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## **The *Taricco* case and the courts’ power to create new criminal law: strained dialogue between the Italian Constitutional Court (ICC) and the European Court of Justice (ECJ)**

*Abstract. In the Taricco judgment, the ECJ held that Article 325 TFEU requires the national courts to disregard the Italian rules of limitation periods if their application prevents the imposition of effective and deterrent penalties in a significant number of cases of serious fraud affecting EU financial interests. In Italy, some courts considered that the disapplication imposed by the ECJ runs counter to the fundamental principles of the Italian constitutional system, including the principle of strict legality in criminal matters, formally recognized in the Italian Constitution. Consequently, the ICC had been requested by these judges to exercise the “counter-limits” power in order to prevent the enforcement of the ECJ ruling in Taricco. The ICC sought a preliminary reference from the ECJ on the interpretation of the Article 325 TFEU, making some important statements on the principle of legality. In particular, the ICC stated that this principle is an expression of a supreme principle of the legal order, which has been posited in order to safeguard the inviolable rights of the individual, by clarifying also that this principle does not grant the courts the power to create new criminal law in place of that established by legislation approved by Parliament. Awaiting the ECJ’s decision on the case, there are already several points on the issue of the “Judiciary creation of law and dialogue between judges” around which is possible to discuss and confront different legal traditions.*

**Summary. 1. Introductory remarks. 2. The origins of the case: the gaps of the limitation period rules in the Italian criminal system. 3. The (first) decision of the European Court of Justice (ECJ). 4. The reaction of the Italian Judges: between direct application of the *Taricco* rule and the request for counter-limits. 5. The decision of the Italian Constitutional Court (ICC): a courageous stance or a prudent openness to dialogue?. 6. Future developments: waiting for *Taricco-bis*.**

### **1. Introductory remarks**

First of all, it is important to make some preliminary remarks in order to introduce the most relevant issue of the *Taricco* case, by anticipating and highlighting straight away that it represents - for the Italian academic debate - the criminal judgment most commented ever<sup>1</sup>.

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<sup>1</sup> See A. BERNARDI, *Introduzione*, in *Il caso Taricco e il dialogo tra le Corti. L’ordinanza n. 24/2017 della Corte costituzionale* (a cura di) A. Bernardi e C. Cupelli, 2017, p. IX. It must be underlined that some comments of this ruling are made by foreign authors: see, in this regard, M. LASSALLE, *Taricco kills two birds with one stone for the sake of the PIF*, in *European Law Blog*, 2015; and S. PEERS, *The Italian Job: the CJEU strengthens criminal law protection of the EU’s finances*, in *EU Law Analysis*, 2015.

The ruling given in the *Taricco* case has brought to the fore the problem of the interaction between EU law and one of the supreme principles of the Italian constitutional order<sup>2</sup>: the principle of legality in criminal law<sup>3</sup>.

This principle - its content and, in particular, its scope - has been “batted back and forth” between national courts and the European Court of Justice (ECJ), in the first phase, and between the Italian constitutional court (ICC) and again the ECJ, in the second one<sup>4</sup>.

The dialogue between these judges - as explained below - is still open.

Indeed, after the recent decision of the ICC (no. 24 of 2017) - by which the Italian constitutional judges submitted a reference for preliminary ruling to the ECJ – the “ball is back” to the European Court<sup>5</sup>.

Within the Italian context, all scholars and legal practitioners are looking forward for the forthcoming reply of the Court of Luxembourg.

The *Taricco* case is highly relevant when discussing around the topic of “*Judiciary creation of law*” because the subject-matter of the dispute - only superficially connected to a specific category of criminal provisions - concerns some of the fundamental elements of the Italian criminal justice system: in particular, the role of judge and the limits of its discretion in criminal matters.

## **2. The origins of the case: the gaps of the limitation period rules in the Italian criminal system**

Mr. *Taricco* and several other defendants were charged, before an Italian court (*Tribunale di Cuneo*), with having formed and organised, as members of criminal organisations, during the fiscal years 2005 to 2009, a conspiracy to commit various offences in relation to Value added Tax (hereinafter “VAT”).

The accused were alleged to have put in place fraudulent “VAT carousel” legal arrangements, involving, *inter alia*, the creation of shell companies and the use of false documents, by means of which they were able to acquire goods - bottles of champagne - VAT free.

The offences which the respondents are alleged to have committed are punishable, under the national provisions<sup>6</sup>, by term of imprisonment of up to six years. The offence of

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<sup>2</sup> See M. BASSINI, O. POLLICINO, *The Taricco decision: a last attempt to avoid a clash between EU Law and the Italian Constitution*, in *Verfassungsblog on matters constitutional*, 2017, and M. CAIANIELLO, *Dum Romae (et Brucsellae) Consulitur...Some considerations on the Taricco Judgement and Its Consequences at National and European Level*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2016, p. 1 ss.

<sup>3</sup> See, on this issue, M. D’AMICO, *Principio di legalità penale e “dialogo” tra le Corti. Osservazioni a margine del caso Taricco*, in *Il caso Taricco e il dialogo tra le Corti. L’ordinanza n. 24/2017 della Corte costituzionale* (a cura di) A. Bernardi e C. Cupelli, 2017.

<sup>4</sup> See M. LUCIANI, *Il brusco risveglio. I controlimiti e la fine mancata della storia costituzionale* (relazione al Convegno “*Primato delle norme europee e difesa dei principi costituzionali*”, Ferrara, 7-8 aprile 2011), in *Rivista AIC*, 15 aprile 2016; A. RUGGERI, *Primato del diritto sovranazionale versus identità costituzionale? (Alla ricerca dell’araba fenice costituzionale: i “controlimiti”)*, in *Forum di Quaderni costituzionali*, 9 aprile 2016; and R. BIN, *Taricco, una sentenza sbagliata: come venirne fuori?*, in [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it), 4 luglio 2016.

<sup>5</sup> See P. FARAGUNA, *The Italian Constitutional Court in re Taricco: “Gauweiler in the Roman Campagna”*, in *Verfassungsblog on matters constitutional*, 2017.

conspiracy, laid down in Article 416 of the Penal Code, of which the accused could also be found guilty, is punishable by term of imprisonment of up to seven years for those instigating the conspiracy and up to five years for those merely taking part into it. It means, due to the rules provided by the Penal Code<sup>7</sup>, that, for those instigating the conspiracy, the limitation period is seven years, whereas it is six year for the others.

Moving from the premise that, in all likelihood, the prosecution of the criminal offences of the case will become time-barred before the final judgment, the court – in accordance with Article 267 TFEU – referred four different questions to the ECJ for a preliminary ruling<sup>8</sup>, complaining about the (in)compatibility between these national provisions and the EU law.

In other words, the national court considered that the Italian legislation, by establishing a strict limitation period, was in breach of the obligation under EU law to take measures to contrast criminal activities affecting the financial interest of the Union.

More in detail, by invoking as parameters Articles 101, 107 and 119 TFEU and Article 158 of Directive 2006/112 (on the common system of value added tax), the Italian judge devoted its question to EU competition law, the possibilities of exemption from VAT and the principle of sound public finances.

### **3. The (first) decision of the European Court of Justice (ECJ)**

The Grand Chamber of the ECJ adopted its decision on 8 September 2015.

Above all, it is important to note that the ECJ decided to change the parameters initially mentioned by the Italian court, basing its own decision (only) on the Article 325 TFEU, to which the national court had made no reference.

This Article<sup>9</sup> obliges the Member State, in the first paragraph, to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in the second paragraph, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests<sup>10</sup>.

From a procedural point of view, this choice of the ECJ deserves to be thoroughly analyzed.

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<sup>6</sup> Articles 2 and 8 of Legislative Decree n. 74/2000 (laying down new rules governing offences in relation to income tax and value added tax).

<sup>7</sup> In particular, Article 157 of the Italian Penal Code that provides as follow: “*prosecution of an offence shall be time-barred after a period equal to the maximum duration of the penalty laid down in the criminal-law provision for the offence itself; the foregoing notwithstanding, the limitation period shall be no less than six years for serious offences [...]*”. Is also important to remember that Article 161 establishes that, with the exception of the prosecution of particular offences, “*an interruption of the limitation period may give rise to an extension of that period by no more than one quarter [...]*”.

<sup>8</sup> The National court adopted its decision on 17 January 2014.

<sup>9</sup> Article 325 TFEU provides that “*the Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies*” and that “*Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests*”.

<sup>10</sup> See also, on this issue, ECJ, C-617/10, *Åkerberg Fransson*, 26 February 2013.

In this regard, indeed, the ECJ, in accordance with its case-law<sup>11</sup>, reminded, on one hand, that “*the Court does not have the jurisdiction to consider points of law which the national court has expressly or implicitly omitted from its request for a preliminary ruling*”, and, on the other, that the Court does have the jurisdiction, when ruling on a request for a preliminary ruling, “*to give clarification, in the light of the information in the case-file, to guide the referring court in giving judgment in the main proceedings and, in so doing, also to consider provisions to which the referring court has not referred*”<sup>12</sup>.

In this way the Court was able to easily overcome the procedural obstacles, shifting the focus of its decision to the general duty in order to impose effective penalties<sup>13</sup>.

Does EU law require the courts of the Member States to refrain from applying certain provisions of their national law on the limitation periods applicable to the prosecution of criminal offences in order to guarantee the effective punishment of tax offences? That is, in essence, the question which the Court of Luxembourg is called upon to consider in the present case.

That said, for the ECJ, the national provisions at issue, by introducing — in the event of interruption of the limitation period by one of the events indicated in the Penal Code<sup>14</sup> — a rule according to which the limitation period may in no case be extended by more than a quarter of its initial duration, have the effect, given the complexity and duration of the criminal proceedings leading to the adoption of a final judgment, of neutralising the temporal effect of an event interrupting the limitation period<sup>15</sup>.

The implications of this circumstance are clear: if the national court concludes that the application of the national provisions in relation to the interruption of the limitation period has the effect that, *in a considerable number of cases*, the commission of *serious fraud* will escape criminal punishment, since the offences will usually be time-barred before the criminal penalty laid down by law can be imposed by a final judicial decision, it would be necessary to find that the measures laid down by national law to combat fraud affecting the financial interests of the European Union could not be regarded as being effective and dissuasive, which would be incompatible, in particular, with Article 325 TFEU<sup>16</sup>.

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<sup>11</sup> Judgments in *SARPP* (C-241/89, EU:C:1990:459, § 8); *Ritter-Coulais* (C-152/03, EU:C:2006:123, § 29); *Promusicae* (C-275/06, EU:C:2008:54, § 42); *Aventis Pasteur* (C-358/08, EU:C:2009:744, § 50); and *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve* (C-562/13, EU:C:2014:2453, § 37).

<sup>12</sup> See, in this regard, the Opinion of Advocate General, C-105/14, 30 April 2015, § 75 - 76.

<sup>13</sup> At the end of its decision, the Court affirmed that the answers to the other questions cannot be assessed in the light of Articles 101, 107 and 119 TFEU. <sup>13</sup> See ECJ, C-105/14, *Taricco and others*, 8 September 2015, § 65.

<sup>14</sup> Article 160 of Italian Penal Code provides that “*the limitation period shall be interrupted by judgment or conviction. An order applying protective measures [...] and an order fixing the preliminary hearing [...] shall also interrupt the limitation period. If it is interrupted, the limitation period shall start to run anew from the day of the interruption [...]*”.

<sup>15</sup> See ECJ, C-105/14, *Taricco and others*, 8 September 2015, § 46.

<sup>16</sup> In addition, for the ECJ, it is for the national court to verify whether the national provisions in question apply to cases of VAT evasion in the same manner as they apply to fraud affecting the Italian Republic's own financial interests, as required under Article 325(2) TFEU. That would not be the case, in particular, if the second subparagraph of Article 161 of the Penal Code laid down longer limitation periods for offences, similar in nature and seriousness, affecting the Italian Republic's financial interests. As the European Commission observed at the hearing before the Court, and subject to verification by the national court, Italian law does not lay down any absolute limitation period in respect of the offence of conspiracy to commit crimes in relation to import duties on tobacco products. See ECJ, C-105/14, *Taricco and others*, 8 September 2015, § 47 – 48.

Having considered these preliminary elements, the ECJ dealt with the consequences of the incompatibility of the national provisions at issue with EU law and the role of the national court.

In this regard, the European Court clarified that if the national court concludes that the national provisions at issue do not satisfy the requirement of EU law that measures to counter VAT evasion be effective and dissuasive, that court would have to ensure that EU law is given full effect, if need be by disapplying those provisions, without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure<sup>17</sup>.

These, also, due to the fact that, in accordance with the principle of precedence of EU law, the provisions of Article 325 TFEU have the effect, in their relationship with the domestic law of the Member States, of rendering automatically inapplicable, by their mere entering into force, any conflicting provision of national law.

At this point, the European judges affirmed very clearly that the extension of the limitation period and its immediate application do not entail an infringement of the principle of legality in criminal law, recognized by Article 49 of the EU Charter<sup>18</sup> (and by Article 7 of ECHR), since those provisions cannot be interpreted as prohibiting an extension of limitation periods where the relevant offences have never become subject to limitation.

For the ECJ, the case-law of the European Court of Human Rights (ECtHR) – in particular one of its rulings on this issue: *Coeme and Other v. Belgium*, 22 June 2000 – support this conclusion.

In the European perspective, in fact, the principle of legality in criminal law – considered also as one of the general legal principles underlying the constitutional traditions common to the Member States – provides that no one is to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed, and, furthermore, that a heavier penalty is not to be imposed than the one that was applicable at the time the criminal offence was committed.

Therefore, in the reasoning of the Court, it is implicit the consideration that it cannot be inferred from the principle of legality, recognized by Art. 49 of the EU Charter, that the applicable rules on the length, course and interruption of the limitation period must of necessity always be determined in accordance with the statutory provisions that were in force at the time when the offence was committed.

“No legitimate expectation to that effect exists” affirmed, in this regard, the Advocate General, by clarifying also that “the period of time within which a criminal offence may be prosecuted can still be altered even after the offence has been committed, so as long as the limitation period has not expired”<sup>19</sup>.

On those grounds, the ECJ hereby rules:

- ✓ A national rule in relation to limitation periods for criminal offences such as that laid down by the last subparagraph of Article 160 of the Penal Code, as amended

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<sup>17</sup> See ECJ, C-105/14, *Taricco and others*, 8 September 2015, § 49.

<sup>18</sup> See M. D’AMICO, *Articolo 49*, in R. Bifulco, M. Cartabia, A. Celotto (a cura di), *L’Europa dei diritti. Commento alla Carta dei diritti fondamentali dell’Unione Europea*, Bologna, 2001, p. 334 ss.

<sup>19</sup> See the Opinion of Advocate General, C-105/14, 30 April 2015, § 119 - 120.

by Law No 251 of 5 December 2005, read in conjunction with Article 161 of that Code — which provided, at the material time in the main proceedings, that the interruption of criminal proceedings concerning serious fraud in relation to value added tax had the effect of extending the limitation period by only a quarter of its initial duration — is liable to have an adverse effect on fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, which it is for the national court to verify. The national court must give full effect to Article 325(1) and (2) TFEU, if need be by disapplying the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under Article 325(1) and (2) TFEU;

- ✓ A limitation system applicable to criminal offences in relation to value added tax such as that established by the last subparagraph of Article 160 of the Penal Code, as amended by Law No 251 of 5 December 2005, read in conjunction with Article 161 of that Code, cannot be assessed in the light of Articles 101 TFEU, 107 TFEU and 119 TFEU.

#### **4. The reaction of the Italian Judges: between direct application of the *Taricco* rule and the request for counter-limits**

As it is well known, national courts had to guarantee the application of the ECJ's decision, if need be with the disapplication of the domestic provisions<sup>20</sup>.

This means, in the present case, that the Italian courts must disapply the national rules concerning the maximum extension of the limitation period in order to allow the effective prosecution of serious frauds affecting the financial interests of the Union, by giving full effect to Article 325 TFEU.

However, in accordance with the judgment of the ECJ, national courts are not always obliged to disapply the domestic provisions.

Indeed, the ECJ, in its ruling, specified two conditions under which the Italian courts are required to disregard the national rules of limitation period:

- ✓ the requirement of a *considerable number of cases* of impunity, as a consequence of the normal application of the national rules;
- ✓ the *serious* nature of the *fraud* (affecting the financial interests of the Union)

That said, in Italy, some courts, with a very “obsequious” attitude to the authority of the ECJ, did not hesitate to directly perform the *Taricco* rule<sup>21</sup>, including the third division of the

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<sup>20</sup> See P. FARAGUNA, *The Italian Constitutional Court in re Taricco: “Gauweiler in the Roman Campagna”*, cit.

<sup>21</sup> See D. TEGA, *Narrowing the dialogue: the Italian Constitutional Court and the Court of Justice on the Prosecution of VAT frauds*, in *I·CONnect blog*, 2017.

Court of Cassation<sup>22</sup> which, just few days after the ruling of the ECJ, disapplied the national rules with strong effects *in malam partem* for the defendants of that case.

With an opposite approach, some months later, the fourth division of the Court of Cassation<sup>23</sup> held that the double conditions provided by the ECJ for the disapplication were not met and, accordingly, decided to apply the national provisions.

Other courts, such as the Milan Court of Appeal<sup>24</sup> and the third division of the Court of Cassation (in a different composition from those mentioned above)<sup>25</sup> have referred to the ICC a question concerning Article 2 of Law no. 130 of 2 August 2008<sup>26</sup>, insofar as it authorises the ratification and gives legal effect to Article 325(1) and (2) of the TFEU, as interpreted by the judgment *Taricco* of the Grand Chamber of the ECJ<sup>27</sup>.

With these requests, the ICC was asked to rule on whether the doctrine of counter-limits prevented national courts from enforcing the *Taricco* rule<sup>28</sup>.

According to this doctrine, the principle of supremacy of EU law, pursuant to Article 11 of the Italian Constitution<sup>29</sup>, must be balanced with the supreme principles of the Italian legal order: the compliance between the EU law and those principles is a prerequisite for the applicability of EU Law itself in the Italian system.

This means that in the unlikely event that a specific European provision were not so compliant the ICC would rule unconstitutional the national law authorizing the ratification and implementation of the Treaties, solely insofar as it permits such a legislative scenario to arise<sup>30</sup>.

That said, in cases pending before the Milan Court of Appeal and the Court of Cassation, the judges were hearing prosecutions for tax fraud relating to the collection of VAT, which they consider to be *serious* and which would have been time-barred had national provisions been applicable, whilst otherwise the proceeding would have resulted in convictions.

The referring courts also pointed out that the exemption from punishment resulting from application of national provisions concerning limitation period applies in a *considerable number of cases*.

Therefore, in both proceedings, the double conditions provided by the ECJ have been met.

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<sup>22</sup> See Court of Cassation, 2210/16, 17 September 2015, Def. *Pennacchini*.

<sup>23</sup> See Court of Cassation, 7914/16, 25 January 2016, Def. *Tormenti and others*.

<sup>24</sup> See Milan Court of Appeal, 6421/15, 18 September 2015, Def. *De Bortoli and others*.

<sup>25</sup> See Court of Cassation, 28364/16, 30 March 2016, Def. *Cestari and others*.

<sup>26</sup> Ratification and implementation of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community and certain related acts, with final act, protocols and declarations done in Lisbon on 13 December 2007.

<sup>27</sup> With different points of view, F. VIGANO', *Il caso Taricco davanti alla Corte costituzionale: qualche riflessione sul merito delle questioni, e sulla reale posta in gioco*, in [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it), 2016; and V. MANES, *La "svolta" Taricco e la potenziale "sovrersione di sistema": le ragioni dei controlimiti*, in [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it), 2016.

<sup>28</sup> See again M. BASSINI, O. POLLICINO, *The Taricco decision: a last attempt to avoid a clash between EU Law and the Italian Constitution*, cit.

<sup>29</sup> Which states that "Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends".

<sup>30</sup> See ICC, order no. 24 of 2017, § 2. See also ICC; order no. 232 of 1989, no. 270 of 1984 and no. 183 of 1973.

However, as seen above, the referring courts doubted that the disapplication imposed by the ECJ is compatible with the supreme principles of the Italian constitutional order and with the requirement to respect inalienable human rights<sup>31</sup>, with particular reference to the principle of legality in criminal matters, formally recognized by Article 25(2) of the Italian Constitution<sup>32</sup>.

In this regard, the referring courts developed their arguments moving from the statement that the provisions concerning the limitation period are covered by the principle of legality.

It is, consequently, necessary that these provisions are described in detail by means of a rule in force at the time the offence was committed.

In other words, it means that all of the corollaries of the principle of legality (in particular, the *principle of non retroactivity* and the *principle of certainty*) - usually and traditionally recognized with regard to the offence and the punishment - must be applied also to the rules of limitation periods.

For the referring judges, the disapplication imposed by the ECJ runs counter, in particular, the principle of legality for two fundamental reasons:

- 1) the requirement of *considerable number of cases* – because of its vagueness – infringes the *principle of certainty*;
- 2) the extension of limitation period for offences committed before 8 September 2015 (the day of the ECJ’s decision) results in a retroactive increase in the severity of the punishment regime, in breach of the *principle of non retroactivity*;

##### **5. The decision of the Italian Constitutional Court (ICC): a courageous stance or a prudent openness to dialogue?**

As anticipated in the introduction, the ICC decided the referred question with the rule no. 24 of 2017.

The premise from which the ICC moves to elaborate its own arguments is as follow: “*there is no doubt that the principle of legality in criminal matters is an expression of a supreme principle of the legal order, which has been posited in order to safeguard the inviolable rights of the individual insofar as it requires that criminal rules must be precise and must not have retroactive effect*”<sup>33</sup>.

This is a crucial statement, full of implications.

Within the national system, in fact, the supreme principles represents an essential, albeit controversial, category<sup>34</sup>: the supreme principles qualify the constitutional identity of the State but they are not listed exhaustively in the Constitution. It is true that the ICC, in its

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<sup>31</sup> As laid down by Article 3, 11, 24, 25(2) 27(3) and 101(2) of the Constitution.

<sup>32</sup> Article 25(2) of the Italian Constitution states that “*no punishment may be inflicted except by virtue of a law in force at the time the offence was committed*”. The Milan Court of Appeal, in particular, focused its decision on Article 25(2) of the Italian Constitution. On the principle of legality in criminal law, see See M. D’AMICO, *Sub Art. 25, comma 2, Cost.*, in R. Bifulco, A. Celotto, M. Olivetti (a cura di), *Commentario alla Costituzione*, Torino, 2006, p. 536 ss.

<sup>33</sup> See ICC, order no. 24 of 2017, § 2.

<sup>34</sup> See P. FARAGUNA, *Ai confini della Costituzione. Principi supremi e identità costituzionale*, Milano, FrancoAngeli, 2015.

case-law, has been called upon to deal with this category<sup>35</sup>, nevertheless it has never clarified which and how many are the supreme principles<sup>36</sup>.

Anyhow, it is important to note that the element which characterises the supreme principles is that they cannot be changed by legislator, even by means of the constitutional review procedure, and compliance with them, as already said, is a prerequisite for the applicability of EU law in Italy<sup>37</sup>.

It follows that if a norm - like Article 325 TFUE as interpreted by the ECJ - of the Treaty results in a legal norm that is contrary to the supreme principles, the ICC has the duty to prohibit<sup>38</sup>.

In the light of foregoing, the ICC, by directly addressing the complaints of the referring judges, affirms that, within the national legal order, the rules of limitation periods are subject to the principle of legality in criminal matters laid down by Article 25(2) of the Constitution<sup>39</sup>.

In this perspective, the ICC reminds that limitation is an institute that “*impinges upon the liability to punishment of individuals, and the law consequently regulates it on the basis of an assessment that is made with reference to the level of social alarm caused by a certain offence and the idea that, following the passage of time after the commission of the offence, the requirements for the punishment have diminished and the author has acquired a right for it to be forgotten*”<sup>40</sup>.

In this respect, it must be pointed out that this is the choice made by the Italian legislator, which - by the evidence - is not the only possible: it is well known, in fact, - as observed by the ICC - that certain Member States embrace a procedural conception of limitation (to which the judgment given in the *Taricco* case is closer, based also on the case law of the ECtHR)<sup>41</sup>.

In the light of above, the ICC passes to address the most controversial issue of the judgment given in the *Taricco* case: whether the rule inferred from the decision of the ECJ fulfils the requirements of certainty, which is a constitutionally needed - as already mentioned - for the provisions of substantive criminal law<sup>42</sup>.

In the ICC’s perspective, this verification operates on two different levels.

First and foremost, is necessary to ascertain the requirement of *foreseeability* of the rule laid down in the judgment given in the *Taricco* case.

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<sup>35</sup> See, in particular, ICC, order no. 18 of 1982 and 238 of 2014.

<sup>36</sup> In fact, the ICC attributed this tag in a few cases and always to the specific principle *sub judice*.

<sup>37</sup> See ICC, order no. 24 of 2017, § 2.

<sup>38</sup> See M. BASSINI, O. POLLICINO, *The Taricco decision: a last attempt to avoid a clash between EU Law and the Italian Constitution*, cit.

<sup>39</sup> As has been repeatedly acknowledged by the same Constitutional Court. Cfr., *ex multis*, ICC, order no. 143 of 2014.

<sup>40</sup> See ICC, order no. 24 of 2017, § 4.

<sup>41</sup> The ICC then proceeds affirming that “*however, there are other States, such as Spain, which adopt a substantive concept of limitation that does not differ from that applied in Italy*” (Cfr. ICC, order no. 24 of 2017, § 4).

<sup>42</sup> See ICC, order no. 24 of 2017, § 5. Cfr. M. D’AMICO, *Principio di legalità penale e “dialogo” tra le Corti. Osservazioni a margine del caso Taricco*, cit.; I. PELLIZZONE, *Principio di determinatezza, separazione dei poteri e ruolo del giudice penale: le sollecitazioni del caso Taricco*, in *Forum di Quaderni costituzionali*, 2017.

For the ICC, this requirement - broadly enhanced in the jurisprudence of the Strasbourg Court<sup>43</sup> - is not fulfilled in the present case: an individual could not have reasonably considered, prior to the judgment given by the ECJ, that Article 325 TFUE requires the national judges to disregard the Italian rules of limitation period *“in situations in which this would have resulted in an exemption from punishment in a considerable number of cases involving serious fraud affecting the financial interest of the Union”*<sup>44</sup>.

Secondly, it is necessary to examine whether the requirement of certainty is respected in the *Taricco* rule, with particular regard to the power of the courts, which cannot be empowered to make choices based on discretionary assessments of criminal policy.

For the ICC, the rule laid down by the ECJ cannot be interpreted with a minimum and sufficient standard of certainty. In particular, the requirement of *“considerable number of cases”*, upon which the effect indicated by the ECJ is conditional, is so vague and ambiguous that every courts could interpret it in a discretionary way, without any guarantee of objective.

Indeed, what is *“considerable”* for one court can be *“non considerable”* for another one, with enormous implications for the defendant involved in the case.

At this point, the ICC further clarifies that the period of time necessary in order for limitation of an offence to operate and the legal operations which must be carried out to calculate it must result from application by the criminal courts of legal rules that are sufficiently precise<sup>45</sup>.

At the end of its decision, the ICC also observes that the ECJ in its judgment held that there was no incompatibility between the rule asserted therein concerning Article 49 of the Charter and the sole prohibition on retroactivity, but did not examine the other corollary of the principle of legality, namely the requirement that the provision concerning the regime of punishment must be sufficiently precise.

In this regard, for the ICC, even if the limitation were considered procedural in nature, or even if it were possible to regulate limitation through a legislation enacted after the offence was committed, this would not affect the principle that the activity of the criminal courts must be governed by legal provisions that are sufficiently precise<sup>46</sup>. This principle - which encapsulates a defining feature of the constitutional systems of the Member States of civil law tradition<sup>47</sup> - does not grant *“the courts the power to create new criminal law in place of that established by legislation approved by Parliament, and in any case reject the notion that the criminal courts may be charged with fulfilling a purpose, albeit defined by law, if the law does not specify in what manner and within limits this may occur”*<sup>48</sup>.

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<sup>43</sup> See V. ZAGREBELSKY, *La Convenzione europea dei diritti dell'uomo e il principio di legalità penale*, in *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano* (a cura di) V. MANES e V. ZAGREBELSKY, Giuffrè, 2011; e A. BERNARDI, *Art. 7*, in *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali* (a cura di) S. BARTOLE, B. CONFORTI e G. RAIMONDI, Cedam, 2001, p. 249 ss.

<sup>44</sup> See ICC, order no. 24 of 2017, § 5.

<sup>45</sup> See ICC, order no. 24 of 2017, § 5.

<sup>46</sup> See ICC, order no. 24 of 2017, § 9.

<sup>47</sup> See M. D'AMICO, *Principio di legalità penale e “dialogo” tra le Corti. Osservazioni a margine del caso Taricco*, cit., p. 106.

<sup>48</sup> See ICC, order no. 24 of 2017, § 9.

In conclusion, the ICC orders that three different questions concerning the interpretation of Article 325(1) and (2) TFEU be referred to the ECJ for a preliminary ruling pursuant to Article 267 TFEU.

In particular, the ICC asks the ECJ if the Article 325(1) and (2) of the TFEU must be interpreted as requiring the criminal courts to disregard national legislation concerning limitation periods even when there is not a sufficiently precise legal basis for setting aside such legislation or even when limitation is part of the substantive criminal law in the Member State's legal system and is, consequently, subject to the principle of legality.

And furthermore, if the judgment *Taricco* of the Grand Chamber of the ECJ must be interpreted as said above even when setting aside 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.

The ICC's ruling, for all of these reasons, only apparently can be considered, at the same time, as a prudent openness to dialogue and a courageous stance<sup>49</sup>.

On one hand, in fact, the choice not to directly use the counter-limits power expresses the cooperative will of the ICC; on the other, when looking to the content of the motivations of the ruling no. 24, is very clear the intention of the Italian court of defending the constitutional identity of the Italian system, which is provided, for the criminal matters, by the principle formalized in Article 25(2) of the Italian Constitution.

## **6. Future developments: waiting for *Taricco-bis*.**

At the time, it is quite difficult to anticipate the result of the *Taricco-bis* case: there are several aspects, in fact, which make the forthcoming ruling of the ECJ extremely unpredictable.

On this basis, it is however possible to formulate some considerations.

First of all, it is important to note that the ICC, because of the relevance of the case, asked that the reference for a preliminary ruling be determined pursuant to an expedited procedure (accordingly to Art. 105(1) of the *Rules of Procedure of the ECJ*)<sup>50</sup>.

That said, from a substantial point of view, it must be pointed out that the ECJ, in this case, is called to reinterpret its own decision<sup>51</sup> and this circumstance causes a lot of difficulties.

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<sup>49</sup> See M. BASSINI, O. POLLICINO, *The Taricco decision: a last attempt to avoid a clash between EU Law and the Italian Constitution*, cit

<sup>50</sup> Which states as follow: "at the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules". See CJE, C-42/17, *M.A.S. e M.B.*

<sup>51</sup> See P. FARAGUNA, *The Italian Constitutional Court in re Taricco: "Gauweiler in the Roman Campagna"*, cit. For the A.: "the in *Taricco*, the CJEU is called to reinterpret its own decision, after the ICC essentially asked "please, say it again?". We shall now see whether the CJEU will "say it again" in a way that the ICC will consider compatible with a (apodictically affirmed) peculiar notion of constitutional identity".

Indeed, if confirms its first ruling, the European Court could provoke the ICC into taking, for real, a courageous stance, by definitely denying the compatibility of EU law with supreme principles of the Italian constitutional legal order.

In any case, for many authors<sup>52</sup>, the ECJ is now in an awkward position, but it does not lack escape solutions.

There are, in fact, some elements that the Court of Luxembourg could enhance in order to “disarm the bomb” *Taricco*.

There is, in particular, a part of the first ruling in which the ECJ stated that “*if the national court decides to disapply the national provisions at issue, it must also ensure that the fundamental rights of the person concerned are respected*”<sup>53</sup>.

In this perspective, therefore, the ECJ – by recognizing that the application of the *Taricco* rule within the Italian system contrasts with the supreme principle of legality in criminal law (because of the substantive nature of the limitation period rules) – could rethink its prior position:

- ✓ Narrowing down the requirement of *considerable number of cases*;
- ✓ Considering applicable the *Taricco* rule only to the offences committed after 8 September 2015.

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<sup>52</sup> See, in particular, D. TEGA, *Narrowing the dialogue: the Italian Constitutional Court and the Court of Justice on the Prosecution of VAT frauds*, cit.

<sup>53</sup> See ECJ, C-105/14, *Taricco and others*, 8 September 2015, § 47.