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Of import VAT, customs duties and dual preliminarity: Order no. 18284/2024 of the Civil United Sections of the Italian Supreme Court

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1. Preliminary remarks

With the order under review[1], the Italian Supreme Court, Civil United Sections, decided to refer a question to the Italian Constitutional Court for the assessment of the

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[1] Italian Supreme Court, Civil United Sections, 4 July 2024, no. 18284 (ord.).

constitutional legitimacy of Article 70 DPR 633/1972[2] and Article 301 DPR 43/1073 (hereinafter: *TULD*)[3] with respect to the principle of proportionality of criminal offences and penalties enshrined not only in Article 3 of the Italian Constitution but also in Article 49 CFREU[4].

Pursuant to Article 301 TULD, goods used or intended to commit smuggling as well as those that are the object of the offence or the product or profit thereof shall always be confiscated. According to the case law[5], as Article 70 of DPR 633/1972 makes the different offence represented by the evasion of import VAT also subject to the legal regime of "disputes and penalties" provided for smuggling, confiscation is mandatory in this case too.

In the light of the somehow erratic treatment as a criminal or administrative offence of smuggling[6] and – consequently – of the evasion of import VAT[7] by the Italian legislator, the Italian Supreme Court decided to submit the question to the Italian Constitutional Court, questioning the proportionality of the sanction represented by compulsory confiscation *ex* Article 301 TULD for conducts that are punished only as

[2] According to Article 70 of Decree no. 633 of the President of the Republic of 26 October 1972 on the establishment and regulation of value added tax, import VAT «*è accertata, liquidata e riscossa per ciascuna operazione*» and «[s]*i applicano per quanto concerne le controversie e le sanzioni, le disposizioni delle leggi doganali relative ai diritti di confine*».

[3] Decree no. 43 of the President of the Republic of 23 January 1973 on the approval of the Consolidated Text of Legislative Provisions on Customs Matters

[4] Charter of Fundamental Rights of the European Union [2012]. With regard to customs infringements see M. CEOLOTTO, *Il complesso equilibrio tra i principi generali in materia di sanzioni doganali, tra evoluzione normativa e giurisprudenza della Corte di giustizia*, in *Eurojus*, 2022, p. 128. From a general perspective, see S. MONTALDO, *EU Sanctioning Power and the Principle of Proportionality*, in S. MONTALDO, F. COSTAMAGNA, A. MIGLIO (eds.), *EU Law Enforcement. The Evolution of Sanctioning Powers*, Abingdon-New York, 2021, p. 115.

[5] Indeed, "[i]*il richiamo alle sanzioni previste dalle leggi doganali relative ai diritti di confine, contenuto nell'art. 70* [DPR 633/1972 cit.] è da intendersi come rinvio all'intero titolo VII del [TULD]" (Italian Supreme Court, III Criminal Section, 25 September 2018, no. 404).

[6] After a first decriminalisation for cases below Euro 4.000 by Legislative Decree no. 507 of 30 December 1999 on decriminalisation of minor offences and reform of the sanctions system, ordinary smuggling was punished with a monetary fine proportional to the tax evaded, while Article 295 TULD provided for certain aggravating circumstances that resulted in the application of a prison sentence. In 2016, all offences punished only with a monetary fine (including ordinary smuggling) were decriminalised and "transformed" into administrative offence by Legislative Decree no. 8 of 15 January 2016 on Decriminalisation pursuant to Article 2(2) of Law No. 67 of 28 April 2014. By contrast, the cases of aggravated smuggling identified by Article 295 TULD became autonomous criminal offences (see Italian Supreme Court, VI Criminal Section, judgment of 22 July 2021 no. 28701). To comply with the PFI Directive (Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law), Legislative Decree no. 75 of 14 July 2020 on Implementation of Directive (EU) 2017/1371 on combating fraud affecting the financial interests of the Union by means of criminal law lowered the threshold of criminal relevance for customs infringements, re-qualifying as criminal offences all violations, even if punished with a monetary sanction only, if the amount of evaded tax exceeds Euro 10.000. If the evaded tax exceeds Euro 50.000, a prison sentence also applies.

[7] The regime applicable to smuggling (including the thresholds of criminal relevance) applies also to import VAT evasion (Italian Supreme Court, Tax Section, 21 July 2023, no. 21917 (ord.)).

administrative offences, and therefore the compatibility of the regime with the aforementioned provisions of the Italian Constitution and of the CFREU[8].

While this is the main topic tackled by the Italian Supreme Court, the order under review is interesting for several reasons, on which this paper aims to focus.

On the one hand, one of the most compelling points is represented by one of the assumptions underlying the reasoning (and the doubt of unconstitutionality) expressed by the Italian Supreme Court, namely the statement – in very clear and unambiguous terms – that it would already be settled case law that import VAT cannot be assimilated to customs duties, being in reality the same tax as "ordinary" intra-EU VAT[9]. As a matter of fact, the distinction between import VAT and customs duties is by no means settled in the national case law[10], and there are actually many rulings, even very recent ones, and even issued by the same Italian Supreme Court, that state the opposite[11]. The correct qualification of import VAT is indeed a point of latent conflict between (part of) the national case law and the Court of Justice, which has repeatedly stated that VAT levied by a Member State on goods imported from other Member States[12] or from third countries[13] does not constitute a customs duty or a charge having an equivalent effect[14].

On the other hand, even if the Italian Supreme Court "forgot" to mention Articles 11 and 117 Italian Constitution[15] (i.e. the very provisions providing constitutional relevance to the CFREU and – more generally EU law), this is a case of so-called dual preliminarity in which the Italian Supreme Court dealt with a case concerning the (alleged) violation of fundamental rights conferred upon individuals by both the Italian Constitution and the CFREU[16]. The Italian Supreme Court decided to follow the "domestic route" outlined by

[8] Italian Supreme Court no. 18284/2024, cit.

[9] Indeed, "[c]*ostituisce giurisprudenza assolutamente consolidata* […] *che l'Iva all'importazione non è un diritto di confine (riconducibile all'art. 34 TULD) al pari dei dazi doganali ma, quanto alle sue caratteristiche, è la medesima imposta dell'Iva intraunionale*» (Italian Supreme Court no. 18284/2024, cit.).

[10] *Inter alia* L. UGOLINI, *La natura dell'Iva all'importazione e la responsabilità dello spedizioniere*, in *Rivista Telematica di Diritto Tributario*, 2020, p. 416; S. ARMELLA, *Dazi doganali e Iva all'importazione: presupposti impositivi distinti secondo la Corte di giustizia europea*, in *Rivista di diritto tributario*, 2020, p. 10; C. VERRIGNI, *Il controverso rapporto tra il contrabbando doganale e l'evasione dell'IVA all'importazione*, in *Rivista trimestrale di diritto tributario*, 2015, p. 319; G. VEZZOSO, *IVA sulle importazioni e diritti doganali*, in *Diritto marittimo*, 2011, p. 129.

[11] See note 37.

[12] *Inter alia* Court of Justice, 5 May 1982, Case 15/81, *Schul*, ECLI:EU:C:1982:135.

[13] *Inter alia* Court of Justice, 17 July 2014, Case C-272/13, *Equoland*, ECLI:EU:C:2014:2091, on which see B. SANTACROCE, E. SBANDI, *IVA all'importazione: la sentenza "Equoland" e la posizione restrittiva dell'Amministrazione doganale*, in *Corriere tributario*, 2014, p. 3489.

[14] See *infra* Section 3.3.

[15] While the wording "*anche con riferimento agli artt. 11 e 117 Cost.*" is often used before the reference to the EU provisions potentially breached (e.g. Italian Supreme Court, Labour Section, 8 March 2023, no. 6979 (ord.); Italian Supreme Court, III Criminal Section, 24 March 2022, no. 20559 (ord.); Italian Supreme Court, II Civil Section, 16 February 2018, no. 3831 (ord.)), Italian Supreme Court no. 18284/2024, cit. reads "[l]*a Corte, visti gli artt. 134 Cost. e 23 della l. 11 marzo 1953, n. 87, dichiara rilevante e non manifestamente infondata, in riferimento all'art. 3 della Costituzione e all'art. 49* [CFREU], *la questione di legittimità costituzionale dell'art. 70* [DPR 633/1972, cit.]".

[16] In addition to the works cited elsewhere, G. REPETTO, *Judgement no 269/2017 and dual preliminarity in the evolution of the jurisprudence of the Italian Constitutional Court*, in *Italian Journal of Public Law*, 2023, p. 8; C. AMALFITANO, L. CECCHETTI, *Sentenza n. 269/2017 della Corte Costituzionale e doppia*

the Italian Constitutional Court with the landmark and much-debated judgement no. 269/2017[17]. While the facts of the case might have suggested that the Italian Supreme Court could have approached the Court of Justice directly[18], the solution chosen offers to the Italian Constitutional Court the possibility to consider whether it should itself make a reference for a preliminary ruling under Article 267 TFEU, a choice that would enrich the already flourishing dialogue between the Court of Justice and the Italian Constitutional Court with a further chapter[19].

After a brief description of the factual background of the case, these aspects will be discussed below. Paragraph III will focus on the substantive issues concerning the relation between import VAT and customs duties, while Paragraph IV will briefly discuss the options that the legal system offers to domestic courts that find themselves dealing with a provision that may be inconsistent with both the Italian Constitution and the CFREU.

2. The factual background behind the referral by the Italian Supreme Court to the Italian Constitutional Court

The Italian Customs issued a confiscation order concerning a high-value painting that had been brought into Italy from Switzerland without being declared and without payment of VAT at the time of importation. As the EU-Swiss free trade agreement abolished long time ago customs duties, the only tax that was evaded was import VAT[20].

During a control, the painting was seized pursuant to Article 321 of the Italian Code of Criminal Procedure in order to be subsequently confiscated pursuant to Article 301 TULD at the end of the criminal proceedings. However, the criminal proceedings ended with the acquittal of the defendant as the Court of Milan pointed out that the offence of ordinary smuggling had been – *medio tempore*[21] – decriminalised. Nevertheless, Customs

pregiudizialità: l'approccio della Corte di giustizia dell'Unione europea, in *Eurojus*, 2022, p. 206; G. REPETTO, *Sentenza 269 e doppia pregiudizialità nella giurisprudenza della Corte costituzionale*, in *Eurojus*, 2022, p. 312; F. DONATI, *La questione prioritaria di costituzionalità: presupposti e limiti*, in *Federalismi*, 2021, p. 1; A. RUGGERI, *Il giudice e la "doppia pregiudizialità": istruzioni per l'uso*, in *Federalismi*, 2021, p. 211; D. GALLO, *Efficacia diretta del diritto UE, procedimento pregiudiziale e Corte Costituzionale: una lettura congiunta delle sentenze n. 269/2017 e 115/2018*, in *Rivista AIC*, 2019, p. 159; F. SPITALERI, *Doppia pregiudizialità e concorso di rimedi per la tutela dei diritti fondamentali*, in *Dir. Un. Eur.*, 2019, p. 729; C. AMALFITANO, *Rapporti di forza tra Corti, sconfinamento di competenze e complessivo indebolimento del sistema UE?*, in *La Legislazione penale*, 2019, p. 1; C. SCHEPISI, *I futuri rapporti tra le Corti dopo la sentenza n. 269/2017 e il controllo "erga omnes" alla luce delle reazioni dei giudici comuni*, in *Federalismi*, 2018, p. 1; G. MARTINICO, *Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order*, in *Int. J. Const. Law*, 2012, p. 871.

[17] Italian Constitutional Court, 14 December 2017, no. 269.

[18] See i*nfra* Section 4.2.

[19] On the relationship between the two courts see also L. SALVATO, *La Corte di giustizia e la Corte costituzionale*, in M. MARISARIA (ed.), *Il diritto europeo e il giudice nazionale*, Milano, 2023, p. 251 and S. SCIARRA, *First and last word: can Constitutional Courts and the Court of Justice of the EU speak common words?*, in *Eurojus*, 2022, p. 69. More generally, on the relations between the Court of Justice and the Constitutional Courts of other Member States, see, among many others, J. ZILLER, *Dialogo, confronto, o contrapposizione tra Corti?*, in *Eurojus*, 2022, p. 43; N. VEROLA, *Corte di Lussemburgo e giudici costituzionali degli Stati membri nel (faticoso) avanzamento del processo di integrazione europea*, in *Eurojus*, 2022, p. 34.

[20] Agreement of 22 July 1972 between the EEC and the Swiss Confederation.

[21] See note 6.

proceeded to confiscate the painting holding that confiscation was possible (and mandatory) even if no crime but an administrative offence had been committed.

After an unsuccessful appeal at first instance[22], the Regional Tax Court of Milan upheld the taxpayer's plea, ruling that the accessory penalty of confiscation would no longer be applicable in light of the decriminalisation of simple smuggling[23]. Upon hearing the appeal brought by the Customs, the Italian Supreme Court, noting the importance of the issue, decided to refer the case to the United Civil Sections[24]. The latter in turn decided to submit the question to the Italian Constitutional Court, questioning the compatibility of Article 301 TULD with Articles 3 of the Italian Constitution and 49 CFREU.

3. Customs duties and import VAT: a tangled relation

3.1."Importing a good" in the EU: release for free circulation vis-à-vis release for consumption

The ordinary way of introducing non-EU goods into the customs territory of the EU is through their definitive importation[25]. From a legal viewpoint, definitive importation takes place in two separate and distinct phases: goods shall be released for free circulation and for consumption.

The release of a good for free circulation follows the payment of any customs duty that may be due in respect of its importation[26]. The customs duty is due at the moment the goods cross an external border of the EU and is (or should have been[27]) the subject of a declaration for definitive importation[28]. The payment of customs duties entitles the imported goods to acquire the status of EU goods and to move freely within the territory of the EU[29].

The release for consumption occurs when the goods holding the EU status are introduced into the economic circuit of a Member State, with payment of that Member State's internal taxes, including import VAT. With the release for consumption, and the consequent payment of import VAT, the importer acquires full disposal of the goods and may sell them in the Member State where they have been released for consumption. Import VAT can be levied also on goods imported from third counties with which a free

[22] Tax Court of Milan, 14 January 2019, no. 125.

[23] Regional Tax Court of Milan, 15 January 2021, no. 266.

[24] Italian Supreme Court no. 21917/2023, cit.

[25] The term "ordinary" is used to distinguish importation from so-called special customs procedures (i.e. transit, deposit, specific use and processing) referred to in Articles 210 ff of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, whereas the term "definitive" is used to distinguish it from the temporary admission regime referred to in Articles 250 ff of Regulation 952/2013, cit.

[26] Cf. Article 201 of Regulation 952/2013, cit.

[27] Indeed, the «*unlawful introduction of goods is completed at the moment at which those goods pass beyond the first customs office situated inside the customs territory of the* [EU] *without those goods having been presented there*» (Court of Justice, 7 March 2019, case C-643/17, *Suez II*, ECLI:EU:C:2019:179 para 47).

[28] Article 77 of Regulation 952/2013, cit.

[29] Articles 5(23) and 201(3) of Regulation 952/2013, cit.

trade agreement is in place and even in case of intra-EU purchases, of course if VAT has not already been paid in the Member State of "exportation"[30].

A rebuttable presumption exists that the two phases usually overlap as the Member State of first entry often coincides with the Member State where the goods are intended to be consumed[31]. If this is not the case, however, customs duties (if due) are due in the Member State where release for free circulation took place while VAT is due in the other Member State where release for consumption took place[32].

3.2. Customs duties vis-à-vis import VAT: the approach(es) followed by Italian courts …

In the Italian legal order, the definition of customs duties is provided by Article 34 TULD, which also adds a sort of sub-category – that of border duties ("*diritti di confine*"). Customs and borders duties are indeed in a *genus* and *species* relation within each other: while the notion of customs duties include all the duties that Customs is required by law to collect in connection with customs operations[33], the list of border duties includes import and export duties, levies and other import or export charges provided for in EU regulations and their implementing rules, in respect of imported goods, monopoly duties, border surcharges and any other taxes or surcharges on consumption in favour of the State[34].

While there is no doubt that border duties include all charges provided for by EU legislation[35], the wording of Article 34 TULD has made much more controversial the question of whether import VAT can also be included within the notion of customs and border duties. These doubts have been somehow reinforced by the fact that Article 71(1)(2) of the VAT Directive authorises Member States to link the chargeable event for import VAT to the chargeable event for customs duties[36].

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[30] Italian Supreme Court, III Criminal Section, 9 January 2014, no. 11976.

[31] Court of Justice, 8 September 2022, Case C-368/21, *Hauptzollamt Hamburg (Lieu de naissance de la TVA - II)*, ECLI:EU:C:2022:647 paras 26-27; Court of Justice, 3 March 2021, Case C-7/20, *Hauptzollamt Münster (Lieu de naissance de la TVA)*, ECLI:EU:C:2021:161, paras 30-31.

[32] Court of Justice, 10 July 2019, Case C-26/18, *Federal Express Corporation Deutsche Niederlassung*, ECLI:EU:C:2019:579 para 54.

[33] Pursuant to Article 34(1) TULD, cit., customs duties are «*tutti quei diritti che la dogana è tenuta a riscuotere in forza di una legge, in relazione alle operazioni doganali*».

[34] Pursuant to Article 34(2) TULD, cit., borders duties are «*dazi di importazione e quelli di esportazione, i prelievi e le altre imposizioni all'importazione o all'esportazione previsti dai regolamenti comunitari e dalle relative norme di applicazione ed inoltre, per quanto concerne le merci in importazione, i diritti di monopolio, le sovrimposte di confine ed ogni altra imposta o sovrimposta di consumo a favore dello Stato*».

[35] Italian Supreme Court, III Criminal Section, 5 April 2016, no. 35575; Italian Supreme Court, V Criminal Section, 30 November 2006, no. 4950.

[36] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. According to the Court of Justice, this is the case because «*import VAT and customs duties display comparable essential features since they arise from the fact of importation of goods into the* [EU] *and the subsequent distribution of those goods through the economic channels of the Member States*» (Court of Justice, 18 January 2024, Case C-791/22 *Hauptzollamt Braunschweig (Lieu de naissance de la TVA - III)*, ECLI:EU:C:2024:59 para 23; Court of Justice, 7 April 2022, C-489/20 *Kauno teritorinė muitinė*,

According to a first line of case law, the notion of border duties also includes import VAT[37]. This view is based on the wording of Article 34 TULD: firstly, import VAT is collected by Customs pursuant to the law (namely Articles 1, 67 and 70 DPR 633/1972[38]) and therefore falls within the notion of customs duties; secondly, being a customs duty that is collected on the occasion of an importation, import VAT is also a border duty.

According to a different view, import VAT shall be considered as falling outside the scope of customs duties. Although both arise as a result of the importation of goods into the EU and their later introduction into the economic circuit of a Member State, import VAT is to all intents and purposes an internal tax[39]: in other words, there is no such thing as import VAT as opposed to "ordinary VAT", being actually the same form of taxation[40].

A non-exhaustive review of the case law seems to suggest that these different approaches at least in part mirrors the division of judicial competences that resulted from the (partial) decriminalisation of ordinary smuggling[41], with criminal courts (and thus the Criminal Sections of the Italian Supreme Court in the last instance) more inclined to follow the first approach and the tax courts (and thus the Civil Sections of the Italian Supreme Court in the last instance) fonder of the second approach[42].

What matters, however, is that following one or the other of the two above-mentioned approaches may result in significant differences in practice. This is not the place to fully explore this issue, but it is sufficient to recall that the differences are in essence all related to the fact that the potential exclusion of import VAT from the notion of border duties

ECLI:EU:C:2022:277 para 47; Court of Justice, 11 July 2013, Case C-273/12 *Harry Winston SA*, ECLI:EU:C:2013:466 para 41).

[37] *Inter alia*, Italian Supreme Court, III Criminal Section, 14 March 2024, no. 22297; Italian Supreme Court, III Criminal Section, 6 April 2023, no. 44659; Italian Supreme Court, III Criminal Section, 13 January 2022, no. 4978; Italian Supreme Court, III Criminal Section, 12 February 2021, no. 13831; Italian Supreme Court, III Criminal Section, 20 February 2019, no. 19233; Italian Supreme Court, III Criminal Section, 22 June 2016, no. 26202; Italian Supreme Court, III Criminal Section, 29 November 2010, no. 42161; Italian Supreme Court, III Criminal Section, 21 January 2003, no. 13102; Italian Supreme Court, III Criminal Section, 8 July 1992, no. 1298.

[38] According to the first two provisions, import VAT is due on goods imported to Italy from third countries unless they have already been released for free circulation in another Member State. Indeed, according to Article 1 DPR 633/1972, cit., VAT is due not only «*sulle cessioni di beni e le prestazioni di servizi effettuate nel territorio dello Stato*» but also «*sulle importazioni da chiunque effettuate*» and, according to Article 67 DPR 633/1972, cit., «*le operazioni di immissione in libera pratica*» shall be qualified as imports if they concern goods «*che siano originari da Paesi o territori non compresi nel territorio della Comunità e che non siano stati già immessi in libera pratica in altro Paese membro della Comunità medesima*». According to Article 70 DPR 633/1972, cit., as already seen, disputes and penalties for import VAT evasion are subject to the rules established by the TULD for smuggling.

[39] Regional Tax Court of Milan, 13 May 2021, no. 1815; Italian Supreme Court, V Civil Section, 21 March 2019, no. 7951; Italian Supreme Court, V Civil Section, 28 February 2019, no. 5962; Italian Supreme Court, V Civil Section, 6 April 2018 no. 8473.

[40] In other words, "[i]*l sistema dell'Iva all'importazione è per sua natura incardinato in quello generale dell'Iva poiché non colpisce il prodotto importato in quanto tale, ma s'inserisce nel sistema fiscale uniforme dell'Iva, che colpisce sistematicamente e secondo criteri obiettivi sia le operazioni degli Stati membri, sia quelle all'importazione*» (Italian Supreme Court, Tax Section, 24 May 2023, no. 14421; Italian Supreme Court no. 7951/2019, cit.; Italian Supreme Court, VI Civil Section, 29 July 2015, no.15988).

[41] See note 6.

[42] There are of course exceptions: e.g., on the one hand, Italian Supreme Court, III Criminal Section, 4 May 2010 no. 16860 and, on the other hand, Regional Tax Court of Bari, 19 October 2015, no. 2157.

implies that smuggling can never be contested when the only tax evaded is represented by import VAT[43]. Indeed, virtually all the provisions[44] that compose Chapter I ("smuggling") of Title VII ("customs violations") TULD explicitly refer to borders duties to determine their scope of application. This also applies to Article 292 TULD which, as is well known, is a kind of "catch all provision" on the subject of smuggling[45].

The correct legal qualification of import VAT is therefore a critical factor in assessing, *inter alia*, issues such as the possibility (i) of combining the amount of border duty and VAT evaded[46] for sanctioning purposes and in particular for classifying smuggling as ordinary or aggravated[47], or (ii) to classify the offence of import VAT evasion as having a permanent nature, with implications for the limitation period[48], or (iii) to hold that that these offences can be committed only by the person materially importing the non-EU goods[49] or also by other persons[50], and in particular those holding the goods[51], as well as

[43] If one holds that customs duties include import VAT, then the evasion of each of them results in a smuggling offence (see Italian Supreme Court, III Criminal Section, 12 march 2024, no. 24784). If one follows the other approach, if the only tax evaded is import VAT there is no smuggling but only the stand-alone offence pursuant to Articles 67 and 70 DPR 633/1972, cit. (Trib. Napoli Nord, 19 February 2016, no. 182; Italian Supreme Court, III Criminal Section, 14 March 1985).

[44] Cf. Articles 282 ff TULD.

[45] The cases covered by Articles. 282 ff TULD actually represent mere "typified cases" of smuggling (Italian Supreme Court, V Criminal Section, 8 May 2015, no. 39196), an offence that, however, has a "free form by nature" (Italian Supreme Court no. 35575/2016, cit.). In order not to leave unpunished any of the innumerable ways in which smuggling can occur (Regional Tax Court of Turin, 5 August 2022, no. 835), therefore, Article 292 TULD is a catch-all provision that identify only the relevant event (the evasion of border duties) but not the relevant behaviour, so that any conduct capable of determining that result may constitute the offence (Italian Supreme Court, III Criminal Section, 27 November 2002 no. 4032; Tribunal of Naples, 28 January 2011, no. 17813).

[46] If import VAT is treated as a domestic tax, it cannot be added to the amount of border duties evaded, when determining the penalties (Italian Supreme Court, Tax Section, 18 August 2023, no. 24788). If one follows the opposite approach, the amount of import VAT shall be combined with the amount of the customs duties to determine the evaded tax (Italian Supreme Court judgment no. 4978/2022, cit.; Italian Supreme Court, III Criminal Section, 23 November 2022, no. 44459).

[47] This was a paramount matter following the decriminalisation of ordinary smuggling carried out by Legislative Decree 8/2016, cit. (see note 6).

[48] See Italian Supreme Court judgment no. 19233 /2019, cit.; Italian Supreme Court, III Criminal Section, 18 May 2017, no. 56264.

[49] If import VAT is not a border duty, the reference made by Article 70 DPR 633/1972, cit., to the customs legal framework applies only to the sanctioning treatment and does not extend to the other provisions, including the presumption *ex* Article 25 TULD that the holder of the goods can be held liable for smuggling if he or she cannot prove their legitimate origin (Italian Supreme Court, III Criminal Section, 18 March 2004, no. 19514; Italian Supreme Court no. 7951/2019, cit.; Trib. Torre Annunziata, 22 March 2022, no. 679).

[50] The Court of Justice has recently decided, however, that the indirect customs representative of a given importer cannot be held liable for the evasion of import VAT as the former is liable only for customs duties (Court of Justice, 12 may 2022, Case C-714/20 *U.I. (Représentant en douane indirect)*, ECLI:EU:C:2022:374). This approach has already been confirmed also by Italian Supreme Court, Tax Section, 23 May 2024, no. 14382.

[51] See Italian Supreme Court no. 42161/2010, cit.; Italian Supreme Court, Tax Section, 10 November 2021, no. 32978.

(iv) to extend also to import VAT evasion the legal equivalence set by Article 293 TULD[52]between the attempt to commit the offence and the offence actually committed[53].

3.3. … and by the Court of Justice: customs duties and import VAT are levies different in nature

As anticipated, the second approach developed (mainly) by Italian tax and civil courts seems to be more in line with the case-law of the Court of Justice.

While it has often acknowledged that "import VAT and customs duties display comparable essential features"[54], the Court of Justice also acknowledged that there are inherent differences between the two levies[55], thus repeatedly stating that "import duties do not include the VAT to be levied on the importation of goods"[56].

Having established long ago that Member States cannot impose VAT on the importation of goods from other Member States supplied by private persons where no such tax is levied on the supply of similar products by private person within the territory of the Member State of importation[57], nor sanctioning the evasion of import VAT in a (too) stricter manner than the evasion of VAT payable on domestic sales[58], the Court of Justice has also stated in very clear terms that VAT levied by Member States on the importation of goods is part of the harmonized and common system of VAT: as such, it must be considered as an integral part of a general system of internal taxation, so that its compatibility with EU law must be assessed under Article 110 TFEU rather than pursuant to Article 30 TFEU[59].

It is precisely against this background, and in the light of the significant practical consequences resulting from the correct qualification of import VAT recalled above, that it was worth to point out that, in the order under review, the Italian Supreme Court takes a very clear stance towards the impossibility of considering import VAT as a customs

[52] An attempt to commit smuggling occurs whenever there are acts unequivocally aimed at committing smuggling (see Tax Court of Turin no. 835/2022, cit.; Italian Supreme Court, VI Criminal Section, 25 March 1983 and Italian Supreme Court, III Criminal Section, 27 November 1984).

[53] The regime of the attempted offence can be extended also to import VAT evasion because the reference to disputes and penalties («*controversie e le sanzioni*») provided for by customs laws contained in Article70 DPR 633/1972, cit. refers to the entire Title VII of TULD, including Article 293 TULD (Italian Supreme Court no. 404/2018, cit.)

[54] See note 36.

[55] E.g., «[u]*nlike customs duties, which accrue to the* [EU] *irrespective of the Member State which collects them, revenue deriving from import VAT belongs, in accordance with that principle, to the Member State in which final consumption occurred*» (Court of Justice, 27 September 2007, Case C-146/05 *Collée* ECLI:EU:C:2007:549 para 37).

[56] Most recently, Court of Justice, 12 may 2022, Case C-714/20 *U.I. (Représentant en douane indirect)*, cit., para 49; Court of Justice, 10 September 2015, Cases C-266 to 228/14 *Eurogate Distribution Gmbh*, ECLI:EU:C:2016:405 para 81; Court of Justice, 29 July 2010, Case C-248/09 *Pakora Pluss SIA*, ECLI:EU:C:2010:457 para 47.

[57] Court of Justice, 5 May 1982, Case 15/81, *Schul*, cit. para 48.

[58] Court of Justice, 25 February 1988, Case C-299/86 *Drexl* ECLI:EU:C:1988:103 para 23.

[59] Court of Justice, 3 October 1985, Case C-249/84, *Profant*, ECLI:EU:C:1985:393 para 15; Court of Justice, 12 January 1983, Case C-39/82 *Donner*, ECLI:EU:C:1983:3 para 8.

duty, thereby bringing the Italian legal order into line with the case law of the Court of Justice.

4. Dual preliminarity: a candidate for a new referral by the Italian Constitutional Court?

4.1. Dual preliminarity: generalities

With the well-known and much-debated judgement no. 269/2017[60], the Italian Constitutional Court has notoriously reshaped the relationship between the preliminary reference procedure *ex* Article 267 TFEU and the review of constitutionality *ex* Article 134 of the Italian Constitution for those cases involving a potential clash between a national provision and a fundamental right enshrined in both the Italian Constitution and the CFREU.

While this is not the place to discuss this highly complex matter with any claim of being exhaustive, suffices it to recall that, according to the Italian Constitutional Court, in these situations, the compatibility of the national provision with EU law represents a logical and legal *prius* with respect to the question of its constitutionality[61]. It follows that, while they remain free to stay[62] the proceedings and submit a question to the Court of Justice under Article 267 TFEU, Italian courts may[63] also decide to refer the matter directly to the Italian Constitutional Court, which may in turn elect to ask the Court of Justice for guidance: the "domestic route" has the added value of enabling an intervention with *erga omnes* effects. There is no need to mention that this decision represented an unexpected (and partial) *revirement* of the Italian Constitutional Court considering that, at least since the *Granital* judgment[64], the Italian Constitutional Court had always held

[60] Italian Constitutional Court no. 269/2017, cit.

[61] *Ex pluribus* Italian Constitutional Court, 4 June 2024, no.100; Italian Constitutional Court, 29 November 2019, no. 245.

[62] According to Article 23 of the Statute of the Court of Justice (Protocol no. 3 to the Treaties), the request for a preliminary ruling is to suspend the national proceedings. On the (limited) exceptions to this rule see Court of Justice, 6 June 2024, Joined Cases C-255/23 and C-285/23, *Criminal proceedings against AVVA and Others*, ECLI:EU:C:2024:462.

[63] Subsequent case law (such as Italian Constitutional Court, 21 March 2019, no. 63 and Italian Constitutional Court, 21 February 2019, no. 20, reading «*va preservata l'opportunità di un intervento con effetti* erga omnes *di questa Corte*») clarified that the "domestic route" is an opportunity and not an obligation (which would have likely proved to be inconsistent with EU law), since judgment no. 269/2017, cit., was ambiguous in this regard, claiming that «*le violazioni dei diritti della persona postulano la necessità di un intervento* erga omnes *di questa Corte*». In 2022, the Italian Constitutional Court further added that the "domestic route" «*non è alternativo a un meccanismo diffuso di attuazione del diritto europeo* […], *ma con esso confluisce nella costruzione di tutele sempre più integrate*" (Italian Constitutional Court, 11 March 2022, no. 67, on which see N. LAZZARINI, *Lunga vita alla disapplicazione immediata (se non si tratta di doppia pregiudizialità): riflessioni a margine della sentenza no. 67/2022 della Corte costituzionale*, in *Rivista giuridica del lavoro e della previdenza sociale*, 2022, p. 315) and that «*esiste un rapporto di mutua implicazione e di feconda integrazione" tra i divieti di discriminazione prescritti dal diritto dell'Unione e i diritti fondamentali garantiti dalla Costituzione nazionale*» (see Italian Constitutional Court, 30 July 2020, no. 182 (ord.), as noted by B. NASCIMBENE, P. DE PASQUALE, *Il diritto dell'Unione europea e il sistema giurisdizionale. La Corte di giustizia e il giudice nazionale*, in M. MARISARIA (ed.), *Il diritto europeo e il giudice nazionale*, cit., p. 3, spec. 23).

[64] Italian Constitutional Court, 8 June 1984, no. 170.

that the assessment of the compatibility of national provisions with EU law had logical priority over the assessment of their unconstitutionality[65].

As judgement no. 269/2017 (after the 2019 and 2022 "fine tuning")[66] has essentially conferred to Italian judges a margin of discretion in choosing between the EU or the domestic route[67], it is hardly surprising that, in the aftermath of this ruling, the practice (even of the Italian Supreme Court alone) developed around various alternative solutions[68].

In some cases, the Italian Supreme Court directly set aside the domestic provision, without making any referral, neither to the Italian Constitutional Court nor to the Court of Justice. This happened, for example, in a case concerning a potential violation of the principle, of both constitutional and EU relevance, of equal treatment of men and women[69]. In other cases, the Italian Supreme Court preferred to refer the matter directly to the Court of Justice even though the potential breach of rights protected – *inter alia* – by Articles 21 and 31 CFREU (such as the right to non-discrimination on the ground of age or the right to annual leave) could be coupled with a violation of Articles 3 and 36 of the Italian Constitution[70]. In still other cases, the Italian Supreme Court decided – as in the case at hand – to follow the "domestic route" and to raise the issue of constitutionality rather than relying directly on Article 267 TFEU: sometimes, perhaps, because the incompatibility of national law was identified not only against the Italian Constitution and the CFREU but also against the ECHR[71], which notoriously lacks direct applicability[72].

In any case, while the Italian Constitutional Court's judgment no. 269/2017 initially raised some doubts – for the most part superseded by subsequent case law[73] – as to its consistency not only with the preliminary ruling procedure itself, but also with the

[65] See for example R. MASTROIANNI, *Da Taricco a Bolognesi, passando per la ceramica Sant'Agostino: il difficile cammino verso una nuova sistemazione del rapporto tra Carte e Corti*, in *Osservatorio sulle fonti*, 2018; G. AMOROSO, *La doppia pregiudizialità — costituzionale ed europea — nel quadro della giurisprudenza della Corte costituzionale e della Corte di giustizia*, in *Foro Italiano*, 2020, p. 265.

[66] See note 63 and, *inter alia*, Administrative Regional Court of Rome, 10 February 2020, no. 1770 and Italian Supreme Court, VI Criminal Section, 4 February 2020, no.10371.

[67] R. MASTROIANNI, *Sui rapporti tra Carte e Corti: nuovi sviluppi nella ricerca di un sistema rapido ed efficace di tutela dei diritti fondamentali*, in *European Papers*, 2020, p. 494.

[68] For a more detailed analysis see M. MASSA, *The «dual preliminarity» doctrine in the case law of ordinary courts of first instance and appeals*, in *Italian Journal of Public Law*, 2023, p. 25; L. LORENZONI, *The Doctrine of Dual Preliminarity in the Case Law of Italian Administrative Courts*, in *Italian Journal of Public Law*, 2023, p. 41; D. TEGA, *The Italian Court of Cassation and Dual Preliminarity*, in *Italian Journal of Public Law*, 2023, p. 69; O. SCARCELLO, *An Empirical Analysis: Practices of Italian Courts on Dual Preliminarity (2018-2022). A Mixed Response*, in *Italian Journal of Public Law*, 2023, p. 138.

[69] Italian Supreme Court, 17 May 2018, no. 12108.

[70] Italian Supreme Court, 30 May 2018, no. 13678 (ord.); Italian Supreme Court, Labour Section, 10 January 2019, no. 451 (ord.).

[71] Italian Supreme Court no. 3831/2018, cit.

[72] Italian Supreme Court, Criminal United Sections, 28 April 2016, no. 27620.

[73] See note 63. Indeed, «*the current configuration seems to pose no serious threats to the EU systemic principles involved nor to EU law's uniformity, coherence, and effectiveness*» (C. AMALFITANO, L. CECCHETTI, *The ECJ's Approach to Dual Preliminarity 5 Years after the ItCC's Judgment No. 269/2017*, in *Italian Journal of Public Law*, 2023, p. 84).

principles of primacy, direct effect and effectiveness of EU law[74], it seems that, at least in general terms[75], this sort of "centralisation of competence" by the Italian Constitutional Court[76] actually led to a greater reliance of the latter on Article 267 TFEU and, thus, ultimately widened the scope of dialogue and cooperation between the Italian Constitutional Court and the Court of Justice[77].

After having for decades refused to be qualified as a court for the purposes of Article 267 TFEU (or better, as a subject that could need guidance from the Court of Justice)[78], nowadays – and also[79] and precisely in the aftermath of judgment no. 269/2017 – referrals for preliminary rulings to the Court of Justice by the Italian Constitutional Court have become much more frequent, as shown by the recent practice: for example, the Italian Constitutional Court has stayed the proceeding and submitted a question pursuant to Article 267 TFEU in 2019[80], 2020[81], 2021[82] and early this year[83].

[74] E.g. D. GALLO, *Challenging EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure*, in *European Law Journal*, 2019, p. 434; L. S. ROSSI, *La sentenza 269/2017 della Corte costituzionale italiana: obiter "creativi" (o distruttivi?) sul ruolo dei giudici italiani di fronte al diritto dell'Unione Europea*, in *Federalismi*, 2018, p. 1.

[75] There are, of course, many cases where the Italian Constitutional Court, although the question concerned the compatibility of national rules with both the Italian Constitution and the CFREU, has itself ruled that the national provisions were unconstitutional, without submitting any question to the Court of Justice (Italian Constitutional Court, 21 February 2019, no. 20), sometimes for procedural reasons (Italian Constitutional Court, 2 December 2021, no. 230; Italian Constitutional Court, 23 November 2021, no. 218).

[76] D. GALLO, G. PICCIRILLI, *Dual Preliminarity, Today. Evaluating the Impact of Judgment No. 269/2017 of the Italian Constitutional Court*, in *Italian Journal of Public Law*, 2023, p. 1, spec. p. 2; D. TEGA, *The Italian Constitutional Court in Its Context: A Narrative*, in *European Constitutional Law Review*, 2021, p. 369.

[77] E.g. I. GAMBARDELLA, *The Italian Constitutional Court and the Court of Justice of the European Union – A Step towards a More Constructive Dialogue on Fundamental Rights Matters?*, in *Public Law*, 2022, p. 470; C. AMALFITANO, *Il dialogo tra giudice comune, Corte di Giustizia e Corte costituzionale dopo l'obiter dictum della sentenza n. 269/2017*, in *Osservatorio sulle fonti*, 2019, p. 26.

[78] Italian Constitutional Court, 29 December 1995, no. 536 (ord.).

[79] Of course, the Italian Constitutional Court's "change of heart" occurred prior to judgment no. 269/2017, cit., initially for so-called principaliter proceedings (see Italian Constitutional Court, 15 April 2008, no. 103 (ord.)), and then also for so-called incidenter proceedings (see Italian Constitutional Court, 18 July 2013, no. 207 (ord.)).

[80] Italian Constitutional Court, 10 May 2019, no. 117 (ord.), leading to Court of Justice, 2 February 2021, Case C-481/19, *Consob*, ECLI:EU:C:2021:84, and then to Italian Constitutional Court, 30 April 2021, no. 84. See B. NASCIMBENE, *La tutela dei diritti fondamentali in Europa: i cataloghi e gli strumenti a disposizione dei giudici nazionali (cataloghi, arsenale dei giudici e limiti o confini)*, in *Eurojus*, 2020, p. 272.

[81] Italian Constitutional Court no. 182/2020, cit., leading to Court of Justice, 2 September 2021, Case C-350/20, *INPS*, ECLI:EU:C:2021:659, and then to Italian Constitutional Court, 4 March 2022, no. 54. See N. LAZZERINI, *Dual Preliminarity Within the Scope of the EU Charter of Fundamental Rights in the Light of Order 182/2020 of the Italian Constitutional Court*, in *European Papers*, 2020, p. 1463.

[82] Italian Constitutional Court, 18 November 2021, no. 216 (ord.), leading to Court of Justice, 18 Aprile 2023, Case C-699/21, *E. D. L. (Motif de refus fondé sur la maladie)*, ECLI:EU:C:2023:295, and then to Italian Constitutional Court, 28 July 2023, no. 177. See also Italian Constitutional Court, 18 November 2021, no. 217 (ord.), leading to Court of Justice, 6 June 2023, Case C-700/21, *O. G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)*, ECLI:EU:C:2023:444, and then to Italian Constitutional Court, 28 July 2023, no. 178.

[83] Italian Constitutional Court, 27 February 2024, no. 29 (ord.), leading to case C-151/24 *Luevi*

4.2. The Order under review: the exercise of the margin of discretion in choosing between the "EU route" or the "domestic route"

Even from the perspective of dual preliminarity, the order under review displays some interesting profiles. In particular, it seems opportune to briefly discuss the reasoning by which the Italian Supreme Court ruled out the necessity (and relevance) of referring the matter to the Court of Justice.

Noting that the issue concerned a harmonised area such as VAT[84], the Italian Supreme Court recognised that it would have been appropriate to first assess the compatibility of Article 301 TULD with proportionality as a general principle of EU law[85], thereby making it clear that it considered the "domestic route" to be an option and certainly not an obligation. The Italian Supreme Court, however, immediately discarded this scenario noting that, in the past, the Court of Justice had already stated that the principle of proportionality is irrelevant when it comes to the sanctioning regime for the evasion of import VAT from third countries, even in those cases where a free trade agreement is in force.

The Italian Supreme Court's reference is to the *Metalsa* case[86], where the Court of Justice – actually building upon the previous *Kupferberg* case concerning Portugal[87] – held that the *Drexl* doctrine[88], according to which what is now Article 110 TFEU demands that evasion of VAT levied on intra-EU and domestic transactions are proportionally punished one to the other, could not be applied by analogy to imports from Austria (back then a third country), as these are very different situations. Regarding intra-EU trade, the legal framework is based on the Treaties, which aim to promote the internal market; for third countries, the reference is free trade agreements that seek to preserve and extend the existing economic relations between the parties[89].

Accordingly, the provision of a free trade agreement requiring the parties to avoid internal tax discrimination between their products[90], despite having a similar wording to Article 110 TFEU, pursues a different aim and it does not entail the need – and the possibility – to compare penalties imposed by Member States for tax offences on imports

[84] Although the Court of Justice has been somewhat erratic on this point, delivering more (e.g. Court of Justice, 19 November 2019, Joined Cases C-609/17 and C-610/17, *TSN v AKT*, ECLI:EU:C:2019:981) or less (Court of Justice, 14 September 2023, Case C-27/22, *Volkswagen Group Italia e Volkswagen Aktiengesellschaft*, ECLI:EU:C:2023:663) restrictive judgments on the interpretation of Article 51 CFREU, there should be no doubt that, in the present case, the provisions alleged to be incompatible with Article 49 CFREU represent an implementation of EU law by Italy, as the factual circumstances are not too dissimilar from the leading case in this field (see Court of Justice, 26 February 2013, Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105). On this topic see inter alia B. NASCIMBENE, *Il principio di attribuzione e l'applicabilità della Carta dei diritti fondamentali: l'orientamento della giurisprudenza*, in *Riv. Dir. Int.*, 2015, p. 49.

[85] Italian Supreme Court no. 18284/2024, cit., para 15.

[86] Court of Justice, 1 July 1993, Case C-312/91, *Metalsa* ECLI:EU:C:1993:279.

[87] Court of Justice, 26 October 1982, Case 104/81, *Kupferberg*, ECLI:EU:C:1982:362.

[88] Court of Justice, 25 February 1988, Case C-299/86 *Drexl*, cit.

[89] Court of Justice, 1 July 1993, Case C-312/91, *Metalsa*, cit., paras 15-16.

[90] As Article 21 of the Agreement of 22 July 1972 between the EEC and the Portuguese Republic, Article 18 of the Agreement of 22 July 1972 between the EEC and the Republic of Austria, and Article 18 of the Agreement of 22 July 1972 between the EEC and the Swiss Confederation.

with those imposed for tax offences on domestic or intra-EU transactions[91], nor prohibits disproportionate sanctions between the two categories of offences[92]. Noting that Article 18 of the EU-Swiss free trade agreement matches the provision of the agreement with Austria that was addressed in the *Metalsa* case, the Italian Supreme Court concluded that the conditions for a referral under Article 267 TFEU, or for the disapplication of Article 301 TULD, would not be met[93].

What appears to be an application of the *Cilfit* criteria[94] reveals some aspects that are not fully convincing. This point is well illustrated by the individuation of the EU parameter with which the Italian Supreme Court itself postulates the possible incompatibility of Article 70 of DPR 633/1972 and Article 301 TULD: indeed, the Italian Supreme Court considers that doubts of constitutionality arise with respect to the principles of proportionality and reasonableness enshrined in Article 3 Italian Constitution and Article 49 CFREU[95]. The relevant EU rule, therefore, does not seem to be (and at least not only) the prohibition of tax discrimination provided for in the EU-Swiss free trade agreement, but rather Article 49 CFREU, a provision clearly not covered by the Court of Justice's rulings in *Metalsa* and *Kupferberg*, if only because it did not even exist when these rulings were issued[96]. In other words, confiscation *ex* Article 301 TULD for import VAT evasion could, in hypothetical terms, be disproportionate not so much because it represents a stricter punishment than the evasion of domestic VAT, but rather because it goes "beyond what is necessary in order to attain the objectives legitimately pursued by that legislation" and is therefore "disproportionate to those objectives"[97].

While the *Cilfit* doctrine allows national courts to refer a question for a preliminary ruling again, even if the Court of Justice has already addressed the issue and nothing has changed, in this case there were novel and important elements: the entry into force of Article 49 CFREU would have (perhaps) justified a different assessment by the Italian Supreme Court of the opportunity of the referral to the Court of Justice. This choice would have been particularly appropriate if one considers that the conflict with Article 49 CFREU is envisaged in an area that, without prejudice to sanctioning competences

[91] Court of Justice, 1 July 1993, Case C-312/91, *Metalsa*, cit., para 20.

[92] Court of Justice, 1 July 1993, Case C-312/91, *Metalsa*, cit., para 21.

[93] Italian Supreme Court no. 18284/2024, cit. para 17.

[94] Court of Justice, 6 October 1982, Case C-283/81, *Cilfit*, ECLI:EU:C:1982:335. As it is well-known, the *Cilfit* criteria "escaped" the criticism formulated not too long ago by AG Bobek (see Opinion of AG Bobek, 15 April 2021, Case C-561/19, *Consorzio Italian Management e Catania Multiservizi*, ECLI:EU:C:2021:291) virtually unaffected (see Court of Justice, 5 November 2021, Case C-561/19, *Consorzio Italian Management e Catania Multiservizi*, ECLI:EU:C:2021:799). For further references see F. MUNARI, *Il «dubbio ragionevole» nel rinvio pregiudiziale*, in *Federalismi*, 2022, p. 162.

[95] Italian Supreme Court no. 18284/2024, cit., para 17.

[96] On the other hand, it is true that proportionality was established as a general principle of EU law by the Court of Justice already in the 1970s (see Court of Justice, 14 May 1974, Case 4/73, *Nold*, ECLI:EU:C:1974:51).

[97] Court of Justice, 23 November 2023, Case C-653/22, *J. P. Mali*, ECLI:EU:C:2023:912, para 32; Court of Justice, 8 June 2023, Case C-640/21, *Zes Zollner Electronic*, ECLI:EU:C:2023:457, para 61; Court of Justice, 4 March 2020, Case C-655/18, *Schenker*, ECLI:EU:C:2020:157, para 43.

regulated mainly at national level, not only – as noted by the Italian Supreme Court – concerns a harmonised tax such as VAT, but actually falls within (or on the edges of) an exclusive competence of the EU, such as the customs union[98].

Precisely for this reason, it is not excluded – and indeed would perhaps be desirable – that the Italian Constitutional Court may in turn decide to refer the matter to the Court of Justice, offering the Court of Justice with the opportunity to provide a uniform approach to the interpretation of Article 49 CFREU.

5. Conclusive remarks

As this paper has attempted to stress, the order under review offers many points of discussion and interest, a circumstance that is not surprising considering that it is a ruling delivered by the United Sections of the Italian Supreme Court.

The substantive issue, on which the Italian Constitutional Court and (perhaps) the Court of Justice will be called upon to decide, concerns the compatibility with the principles of proportionality and reasonableness enshrined in Article 3 Italian Constitution and Article 49 CFREU of the mandatory confiscation prescribed by Article 301 TULD and – as far as VAT is concerned also by – Article 70 DPR 633/1972 for all cases of evasion of customs duties and import VAT, regardless of the gravity of the offence and of whether it is classified as a criminal or administrative offence.

While this issue is therefore still open, the Italian Supreme Court already expressed some highly relevant principles of law. In particular, the Italian Supreme Court took a very clear stance toward the impossibility of qualifying import VAT as a customs duty. The order under review therefore enriches, with a particularly influential ruling, the line of jurisprudence most in harmony with the case law of the Court of Justice. This is particularly relevant, if only because the identification of the correct legal status of import VAT has many practical implications. It remains to be seen, however, if the position reiterated by the Italian Supreme Court will be able to bridge the gap between civil and criminal courts on this matter, and thus whether criminal courts will also fall in line.

What is somehow surprising about the order is the Italian Supreme Court's overly cautious attitude towards Article 267 TFEU. Putting itself in line with the case law on dual preliminarity[99], the Italian Supreme Court promptly considered the possibility of referring the matter to the Court of Justice, but then discarded this option following a perhaps too restrictive approach toward the identification of the relevant EU law parameter. The Italian Supreme Court focused on the prohibition of tax discrimination provided for by the EU-Swiss free trade agreement, noting that the Court of Justice already established that this prohibition – also contained in agreements with other third countries – does not allow one to question the possible lack of proportionality between

[98] Article 3(1)(a) TFEU.
[99] See notes 60 and 63.

the sanctions for tax offences on imports with those on domestic or intra-EU transactions[100].

In the present case, however, the relevant question seems to be whether mandatory confiscation, even for minor and decriminalised offences, may in itself be a disproportionate sanction: this is a question that need to be assessed not so much against the text of free trade agreements, but rather and primarily in the light of Article 49 CFREU, the correct interpretation of which could have therefore been asked to the Court of Justice. Indeed, if the *per se* compatibility of confiscation with EU law cannot be seriously questioned, it has been recently noted that "[i]n what circumstances confiscation *in concreto* is lawful may be debatable"[101], thereby arguably leaving the door open to the possibility that there may be specific circumstances (e.g. when imposed in cases of minor offences) in which such an instrument might not be compatible with EU law.

Perhaps, as it did for example in 2019, 2020, 2021 and early this year[102], also in this case the Italian Constitutional Court will decide to ask the Court of Justice for guidance on this matter, a choice that would indeed seem appropriate, especially considering that the conflict with Article 49 CFRUE is envisaged in an area involving an area of exclusive competence of the EU (customs duties) and a harmonised tax (VAT on importation).

[100] Court of Justice, 1 July 1993, Case C-312/91, *Metalsa*, cit. and Court of Justice, 26 October 1982, Case 104/81, *Kupferberg*, cit.

[101] See Opinion of AG Campos Sánchez-Bordona, 8 May 2024, Cases C-717/22 and C-372/23, *Sistem Lux*, ECLI:EU:C:2024:391, para 68.

[102] See notes 80-84.