relating to VAT had not been harmonised by the EU legislature, and harmonisation has since taken place only to a partial extent by the adoption of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law".<sup>26</sup>

Furthermore, "the Italian Republic was thus, at that time, free to provide that in its legal system those rules, like the rules on the definition of offences and the determination of penalties, form part of substantive criminal law, and are thereby, like those rules, subject to the principle that offences and penalties must be defined by law".<sup>27</sup>

Additionally, the CJEU notes that – according to the ICC and within the meaning of Italian law – limitation periods form part of substantive criminal law and are subject to the principle of legality of criminal proceedings. In this respect, the CJEU recalls "the importance given, both in the EU legal order and in national legal systems, to the principle that offences and penalties must be defined by law, as to its requirements concerning the foreseeability, precision and non-retroactivity of the criminal law applicable".<sup>28</sup> This principle is also laid down in both Art. 49 of the Charter and Art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Another point that should not be underestimated is that, on the one hand, the CJEU devoted ample coverage to the ICC contestation about the lack of foreseeability, precision and non-retroactivity of the applicable criminal law. Hence, the CJEU affirmed that "the obligation to ensure the effective collection of the Union's resources cannot therefore run counter to that principle".<sup>29</sup> On the other hand, the CJEU unequivocally reiterates that Art. 325, paras 1 and 2, TFEU imposes on the Member States precise and unconditional obligations, such as the one requiring national courts to disapply incompatible national provisions (s.c. *Taricco* rule).<sup>30</sup>

<sup>24</sup> *M.A.S. & M.B.*, cit., para. 27.

<sup>25</sup> *Ibidem*, para. 43.

<sup>26</sup> *Ibidem*, para. 44.

<sup>27</sup> *Ibidem*, para. 45.

<sup>28</sup> *Ibidem*, para. 51.

<sup>29</sup> *Ibidem*, para. 52.

<sup>30</sup> According to the CJEU, Art. 325, paras 1 and 2, TFEU "must be interpreted as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provi-

A further consideration must be added. The CJEU, with the *Taricco II* judgment, reaffirmed the interpretation of Art. 325 TFEU stated in *Taricco*. Nevertheless, at the same time, the CJEU supported the ICC that, with its order of 26 January 2017, no. 24, countered to the interpretation of Luxembourg judges with its potential contrast with the principle of legality. The CJEU has come to this conclusion just because of the clarification according to which the *Taricco* judgment is not applicable to the criminal offences committed prior to the adoption of it. On the contrary, the CJEU proposed a different view for the future: namely, for the criminal offences afterwards perpetrated.

Thus, the CJEU succeeds in combining the coherence of its jurisprudence on the EU law primacy and on respect for fundamental rights concerning the issues referred by the ICC, which strongly warned to trigger the so called "counter-limits" rule in order to halt the application of the so called *Taricco* rule.

#### IV. IMPLICATIONS: ITALIAN CONSTITUTIONAL COURT'S JUDGMENT NO. 269/17

After the above mentioned events, namely just nine days after the delivery of the *Taricco II* judgment, the ICC – with its judgment of 14 December, no. 269<sup>31</sup> – took a stance on this issue with an *obiter dictum* that lucidly questions CJEU competence in

sions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed" (*ibidem*, para. 62).

<sup>31</sup> On this judgment, *ex multis*, see L. SALVATO, *Quattro interrogativi preliminari al dibattito aperto dalla sentenza n. 269/2017*, in *Forum costituzionale*, 18 December 2017, [www.forumcostituzionale.it](http://www.forumcostituzionale.it); A. GUAZZAROTTI, *Un "atto interruttivo dell'usucapione" delle attribuzioni della Corte costituzionale? In margine alla sent. n. 269/2017*, in *Forum costituzionale*, 18 December 2017, [www.forumcostituzionale.it](http://www.forumcostituzionale.it); R. CONTI, *La Cassazione dopo Corte cost. n. 269/2017. Qualche riflessione, a seconda lettura*, in *Forum costituzionale*, 28 December 2017, [www.forumcostituzionale.it](http://www.forumcostituzionale.it); ID., *Qualche riflessione, a terza lettura, sulla sentenza n. 269/2017*, in *Rivista di Diritti Comparati*, 2018, p. 1 *et seq.*; G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269/2017: presupposti teorici e problemi applicativi*, in *Forum costituzionale*, 25 January 2018, [www.forumcostituzionale.it](http://www.forumcostituzionale.it); D. TEGA, *La sentenza n. 269 del 2017 e il concorso dei rimedi giurisdizionali costituzionali ed europei*, in *Forum costituzionale*, 24 January 2018, [www.forumcostituzionale.it](http://www.forumcostituzionale.it); L.S. ROSSI, *La sentenza 269/2017 della Corte costituzionale italiana: obiter "creativi" (o distruttivi?) sul ruolo dei giudici italiani di fronte al diritto dell'Unione europea*, in *Federalismi.it*, 31 January 2018, [www.federalismi.it](http://www.federalismi.it); M. NISTICÒ, *Taricco II: il passo indietro della Corte di giustizia e le prospettive del supposto dialogo tra le Corti*, in *Osservatorio Cosutuzionale AIC*, 17 January 2018, [www.osservatorioaic.it](http://www.osservatorioaic.it) and G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269/2017: presupposti teorici e problemi applicativi*, in *Forum costituzionale*, 25 January 2018, [www.forumcostituzionale.it](http://www.forumcostituzionale.it).

interpreting the Charter and the constitutional traditions common to the Member States provided for by Art. 6, para. 3, TEU.

In this judgment the ICC begins by dealing with the resolution of the antinomy between direct effect of EU law and domestic law. The ICC reaffirms that this settlement is a matter for the national court. In absence of such a decision, it would lead to the inadmissibility of the question for lack of relevance, as the national court did not disapply the domestic rule. In doing this, the court would meet both the primacy of EU law and the principle according to which “judges are subject only to the law”.<sup>32</sup>

The ICC differently established in the case where EU provisions are not self-executing. In fact, if a clash between EU self-executing provisions and domestic laws takes place, the court must raise an issue of constitutional legitimacy. Consequently, in this hypothesis, the ICC is meant to rule – on issues of constitutional legitimacy – in the light of internal principles and, possibly, in the light of the European ones,<sup>33</sup> according to a sequence identified on a case-by-case basis. This, in order to ensure that the rights guaranteed in the Charter will be interpreted as sources of law, in accordance with the constitutional traditions, as stated in both Art. 6, TFEU and Art. 52, para. 4, of the Charter.

Yet, after the above mentioned steps, the ICC inaugurates a new orientation. On this behalf, antinomies between the Charter and domestic laws would be, in any case, reserved to the jurisdiction of the ICC, even if EU provisions are self-executing.

It is worth noting that the ICC assumed that the Charter has a specific character as a result of its “constitutional content” and that principles and rights laid down by the Charter mainly intersects the ones envisaged in the Italian Constitution. Thereby, with a reference to the *Taricco II* judgment, the ICC pointed out the necessity of its *erga omnes*<sup>34</sup> intervention whenever “the human rights violation breaches both the guarantees enshrined in the Italian Constitution and the ones codified by the Charter of Fundamental Rights of the EU”. This, within a framework of loyal and constructive cooperation among different systems guaranteeing fundamental rights, in which Constitutional Courts are called to foster the dialogue with the CJEU,<sup>35</sup> in order to ensure the highest protection of rights.<sup>36</sup>

<sup>32</sup> Art. 101 of the Italian Constitution.

<sup>33</sup> *Ex Arts* 11 and 117 of the Italian Constitution.

<sup>34</sup> According to Italian Constitutional Court, judgment no. 269/2017, cit., para. 5.2.: “without prejudice to the principles of primacy and direct effect of EU law as hitherto consolidated in both European and constitutional jurisprudence” whenever there is a violation of both the Charter of Rights and the Constitution, constitutional prejudiciality becomes a priority with regard to the EU one, even in those cases where the provisions of the Charter are self-executing. The assignment to the ICC of a more intense role in these circumstances would be in line with both Art. 53 of the Charter and the existence – in the Italian legal system – of the centralised judgment of constitutionality, provided for by Art. 134 of the Italian Constitution.

<sup>35</sup> See Italian Constitutional Court, order of 26 January 2017, no. 24.

<sup>36</sup> Art. 53 of the Charter.



As shown above, the ICC first resume its well-established jurisprudence according to which the evaluation of compatibility of the provisions – appealed with EU law – affects on the relevance of the issue of constitutional legitimacy.<sup>37</sup> Then the ICC wishes to point out that if the EU provision is not self-executing a different conclusion will be reached. Notably, the ICC should raise the issue of constitutional legitimacy since the national courts must judge domestic law in compliance to the EU law criteria, also when it refer to the CJEU for a preliminary ruling.<sup>38</sup>

So settled the theme, it is easy to reach the conclusion of the argumentative path: in case of concurrent judicial remedies, the domestic remedy must precede the European one. In fact, the ICC claimed that if a law generates doubts of legitimacy<sup>39</sup> – with regard to the rights guaranteed by both the Italian Constitution and the Charter – the issue of the constitutional legitimacy must be raised, without prejudice to recourse to the preliminary ruling procedure concerning the interpretation of the treaties and the invalidity of EU law.<sup>40</sup> In addition to that, since the safeguard of fundamental rights laid down by both the Charter and the Italian Constitution could generate a cumulation of judicial remedies,<sup>41</sup> the ICC – while referring to both cases *Melki*<sup>42</sup> and *A. v. B.*<sup>43</sup> – stated that, in case of disputes which lead both issue of constitutional legitimacy and issue of compatibility with the EU law, the courts – where the self-executing character of EU provisions is missing – must primarily raise the issue of constitutional legitimacy.

From now on, when a conflict of an internal norm with both a constitutional parameter and the Charter is foreseen, the ICC will have to rule on it. Subsequently – only if necessary – the same will be done by the CJEU.

With respect to the *obiter dictum* of the ICC judgment no. 269/17, it seems that the ICC intends to take into its own hands the role of guarantor of last resort for the protection of fundamental rights. All this would imply firstly, a potential breaching of the principles reserved to the CJEU by the Treaties. Secondly, this might allegedly decelerate the immediate dialogue between the CJEU and the courts of the Member States, which allowed both the development and the effectiveness of EU law in the first 60 years of European integration. Thirdly, this might result in questioning the principle of direct en-

<sup>37</sup> See Italian Constitutional Court, order of 12 July 2001, no. 249.

<sup>38</sup> As the Italian Constitutional Court did in both order of 15 April 2008, no. 103 and order of 18 July 2013, no. 207.

<sup>39</sup> See P. POPELIER, C. HEYNING, P. VAN NUFFEL, *Human rights protection in the European legal order*, Cambridge: Intersentia, 2011.

<sup>40</sup> As provided for in Art. 267 TFEU.

<sup>41</sup> See E. CANNIZZARO, *Sistemi concorrenti di tutela dei diritti fondamentali e controlimiti costituzionali*, in *Forum costituzionale*, 23 October 2016, [www.forumcostituzionale.it](http://www.forumcostituzionale.it) and L.A. JIMÉNEZ, *Constitutional Empathy and Judicial Dialogue in the European Union*, in *European Public Law*, 2018, p. 57 *et seq.*

<sup>42</sup> Court of Justice, judgment of 22 June 2010, case C-189/10, *Melki and Abdeli*.

<sup>43</sup> Court of Justice, judgment of 11 September 2014, case C-112/13, *A. v. B.*

forceability of EU legislation, as defined by the CJEU in the *Simmenthal* judgment<sup>44</sup> and subsequently applied by the ICC in the *Granital* judgment.

Moving on now to the implications of this *obiter dictum*, it seems appropriate to question the practical effects of the control system – as proposed by the ICC – on the ordinary court's power and/or duty to disapply an "anti-EU" law. Besides the assumption concerning the threat to trigger the so called "counter-limits" rule, the risk is that such a system could not be suitable in practice. On this behalf, the courts would not, in any case, be bound by the judgment of the ICC with regard to the EU law. That might be recognised by the ICC.

Indeed, the *obiter dictum* of the ICC judgment no. 269/17 is symbolic to understand the relationship between domestic and EU law.

A highly critical profile is represented by the possible resolution of an antinomy that would jeopardise the protection of human rights, as enshrined by the para. 5.2 of the judgment no. 269/17, that – according to the ICC – was necessary because of the "*trasformazioni*" (changes) resulting from the entry into force of the Lisbon Treaty.

It should be recognised that it is as yet unclear what changes<sup>45</sup> in EU law and in its relation to domestic legal system after the entry into force of the Lisbon Treaty could account for such a position.

Moreover, the inclusion of this legal instrument (i.e. the preliminary ruling procedure) in the framework of procedural rules governing the proceedings of incidental judgments of legitimacy, does nonetheless raise some concerns, particularly regarding the case of the so-called "*doppia pregiudizialità*"<sup>46</sup> (dual preliminaryity).<sup>47</sup> Turning again to the analysis of the ICC judgment no. 269/17, the ICC points out that in case of the so-called dual preliminaryity the EU law does not affect the priority nature of the constitutionality judgment falling under the competence of national constitutional courts.<sup>48</sup> This would be confirmed by the afore-mentioned judgments of the CJEU (*Melki* and *A v. B*). Thereafter, the ICC recalls, though, that these rulings subordinate the compatibility of such a system to the requirement that "the other national courts or tribunals remain free to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary" and "to

<sup>44</sup> Court of Justice, judgment of 9 March 1978, Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*.

<sup>45</sup> With the exception of the Art. 6 TEU that gives the Charter the same legal value as the Treaties, even though it is not incorporated into them as such.

<sup>46</sup> That is to say, all those cases where the courts consider that the law applicable to a particular case simultaneously presents aspects of incompatibility with both constitutional and supranational law.

<sup>47</sup> See G. MARTINICO, *Multiple loyalties and dual preliminaryity: The pains of being a judge in a multi-level legal order*, in *International Journal of Constitutional Law*, 2012, p. 871 *et seq.*

<sup>48</sup> Italian Constitutional Court, judgment no. 269/2017, *cit.*, para. 5.2.

disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to European Union law".<sup>49</sup>

## V. CONCLUSIONS

In recent years, the dialogue – that took place so far between the European Union and national systems – has become direct owing to the preliminary ruling procedure. This led to the significant – and maybe predictable – development of the so-called *Taricco II*: namely, both EU and domestic systems are constantly evolving and principles governing them are always susceptible of adaptations due to transformations which concern themselves. Hence, it cannot be a surprise for the whole community that a particular principle has been, partly, adapted to the new context in which it was set out. Consequently, it is important to emphasise that the *obiter dictum* taken into in-depth analysis represents the natural fruit of an evolution of which the ICC took note also in the light of a recent judgment of the CJEU.

It is often argued that the *Taricco II* judgment reiterated the logical direction followed by the first judgment; notwithstanding, it further widened the aspects related to both the observance of the inalienable rights of the individual and the principle of legality. In doing so, the CJEU was consistent with its jurisprudence on the *primauté* of EU law.<sup>50</sup> Besides, the CJEU clearly developed issues related to the safeguarding of fundamental rights of the individual, as enshrined by the Charter and by the constitutional traditions common to the Member States as well.

As far as the way in which interpretation constraints must be considered – i.e. based on the maximization of protection of fundamental rights – some consequences can emerge. Notably, concerning the conflicts between judgments of the CJEU and the courts. The question, in this regard, then arises: which novelties are to be expected after the ICC judgment no. 269/17? In my humble opinion, the mechanism of centralised judicial review confirms the desire, powered by the ICC, to be the guarantor of last resort for the protection of fundamental rights laid down by both the Italian Constitution and the Charter. Therefore, it is highly complicated to conceive the case in which a judgment of the ICC could be brought before the CJEU. Thereafter, it is difficult that the CJEU declares the infringement of the Charter of this judgment. Thus, finally, it is likewise hard that the ICC does not reply to the CJEU decision by brandishing the "counter-limits" weapon and, thereby, preventing its execution by national judges.

However, the crux of the matter lies in the way in which the courts will react to the ICC judgment no. 269/17. Particularly, it would be interesting to analyse the response of

<sup>49</sup> *Melki and Abdeli*, cit., para. 76.

<sup>50</sup> See M. CLAES, *The validity and primacy of EU law and the "cooperative relationship" between national constitutional courts and the Court of Justice of the European Union*, in *Maastricht journal of European and comparative law*, 2016, p. 151 *et seq.*

the Italian Court of Cassation, whose nomophylactic role resulted blatantly decreased by this judgment.

It should be admitted that we have some revealing signals regarding the way the CJEU intends to play its role: specifically when it comes to ensure protection for the rights for which they are guarantors. Notwithstanding, it is no coincidence that in the same period of time in which ICC judgment no. 269/17 saw the light, the CJEU claimed that:

“Article 267(3) TFEU must be interpreted as meaning that a national court against whose decisions there is no judicial remedy is required, in principle, to refer a question for a preliminary ruling concerning the interpretation of EU law even if, in the course of the same national proceedings, the constitutional court of the Member State concerned has assessed the constitutionality of national rules in the light of regulatory parameters with content similar to rules under EU law”.<sup>51</sup>

In this way, as it is clear, there could be divergent decisions of the two Courts, whose contrasts once again could only be resolved by national judges through the application of the best rights protection. It is certainly sure that the very fact of the coexistence of the “dual preliminaryity” – constitutional and supranational – can lead to different judgments, of both Courts, not compatibles with one another.

Since the orientation of both the ICC and the CJEU has not been already defined, today scenario still looks fairly magmatic and in the process of settling. Yet, further adjustments are to be taken into account. Particularly, with regard to the order in which the referral to both the ICC and the CJEU can take place.

All things considered, on one argument it is possible to say something certain: in a framework characterised by several Courts, the responsibilities of both the ICC and the CJEU are increased. Although, perhaps the duties of national judges are extended even further. In fact, they must state in compliance with the principle of maximization of preservation of fundamental rights. Additionally, it should not be forgotten that both the first impulse – thanks to which the ICC and the CJEU can intervene – and the final decision – following the ICC or the CJEU settlement – still remain in the hands of national judges.

Furthermore, as long as both courts and preliminary ruling procedure exist, it seems extremely far-fetched that the principle of the primacy of EU law could be undermined.<sup>52</sup> The *Taricco II* judgment, although it does not require to disapply the limitation rules with regard to cases dealing with events preceding the *Taricco* judgment, clearly restates it. Also, the ICC has always been compliant to the EU law and, in my opinion, it will probably keep pursuing this course. However, it is unlikely that the courts will be able to make direct use of the Charter, given the robust commitment of the ICC

<sup>51</sup> Court of Justice, judgment of 20 December 2017, case C-322/16, *Global Starnet Ltd v. Ministero dell'Economia e delle Finanze and Amministrazione Autonoma Monopoli di Stato*, para. 66.

<sup>52</sup> See S. KAUFMAN, *Le Bundesverfassungsgericht et les limites à la primauté du droit de l'Union*, in *Revue trimestrielle de droit européen*, 2017, p. 59 *et seq.*

to attract every issue concerning fundamental rights into its own mechanism of centralised judicial review.

Nevertheless, judgment no. 269/17 is allegedly liable to generate tensions between courts – particularly if they are judges of last resort – and the ICC. In addition to that, as far as the relations between the ICC and the CJEU are concerned, it should be wondered whether it makes sense to exacerbate a dialogue which, at least in its appearance, seems to have been constructive.

In conclusion, overthrowing a well-established jurisprudence, the ICC – with judgment no. 269/17 – considered itself legitimated to start a preliminary ruling procedure to the CJEU, both in the case of primary constitutional proceedings and in that of an incidental judgment of constitutional legitimacy. Moreover, experience has shown that the purpose – followed by both the ICC and the CJEU – of prevailing on the other, inevitably escalates into a serious clash. Besides, even if this clash leads to a solution supported by one or other Court, eventually at first, it pollutes their fruitful relationship; secondly, it jeopardises the willingness to mutual listening; last but not least, it often leads to incomplete and unsatisfying preservation of fundamental rights.

The hope is that the awareness of the need of giving each other assistance grows in all the places wherever justice is administered, as well as both the domestic systems and the European Union have the same need to foster their integration,<sup>53</sup> step-by-step,<sup>54</sup> instead of delegitimizing each other.

<sup>53</sup> On the basis of this hope, in my opinion, it is worth mentioning a passage of Mireille Delmas-Marty: “En ces temps où les peuples d’Europe sont tentés par un repli souverainiste qu’ils croient encore possible, encouragés par le discours de dirigeants qui préfèrent la démagogie de l’illusion à la pédagogie de la raison, la lucidité nous vient de façon inattendue d’un américain célèbre Henry Kissinger: «L’Europe qui exerçait il y a moins d’un siècle un quasi-monopole sur l’ordre du monde, menace de se couper de la quête contemporaine d’un ordre mondial en faisant de sa construction interne son objectif géopolitique ultime». Ce n’est pas seulement pour nous protéger – hier contre les guerres fratricides et aujourd’hui contre la mondialisation économique et financière – que nous avons voulu l’Europe. C’est aussi pour contribuer à un futur ordre mondial universaliste mais pluraliste. N’oublions pas que nous sommes la seule région où l’on s’efforce de conjuguer juridisme avec pluralisme, d’inventer un pluralisme ordonné. Certes ce pari ambitieux n’est pas gagné mais si nous renonçons à cette ambition, la peur seule ne nous protégera ni du grand désordre, ni d’un ordre juridique hégémonique au profit des plus puissants, qu’il s’agisse des Etats ou des marchés”, (M. DELMAS-MARTY, *L’intégration européenne entre pluralisme, souverainisme et universalisme*, in *Revue de science criminelle et de droit pénal comparé*, 2016, p. 447 et seq.).

<sup>54</sup> The Schuman Declaration of 9 May 1950, available at [europa.eu](http://europa.eu): “Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity”.

