The Judicial Dialogue in the CJEU and the Fake Contradiction of the *Taricco* Saga

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Abstract: Although initially the CJEU left no space for the inclusion of national issues in order to establish the founding qualities of EU legal order, such as supremacy and direct effect, more recently the Court has developed a trend towards taking into account the protection of national fundamental rights and constitutional provisions by using EU primary legislation. The new approach adopted by the Luxembourg Court is fostering the judicial dialogue with the national constitutional courts. The aim of the paper is to demonstrate that the "*Taricco* Saga" represents the last step of this pathway by fitting the qualities of EU legal order in the peculiarity of national legal systems not as national exception but as an issue of European law through concepts like "common constitutional principles". Commenting the features of *Taricco II*, in particular, it will be demonstrated that this ruling does not contradict *Taricco I* but, rather, it represents a specification of the interpretation of article 325 TFEU that encompasses also the acknowledgment of an issue linked to the principle of legality, as intended by the constitutional traditions of EU.

Keywords: EU law; constitutional law; judicial dialogue; supremacy; effectiveness.

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1. *Introduction*

Since the birth of the European Community, the Court of Justice of the European Union (CJEU) has had a central role in establishing the founding features of EU legal order: direct effect, supremacy and effectiveness. Initially, the Court's approach left little space for the inclusion of national issues stating that the "recourse to the legal rules or concepts of national law to judge the validity of measures adopted by EU institutions would have an adverse effect on the uniformity and efficacy of Community law"[1]. However, more recently, it is developing a trend toward giving consideration to the protection of national fundamental rights and constitutional provisions by using EU primary legislation which fosters the judicial dialogue between the European Court and the national constitutional courts. The aim of this paper is to demonstrate that the "*Taricco* Saga" represents the last step of this pathway by fitting the qualities of EU legal order in the peculiarity of national legal systems, not as a national exception but as an issue of European law, through concepts like "common constitutional principles".

The paper firstly investigates the nature of supremacy and effectiveness of EU law as developed by the CJEU. Subsequently, the essay analyzes how national courts, namely the German *Bundesverfassungsgericht* (*BVerfG*) and the Italian *Corte costituzionale*, reacted to these principles and the limits introduced by them. Afterward, the focus lies on the rulings, rendered by the CJEU and the *Corte costituzionale*,

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1. C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECR 1970 1125 para. 3.

which constitute the "*Taricco* Saga". Finally, commenting the features of *Taricco II* in particular, the paper postulates that this ruling does not contradict *Taricco I,* but rather it represents a specification of the interpretation of article 325 of the Treaty on the Functioning of the European Union (TFEU), in a way that also encompasses the acknowledgment of an issue linked to the principle of legality, as intended by the constitutional traditions of EU. In conclusion, the essay assesses the willingness of the Court to strengthen the judicial dialogue between itself and the national constitutional courts in general by using the preliminary reference as an instrument.

2. *Supremacy and Effectiveness of EU Law*

The EEC Treaty included no provision dealing with the supremacy of Community law over national law. Notwithstanding the absence of any explicit provision, the CJEU enunciated its vision of supremacy in the early years of the Community. In *Van Gend en Loos*[2], it stated that the Community represented a new legal order of international law, on behalf of which the States had limited their sovereign rights. In *Costa v. Enel*[3], the Court deployed several arguments to support the conclusion that EU law should be accorded primacy over national law. Firstly, the Court argued that primacy of EU law is a result of the agreement made by the Member States to create "a new legal order which became an integral part of their legal systems and which their courts are bound to apply"[4] and to confer to the EU "real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, albeit within limited fields"[5]. Then, the Court stated that the aims of the Treaty were integration and cooperation, and their achievement would be undermined by a Member State refusing to implement a law that should uniformly bind all. Finally, discrepancy in the application of EU law among Member States would occur, if States could unilaterally override Treaty provisions.

2. C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECR 1963 3.
3. C-6/64, *Flaminio Costa v. E.N.E.L*, ECR 1964 585.
4. *Id.* at 593.
5. *Id.*

In *Internationale Handelsgesellschaft*[6], the Court ruled that the legal status of a conflicting national measure was irrelevant as for the question of whether EU law should prevail neither a fundamental national constitutional provision could be invoked to challenge the supremacy of a directly applicable norm. As an independent source of law, EU law cannot be overridden by national law without being deprived of its character. In fact, "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure", although "[t]he protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community"[7]. Thus, the CJEU has gradually transformed primacy from a general principle of constitutional law to a specific obligation on national courts to provide full and effective remedies for the protection of EU rights.

Conversely, the principle of effectiveness, although of judicial origin, may find its legal basis in article 4(3) of the Treaty on European Union (TEU), namely the duty of loyalty or solidarity. Accordingly, Member States shall not only take any appropriate measure to implement the obligations arising from the Treaties or from the acts of the EU institutions, but they shall also facilitate the achievement of the Union's tasks and objectives without jeopardizing it. Hence, effectiveness requires the effective enforcement of EU law in national courts and, notably, the effective protection of the Community rights. Moreover, effectiveness "is a more articulated proxy than primacy and direct effect, and, as such, corresponds to a more advanced stage of the federalization process"[8]. It is through it, in fact, that, the supremacy of EU law penetrated throughout the national legal system and was to be applied by all national courts in cases that fell within their jurisdiction, refusing to apply provisions of national law that conflicted with EU law.

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6. *Internationale Handelsgesellschaft* (cited in note 1).

7. *Id.* paras 3–4.

8. Takis Tridimas, *The ECJ and the National Courts: Dialogue, Cooperation and Instability*, in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* 415 (Oxford University Press 2015).

The supremacy of EU law has not only been construed as an obligation on national courts, but on Member States as well. In *Francovich,*[9] the Court declared that rights provided by the Treaty could be implemented also through States' obligation to compel with community rules in order to provide the full effectiveness of these rights. It recognized the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible.

> The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law[10].

In the same case, the Court also stated the conditions detecting State liability:

> The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties[11].

In *Simmenthal*[12], the CJEU further extended its supremacy doctrine, stating that it applied regardless of the fact that national law pre-dated or post-dated EU law: an EU measure invalidates any conflicting provision of national law and prevents the adoption of new national law that would conflict with it.

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9. C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, ECR 1991 I-5357.
10. *Id.* para. 34.
11. *Id.* para. 40.
12. C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, ECR 1978 629.

> Accordingly, any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law, by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect, are incompatible with those requirements which are the very essence of Community law[13].

In civil law countries this was an issue of special concern, as only the Constitutional Court may declare a national provision unconstitutional and, therefore, deliberate its disapplication. However, the *Simmenthal* principle does not require that national courts invalidate or annul the provision of national law which conflicts with EU law; it rather prescribes not to apply it, in order to give immediate effect to Union Law, without awaiting the prior ruling of the Constitutional Court.

The CJEU case law has developed the value of the principle of full effectiveness, providing it with a wider range of applications. Thus, in *Factortame*[14], CJEU affirmed that a "national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule"[15]. Furthermore, in *West Tankers*[16], an anti-suit injunction made by a national court for commencing proceedings before the court of another Member State has been deemed contrary to EU law as conflicting with an arbitration agreement: this would, consequently, affect the full effectiveness of the community regulation on jurisdiction, the aim of which is to unify rules across the Union.

Arguably, "direct effect is a powerful tool, with its own area of application and its own conditions for use, to invoke EU law, allowing individuals to enforce rights which are only available in the national

13. *Id.* para. 22.
14. C-213/89, *The Queen v. Secretary of State for Transport, ex parte Factortame,* ECR 1990 I-2433.
15. *Id.* para. 23.
16. C-185/07, *Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc,* 2009 I-663.

legal order because of EU law"[17]. However, it represents only one of the instruments provided by the court to invoke EU law at a national level: state liability, primacy and consistent interpretation are relevant as well when individuals' rights provided by community norms are at stake. Therefore, in order to solve the conflicts that direct effect may cause, the boundaries and conditions under which effectiveness occurs must be clear.

Nonetheless, in the late 1990s, with the development of European citizenship and fundamental rights protection provisions, such as the general principle of non-discrimination[18], controversies have increased, outlining a relevant judicial dialogue around the need of harmonization between the different constitutional traditions and the full effectiveness of EU law. In cases like *Omega*[19] and *Mangold*[20], a clash arose between the national protection of general rights granted to individuals and the full application of EU law. Although the Court repeatedly supported that "fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States"[21], it is substantially challenging to reconcile the *effet-utile* of Community law with constitutional pluralism. Hence, in *Omega*, Germany could guarantee the level of protection of human dignity as enshrined in the German constitution also overriding freedom of services on grounds of proportionality of measures. Instead, in *Mangold*, the principle of non-discrimination was given effectiveness, through the assertion of the prohibition for Germany to adopt labour law measures that created discrimination only based on age. In *Mangold*, the judicial dialogue is partially developed by two acknowledgements: first the

17. Koen Lenaerts and Tim Corthaut, *Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law*, 31 European Law Review 287, 306 (2006).

18. See Nicolas Leron, *The Constitutional Governance of Judges in the EU, the Invention of a Communicative Mode of Regulation of Constitutional Conflict Risks*, speech at the European Consortium for Political Research 2014 General Conference (Glasgow, September 5, 2014), available at https://ecpr.eu/Events/PaperDetails.aspx?PaperID=17541&EventID=14 (last visited April 26, 2020).

19. C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, ECR 2004 I-9609.

20. C-144/04, *Werner Mangold v. Rüdiger Helm*, ECR 2005 I-9981.

21. *Omega* para. 33 (cited in note 19).

Court imposed primacy of EU law and obliged judges to set aside the national rule; further, it asserted the possibility for national courts to limit Community law, still abiding by principles of proportionality and necessity.

Melki[22] is a remarkable case about the impact of the principle of effectiveness, since it emphasized the interaction between EU obligations and national constitutional norms. "French law did not intend to question the primacy of EU law but give priority to constitutional review over review of compatibility with international treaties, thus reiterating that the constitution was at the apex of the national legal system"[23]. The CJEU ruled that EU law precluded this national legislation insofar as the priority nature of the procedure prevented all other national courts from referring to the CJEU under article 267 TFEU, both before submission of a question of constitutionality to the national Constitutional Court and after its decision. However, the Court outlined certain conditions under which such procedure could comply with EU law:

> Article 267 TFEU does not preclude such national legislation, insofar as the other national courts or tribunals remain free: to refer to the CJEU 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; to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order; and to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law[24].

Moreover, "*Melki* also opened the way for a direct dialogue between the ECJ and the *Conseil constitutionnel*. The effect of *Melki* is that the Court reversed the priorities: instead of EU primacy accommodating

22. C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli*, ECR 2010 I-5667.
23. Takis Tridimas, *The ECJ and the National Courts* at 415 (cited in note 7).
24. *Aziz Melki* para. 57 (cited in note 21).

the national system of constitutionality review, the latter had to fit in with EU primacy"[25].

As the paper asserts below, the rulings in *Taricco* do not contradict with this set of jurisprudence. In both cases the effectiveness of EU law is indeed confirmed even though the limits outlined by the principle of legality, as enshrined in the "common constitutional principles", must also be taken into account by national judges when applying the "Taricco rule".

3. *The Reaction of National Courts*

Member States' courts have embraced the primacy of EU law, but on the basis that primacy results from the provisions of national law recognizing incorporation of EU law into domestic legal systems, and not from EU law itself. Conflicts continuously surround the acceptance of the principle of supremacy, due to the different views given by national courts and the CJEU about the origins of supremacy. Some scholars discuss the interaction between constitutional courts and the CJEU by assessing the "inequality theory": "certain national courts are in a privileged position vis-à-vis other national courts. Their potential to participate and affect the European-level political process is greater than that of other national courts"[26]. This power derives, among others, from several elements like the relevance of the country and the activism of the national constitutional court. Only constitutional courts of the most important countries, such as the German *BVerfG* or the French *Conseil constitutionnel*, can establish a judicial dialogue in a condition of equality with the Luxembourg Court, due to the utmost importance of the Member States they represent. Notably, Germany and Italy are countries with extensive case-law in this area highlighting this conflict, precisely on ground of protection of constitutional fundamental rights.

25. Takis Tridimas, *The ECJ and the National Courts* at 416 (cited in note 8).

26. Tomi Tuominen, *Aspects of Constitutional Pluralism in Light of the Gauweiler Saga*, 43 European Law Review 186 (2018).

3.1. *Germany*

The supremacy of EU law is based primarily on article 23 of German Constitution, which is specifically concerned with the EU and allows for delegation of sovereign powers. Reliance on constitutional provisions has been the dominant rationale for the acceptance of EU supremacy within Germany. Nonetheless, the German courts provided limits for the acceptance of EU supremacy: in *Solange I*[27], the German Constitutional Court held that article 24 could not cover a transfer of power to amend an "inalienable essential feature" of the German legal order, such as the protection of fundamental rights. Hence, national protection would prevail over EU law in the event of a conflict. Afterward, in *Solange II*[28], the German Constitutional Court reduced the likelihood of a clash between EU and national law. Although the court did not surrender jurisdiction over its fundamental rights, it held that "so long as" (*solange*) the EU law and CJEU case law ensure effective protection of fundamental rights which is deemed substantially equal to the one required unconditionally by the German Constitution, the *BVerfG* will no longer exercise its jurisdiction. However, in the more recent *Lisbon Treaty*[29] and *Gauweiler*[30] cases, the *BVerfG* has recentralized its role, by allowing citizens and constitutional organs to refer issues of constitutionality towards two types of acts emanated by EU institutions: *ultra vires* acts, which are acts beyond conferred competences, and acts that may violate the constitutional identity of the nation. According to the Court, this competence is not in contradiction with the EU principle of cooperation.

3.2. *Italy*

The Italian courts have accepted the supremacy of EU law, albeit subject to qualification, at a relatively early stage. The conceptual basis for compliance with the principle of supremacy is article 11 of

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27. *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 2 CLMR 540 (Bundesverfassungsgericht 1974).

28. Bundesverfassungsgericht, *Re Wünsche Handelsgesellschaft*, 3 CLMR 225 (1987).

29. Bundesverfassungsgericht, 2 BvE 2/08, June 30, 2009.

30. Bundesverfassungsgericht, 2 BvR 2728/13, June 21, 2016.

the Italian Constitution, which allows limitations of national sovereignty, subject to reciprocity, to ensure peace and justice among nations. Acceptance of EU law has not been unconditional: in *Frontini*[31], the Italian Constitutional Court, while accepting the direct effect of EU law, confirmed that it would continue to review the exercise of power of EU institutions to ensure that there was no infringement of fundamental rights or basic principles of the Italian constitutional order. This has subsequently been defined as the "*controlimiti*" (counter-limits) doctrine. However, in *Granital*[32] the Constitutional Court accepted the principle of effectiveness of EU law asserting that, in order to enforce the supremacy of EU law, Italian courts must be prepared, where necessary, to disregard conflicting national law and to apply EU law directly. The national law would not be abrogated, but rather ignored, insofar as the field in which it operated had been preempted by EU law. The national provisions would survive and still regulate the relevant subject matter in areas which transcend the scope of the EU provision.

4. *The* Taricco *Saga*

The *Taricco* saga is representative of the most recent stage of this evolution, as it encompasses two fundamental issues of European law: primarily, the relation between supremacy of EU law and the national courts' reaction to the duty of enforce Union provisions; secondly, it represents a path of development of judicial dialogue among the courts in order to dismiss the conflict and avoid the trigger of the "*controlimiti*" doctrine by the Italian Constitutional Court.

4.1. *The Ruling in* Taricco I

During a criminal proceeding for VAT fraud, an Italian tribunal submitted a preliminary reference to the CJEU questioning the compatibility with EU law of the Italian provisions regulating the limitation periods applicable to tax and financial offenses. In the case

31. Corte costituzionale, December 18, 1973, no. 183.
32. Corte costituzionale, June 5, 1984, no. 170.

in question, the prosecution would have likely become time-barred before a final judgement could be delivered and, according to the referring Court, this was because of a structural problem of the Italian criminal justice system rather than the specific circumstances of the case. The referring Court asked the CJEU to determine whether limitation rules infringed Treaty provisions on competition, state aid and sound public finance principle, as well as directive 2006/112 on VAT.

The CJEU reformulated and decided to focus on the possible incompatibility of the Italian limitation provisions with article 325 TFEU which provides for the duty for the Union and the Member States to combat any "fraud or illegal activities affecting the financial interests of the Union through measures which shall act as a deterrent and be such as to afford effective protection in the Member States"[33]. As criminal penalties may "be essential to combat certain serious cases of VAT evasion in an effective and dissuasive manner"[34], the Member States has the duty to put in place criminal penalties that are effective and dissuasive in order to punish these offences.

Leaving the evaluation to the Italian courts the CJEU held that if "in a considerable number of cases the commission of serious fraud will escape criminal punishment"[35], then national law is incompatible with article 325 TFEU because it can not be considered "effective and dissuasive". If national courts had accepted this, they would have been called to disapply the domestic provision and to give full effect to EU law. To support this, the Court recalled its established case-law on EU law effectiveness and primacy. However, the Court made a reservation in paragraph 53 of the Judgement asserting that, even though national courts conclude for the disapplication of national law, they are still called to ensure the respect for the fundamental rights of the individuals affected by criminal proceedings. However, in this Judgement the Court did not seem to be concerned with possible fundamental rights infringements because the disapplication of national law on limitation periods, in its view, did not affect the principle of legality and proportionality as enshrined in article 49 Charter of fundamental

33. Art. 325(1) TFEU.
34. C-105/14, *Criminal proceedings against Ivo Taricco and Others* para. 39 (2015).
35. *Id.* para. 47.

rights of the European Union (the Nice Charter). On the contrary, paragraph 53 was crucial in the analysis of the *Taricco II* Judgment.

4.2. *The Reaction of the Italian Courts and the Preliminary Reference of the Constitutional Court*

The decision of the CJEU caused turmoil in the Italian legal system because Italian criminal law considers limitation periods as part of substantive criminal law. Accordingly, the Constitutional Court applies also to the limitation period rules the principle of non-retroactivity, explicitly denying the possibility of applying retroactively amendments *in peius*. The application of the so-called "*Taricco* rule" would have led therefore to a conflict between EU law and the Italian Constitution, particularly with regard to article 25.

Two Italian courts, among which the Court of Cassation, referred a question of constitutionality doubting whether the "*Taricco* rule" would comply with the "supreme principles of the Italian constitutional order", including fundamental rights. The Constitutional Court recognized the severe consequences that would have derived from the application of the "*Taricco* rule" in the Italian legal order. Thus, it decided to avoid an immediate conflict with the CJEU and preferred to send another preliminary reference to the latter asking for further clarifications on the interpretation of article 325 TFEU.

The Italian Constitutional Court[36] reaffirmed its long-standing case law concerning the primacy of EU law moderated by the existence of the "controlimiti" theory, namely the respect for the supreme principles of the national constitutional order and of fundamental rights as a condition for the applicability of EU law in Italy. Indeed, in the view of the Italian Constitutional Court, the principle of legality is one of these supreme principles. Hence, a contrasting EU provision could not be incorporated in the Italian legal order.

As the Italian legal system considers the limitation rules as part of substantive criminal law, *Taricco I* was in apparent contrast with the Italian Constitution. The Constitutional Court brought two sets of arguments before the CJEU to solve the conflict between the legal orders and avoid enforcing the "controlimiti". The first set was based

36. Corte costituzionale, November 23, 2016, no. 24.

on the notion of the respect for national constitutional identities constructed on the basis of article 4(2) TEU. The Italian Constitutional Court was *de facto* asking for the formal recognition of the counter-limits doctrine. In its view, EU law, including the *Taricco* rule, would only be applicable "if it is compatible with the constitutional identity of the Member State". Although this argument was raised in the preliminary reference, the CJEU in the *Taricco II* ruling did not address this issue. This seems reasonable since it aims to enhance the debate on common European grounds rather than strengthening national identity arguments.

In the second set of arguments, the Italian Constitutional Court asked the CJEU to reconsider its interpretation of article 325 TFEU on the basis of its incompatibility with article 49 of the Nice Charter and the principle of legality. The Court held that the CJEU in its first decision took into account only the aspect of the prohibition of retroactivity without considering that in Italy limitation periods are part of substantive criminal law. Therefore, also the requirement of precision of punishment must be analyzed. The "*Taricco* rule" was reformulated by the CJEU precisely on this ground in order to encompass the Italian particularity.

4.3. *The Decision in* Taricco II

The ruling under the accelerated procedure delivered in the *M.A.S. Case*[37] introduced an important clarification on the interpretation of article 325 given in *Taricco I*. Indeed, according to the CJEU, national courts should not disapply the provisions on limitation periods when

> [the disapplication would]entail 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 on criminal liability stricter than those in force at the time the infringement was committed[38].

37. C-42/17, *Criminal proceedings against M.A.S. and M.B.* (2017).
38. *Id.* para. 62.

The CJEU positively addressed the concerns of the Italian Constitutional Court so that the latter did not have to operate the the controlimiti doctrine.

Firstly, the CJEU held that it is especially for the national legislature to lay down rules ensuring compliance with EU law obligations and so also with article 325 as interpreted in *Taricco I* considering that EU financial interests protection is a concurring competence of EU and Member States under article 4(2) TFEU. Furthermore, it is for the legislature to remedy a national situation incompatible with EU law when national courts are prevented to do so due to their fundamental rights obligations. This holding is not in contradiction with the *Simmenthal* rule because disapplying national legislation would have led to a breach of EU fundamental rights.

Secondly, the Court brought together the peculiarity of the Italian system, namely the inclusion of the limitation period rules in substantive criminal law, and the need to respect the principle of legality of criminal offenses and penalties that is part of the common constitutional traditions of the Member States. Italy was indeed allowed to consider the limitation provisions as substantial criminal rules because the EU law had not yet harmonized the matter. Furthermore, Member States may apply national fundamental rights standards higher than those provided by the Nice Charter without compromising primacy, unity and effectiveness of EU law. These choices are "the expression of legitimate diversity within the Union's legal order"[39].

Moreover, since the Italian requirements of foreseeability, precision and non-retroactivity apply also to the limitation rules for criminal offenses related to VAT, domestic courts must not disapply national limitation provisions. It will be a duty of the legislature to remedy to this situation of incompatibility with the EU. The Court based its reasoning on the finding that the principle of legality is one of the "common constitutional principles" of Union law. The CJEU offered to the Italian Constitutional Court the way to ensure the respect of the principle of legality within the national legal order

39. Matteo Bonelli, *The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union*, 25 Maastricht Journal of European and Comparative Law 357, 365 (2018).

without imposing the same solution to the rest of the Member States of the European Union.

4.4. *The Constitutional Court Application of the "*Taricco *Rule"*

In the Judgment 115/2018[40] the Italian Constitutional Court held that the *Taricco* rule is not applicable to facts that occurred before the publication of *Taricco I* ruling. Afterwards, the Court stated that, in any case, whether the crimes are committed before or after the *Taricco I* decision, the degree of precision required under article 25(2) of the Italian Constitution precludes the application of the *Taricco* rule, even as clarified in *M.A.S.* The Court held indeed that individuals must be able to foresee the consequences of their conducts through legislative texts and that it is "intuitive" that the *Taricco* rule cannot be read into article 325 TFEU. However, the way in which the Italian Constitutional Court enforced the CJEU ruling is questionable: it reaffirmed the concept of "constitutional identity" and it reiterated its pivotal role in overseeing the relationship between the Italian legal order and the EU one claiming its central role in the constitutional review of fundamental rights.

5. *A Superficial Contradiction to Strengthen the Judicial Dialogue*

Looking at the two judgments by the CJEU, at first glance, it may seem that there is a strong contradiction and in particular a "retreat" by the Court from imposing supremacy of EU law under the threat of the *Corte costituzionale* of triggering the "*controlimiti*" doctrine and so of the creation of a serious conflict between the two legal orders. However, the saga should be viewed as a step forward in the CJEU attempt to adapt the concepts of primacy and effectiveness to the peculiarities of national legal systems.

In the *Melki* case the Court avoided the conflict with the French *Conseil constitutionnel* providing for certain conditions under which there is no need for disapplying national rules on constitutional reference. In *Taricco II*, the Luxembourg Court understood the peculiarity

40. Corte costituzionale, April 10, 2018, no. 115.

of the national legal system under scrutiny and provided for an interpretation of article 325 TFEU capable to accommodate also this feature.At the same time, the Court guaranteed a general rule for the EU rather than granting an exception for the specific country. It is noteworthy how the Court, although recognizing the peculiarities of the Italian legal system, never referred to the concept of "constitutional identity" but rather it prefered to discuss of the "common constitutional principles of the Member States".

Indeed, the issue of the Taricco II/MAS Judgment is based on paragraph 53 of the previous judgment, that is, "the respect of the fundamental rights of persons", and on the interpretation of article 49 Nice Charter, namely the principles of legality and proportionality of criminal offenses and penalties. "The court established a link between the Italian decision to consider limitation rules as part of substantive criminal law and the common concern for the principle of legality and for the requirements of foreseeability, precision and non-retroactivity deriving from it"[41]. Ensuring the respect for these principles became an obligation for the national courts, not only a possibility. The key argument of the Court's reasoning was the avoidance not only of a breach of article 25 of the Italian Constitution but, first and foremost, of a breach of the EU principle of legality by disapplying rules on limitation periods.

The *Taricco II* Judgment represents a step forward by the CJEU toward considering with a more positive attitude the constitutional law claims compared to the past. Nevertheless, the refusal of the "national constitutional identity" argument may be read as "an invitation to national constitutional courts to frame their fundamental rights concerns in terms of common principles rather than on a national basis"[42]. Therefore, these constitutional claims should be better framed as claims based on legally binding primary Union law such as the Charter of Fundamental Rights.

An analysis of the nature of the Judgment further corroborates the thesis that the contradiction in the *Taricco* saga is misleading. It does not exist under EU law a right of "appeal" before the CJEU. Therefore, new arguments must be brought to the attention of the latter court in

41. Bonelli, *The Taricco Saga* at 371 (cited in note 39).
42. *Id.*

order to obtain a further judgment. Besides, the Court, when answering questions referred for a preliminary ruling, must take account of the factual and legislative context of the questions as described in the reference order.

In the *Taricco* Judgment, although the *Tribunale di Cuneo* raised a preliminary reference on grounds of a violation of competition law and public finance provisions, the CJEU "found it necessary, to provide it with an interpretation of article 325(1) and (2) TFEU"[43].

Instead, in the *M.A.S. case*, the Italian Constitutional Court raised the preliminary reference. It described the matter of dispute as follows:

> *Corte costituzionale* raises the question of a possible breach of the principle that offenses 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 offenses are committed and cannot be retroactively altered *in peius*, and, second, to the requirement 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[44].

The differences between the two cases about the core issue under scrutiny are particularly relevant in order to comprehend the reasoning of the CJEU. In the first case, the aim of the Court was to enforce the effectiveness of EU law and particularly of article 325 TFEU utilizing the *Simmenthal* principle, that is, disapplying the contrasting relevant national rules. Very few attention was given to the ground of the respect of fundamental rights especially because, following previous CJEU and ECtHR case-law, the disapplication of the limitation period rules would have not constituted a breach of the fundamental principle of legality of criminal offenses and penalties.

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43. *Criminal proceedings against M.A.S. and M.B.* para. 26 (cited in note 35).
44. *Id.* para. 27.

In the second judgment, instead, the focus evolved into the design of a "decentralized constitutional model" capable to accommodate a legitimate national peculiarity *such as* the inclusion of the limitation rules in substantive criminal law, without modifying the EU general rule providing for the efficacy and the dissuasive power of the sanctions for fraud against EU financial interests. Hence, the solution was found in light of the supranational principle of legality. National judges have the duty to verify the respect of the EU principle of legality considering the specific circumstances of each case and to prevent the application of the "*Taricco* rule" if this principle is not found to be abided by.

To conclude, the Italian Constitutional Court has sharply asserted that the "*Taricco* rule" is incompatible with the Italian constitutional legal system because it violates the national principle of legality and also because this rule would give to the judges the task of pursuing criminal policy objectives violating article 101 of the Constitution. Furthermore, the Italian Constitutional Court ruled that it has the exclusive competence to verify the compatibility of the *Taricco* rule with the principle of legality, since a supreme principle of the Italian constitutional order is at stake.

6. *Conclusion*

The *M.A.S* Judgment may be superficially seen in contradiction with the *Taricco I* ruling. The CJEU, instead, reiterated the lack of effectiveness and dissuasive power of the Italian criminal system and still ruled for the applicability of the *Simmenthal* principle to ensure the full effectiveness of EU law, in particular article 325 TFEU. However, the Court demonstrated its willing to consider the issues arising at a national level as a matter of EU law. Therefore, the CJEU placed on the national judges the duty to verify if a principle of legality common to all Member States' constitutional traditions was at stake in the specific case. The CJEU held that if the disapplication of the national rule had undermined the protection of this common principle, the national judges would have been obliged to not put aside the national provision in question. The approach taken in the *Taricco II* Judgment can be seen as positive for the development of the "decentralized

constitutional model" of the EU. The Court demonstrated an interest in having a judicial dialogue with national constitutional courts on grounds of common constitutional issues; however, the Court considered the peculiarity of the national legal systems as an integral part of the European judicial debate itself. Indeed, the Court did not provide an exemption for the Italian legal order due to its peculiar feature, but rather found a solution in having a general European norm suitable for the different legal systems of the Union. The choice of the Court of strengthening the cooperation between the two legal systems is fundamental for the development of the EU law as cooperation is the most promising tool to reach its uniform and effective application thanks to the implementation of EU provisions by national judges.