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**Constitutional dialogues or diktats?
The Italian Constitutional Court
and the European Court of Justice**

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The order of the arguments

- ❖ Taking dialogues seriously
- ❖ A retrospective: the relationship between the Italian Constitutional Court (ICC) and the Court of Justice (CJEU)
- ❖ A “hard case”: *Taricco* and the principle *nullum crimen, nulla poena sine praevia lege*
- ❖ A prospective

1. Taking dialogues (between courts) seriously

- ❖ **Avoiding generic labels.** Current literature, in the field of public law, is replete with examples of how judges engage in dialogues. But this word refers to a variety of situations, including e.g. whether higher courts cite foreign authorities, as well as whether judges meet in transnational fora for discussing how analogue issues are solved within their legal systems (see Slaughter, *A Global Community of Courts*, Harvard Int'l L. J. 2003). This is interesting, but has little to do with the cases in which courts are involved in handling 'hard cases' *à la* Dworkin
- ❖ **No “irenic constitutionalism”:** dialogues, not diktats: use of arguments and interpretations

1. Taking dialogues (between courts) seriously [seq.]

- ❖ **Special importance of judicial dialogues within the EU.** Reasons include:
 - A. the constitutional framework: EU as a network of constitutions (Pernice, *Die Europäische Verfassungsverbund und die Netzwerktheorie*, ZaoRV, 2010). Importance of the ECHR
 - B. substance: EU as legal system where rights are not absolute
 - C. process: the preliminary reference procedure (TFEU Article 267). “The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union”. Interaction with higher national courts

2. A retrospective: the Italian Constitutional Court and the Court of Justice

- ❖ The Italian case: the doctrine of (counter)limits
 - A. a contrast about the primacy of EC law over national law: ECJ, Case 6/64, *Costa v. ENEL* (1964), ICC, judgment n. 14/1964 (the Constitution as higher law)
 - B. the ICC recognizes that the two legal orders are ‘coordinated’ [*Frontini* (1973) and *Granital* (1984)], but sets limits to primacy, the ‘supreme principles’
 - C. the ICC send the first preliminary reference to the ECJ: a tax case (2007). [See G. della Cananea, in *European Public Law*, 2008]
- ❖ ICC ruling n. 238/2014 according to which “the national constitution trumps international law” [C. Tomuschat in *Italian J. Public L.* 2014] with regard to war crimes

3. A “hard case”: *Taricco* and the principle *nullum crimen*

- ❖ A request for a preliminary ruling from the Tribunale di Cuneo (2014)
- ❖ **The issue:** in a criminal proceeding concerning offenses in relation to value added tax (VAT), does national legislation laying down an absolute time limitation which may give rise to impunity (if the trial is not concluded within that time limitation) imply a potential prejudice to the financial interests of the EU? If so, what should national judges do?
- ❖ **The judgment of the CJEU** (Grand Chamber) of 8 September 2015, Case C-105/14, criminal proceedings against Taricco and others: obligation, for the national court, to disapply any provision of national law liable to affect fulfillment of the Member States’ obligations under Article 325 TFEU to protect the financial interests of the European Union by adopting effective and dissuasive penalties, when prosecution of serious VAT frauds is time-barred in a significant number of cases

3. A “hard case”: *Taricco* and the principle *nullum crimen*

B) *Taricco II*

- ❖ *Taricco II* before the ICC: does the retroactive enforcement of EU law, and its impact on prescription, infringe a ‘supreme principle’, i.e. the principle of legality of punishment [Article 25 (2) of the Constitution provides that “no punishment may be inflicted except by virtue of a law in force at the time the offence was committed”: *Nullum crimen, nulla poena sine praevia lege*]
- ❖ Three views about what the ICC had to say
 1. the ICC must ensure that the financial interests of the EU are protected
 2. the ICC must enforce Article 25 (2) and ‘block’ EU law
 3. the ICC must refer a question to the CJEU
- ❖ The ICC sent a preliminary reference (order n. 24/2017), recognizing primacy, whilst pointing out that the principle of legality in this field cannot be derogated, because it affects the “constitutional identity of Italy” in the sense of Art. 4 TEU

3. A “hard case”: *Taricco* and the principle *nullum crimen*

C) the opinion of AG Bot in Case C-42/17

- ❖ the ICC “not only submits those questions for a preliminary ruling to the Court, but also advises the Court on the answer that should be given in order to avoid initiating what is known as the ‘counter-limits’ procedure” (§ 10)
- ❖ The criterion used by the CJEU in *Taricco I* is based on the existence of a systemic risk of impunity (§ 119) and it is consistent with the case-law of the European Court of Human Rights on the scope of the principle that offences and penalties must be defined by law (§ 127)
- ❖ “Article 53 of the Charter does not allow the judicial authority of a Member State to refuse to fulfill the obligation identified by the Court in the judgment in *Taricco and Others* on the ground that that obligation does not respect the higher standard of protection of fundamental rights guaranteed by the Constitution of that State” (§ 168)
- ❖ no risk for national constitutional identity (§ 186)

4. A prospective

- ❖ Should the CJEU follow the opinion of AG Bot:
 - no room for differences between national constitutional traditions?
 - will the ICC enforce its doctrine of ‘counter-limits’?