

## ZOOM IN

### *The question:*

#### **Of direct effect, primacy and constitutional identities: Rome and Luxembourg enmeshed in the *Taricco* case**

*Introduced by Antonello Tancredi*

In the preliminary ruling rendered by the Grand Chamber in the *Taricco* case (case C-105/14) on 8 September 2015, the European Court of Justice stated *inter alia* that if a national rule concerning limitation periods for criminal offences prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the EU, national courts must give full effect to Article 325(1) TFEU, if need be by disapplying those domestic provisions which have an adverse effect on the fulfilment of the Member States' obligations under that same Article.

In order no 24 of 26 January 2017,<sup>1</sup> the Italian Constitutional Court (hereinafter, the 'ICC') sought a preliminary reference from the ECJ concerning the meaning to be attributed to Article 325 TFEU on the basis of the *Taricco* judgment. More specifically, the ICC questioned whether Article 325 TFEU must 'be interpreted as requiring the criminal courts to disregard national legislation concerning limitation periods' even when: 1) '...there is not a sufficiently precise legal basis for setting aside such legislation'; 2) '...[that] limitation is part of the substantive criminal law in the Member State's legal system and is subject to the principle of legality'; and 3) '... the setting aside [of] such legislation would contrast with the supreme principles of the constitutional order of the Member State or with the inalienable human rights recognized under the Constitution of the Member State'.

In the Italian legal system EU law enjoys primacy over national norms but with a (counter-)limit (in practice never applied to EU law), ie, compliance with the supreme principles of the Italian constitutional order

<sup>1</sup> English text available at <[www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/O\\_24\\_2017.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf)>.

and inalienable human rights. In order no 24/2017, the ICC affirms that the principle of legality in criminal matters ‘is an expression of a supreme principle of the legal order’ laid down in Article 25 (2) of the Constitution,<sup>2</sup> which requires that criminal rules must be precise and must not have retroactive effect. Since, in the ICC’s view – unlike the interpretation of Article 49 of the Charter of Fundamental Rights of the European Union and Article 7 of the ECHR given by the ECJ – the principle of legality also covers limitation periods (and not only criminal offences and penalties), and no offender could reasonably have expected, before the *Taricco* judgment, that Article 325 TFEU would require a longer statute of limitations, the ICC envisages the possibility of a clash between the obligations flowing from Article 325 TFEU and a supreme constitutional principle which prohibits the retroactive application of criminal law *in malam partem*, being that this principle is part of the ‘national identity’ protected by Article 4(2) TEU. Were this possibility inescapable, the ICC ‘would be under a duty to prevent’ the application of EU law.

Furthermore, the criteria (ie, systematic impunity and the seriousness of the alleged tax fraud) to be employed by Italian courts in order to decide on the disapplication of domestic rules on limitation periods are vague, ambiguous ‘... and in any case cannot be substantiated through interpretation’. In this regard, it is not possible ‘for EU law to set an objective as to the result for the criminal courts and for the courts to be required to fulfil it using any means available within the legal order, without any legislation laying down detailed definitions of factual circumstances and prerequisites’. In other words, employing EU law (Article 325 TFEU in this case) as a ‘shield’ (which renders inapplicable relevant domestic law) when it is not possible to use it as a ‘sword’ (ie, to apply EU law in place of diverging domestic law, for want of detail or precision) raises specific problems in criminal matters,<sup>3</sup> where the ‘law’ must meet

<sup>2</sup> According to which ‘No person may be punished except by virtue of a law that was in force at the time the offence was committed’.

<sup>3</sup> See, on this point, D Gallo, ‘La primazia del primato sull’efficacia (diretta?) del diritto UE nella vicenda Taricco’ available at <[www.sidiblog.org/2017/02/25/la-primazia-del-primato-sullefficacia-diretta-del-diritto-ue-nella-vicenda-taricco/](http://www.sidiblog.org/2017/02/25/la-primazia-del-primato-sullefficacia-diretta-del-diritto-ue-nella-vicenda-taricco/)>, and A Terrasi, ‘Note a margine dell’ordinanza della Corte costituzionale sul caso Taricco: l’effetto delle norme dei trattati istitutivi dell’UE sulla legge penale sostanziale italiana’ (2017) 11 Diritti umani e diritto internazionale, forthcoming.



qualitative requirements such as certainty and, thus, the foreseeability of the consequences produced by a given conduct.

As is evident, the case at hand – which comes after the *Gauweiler-OMT* saga and the judgment given by the Danish Supreme Court in December 2016 where it was held that non-written principles of EU law are not binding in the Danish legal order – raises profound legal questions. The ICC has decided not to immediately apply the doctrine of ‘counter-limits’, preferring to seek interpretative guidance from the Luxembourg’s judges. Order 24/2017 speaks the language of cooperative constitutionalism in Europe<sup>4</sup>, it mostly employs conciliatory, if not deferential tones, but the substance of the confrontation remains rather unforgiving. Is the ICC seeking a clarification, or rather a *revirement* of the ECJ *Taricco* judgment? What is the strategy employed to reach this objective? Would it have been possible (or proper) for the ICC to identify within the constitutional principle of legality a more limited ‘supreme’ core, which excludes the rules governing limitation periods? Is the act of distinguishing *vis-à-vis* the ECJ’s judgment in the *Melloni* case persuasive? And what about the preservation of national constitutional identities? Are they part of the balance between unity and diversity on which the EU is based? Does Article 4(2) TEU enable domestic authorities to review EU law provisions and ECJ judgments in the light of domestic constitutional identities (as it is claimed today by the ICC and is implicit in the *Identitätskontrolle* elaborated by the German Constitutional Court) and what are the consequences of making the applicability of EU law conditional upon Member States supreme constitutional principles? And finally, what are the potential scenarios for the judgment that will be rendered by the ECJ according to an expedited procedure?

QIL is, and will remain greatly interested in exploring issues and patterns of interrelation between legal sub-systems. In this zoom-in, we asked two European public law scholars who have investigated and considered these questions in their research, to comment on the ICC’s order no 24/2017 and the implications of this exercise in ‘open’ judicial dialogue.

<sup>4</sup> O Pollicino, M Bassini, ‘When Cooperation Means Request for Clarification, or Better for “Revisitation”’ available at <[www.penalecontemporaneo.it/d/5195-when-cooperation-means-request-for-clarification-or-better-for-revisitation](http://www.penalecontemporaneo.it/d/5195-when-cooperation-means-request-for-clarification-or-better-for-revisitation)>.