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The EU Charter of Fundamental Rights in constitutional adjudication. The Italian perspective

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Il contributo si propone di fornire un'analisi critica dell'impatto della Carta dei diritti fondamentali dell'Unione europea sul giudizio di legittimità costituzionale italiano. La ricostruzione dei più recenti orientamenti della giurisprudenza costituzionale, con il riconoscimento della natura sostanzialmente costituzionale della Carta e dell'ampia sovrapponibilità delle garanzie da essa previste con quelle contenute nella Costituzione repubblicana, consentirà di mettere in luce le dinamiche del dialogo tra la Corte costituzionale e la Corte di Giustizia, nonché lo spirito di collaborazione che ne connota i rapporti in linea di massima. Il lavoro evidenzia altresì il ruolo cruciale svolto dalle due Corti nella definizione dei contenuti dell'identità nazionale e delle tradizioni costituzionali comuni anche in riferimento alla cd. dottrina dei controlimiti.

This study aims to critically examine the influence of the European Union's Charter of Fundamental Rights on the Italian constitutional adjudication system. The EU Charter's substantive constitutional nature and the significant overlap between its guarantees and those found in the Italian Constitution will be taken into consideration as the Italian Constitutional Court highlights its most recent approaches to the Charter of Fundamental Rights. The analysis will demonstrate how, in general, the Italian Constitutional Court's approach to the Court of Justice is one of open communication and cooperation. With reference to the so-called counter-limits doctrine, it will also highlight the critical roles that the two courts have played in defining the components of national identity and shared constitutional traditions.

1. Introduction[1]

The purpose of this paper is to critically consider the impact of the Charter of Fundamental Rights of the European Union (CFREU) within the Italian constitutional adjudication system.

After briefly recalling the Italian Constitutional Court's well-established jurisprudence on the relationship between domestic and European Union law's main features (paras. 3-3.1), the most recent approaches developed by the Italian Constitutional Court (ICC) with reference to the Charter of Fundamental Rights will be highlighted, taking into account the substantially constitutional nature of the EU Charter of Fundamental Rights and the largely overlap of its guarantees with those provided for in the Constitution of the Italian Republic (paras. 2, 5, 5.1, 5.2).

The tricky question of the relationship between the two charters has led to a rethinking of the link between the Italian Constitutional Court, the European Court of Justice (ECJ) and the ordinary court. In this regard, the ICC deemed necessary to make a "clarification" on the so-called "dual preliminarity", through an obiter dictum in a decision rejecting a constitutional challenge (paras. 6-6.2).

In this occasion, the Italian Constitutional Court had the opportunity to enhance its role as a court of referral under Article 267 TFEU despite its previous reluctance in such a recognition (para. 4).
Indeed, the very reason for the aforementioned "clarification" seems to be the dissatisfaction with the formulation of the preliminary questions proposed by the Tribunal of Cuneo to the Court of Justice in the case that gave rise to the well-known "Taricco Saga" (paras. 7-7.1). After the decision of the Court of Justice on this case, the Italian Constitutional Court considered it necessary, in fact, to better clarify the interpretative questions already submitted to the ECJ by the territorial Tribunal, proposing a new preliminary ruling on the same object in a constitutional proceeding in which the remitting judges (giudici a quibus) had decided to follow the Constitutional Court's "clarification" on the "first word", although it was not legally binding (para. 6.1).
The analysis that follows will show how an open dialogue and a spirit of cooperation characterise in principle the attitude of the Italian Constitutional Court towards the Court of Justice. The tensions that have also occurred seem to be inherent in the physiological dynamic of constructive relationships.
The crucial role played by the two Courts in defining national identity and common constitutional traditions has initiated a heated and rich doctrinal debate, which, however, does not yet seem to have found shared ground. After all, this is a highly complex task under a constitutional perspective with delicate political repercussions. The discussion on the so-called counter-limits doctrine, in particular, deserves further and deeper consideration (para. 8).

2. An overview of the references to the Charter of Fundamental Rights in Italian constitutional case law: some general features

As for Italian Constitutional justice, it seems appropriate to point out since the very beginning that the analysis here relevant has been developed mainly in the context of the "incidental" judicial review of legislation: out of 240 decisions (between 2002-2022) where the Charter is mentioned, 221 were delivered in this type of proceedings, whereas only 11 references were in "direct" judicial review on legislation, 7 in conflicts of attributions among the different powers of the

State, and one in an admissibility referendum request[2]. It is worth noting that in the Italian system there is no individual access route to the Constitutional court for the protection of fundamental rights.
Similarly to the guarantees of the ECHR[3], the CFREU provisions taken the most into account were: Article 21 (Non-discrimination), with 46 references; Article 47 (Right to an effective remedy and to a fair trial), with 43 references; Article 49 (Principles of legality and proportionality of criminal offences and penalties), with 37 references; Article 20 (Equality before the law), with 27 references; Article 24 (The rights of the child), with 25 references; Article 7 (Respect for private and family life), with 16 references; Article 3 (Right to the integrity of the person), with 15 references; Article 34 (Social security and social assistance), with 14 references; Article 41 (Right to good administration), with 12 references; Article 50 (Right not to be tried or punished twice in criminal proceedings for the same criminal offence), with 11 references; Article 16 (Freedom to conduct a business), with 11 references; Article 48 (Presumption of innocence and right of defence), with 10 references[4].
There are many ways in which the constitutional jurisprudence mentions or applies the provisions of the CFREU: sometimes they are recalled only in the factual part, other times they are mentioned only "ad colorandum", other times they are applied for the purposes of the decision on the admissibility or on the merits (see paras. 5-5.1-5.3).

3. The Italian Constitutional jurisprudence on the relationships between European and domestic law: the dualist doctrine. Brief remarks

In order to better understand the most recent developments in constitutional jurisprudence with reference to the Charter of Fundamental Rights of the European Union, it is appropriate to bear in mind its established case law on the relationship between domestic and European law[5] by recalling the historical landmark set by Judgment No. 170/1984 (Granital Judgment, rel. La Pergola)[6].
According to the Italian Constitutional Court, the provisions of the European Economic Community (EEC), endowed with the trait of immediate applicability, do not have the effect of annulling – in the proper meaning of the

term – the incompatible domestic rule, but, rather, of preventing that rule from being applied for the resolution of the dispute before the national court. «*This would not be the case if the Community and State systems – and their respective law-making processes – were composed of units. In the Court's view, however, although coordinated, they are distinct and mutually autonomous*».

Such general approach was constantly reiterated, recalling the more recent ECJ's jurisprudence[7] that reaffirmed «*the centrality of references for preliminary rulings for guaranteeing the full effectiveness of EU law and to ensure the useful effect of Article 267 TFEU, under which the power to "disapply" conflicting domestic provisions is consolidated*»[8]. The Constitutional Court stressed that the Court of Justice «*explained that the failure to disapply a national provision that is held to conflict with European law violates «the principle of equality between the Member States and the principle of sincere cooperation between the European Union and the Member States, recognized by Article 4(2) and (3) TEU, with Article 267 TFEU and [...] the principle of the primacy of EU law (Judgment of 22 February 2022 in case C-430/21, RS, point 88)*»[9].

By virtue of Articles 11 and 117, para. 1 of the Constitution, the Court guarantees compliance with the constraints of EU membership also in case of conflict with an EU rule lacking in direct effect. In such case where the conflict cannot be resolve by means of interpretation «*the ordinary court must raise a question as to the constitutionality, as it falls to this Court to evaluate the existence of a conflict that cannot be remedied by means of interpretation and to, potentially, strike down the law that conflicts with EU law*»[10].

It is worth noting that the ICC also underlined to have consistently upheld the principle of the primacy of the EU law, clarifying that «*Within this system, the centralised review of constitutionality enshrined in Article 134 of the Constitution is not an alternative to the widespread mechanism for implementing European law [...], but rather merges with them to build an increasingly well integrated system of protections*»[11].

3.1 The different approach followed by the Italian Constitutional Court with regard to the ECHR

With the 2007 twin judgments (Nos. 348 and 349)[12], the Court "contained" the

emerging jurisprudential practice of disapplying the domestic law incompatible with the ECHR – assumed as a source of EU law by virtue of Article 6 TEU – on the basis of the centralised nature of the review of constitutionality, that would otherwise be compromised, given the substantive constitutional content of the ECHR provisions.

From a methodological point of view, the ICC, therefore, requires the ordinary court to firstly attempt to interpret the applicable law in conformity with the ECHR. Secondly, should it not be possible, the ordinary court is asked to raise a question of constitutionality with reference to Article 117, para. 1, of the Italian Constitution, in relation to the ECHR principles concretely relevant in the case at stake (as interposed parameters). As clarified by the ICC, ordinary judges are to consider ECHR provisions in light of the interpretation offered by the Court of Strasbourg. Under this aspect, in Judgment No. 49/2015[13] the ICC explained that the ordinary court is obliged to follow the case law of the ECtHR only if the latter is an expression of "well established-jurisprudence", thus clarifying that "in any event" the court's duty to interpret domestic law in a manner consistent with the ECHR «*is, of course, subordinate to the overriding task of adopting a constitutionally compliant reading, since such a course of action reflects the axiological predominance of the Constitution over the ECHR*».

This "clarification" gave rise to a heated debate at the time; it seems to affirm a kind of "constitutional protagonism", the same that seems to characterise the "clarification" from 2017 (Judgment No. 269)[14] and the ICC's preliminary reference in the "Taricco saga"[15].

The Constitutional Court nevertheless deemed it appropriate to reiterate that the ordinary judge, in interpreting domestic law has the constitutional duty to avoid violations of the European Convention and to apply its provisions, based on the "principles of law" expressed by the Strasbourg Court, especially when the case can be traced back to precedents of the latter (Constitutional Court Judgments No. 109/2017; No. 68/2017; No. 276/2016; No. 36/2016). When the conflict between the relevant law and the provisions of the Convention cannot be solved by interpretation, judges are still bound to raise a question of constitutionality before the Constitutional Court.

This system, established by the twin judgments of 2007, has not undergone changes following the entry into force of the Lisbon Treaty (December 1, 2009).

The Constitutional Court has indeed ruled out that the inclusion of the ECHR within the EU law (per Article 6, paragraphs 1-3, TEU) allows for the Convention to also be covered by Article 11 of the Constitution, therefore a direct disapplication of domestic provisions that are incompatible with it is excluded (see, among many, Constitutional Court judgments no. 80/2011; no. 264/2012 and no. 223/2014).
The Italian Constitutional Court has also excluded an indirect "treatisation" of the ECHR, based on the "equivalence clause" of Article 52, paragraph 3, of the EU Charter of Fundamental Rights, which follows from the equal standing of the latter with the Treaties, and this by emphasizing that by virtue of Article 51, paragraph 1, TEU, the provisions of the Charter apply only within the scope of the competences of the European Union.

4. Italian Constitutional Court as a "judge" in light of Article 267 TFEU: a troubled path

For a long time, the Italian Constitutional Court has been reluctant to qualify itself as a referring court within the meaning of Article 177 TEC (now Article 267 TFEU). The justification for such a position was based on its function «*of constitutional control, of supreme guarantee of the observance of the Constitution of the Republic by the constitutional organs of the State and those of the Regions*». This particular and unique role, in the Court's opinion, precluded its inclusion «*among the judicial organs, whether ordinary or special, as so many, and profound, the differences are of its task, without precedent in the Italian legal system, and those well-known and historically consolidated proper to the judicial organs*» (Order No. 536/1995)[16]. It was, therefore, up to the ordinary judge to refer the matter to the Court of Justice.
It will take until 2008, with Order No. 103[17], to record the Constitutional Court's entry into the "European judicial circuit" with the first preliminary reference to the Court of Justice in the context of a *direct* judicial review of legislation[18], brought by the State on a law of the Region of Sardinia that introduced a regional tax on tourist stopovers of aircrafts and recreational crafts applicable also to companies not having tax domicile in the Region.
The Court recognised for the first time its own legitimacy to make a preliminary

reference in a *direct* judicial review on laws as the «*sole judge called upon to rule on the dispute*», with the aim to grant in this case the possibility «*to make the reference for a preliminary ruling provided for in Article 234 of the EC Treaty*» in the general interest of uniform application of Community law, as interpreted by the ECJ.

It is, however, the second reference for a preliminary ruling (Order No. 207/2013)[19] that deserves to be particularly mentioned here: despite the fact that it was proposed for the first time in an *incidental* judicial review – in which the Court is not the sole judge – no reasoning was spent on such a relevant point. This silence seems revealing of the Court's willingness not to engage in statements that would have forced it to explicit the terms of its role as a direct interlocutor with the European Court of Justice, drawing all the consequences.

Indeed, the Court's position is still characterised by a certain "fluidity": sometimes its referral to the ECJ sounds in strong defence of "constitutional patriotism"[20] – quoting the words of Silvana Sciarra, currently President of the ICC[21] –, at other times it seems inspired by a more genuine spirit of cooperation[22].

5. The various ways in which the Charter has been used in constitutional adjudication before and after its "treatisation"

Turning to the examination of the constitutional jurisprudence, a distinction should be made between the orientations developed before and after the entry into force of the Lisbon Treaty, which constitutes a crucial watershed.

Before the entry into force of the Lisbon Treaty, the Italian Constitutional Court's consideration towards the Charter is clearly demonstrated by the fact that it was mentioned since Judgment No. 135/2002[23], recognising that «*even though it has no legal effect, it is expressive of the principles common to the legal systems*». Following that first judgment, the Charter has since been referred to in other decisions, in which the Court has affirmed interpretative relevance to cases to which EU law was applicable[24].

After the entry into force of the Lisbon Treaty, the Italian Constitutional Court noted the "treatisation" of the Charter[25], excluding, however, that this resulted in

an indirect and generalised communitarisation of the ECHR, thus denying the ordinary court the power to directly disapply domestic rules incompatible with it[26]. And this despite the fact that the general principle of equivalence of the protections ensured by the Charter and by the European Convention on Human Rights and its protocols (Article 52, para. 1 CFRUE) is also well established in the case law of the ECJ[27].

With respect to the scope of application, after recalling Article 51 of the catalogue as well as the Declaration No. 1 annexed to the Treaty of Lisbon, the Italian Constitutional Court clearly stated that the Charter does not constitute an instrument for the protection of fundamental rights beyond the competences of the Union, aligning itself with the ECJ's constant jurisprudence[28]. The Court reiterates that: «*It is therefore a condition for the applicability of the Charter of Nice that the case before the court must be governed by European law – in so far as it relates to acts of the European Union, national acts and conducts which give effect to European Union law, or to the justifications put forward by a Member State for a national measure which is otherwise incompatible with European Union law – and not merely by national rules which have no connection with European Union law*»[29]. Nor can the existence of a "European case" be inferred from a generic reference to policies pursued by the Union or to Council recommendations without binding force. The application of the Charter presupposes that European Union law establishes specific obligations on the Member States in the area covered by the provisions under review.

In 2017, by Judgment No. 269[30] the ICC marked an important turning point in cases of "dual preliminarity", securing for itself the first word[31].

The ruling, recalling that the Lisbon Treaty «*has conferred binding legal effects on the Charter of Fundamental Rights (...), putting it on an equal footing with the Treaties*», explicitly stated that it «*constitutes a part of Union law endowed with special characteristics by reason of its constitutionally-derived content*». The circumstance that the principles and rights enshrined therein «*intersect to a large extent with the principles and rights guaranteed by the Italian Constitution (and by the other national Constitutions of the Member States)*» is decisive for the role that the Constitutional Court has acknowledged for itself in cases of "dual preliminarity", i.e. questions with which the simultaneous violation of rights protected both by the Constitution and by the European catalogue is claimed[32].

In 2020, emphasising the Charter's aspiration to «*summarise the constitutional traditions common to the Member States of the entire Union*» – the Constitutional Court reaffirmed its applicability (also) as an «*interpretative instrument of the corresponding constitutional guarantees*» (Judgment No. 102/2020)[33]. The Italian Court highlighted the «*relationship of mutual implication and fruitful integration*» that links, sometimes in an inseparable connection, constitutional principles and rights with those recognised by the Charter: indeed, the scope and latitude of supranational guarantees «*reverberate on the constant evolution of constitutional provisions*» with a view to constantly enriching the instruments for the protection of fundamental rights[34].

In this perspective, the Charter is applied as a "complement" to constitutional guarantees: the Italian Court emphasised that «*the implementation of an integrated system of guarantees has its cornerstone in the loyal and constructive cooperation between the different jurisdictions, called upon – each for its part – to safeguard fundamental rights in the perspective of a systemic and non-divided protection*»[35]. The Constitutional Court, hearing questions concerning the application of the statute of limitations, referred to the mechanism of greater constitutional protection with regard to the principles of retroactivity of the milder criminal law and the legality of crimes and penalties.

The principle of retroactivity of the milder criminal law is not supported – unlike the prohibition of retroactivity of the incriminating or aggravating legislation (Article 25, second paragraph, of the Italian Constitution) – by explicit constitutional coverage. It finds expression in the Italian system at the ordinary law level (Article 2 of the Criminal Code) and its implicit foundation in the principle of equality (Article 3 of the Italian Constitution), which also marks its limit, any exceptions being permitted within what is reasonable[36]. Additionally, the Italian Court specified that the principle of retroactivity in mitius finds explicit confirmation and European coverage in Article 49, para. 1 of the Charter, pursuant to which if, after the commission of the offence, the law provides for the application of a lighter penalty, the latter must be applied.

The Italian Constitutional Court made it also clear that, even in the absence of the necessary reasoning by the referring court on the EU-law applicability, the rules of the Charter may «*nevertheless be taken into account as criteria for interpreting the other parameters, constitutional and international, invoked by the*

court»[37].

Thus, in many judgments[38], the Charter is employed mainly ad adiuvandum, in support of a reasoning that would, in any case, be sufficient in relation to the internal parameters referred to. Such a use of the Charter, symptomatic of a spontaneous choice of the Constitutional Court, demonstrates not only its use to broaden the range of instruments for the protection of fundamental rights from which it can be drawn on, but also its ambition to take a leading role in shaping the multilevel system of fundamental rights protection[39].

5.1 The Charter as a formal parameter of constitutional adjudication

In a significant number of decisions[40] the Charter was invoked formally as a parameter of the judgement included in the thema decidendum.

With Order No. 117 of 2019[41], a referral to the ECJ, the Italian Constitutional Court affirmed to «*seek clarification from the Court of Justice on the exact interpretation and, if necessary, the validity, in the light of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union*», of the relevant secondary European law. The Court added that the question at stake – involving the right to silence of the accused (nemo tenetur se detegere) in administrative proceedings liable to result in the imposition of sanctions of a punitive nature – had never before been addressed to the ECJ. After the ruling of the Court of Justice, the Italian Court concluded stating that the domestic provision was incompatible with the right to silence, protected by Articles 24 Const., 6 ECHR, 14 § 3 lett. g) of the International Covenant on Civil and Political Rights, and Articles 47 and 48 of the CFREU[42]. Indeed, interpreting Articles 47 and 48 of the Charter, the Grand Chamber of the ECJ, in *D. B. v. Consob*[43], clarified that the right to silence is intended to ensure that, in a criminal case, the prosecution bases its arguments without resorting to evidence obtained by coercion or pressure, against the defendant's will; therefore, it is violated, in particular, in a situation in which a suspect, threatened with punishment, should they refuse to testify, either testifies or is punished for refusing to testify. Following the ECJ indications, the Italian Court found the violation of the right to silence protected jointly by the aforementioned constitutional, supranational, conventional and international

parameters which, complementing each other, are integrated in the definition of the standard of protection of the right to defence, the essence of which consists in the right of the person concerned to remain silent without being compelled, under threat of punishment, to make statements contra se ipsum and to answer questions likely to give rise to their own liability.

5.2 Direct effect of the Charter and question of constitutionality

More recently, through Judgment No. 149/2022[44], the Italian Constitutional Court reiterated that the direct effect in the Member States' legal orders of the rights recognised by the Charter (and of the rules of secondary law implementing those rights) does not render inadmissible the question of constitutionality on a domestic provision in relation to rights which to a large extent intersect the principles and rights guaranteed by the Italian Constitution itself. Such questions, once raised, must instead be scrutinised on the merits by the Constitutional Court, which exclusively has the task of declaring, with erga omnes effects, the constitutional illegitimacy of provisions that are contrary to the Charter, pursuant to Articles 11 and 117, para. 1 of the Italian Constitution[45]. Such remedy does not replace, but, rather, is in addition to the one represented by the disapplication in the individual case, by the ordinary court, of the provision contrary to a rule of the Charter with direct effect. And this with a view to enriching the instruments for the protection of fundamental rights, which, «*by definition, excludes any preclusion*», and which sees both the ordinary court and the Constitutional Court committed to implementing European Union law in the Italian legal order, each with its own instruments and each within the scope of its respective competence.

6. Cases of "dual preliminarity": the first word to the Constitutional Court

The multilevel system of protection of fundamental rights realises the possibility that a domestic law may be deemed by the ordinary court to be incompatible with the Constitution and, at the same time, with the Charter of Fundamental

Rights of EU.
Rather than leaving ordinary judges free to choose to which court they should address any interpretative or compatibility doubt to this regard, the Italian Constitutional Court decided to provide a clarification aimed at directing said choice within the already mentioned landmark Judgment No. 269 of 2017[46].
The substantive constitutional content of the European catalogue makes it possible, in fact, for cases of "dual preliminarity" to occur, when domestic laws infringe individual rights protected at the same time by the Constitution and by the Charter. In these cases, the Italian Constitutional Court stated that: «*Therefore, violations of individual rights posit the need for an erga omnes intervention by this Court, including under the principle that places a centralised system of the constitutional review of laws at the foundation of the constitutional structure (Article 134 of the Constitution). The Court will make a judgment in light of internal parameters and, potentially, European ones as well (per Articles 11 and 117 of the Constitution), in the order that is appropriate to the specific case, including for the purpose of ensuring that the rights guaranteed by the aforementioned Charter of fundamental rights are interpreted in a way consistent with constitutional traditions, which are mentioned in Article 6 of the Treaty on European Union and by Article 52(4) of the EUCFR as relevant sources in this area. Other national constitutional courts with longstanding traditions have followed an analogous line of reasoning (see, for example, the decision of the Austrian Constitutional Court, Judgment U 466/11-18; U 1836/11-13 of 14 March 2012)*»[47].
In this way, the principle of legal certainty with respect to the domestic legal system is better safeguarded, especially with regard to issues that may give rise to a wide number of similar disputes[48].
In the opinion of the ICC, the reserved "first word" has been balanced by the affirmation of the persistent power/duty of the ordinary judge to disapply the domestic rule incompatible with the Charter, of course when the conditions are met[49].
The Court's approach finds justification in the need to preserve the centrality of its role within the Italian system of constitutional justice, fearing the risk of otherwise being marginalised by the European Court.
Moreover, the Court stressed in this way the importance of being the referral

judge in the light of Article 267 TFUE, granting a direct and cooperative dialogue with the ECJ on the Charter, also with the aim of defining national identity and the common constitutional traditions.

6.1 The non-binding effect of the "clarification" on the first word

An analysis of the first judicial follow-up showed that the "clarification" of the Court has been variously transposed by ordinary judges: some have immediately complied with it[50]; others have considered it as a mere "methodological proposal" with no binding value; some courts, deeming it unsuitable to bind their logical procedure, have made "direct implementation" of the CFREU as interpreted by the Court of Justice because of the "specific elements" of the case at hand, «*without determining any friction with the principle of centralised control of constitutionality under Article 134 Const., on which the indications contained in C. const. No. 269/17 are based*».

Still, others courts have proposed preliminary referrals, rather than raising a question of constitutionality in advance, not considering binding the path indicated by the Constitutional Court. Taking into account the concrete case at stake, ordinary judges underlined that «*The direct dialogue with the Court of Justice turns out to be, in the present case, the most direct and effective tool to ascertain the compatibility of domestic law with the provisions of the Union and the principles placed to protect fundamental rights given the clear prevalence of the aspects concerning the disputed compliance with Union law over national profiles*»[51].

The reluctance of the Court of Cassation to follow the Constitutional Court's directive clearly shows how a general and abstract indication is not suitable to guarantee the best solution in the concrete case. Moreover, the Constitutional Court has no weapons to prevent and to strike down the judge's disobedience, relying only on its own moral suasion.

With the arguments put forward, the reluctant judges claimed the prerogative of direct dialogue with the Court of Justice guaranteed to them by EU law, a prerogative that constitutes the hallmark of the European judicial system, obviously in the areas of EU competence, which, as it is well known – it is worth

recalling –, have not been extended since the entry into force of the Charter of Fundamental Rights (Article 6 TEU).

6.2 The subsequent fine-tuning of the "clarification"

Indeed, with Order No. 117/2019[52], the Court – in one of the first decisions raised by the Supreme Court of Cassation in deference to the "clarification"[53] contained in Judgment No. 269/2017 – rather than simply deciding the *quaestio legitimitatis* on the basis of constitutional provisions, addressed to the Court of Justice some questions regarding the correct interpretation of the European provisions also invoked by the referring judge. The Constitutional Court evoked in particular the «*spirit of loyal cooperation between national and European courts*», necessary to reach the definition of "common levels" of protection of fundamental rights. It also enhances the perimeter of dialogue (in "matters subject to regulatory harmonization"), which in the field of rights is considered «*an objective of primary importance*» for the purpose of shared identification of standards of protection.

This collaborative attitude and the role of the Constitutional Court were confirmed by Order No. 182/2020[54], that address to the ECJ an interpretative question on the scope of Article 34 CFREU, i.e. whether it should be interpreted to include birth and maternity allowances, based on the European legislation on the coordination of social security systems, and, therefore, whether EU law should be construed to disapply national legislation that does not extend the aforementioned benefits to foreigners holding a single residence permit, contrarily to foreigners holding EU long-term permits.

The Constitutional Court requested that the referral be decided under an expedited procedure, warning that the issues submitted for European consideration are «*widely debated in the domestic case law*» and that it could not be ruled out that they would «*give rise to numerous further prejudicial referrals from the ordinary courts*». The order specified that «*the amplitude of the pending litigation attests to a serious state of uncertainty as to the meaning to be attributed to Union law*» in a «*pivotal area of the European Union's common immigration policy in the space of freedom, security and justice*» and in the matter of «*equal treatment of third-country nationals and nationals of the Member States in which*

they reside, which is a qualifying and propelling element of that policy». Moreover, in a passage of the reasoning, the Court expressly clarified the reason why the Supreme Court of Cassation preferred not to directly propose the preliminary reference: «*The widespread orientation in the jurisprudence on the merits, which gives direct effectiveness to the provisions of Article 12 of Directive 2011/98/EU, is not followed by the administration competent to grant the benefits, while the Court of Cassation, called to ensure the uniform interpretation of national law, has turned to this Court to obtain a pronunciation with erga omnes effects*». The quoted statements clearly demonstrate the spirit underlying the dialogue between Courts, which is nourished by knowledge and respect for each other's areas of competence. They shed new light on the "clarification" contained in Judgment No. 269 and its sequel, punctually enhancing the proprium connected with the Constitutional Court's exercise of the power of referral under Article 267 TFEU, in cases susceptible of generating serial litigation.

By means of such an order Italian Constitutional Court summarised the most recent orientation underlining its competence to «*review any aspects in which the national provisions conflict with the principles set out in the Charter*»; and, when it is the referring court itself that raises a question that also concerns the rules of the European catalogue, it «*cannot refrain from assessing whether the provision under control infringes, at the same time, the constitutional principles and the guarantees enshrined in the Charter*»[55]. As a national court in the light of Article 267 TFEU, the Court «*shall make a reference for a preliminary ruling whenever necessary in order to clarify the meaning and effects of the rules of the Charter; and it may, at the outcome of that assessment, declare the provision under control to be unconstitutional, thereby removing it from the national legal order with erga omnes effects*»[56].

7. The threat to raise the counter-limits in defence of national identity. The mainstream reading of the so-called "Taricco saga"

Finally, mention should be made to the sensitive issue of the limits to the entry of European law in a context deeply changed in relation to those that led the Constitutional Court to the elaboration of the counter-limits doctrine.

Under this aspect, Order No. 24 of 2017[57] needs to be analysed, through which the Constitutional Court made a reference to the ECJ for a preliminary ruling for the third time in its history[58].

Having been asked to decide the question on the constitutionality of Article 2 of Law No. 130/2008 – that authorised the ratification of the Treaty of Lisbon in so far as it gives effect to Article 325 paras. 1-2 of the Treaty on the Functioning of the European Union, as interpreted by the Taricco judgment[59] –, the Constitutional Court asked the European Court of Justice to clarify whether the aforementioned Article 325, in the interpretation offered by it, should be understood as requiring the criminal court to not apply national rules on limitation periods. The latter precluded in a considerable number of cases the eradication of serious frauds, detrimental to the financial interests of the Union, or, in any case, provided for such frauds shorter limitation periods than those laid down for frauds detrimental to the financial interests of the State. The non-application lacked a sufficiently determined legal basis, even in a Member State's legal system such as the Italian one, where the limitation period is part of substantive criminal law and subject to the principle of legality and where, therefore, the non-application is contrary to the supreme principles of the Member State's constitutional system or to the inalienable rights of the individual. The doubt of constitutionality, from which the European preliminary ruling question arose, was fuelled by the circumstance that the non-application of the domestic statute of limitation rules, imposed by the Taricco judgment, would have led to the conviction of numerous people accused of tax fraud in relation to the collection of VAT, which would otherwise be time-barred under the current legal framework. The case called into question a cornerstone of the Italian constitutional order, namely the principle of legality of offences and penalties, which required, inter alia, that the rules on criminal liability are sufficiently determined. The Court noted that the European judgment merely excluded the statute of limitation period from the scope of Article 49 of the Charter on the legality of criminal offences and penalties, but did not require the Member State to refrain from applying «*its constitutional provisions and traditions, which, in relation to Article 49 (...) and Article 7 of the European Convention on Human Rights, are more favourable to the defendant*»: this would not be allowed «*when they express a supreme principle of the*

constitutional order, as is the case with the principle of legality in criminal matters in relation to the entire material sphere to which it is addressed». Given this premise, the Italian Constitutional Court could have activated the mechanism of counter-limits to preserve the integrity of a supreme constitutional principle, pronouncing the constitutional illegitimacy of the law ratifying and executing the Treaty of Lisbon in the part in which it introduced into the domestic legal system the rule entailing the disapplication of the provision on the limitation period (through the Taricco judgment).

The Italian Court, instead of invoking the counter-limits, nonetheless, chose the different path of a collaborative dialogue with the Court of Luxembourg. The latter was therefore asked to clarify whether the rule enunciated by the Taricco judgment should operate to the detriment of a supreme principle. The Italian Court, while anticipating its own contrary conviction, wisely addressed the doubt to the ECJ. Indeed, according to the Italian Court the qualification as a rule of substantive criminal law subject to the principle of legality expressed by Article 25, second paragraph, of the Italian Constitution «*constitutes a higher level of protection than that granted to defendants by Article 49 of the Nice Charter and Article 7 of the ECHR*». The Constitutional Court, in the perspective of the multilevel system of protection, appealed to Article 53 of the Charter affirming that European law itself requires safeguarding the higher level of protection offered, in this case, by the Italian Constitution. It «*confers on the principle of criminal legality a broader object than that recognised by the European sources, because it is not limited to the description of the fact of the crime and the penalty, but includes every substantial profile concerning criminal liability*», including the statute of limitations.

A different conclusion, in addition to clashing with the spirit of the aforementioned Article 53, would illogically lead to the assumption that the process of European integration would have the effect of degrading national achievements in the area of fundamental freedoms and would depart from its path of unification under the banner of respect for human rights. Indeed, the ECJ has pointed out that the ways in which each Member State protects the fundamental rights of the individual do not need to be identical and that each State protects those rights in accordance with its own constitutional system. In its judgment of 5 December 2017, the Grand Chamber of the ECJ[60], in

understanding the interpretative doubt raised by Order No. 24 of 2017, held that the national court's obligation to disapply, with respect to VAT fraud, the domestic statute of limitations law is void where it results in a violation of the principle of legality, due to the retroactive application of the stricter penalty rules and/or the insufficient precision of the applicable law. Instead, it should be left to the national court to assess the compatibility of the "Taricco rule" with the principle of certainty in criminal matters, which is «*both a supreme principle of the Italian constitutional order and a cornerstone of European Union law, pursuant to Article 49 of the Charter*». The competent authority in this respect is the Constitutional Court which «*has the exclusive task of ascertaining whether the European Union law conflicts with the supreme principles of the constitutional order*»[61].

Subsequently, with Judgment No. 115/2018[62], the Italian Constitutional Court declared the questions concerning the compatibility of the "Taricco rule" with the supreme constitutional principle of criminal legality as unfounded.

According to the prevailing doctrinal opinion this outcome culminated in the decisive dialogue between the Courts in a climate of loyal and constructive cooperation[63].

7.1 A less enthusiastic [and celebrating] reading of the "Taricco saga"

With Order No. 24/2017, as mentioned above, the Italian Constitutional Court reacted to the judgment of the Court of Luxembourg – in the case of the so-called "Carosello frauds" perpetrated to the detriment of the financial revenues of the Union – by which the Grand Chamber of the ECJ had declared that the Italian legislation on limitation periods undermined the obligations imposed on Member States by Article 325, paras. 1 and 2, TFEU in the event that it «*prevents the imposition of effective and dissuasive sanctions in a considerable number of cases of serious fraud detrimental to the financial interests of the European Union, or in which it provides, for cases of fraud detrimental to the financial interests of the Member State concerned, longer limitation periods than those provided for cases of fraud detrimental to the financial interests of the European Union*», circumstances which it was for the national court to verify. The ECJ had also

stated that it was up to the national court to disapply domestic legislation in order to comply with the obligations arising from Article 325 TFEU, without «*requesting or waiting for the prior removal of those provisions by legislation or by any other constitutional procedure*» (para. 49). Moreover, the Court of Justice pointed out: «*It should be added that if the national court were to decide to disapply the national provisions in question, it would at the same time have to ensure that the fundamental rights of the persons concerned are respected. The latter, in fact, could have sanctions imposed on them from which, in all probability, they would have avoided if the said provisions of national law had been applied*» (para. 53).

Questions of constitutionality on European law as interpreted in the Taricco judgment were submitted to the Constitutional Court, with reference to Article 25 Const., by the Supreme Court of Cassation and the Court of Appeal of Milan. Endorsing the interpretative theses of the referring judges and of a relevant part of the doctrine, the Italian Court assumed that the substantive nature of the statute of limitations was inherent to the principle of legality under Article 25 Const., and for that very reason rose to a supreme principle of the system, an expression of national identity. Through the referral of Article 267 TFEU, with Order No. 24/2017, it therefore proposed three interpretative questions aimed at obtaining a reconsideration of the Taricco ruling that would avoid the otherwise-deemed inevitable application of the counter-limits doctrine.

Well, the 1973 legal context, within which the Italian Constitutional Court had elaborated the aforementioned doctrine to limit the entry of EU provisions into the domestic legal order, was quite different: the current one, as it has already been pointed out[64], not only records a decisive enlargement of the areas of competence of Union law, but also the adoption of a Charter of Fundamental Rights having the same legal value as the Treaties.

In this renewed context, more courageous and innovative avenues could have been explored, capable of "contaminating" the different legal concepts involved, with the ultimate goal, not already of asserting an axiological predominance of the Italian Constitution, even over European Community law, but of offering constitutional justice through an open dialogue, not precluded by pre-established positions[65].

Turning to the heart of the question, we must dwell on the passages from the

grounds of the order in which the substantive nature of the statute of limitations is assumed to be the inalienable content of the supreme principle of legality in its national version, not only for the past, but also for the future, on the basis of the consolidated case law with which the ICC endorsed the thesis of the majoritarian criminal doctrine.

According to the Constitutional Court, the statute of limitations «*affects the criminal liability of individuals and the law, consequently, regulates it by reason of an assessment that is made with reference to the level of social alarm induced by a certain crime and to the idea that, after some time has elapsed since the commission of the act, the need for punishment is reduced and the author has acquired a right for it to be forgotten (judgment no. 23 of 2013)*»[66].

The Court does not seem to recognise any relevance to the fact that the right to be forgotten – if it can be protected exclusively in the event of failure to bring a prosecution in due time – must, on the contrary, be balanced with other interests equally worthy of protection, once the criminal proceedings have started: in this case, in fact, it does not seem reasonable to consider that the passage of time in any case mitigates the need for punishment[67].

The clear distinction between the prescription of the crime and the prescription of the trial proposed in this regard by Glauco Giostra appears illuminating and fully persuasive: «*The social wound of the crime can be healed in two ways: with the healing of time or with the suture operated by a judge. The first eventuality occurs when the judicial system does not know, does not want to or does not succeed in intervening: after a certain number of years, society considers oblivion more functional to social stability, rather than the exhumation of the event (prescription of the crime). When, on the other hand, before the statute of limitations of the offence accrues, the deputy judicial bodies promote the ascertainment of liability, attributing it to a specific object, there is no longer the inert passage of time, the silent action of Cronos: the community does not want to forget. There are indications of guilt and there is a need to verify their basis. The running of the crime's statute of limitations stops forever. The demand for justice can no longer be silenced by time, it must be answered by the judge's ruling. But this cannot happen in an indefinite time, the accused has the right to know the judicial response in a reasonable time, after which, the judge must issue a measure of not having to proceed (statute of limitation of the trial)*»[68]. Giostra himself defined the statute of

limitations as the "platypus" of the Italian criminal system, questioning its very "criminal policy option".
To tone down the terms of the confrontation between the two Courts, the reasoning could have been articulated according to the different configurable hypotheses based on the time of commission of the crime and whether or not the statute of limitations had run, distinguishing between crimes committed before the Taricco ruling (September 8, 2015), crimes committed after that ruling for which the statute of limitations had not run yet, and crimes committed after the ruling for which the statute of limitations would have run at the time of the trial.
To align with the European Courts, constitutional jurisprudence on favourable criminal provisions – which per se would systematically escape constitutionality review precisely because of the principle of legality set forth under Article 25 Const.[69] – could have been used, exactly as in the present case.
At the very root of the Taricco querelle, still distant positions on the notion of national identity, common constitutional traditions and the function of counter-limits can be discerned[70]. But the analysis of such an issue is beyond the scope of this contribution.

8. Conclusive remarks

To sum up, in disputes concerning cases governed by EU law, where a provision of the Charter allegedly infringed by national law has direct effect, the protection can and must be ensured by the ordinary court by means of disapplication, in the context of a widespread review of European compatibility.
If the supranational provision cannot grant the aforementioned effectiveness, the path of disapplication must give way to the constitutional review of domestic legislation with reference to Articles 11 and 117, para. 1, of the Italian Constitution. In any case, this is without prejudice to the review of constitutionality referred to the Court when the same petitioner invokes it by referring cumulatively to domestic and supranational parameters, as well as in cases where the question is raised in main proceedings.
In cases having no connection with EU law, instead, the assessment on the conformity with domestic constitutional parameters of the rule allegedly infringing a fundamental right is necessarily left to the Constitutional Court. But

re-centralisation for mere defensive purposes or for "constitutional protagonism" seems in itself hardly compatible with a system of integrated constitutional justice that draws its lifeblood from the instrument of the preliminary reference, from the direct dialogue between the Court of Justice and all the national jurisdictions.

The centralised model of constitutional justice in which the Constitutional Court is the undisputed protagonist is unaffected in areas that fall outside European law. In matters within the competence of the European Union, even when fundamental rights are at stake, however, the claim will of the Constitutional Court to play the role of a filter or a gatekeeper before the Court of Luxembourg, conveying questions of European (constitutional) compatibility that arise in judgments pending before the ordinary courts, seems questionable[71].

Completely different are the considerations regarding a "re-centering" aimed at guaranteeing "depth" to the dialogue among Courts: in the "ascendent" phase, through a broader and more accurate representation of the specificities and problems of the domestic system; in the "descendent" phase, through the erga omnes effects of a decision of unconstitutionality.

In this perspective Constitutional Courts hold a different "centrality" in the system of protection of fundamental rights. They play a key role as "constitutional mediators" required to provide the Court of Justice with the essential elements for the appreciation and enhancement of common constitutional traditions.

In other words and in conclusion, the implementation of the EU Charter of Fundamental Rights has had a significant impact on the ongoing transformations of constitutional justice, redefining the boundaries of constitutional jurisdiction in the relationship between national Constitutional/Supreme courts, Courts of Justice and ordinary courts.

1. This contribution will be published also in: A. Heger (ed.), *Relationship between the EU-Charter of Fundamental Rights and National Fundamental Rights: A Comparative Analysis of the Case Law of National Constitutional Courts*, Springer, 2024.
2. According to Article 134 of the Italian Constitution: «*The Constitutional Court shall pass judgement on: disputes concerning the constitutional legitimacy of laws and enactments having the force of law issued by the State and the Regions; conflicts arising over the allocation of powers of the State and between the State and the Regions, and between Regions;*

accusations made against the President of the Republic, according to the provisions of the Constitution». Furthermore, according to Article 2 of the Constitutional Law No. 1 of 1953, «*It is for the Constitutional Court to judge whether requests for an abrogative referendum submitted under Article 75 of the Constitution are admissible under the second paragraph of the same article*». For more details on the Italian system of constitutional justice, see V. Barsotti, P. G. Carrozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, Oxford University Press, New York, 2016, pp. 49-63.

3. Indeed, in the majority of the cases analysed (153 out of 240), the provisions of the CFREU were invoked along with the corresponding guarantees of the ECHR.
4. Other provisions were mentioned less than ten times. A comprehensive overview of constitutional jurisprudence on the subject is provided by R. Nevola, *L'applicazione della Carta dei diritti fondamentali dell'Unione europea nella giurisprudenza della Corte costituzionale*, Servizio Studi Corte costituzionale (STU 32), 2021, pp. 28-29 (https://www.cortecostituzionale.it/documenti/convegni_seminari/stu_322__carta_ue__20210623143037.pdf) until June 2021 and, afterwards, by the *Annual Report on the Constitutional jurisprudence*, Chapter IV, pp. 547-556 edited by the Constitutional Court Studies Department, 2021 (https://www.cortecostituzionale.it/documenti/interventi_relazioni/1043_P/relazione_giurisprudenza_costituzionale_2021_20220427115533.pdf) and the *Annual Report on the Constitutional jurisprudence*, Chapter IV, pp. 563-578 edited by the Constitutional Court Studies Department, 2022. (https://www.cortecostituzionale.it/annuario2022/pdf/Relazione_Giurisprudenza_costituzionale_2022_23_marzo_2023.pdf).
5. On the troubled stages of the constitutional jurisprudence, see: B. Nascimbene, *Costa/Enel: Corte costituzionale e Corte di Giustizia a confronto, cinquant'anni dopo*. Giuffrè Editore, Milano, 2015; V. Barsotti, P. G. Carrozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, Oxford University Press, New York, 2016.
6. Const. Court, Judgment No. 170/1984 available at https://www.cortecostituzionale.it/stampaPronunciaServlet?anno=1984&numero=170&tipoView=P&tipoVisualizzazione=O.
7. Judgment of 20 December 2017, case C-322/16, Global Starnet Ltd., paras 21 and 22; Judgment of 24 October 2018 case C-234/17, XC and others, para 44; Judgment of 19 December 2019 case C-752/18, Deutsche Umwelthilfe, para 42; Judgment of 16 July 2020 case C-686/18, OC and others, para 30.
8. Const. Court, Judgment No. 67/2022, *Conclusions on points of law* n. 10, available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sent.%2067%20del%202022.pdf. See also Const. Court, Judgment No. 198/2022.
9. Const. Court, Judgment No. 67/2022, *Conclusions on points of law* n. 10. See G. Della Cananea (2023), 165-199.
10. Const. Court, Judgment No. 263/2022. See also Judgments No 284/2007, 28/2010,

227/2010, 75/2012, 267/2017 and Order No. 207/2013.

11. Const. Court, Judgment No. 67/2022, *Conclusions on points of law* n. 11.
12. Const. Court, Judgments Nos. 348 and 349/2007 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S348_2007_Eng.pdf and at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S349_2007_Eng.pdf.
13. Const. Court, Judgment No. 49/2015 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S49_2015_en.pdf.
14. See below para. 6.
15. See below para. 7.
16. Const. Court., Order No. 536/1995, available at https://www.cortecostituzionale.it/stampaPronunciaServlet?anno=1995&numero=536&tipoView=P&tipoVisualizzazione=O.
17. Constitutional Court, Order No. 103/2008 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O2008103_en.pdf.
18. See V. Barsotti, e al., *op. cit.*, pp. 53-54.
19. Const. Court. Order No. 207/2013 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/207-2013.pdf.
20. Const. Court, Order No. 24/2017 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf.
21. S. Sciarra, *Lenti bifocali e parole comuni: antidoti all'accentramento nel giudizio di costituzionalità*, in *Federalismi.it*, 3, 2021, p. 45 (https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=44831).
22. Const. Court, Order No. 117/2019 available at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_117_2019_EN.pdf; Const. Court, Order No. 182/2020 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/EN_Ordinanza_182_2020_Sciarra.pdf; Const. Court, Order No. 216/2021 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Ordinanza%20n.%20216%20del%202021%20(1).pdf; Const. Court, Order No. 217/2021 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Ordinanza%20n.%20217%20del%202021.pdf See below para. 6.2.
23. Const. Court, Judgment 135/2002 available at https://www.cortecostituzionale.it/stampaPronunciaServlet?anno=2002&numero=135&

tipoView=P&tipoVisualizzazione=O.

24. See R. Nevola, *op. cit*., and the *Annual Report on the Constitutional jurisprudence*, *op. cit*., (2021 and 2022).
25. Const. Court, Judgments Nos. 28, 93 and 138/2010; 236/2011, 31/2012 and 210/2013. More references in R. Nevola, op. cit., p. 30 and in the *Annual Reports on the Constitutional jurisprudence* (2021-2022), *op. cit.* See C., Amalfitano, M. D'Amico, S. Leone, *La Carta dei diritti fondamentali dell'Unione Europea nel sistema integrato di tutela*, in *Atti del convegno svoltosi nell'Università degli Studi di Milano a venti anni dalla sua proclamazione*, Giappichelli, Torino 2022.
26. Const. Court, Judgment No. 80/2011 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2011080_DeSiervo_Frigo_en.pdf. See also Const. Court, Judgments Nos. 239/2014; 18/2021.
27. Const. Court, Judgment No. 222/2019 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/EN_Sentenza_222_2019_Vigan%C3%B2.pdf. See also Judgments Nos. 145/2020, 84 and 182/2021.
28. Const. Court, Judgments Nos. 80/2011, 67/2016, 185 and 213/2021, 19, 28 and 34/2022.
29. Const. Court, Judgment No. 80/2011, above n. 25. See R. Nevola, *op. cit.*, p. 45.
30. Const. Court, judgment No. 269/2017 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_269_2017_EN.pdf.
31. See below para. 6. See G. Martinico, G. Repetto, *Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath*, in *European Constitutional Law Review*, 15(4), 2019, pp. 731-751 (doi:10.1017/S1574019619000397).
32. Const. Court, Judgment No. 20/2019 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_20_2019_EN.pdf. Const. Court, Orders Nos. 117/2019 and 182/2020 expressed themselves in equivalent terms, above n. 21.
33. Const. Court, Judgment No. 102/2020 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/EN_Sentenza_102_2020_Vigano.pdf.
34. Const. Court, Order No. 182/2020, above n. 21. and Judgment No. 54/2022 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/SENTENZA%20n.%2054%20del%202022%20-%20red.%20Sciarra%20EN.pdf.
35. Const. Court, Judgment No. 254/2020 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza_n._254_del_2020_red._Sciarra_EN.pdf.
36. Const. Court, Judgments Nos. 393 and 394/2006, 28/2010, 223/2018 and 63/2019

available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/EN_Sentenza_63_2019_Vigan%C3%B2.pdf.

37. Const. Court, Judgment No. 33/2021 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza%20n.%2033%20del%202021%20red.%20Vigan%C3%B2%20EN.pdf.
38. Const. Court, Judgments Nos. 135 and 445/2002, 45/2005, 190, 393/2006, 394/2006, 349/2007, 182/2008, 251/2008, 438/2008, 28/2010, 93/2010, 82/2011, 236/2011, 168/2014, 239/2014, 95/2016, 200/2016, 236/2016, 262/2016, 17/2017, 76/2017, 269/2017, 43/2018, 223/2018, 232/2018, 114/2019, 144/2019, 187/2019, 271/2019, 32/2020, 44/2020, 102/2020, 103/2020, 145/2020, 192/2020, 260/2020, 15/2021, 32/2021, 59/2021, 112/2021; Const. Court, Orders Nos. 314/2011 and 207/2018. See R. Nevola, *op. cit.*, p. 33, and the *Annual Reports on the Constitutional Court jurisprudence*, *op. cit.*, 2021 and 2022.
39. Among the most significant decisions, see Const. Court, Judgment No. 236/2016 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/236_2016.pdf. The ICC held that the edictal framework established by the Criminal Code for the crime of alteration of state committed by means of forgery was intrinsically unreasonable, recalling that the principle of the necessary proportionality of the penalty with respect to the crime not only derives from the invoked constitutional parameters (Articles 3 and 27) but also receives explicit support in Article 49, para 3, of the Charter.
40. See, ex multis, Const. Court, Judgments Nos. 23/2016, 94, 111 and 179/2017, 99, 115 and 194/2018, 20, 37, 63 and 112/2019, 49 and 84/2021, 13, 54 198 and 262/2022. See R. Nevola, *op. cit.*, pp. 37-43 and the *Annual Reports on the Constitutional jurisprudence*, *op. cit.*, 2021-2022.
41. See above n. 21. See also Const. Court, Judgments Nos. 13 and 19/2022.
42. Const. Court, Judgment No. 84/2021; similarly see: Const. Court, Judgment No. 13/2022.
43. ECJ [GC], Judgment of 2nd February 2021, case C-481/19, D.B. v. Consob, ECLI:EU:C:2021:84.
44. Const. Court, Judgment No. 149/2022 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza%20n.%20149%20del%202022%20EN.pdf.
45. See also Const. Court, Judgments Nos. 54/2022, 182/2021, 49/2021, 11/2020, 63/2019, 20/2019 and 269/2017; Const. Court, Orders Nos. 182/2020 and 117/2019.
46. See above n. 29. N. Zanon, *Ancora in tema di doppia pregiudizialità: le preminenti ragioni della "precisazione" contenuta nella sentenza n. 269 del 2017 rispetto alla "grande regola" Simmenthal-Granital*, in *Member States' National Identity, Primacy of European Union Law, Rule of Law and Independence of National Judges. Study Meeting. Celebrating the Court of Justice of the European Union's 70th Anniversary*. Rome, Palazzo della

Consulta, September 5th, 2022, pp. 79-96 (https://cortecostituzionale.it/jsp/consulta/convegni/5_sett_2022/Giornata-Studio-Zanon.pdf).

47. Const. Court, Judgment No. 269/2017, *Conclusions on points of law* n. 5.2, above n. 29.
48. See Const. Court, Order No 182/2020, above n. 21.
49. Const. Court, Judgment No. 63/2019, above n. 35 and Order No. 117/2019, above n. 21.
50. Supreme Cour of Cassation, Order No. 3831/2018. B. Randazzo, *Sanzioni amministrative e garanzie fondamentali: la prima parola alla Consulta. L'inversione della "doppia pregiudizialità" alla prova*, in *Giornale di Diritto amministrativo*, 3, 2018, pp. 368-374. See below para. 6.2.
51. Supreme Cour of Cassation, Judgment No. 451/2019 and similarly Judgments Nos. 13678/2018; 12108/2018 6101/2017.
52. See above n. 21.
53. Supreme Cour of Cassation, Order No. 3831/2018, above n. 49.
54. Const. Court., Order No. 182/2020, above n. 21. See S. Sciarra, *First and Last Word: Can Constitutional Courts and the Court of Justice of the Eu Speak Common Words?*, in *Eurojus*, 3, 2022, pp. 7-11. Similarly see Const. Court. Orders Nos. 216 and 217/2021, above n. 21 and Judgment No. 54/2022, above n. 33.
55. Const. Court, Order No. 182/2020, above n. 21.
56. Const. Court, Order No. 182/2020, above n. 21 and also Const. Court, Judgment No. 46/2021.
57. See above n. 20.
58. See above para. 4.
59. ECJ [GC], Judgment of 8th September 2015, case C-105/14, *Taricco e a,* ECLI:EU:C:2015:555.
60. ECJ [GC], Judgment of 5th December 2017, case C-42/17, M.A.S. e M.B., ECLI:EU:C:2017:564. Critical towards the decision F. Viganò, *Melloni overruled? Considerations on the "Taricco II" judgment of the Court of Justice*, in *New Journal of European Criminal Law*, 9(1), 2018, pp. 18-23. In the Author's view «*the costs of such an approach should not be underestimated. Allowing the constitutional traditions of 27 member states to hinder a uniform EU criminal policy – even when these traditions are frankly extravagant (...) – would create a serious risk of undermining the effectiveness of that policy*».
61. Skeptical D. Gallo, *Challenging EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure*, in *European Law Journal*, 25(4), 2019, pp. 434-456 (https://doi.org/10.1111/eulj.12333).According to the Author, «*If the principles to be interpreted and applied are EU constitutional principles, such as direct effect and primacy, this task is responsibility of the Luxembourg court, rather than the ICC or other supreme courts of EU Member States*». See also R. Mastroianni, *Sui rapporti tra Carte e Corti: nuovi sviluppi nella ricerca di un sistema rapido ed efficace di tutela dei diritti fondamentali*, in *European Papers*, 5(1), 2020, pp. 493-522

(Doi:10.15166/2499-8249/369), and M. De Visser, *National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights in a Post-Charter Landscape*, in *Human Rights Review*, 15, 2014, pp. 39–51. (https://doi.org/10.1007/s12142-013-0273-3).

62. Const. Cour. Judgment No. 115/2018 available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_2018_115_EN.pdf.
63. See, *ex multis*, F. Fabbrini, O. Pollicino, *Constitutional Identity in Italy: European Integration As the Fulfillment of the Constitution*, in *EUI Department of Law Research Paper*, 06, 2017, pp. 11-15 (http://dx.doi.org/10.2139/ssrn.2930106); D. Tega, *The Italian Constitutional Court in its Context: A Narrative*, in *European Constitutional Law Review*, 17, 2021, pp. 382-391 (https://doi.org/10.1017/S1574019621000274).
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