

EU FRAUD AND LIMITATION PERIODS: THE “TARICCO RULE” IS INCOMPATIBLE WITH THE PRINCIPLE OF CERTAINTY IN CRIMINAL LAW

An emblematic case of dialogue between Courts

The *Taricco* case is a significant example of “dialogue between Courts”. Often, such dialogue is intentionally sought, although doubts may remain as to its effective feasibility. With the *Taricco* case, however, by means of the decisions of the Court of Justice of the European Union (CJEU) and of the Constitutional Court of the Italian Republic, such dialogue took place and its outcome was productive, as made clear in the Constitutional Court’s judgment, filed today as No. 115 of 2018 (Judge Rapporteur: Giorgio Lattanzi).

Taricco I

The judgment delivered by the Grand Chamber of the CJEU in *Taricco* established that Italian courts were to disapply Articles 160(3) and 161(2) of the Italian Criminal Code, to refrain from ruling that the crimes of fraud affecting the European Union were time-barred and to proceed with the trial, in two cases: first, according to a rule drawn from Article 325(1) of the Treaty on the Functioning of the European Union (TFEU), when such provisions establishing the limitation period prevent the imposition of effective and deterring punishments in a significant number of cases of serious fraud affecting the financial interests of the Union; second, on the basis of a rule drawn from Article 325(2) TFEU (the so-called principle of assimilation), when the limitation period, because of the abovementioned provisions, is shorter than that established by domestic law for analogous cases of fraud affecting the Member State.

The Italian courts

The Supreme Court of Cassation and the Court of Appeal of Milan, however, considered that the rules established in *Taricco I* contrasted with a number of supreme principles of the Italian constitutional order, namely Articles 3, 11, 24, 25(2), 27(3) and 101(2) of the Constitution. Referring the two trials under their jurisdiction to the Constitutional Court, they raised questions of constitutionality regarding Article 2 of Law No. 130 of 2 August 2008, on the ratification and execution of the Lisbon Treaty, in so far as, by requiring the application of Article 325 TFEU as interpreted in *Taricco I*, in some cases, Articles 160(3) and 161(2) of the Criminal Code would be disapplied in the context of crimes relating to value-added tax (VAT) that constitute fraud affecting the financial interests of the Union.

The Supreme Court of Cassation, after recalling that, in the Italian legal system, limitation periods pertain to the sphere of substantive criminal law, emphasized that the violation of Article 25(2) of the Constitution had occurred with regard to: the requirement of reservation to primary legislation in criminal matters, given that the framework regulating limitation periods would cease to be legal; of certainty, because of the generic nature of the concepts of “serious fraud” and “significant number of cases”, upon which the “*Taricco* rule” is based; and the prohibition on retroactivity, considering that the facts giving rise to the offence pre-date 8 September 2015, when the *Taricco I* judgment was published.

In addition, Article 101(2) of the Constitution has also been infringed, because the challenged provisions entrust to judges an activity that requires an “evaluation of political-criminal nature”, which pertains, instead, to the legislator.

The Constitutional Court refers to the CJEU for a preliminary ruling

By means of Order No. 24 of 2017, the Constitutional Court did not decide the questions posed by the referring courts, but rather sought a preliminary ruling from the CJEU on the interpretation of Article 325 TFEU and *Taricco I*.

According to the Constitutional Court, the application of the “*Taricco* rule” in the Italian legal system would violate Articles 25(2) and 101(2) of the Constitution and could not, therefore, be allowed, even in light of the principle of supremacy of Union law. However, in the Constitutional Court’s view, *Taricco I* appeared to exclude such an application in cases where a conflict with the constitutional identity of the Member State would arise, entailing a violation of the principle of legality in criminal law.

The CJEU’s confirmation was sought on the above points.

The second CJEU judgment: *Taricco II*

With the judgment handed down on 5 December 2017 in Case C-42/17, *M.A.S. and M.B.*, the Grand Chamber of the CJEU, taking into account the doubt raised by the Constitutional Court, recognized that the obligation for national courts to disapply domestic legislation on limitation periods on the basis of the “*Taricco* rule”, does not need to be met when it entails a violation of the principle of certainty of offences and punishments, because of the insufficient degree of certainty of the applicable law or of the retroactive application of a legal framework that envisages a harsher system of punishments than that in force at the time when the crime is committed.

The CJEU’s new judgment operates on two related levels.

First, it clarifies that, in light of the prohibition on retroactivity *in malam partem* of criminal law, the “*Taricco* rule” cannot be applied to facts occurring prior to the date of publication of the judgment establishing it, that is, before 8 September 2015. This prohibition derives automatically from Union law and does not require any further control on the part of national judicial authorities.

Second, it remits to such authorities the task to verify the compatibility of the “*Taricco* rule” with the principle of certainty in criminal law, which is both a supreme principle of the Italian constitutional order and a foundational pillar of Union law, on the basis of Article 49 of the Charter of Fundamental Rights of the European Union (CFREU).

The final word to the Constitutional Court: the “*Taricco* rule” contrasts with the principle of certainty in criminal matters

In light of the clarification provided by *M.A.S.*, the Constitutional Court considered that all questions raised by the referring courts were unfounded, because the “*Taricco* rule” was to be held inapplicable in the cases before them.

Indeed, in both cases, the facts had occurred prior to 8 September 2015, such that the applicability of Articles 160(3) and 161(2) of the Criminal Code, and the consequent time-barring of the crimes that had given rise to the case at hand were recognized by the *M.A.S.* judgment, which had excluded the effects of the “*Taricco* rule” from the crimes committed prior to that date.

In addition, according to the Constitutional Court, regardless of when the facts took place, whether before or after 8 September 2015, the referring judges could not have applied the “*Taricco* rule” because it contrasted with the principle of certainty of the law in criminal matters enshrined in Article 25(2) of the Constitution.

Indeed, in the Italian legal system, provisions on matters such as limitation periods – which bear an effect on the liability of persons to punishment by connecting the passing of time with the effect of preventing the application of the punishment – fall within the constitutional provision on the principle of legality in criminal matters established in Article 25(2) of the Constitution in especially broad terms, and the lack of certainty characterizing both Article 325(1) and (2) TFEU (with regard to the parts from which the “*Taricco* rule” may be inferred) and the “*Taricco* rule” itself appeared to be clear indeed.

As for the “*Taricco* rule”, the part thereof deriving from Article 325(1) TFEU was held to be irremediably uncertain with regard to the definition of the “significant number of cases” required for its operation, because criminal courts do not possess any criteria to apply the law that may enable them to draw a sufficiently certain rule from this text. Nor can such courts be given the task to pursue a purpose of criminal policy, independently of the law, which it is instead required to observe (Article 101(2) of the Constitution).

First, however, Article 325 TFEU was deemed uncertain, because its formulation does not allow parties to expect the applicability of the “*Taricco* rule”, whereas a choice relating to the liability to punishment must be drawn solely from the legal text which interested parties may access. “Although,” added the Constitutional Court, “it remains well-established that it is only for the Court of Justice to interpret Union law in a uniform manner, and specify whether it has direct effect, it is also undoubted that, as recognized in the *M.A.S.* judgment, an interpretation that does not conform to the principle of certainty in criminal matters does not have any place in our legal system.”

Analogous findings were also made for the part of the “*Taricco* rule” drawn from Article 325(2) TFEU.

Indeed, in this case, even if the principle of assimilation did not substantially give rise to an analogous procedure *in malam partem*, and could allow criminal courts to perform activities without any unacceptable margins of uncertainty, this could not, at any rate, occur on the basis of Article 325(2) TFEU, from which the content of the “*Taricco* rule” could not be deduced.

In other words, if the criminal court considers it possible to proceed to a comparison between tax fraud affecting the State and tax fraud affecting the Union, for the purpose of preventing the latter from being punished less harshly than the former in terms of limitation periods, Article 325(2) TFEU would not be taken as a clear legal basis of such an operation in criminal matters, because the interested parties could not have, nor could today, on the basis solely of the legal framework, expect such effects.

Therefore, the Constitutional Court has concluded that “the inapplicability of the ‘*Taricco* rule’, as recognized by the *M.A.S.* judgment, arises not only from the Constitution of the Republic [of Italy],

but in Union law itself' and that the questions of constitutionality raised on the basis that the law was, instead, applicable, are unfounded.

Rome, 31 May 2018