THE GOOD, THE BAD, AND THE UGLY: NATIONAL CONSTITUTIONAL JUDGES AND THE EU CONSTITUTIONAL IDENTITY

*Giovanni Zaccaroni**

Abstract

This article offers an analysis of three judgements concerning the relationship between the Court of Justice of the EU and three EU national Constitutional Courts. The judgments, from the Danish Supreme Court and the German and Italian Constitutional Courts, where occasions where the latter Courts have threatened to oppose to distinctive elements of the EU constitutional legal order. These elements can ultimately lead to the theorisation of an EU constitutional identity. In particular, this article analyses the *Dansk Industri* judgment of the Danish Supreme Court, where the Danish court decided not to apply a preliminary ruling of the Court of Justice declaring the horizontal direct effect of the principle of non discrimination on the ground of age; the *OMT* judgment of the German Constitutional Court, where the German Court, after having threatened to declare the ECB OMT programme as *ultra vires* decided to accept the functional interpretation of the principle of conferred powers at the conditions established by the Court of Justice in the *Gauweiler* judgment; and the request for a preliminary ruling made by the Italian Constitutional Court in the *Taricco II (M.A.S. and MB)* judgment, where the Court of Justice has ruled on the balance between the primacy of EU law and the constitutional principle of legality.

TABLE OF CONTENTS

* Post-doctoral Researcher (Research Associate), University of Luxembourg. Ph.D. in EU law, University of Bologna and Strasbourg. The author would like to thank the anonymous reviewers and the participants into the panel at the pre-session of the IACL Roundtable for the fruitful advice and forum for confrontation, and in particular Pietro Faraguna. Errors and inaccuracies rest in the sole responsibility of the author.

1. Introduction: a case study in constitutional adjudication from an EU Constitutional Identity perspective

The "constitutional" nature of the EU legal order is surely one of the most debated and contended results of the gradual development of the process of European integration[1]. The lack of a consensus on the constitutional nature of the EU legal order[2] is the main driver (but hardly the only one)[3]that fuels the confrontation between the EU Court and the national constitutional judges. The main reason for the analysis at hand is that, while these three decisions are usually representative of the *revirement* of the pluralism of national constitutional identities within the EU, they are at the same time supporting the emersion of distinctive elements of the EU constitutional legal order. These elements are

[1] For some commentators this process is a fragile compromise between the different voices within the EU. See i.e. B. de Witte, A. Ott & E. Vos (eds.), *Between Flexibility and Disintegration, the Trajectory of Differentiation in EU Law* (2017). For other commentators, the fragmentation of the process of European integration is caused by a more serious "system deficiency". See A. von Bogdandy & M. Ioannidis, *Systemic deficiency in the rule of law: What it is, what has been done, what can be done*, 51 Comm. Mkt. L.R. 1 (2014).

[2] Historically, in favour see G. F. Mancini, *The making of a constitution for Europe*, 26 Comm. Mkt. L.R. 4 (1989), *contra* D. Grimm, *Does Europe need a Constitution?*, 1 Eur. L.J. 3 (1995), at 219. See also J.H.H. Weiler & J. P. Trachtman, *European Constitutionalism and its discontent*, 17 (1) Nw. J. Int'l L. & Bus. (1997) 354. Recently, see K. Tuori, *European Constitutionalism* (2015), as well as the critique of the book made by P.L. Lindseth, *The Perils of 'As If' European Constitutionalism*, 22 Eur L.J. 5 (2016), at 696.

[3] The political situation in several Member States makes it more difficult for national constitutional judges to back convincingly the process of EU integration, as was done in the past, without falling into the trap of "elitism" or even "globalism". Words are swords, and these concepts, widely abused in the current political debate, can make the difference in a national political election.

part of the conceptualisation of the "EU constitutional identity" that is, in the mind of the author, pursued by the Court of Justice as a further development of its doctrines of primacy and direct effect of EU law. The hypothesis behind this article is that the Court of Justice, in identifying through its case law, is advancing certain fundamental elements of EU law that are part of the EU constitutional identity, but that there is still a lack of a substantial theorisation of the latter. This struggle of the Court of Justice for the clarification of the extent of an EU constitutional identity counterweights and perhaps enriches the pluralism of national constitutional identities in Europe.

The main problem that such an ambitious assumption poses is, by far, determining what is the EU constitutional identity. In general, identity represents the self-awareness of an individual, and the physical, cultural or anthropological characteristics that allow for self-determination. As for legal orders, constitutional identity joins together the elements that allow for the external and internal self-determination of the constitutional legal order.[4] However, when it comes to the enumeration of the elements that specifically belong to the EU constitutional identity, we realize that, as Rosenfeld said, it is a rather elusive concept[5]. Within EU law scholarship,[6] the EU constitutional identity is composed of values, principles and rights that are included in the EU Treaties and, since 2009 (with the entrance into force of the Lisbon Treaty), in the Charter of Fundamental Rights of the European Union, as well as in the case law of the EU Court of Justice. It is not clear, however,

[4] M. Rosenfeld, *The Identity of the Constitutional Subject*, 16 (3-4) Cardozo L.R. (1995). Id., *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community,* (2009).

[5] M. Rosenfeld, *The Identity of the Constitutional Subject*, cit. at 4, 1049-1055.

[6] See L.S. Rossi, *Fundamental Values, Principles, and Rights after the Treaty of Lisbon: The Long Journey toward an European Constitutional Identity*, in *Europe(s), Droit(s) européen(s) – Liber Amicorumenl'honneur du professeur Vlad Constantinesco*", (2015). For a broader picture, encompassing *inter alia* the relationship between the EU and the Member States Constitutional Identity see A. SaizArnaiz & C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration* (2013), F.X. Millet, *L'Union Européenne et l'identité constitutionelle des Etats Membres* (2013), E. Cloots, *National Identity, Constitutional Identity, and Sovereignty in the EU*, 45 Netherland J. of Legal Philosophy 2 (2016) and P. Faraguna, *Constitutional Identity in the EU – A Shield or a Sword?,* 18 Ger. L.J. 7 (2017).

the extent to which a certain right, principle or value belongs to the EU constitutional identity and the extent to which it does not.

It would be overwhelmingly ambitious to attempt to clarify in this article all the elements that belong to such an identity. The scope of this work is mainly restricted to the analysis of the reaction of three national constitutional courts to the attempt of the Court of Justice to affirm certain specific elements, which allow the recognition of the EU constitutional identity, at least from a scholarly perspective. This happens as a necessary counterpart to the restatement of the national constitutional identities in the latter judgments. The three specific areas are, first, the principle of non-discrimination on the ground of age and its horizontal direct effect (para.2 of this article), second, the principle of conferred powers (para.3) and, third, the protection of the financial interest of the EU (para.4). To a certain extent, it is possible to argue that the Court of Justice is bringing to another level the process of constitutionalisation of specific elements of EU law. That is why a certain degree of scepticism from national constitutional judges towards these techniques persists, as their national constitutional legal orders have already been passed and guided through the respective national process of constitutionalisation. The Court of Justice still lies in the middle of the path. That is why an analysis of the three judgments that follow is needed: it acknowledges the central importance of the jurisdiction of the Court of Justice for the national legal orders, and the fact that the constitutionalisation of the process of European integration will be difficult without the involvement of the national constitutional courts.

2. The Danish Supreme Court and the principle of non-discrimination (on the ground of age)

The first judgment to be analysed is the judgment of the Danish Supreme Court in *Dansk Industri,* where the Danish Supreme Court refused to apply a preliminary ruling of the Court of Justice of the European Union. In order to pursue this analysis, we will firstly analyse the judgment of the Court of Justice, in order to understand its importance, and, secondly, we will examine the elements of the judgment of the Danish Supreme Court rejecting its application.

2.1 The Court of Justice applies horizontally the principle of non-discrimination on the ground of age

The judgment of the Court concerned the dismissal of a Danish worker (Mr. Rasmussen). According to the legislation in force in Denmark,[7] the dismissed worker was entitled to a severance allowance of 1, 2 or 3 months of salary in the event that the working relationship is terminated in advance, after respectively 12, 15 or 18 years. The decision of the Court of Justice was divided in two main parts. In the first part, the Court of Justice tackles the issue of the scope of application of the principle of non-discrimination against the Directive 2000/78/EC[8]. The Court departs from the traditional definition of the principle of non-discrimination as a general principle of EU law[9], which finds its roots in the constitutional traditions common to the Member States and finally in the Charter of Fundamental Rights, mentioning the leading case law in *Mangold*[10]and *Kücükdeveci*[11]. The Court also underlines that "the scope of the protection conferred by the directive does not go beyond that afforded to the principle"[12], which appears to confirm that the principles of EU law have a scope of application that is broader than the one of the directive. However, the Court stresses that to apply the principle, the case should fall within the scope of the prohibition of discrimination in Directive 2000/78/EC[13]. The Court finds that the case falls within the scope of the above-mentioned prohibition as it regards the dismissal of a worker within the meaning of Article 3.1 c) of Directive 2000/78/EC. Therefore, the principle of non-discrimination on the ground of age should be applied to the dispute, which involves two private persons[14]. In the second part of its decision, the Court of Justice has been asked by the national Court how to balance the principle of non-discrimination, found to be applicable, and the principle of legal certainty and legitimate

[7] Paragraph 2 a (1) of the Danish Law on legal relationships between employers and employees.
[8] Directive 2000/78/EC, OJ L 303 2000.
[9] Court of Justice of the EU (CJEU), case C-441/14, *Dansk Industri (DI)* [2016], para. 22.
[10] CJEU, case C- 555/07, *Kücükdeveci* [2010].
[11] CJEU, case C-144/04, *Mangold* [2004].
[12] *Ibid.,* para. 23.
[13] *Ibid.,* para. 25.
[14] *Mangold,* para. 26.

expectations, justified, according to the national court, by the impossibility to interpret the national legislation according to EU law[15]. The Court accordingly provides the national court with the necessary guidance as to discern between consistent interpretation and the horizontal application of a general principle.

The judgment tackles two relevant issues, which makes it worthy of in-depth analysis. It represents an answer of the Court of Justice to some of the criticism that has been put forward either on the opportunity of the horizontal application of the principle of non-discrimination on the ground of age[16] or on the theoretical systematization of the doctrine of direct effect, clarifying the distinctive character of horizontal direct effect and of consistent interpretation[17]. In both ambits the judgment is to be warmly welcomed, as other than providing a clearer indication of the differences between horizontal direct effect and consistent interpretation[18],it gives the dimension of the importance of the principle of non-discrimination in the EU legal order. This article will focus mainly on the first part of the decision.

2.2. The "constitutional status" of the principle of non-discrimination (on the ground of age)

The previous case law, in particular *Mangold* and *Kücükdeveci*, introduced a new approach to the application of the

---

[15] *Ibid.,* para. 29.

[16] Criticism towards the horizontal application of general principles has been developed at different levels. In literature, see T. Papadopoulos, *Criticizing the horizontal direct effect of the EU general principle of equality*, 17 (4) European Human Rights Law Review 437 (2011). However, some of the fiercest challengers of the horizontal application have been Advocate Generals of the Court of Justice. See, for instance: CJEU, Opinion of AG Ruiz-Jarabo Colomer in case C-397/01, *Pfeiffer* [2004], para. 46 and in joint cases C-55/07 and C-56/07, *Michaeler* [2008], para. 22; Opinion of AG Kokott in case C-321/05, *Kofoed* [2007], para. 67; Opinion of AG Trstenjak in case C-282/10, *Dominguez* [2012], paras 127 - 128. AG Trstenjak in particular maintains that the horizontal application of general principles would be in contrast with the limits towards the application of fundamental rights included in Art. 51 (2) of the Charter.

[17] See, for instance, the traditional case law on consistent interpretation, where the principle of legal certainty is expressly regarded as a limit towards consistent interpretation. For a restatement of this case law, see CJEU, case C-268/06, *Impact* [2008], paras 100 – 101.

[18] See E. Gualco, L. Lourenço, *Clash of Titans. General Principles of EU Law: Balancing and Horizontal Direct Effect*, 1 European Papers 2 (2016).

doctrine of direct effect to general principles and secondary EU legislation. The usual understanding of their relationship had been, before these two seminal decisions, that general principles did not enjoy a scope of application broader then the legal instrument to which they were linked. As to the nature of the legal instrument involved, this had not represented an issue for regulations as well as for decisions, in as much as their scope of application was not limited by the Treaties. But, as it is quite trite EU law, directives are binding "only as to the results to be achieved" by the Member States[19]. This has limited the application and enforcement of directives by the national jurisdictions to litigation between the State and the citizens (vertical direct effect). Again, the problem comes when the judgment involves two private parties, as directives cannot generate obligations on individuals, but only confer on them rights (horizontal direct effect). The direct application of the content of a directive in front of a national Court would rather lead to the imposition on individuals of obligations that should have been dealt with by the State. The reasoning of the Court of Justice in *Dansk Industri*, accordingly, attempts to reorder the rules on the application of the above-mentioned principle to litigation involving private parties. The Court clarifies that the principle of equal treatment finds its roots in various international instruments as well as in the constitutional traditions common to the Member States. It mentions additionally the Charter of Fundamental Rights, which is recognized as the source of the general principle[20]. Up to this point, the legal reasoning appears consistent with the previous in *Mangold* and *Kücükdeveci*. The Court of Justice, however, takes a few steps further. First, it tackles directly and with a systematic approach the issue of the scope of application of the Directive and of the principle, clearly stating, "the scope of the protection conferred by the directive does not go beyond that afforded by the principle"[21]. Second, the Court openly recognizes that the principle of non-discrimination holds a specific, distinctive place within the constitutional legal order of the EU. In paragraph 26 of the judgment, the Court maintains, given that it had already found in previous case law the applicability of

[19] Art. 288.3 TFEU.
[20] *Dansk Industri (DI),* para. 22.
[21] *Ibid.,* para. 23.

Directive 2000/78/EC to the Danish legislation in force, the same *"[A]pplies with regards to the fundamental principle of equality, the general principle prohibiting discrimination on grounds of age being a merely specific expression of that principle"*[22]. It is worthy to note that Lenaerts theorized a similar approach, which envisages the fundamental role of the principle of non-discrimination within the EU constitutional order, pointing out that "general principles of EU law enjoy a 'constitutional status'"[23]. The doctrine is not unanimous on this assumption, as other authoritative voices have raised different views in the past[24]. This cannot, however, undermine the potential of the innovation that the Court is supplying, opening the way to the use of the principle of non-discrimination on the ground of age when EU secondary legislation is not applicable.

2.3. The Danish Supreme Court and the "lack of a written provision": A classic case of "ultra vires review?"

The solution given by the Court of Justice in *Dansk Industri* represents an important systematization of the case law on the principle of non-discrimination. Notwithstanding that, the Danish Supreme Court decided not to follow the indication provided for by the Court and decided not to apply the principle of non-discrimination. The Danish Supreme Court maintained that it was not possible to interpret Danish law in conformity with EU law, since, as anticipated in its question for preliminary ruling, this would have been regarded as a *contra legem* interpretation[25]. The main reason for refusing the application of the preliminary ruling as resulting from the reasoning of the Danish Supreme Court can be summarized as follows: the principle of conferral does not allow the Court of Justice to claim the power to apply the principle of non-discrimination to a litigation between private parties[26]. In

[22] *Dansk Industri (DI),* para.26.

[23] K. Lenaerts, *The Principle of Equal Treatment and the European Court of Justice,* Dir. Un. Eur. 3 (2013), at 470, K. Lenaerts & J.A. Gutierrez Fons, *The Constitutional Allocation of Powers and General Principles in EU law*, 47 Comm. Mkt. L. R. 6 (2010), at 1648.

[24] See, inter alia, V. Skouris, *Effet utile Versus Legal Certainty: The Case-law of the Court of justice on the Direct Effect of Directives*, 17 Eur. Business L.R. 2 (2006), 254.

[25] It is worthy to note that the Advocate General was convinced of the opposite. See the Opinion of AG Bot in *Dansk Industri (DI)*, paras 63-64.

[26] S. Klinge, *Dialogue or disobedience between the European Court of Justice and the Danish Constitutional Court? The Danish Supreme Court challenges the Mangold-*

particular, the Danish Court holds that the Danish Accession Agreement to the European Union of 1973 (as well as the Preparatory Works of the Danish Parliament) do not contain any legal basis to confer to an unwritten EU principle the right to prevail over a provision of national law[27]. This restrictive and literal interpretation of the principle of conferred powers is not surprising as this is not the first case in which a national Supreme or Constitutional Court has refused to follow the indications received from the Court of Justice[28]. However, the argument used seems not to take into account that the reasoning of the Court of Justice on primacy and direct effect is based on unwritten principles. Should it therefore accordingly be assumed that this decision of the Danish Supreme Court is a challenge to the primacy of EU law over national law? Perhaps the real meaning of the judgment is that the Danish Supreme Court wants the Court of Justice to withdraw from its *Kucukdeveci* and *Mangold* case law and to go back to its *Dominguez* decision.[29] In that judgment the Court openly recognized that it is for the national Court to decide if it is possible to apply national law in conformity with EU law, without imposing the horizontal application of the principle of non-discrimination[30]. The *Dominguez* decision represents, however, a step back in the process of the constitutionalisation of EU law through general principles that the Court has strongly upheld in the recent past, and which clearly represents the approach taken in *Dansk Industri*. The refusal of the Danish Supreme Court to follow the preliminary ruling of the Court of Justice is also a sign of the rejection of a pluralist approach towards European and national constitutional identities: it is not however sufficient to reduce the impact and the

principle, EU Law Analysis (2016), available at http://eulawanalysis.blogspot.it/2016/12/dialogue-or-disobedience-between.html (lastly visited 1 February 2018).

[27] Danish Supreme Court (DSC), judgment n. 15/2014, [2016], 40. An unofficial English translation is available at http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf (lastly visited 1 February 2018).

[28] CJEU, case C-399/09, *Marie Landtová* [2011]. On this point see generally O. Pollicino, *The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?*, 29 Yearbook Eur. L. 1 (2010), at 65.

[29] CJEU, case C-282/10, *Dominguez* [2012].

[30] *Ibid.,* para. 44.

importance of the decision of the Court in *Dansk Industri*. The authority of the decisions of the Court of Justice does not depend simply on the implementation at national level. Others national courts can equally apply the judgment and at the same time other private parties can rely on the principle of non-discrimination in front of national courts, provided that it is not possible to interpret national legislation according to EU law.

3. The German Constitutional Court and the OMT and PSPP programmes: shortcomings on the principle of conferred powers

3.1. The Gauweiler decision and the CJEU functional interpretation of the principle of conferred powers

The *Gauweiler*[31]case originated from a complaint brought to the Federal Constitutional Court of the German Republic by Peter Gauweiler, who was at the time of the action a German member of the Bundestag. This decision originates, as widely acknowledged, from the notorious OMT (Outright Monetary Transactions) programme. In particular, the question for preliminary ruling raised by the German Constitutional Court asks, in essence, the Court of Justice to assess the validity of the decisions of the Governing Council of the European Central Bank of 6 September 2012[32] in light of the interpretation of Articles 119 TFEU, 123 TFEU and 127 TFEU and of Articles 17 to 24 of Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank[33]. These decisions regulate a number of the technical features regarding the OMT in the secondary sovereign bond markets of the Eurozone, as a part of a wider strategy carried out by the Eurozone countries in order to react to the sovereign debt crisis that has affected some EU Member States since 2008. Briefly summarised, since 2012, the ECB has launched a programme to buy, under clearly defined circumstances, the sovereign bonds of EU Member States that have the Euro as a common currency. This

[31] CJEU, case C-62/14, *Gauweiler* [2015].

[32] European Central Bank, press release of 6 September 2012, available at https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (lastly visited 1 February 2018).

[33] Protocol (No 4) on the statute of the European System of Central Banks and of the European Central Bank, OJ 2012 C 326.

represented a major issue for those Member States[34]that have traditionally been opposed to "sharing the risk" of the sovereign debt of States who pay a lower rate interest on their placed sovereign debt compared to those Member States paying a considerably higher interest rate on their bonds.[35] One of the points which the judgment concerns is if the decisions taken by the Governing Board of the European Central Bank complies with the principle of conferred powers[36]. The above-mentioned principle is, according to the Court of Justice[37] as well as according to the referring Court[38], the basic source of the powers of the European Union; it is generally accepted that it is not possible to interpret the *acquis communautaire* in a way that is sensible to enlarge the powers conferred by the Treaties to the EU institutions[39]. The real picture

[34] *Exempli gratia,* see the ordoliberal school, majoritarian in Germany, according to which the EU institutions should not promote the "moral hazard" of inflation through the endorsement of the debt of less-fiscally disciplined States.

[35] See the statistics of the European Central Bank for long-term (10 years) government bonds from February 2016 onwards. Available at https://www.ecb.europa.eu/stats/financial_markets_and_interest_rates/long_term_interest_rates/html/index.en.html (lastly visited 1 February 2018).

[36] Article 4.1 and 5.1-2 TFEU.

[37] CJEU, *Gauweiler*, para. 41.

[38] According to an established case law of the German Constitutional Court (GCC), the transfer of sovereign power to supranational organizations should be clearly limited. I.e. GCC, Judgment of the Second Senate of 30 June 2009 2 BvE 2/08 para. 233-234 [Lisbon Urteil]: "The Basic Law does not authorise the German state bodies to transfer sovereign powers in such a way that their exercise can independently establish other competences for the European Union. It prohibits the transfer of competence to decide on its own competence (*Kompetenz-Kompetenz*)". See the comment by L.S. Rossi, *I principi enunciati dalla sentenza della Corte costituzionale tedesca sul Trattato di Lisbona: un'ipoteca sul futuro dell'integrazione europea?,* 92 Riv. Dir. Int. 4 (2009), at 454.

[39] The "quest for legitimacy" originated by the principle of conferral had a considerable impact on the development of the process of EU legal integration. It is enough to recall the provision of Article 51.2 of the Charter of Fundamental Rights of the EU, included in the text of the Charter in order to ensure that the latter "does not extend the field of application of Union law beyond the powers of the Union or establish any new power". The Agreement on the Accession of the European Union to the European Convention of Human Rights incurred such a fate, where the Court of Justice gave a negative Opinion (CJEU, Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014]) towards its compliance with the Treaties, *inter alia* on the ground that the powers of the EU institutions (and of the Court itself) were likely to be severely affected. Exploring a different field of

is, however, much more complicated. While it is true that the European Union and its Court of Justice have always strived to show deference towards the principle of conferred powers, the developments in the case law have showed at least a move towards an increasingly "functional" interpretation of the wording of the Treaties. The Court has relied on various instruments, as in the doctrine of *effet utile* and implied powers[40], in order to carve out of the literal meaning of the Treaties an interpretation that could be instrumental to the ultimate goal of the constitutional legal order of the European Union: the creation of an *ever-closer Union*. The *Gauweiler* case represents, to a certain extent, a reliable example of this functional interpretation. In order to pass the test of the principle of conferred powers, the institution involved should ensure that the act adopted falls within one of the different categories of competences that the States have conferred to the EU. In this case, being an act addressed to the acquisition of certain typologies of government bonds, the act should have been meant to fall within the exclusive competence of EU monetary policy[41] and not, as claimed by the applicants in the national proceeding, within the scope of economic policy[42]. In order to realize this objective, the Court of Justice, while never denying the being subject to the principle of conferred powers, interprets[43] the extent of monetary policy in order to ensure the effective protection of the interests of the Member States more affected by the economic crisis. This

EU law, the conferral originated the famous *Meroni* doctrine (CJEU, case 9/56, *Meroni v High Authority* [1957]) according to which the EU institutions cannot delegate to other bodies powers that go beyond the ones which were conferred to them by the Treaties.

[40] V. Skouris, *Effet utile Versus Legal Certainty,* cit. at 24.

[41] CJEU, *Gauweiler*, para. 42.

[42] It is widely known that while having an exclusive competence in monetary policy (Article 3 TFEU), the EU has only the power to coordinate (Article 5 TFEU) national economic policies. The boundaries between these two policies are however extremely fuzzy. See in this regard M. Waibel, *Monetary policy: an exclusive competence only by name?,* in S. Garben & I. Govaere (eds.), *The Division of Competences between the EU and the Member States Reflections on the Past, the Present and the Future* (2017).

[43] In this sense, one could speculate that the Court of Justice has operated a balance between the principle of conferred power and the principle of solidarity and loyal cooperation, which informs the relationship between the EU and the Member States as well as the Member States themselves.

interpretation is enabled thanks to the "fuzzy boundary"[44]that separates economic and monetary policy, and of which the Court of Justice attempts to take advantage[45]. The Court of Justice accordingly concluded that*: "[A] monetary policy measure cannot be treated as equivalent to an economic policy measure merely because it may have indirect effects on the stability of the euro area"*[46]*.* The last part of the decision, equally relevant from the point of view of the functional interpretation that ensures compliance with the principle of conferred powers, pertains to the evaluation of the compliance of the OMT programme with the provision of Article 123 TFEU[47]. This article forbids the provision of credit facilities by the European Central Bank to Member States (in order to exclude the possibility of the creation of EU bonds). Once more, the Court of Justice makes sure that the compliance with the principle of conferred powers is respected by explaining the conditions under which the European System of Central Banks (ESCB) can uphold outright monetary transactions: first, the operation should be limited only to the purchase of bonds already present in the market[48]; second, the ESCB should ensure that the measure does not have an "effect equivalent to that of a direct purchase of government bonds"[49]; third, that "*[T]he Governing Council is to be responsible for deciding on the scope, the start, the continuation and the suspension of the intervention on the secondary market envisaged by such a programme*".[50] The Court of Justice's interpretation leads to the conclusion that the overall measure is not capable of "*[L]essen[ing] the impetus of the Member States concerned to follow a sound budgetary policy*"[51].

3.2. The OMT judgment: identity review, ultra vires review and "openness to European integration"

The judgement of the Court of Justice was welcomed with a certain degree of scepticism in Germany, and it was unsure[52] if that

[44] M. Waibel, *Monetary* policy, cit. at 42, 8.
[45] CJEU, *Gauweiler*, paras 47-49.
[46] *Ibid.*, para. 52.
[47] Article 123 TFEU.
[48] CJEU, *Gauweiler*, para. 95.
[49] *Ibid.*, para. 97.
[50] *Ibid.*, para. 106.
[51] *Ibid.*, para. 129.
[52] See, specifically referring to the identity review, P. Faraguna, *Il Bundesverfassungsgericht e l'Unione Europea, tra principio di apertura e controlimiti*,

attitude would have led to an open rejection of the outright monetary transaction system. In any case, it appeared most likely that the German Constitutional Court would have chosen either to approve or to reject the OMT. The German Constitutional Court[53], however, made a third choice and decided not to declare the unconstitutionality of the OMT. The judgment of the German Constitutional Court represents a structured answer to the functional interpretation of the monetary policy, which belongs to what has been defined as the economic constitution[54] of the European Union and which in this capacity represents an important aspect of the constitutional legal order (and identity) of the EU[55]. This is perhaps the reason why the German Constitutional Court decided to detail an explanation of the theoretical differences between the two concepts. According to the German Constitutional Court, it is not enough to recall the principle of *Kompetenz-Kompetenz*[56] in order to justify the necessity to deviate from the project of European integration[57], but it is necessary to make reference to the concept of the German constitutional identity and to the use of the powers that are associated to it. The Karlsruhe Court points out that the two concepts against which the EU measure shall be assessed are strictly linked, since in the opinion of

DPCE 2 (2016), at 454. See also L.F. Pace, *The OMT Case: Institution Building in the Union and a (Failed) Nullification Crisis in the Process of European Integration*, in L. Daniele, P. Simone & R. Cisotta (eds.), *Democracy in the EMU in the Aftermath of the Crisis* (2017).

[53] GCC, Judgment of the Second Senate of 21 June 2016, 2 BvR 2728/13 [OMT judgment].

[54] On this concept see e.g. K. Touri & K. Touri, *The Eurozone Crisis* (2014), C. Joerges, *Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, 15 Ger. L.J. 5 (2015), at 987 and F. Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (2016). See also H. Hofmann, A. Pantazatou, *The transformation of the European Economic Constitution*, University of Luxembourg Law Working Paper Series, (2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564156## (lastly visited 1 February 2018).

[55] The concept of economic constitution is controversial and openly debatable. It resorts to Karlo Tuori concept of the "multiple constitutions" of Europe, as detailed in K. Tuori, *Multi-Dimensionality of European Constitutionalism: The many constitutions of Europe*, in K. Tuori (ed.) *The Many Constitutions of Europe* (2010). For a useful literature review on the point, see also H. Hofmann & A. Pantazatou, *The transformation of the European Economic Constitution,* cit. at 54.

[56] GCC, *OMT Judgment*, para 130.

[57] *Ibid.*, para 141.

the German Constitutional Court, the *ultra vires* review is a particular case of the application of the general protection of the constitutional identity, but one that should be treated independently from another[58].

The German Constitutional Court then details further the difference, linking *ultra vires* review to the use of the principle of conferred powers, while referring to the identity review as the ultimate limit that cannot be trespassed by the EU institutions.[59]

This latter sentence is of special value for the argument explained in this article, as it results that the protection of the national constitutional identity justifies an action against the European Union when it trespasses the competences conferred by the Member States; at the same time, the origin of the trespassing lies in the affirmation of the specific character of the EU legal order, as the German Constitutional Court also openly acknowledges[60]. The reason of the "restraint" of the Karlsruhe Court from digging further into the use of the principle of conferred powers lies in the principle of "openness to European Integration". This principle finds its roots in the more general principle of "openness to international law"[61]that represents the most visible inheritance of the neo-functionalist approach that was (and still is) imbibing European Constitutions in the aftermath of the Second World War. This principle is also (with others) supporting the reasoning of the German Constitutional Court in its case law and in particular in the *Maastricht* and *Lisbon* decisions where this principle is further detailed. In the *Lisbon Urteil*, the GCC openly recognized that there is a functional link between the Basic Law and the process of EU integration, and that accordingly the conflict between a constitutional provision and EU law should be interpreted in the light of this favourable approach[62]. In the *OMT* judgment the GCC

[58]*Ibid.*, para 153.
[59]*Ibid.*, para 153.
[60] GCC, *OMT Judgment*, para 154: "Both the ultra vires and the identity review – each constituting independent instruments of review – must be exercised with restraint and in a manner open to European integration".
[61] C. Lebeck, *National Constitutionalism, Openness to International Law and the Pragmatic Limits of European Integration – European Law in the German Constitutional Court from EEC to the PJCC*, 7 Ger. L.J. 11 (2006), at 908-909.
[62]GCC, *Lisbon Urteil*, para 225. "The Basic Law calls for European integration and an international peaceful order. Therefore, not only the principle of openness

confirms, in paragraph 154, the importance of the principle of "openness to European integration" and acknowledges that is part of the German constitutional identity in as much as the principle of conferred powers.

3.3 The (partial) acceptance of the functional interpretation of the Principle of conferral in the OMT judgment…

As has already been pointed out, the German Constitutional Court decided to uphold the decision of the Court of Justice in *Gauweiler*. This implied also the compliance of the judgment with the Basic Law and the acceptance of the conditions[63] underlined by the Court of Justice in order to ensure the compliance of the OMT programme with the Treaties. However, we should not think that this positive decision might represent, on the Karlsruhe side, a blank cheque acceptance of the system based on the "openness to European integration". The German Constitutional Court based its review of the OMT programme on the principle of conferred powers, seen either from the German perspective (*Kompetenz-kompetenz*) as well as from the EU perspective (Article 5 TEU). The restating of such a traditional element of the identity review confirms that, at the present time, an extensive interpretation of the Treaties is only limitedly possible in as much as "[*T]he finality of the European integration agenda may not lead to the de facto suspension of the principle of conferral*"[64]. This interpretation of the principle of conferral represents the most relevant challenge that the Court of Justice has to face in confronting the Karlsruhe review. Separately, it should be recognized that the German Constitutional Court acknowledges the jurisdiction of the Court of Justice and consequently accepts its interpretation[65], while at the same time highlighting that the German government and the *Bundestag* should ensure that the further implementation of the OMT programme complies with the conditions described by the CJEU.

towards international law, but also the principle of openness towards European law (Europarechtsfreundlichkeit) applies."

[63] GCC, *OMT Judgment*, paras 199 and 206.

[64] *Ibid.*, para 185.

[65] *Ibid.*, para 156.

3.4 …And in the new referral of the German Constitutional Court on the Public Sector Purchase Programme of the European Central Bank

A new chapter of this debate was inaugurated by the German Constitutional Court in mid-summer 2017. The Karlsruhe Court referred a question for preliminary ruling[66] to the Court of Justice of the European Union in order to ascertain if the Public Sector Purchase Programme (PSPP)[67] of the European Central Bank complies with the letter of the Treaties. The preliminary ruling, concerning the validity of the programme, asks the Court of Justice if the action of the European Central Bank complies with Article 5TEU (principle of conferral) and Article 123 TFEU (prohibition of monetary financing). In essence, the German Constitutional Court asks if the purchase of public sector securities conducted by the European Central Bank is a turnaround to avoid the application of Article 123 TFEU prohibition and consequently goes beyond the powers conferred to the EU by the Member States. The German Constitutional Court has also asked to the Court of Justice to treat the matter according to the expedited preliminary ruling procedure[68]. The Court of Justice, with an order of 18 October 2017[69], has refused the request, agreeing, however, to prioritize its treatment according to Article 50.3 of the Rule of Procedure. In its question for preliminary ruling, the German Constitutional Court expresses several doubts about the compatibility of the measure with the EU Treaty and affirms: "*[T]he resulting risks for the profit and loss account of the national central banks would amount to a violation of*

[66] GCC, order of 18 July 2017, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15. Translation in English not available. See the press release of 15 August 2017, available at http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-070.html

[67] The PSPP is a European Central Bank programme that is part of the larger Expanded Asset Purchase Programme (EAPP). Both programmes are ultimately part of the Quantitative Easing (QE). Through these various programmes, the European Central Banks is buying securities and bonds in the secondary market and is contributing to price stability in the Eurozone.

[68] Art. 105 of the Rule of Procedures of the Court of Justice of the European Union, OJ L 265 2012.

[69] CJEU, order of the president of the Court in case C-493/17, *Weiss* [2017].

the constitutional identity within the meaning of Art. 79(3) GG"[70]. The German Constitutional Court is, most likely, asking the Court of Justice to rule another OMT judgment, where the Luxembourg Court will detail the condition under which the purchases provided for by the PSPP are conducted according to the EU Treaties. In this case, it must be acknowledged, the German Constitutional Court accepts the dimension of the European dialogue between Constitutional Courts. At the same time, it does not withdraw from its identity review, making explicit that an answer different from a clear description of the conditions under which the European Central Bank can operate would not be deemed sufficient. The Court of Justice will surely need time to reflect on the correct way to address a similar challenge.

As a preliminary conclusion, it seems that the approach adopted by the German Constitutional Court in the *Gaweiler/OMT* judgment and in the reference for the preliminary ruling in the *Weiss/PSPP* judgment is similar: both judgments are expression of the *ultra vires* and identity review of the German Constitutional Court. However, contrary to the Danish Supreme Court judgment, they are not opposing to the coexistence of the pluralism of the national constitutions and of the attempt by the Court of Justice of the determination of the distinctive elements of the EU constitutional legal order. At the same time, the dimension of the challenge to the Court of Justice remains. The second judgment in particular requires a clear answer from the Court of Justice: an answer that can lead to the reinforcement of the functional interpretation of the principle of conferred powers as a distinctive element of the EU constitutional legal order that the Court of Justice has pronounced in *Gauweiler*.

4. The Italian Constitutional Court and the protection of the financial interests of the EU

Here, we move towards the analysis of the last decision: the request for preliminary ruling lodged by the Italian Constitutional Court on the interpretation of the seminal *Taricco* judgment. From an analysis of the question posed we can draw the conclusion that

[70] GCC, order of 18 July 2017, Para 131. Translation is courtesy of the press release of the German Constitutional Court.

the *Taricco II (M.A.S and M.B.)*[71]decision represents another occasion where the Court of Justice has been asked to rule on the conflict between a national constitutional value (the principle of legality) and a distinctive element of the EU constitutional legal order (the primacy of EU law).

4.1. *Taricco* hits back: the decision of the Court of Justice and the second preliminary ruling

The decision of the Court of Justice in *Taricco*[72] has raised a number of concerns and reactions although mainly within Italian legal scholarship.[73]The Court dealt with the criminal proceedings against an Italian national, who was held guilty, *inter alia*, for a fraud that was in principle likely to have an impact on the financial interests of the European Union. The field of the financial interests of the EU stands at a crossroads between European criminal, tax and constitutional law, and is a clear example of the trend of EU law towards an interdisciplinary approach. The importance of the case is linked to the fact that the Court of Justice decided, in order to ensure the effective protection[74] of the financial interests of the European Union, to interpret the national legislation about the limitation period associated to the conclusion of a criminal proceeding in order to avoid the crime being statutory-barred. In essence, what the Court of Justice has done is to affirm the procedural nature of the limitation period, rather than substantial as it is according to the case law of the Italian Constitutional Court[75], in order to confer on Article 325 TFEU direct effect and to disapply the national provision that was impeding the prosecution of the crime against the financial interests of the EU. The case eventually came to the attention of the Italian Constitutional

[71] CJEU, Case C-42/17, *M.A.S. and M.B.* [2017].
[72] CJEU, case C-105/14, *Taricco* [2015].
[73]See e.g. R. Mastroianni, *Supremazia del diritto dell'Unione e "controlimiti" costituzionali: alcune riflessioni a margine del caso Taricco*, Diritto penale contemporaneo, (2016); F. Viganò, *Il caso Taricco davanti alla Corte costituzionale: qualche riflessione sul merito delle questioni, e sulla reale posta in gioco*, in A. Bernardi (ed.), *I controlimiti. Primato delle norme europee e difesa dei principi costituzionali* (2017); E. Cannizzaro, *Sistemi concorrenti di tutela dei diritti fondamentali e controlimiti costituzionali*, in A. Bernardi (ed.), cit. at 61.
[74] Art. 325 TFEU.
[75] M. Bassini, *Prescrizione e principio di legalità nell'ordine costituzionale europeo. Note critiche a Taricco,* Consulta Online 96 (2016).

Court[76], which was asked, by the *Corte di Cassazione*, to rule on the compliance of the interpretation of the Court of Justice with the Italian Constitution. This judgment is the expression of a specific kind of review that, to a certain extent, is analogous to the identity review and the *ultra vires* review of the German Constitutional Court: the doctrine of counterlimits, in the wording of the Italian Constitutional Court[77]. In the case of the application of the counterlimits theory, the Italian Constitutional Court analyses either if the Court of Justice has exceeded the powers conferred by the Treaties and/or if the limit of the protection of the core of constitutional rights has been trespassed by the exercise of these powers.

4.2. The conditions for the application of direct effect to a Treaty provision

The question of the application of direct effect to Article 325 TFEU brings us to the core of EU law. According to a consistent case law of the Court of Justice[78], in order to be directly effective a provision of primary law should be sufficiently detailed, precise, and unconditional (not subjected to further implementation)[79].The Treaties provides the necessary coverage to justify the direct effect of primary EU law (in particular of directives, regulations and decisions)[80]. There is, however, a lack of provisions regulating the direct effect of the articles of the Treaties themselves. This is partly linked with the specific character of the Treaties, which, being clearly addressed to the States, should not be able in principle to confer to an individual certain rights that can be relied on in front of the national courts. On the other side, since the *Defrenne* case law[81], the Court of Justice has retained the right to determine if certain provisions of the Treaties meet the elements necessary to be

[76] Italian Constitutional Court (ICC), order n. 24/2017 of 23 November 2016.
[77] I.e. CJEU, case 183/73, *Frontini* [1973], para. 9.
[78] CJEU, case 26-62, *Van Gend en Loos* [1963].
[79] See P. Craig, *The Legal Effect of Directives: Policy Rules and Exceptions*, 34 Eur. L.R. 3 (2009), at 349.
[80] Art. 288 TFEU, paras 2-3-4.
[81] Where it was recognized the direct effect of Article 118 TEC, regulating the right of women and men to be paid equally. CJEU, case 43-75, *Defrenne v Sabena (II)* [1976].

applied directly, either vertically or horizontally[82]. The circumstances of this case differ from the ones usually related to the application of direct effect. In general, vertical direct effect is associated with directives, and the rule behind this utilisation is that directives cannot be used in order to impose obligations on individuals. The factual circumstances of *Taricco*, however, go to the detriment of the individuals concerned, in the sense that they force the State to prosecute a crime that was not, according to national legislation, meant to be prosecuted. The Court of Justice, relying on its exclusive jurisdiction on the conferral of direct effect to Treaties provisions, decided to apply Art. 325 TFEU although the Treaty provision was not intended to place a burden on the citizen but rather on the Member State[83]. It could be argued however that the primary concern of the Court of Justice is not simply the affirmation of direct effect, but rather an attempt to proceed towards the harmonisation of the general part of criminal law[84]. In this case, the decision of the Court in *Taricco* gains a different relevance and importance, as the objective of the harmonization of criminal law is as important as the rights of the individuals involved in the same proceeding. Again, as has been pointed out[85], another explanation can be found in the specific character of the application of direct effect: it is true and noticeable that the literal provision of the Treaties lacks the conditions necessary to be applied. At the same time, it is equally true that the obligation in Article 352 is detailed, precise and unconditional enough: it imposes on the Member States a requirement to reach the objective of the "efficient protection" of the financial interests of the EU. In the present case it looked quite evident that the Italian authorities were not able to ensure this objective.

---

[82] However, differently from *Dansk Industri*, the present case does not involve a controversy between two individuals. See *supra*, para. 2.

[83] Ensuring the "effective protection" of the financial interests of the European Union is, in fact, an obligation which should bear on the Member State. Otherwise, the principle of the legitimate expectations of the citizens of that Member State might be seriously undermined.

[84]See the comment of F. Rossi, *L'obbligo di disapplicazione in malam partem della normativa penale interna tra integrazione europea e controlimiti. La problematica sentenza Taricco della Corte di giustizia*, 17 Rivista Italiana di Diritto e Procedura Penale 1, (2016), at 373.

[85] See P. Faraguna, *Il caso Taricco, I controlimiti in tre dimensioni*, in A. Bernardi (ed.), *I controlimiti*, cit. at 72, 359.

4.3. Order n. 24/2017 and decision C-42/17: a particular case of dialogue between openness and resistance

In its question[86], the Italian Constitutional Court essentially asks the Court of Justice if the early decision of the Court of Justice in *Taricco* is to be applied as well if affects the constitutional identity[87] and the supreme principles of the Italian constitutional legal order[88]. As some scholars have pointed out[89], the overall style of the question of the Italian Constitutional Court is drafted as a meta-dialogue: the Italian judge, adopting a rather conciliatory approach[90], describes the necessity of a dialogue through a legal instrument that is typical of the dialogue between the Constitutional Courts. The Italian Constitutional Court asks the Court of Justice to interpret *Taricco* in a way that is compatible with the Italian constitutional legal order. However, behind this formal openness, it is clear that the Italian Constitutional Court is threatening to declare a restatement of the first *Taricco* decision as trespassing the limits of the powers conferred by the Treaties to the Court, and ultimately violating an essential element of the Italian

[86] Two interesting contributions explain (in English) why the Taricco order is especially important for the Italian and European legal order. See P. Faraguna, *The Italian Constitutional Court in re Taricco: "Gauweiler in the Roman Campagna"*, VerfBlog (2017) available at http://verfassungsblog.de/the-italian-constitutional-court-in-re-taricco-gauweiler-in-the-roman-campagna/ (lastly visited 1 February 2018). D. Tega, *Narrowing the Dialogue: The Italian Constitutional Court and the Court of Justice on the Prosecution of VAT Frauds*, ICONnect blog (2017), available at http://www.iconnectblog.com/2017/02/narrowing-the-dialogue-the-italian-constitutional-court-and-the-court-of-justice-on-the-prosecution-of-vat-frauds/ (lastly visited 1 February 2018).

[87] The Italian Constitutional Court uses the expression "constitutional identity" in as much as the German Constitutional Court uses the word "limits" to describe its identity review: this might be interpreted as a sign that the national Constitutional Courts are striving to find a consistent and uniform way to review the decisions of the Court of Justice. See para. 6 of the Order.

[88] Paras 10-11 of the Order.

[89] See L. Gradoni, *Il dialogo tra Corti, per finta*, Sidiblog (2017), available at http://www.sidiblog.org/2017/02/08/il-dialogo-tra-corti-per-finta-4/ (lastly visited 1 February 2018) and D. Gallo, *La primazia del primato sull'efficacia (diretta?) del diritto UE nella vicenda Taricco*, Sidiblog (2017), available at http://www.sidiblog.org/2017/02/25/la-primazia-del-primato-sullefficacia-diretta-del-diritto-ue-nella-vicenda-taricco/ (lastly visited 1 February 2018).

[90] It is worthy to recall that, contrary to what the German Constitutional Court and the Danish Court have done, the Italian Constitutional Court recognizes the primacy of EU law. See para. 6 of the Order.

constitutional identity. The Court of Justice, differently from the early Opinion of its Advocate General[91], decided to answer to this question in a way that attempts to strike a balance between a constitutional right and the primacy of EU law[92].

Instead of resorting to its case law on national constitutional identities (as in*Sayn Wittgenstein*[93]and in *Von Bogendorff*[94]), the Court openly recognizes that the application of EU law over national law is not without limits[95]. It does so through a twofold reference to EU and national law. In first place, the Court points out that the field of VAT fraud lies within the EU-Member States shared competences[96], and that, accordingly, the margin of discretion of the Member States depends on the level of harmonization at EU level[97]. Given that the EU rules on harmonization of VAT fraud were not in force at the moment of the initiation of the criminal proceeding, "*The Italian Republic was thus, at that time, free to provide that in its legal system those rules, like the rules on the definition of offences and the determination of penalties, form part of substantive criminal law*"[98]. The Court also recalls that the principle of legality is equally important for EU as well as for national law, since it is enshrined in Art. 49 of the Charter of Fundamental Rights of the EU as well as being part of the constitutional traditions common to the Member States[99]. With this sentence the Court avoids referring to the concept of constitutional "identity", resorting to the more

[91] The Opinion of AG Bot in *Taricco II*, released on 18 July 2017, takes a different stance. The Advocate General reaffirms the primacy of EU law, ultimately recalling the duty of the Italian Constitutional Court to answer to the national court in the sense of ordering to disapply the limitation period, thus violating the constitutional interpretation of the criminal law provision in Italian law. See Opinion of Advocate General Bot, case C-42/17, *M.A.S. and M.B.* [2017]. Since, however, Opinions of the Advocate Generals are not binding on the Court, this did not impede the different answer given by the Court of Justice.

[92] CJEU, Case C-42/17, *M.A.S. and M.B.* [2017] [*Taricco II*].

[93] CJEU, case C-208/09, *Sayn-Wittgenstein* [2011]. On *Sayn Wittgenstein* and the case law of the CJEU on national constitutional identities see the clear description provided by G. Di Federico, *Identifying national identities in the case law of the Court of Justice of the European Union*, 4 Dir. Un. Eur. (2014), at 769.

[94] CJEU, case C-438/14, *Von Wolffersdorff* [2016].

[95] CJEU, *Taricco II*, para. 41.

[96] Art. 4 (2) TFEU.

[97] CJEU, *Taricco II*, para. 43.

[98] *Ibid.*, para. 45.

[99] CJEU, *Taricco II*, paras 53-54.

relational and plural concept of "common constitutional traditions"[100]. Although the language of common constitutional traditions is less prone to conflict than the one of constitutional identity, it is undoubted that the Court of Justice is underlining the specific importance of the principle of legality in the EU and national legal orders. The Court of Justice, with this decision, tries to kill two birds with one stone. Instead of paving the way to a conflict between a constitutional right and a provision of the Treaties, the Court recognizes that, as a way of exception, the principle of legality, common to EU and Member States legal orders, might authorize the disapplication of a Treaty provision. Concurrently the Court of Justice demonstrates commitment to acknowledge the pluralism of the interpretations of rights and principles that are at the core of national constitutional identities.

5. Conclusion

Approaching the end of this work, a first conclusion might be that the different judgments analysed share a common approach: they are expression of the creative tension between the pluralism of the national constitutional identities and the emersion of an EU constitutional identity. In the end, the author resisted the temptation to label every single Constitutional Court with an adjective ("good", "bad" or "ugly"), which would have been ultimately either simplistic or unjust. The Italian, German and Danish judgments are at the same time troublesome and challenging, as seen from the perspective of the Court of Justice. Certain approaches might raise more doubt than others in the mind of an EU law scholar (see i.e. the Danish judgement) but this does not mean that they cannot be the object of a contextual interpretation. The Danish judgement, while representing perhaps the strongest rejection of a distinctive element of the EU constitutional legal order, as the direct effect of general principles, will challenge the Court of Justice to explain in a more convincing way (at least from the perspective of the national courts) its doctrine of direct effect. A similar remark can be made with reference to the

[100] F. Fabbrini & O. Pollicino, *Constitutional identity in Italy: European integration as the fulfilment of the Constitution*, EUI Department of Law Working Papers n. 6, (2017). On this point see also M. Cartabia, *Of bridges and walls: the "Italian style" of constitutional adjudication,* 8 Italian J. of Pub. L. 1 (2016).

Taricco II judgment, where the Italian Constitutional Court asked the Court of Justice to clarify its previous *Taricco* case law. The tension occurring is accordingly a by-product of the process of constitutionalisation of the EU legal order. The good news is that no one among the different Courts is openly opposing the elements of the EU constitutional identity[101].The bad news is that, as showed in the *Taricco II* decision, there might be little space for further clarification from the Court of Justice since concerns of another *ultra vires* declaration from another national constitutional court are high. In this sense, the solution might be threefold. First, the time is come for the Court of Justice to provide a stronger theoretical background on the value and the meaning of the distinctive elements of the EU constitutional legal order. A first occasion has been the *Taricco II* decision, where the Court of Justice, albeit not referring openly to Art. 4 (2) of the TEU[102], has however recalled that the EU and Member States share common constitutional traditions that can ultimately cause the disapplication of a Treaty provision. Second, the Court of Justice might consider developing further the *Gauweiler* functional interpretation of the principle of conferred powers (and in this case the occasion might be provided for by the pending *PSPP* judgment), another distinctive element of the EU constitutional legal order. Third, the Court of Justice of the EU should recall that, contrary to the national constitutional courts, it does not enjoy the possibility of upholding a "reverse preliminary ruling"[103] and that its exposure to the review of its national counterparts is permanent. This should suggestthat the Court of

[101] It is also interesting to note that even the German Constitutional Court, which consistently stated in its case law that a further transfer of competences to the European Union is not admissible under the German Constitution (*Kompetenz-kompetenz*) without a formal revision of the Treaties, has recognized in the *OMT* judgment that the "principle of the openness to European Integration" embodied in the German Constitution might, under certain conditions, allow also for the approval of a measure which reflects a functional interpretation of the principle of conferred powers.

[102] As it was suggested by L.S. Rossi, How Could the ECJ Escape from the Taricco Quagmire?, *VerfBlog* (2017), available at http://verfassungsblog.de/how-could-the-ecj-escape-from-the-taricco-quagmire/ (lastly visited 1 February 2018) where the author proposes an operative part for the judgment of the Court of Justice in *Taricco II*.

[103] This solution would require a modification of the Treaties. At the same time, it would not be welcomed by the Court itself as an acceptable solution, since it is likely to affect the autonomy of the institution.

Justice adopt the particularly cautious approach of the *Taricco II* decision, taking into account the fact that most of the national constitutional rights are also fundamental rights at EU level. While this does not go as far as to the Europeanisation of counterlimits suggested by certain authors[104], it is however the formal recognition that the Court of Justice can tolerate a violation of one of the elements on which the EU legal order is based if it is justified by the exigency to protect a fundamental right that belongs to the common constitutional traditions of the EU and its Member States. Overall, the tension between pluralism and unity described in these judgments leads the interpreter into an unknown dimension. Unless the Court of Justice further clarifies on the meaning of the distinctive elements of the EU constitutional legal order, the atmosphere will continue to recall the surrealist ambiance of Sergio Leone's cinema: the main characters will keep on staring at each other, waiting for the Court of Justice to make the first move.

[104] See A. Bernardi, *I controlimiti al diritto dell'Unione ed il loro discusso ruolo in ambito penale*, in A. Bernardi (ed.), cit. at 72.