# A Report on the Hindrances Between Community Law and Criminal Law: Neutralisation and Obligation of Incrimination*

Stefano Manacorda**

## A. Preliminary Observations: the Focus of the Italian Doctrine on the Influences Between Community Law and Internal Penal Law

Some years ago, one would have scarcely imagined that Community issues could have had such a success among criminal law experts, as has recently been registered in Italy. Having abandoned the reservations about European themes which have marked this field for more than thirty years, a few important exceptions notwithstanding,[1] the doctrine showed renewed interest by contributions that are widely varied in their approach and in their level of depth, most frequently characterized by very detailed and original arguments as well as by a deep understanding of Community themes. This renaissance of scientific debate, in spite of the intervention not only of previous experts in the field of EU criminal law but also of some of the most recognized criminal lawyers, owes a lot to numerous young researchers, sensitive to new legal dimensions and at the same time continuing to respect classic categories.

The focus of the doctrine has taken essentially two directions. Recently, it has focused on the creation of increasingly closer forms of integration between the European penal systems – the emphasis being on cooperation or with the prospect of unification. Recent projects will not be discussed here: Therefore, diverse

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** Professor of Criminal Law, Seconda Università di Napoli; Visiting Professor, Université Paris I Panthéon-Sorbonne.

1 C. P. C. Pedrazzi, *Il riavvicinamento delle legislazioni penali nazionali nell'ambito della Comunità economica europea*, 1967 Indice penale, 335; F. Bricola, *Alcune osservazioni in materia di tutela penale degli interessi delle Comunità europee*, 1968 *Indice penale*, 5 *et seq.*, as well as the book *Prospettive per un diritto penale europeo* (1968), with contributions by G. Bettiol, *Sull'unificazione del diritto penale europeo*, 1 *et seq.*; A. Baratta, *Contro il metodo della giurisprudenza concettuale nello studio del diritto penale comunitario*, 19 *et seq.*; P. Nuvolone, *Relazione di sintesi*, 511 *et seq.*; H. H. Jescheck, *Lo stato attuale del diritto penale europeo*, 321 *et seq*.

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forms of mutual understanding, most notably the European Arrest Warrant, which has already been the subject of lively discussions concerning doctrine,[2] important decisions of internal constitutional Courts[3] and is currently scrutinized by the Court of Justice itself,[4] will be excluded from our consideration. Nor do our reflections lean toward fitting within the framework of problems linked to plans to create unified micro-sectors of law and of penal procedure directly applicable from Community sources,[5] plans which should have been solidified in the constitutional Treaty in articles III-271 and following articles.[6] These aspects

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[2] For examples from the extensive literature on the question *see, e.g*., G. Vassalli & V. Caianiello, *Parere sulla proposta di decisione-quadro sul mandato di arresto europeo*, 2002 Cass. pen., 462 *et seq*.; G. Vassalli, *Mandato d'arresto e principio di uguaglianza*, 2002 Il Giusto processo, 131 *et seq*.; M. Del Tufo, *Il rifiuto della consegna motivato da esigenze di diritto sostanziale*, *in* G. Pansini & A. Scalfati (Eds.), Il Mandato di arresto europeo (2005), 137 *et seq*. Specifically regarding the situation in Germany *see* B. Schünemann, *Der Europäische Haftbefehl und der EU-Verfassungsentwurf auf schiefer Ebene – Die Schranken des Grundgesetzes*, 2003 Zeitschrift für Rechtspolitik, 185 *et seq*.; B. Schünemann, *Die parlamentarische Gesetzgebung als Lakai von Brüssel? Zum Entwurf des Europäischen Haftbefehlsgesetzes*, 2003 StV, 531 *et seq*.; some references can also be found *in* B. Schünemann, *Fortschritte und Fehltritte in der Strafrechtspflege der EU*, 2004 Goltdammer's Archiv, 202 *et seq*. *See also* F. Tulkens, *La reconnaissance mutuelle des décisions sentencielles. Enjeux et perspectives*, *in* G. de Kerchove & A. Weyembergh (Eds.), La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne (2001), 171 *et seq*. Finally, for a comprehensive analysis of the discussion, please *see* S. Manacorda, *Le mandat d'arrêt européen et l'harmonisation substantielle: le rapprochement des incriminations*, *in* G. Giudicelli & S. Manacorda (Eds.), L'intégration pénale indirecte. Interactions entre droit pénal et coopération judiciaire au sein de l'Union européenne (2005), 127 *et seq*.

[3] As for the German Constitutional Court (Bundesverfassungsgericht), after an early decision (BVerfG, 2 BvR 2236/04 of 24 November 2004), followed an oral hearing on 13 and 14 April 2005, and most recently a decision (BVerfG, 2 BvR 2236/04 of 18 July 2005) declaring the transformation act (Gesetz zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren den Mitgliedstaaten der Europäischen Union) to be incompatible with Articles 16(2) and 19(4) of the German Basic Law. For a doctrinal perspective *see* J. Vogel, *Europäischer Haftbefehl und deutsches Verfassungsrecht*, 2005 Juristen Zeitung, 801 *et seq*. By contrast, the Belgian *Cour d'arbitrage*, by decision no. 124/2005 of 13 July 2005, sent a preliminary reference to the European Court of Justice (*see* the subsequent footnote). *See also* decision no. 1/05 of the Polish Constitutional Court, and corresponding observations by J. Sawicki, *Incostituzionale ma efficace: il mandato di arresto europeo e la Costituzione polacca*, at http://www.associazionedeicostituzionalisti.it/cronache/estero/arresto_polonia/.

[4] Prejudicial question presented by the *Arbitragehof*, by judgement on 13 July 2005, in the case v.z.w. Advocaten voor de Wereld *v*. Ministerraad, case C-303/05, JOCE, 2005/C 271/26.

[5] Strong criticism has been voiced in Germany against the project of a sectorial unification of criminal law as attempted in the Corpus Juris. *See*, in particular, S. Braum, Europäische Strafgesetzlichkeit (2003), and W. Hassemer, *Corpus Juris – Auf dem Weg zu einem europäischen Strafrecht?*, 1999 KritV, 133 *et seq*. In Italy, this debate was promptly picked up, both in terms of its substance and of its criticism, for example by A. Baratta, *Il Corpus Juris e la cultura giuridico-penale europea*, *in* S. Moccia, Ambito e prospettive di uno spazio giuridico-penale europeo (2004), p. 25 *et seq*.; S. Moccia, La politica criminale del Corpus Juris: dal Corpus Juris al diritto penale europeo? 43 *et seq*. (2004); and T. Padovani, Le sanzioni nel Corpus Juris 65 *et seq*. (2004).

[6] In the European Constitution, relative to criminal law, *cf.*, for a reconstruction of the ensemble, T. Weigend, *Der Entwurf einer Europäischen Verfassung und das Strafrecht*, 2004 Zeitschrift für die gesamte Strafrechtwissenschaft, 275 *et seq*.; for critical remarks *see* W. Hassemer, *Strafrecht in einem europäischen Verfassungsvertrag*, *ivi*, 304 *et seq*; and in general A. Bernardi, *Europeizzazione*

will not be considered here, except to show, in passing, the difficulties of the Community construction specifically with regard to penal procedures or, from a different point of view, a mistrust by the doctrine – which can be shared out to a certain degree[7] – concerning perspectives of 'strong integration' on a European level.[8]

These elements set the stage on which the questions will be addressed, relative to classic modalities – if I may be permitted to use this expression, in as much as they are now incorporated in the manuals – of interference between Community doctrines *stricto sensu* and national/internal penal standards. Within this framework, the following observations target the older but also more complex mechanism of interrelation. This mechanism is derived from the conflict between the Community parameters and the domestic penal provisions. This mechanism will be verified, in the first part of this article with regard to the Community principle,[9] The conflict is resolved by putting aside the incrimination – most often due to the disappearance of the illicit character of the incriminating act – creating a new expansion of individual liberties

As a result of the phenomenon of non-application of criminal law provisions which clash with Community law, cases of neutralization in *malam partem* have been recently observed. The problem concerns, generally speaking, the potential conflict between national criminal law standards and Community law standards potentially generating unfavorable effects for the party for whom the rule was intended. This problem could arise from a decision of a judge on the basis of non-application of incrimination or from a declaration of unconstitutionality, possibly accompanied by a decision of the Court of Justice in a preliminary ruling. These cases entail – in contrast with the traditional paradigm – a *constriction* of individual freedoms. It is, therefore, necessary to analyze them from the criminal law point of view, boosting the typology of the links of mutual influence between legal rules, the role of constitutional principles as limits on restrictions imposed by Community law on national legislators[10] and the potential interpretative solutions offered in their field. It is, nevertheless, useful to note that this is a domain where distinctions between disciplines are not clear and where, on the contrary – thanks

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*del diritto penale e progetto di Costituzione europea*, 2004 Dir. pen. proc., 5 *et seq*. *See* our studies *L'intégration en matière pénale of the traité d'Amsterdam au projet de Constitution*, 2003 Revue de science criminelle, 889 *et seq*. and *Los extrechos caminos de un derecho penal of Unión Europea. Problemas y perspectivas de una competencia penal "directa" en el Proyecto de Tratado Constituciónal*, 2004 Criminalia, 208 *et seq*.

7 Most recently, *Introduction*, *in* G. Giudicelli-Delage & S. Manacorda (Eds.), L'intégration pénale indirecte, Interactions entre droit pénal et coopération judiciaire au sein de l'Union européenne (2005), p. 21 *et seq*.

8 *Cf*. Now also M. Delmas-Marty, Les forces imaginanes du droit (II). Le pluralisme ordonné 155 *et seq*. (2006).

9 Among the first authors having reported this data, *see* F. Mucciarelli, *Osservazioni in tema di immediata applicabilità delle direttive comunitarie in materia penale*, 1982 Riv. It. Dir. Proc. Pen., 402 *et seq*.

10 Better, as counter-limits and notably: legality and non-retroactivity, retroactivity of less severe criminal statutes, necessity that the charge protects a Rechtsgut (harm principle), conscience of the illicit nature of the act.

to its intrinsic interdisciplinary character – a dialogue between experts in different branches of law becomes necessary, thus renewing a tradition of exchanges of ideas.

## B. Neutralization by the Effect of the Community Non-Discrimination Principle and Excuses

### 1. Principle of Equality and Principle of Non-Discrimination Between Community Law and Constitutional Law. Effect of Neutralization on Sanction and Incrimination

Non-discrimination can be defined as the essential core of the principle of equality, encapsulated in the banning of all discrimination based on purely subjective criteria[11] (*ratione subiecti*). Therefore, it can be considered as a foundation (prohibition sanctioned by criminal law of all discriminatory behavior based on race, for example) and as a limit (banning of all criminal discrimination between individuals of different sex) of the repressive power of the state.[12] I will try to develop these two aspects by examining the bases of the principle so that I can determine the criminal law angle.

With regard to its constitutional foundation, the principle can be immediately inferred from article 3 al.1 of the Italian Constitution, because it constitutes a subgroup of the traditional principle of equality, defining itself by the repeal of subjective criteria of sex, language, religion, and political opinion.[13] On the Community level non-discrimination was historically the first to affirm itself. In the original version of the treaties of the 1950s, it was only designed for the creation of a common market and was limited to prohibiting discriminatory acts based on nationality, notably with regard to the free trade of goods.[14] It is only as a result of the development, first of Community law then of the Union, that the principle has progressively emancipated itself from its exclusively economic character, thanks to new references in ECJ case law to the more general concept

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[11] A. Cerri, *Uguaglianza (Principio costituzionale di)*, 1994 EGT, 3 *et seq*.; A. Cerri, *Ragionevolezza*, 1994 EGT, 14 *et seq*.

[12] In general *cf*. V. Militello, *I diritti fondamentali fra limite e legittimazione di una tutela penale europea*, 2004 Ragion pratica, 139 *et seq*.

[13] F. Ghera, Il principio di eguaglianza nella Costituzione italiana e nel diritto comunitario 35 *et seq*. (2003) which underlines on the other hand the different nature of distinctions based on personal and social conditions. On the plurality of readings of article 3 Const. we refer to the famous theses of C. Esposito, *Eguaglianza e giustizia nell'article 3 della Costituzione*, *in* La Costituzione italiana. Saggi (1954); C. Mortati, Istituzioni di diritto pubblico (1976); L. Paladin, Il principio costituzionale di eguaglianza (1965). On the Community level *cf*. R. Hernu, Principe d'égalité and principe de non-discrimination dans la jurisprudence de la Cour de Justice des Communautées européennes (2003) notably 42 *et seq*.

[14] Now in article I2 TCE: "Within the scope of the Constitution, and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited."

of equality[15] and to its subsequent larger consecration within article 13 TCE upon the adoption of the Amsterdam Treaty.[16] As for the Charter of Fundamental Rights of the European Union, whose third title refers to equality in its different declinations and as for the arrangements in the Constitutional Treaty, it seems useless to mention them because, in spite of their radically innovative nature acknowledging to the principle of non discrimination the position of a fundamental right of the individual, neither text has any legal impact due to the nature of the Charter's simple program and because of the obstacles encountered by the text at the ratification stage. In spite of this undeniable evolution, it is useful to stress that non discrimination is still today strongly marked by this *market related approach,* which makes up the main element of non-discrimination and the most evident structural and axiological limit.[17]

With regard to the principle of non discrimination, just schematically described, its connection to the basic standards of criminal law does not present, at first glance, a single particularity with regard to the traditional issue of the relationship between domestic sources and Community sources, and seems to insert itself into the framework of neutralization. Community non-discrimination seems in effect to exert an intrinsic coercive force upon the action of the legislator. It has effectively been at the origin of a very large number of court rulings, having engendered the disappearance or the restriction of the internal repressive arrangement – this last aspect being one that we will be further explored in this article. It has in fact produced much more important effects on the criminal law in the Member States (at least in the sectors related to the *lato sensu* economic domain) than the principle of equality or the broader version of the '*ragionevolezza*'.[18]

Not discussed here are the problems related to the *expansion*, in other words to the extension of the domain of repression by the effect of the obligations of

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[15] Then established in the texts: article 3, al. 2 TCE: "2. In all the activities referred to in this Article, the Community shall aim to eliminate the inequalities, and to promote equality, between men and women."

[16] Article 13 TCE:

> 1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
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> 2. By way of derogation from paragraph 1, when the Counclil adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.

[17] In one sense partially different Hernu, *supra* note 13, 78 *et seq.*.

[18] On this principle *cf.* Cerri, *supra* note 11. On the internal level the judgements of inconstitutionality based on the *ragionevolezza* were rendered, for example, in cases where the legislator had arbitrarily presented identical incriminations to different sanctions (*cf.* notably the judgements n. 102 of 1985 and n. 341 of 1994), or in situations where he had foreseen the same punishment for the infraction actually committed and for the same attempted infraction (*see for example* the judgement n. 26 of 1979).

incrimination, which in the systems of romano-germanic tradition always come about via the intermediary of the legislative filter.[19] In this context, the principle of non discrimination could well serve as a criterion for the criminal-political orientation of a process of progressive broadening of criminal law, aiming to guarantee equal treatment of individuals occupying equal positions (equal dignity of races, equal treatment of the sexes) by way of the creation of varied incriminations, imposing sanctions on behaviours which harm this equality of individuals. These aspects of *extension* will not be taken into account in our discussion, even though they clearly fall within the jurisdiction of the standards of reference of the Union (for example, the case of xenophobic behaviour), i.e. the Italian version of such legislation. The breadth of problems related to this expansion effect, as much from the point of view of the opportunity of content of choices of incrimination (choices of values to protect, sanctions and criminal political priorities) as from that of their formal legitimacy (with regard to activity which is essentially confined to unnamed authorities of necessary democratic legitimacy) would merit being deepened well beyond what the scope of this article allows. The preferred approach, in consideration equally of the nature of this study exploring a terrain hardly charted by criminal science, is centered on a series of cases pulled from sectors where Community law intervenes as *tertium comparationis*. We will then be led to distinguish between the prohibition of discrimination because of nationality, original form and the 'core' of the principle on the European level, and other forms of non-discrimination such as gender issues and racial discrimination.

## 2. Non-Discrimination Based on Nationality and Free Movement of Goods: the *Grilli* Case. The Safeguard Clauses for Public Order

According to the original version of Article 6 TCE, repeated in the text of the current article 12 TCE, "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." This ban applies to the four fundamental freedoms instituted by the treaty; in keeping with the spirit of the founding market, it therefore excluded from the beginning any potential discrimination against goods coming from other Member States (articles 28 and 29 TCE, relative to the quantitative and qualitative importation restrictions).

According to the first and broader interpretation, the implementation of the principle should have implied the non-application of domestic provisions and the exclusive recourse to the foreigner's right, in keeping with the principle of 'national treatment', to subject any foreign product to the same rules in its country of origin and elsewhere. Thus, for example, Italy should have consented to the status of chemical solvents imported into its territory in other Member States with reference to labeling and other provisions as in the State of origin. Another more sensible interpretation of the principle of non-discrimination was

[19] *Cf.* our study *L'efficacia espansiva del dritto comunitario sul diritto penale*, IV Foro Italiano, 55 *et seq*. (1995).

finally implemented, based on 'reconnaissance mutuelle', aiming to assimilate foreign goods into internal goods and banning them from being subjected to a non-homogenous treatment (equally) from a criminal law point of view. Thus, Community law obliges Italy to apply the same labeling standards to domestic and Community chemical products.[20]

Even in its narrow meaning, the Community principle of non discrimination has exerted a remarkable influence on domestic legal systems, frequently implying the neutralisation of complementary criminal law provisions. The example of a recent judgement of the ECJ, taken in application of a traditional interpretation, uniquely and clearly illustrates this issue. It relates to the *Grilli* case, which concerns parallel import in Italy of cars coming from the internal Community market. This case can be briefly summarized in the following terms:[21] Mr. Grilli, after having purchased a car in Germany near a used car lot established in Hamburg, was returning to Italy driving the car he had just bought. The car carried a temporary license plate issued by the Italian administrative authorities. Just before the Austrian border German police performed an inspection of Mr. Grilli's vehicle. The authorities found abusive use of the licence plate and imposed a fine. During the hearing of the appeal against this decision, the *Bayerisches Oberstes Landesgericht* made a preliminary ruling request to the ECJ in orer to establish whether the relevant German provisions constitute an illegitimate obstacle to the free trade of goods. The ECJ first reaffirmed its solid jurisprudence by virtue of which article 29 TCE "targets national measures which have for a goal or for effect to restrain specifically the channels of exportation and to establish thus a difference in the treatment between domestic commerce of a member State and its exportation commerce, in such a manner as to assure a particular advantage for national production or domestic market of the interested State, to the detriment of the production or of the commerce of other Member States." One can deduce from this that it is prohibited to introduce or to maintain in the domestic system "the only national measures predicting a difference in the treatment between the products destined for exportation and those which are set for sale within the member State concerned." Consequently, and interestingly for the purposes of this paper, "article 29 CE goes against situations in which a member State's regulation prohibits a foreign citizen from another member State, under threat of penal sanctions such as a threat of imprisonment or a fine, to transport into this member State a vehicle purchased in the first member State, upon which would be attached provisory license plates issued, in view of the exportation of the vehicle toward the destination member State, issued by qualified authorities of this State, if this regulation is designed to restrain the flow of exportation, it creates a difference in treatment between the domestic commerce of a State and its exterior commerce, is at the root of an advantage for domestic commerce and the detriment of that of another member State."

The first lesson we can therefore learn from this with regard to the links between non-discrimination and freedom of movement of goods is that, according

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[20] On this problem *cf*. Ghera, *supra* note 13, 97 *et seq*.

[21] Court of Justice, 2 October 2003, C-12/02.

to the previously described format, the incrimination has to *ceder le pas* each time its application risks influencing negatively the intracommunity flow of goods. Technically the incrimination wouldn't have to be repealed by the legislator except in case of absolute incompatibility with the Community principle, which is very rare. More often the provision will not be applied by the domestic judge, called to make a delicate judgement on the balance between opposing interests. In effect this mechanism of neutral appearance finishes by touching the balance of values protected by criminal law standards: in imposing, according to the case, either a real obligation of decriminalisation at the suspicion of the legislator or, more often, relaxes the charge because the infraction is not legally built up, the neutralisation steals from the criminal field of interest or of modalities of aggression which according to the legislator warrant protection. This aspect seems to underline, since the penal arrangement will have to retreat before a principle of non-discrimination of essentially economic value, whereas the standard of incrimination is frequently finalised for the protection of important values or at least comparable to non-discrimination taken in this restrictive sense. The inevitability of the mechanism of neutralisation, thanks to the hierarchical position occupied by the Community principle, is therefore susceptible to engendering dystonies in the domestic systems and merits making the object of an attentive analysis. It is suitable to put this problem aside for the moment, reviewing the conclusions from the first part, in which we will evaluate the situation of this complex legal framework, to evaluate the impact and to propose an adequate interpretation.

For the moment it suffices to clarify that this difficult equilibrium, as well as the necessity to safeguard the opposing interests, seems to have been taken into account by the Community Treaty, because, by virtue of this, the principle of non-discrimination between goods according to its nationality has no absolute value and is limited by the safeguard clauses of the public order. According to article 30 TCE, in effect, "The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property." Admitting this exemption, which is also agreed to with regard to the other freedoms of trade, even with some restrictions, the ECJ reserves the right to exercise a rigorous control aiming to avoid having the national standard constitute "a means of arbitrary discrimination" or a "a disguised restriction on trade between Member States."

Specifically regarding criminal law, after having excluded what one could invoke – like certain Member States claimed at the beginning – the only criminal nature of the standard neutralised to avoid non application, the ECJ adopted a very vigilant attitude. Whereas judgements rejecting this exception are numerous,[22] decisions keeping the possibility to justify the discriminatory effect of internal

[22] Among the most recent decisions, *see* the judgement of the Grande Chambre of 31 May 2005 in the *Hanner* case relating to pharmaceutical commerce in Austria, where there is a monopoly of a company entrusted to be responsible for managing a service of general economic interest; it was established that: "Article 31, paragraph 1, CE is opposed to a regime expecting an exclusive right

(domestic) incrimination by the presence of opposing interests as predicted by the public order clauses are rare. Among these one finds, for example, the *Läära* case,[23] relating to the monopoly of the management of public slot machines in Finland, in which the Court decided that "the provisions of the treaty relative to the free trade of services are not in conflict with a national law which allows one soul public organization the exclusive rights to the operation and management of coin-operated machines, in that Finnish legislation includes objectives of general interest that justify such rights."

Next, an interesting series of decisions concerning the controlled origin designation of Italian food products: with regard to these, it has been established that "the act of subordinating the use of the protected origin designation 'Prosciutto di Parma' for commercialized sliced ham on the condition that the operations of slicing and wrapping be carried out in the region of production, creates an effect equivalent to a quantitative restriction on the exportation as defined in article 29CE, but may be considered justified, and, assuming that, may be considered compatible with this provision."[24]

In the context of stability of values, the decision of 14 October 2004 in the *Omega* case, while not touching the field of criminal law, is very significant. The *Omega* case concerned a simulation laser gun game played out at a special laser gun range in Germany using equipment lawfully made by a British company. The location housed a laser tag range, which included notably laser guns with guided sights similar to those on assault rifles, as well as laser beam 'catchers' installed in the firing halls and on the vests worn by the players. The goal of the simulation was to 'play to kill'[25] and the German police deemed that it contradicted German constitutional provisions concerning human dignity since it simulated acts of homicide and trivilised violence. The British company that provided the equipment argued that forbiding the game breached its freedom to provide services. On this point, the Court, seized by the Federal Administrative Tribunal on the occasion of the appeal against the sanction imposed on the managing company, established that Community law is not in opposition to the fact that an economic activity consisting of the commercial management of games of simulated acts of homicides makes the object of a national tone of prohibition of such games adopted for motives of protection of the public order because of the fact that this activity negatively impacts human dignity.

Definitely, non-discrimination in the sector of the free movement of goods results, therefore, directly from the logic of the market underlying the construction of the Community since its birth. These undeniable effects of neutralisation must, therefore, be carefully measured in relation to the values protecting from repressive initiatives. Within this framework, the hypotheses in which the ECJ

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to the retail sales of prepared household goods according to the modalities which characterize the regime."

[23] Court of Justice, 21 September 1999, C-124/97, *Läärä*.

[24] Court of Justice, 20 May 2003, C-108/01, *Consorzio del Prosciutto di Parma*.

[25] Court of Justice (Première Section), 14 October 2004, C-36/02, *Omega Spielhallen- und Automatenaufstellungs GmbH*.

acknowledges to the national legislator the ability to sustain oneself with respect to the non-discrimination favoring internal projects are very limited and they seem rather marginal with respect to the axiological dimension.

## 3. Non-Discrimination Based on Nationality and Free Movement of Persons: the *Calfa* Case. The Question of Citizens of Third States

The mechanism of neutralisation, resulting from the prohibition of discriminatory measures, spreads over the ensemble of freedoms of movement outlined by the Treaty, whether they are related to services, capital, or persons. Also, one can observe in these domains problems which are analogous to those which were just highlighted.

Concerning the free movement of persons, the problems capable of interesting Criminal Law are well illustrated by the judgement made by the Court of Justice on 19 January 1999 in the *Calfa* case.[26] The preliminary ruling was raised within the framework of a criminal process opened against Mrs. Calfa, an Italian citizen accused of possession and use of narcotics while on a vacation in Crete, who had been prosecuted for her crime and sentenced to three months in prison as well as the additional punishment of expulsion in perpetuity from the Greek territory. Following the judgement in the Court of Appeal against the original judgement, Mrs. Calfa asserted the contrast between this punishment and the provisions of the Treaty relating to European citizenship (articles 8 and 8A TCE) and to the free benefit of services (article 59 TCE), the expulsion in perpetuity not according to the evidence being applicable to Greek immigrants. The controversial provisions, incidentally, inspired the judge to hand down the sentence in question, unless it did not consist of serious motives, notably of familial order, justifying the permanence in the country.

The Court of Justice considered that this automatic sentencing following a criminal conviction, and neither taking into consideration the personal behaviour of the perpetrator of the crime nor of the danger that it represents for the public order, does not conform to Community Law. The punishment in question was at the same time discriminatory and ill proportioned and its dismissal was required.

One can additionally note that if, in its judgement, the Court is equally leaning to the exception of the public order, which could have abstractly legitimized a derogation on the principle of non-discrimination, it is to exclude from it the validity in this particular case: "the conditions for application of the exception of the public order […] are not met and […] the exception of the public order cannot be practically invoked to justify a restriction on the free trade of services to the point that would result in principal cause regulation."

A new aspect that one doesn't see appear in the discussion of the free movement of goods seems notably to pose a problem. The equality of penal treatment among citizens of the Member State where the infraction was committed and citizens of other Member States, neutralizing the penal standard (in this specific case the additional automatic punishment of expulsion in perpetuity) legitimizes

[26] Court of Justice, 19 January 1999, C-348/96.

the permanence of a radical distinction between Community citizens and non-Community citizens. So a citizen of a Third Country would not be guaranteed the right to the same treatment under the law, and in a case like the one concerning Mrs. Calfa, proportionality and non-discrimination will not be applied in her favor.[27]

Finally, the economic nature of this freedom, originally conceived as free movement of workers in Europe, and not for everyone in as much as it does not lend itself to what constitutes a universally applicable fundamental individual right. It is impossible to hide the simply unsatisfactory nature – even though technically it conforms to the Treaties – of this scope of non-discrimination which, again, reveals its original, and never completely outdated, spirit of marketing matrix.

## 4. Non-Discrimination According to Nationality and Free Trade of Services: the *Aubertin* Case. Reverse Discrimination.

The free movement of services recognized by the EC Treaty seems to pose fewer problems. With regard to the effect of neutralization it is without a doubt like the other freedom in the treaties, susceptible to the engendering of the suppression of all discrimination resulting from a penal standard of incrimination which would constitute an obstacle to the free establishment of services in another Member State. It is in this perspective that we should read, for example, the major disagreement concerning the exercise of liberal professions which has come before the ECJ, as a result of the resistance of certain Member States to admit that foreign nationals can, within the national territory, practice a profession for which they only have foreign credentials. Among the leading cases in this category, we should remember the two *Auer* judgements of 1979[28] and 1983[29] – known by Community Law experts essentially in terms of effects of Directives transposed by means of a law of adaptation not conforming to Community standards – on the heels of which France finally had to admit free practice of veterinary medicine by all Community citizens having qualified in a Member State.

The litigation deriving from the conflict between the principle of equal treatment of recipients of citizens' services from another Member State and the criminal law provisions presents a problem with regard to 'reverse' discrimination. This aspect, even though it doesn't concern this sector, was at the center of some decisions of the Court of Justice.[30] The problem could be summed up as follows: the case for permitting a foreign national to be subjected to his own laws, even criminal laws, can produce an unfavorable effect for the domestic citizen, when the laws applicable to the domestic citizen are less favorable than the foreign

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27 On this problem *cf*. Ghera, *supra* note 13, 132 *et seq*.

28 Court of Justice, 7 February 1979, C-136/78, *Auer*.

29 Court of Justice, 22 September 1983, C-271/82, *Auer*.

30 *Cf.* E. Cannizzaro, *Esercizio di competenze comunitarie e discriminazioni "a rovescio"*, 1996 Diritto dell'Unione europea, 351 *et seq*. and Ghera, *supra* note 13, 118 *et seq*.; C. Sanna, *Article 12*, *in* A. Tizzano (Ed.), Trattati dell'Unione europea e della Comunità europea, 235 *et seq. (*2004).

laws. An example taken from the jurisprudence in the sector we are discussing here would have to help clarify the concept as well as he risks that it incorporates: it has to do with the *Aubertin* case, raised in the framework of a French criminal trial against a french citizen operating in France, for illegally practicing as a hairdresser.

The Court decided that, since the provisions of the Treaty regarding free movement of people cannot be applied to activities for which all the elements are isolated to the interior of one sole Member State, and since Directive 82/489 – comprised of measures destined to facilitate the effective exercise of the right of establishment and of provision of hairstyling services – does not aim to harmonize the conditions of access and exercise of the profession predicted by national regulations, Community law does not contradict a national regulation by which a Member State requires of its own citizens, for the operation of a hair salon formed on national territory, the possession of a diploma, whereas it permits hairdressers from other Member States meeting certain conditions required for the profession, to operate such a salon without being holders of a diploma and without being forced to resort to a technical manager who possesses one.

In summary the effect of Community non-discrimination, not touching purely internal situations, can ultimately favor citizens of other Member States, reaching a sort of penal imbalance in favor of foreign nationals in relation to nationals without a single cure envisioned for this phenomenon, and without, more generally, being able to be considered in conflict with Community law. The European constraints, being strictly tied to an economic vision of freedoms of circulation, seem to us again hardly apt to induce an effective equality between individuals (even though in this particular case the imbalance negatively impacts the citizens of the State which is the recipient of neutralisation and not, as one had brought up until now, foreign nationals). From the point of view of the criminal lawyer, perhaps paradoxically, so rigid an application of non-discrimination could seem to contrast with the principle of equality, short of considering that it subsists of patterns justifying an exemption. The judgement of the Italian Constitutional Court no. 443 of 30 December 1997, moving away from the reverse discrimination of the Community matrix,[31] is therefore significantly linked to such a conflict.

## 5. Non-Discrimination Based on Gender and Access to Work: the *Stoeckel* Case. The Brief with the Social Rights.

In the body of the Treaties, the principle of non-discrimination based on nationality, to which the preceding remarks were based, was completed by the principle of equality between men and women with regard to employment (article 141 TCE). It was then extended, since the adoption of the Treaty of Amsterdam, to the end of the 1990s. By virtue of article 13 TCE Member States are effectively not permitted to introduce distinctions based "on sex, race, or ethnic origin, religion or convictions, a handicap, age, or sexual orientation."[32] This enlarged core of

[31] Ghera, *supra* note 13, 231 *et seq*.
[32] Ghera, *supra* note 13, 91 *et seq*.

the principle is, therefore, a source of obligations for Community institutions, but always in the framework of competencies consigned to them by the Treaty, to know, primarily, insomuch as discrimination based on one of the reasons mentioned constitutes an obstacle to the freedoms of circulation prescribed by the treaty as well as to the freedom of competitive trade.

This Community principle was clearly applied by detailed Directives in the sector of access to work and conditions of employment, to avoid all discrimination based on gender. However, obviously, the rationale is strongly tied to economics. It suffices, on this subject, to think about litigation having concerned, in this sector, more accurately criminal law: it concerns the old problem of night work for women, a domain in which a considerable number of criminal laws of Member States prescribed, until a relatively recent era, a prohibition criminally sanctioned with the employer held responsible.

The importance of the litigation, as much quantitative as qualitative, depends no doubt on the resistance, particularly strong within certain Member States, to abandon the model of the welfare State put in place by the legislator favoring the liberal and concurrent model prescribed by the political choices of Brussels. That provoked, in the specific sector we are discussing here, the necessity for several initiatives by the ECJ as much in by way of interpretation, a preliminary ruling having been posed to it by the penal judge in the framework of a lawsuit against an employer,[33] as in the framework of torts initiated by the Commission against Member States, revealing the resistance of domestic legislators to adapt to Community decrees.[34]

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[33] Court of Justice, 2 August 1993, C-158/91, *Levy*.

[34] Court of Justice, 16 January 1997, C-197/96, *Commission c/ France*. *Cf. also* the Preamble of the Directive of 2002, n. 12:

> In a constant jurisprudence, the Court of Justice recognized that it is legitimate, with regard to the principle of equal treatment, to protect a woman because of her biological condition during and after pregnancy. As well, it invariably stated that all unfavorable treatment linked to pregnancy or maternity inflicted on women constituted a direct discrimination based on sex. The current directive agrees therefore without prejudice with directive 92/85/CEE of the Council of 19 October 1992 concerning the enactment of measures aiming to promote the improvement of security of the health of pregnant workers, giving birth or breastfeeding at work, (tenth directive particular to the meaning of article 16, paragraph 1, of directive 89/391/CEE) which aims to assure the protection of the physical and mental condition of women who are pregnant, who have recently given birth, or who are breastfeeding. The subject of the said directive specifies that the protection of the security of the health of workers who are pregnant, giving birth or breast feeding should not negatively impact women in the workplace and should not hurt the directives addressing equal treatment of men and women. The Court of Justice recognized the principle of protection of women's rights with regard to employment, specifically concerning their right to come back to the same job or an equivalent job with no less favorable job conditions and to benefit from all improvements to the working conditions to which they would have been entitled during their absence.

In this respect the *Stoeckel* judgement frequently cited in relation to the distinct (but not separate) question of the direct effect of non-transposed Directives,[35] is very famous. Mr. Stoeckel, called to respond before the French judge about the violation of article L 213 of the Code of Work, its measures penally sanctioned, foiled the contradiction of this standard with article 5 of Directive 76/207, with the judgement of 25 October 1988, *Commission v. France.* The Directive, in effect, aimed to enforce in the Member States the principle of equality in the treatment of men and women with regards to, among other things, access to employment and working conditions, anticipating to this effect the suppression or modification of contrary internal regulations, founded originally on the grounds of protection, having become irrelevant. With regard to the judgement of 1988, the Court of Justice had declared there that the French Republic, not having adopted all the regulations necessary for the suppression of inequalities in treatment prohibited by the Directive, had defaulted on its obligations.

Called by the national judge to establish if "article 5 of the directive of 9 February 1976 [is] sufficiently precise to create under the responsibility of a member State the obligation to not place in rule of law the prohibition of nighttime work for women, as it appears in article 213-1 of the French code of work", the Court develops an articulated plea. It examines itself first on the agreed dispensations on the principle of non-discrimination, and reaffirms that Community law does not create any obstacle to the provisions relative to the protection of women, notably with regard to pregnancy and maternity, in that these aim to guarantee protection, in one sense, of the biological condition of women and, in the other sense, particular relations between the woman and her child. The court rejects the means invoked by the Italian and French governments, who assert that the prohibition of work would meet the general requirements of protection of the female workforce as well as particular considerations of relative social order, e.g. risk of aggression against women and the heavier responsibility of family work weighing on the woman. On this point however the Court is clear:

> whatever the inconveniences of night work may be, it does not appear that, except in case of pregnancy and maternity, that the risks to which women are exposed in such work are, generally speaking, different in nature than those to which men are equally exposed. […] Regarding the risks of aggression, to suppose that they are greater at night than during the day, appropriate measures can be adopted to address that without detracting from the fundamental principle of equality between men and women. […] With regard to familial responsibilities, the Court has already said that the directive was not intended to regulate questions relative to the organisation of the family or to modify the distribution of responsibilities within the couple.

It concludes, therefore, that: "the concern for protection which originally inspired the law prohibiting nighttime work for women no longer appears founded, and the maintaining of this ban, because of risks which are not exclusive to women or concerns outside the focus of directive 76/207, cannot find its justification in the provisions […] of this directive."

On this subject, the risk of conflicts between Community law restrictions and other interests meriting protection appears quite concrete, if one considers that

[35] Court of Justice, 25 July 1991, C-345/89, *Stoeckel*.

in other areas of international law women receive a protection accentuated with regard to work and that the attribution of night jobs to this one is rigidly regulated. Moreover, France has since 1993 been forced to denounce the convention of the International Work Organization which related to this question.[36] The liberal model proposed by Brussels obviously requires the sacrifice of certain social rights and, when these are accompanied by penal sanctions, also incorporates the suppression of the standard of incrimination.

## 6. Non-Discrimination Based on Ideological Convictions: the *Vajnai* Case. The Structural Limits of the Community Principle

Community law does not protect the non-discrimination principle between Community citizens because of their ideological and political convictions. It is this conclusion at which the Court of Justice arrived in a very recent order taken in the *Vajnai* case of 6 October 2005.[37.]

The case brought before the judges of the ECJ finds its origin within a preliminary question posed by the Hungarian penal judge in the framework of criminal pursuits against Mr. Vajnai for violation of article 269/B of the Penal Code, sanctioning the public use of 'emblems of totalitarianism'.[38] The plaintiff, vice-president of the workers' party of Hungary, was sued for having worn a red cardboard five branch star 5 cm in diameter, in front of a large public gathering, during a demonstration organized in Budapest, on 21 February 2003. For this behaviour, Mr. Vajnai had been sentenced to probation, and the confiscation of the emblem had been ordered. On appeal, the jurisdiction had revealed that:

> in several Member States, for example the Italian Republic, the left-wing parties are symbolised by a red star or by the hammer and sickle. It follows, according to this jurisdiction, that the members of Italian left-wing organisations can display emblems of the workers' movement, without clashing with any ban, while the Hungarian penal code forbids the use of these emblems. Therefore, this begs the question to know if a provision which, in a Member State, outlaws the use of emblems of the international workers' movement under threat of criminal sanctions while, in the territory of another Member State, the wearing of the same emblems wouldn't generate a single sanction, is discriminatory.

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[36] Decree no. 93-939 of the 15 July 1993 regarding publication of the exchange of letters bearing the denunciation of the OIT convention no 89 (revised en 1948) concerning night time work for women busy in industry, adopted in San Francisco on 9 July 1948, signed 17 February and 12 March 1992.

[37] Court of Justice, (Section quatrième), 6 October 2005, C 328/04.

[38] (1) Commits the infraction (vétség), when the act does not constitute a more serious infraction, sanctioned by an amendment, any person who: a) buys, b) uses publicly, or c) puts up in public a cross which is 'uncinée', an SS emblem, a hammer and sickle, a red five-point star, or any other symbol reproducing them. (2) Not punishable is the person who commits the above-mentioned acts for the purposes of disclosure, of education, scientists, artists, or to inform about past or present events. (3) The provisions to which aux nn. 1 and 2 do not apply to current official emblems of the States.

The question put before the Court centered on the potential incompatibility between, on one side, the standard of the penal code, in its part relative to the use of a red star with five branches, and, on the other, the principle of non-discrimination, article 6 TUE (according to which the Union is based on principles of liberty, democracy, respect for human rights and fundamental liberties) and articles 10,11, and 12 from the Charter of fundamental rights (dealing with freedom of expression).

The Court adjudicated a *non liquet*, considering that the suit didn't present one tie with situations taken into account by the provisions of the Treaty and that the Hungarian legal standards applied in the original suit do not fall into the area of Community law.

It has to do with a decision that does not evoke any surprise, in that it is conformed to reading by the controlling doctrine of the treaties. The area of application of these is in effect normally limited to the exercise of economic freedoms as well as subordinate to the existence of a transnational element, but these characters were not present in this case. In the same timeframe, the decision of the Court put into evidence an important structural limit on the Community principle of non-discrimination, one which revealed itself ill-adapted to establish an effective equality of treatment between Community citizens in the exercise of liberties and fundamental rights, such as they are forms of expression and manifestation of thoughts. In other words, economic and social rights are not accompanied by an effective recognition of civil and political rights, which confirms the overall capitalistic character of the Community construction. One could retort that the places to foil, on the jurisdictional level, the harming of fundamental rights of the individual are from others, this question resulting essentially from the competence European Court of Human Rights; each one will notice nevertheless the difference in the thrust of the two courts, the judgement of Strasbourg having been conditioned by the preliminary exhaustion of internal avenues of recourse whereas the one rendered in Luxembourg can intervene by incidental decisions, suspensive of judgement *a quo*.

## 7. Non-discrimination and the Role of the Internal Judge: from the Constitutional Judge to the Penal Judge

Starting from these reflections, and notably on the base of internal limits (public order clauses, reverse discriminations, discriminations toward citizens of Third Countries, tensions with social rights) and external limits (structural limits excluding political and religious opinions) brought to the principle of non-discrimination as it is consecrated to Community law, it seems a good time to attempt to draw some conclusions aiming at the matching framework of the phenomenon as well as at the proposition of a common interpretation model for its enactment.

The marking element of our observations, so far not explicitly stated, holds to the fact that the mechanism of neutralisation as a result of discrimination is largely entrusted to the judge. The whole question of equality, and more so that

of *ragionevolezza,* as criteria for sanctioning all non-homogenous and unjustified penal treatment, touches on the relationships between the legislator and the judge.[39] Bearing witness to this, the analyses which have developed with regard to the judgements of the Italian Constitutional Court; this doctrine is obviously aware that the opening of fundamental questions of equal application of the law to judicial review might lead to incursions of the judicial power into areas normally reserved to the legislature. The theoretical analysis of this question has found a culmination point in the area of constitutional guarantees of due process in criminal matters, and, more recently, in the area of constraints based in Community law (see the discussion below in part 2) because it is in these limited instances that the legislative powers could actually draw a motion of censure from the constitutional judges.

In the case which interests us, nevertheless, we are in the presence of quite a different situation, in which the intervention of judicial power is not at the origin of an expansion of the repressive field, to the contrary, it is withdrawing progressively, by way of neutralisation of former national prescriptions leading to discrimination based on national origin of individuals. Nevertheless, it is undeniable again that the set of hypotheses is affecting the relationship between the legislature and the judiciary. Once again, the latter is becoming the arbiter of the reasonableness of legislative choices made by Parliament pursuant to its interpretation of the legitimation provided to the Community and required from it by the Treaties. A judgment based on Article 3 of the Constitution, however, must be distinguished because of the important role performed by the trial judge. This finding, and its remarkable implications, cannot be fully understood unless one distinguishes two scenarios with regard to the function of the respective Community norm and its judicial effects.

For a first whole of assumptions, who rise from the violation of the parameters of article 13 TCE, dealing with a law deprived of direct effect and creating only positive obligations under the responsibility of the Member States, the role of the judicial power appears marginal. The Court of Justice will be able in this case to state the failure with the provisions of the treaties, on recourse of the Commission or Member States.

Dealing with discriminations forbidden by article 12 TCE, based on nationality, the role of the judge is clearly much more diversified and complex. To begin with, in case of doubt about the interpretation of the Community law standard, and whenever the matter presents a new interpretation, the internal judge should or could, depending on whether he or she is a presiding judge of last resort or not, submit an interlocutory question (article 234 TCE) to the Court of Justice. Upon the issue of the decision of the Court, the same judge will be kept to determine the outcomes in the judgement *a quo*.

Nevertheless, it must be said that article 12 TCE is, according to the majority interpretation, a *self executing* statute.[40] This implies that when the interpretation of this article is not in doubt, the internal judge, first judge of Community law as

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[39] On this point *cf*. Cerri, *supra* note 11, at 3 *et seq*.

[40] *Cf*. Sanna, *supra* note 30, at 231.

was definitively established by the famous 1978 *Simmenthal* judgement, would have to directly and immediately apply the European norm. He would, therefore, set aside *proprio motu* the application of the domestic law which conflicts with article 12, without waiting for the intervention of the constitutional legislator or even constitutional judge, possibly qualifying himself to rule by means of exceptional circumstance on the legitimacy of the norms.[41]

The difference between these two theories hinges on the interpretive function of orientation of the Court of Justice, probably preferable in an area as delicate as that of non-discrimination. The issue of process remains in any case the same: that the national judge would hold the incompatibility between the Community standard and the domestic penal provisions or, if he would be contented to give up control by remand to the Court – this last option therefore retaining the existence of a conflict. It is always incumbent upon the internal judge to apply the European provision, after having evaluated its pertinence in the particular case, setting aside if necessary the application of the incompatible internal standard.

Meanwhile it still remains to be established which is the juridical mechanism that is best suited for appeal, and in particular how neutralization should be qualified from a criminal law point of view. Without claiming to offer an exhaustive analysis, I believe I can affirm that in this specific case, we are in the presence, in accordance with the overall reconstruction of the doctrine, of a justifying event well founded in the exercise of a right, provided in the Italian system by article 51 of the Penal Code.[42] Not only does this correspond to the structure of the internal judgement, but it also permits the judge to intervene according to the schema of the comparison of interests.[43] The principle of hierarchy of sources is nothing more than one of the parameters to which the judge has to take into account, as the complex problem of the exercise of a right well teaches us; the hierarchical rank of the provision will have to be completed by the taking into account of the principle of specialty as well as by other considerations of basic criminal law relevant to the judge. It follows that the judge, in our opinion, will not always be able to be happy with non-application based on the primacy of Community law, but will have to take into account opposing interests, expressed additionally by the aforementioned internal and external limits, and prevailing sometimes over the principle of non-discrimination. In conclusion, it seems a judge would not be able to set aside the partial or total application of the penal standard, as it would appear, after a thorough analysis, that it protects the values which fundamentally override the Community economic principle.

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41 Court of Justice, 9 March 1978, *Simmenthal*, case 106/77.

42 On the qualification of the neutralization according to the categories of penal lawl *cf.* C. Pedrazzi, *Droit communautaire and droit pénal of the États membres*, 1981 Droit communautaire et droit pénal 49 *et seq*., and notably 57; C. Pedrazzi, *L'influenza della produzione giuridica della CEE sul diritto penale italiano*, *in* M. Cappelletti & A. Pizzorusso (Ed.), L'influenza del diritto europeo sul diritto italiano 624 (1982); G. Fiandaca & E. Musco, Diritto penale. Parte generale 63 (2001); G. Marinucci & E. Dolcini, Corso di diritto penale 73 (2001); F. Viganò, *Article 51*, *in* G. Marinucci & E. Dolcini, Codice penale commentato 426 *et seq*. (1999); G. Mazzini, *Prevalenza del diritto comunitario e non obbligatorietà della legge penale: un rapporto interessante, ma non sostenibile (Nota a Trib. Milano 1 marzo 2001)*, 2002 Riv. It. Dir. Proc. Pen. 368 *et seq*.

43 *Cf.* Cerri, *supra* note 11, at 12 *et seq*.

# C. Neutralization in Malam Partem of Criminal Law and Obligations to Criminalize

## 1. The in Malam Partem Effects of Community Law on Internal Criminal Law: an Overview

In the wake of two avant-garde contributions,[44] the Italian Criminal Doctrine was very focused on the question of the offense of fraud in accounting records (a.k.a. 'fake balance sheets').[45] The extremely lively nature of the debate on this point depends on several factors, which would be suitable to recall concisely. First of all, the case presented aspects of an extreme technical complexity, as it involves testing an (apparently) uncharted effect of Community laws on internal incrimination norms. Then, the importance of the questions evoked from the point of view of criminal law politics has certainly contributed to their success: the goal is, in effect, to find a way to eliminate from the system a body of legislation, those

[44] From Criminal Law point of view of the Community Law, *see*, respectively: C. Sotis, *Obblighi comunitari di tutela e opzione penale: una dialettica perpetua?*, 2002 Riv. It. Dir. Proc. Pen., 171 *et seq*.; R. Mastroianni, *Sanzioni nazionali per violazione del diritto comunitario: il caso del "falso in bilancio"*, 2003 Riv. it. dir. pubbl. comunitario, 621 *et seq*. as in the volume of R. Mastroianni (Ed.), Il "falso in bilancio" tra ordinamento interno e ordinamento comunitario 49 *et seq.* (2004).

[45] Judgement of the Court of Justice (Grande Chambre), 3 May 2005, joint affairs C-387/02, C-391/02 e C-403/02, relative to prejudicial requests submitted to the Court, on the basis of article 234 CE, by the Tribunal de Milan (cases C387/02 and C403/02) and by the Court of Appeals of Lecce (case C391/02), by ordonnances of the 26, 29 and 7 October 2002, received respectively, 28 October, 12 and 8 November 2002, in the penal processes against Silvio Berlusconi (case C387/02), Sergio Adelchi (case C391/02), Marcello Dell'Utri and a. (case C403/02). The judgement is now published *in* 2005 Cass. Pen., 2764 *et seq*. and commented by G. Insolera & V. Manes, *La sentenza della Corte di Giustizia sul "falso in bilancio": un epilogo deludente?*.

The first preliminary ruling was raised by The Court of Appeals of Lecce, by ordonnance of 7 October 2002, *Adelchi*, and was published in 2003 Cass. pen., 640, with a note from E. Aprile, *Note a margine di una domanda di pronuncia pregiudiziale di interpretazione di norme comunitarie, rivolta dal giudice penale alla Corte di giustizia delle Comunità europee in relazione alla nuova disciplina delle false comunicazioni sociali di cui al d.lg. n. 61 del 2002*; and in 2003 Cass. pen., 1316 *et seq*., with a note from V. Manes, *Il nuovo "falso in bilancio" al cospetto della normativa comunitaria*. Two other questions were then raised before the Milan Tribunal sect. I penal code, ordonnance of 26 October 2002, prés. Ponti, Trib. Milan, sect. IV pénale, ordonnance of 29 October 2002, prés. Magi. One can call the case closed for the moment. One last decision was taken by the *Corte Costituzionale* on 24 février 2006 (*see* ordonnance n. 70/2006), following suit to one last exception of inconstitutionality raised by the Court of Appeals of Naples. On future issues, entrusted to a dialogue between Courts, *cf*. Insolera & Manes, *supra* note; M. D'Amico, *Ai confini (nazionali e sovranazionali) del favor rei*, *in* R. Bin, *et al*. (Ed.), Ai confini del "favor rei". Il falso in bilancio davanti alle Corti costituzionale e di giustizia (2005), notably 26 *et seq*., based on a global re-reading of constitutional jurisprudence relative to the predicted norms; R. Bin, *Un ostacolo che la Corte non può aggirare*, *ivi*, notably 112 *et seq*.; G. Brunelli, *Sui limiti del* favor rei *l'ultima parola alla Corte costituzionale*, *ivi,* 125 *et seq*.; R. Mastroianni, *Vecchi principi e nuove interpretazioni nella sentenza della Corte di Giustizia sul "falso in bilancio"*, *ivi*, 263 which advocates an appeal before the Constitutional Court based on article 11 of the Constitution or before the Court of Justice again on the basis of Article 234 TCE.

of the new articles 2621 and 2622 of the Civil Code, that the majority doctrine would find irremediably illegitimate[46] and the expression of an intolerable personal priviledge,[47] in that they redefine the crime of fraud in accounting, making it a 'lesser offense'. Considerations of a political nature, probably the same ones that caused the case to be brought before the Grand Chamber, have fueled this lawsuit.[48]

These elements together, all being the cause of the undeniable success of the subject, have nevertheless urged more attention be given to the specific characters in this particular case, moreso than to its significance within the complex (and diversified) system of relations between the European Union and the internal criminal orders.[49] In a perspective detached from the contingent aspects of the case and understanding – from a point of view that is as much restrospective as prospective – over the long term, the question of 'fake balance sheets' does not constitute a unique case, but more an episode – allbeit a very important one – of the tormented relationship between the prescriptive production of Brussels and the politics of criminal law of the Member States, going well beyond the limits of time and structure of this case. Also, if the evaluation, and sometimes the amplification, of some of the affirmations contained in the court judgement of 3 May 2005 can no doubt work together, in order to truly seize the legal questions that uphold it, it seems more useful to connect it with a limited but important core of decisions of the ECJ which present similarities with this evaluation and which, most frequently and apparently by chance, touch the very base of Italian criminal law.

To look outside the specifics of the case, is to diminish the *pathos* which has sometimes led the first commentaries, is to then suggest a reconstruction of the

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[46] On these new incriminations *cf.*, among others, A. Crespi, *Le false comunicazioni sociali: una riforma faceta*, 2001 Riv. soc., 1345 *et seq*.; C. Pedrazzi, *In memoria del "falso in bilancio"*, ivi, 1369 *et seq*.; F. Giunta, *La vicenda delle false comunicazioni sociali. Dalla selezione degli obiettivi di tutela alla cornice degli interessi in gioco*, 2003 Riv. trim. dir. pen. econ., 601 *et seq*.; F. Giunta, I nuovi illeciti penali e amministrativi riguardanti le società commerciali (2002); D. Pulitanò, *False comunicazioni sociali*, *in* A. Alessandri (Ed.), Il nuovo diritto penale delle società: D. lgs. 11 aprile 2002, n. 61 (2002). As numerous authors indicate, limits which affected the preceding regulations must not in the meantime be forgotten.

[47] E. Dolcini, *Leggi penali* 'ad personam' *riserva di legge e principio costituzionale di eguaglianza*, 2004 Riv. it. dir. proc. pen., 50 *et seq*.

[48] According to article 44 §3 of the Rule of procedure of Court of Justice "The Court sent back before the chambers to five or three judges all cases it was handling in which the level of difficulty or importance of the case or of the particular circumstances did not require being sent before the Grand Chamber."

[49] For a systematisation *cf*. A. Bernardi, L'europeizzazione del diritto e della scienza penale 2004. *See* A. Bernardi, *I tre volti del 'diritto penale comunitario'*, *in* L. Picotti (Ed.), Possibilità e limiti di un diritto penale dell'Unione europea 41 *et seq*. (1999); S. Manacorda, *Union européenne et droit pénal: esquisse d'un système*, 2000 Revue de science criminelle, 96 *et seq*. and finally, in le panorama italien, S. Canestrari & L. Foffani (Ed.), Il diritto penale nella prospettiva europea: quali politiche criminali per quale Europa (2005). For another attempt at systematisation, accompanied by conceptual categories, *see also* the essay of J. Vogel, *Europäische Kriminalpolitik – Europäische Strafrechtsdogmatik*, 2002 Goltdammer's Archiv, 501 *et seq*.

system which would possibly also be susceptible to reveal the unconvincing aspects of the interpretation adopted by jurisprudence and it is to reveal potential avenues for the deepening of questions of Community criminal law.

Technically, in this framework, to go outside the particularities of the case requires the exploration of this specific modality of intersection between the prescriptive sets of which the assumption of 'fake balance sheets' only constitutes one form of manifestation – certainly important, but not isolated. It has to do with the contentious question of the effects *in malam partem* of Community law on internal criminal law, which was already mentioned in the introduction. With regard to the classic phenomenon (of non-application *in bonam partem),* the case law analyzed presents a common aspect as well as an element of divergence. The common aspect consists in the contrast between a direct effect (or at least directly applicable) Community norm and one of the components of the internal criminal disposition (incrimination or sanction, description or repression of the infraction). The element of difference however holds to the pre- or co-existence of another criminal code, more severe than the one serving as the object of antimony, of the sort that the non-application/canceling of the latter could possibly lead to a new expansion of the first one.

The question touches indirectly on one of the obligations of penalty, toward which the doctrine has also recently leaned: even if opposing opinions should be raised, upholding that to determine the opportunity for a penal response the ordinary legislator would be singly competent, it seems it subsists of Community obligations of repression requiring that this response be adequate and having the ability as well to indirectly impose criminal sanctions.[50]

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[50] On the constitutional constraints of penalization, *see* D. Pulitanò, *Obblighi costituzionali di tutela penale*, 1983 Riv. It. Dir. Proc. Pen., 484 *et seq*.; For Community Law constraints *see* Sotis, *supra* note 44, 171 *et seq*.; G. Insolera, Democrazia, ragione e prevaricazione. Dalle vicende del falso in bilancio ad un nuovo riparto costituzionale nella attribuzione dei poteri? (2003); G. Salcuni, *Il "canto del cigno" degli obblighi comunitari/costituzonali di tutela: il caso del falso in bilancio*, 2003 Riv. Trim. Dir. Pen. Ec., 93 *et seq*.; in a broader European perspective taking into account the ECHR, *see* M. del Tufo, *Il diritto penale sommerso: dritto europeo e modifiche del sistema penale*, II Diritto pubblico comparato ed europeo, 1007 *et seq* (2001). From a more extended point of view with interesting remarks on the necessity to prepare for an abrogation effect of the Community norms which are incompatible with the internal norms *cf.* A. Pizzorusso, *L'attuazione degli obblighi comunitari: percorsi, contenuti e aspetti problematici di una riforma del quadro normativo*, V Foro it., 225 *et seq.* (1999). On the specific subject of the principle of Community loyalty of article 10 TCE, *cf*. A. Bernardi, *Falso in bilancio e diritto comunitario*, 2004 Riv. it. dir. pubbl. comunitario, 367 *et seq*. Maybe be permitted to refer back as well to our own *L'efficacia espansiva del diritto comunitario sul diritto penale*, *supra* note 19.

Lastly *see* above all the Court of Justice, judgement of 13 September 2005, case C176/03, Commission of the Communautés européennes *v.* Conseil de l'Union européenne, published also *in* 2005 Dir. Pen. Proc., 255 *et seq*., on which *cf.* F. Viganò, *Recenti sviluppi in tema di rapporti tra diritto comunitario e diritto penale*, 2005 Dir. Pen. Proc., 1433 *et seq*. For a cost-benefit analysis linked to the perspectives of unification and harmonisation, *see* C. Sotis, *'Mauvaises pensées et autres' à propos of the perspectives de création d'un droit pénal communautaire*, *in* G. Giudicelli-Delage & S. Manacorda, L'intégration pénale indirecte. Interactions entre droit pénal et coopération judiciaire au sein de l'Union européenne, 243 *et se*q. (2005).

The frame of reference having been thus summarily described, one must now isolate the different concrete forms of potential effects *in malam partem* of Community Law on Internal Law. We have seen that the essential condition of the production of these effects consists of the existence of a *rapport of interference* between criminal norms of which one contrasts with Community law. Now, as we have already said, this interference could take two different forms according to whether the two laws in question are present (and interfering) at the same time in the system, or if they are successive (and equally interfering) one after the other.

In the first hypothesis (*synchronic interference*), we would have two or several criminal laws, all in force at the same time, enacting Community law. However, as a result of the effect of the rules on the apparent competition of laws only one will be applicable in this particular case. This hypothesis has already been submitted to the attention of jurisprudence with regard to examples extracted from Italian legislation bearing upon cases in which there were two laws of incrimination, one *special* and the other general; it can nevertheless also *se deduire*, problematically and for the moment in an abstract manner, in the case of two laws of which one is the principal and the other *subsidiary.*

A second group of hypotheses concerns the *diachronic interference* between laws, meaning the succession of criminal laws in the time in which the last, less severe, seems to contrast with Community law; a phenomenon of which the case of 'fake balance sheets' seems to constitute a paradigmatic example.

Before jumping into this analysis, however, the reader must be warned that our developments are limited to the relationships of interference between two laws of incrimination. We will not dwell on other possible forms of manifestation of the phenomenon, more complex and, at the current stage, purely hypothetical, as those where the conflict with Community law would concern a domestic law declaring a justificative, or at least an excuse or a cause for exclusion of the punishability. In these cases too, it must be noted – coming back to advisable interventions of the doctrine, following the model of a constitutional jurisprudence already offering reflections on the subject (we are thinking of cases relative to justificative facts introduced by regional laws then declared unconstitutional) – the possible resection of the favorable law could potentially have negative consequences on the position of the individual, implicating the constitution of an infraction complete in all its elements.

## 2. 'Diachronic' Interference and Immediate Modification of Incrimination in the Berlusconi, Adelchi, and dell'Utri Case

Concerning the case of diachronic interference, incorporating the existence of two or more criminal laws of enactment or of reception of Community law, of which the second repeals or modifies in a more favorable meaning the prevention of the prior one, the judgement on the 'fake balance sheets' as a picture of the most problematic hypothesis, consisting of the immediate modification of incrimination.[51] The new articles 2621 and 2622 c.c, introduced by Article 1 of

[51] According to the terminology of T. Padovani, *Tipicità e successione di leggi penali. La*

the legislative decree of 11 April 2002, no. 61 regarding "Regulation of criminal and administrative infractions concerning commercial businesses" which enacts Article 11 of the law of 3 October 2001, no. 366 regarding "Delegation to the Government for the reform of business law", the law having already generated some perplexities around the doctrine with regard to its conformity to Community Law[52], establish a new regulation in the matter of false information on businesses comprising so many veritable *abolito criminis* cases (Article 2 para. 2, Criminal Code, with for example, the comportment positioned under quantitative thresholds), that the case of succession in the strict sense (Article 2 para. 3, Criminal Code, with, for example, the assumption of downgrading of the infraction from misdemeanor to infringement) as that has definitively been established.[53]

These two assumptions are governed by partially different rules, notably with regard to their effects on the thing being judged. Nevertheless, the problem that they may have appears to be essentially the same, centering on the possible consequences of an official report of Community illegitimacy of the later law (leaving aside for the moment the question of competent jurisdiction to carry out such a censure). In both cases, in effect, after having noted that the overthrowing of the system and the substitution of prior laws were operated in violation of European or Constitutional parameters of legitimacy, (indirectly, through article 117 of the Italian Constitution), one has to wonder if these can be applied to acts committed while they were enacted.

The interpretation developed in the judgement of 3 May 2005 by the Court is known: without squaring up either on the opinion expressed by the Commission[54] or on the opinions of its Advocate General,[55] it considers that "the first business directive can not be invoked as it is against those charged by the authorities of a Member State within the framework of criminal proceedings […]."[56] This

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*modificazione legislativa degli elementi della fattispecie incriminatrice o della sua sfera di applicazione, nell'ambito dell'article 2 commi 2 e 3 c.p.*, 1982 Riv. it. dir. proc. pen. 1354 *et seq*.

[52] C. Sotis, *Illegittimità comunitaria della procedibilità a querela del falso in bilancio* (2001), available at www.penale.it.

[53] Cass. Sez. Un. 26 March 2003. In doctrine, with widely varied points of view , *cf*. E. Musco, I nuovi reati societari 65 *et seq.* (2002).; M. Donini, Abolitio criminis *e nuovo falso in bilancio. Struttura e offensività delle false comunicazioni sociali dopo il d.lg. 11 aprile 2002, n. 61*, 2002 Cass. Pen., 1240 *et seq*. notably 1276; T. Padovani, *Il cammello e la cruna dell'ago, i problemi della successione di leggi penali relativi alle nuove fattispecie di false comunicazioni sociali*, 2002 Cass. Pen., 1598 *et seq*.; D. Pulitanò, *Legalità discontinua? Paradigmi e problemi di diritto intertemporale*, 2003 Riv. it. dir. e proc. pen., 1290 *et seq*.

[54] The contraventional nature of a good part of the reformulated infractions, originally too lenient with regard to sanctions, as well as the risk of a time elapsing that is too short, the introduction of quantitative thresholds so the crime can be punishable, and the limitation of the possibilities of a ex officio pursuance are all elements having driven the Commission to affirm in its conclusions presented 31 March 2003, that the new incriminations contrast with the Community directives with the possible consequence of a new expansion of the earlier incrimination predicted in article 2621 c.c.

[55] Conclusions of Attorney General Juliane Kokott presented on 14 October 2004, combined cases C387/02, C391/02 and C403/02, *Silvio Berlusconi*.

[56] Almost isolated is the position expressed by S. Riondato, *Il falso in bilancio e la sentenza*

conclusion sets apart (*infra),* the judgement puts the reader a little ill at ease: the motivation of a historic decision, apparently breaking with certain legal precedents, and adopted in the framework of a lawsuit with evidence which is not only political and media-friendly but also theoretical, for which the intervention of the Grand Chamber was requested, only counts a total of 27 short paragraphs (from 52 to 78) and, outside this one breakdown, the content of these seems so poor and for certain apodeictic aspects that it induces immediately a feeling of confusion for the reader. Whatever it may be within that realm, the obscurity of the judgement seems to permit – and maybe even owing to a wise choice by the Court to prelude – to the most different interpretations.

Schematically, and to concentrate on the aspects which interest us, the reasoning of the Court rests on three arguments. The first, at its base, consists of the statement that the regime of sanctions required by Article 6 of the first Directive on the right of companies has to concern not only the omission of the publicity of business accounts but also the unfaithful declarations (paragraphs 56 to 65). Certain authors have inferred that at heart the ECJ would have adhered to the interpretation developed by the Italian Courts having appealed before it, opening thus in addition the path to a Constitutional appeal.

This consideration at the base, however, does not have a lot of importance in the decision as a whole. In effect, though it would seem to effectively promote incompatibility, it is set aside in the judgement by other stronger arguments. The Court effectively blends the rebuttal of the conflict evoked in the prejudicial questions over two arguments, developed in thirteen very short paragraphs, in which the attention given to the argument seems inversely proportional to its importance to the results of the decision. It concerns, on one side, the principle of retroactive application of a milder punishment (paragraphs 66-70) and on the other, the banning of the invocation of the first Directive on companies as a source of criminal responsibility (paragraphs 70-77). It must be noted at this stage that the first argument appears to be poorly founded and susceptible to contradiction of preceding decisions by the court, whereas the second seems incomplete but shareable at the base. As a bonus, the logical follow-on of these arguments to the ends of the decision reveal themselves to be very obscure.

Starting with this last aspect, the Court seems to follow a reasoning 'in shock' since after having examined an argument, it then takes back all value due to the logical primacy of the following development. Thus, with regard to the argument at the beginning that it had welcomed, the Court introduced the one on retroactivity *in mitius* 'abstraction made from the applicability of article 6' (paragraph 66) and finishing by affirming that the observations that it had developed itself before were lacking practical interest. With regard to the argument about non-retroactivity, after having briefly discussed it, the Court takes away all its value when it affirms that "there is not meanwhile a place to cut into this question for litigious reasons" (paragraph 71). This manner of proceeding seems singularly bad from a logical

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*della Corte di Giustizia CE: un accoglimento travestito da rigetto*, 2005 Dir. Pen. Proc., 910 and previously *Falso in bilancio e corte di giustizia (causa Berlusconi): non è un rigetto*, *in* R. Bin, *et al.* (Eds.) Ai confini del "favor rei" 335 *et seq*. (2005).

point of view, its grasp nevertheless being useful for being able to evaluate the force of the arguments proposed as well as the significance of the judgement.

With regard to the very content of motivations adopted by the Court, in the judgement one can read, by way of conclusion – the third observation, decisive in the developed reasoning – that according to a constant jurisprudence no Cirective, by itself and independently of an internal law that a Member State takes for its application, can determine or exacerbate the penal responsibility of individuals. Presented in this manner, this argument is not comprehensible, as it is so evident that the national judge was neither able, nor willing, to base penal responsibility on the Directive, but more so on the original formula of article 2621 of the Civil Code which has in the meantime been repealed.[57] The argument has to be read (and corrected) in this sense that it is not possible for Directives on company law on the subject of sanctions of direct effects (*rectius:* regarding direct applicability) comprising the possibility for the founding judge not to apply the internal law, to be attributed to general formulas; it is in this sense that the judgement has otherwise been carefully interpreted and agreed upon by the doctrine.[58] A Directive could not create effects of neutralisation of the penal code: the argument, as has been said, is incomplete but reviewed under this light it can be shared out.

The other argument, concerning the retroactive application of a less severe law, established by the Court as a general principle of Community law (par. 69) is destined to impede any renaissance of the previously existing law. The effects of the Court of Luxembourg having taken this position in this specific case were stigmatized by a part of the doctrine as they seem indirectly to establish the right of the ordinary legislator to assure in any assumption the impunity of anterior events by a less severe law, without that being able to be censored by an international or internal court.[59] It seems to us meanwhile more important to declare that, while that was able to be formulated, this last argument of the Court seems *weak in its very foundation*[60] One invokes therein the common constitutional traditions of Member States, without examining the national principles to take

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[57] On this point *see* the very critical observations of R. Mastroianni, *Vecchi principi e nuove interpretazioni nella sentenza della Corte di Giustizia sul "falso in bilancio"*, *in* R. Bin, *et al.* (Eds.) Ai confini del "favor rei" 258 *et seq*. (2005); as well as of Salcuni, *supra* note 50, 93 *et seq*.

[58] F. Viganò, *"Illegittimità comunitaria" e illegittimità costituzionale: spunti di riflessione*, *in* R. Bin, *et al.* (Eds.) Ai confini del "favor rei" 366 *et seq*. (2005), which infers from this also a series of consequences regarding centralised (Constitutional Court) or scattered (Originating Judge) control with regard to Community illegitimacy. Also the reading of L. Mezzetti, *Il falso in bilancio fra Corte di Giustizia e Corte costituzionale italiana (passando attraverso i principi supremi dell'ordinamento costituzionale ...)*, 3, available at www.giurcost.org/studi/mezzetti.html.

[59] These concerns are expressed by D'Amico, *supra* note 45, at 12 & 20 and by A. Bernardi, *Brevi osservazioni in margine alla sentenza della Corte di Giustizia sul falso in bilancio*, *in* R. Bin, *et al.* (Eds.) Ai confini del "favor rei" 49 (2005) who speaks of a national legislator "who would seem from now on to have a free hand in *bonam partem.*" *Also* M. Scoletta, *Retroattività* in mitius *e pronunce di incostituzionalità* in malam partem, *in* R. Bin, *et al.* (Eds.) Ai confini del "favor rei" 342 *et seq*. (2005). *See* against Mezzetti, *supra* note 58, at 8.

[60] For a position critical of this point, *see also* Bernardi, *supra* note 59, at 48; R. Mastroianni, *supra* note 57, at 258 *et seq*.; R. Tartaglia, *La sentenza sul falso in bilancio: i "controlimiti" della Corte di Giustizia*", *in* R. Bin, *et al.* (Eds.) Ai confini del "favor rei" 351 *et seq*. (2005).

into consideration (which would have led them at least to exclude that in *common law* systems this argument would have the same importance as in legal orders like the Italian Order)[61] the criteria being, therefore, diminished on the basis of *better law* or of the maximum standard;[62] there neither Article 49 of the Charter of Fundamental Rights (textually reprised by the Constitution Project)[63] nor other international instruments, notably Article 7 of the ECHR, is invoked (which is frankly shocking) dealing with the primary source of fundamental rights according to the first line in paragraph 2 of Article 6 TUE. This last omission, by the way, does not seem to be coincidence since it is well known that this law does not establish – unlike Article 15 of the International Pact on Political and Civil Rights – the principle of retroactivity *in mitius.*

In conclusion, therefore, we believe we can affirm that the Court of Justice appears to justify at the core the doubt bearing upon the compatibility of Community law with insufficient sanctions on the conduct of declaration of falsified accounting records. Meanwhile, the nature of the Directive does not permit the national judge to set aside *proprio motu* the laws in conflict (which possibly opens the path, be it to a question of constitutional legitimacy on the basis of the indirect parameter of Article 117 of the Constitution[64] or be it to an intervention of a legislator again reforming companies offenses).[65] The resurgence of the preceding law is in any case excluded, establishing itself on the controversial conclusion of the Communitization of the principle of retroactive application of the less severe law.[66]

It is a matter of briefly exploring these aspects in the light of anterior jurisprudence relative to (possible) effects *in malam partem* of Community Law on Internal Criminal Law.

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[61] *See* the Conclusions of the Attorney General Juliane Kokott presented on 10 June 2004, Case C457/02, *Antonio Niselli.*

[62] Bernardi, *supra* note 57, at 34 *et seq*.

[63] M. D'Amico, *L'introduzione del principio di legalità in materia penale nella Carta europea dei diritti dell'uomo: problemi e prospettive*, 2003 Rassegna di diritto pubblico europeo. Numero speciale: Europa e giustizia, 121 *et seq*.

[64] D'Amico, *supra* note 45, at 26 *et seq*.; Viganò, *supra* note 59, 371 *et seq*. The preceding ordinances of the GUP of the Tribunal de Palerme, at the founding of the ordinance 165/2004 of the Constitutional Court. Judgement n. 161/2004, as well as ordinance n. 165/2004, are published *in* 2004 Dir. pen. proc., 1497 *et seq*., with a note from F. Giunta.

In the law bearing on "Modifications of Part II of the Constitution", definitively approved by the Senate on 16 November 2005 but not yet enacted, article 117 al. 1 Const. was reformulated thusly: "The legislative power is exercised by the State and by the Regions in respect to the Constitution, as well as to the constraints deriving from the Community Order", the last paragraph of the preceding having been overwritten.

[65] *Cf.* article 30 of Law 28 December 2005, n. 262 "Provisions for the protection of savings and the discipline of financial markets", G.U., n. 301 of 28 December 2005, S.O. n. 208, which reformulates articles 2621 and 2622 of the Civil Code .

[66] Regarding the potential effects of this Community arraignment of the retroactivity of *lex mitior* on the Italian legal system (with an extension of retroactivity to the suppositions also found in article 2 al. 3), *cf.* A. Barletta, *Conflitti tra livelli normativi: tra obblighi comunitari e tradizioni costituzionali comuni*, *in* R. Bin, *et al.* (Eds.) Ai confini del "favor rei" 78 *et seq*. (2005).

## 3. 'Synchronic' Interference and Contrast Between the Special Norm and Community Law: the *Tombesi* Case

Among the examples taken from Community legal practice, one doesn't find, to our knowledge, a single assumption about the *in malam partem* effects of Community law in the case of a report of *subsidiarity* between norms, even though that could potentially introduce itself with regard to the chaotic Italian legislation on the subject of protection of financial interests of the European Communities.[67]

On the contrary, in the case of the *speciality* of norms, the problem of *in malam partem* effects is destined to present itself when the special norm which was more favorable at the charging contrasts with Community law. This assumption will not be statistically significant, as charges carrying elements of specialty are normally subjugated to a more severe criminal treatment than those reserved for general assumptions. Nevertheless, it has happened several times that the Court of Justice, in virtue of the essentially technical nature of the first pillar norms (which only has one indirect incidence on the question of sanctions and even more indirect on those of criminal sanctions,[68] in a perspective of 'extreme subsidiarity' of criminal law)[69] having been called to judge the possible clash of Community law and extra-penal norms modified by the legislator (again Italian) in order to limit the operational domain of internal incriminations. More specifically, the problem of the *in malam partem* effects has presented itself when the extra-penal element defined by the Community norm was incorporated in an internal incrimination, followed then by another restricting national norm, in violation of Community law, the range of the prescriptive element in question. Moreover, the possible non-application of the national posterior norm of incrimination, due to a clash with the European provisions endowed to direct effect, is susceptible to produce unfavorable effects on judgements in process according to an outline resembling one which has emerged from the case of the 'fake balance sheets', by the instrument of the re-expansion of incrimination established earlier by the legislator.

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[67] This is a reference to the relationships between incriminations of articles 640-bis of the penal Code and 2 of law n. 898/86 on frauds of the FEOGA, since as a result of the intervention of the legislator, the incrimination predicted by the complementary legislation was expressly qualified as subsidiary to the incrimination established by the code. The potential contrast with Community Law – notably with Principle of Assimilation of article 209A TCE in the Maastricht version (then of Article 280 in the Amsterdam version) and with principle of loyal collaboration of article 10 (former article 5) TCE – could conceivably lead to the expansion of aggravated misrepresentation to obtain public aid- much more seriously sanctioned against than the corresponding infraction established by the norm outside the code. We refer to our *Profili politico-criminali della tutela delle finanze della Comunità europea*, 1995 Cass. Pen., 230 *et seq*.

[68] M. Delmas-Marty, G. Giudicelli & E. Lambert (Eds.), L'harmonisation des sanctions pénales en Europe (2003) *passim*.

[69] On this question *see* M. Donini, *Sussidiarietà penale e sussidiarietà comunitaria*, 2003 Cass. pen., 141 *et seq*.

One supposition of this genre appeared in the *Tombesi* case, defined by the Court of Justice on 25 June 1997.[70] It was established that Article 2, under a), of regulation no. 259/93, by remand to the first Article, under a), of Directive 75/442, modified, established a common definition of the notion of waste inside each Member State […] A national regulation which adopts a definition of the notion of waste excluding recyclable substances and objects is not compatible with Directive 75/442, in its original version, and directive 78/319" (paragraphs 46 and 47). It has followed that the legal decrees introduced with several reprises since 1993, in the part where they distinguish between waste and residuals and plan a more favorable system for both, is contrary to Community law. It seems therefore, that the ordinary judge would have to set aside the national law containing too restrictive a definition (and due to this fact in conflict with the Community Directive) of the notion of waste; it is what has been produced in the Italian legislation identifying new categories of trash, the elimination of which was not accompanied by an effective penal protection, while Community provisions retain the necessity of an adequate protection for all the assumptions.

The Court does not adjudicate on problems related to the possible retroactivity of the less severe law, this particular case not having been touched by the succession of criminal laws in the time, but indirectly it admits that the previous acts – committed under the only empire of the preceding law which is still in effect – could be subjugated to the penal code of *tempus commissi delicti.* In its ruling the Court affirmed in effect that "it comes from remanded ordonnance which, at the time when they were committed, the acts which are the subject of the cases primarily were susceptible to being sanctioned according to national law and that the decrees which took them away to the application of sanctions resulting from DPR n. 915/82 were not enacted until later. In these conditions, there is no need to ponder the consequences which could result from the principle of the legality of punishments in the application of rule n. 259/93" (paragraph 43).

In this case the Court recognizes the invalidity of – and indirectly the possibility of non-application of – the posterior code relative to the extra-penal element which contrasts with a regulation going back in turn to a Directive regarding the definition of waste; the application of the general and more severe code, already in effect at the time of the commission of the crime, doesn't then encounter obstacles, the principle of legality seeming to be respected.

## 4. A Problematic Case: the Posterior Code of Authentic Interpretation in the *Niselli* Case

The reasoning followed by the Court in the decision it pronounced in 2004 in the *Niselli* case, concerning once again Italian legislation on the subject of waste,

[70] Court of Justice (Sixième section), judgement of 25 June 1997, in the joint cases C304/94, C330/94, C342/94 e C224/95, *Tombesi, Santella, Muzi, Savini.*

followed this time with the introduction of an authentic interpretation of the notion of waste,[71] is more complex.

By a reasoning close to the one used in Italian law with regard to law-decrees adopted by the government but not ratified by Parliament,[72] the Advocate General in his opinion had distinguished depending on *tempus commisi delicti* the laws applicable to crimes which were the subject of the judgements in front of the Italian judge. The application to crimes committed at the same time or later than the contentious disposition of Article 14 of decree no. 138/02 was excluded, due to the necessity to respect the principle of legality as well as the banning of the act of causing the penal responsibility to come directly from a Directive (paragraph 62). The law in effect at the time of the crime was considered susceptible to application to earlier crimes: "One can't see why the individual should profit retroactively from a modified assessment on the part of a national legislator, which will go against the objectives of Community Law which will themselves live on unchanged" (paragraph 72). At the same time the Advocate General pushed aside objections based on the principle of retroactive application of the more favorable criminal law. All the while he recognized the indubitable value of the principle as well as its importance to the Community, reinforced by the innovative forecasting of article 49 of the Charter. This result was attained by insisting on coherence to the code, even in the absence of an *applicable* penal code as this one is contrary to Community Law (paragraph 70). The legal framework proposed by the Advocate General is clearly exposed in paragraph 58 of the conclusions, where one can read: "If decree 138/02, introduced only after the crimes, remains unapplied, the incrimination depends on national law applicable at the time of those crimes knowing the general intent of the translation of directive 75/442 (Article 6 of the legislative decree 22/97) now applicable again. The main impact of the directive will be one provision abrogating the infraction adopted after the acts would not be applied."

The Court adheres indirectly to this position when it specifies: "it remains true that, the crimes at the time having generated criminal legal procedures against Mr. Niselli, these could, if the need arises, constitute infractions which are punishable by current law. In these conditions, there is no need to ponder the consequences which could come out of the principle of legality of the punishments in the application of directive 75/442", this point returning to the previously cited *Tombesi* case.[73]

Regarding this last assumption, however, it is doubtful that the situation brought before the ECJ in the *Niselli* case could exactly be traced back to the phenomenon of non-application *in malam partem*. Formally speaking, in effect some of the conditions of this non-application – the only one able to determine the expansion of individual obligations thanks to Community rules – are lacking. One of the presuppositions of activation of this complex mechanism of prescriptive integration presents very problematic aspects. It concerns the conditional

[71] Judgement published also in 2005 Dir. Pen. Proc., 386 *et seq*.

[72] *Cf.* for all T. Padovani, *Decreto-legge non convertito e norme penali di favore, in bilico tra opposte esigenze costituzionail*, 1985 Riv. it. dir. proc. pen., 819 *et seq*.

[73] On the position of the Court *see* remarks of Viganò, *supra* note 50, at 1436.

requirement of the existence of a plurality of successive incrimination standards. In fact, could one argue that a standard adopted by the legislator in order to furnish the authentic interpretation of a preceding rule incorporate a novation of the law and that it gives rise to a succession of criminal laws from the old days? In other words can one, affirm that between Article 6 of the legislative decree 5 February 1997, no. 22, and Article 14 of the decree of 8 July 2002 no. 138, there subsists a phenomenon of succession of criminal laws from the old days or at least a prescriptive specification? It is acceptable to suspect as much, if one considers that the legislator just wanted to clarify the *intentio legis* characterizing the incrimination from its beginnings.

According to this thesis, it would be best not to talk about non-application *in malam partem* admitted by the system but more about a veritable direct effect of the Community standard at the origin of responsibilities criminally sanctioned against the individual. The important question of the violation of legality stemming from this incidence of Community law will inevitably resurface. Considerations in the realm of culpability will be added, the citizen being legitimately loyal to the laws of the State and acts of Community law not being able to directly justify, without the mediation of an internal penal standard, a single individual penal responsibility. Therefore, having excluded any effect of the prejudicial issue in the *a quo* penal process, the only remaining path in this case would be that of appeal for violation of the Treaty in order to throw out the standard of the system and to sanction the State, without the individual having to suffer the direct consequences of this choice of the legislator.

However, outside the locutions used by the internal legislator, it seems to us that the standard (norm) has a value, so to speak, that is innovative and not simply declarative.[74] The Attorney General seems to believe it too as he affirms that: "It is not that on the basis of the restriction of the notion of trash in Article 14 of decree 138/02, *introduced after the crimes,* that there may not be more criminal responsibility" (paragraph 22, our emphasis), which leads to correctly remember that this instance concerns a case of non-application *in malam partem.* Our preceeding developments are also confirmed: the non-application of *in malam partem* cannot have been except when in the internal system it subsists (at the same time or one after the other) two or more penal standards of which one – the most favorable – contrasts with Community law, of the sort that the penal responsibility will always find its foundation in a natural legislative act.

## 5. Some Reflections by Way of Conclusion: The Case of the 'False Balance Sheets', Continuity or Rupture of Community Jurisprudence?

It is now time to attempt a summary of the interpretation developed by the Court. In particular, it has to do with understanding if the judgement in the 'false balance sheets' case represents a single moment in jurisprudence, a turnaround, and even,

[74] In this perspective, *see* Viganò, *supra* note 50, at 143, 7 n. 19 which mentions the "norme 'introduced in contraband' by the Italian legislator as an authentic norm of interpretation."

as some authors feared, a step back in the reports with the penal code or if it can possibly be reabsorbed in a perspective of coherence of the system validating the different elements with regard to similar (but not identical) questions with which the Court of Luxembourg has been busy.

The first conclusion of this study concerns the effects of Community standards on penal rules: they depend strictly on the type of source in play. One standard of a Regulation or of a sufficiently detailed Directive could be directly applicable, while the national penal standard is not applied. However, in Italian law a correct application of article 117 of the Constitution urges judges to abstain from the non-application of the relevant penal provision; this same article permits him to fall back on the Constitutional Court following the *Niselli* process after the judgement of the Court of Justice in 2004.[75] On the contrary, a standard kept in an insufficiently detailed Directive, like those imposing sanctions in an adequate manner (and therefore proportional and efficient) , can not stop the application of the national standards (interfering or not, is of little importance); this standard will nevertheless open the path of recourse in breaches of trust (articles 226 and following TCE) or, once again, that of the question of constitutional legitimacy.

From this point of view the various judgements of the Court with which we are concerned will not necessarily appear in conflict. With regard to the case of the "false balance sheets" the interpretive procedure in the *Tombesi* case is the same, though the effects in the subject of application are obviously different. We are notably in the presence of a Community standard which is contained in a Regulation and is therefore directly applicable, on the condition of default in the *Berlusconi, Adelchi,* and *Dell'Utri* cases, where it was a question of injunctions of generic penalization contained in some Directives.[76]

It must be noted however that in the context of the recent judgement of the Court of Justice issued in the *Pupino* case[77] recognizing the existence of an obligation to interpret in compliance with the national penal code (in form) in relation to a

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[75] Ordinance reviewed by the Constitutional Court on 2 February 2005 adopted by the Tribunal de Terni with regard to the law of delegation for the environment on 15 December 2004 n. 308, Now the provision of article 14 of the d.l. 8 July 2002, n. 138. In the matter of D'Amico, *supra* note 45, at 24.

[76] For similar conclusions on this point, *see*. S. Beltrame, *Il destino delle norme sui "rifiuti" e sul "falso in bilancio" censurate per violazione del diritto comunitario*, *in* R. Bin, *et al.* (Eds.) Ai confini del "favor rei" 88 *et seq*. (2005).

[77] Court of Justice (Grande Chambre), judgement of 16 June 2005, in the case C-105/03, *Pupino*, Now published *in* 2005 Dir. Pen. Proc., 1178 *et seq*.

> articles 2, 3 and 8, paragraph 4, of closed decision must be interpreted to mean that the national jurisdiction must have the possibility to authorize young children, who, as in the principal case, allege to have been victims of mistreatment, to make their deposition according to modalities permitting the guarantee to these children an appropriate level of protection, for example outside the public eye, and before being bound by this. The national legal system is required to take into consideration the whole of the national human rights rules and to interpret them,as much as possible, in the light of the text as well as of the finality of the said closed decision (paragraph 61).

code of the third pillar (in the case at hand a closed loop decision, by definition completely lacking any direct effect) implying the possibility of applying by way of analogy the standards on the anticipated acquisition of evidence (*incidente probatorio)* in the penal processes of 'weak victims'. This recognition is destined to raise other questions that must be examined in the future.[78]

As to the second consequence of the *Berlusconi* judgement relating to the retroactive application of a less severe criminal law, it is *stricto sensu* destined to crop up exclusively in cases of succession of criminal law in time (diachronic interference). In synchronic interference assumptions, as in the *Tombesi* case and probably also in the *Niselli* case, the problem of prior facts presents itself as well, though without implying a rewrite of the general law, therefore in a less 'dramatic' manner. In effect, it is evident that it is easier to apply the existing law at the time of the offense, when that law continues to exist in the system – even though it is substituted at the time of judgement by another special more favorable law in clash with Community Law.

Ultimately, in light of the proposed interpretation, the judgements under examination do not seem to express incompatible points, even though the important complexities already expressed with regard to numerous aspects addressed by the Court persist, particularly with regard to the principle of retroactive application of a 'softer' penal law. This 'softer' penal law, incidentally, doesn't have an absolute scope, as Community law is also governed by the principle of equality. The Court seems to indirectly admit this fact, without, however, arriving at a solution, when it confirms that: "The question remains nevertheless to know if the principle of retroactive application of a lighter punishment is applicable when this principle is contrary to other rules of Community Law".

To consider on the other hand that these various judgements are in conflict, is to argue the existence of incoherence within Community jurisprudence that the judges in Luxembourg will be expected to correct in the future, identifying, among their precedents, *bad law.*

[78] *Cf*. again Viganò, *supra* note 50, 1437 *et seq*. *See also* our *'Judicial activism' in le cadre de l'Espace de liberté, de justice and de sécurité de l'Union européenne (Chronique Droits of Communauté and de l'Union européennes)*, 2005 Revue, 940 *et seq*.