JUDGMENT NO. 115 YEAR 2018

This decision followed a "dialogue between courts," between the European Court of Justice (Court of Justice) and the Italian Constitutional Court (Court), spanning multiple cases. In this case, the Court considered two referral orders challenging a provision Italian law incorporating into the Italian system some provisions of international law from which the Court of Justice, in its preliminary rulings on this and an earlier case, *Taricco*, had inferred the so-called "*Taricco* rule." The "*Taricco* rule" called for Italian courts to disapply certain provisions of Italian law concerning statutes of limitations (or limitations periods) in tax evasion cases involving the value added tax (VAT), where certain conditions were met. The effect of the "*Taricco* rule" was that some cases which were time-barred under Italian law would still be able to be prosecuted in Italian courts, through the disapplication of the Italian provisions. The present case involved two cases of VAT-related fraud in which the conditions were met for the "*Taricco* rule" to apply. The Italian Court made a reference for a preliminary ruling to the Court of Justice, and both courts agreed that, since the defendants were charged with crimes allegedly committed prior to the date of publication of the *Taricco* ruling, the "*Taricco* rule" could not apply under the principle of non-retroactivity of harsher criminal punishments. The Italian Court held, however, that even if the matters were time-barred, the questions raised by the referring courts were not irrelevant. The Court then held that the "*Taricco* rule" could not, in any case, apply to these cases, nor could it have any place in the Italian legal system because it violated the constitutional principle of legal certainty in criminal matters. Starting from the premise that limitation periods are a part of substantive criminal law in the Italian system, the Court held that the rule violated the principal of legal certainty in criminal matters. The Court held that the rule was overly vague, in that it applied to offenses impacting an indefinite "considerable number of cases" and required judges to pursue criminal policy objectives. Above all, the rule did not meet the substantive criminal law requirement that individuals be able to foresee the consequences of their actions based on the written law, with judges playing a clarifying role limited by the options that a person may envision in reading the relevant text. The Court held that the "*Taricco* rule" was not among the options a person could envision based on a reading of the legal provisions from which it was inferred, and thus, interested persons could not be aware of the legal consequences of their actions by reading the text of the relevant laws. Because the violation of the principle of legal certainty in criminal matters served as an absolute bar on the introduction of the "*Taricco* rule" into the Italian legal system, the Court held that the Italian legal provisions that would otherwise work to incorporate the rule into the Italian system did not do so, and, therefore, the questions raised by the referring courts were unfounded.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

In proceedings concerning the constitutionality of Article 2 of Law no. 130 of 2 August 2008 (Ratification and implementation of the Treaty of Lisbon, which modifies the Treaty on European Union and the Treaty Establishing the European Community and some related acts, with final act, protocols, and declarations, done at Lisbon on 13 December 2007) initiated by the Milan Court of Appeals and the Court of Cassation, with orders of 18 September 2015 and 8 July 2016, respectively registered as no. 339 of the 2015 Register of Referral Orders and no. 212 of the 2016 Register of Referral Orders, and published in the Official Journal of the Republic no. 2 and no. 41, first special series, of 2016.

Considering the entry of appearance of M.A. S. and of M. B., as well as the interventions of the President of the Council of Ministers;

Having heard from Judge Rapporteur Giorgio Lattanzi at the public hearing of 10 April 2018;

Having heard from counsel Gaetano Insolera and Andrea Soliani on behalf of M.A. S., Nicola Mazzacuva and Vittorio Manes on behalf of M.B., and State Counsel Gianni De Bellis on behalf of the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– The Court of Cassation has raised questions concerning the constitutionality of Article 2 of Law no. 130 of 2 August 2008 (Ratification and implementation of the Treaty of Lisbon, which modifies the Treaty on European Union and the Treaty Establishing the European Community and some related acts, with final act, protocols, and declarations, done at Lisbon on 13 December 2007), in reference to Articles 3, 11, 24, 25(2), 27(3), and 101(2) of the Constitution.

2.– In turn, the Milan Court of Appeals has raised a question concerning the constitutionality of Article 2 of Law no. 130 of 2008, in reference to Article 25(2) of the Constitution.

3.– The challenged provision mandates the implementation of the Treaty on the Functioning of the European Union (TFEU), as modified by Article 2 of the Treaty of Lisbon of 13 December 2007 and ratified by Law no. 130 of 2008 and, subsequently, by Article 325 of that treaty.

The referring courts allege that the law is unconstitutional in the part in which, by imposing the application of Article 325 TFEU, as interpreted by the judgment of the Grand Chamber of the Court of Justice of the European Union [Court of Justice] in Case C-105/14, *Taricco*, on 8 September 2015, it requires the disapplication of Articles 160(3) and 161(2) of the Criminal Code in certain cases concerning offenses related to the value added tax (VAT) amounting to fraud with prejudice to the financial interest of the European Union [EU]. Taken together, the provision of Articles 160(3) and 161(2) of the Criminal Code place a limit on the extension of the statute of limitations [or limitation period] following an interruption. The limit does not, however, apply to the offenses listed in Article 51(3-*bis*) and (3-*quater*) of the Code of Criminal Procedure.

The Court of Justice's decision in the *Taricco* case established that national courts must disapply Articles 160(3) and 161(2) of the Criminal Code, under the conditions described below, holding that offenses are not time-barred and going forward with criminal proceedings in two instances: first, when, based on a rule drawn from Article 325(1) TFEU, the legal framework relating to the limitation period has the effect that, in a considerable number of cases, the commission of serious fraud prejudicial to the financial interest of the EU will escape effective and dissuasive criminal punishment.

Second, based on a rule inferred from Article 325(2) TFEU (the so-called assimilation principle), when the aforementioned provisions result in a limitation period that is shorter than the one established by national law for analogous cases of fraud prejudicial to the Member State.

Both referring courts are adjudicating matters in which the defendants stand accused of offenses which, if Articles 160(3) and 161(2) of the Criminal Code were to apply, they should hold to be time-barred. An opposite holding would be necessary, however, if the "*Taricco* rule" were applied, rendering the provisions ineffective.

The referring courts point out that the rule clearly applies in their respective proceedings, which deal with serious incidents of VAT-related fraud, with resulting prejudice to the financial interest of the EU. Moreover, the incidents of fraud would extend to a considerable number of cases, thus meeting all the conditions necessary to trigger the "*Taricco* rule."

In the Milan Court of Appeals case, Article 325(2) TFEU would also apply, and with the same effect, because some of the defendants are accused of the offense of criminal conspiracy to commit VAT-related tax offenses. This criminal profile is not included in the list of offenses under Article 51(3-*bis*) and (3-*quater*) of the Code of Criminal Procedure, section 3-*bis* of which includes Article 291-*quater* of Presidential Decree no. 43 of 23 January 1973 (Approval of the unified text of legislative provisions relating to customs and tariffs), namely criminal conspiracy relating to smuggling of foreign-made tobacco products. This means that there may be a scenario of fraud prejudicial to Italy that is analogous to the offense at issue before the referring Court of Appeals, for which the national system provides a framework that calls for the more severe limitation period, in violation of the assimilation principle.

4.– The referring courts, after holding that the "*Taricco* rule" must apply, allege that it contradicts the supreme principles of the constitutional system of the State. Thus, they challenge the national law which, by implementing Article 325 TFEU, incorporates the rule into our legal system.

Based on the premise that limitation periods fall under substantive criminal law, the Court of Cassation alleges that Article 25(2) of the Constitution has been violated on the following grounds: that regulating criminal matters is reserved for the legislator, given that the time-barring framework would no longer be established by primary legislation; that the terms "serious fraud" and "considerable number of cases," upon which the "*Taricco* rule" rests, are too general to satisfy the requirement of legal certainty; and that an impermissible retroactive effect would result, in light of the fact that the events giving rise to the charges against the defendants occurred prior to 8 September 2015, date of publication of the *Taricco* judgment.

The Court alleges further that requiring courts to engage in activities that entail performing a "criminal policy evaluation" violates Article 101(2) of the Constitution, in that such evaluations are the competence of the legislator.

The Court also alleges that Articles 3 and 24 of the Constitution are violated due to the manifest unreasonableness of the "*Taricco* rule," as well as the fact that it would prevent the accused from being able to foresee the date when an offense would become time-barred and, therefore, to assess the opportunity to seek an alternative procedure.

Finally, the Court alleges that Article 27(3) of the Constitution is violated in that linking the limitation period exclusively to the protection of financial interests would compromise the rehabilitative purpose of criminal punishment.

The Milan Court of Appeals, in turn, basing its determination on the fact that limitation

periods are matters of substantive law by nature, holds that the retroactive effect of the greater punishment under the "*Taricco* rule" violates Article 25(2) of the Constitution, in light of the fact that the offenses charged in the pending proceedings were committed prior to 8 September 2015.

5.– With Order no. 24 of 2017, this Court joined the proceedings and referred the matter to the Court of Justice for a preliminary ruling on the correct interpretation of the meaning of Article 325 TFEU and the *Taricco* judgment.

It is the position of this Court that the application of the "*Taricco* rule" within our system would violate Articles 25(2) and 101(2) of the Constitution, and, therefore, may not be permitted, even in light of the primacy of EU Law.

Nevertheless, it seems to this Court that the judgment in *Taricco* (paragraphs 53 and 55) tends to rule out the rule's application where it conflicts with the constitutional identity of the Member State and, in particular, where it implies a violation of the principle of legality in criminal matters, as determined by the competent authority of the relevant Member State.

This Court requested confirmation of these presumptions by the Court of Justice.

6.– The Grand Chamber of the Court of Justice, with a judgment handed down on 5 December 2017 in Case C-42/17, *M.A. S. and M. B.*, took this Court's interpretative concerns into account and affirmed that the national courts may not have a duty to disapply domestic legislation on limitation periods on the basis of the "*Taricco* rule" when this would entail a violation of the principle of the legality of crimes and punishments, due to the insufficient degree of certainty about the applicable law or to the retroactive application of a legal framework entailing harsher punishments than the one in place at the time the offense was committed.

7.– The new decision by the Luxembourg Court operates on two related levels.

First, it clarifies that, in light of the prohibition on the retroactivity of harsher punishments of criminal law, the "*Taricco* rule" cannot be applied to facts committed prior to the date of publication of the judgment that established it, that is, prior to 8 September 2015 (paragraph 60). This prohibition derives directly from EU law and does not require any further verification on the part of national judicial authorities.

Second, it remits the task of verifying that the "*Taricco* rule" complies with the principle of certainty in criminal law to those authorities (paragraph 59). In order to disapply the domestic laws on limitation periods, the national court must find, upon scrutiny, that the "*Taricco* rule" is compatible with the principle of legal certainty, which is both a supreme principle of the Italian constitutional system and a foundational pillar of EU law under Article 49 of the Charter of Fundamental Rights of the European Union (CFREU), proclaimed at Nice on 7 December 2000 and, in an adapted version, at Strasbourg on 12 December 2007 (paragraphs 51 and 52 of the *M.A. S.* judgment).

8.– With regard to this last point, it bears reiterating what this Court previously held in Order no. 24 of 2017. The Constitutional Court is the competent authority to carry out the verification described by the Court of Justice, since it alone is entitled to ascertain whether EU law contrasts with the supreme principles of the constitutional system and, in particular, with the inalienable rights of the person. To that end, the essential role that falls to the ordinary courts is to raise doubts concerning the constitutionality of the domestic law that serves as the entry point for the European rule giving rise to the alleged conflict. Thus, the request for restitution of the documents submitted by the President of the Council of Ministers and by one part of the proceedings before the Milan Court of Appeals cannot be granted, given that, under the *M.A. S.* judgment, it

falls, first of all, within the purview of this Court to assess the applicability of the "*Taricco* rule" within our legal system.

9.– In light of the interpretative clarification provided by the *M.A. S.* judgment, all questions raised by both referring Courts are unfounded, because the "*Taricco* rule" does not apply in the pending proceedings.

10.– In both underlying cases, the facts at issue took place prior to 8 September 2015, and, thus, the *M.A. S.* judgment, which holds that the "*Taricco* rule" does not apply to crimes committed before that date, recognizes that Articles 160(3) and 161(2) of the Criminal Code apply and that, consequently, the offenses at object in the pending proceedings are time-barred.

However, this does not mean that the questions raised are irrelevant, because recognizing that the crimes are time-barred on the sole basis of the *M.A. S.* judgment would, in any case, mean applying the "*Taricco* rule," even if only to specify its temporal limits.

Regardless of whether the facts occurred before or after 8 September 2015, the referring ordinary courts cannot apply the "*Taricco* rule" to them because it contradicts the principle of legal certainty in criminal matters enshrined in Article 25(2) of the Constitution.

This Court, in carrying out the relevant constitutional review, which, in this unusual case, also amounts to performance of the verification required by the Court of Justice, must recall what it has already observed in Order no. 24 of 2017.

In our legal system, an institution that impacts the liability of persons to punishment, by linking the passage of time with the effect of blocking the application of a punishment, falls within the scope of the constitutional principle of substantive legality in criminal matters laid down by Article 25(2) of the Constitution in particularly broad terms.

It follows that limitation periods must be considered an institution belonging to substantive law, which the legislator may modify through a reasonable balancing between the right to be forgotten and the interest in prosecuting crimes until the social alarm caused by the crime has passed (even excluding the latter entirely, for extremely serious crimes), but always in compliance with this non-derogable constitutional prerequisite (see, among many, Judgments no. 143 of 2014, 236 of 2011, 294 of 2010, and 393 of 2006, and Orders no. 34 of 2009, 317 of 2000, and 288 of 1999).

11.– That being said, it seems clear that both Article 325(1) and (2) TFEU (in the part from which the "*Taricco* rule" is inferred), and the "*Taricco* rule" itself are marked by an evident lack of certainty.

The latter, with regard to the part that derives from Article 325(1) TFEU, is irreparably vague in its definition of the "considerable number of cases" that trigger its operation, since it does not provide the criminal adjudicator with any criterion for applying the law which would allow it to derive a sufficiently definite rule from this statement. Nor can that adjudicator be given the task of pursuing criminal policy objectives detached from its subjection to legislation, to which, on the contrary, it is subject (Article 101(2) of the Constitution).

Still prior to this, Article 325 TFEU is vague, in the part relevant for present purposes, because its text does not allow persons to foresee whether or not the "*Taricco* rule" will apply.

Concerning this, the *M.A. S.* judgment emphasized the requirement that substantive criminal law choices must allow individuals to be aware of the consequences of their actions in advance, based on the text of the relevant provision, and, if applicable, with

the aid of the judicial interpretation made thereof (paragraph 56). At least in countries with civil law traditions, and certainly in Italy, this supports (even under EU law, given its respect for the constitutional identities of the Member States) the unavoidable requirement that choices of this kind take the form of legislative documents available to any interested parties. With respect to its written, legislative origins, the interpretative assistance provided by criminal courts is nothing more than a *posterius*, designated to investigate potentially unclear areas, identifying the correct meaning of the provisions only from among the set of options that are authorized by the text, and which a person may envision by reading it.

The principle of certainty has two-fold import, because it is not limited to guaranteeing (as far as courts are concerned) that judicial activity comply with the law through the production of rules that are certain enough to be applied. Rather, it ensures that anyone may have "a sufficiently clear and immediate perception" of the possible grounds on which their conduct may be classified as criminal (Judgments no. 327 of 2008 and 5 of 2004; and, in this same sense, see Judgment no. 185 of 1992).

Thus, even if the "*Taricco* rule" were to eventually take on a less hazy outline, thanks to the progressive refinement of European and national case law, this would not suffice to "make up for a potential original lack of precision in the criminal precept" (Judgment no. 327 of 2008).

12.– It is even intuitive (as revealed by the surprised reaction of the legal community during the extensive scholarly debate in the wake of the *Taricco* judgment, despite the nuances of the various views) that a person, despite full awareness of Article 325 TFEU, could not (and cannot today, on the basis of that article alone) imagine that a rule would be extrapolated from it obliging courts to disapply a particular aspect of the legal framework governing limitation periods, under truly peculiar conditions. If it is true that even "the most certain of laws is in need of systematic 'readings' and interpretations" (Judgment no. 364 of 1988), the fact remains that these cannot fully replace the *praevia lex scripta*, which is intended to ensure that people have "the legal certainty of free and consenting choices of action" (Judgment no. 364 of 1988).

This means that a choice relating to liability to punishment must be able to be independently gleaned from the legislative text to which citizens have access, and this is not the case with the "*Taricco* rule." While it is the exclusive competence of the Court of Justice to provide a uniform interpretation of EU law and to specify whether or not it has direct effect, it is likewise indisputable, as the *M.A. S.* judgment acknowledges, that an interpretive outcome that does not comply with the principle of legal certainty in criminal matters has no place in our legal system.

13.– This conclusion applies to the "*Taricco* rule," both in the part drawn from Article 325(1) TFUE, and in the part derived from section (2).

In the latter, even assuming that the assimilation principle does not actually give rise to an analogy applied to extend a harsher punishment and could permit criminal courts to perform activities free of unacceptable margins of uncertainty, nevertheless, Article 325 TFEU does not provide a sufficiently certain legal basis for this, since a person could not have independently deduced, nor can deduce today, the contours of the "*Taricco* rule."

In other words, even if it were considered possible for a criminal court to make the comparison between tax fraud prejudicial to the State and tax fraud prejudicial to the Union, for purposes of preventing the latter from enjoying less severe treatment than the former in terms of the applicable limitation period, Article 325(2) TFEU still provides

an insufficiently certain legal basis for such an operation in criminal matters, because the interested parties could not have then, nor could today, expect such an effect on the sole basis of the legal framework.

It bears adding that the *Taricco* decision likewise does not provide a sufficient level of certainty relative to "fraud cases prejudicial to the financial interests of the affected Member State," for which it establishes "limitation periods longer than those provided for fraud cases prejudicial to the financial interests of the Union." Indeed, it is a general decision which, since it establishes a broadly discretionary evaluation, cannot satisfy the principle of legal certainty in criminal matters, and is not able to ensure that the interested parties may have a clear expectation.

14.– The inapplicability of the "*Taricco* rule," as recognized by the *M.A. S.* decision, is rooted not only in the Italian Constitution, but in EU law itself, thus confirming the hypothesis outlined by this Court in Order no. 24 of 2017, that is, that there are no grounds for unconstitutionality. It follows that all the questions raised are unfounded, because, irrespective of the additional grounds for unconstitutionality that have been deduced, the violation of the principle of legal certainty in criminal matters serves as an absolute bar, without exceptions, on the introduction of the "*Taricco* rule" into our legal system.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the judgments,

declares that the questions concerning the constitutionality of Article 2 of Law no. 130 of 2 August 2008 (Ratification and implementation of the Treaty of Lisbon which modifies the Treaty on European Union and the Treaty Establishing the European Community and some related acts, with final act, protocols, and declarations, done at Lisbon on 13 December 2007), raised by the Court of Cassation, in reference to Articles 3, 11, 24, 25(2), 27(3), and 101(2) of the Constitution and by the Milan Court of Appeals, in reference to Article 25(2) of the Constitution, with the referral orders indicated in the Headnote.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 10 April 2018.