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THE ECJ DECISION ON TARICCO II AS
A TWO-FACED JUDGMENT?**

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1. *Introduction.*

The European Court of Justice (ECJ) has recently been called to clarify one of its previous judgments on a field where both fundamental rights and economic aspects converged. However, in order to understand the reasons and effects of this clarification, it is necessary to make a little digression.

1.1 *Taricco as a sounding alarm.*

In 2014, the Italian *Tribunale di Cuneo* requested a preliminary ruling¹ from the ECJ in relation with a criminal case of VAT frauds. The referring court asked about the possible applicability (and consequent prevalence) of Articles 101, 107 and 119 of the Treaty on the Functioning of the European Union (TFEU)² as well as about the possible

¹ *Tribunale di Cuneo*, Order 17/01/2014 published in *Diritto Penale Contemporaneo*, together with a critical note by F. Rossi Dal Pozzo (in Italian). The only English version available comprises just the text of the questions referred (without the reasoning) and can be retrieved on the Official Journal of the European Union as *Case C-105/14: Request for a preliminary ruling from the Tribunale di Cuneo (Italy) lodged on 5 March 2014 — Criminal proceedings against Ivo Taricco and Others* (OJ C 194, 24.6.2014, p. 10–11).

² As well known, the first two articles are related to European competition law (respectively, to the arrangements preventing, restricting or distorting competition in the internal market and to the European limitations of State aids) while the latter relates to the obligation to maintain sound public finances. The reference to Article 101 TFEU seems to have been made without a real consideration of the provision, since the order itself refers to a general “rule protecting competition”.

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violation of Article 158 of Council Directive 2006/112/EC. In the view of the referring court, the Republic of Italy would have violated these provisions by establishing a statute of limitations concerning VAT frauds that would have made materially impossible to prosecute this kind of offences, allegedly implying:

- *De facto* impunity, even in cases of serious VAT frauds;
- The favoring of certain undertakings, in violation of the European provisions protecting competition and limiting State aids;
- The creation of a *de facto* VAT exemption which was not laid down in the relevant European Directive;
- The infraction of the guiding principle that the Member States must ensure that their public finances are sound.

By extensively rephrasing the order for reference, the Advocate General advised³ the ECJ to consider another provision, *id est* Article 325 TFEU. This further parameter is the legal basis for two different obligations: para. 1 lays down an obligation for the Member States and the EU to protect the financial interests of the Union against frauds and any other illegal activities, while para. 2 (with an equal-protection clause) obliges Member States to protect the financial interests of the Union with the same measures enacted to protect their own ones. Since part of the Union's resources derived from the application of a uniform rate to the harmonized VAT assessment bases, there was a clear link between the VAT frauds under analysis in front of the referring court and the detriment to the financial interests of the Union, hence Article 325 TFEU could be applied.

The ECJ followed the advice of the Advocate General when it rendered its judgment in September 2015.⁴ The national provisions on the statute of limitations were to be considered infringing Article 325 TFEU if:

- they had an adverse effect on the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the Union, or
- they provided for longer limitation periods in respect of cases of fraud affecting the national financial interests than in respect of the cases affecting those of the Union.

The national judge was to verify the requirements just outlined, eventually giving full effect to Article 325 TFEU, if need be by disapplying the provisions of national law the effect of which would have been to prevent Italy from fulfilling its obligations.

³ Court of Justice of the European Union, Opinion of Advocate General Kokott, delivered on 30 April 2015, Case C-105/14, EU:C:2015:293.

⁴ Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 8 September 2015, *Taricco*, C-105/14, EU:C:2015:555.

In short, in the case at issue the Court found no apparent conflict between the protection of the financial interests of the Union and the fundamental rights of the defendant.

1.2 *National identity vs common constitutional traditions.*

It is now necessary for me to introduce a further element in order to frame the subsequent development of the case.

As well known, the national stances on fundamental rights can enter the European legal framework through two different provisions. Article 4(2) of the Treaty on European Union (TEU) states that “[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. [...]”. In other words, the European Union is obliged to make a step back when it comes to the national identities of its Member States. This provision may (and, in the past, has indeed) been exploited in order to value the national dimension in the protection of fundamental rights, but it can also represent a practical tool for nationalist movements around the continent to make EU law succumb even far beyond the borders of its intended application.⁵

On the other hand, Article 6(3) TEU states that “[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”. Hence, it is also possible to make a national understanding of fundamental rights enter the European legal framework when it represents a constitutional tradition common to the Member States (or when it corresponds to the European Convention for the Protection of Human Rights and Fundamental Freedoms).

Although some scholars identified a “communitarization” of the counter-limits in the articles mentioned above, a major difference must be pointed out. The counter-limits doctrine was laid by national constitutional courts to keep a weapon of last resort against any excesses of the European legal framework. Hence, claiming that the counter-limits have attained a European legal value (thus implying that the ECJ has become the judge competent to assess them) simply means to misplace the titularity of

⁵ For a comprehensive framing of the relation between Article 4(2) TEU, the evolution of the European legal framework and the national attitude towards the use of this judicial tool, see M. Dobbs, *The Shifting Battleground of Article 4(2) TEU: Evolving National Identities and the corresponding need for EU management?*, *European Journal of Current Legal Issue*, 21(2), 2015.

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the constitutional power, which is still up to the single Member States (having never been successfully conferred to the Union).

There is anyway a substantial distinction to be done between Articles 4(2) and 6(3) TEU. The concept of national identity is divisive by definition, since it emphasizes the differences of the national stance with respect to the European position on a certain matter. On the contrary, constitutional traditions praise the points in common between the different European experiences. The national identity and constitutional traditions may substantially describe two different kinds of dialogue with the European institutions, the former being sharper and the latter being more cooperative.

2. *Taricco II as a request for clarifications.*

Now that I have framed the premises, we can proceed with the analysis.

The abovementioned judgment delivered by the ECJ in the *Taricco* affair raised several doubts. The scope of application of the judgment was unclear, as well as the very consequences of disapplying the statute of limitation “in a significant number of cases of serious frauds affecting the financial interests of the Union”. In summary, how can ordinary judges know whether the limitation period affects a significant number of cases, since they are only to deal with the individual suit brought in front of them? And when should a fraud be classified as serious?⁶ The most persuasive scholars argued for a possible violation of the principle of legality in criminal matters, of the subjection of judges to the law (given the broad margin of discretion that the ECJ judgment would have granted to ordinary judges) and even for a possible breach of the separation of powers.

The Italian Constitutional Court, called to answer a question of constitutionality raised in two cases pending in front of the *Corte di cassazione* and the *Corte d'appello di Milano*, analyzed the judgment rendered in *Taricco* and focused on the possible danger for the principle of legality as interpreted in the Italian constitutional tradition: since here the statute of limitation was substantial in character (rather than procedural), the principle of legality should have applied and the ECJ interpretation could have caused the violation of a fundamental right constitutionally protected.

Indeed, the ECJ itself had established⁷ that it was up to the national court to ensure that fundamental rights were not violated. However, immediately after this statement, the Court had developed the point by focusing on the principle of legality enshrined in Article 49 of the Charter of Fundamental Rights of the European Union,

⁶ Some scholars actually argued that the seriousness of the fraud could be interpreted as non-tenuity of the offence, consequently describing an element already present in the Italian legal order. Other scholars suggested to draw a link between the seriousness of the crime and a quantitative threshold for the damage. Which interpretation should be considered correct is still debated and unclear.

⁷ See para. 53 et seq. of the *Taricco* judgment.

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which, according to the case law, covered only the substantial aspects of crimes and punishments (*id est*, in the ECJ's view, not the statute of limitations). The Court had also made reference to the case law of the European Court of Human Rights on the application of Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which confirmed its interpretation.

Given the higher standard of protection determined by the different qualification of the statute of limitation in the Italian legal framework, the Constitutional Court feared that the ECJ had not taken (and actually could not take) into proper account the possible intolerable violation of fundamental rights that the *Taricco* judgment could cause. Hence, the Court raised a preliminary reference⁸, trying to better frame the question at issue.

It is now necessary for me to note that, in the Italian Constitutional tradition, the principle of legality of crimes and punishments is nowadays described as comprising four sub-principles⁹:

- The domain of the law in criminal matters, that prevents other sources to determine crimes and punishments, if not under the law's mandate;
- The precision in the definition of crimes and punishments;
- The necessary possibility to ascertain the elements of the conduct during and with the instruments of the criminal proceedings;
- The prohibition to use analogy in criminal matters.

Through the declension of the national understanding of the principle of legality in some of these aspects, the *Corte Costituzionale* was allowed to follow three argumentative paths that determined three separate questions to be referred.

⁸ *Corte Costituzionale*, Order 24/2017 published in *Diritto Penale Contemporaneo*, together with several critical notes (in Italian). The reference for a preliminary ruling was published on the Official Journal of the European Union as *Case C-42/17: Request for a preliminary ruling from the Corte costituzionale (Italy) lodged on 26 January 2017 — M.A.S., M.B.* (OJ C 195, 19.6.2017, p. 10). Given the strong connection with the *Taricco* affair, this case has been labelled as "*Taricco II*" by the most influential scholars, hence I am following this trend. For a comprehensive perspective, see M. Bassini, O. Pollicino, *The Taricco Decision: A Last Attempt to Avoid a Clash between EU Law and the Italian Constitution*, *VerfassungsBlog*, 28 January 2017, as well as F. Viganò, *Supremacy of EU Law vs. (Constitutional) National Identity: A New Challenge for the Court of Justice from the Italian Constitutional Court*, *European Criminal Law Review*, 2/2017. For a foreign point of view that predicted a possible conflict between the Italian and European approaches to the nature of the statute of limitation, see M. Lassalle, *Taricco kills two birds with one stone for the sake of PIF*, *European Law Blog*, 27 October 2015.

⁹ See G. Marinucci, E. Dolcini, *Manuale di diritto penale. Parte generale*, Giuffrè, 2017 (in Italian). The position is partially disputed among scholars, who tend to argue on the exact boundaries of the sub-principles and on their possible autonomy from a systemic point of view. Other scholars even include the non-retroactivity of unfavorable penal law together with the ultra-activity of favorable criminal legislation within the limits of the principle of legality (see G. Fiandaca, E. Musco, *Diritto penale. Parte generale*, Zanichelli, 2014).

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By question no. 1, the Italian Constitutional Court (without questioning the primacy of EU Law)¹⁰ asked for a clarification concerning the alleged insufficient precision of the legal basis for the disapplication of the national legislation on limitation periods as described in the *Taricco* judgment. In other words, the order for reference focused the attention on the lack of a precise legal basis for the judicial integration of the criminal provisions. This question could call into question not only the principle of legality itself, but even the overriding principle of separation of powers: if Italy had been in breach of Article 325 TFEU, it should have been up to the European Commission to initiate an infringement procedure and the judicial activism of the ECJ could be considered inappropriate, given the desirable prevalence of the protection of fundamental rights over the financial interests of the Union. However, the Italian Constitutional Court decided not to stress this point, presumably in order to show a more dialogical approach on the other questions referred.

By question no. 2, the referring court emphasized the difference between the national qualification of limitation periods (which are considered substantial in nature) and their European understanding (that prominently frames the statute of limitation within procedural law). Since this difference in interpretation was essential in terms of applicability of the principle of legality (declined as non-retroactivity of unfavorable criminal rules) the Italian *Corte Costituzionale* was substantially asking for a possible different interpretation of Article 325 TFEU that could avoid the clash with the Italian understanding of the principle of legality, for example by limiting the applicability in time of the *Taricco* decision.

By question no. 3, the Italian Constitutional Court focused on the real reason for a second preliminary reference to be requested: the disapplication already described could be at variance with the overriding principles of the Constitution or with the inalienable rights of the individual. This question was undoubtedly the most controversial, since it could imply the application of the counter-limits doctrine, *id est* the declaration of unconstitutionality of the Italian law authorizing the ratification of the Treaty on the Functioning of the European Union insofar as it allowed the *Taricco* judgment to be implemented. In practice, this declaration could have been a practical tool to sacrifice the uniformity and primacy of EU law in light of a violation of the very

¹⁰ Which, according to para. 1 of the reasoning of the preliminary reference cited, “is an established fact within the case law of [the referring] Court pursuant to Article 11 of the [Italian] Constitution; moreover, according to such settled case law, compliance with the supreme principles of the Italian constitutional order and inalienable human rights is a prerequisite for the applicability of EU law in Italy”. The Court subsequently made reference to the case law that had implemented the primacy doctrine in the domestic legal framework (especially its Judgment no. 170 of 1984), placing this principle beyond any questioning.

core of the fundamental rights enshrined in the Italian Constitution as interpreted by the national constitutional court.¹¹

Yves Bot was assigned to the case as Advocate General of the ECJ. Undoubtedly influenced by his previous opinion in the *Melloni* judgment¹² and fearing the application of the national identity doctrine laid out in the *Gauweiler* order for reference¹³, the Advocate General advised the Court not to sacrifice the necessary uniformity of application of EU Law.¹⁴ Although the referring court had tried to distinguish the *Melloni* affair from the case under analysis, in light of the European attainment of the principle of legality, the Advocate General did not consider the difference relevant and, on the contrary, stressed the importance of ensuring the primacy, unity and effectiveness of the EU legal order even at the expense of what is nationally qualified as a fundamental right.

3. *The judgment of the ECJ.*

The ECJ delivered its final judgment on 5 December 2017.¹⁵ Roughly speaking, the Court followed only in part the statement made in the *Taricco* affair. Since it is very

¹¹ For a critical analysis of this assessment, see M. Bassini, O. Pollicino, *When cooperation means request for clarification, or better for "revisitation". The Italian Constitutional Court request for a preliminary ruling in the Taricco case*, *Diritto Penale Contemporaneo*, January 2017. Instead, for a comprehensive framing of the doubts raised by the *Taricco* judgment within the Italian constitutional framework in its dialogical evolution, see M. Luciani, *Il brusco risveglio. I controlimiti e la fine mancata della storia costituzionale*, *Rivista Associazione Italiana dei Costituzionalisti*, 2/2016 (in Italian).

¹² Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107. As well known, the judgment regarded the application of a European Arrest Warrant in relation to a conviction rendered *in absentia* by Italian authorities. On the other hand, Article 24(2) of the Spanish Constitution, as interpreted by the national constitutional court, provided for the right to be physically present at the hearing of criminal proceedings. In that occasion, the ECJ reaffirmed the primacy of European Law even at the expense of the essential content of fundamental rights guaranteed by national constitutional law. In other words, the application of national standards of protection of fundamental rights could not challenge the primacy, unity and effectiveness of EU law.

¹³ BVerfG, Order of the Second Senate of 14 January 2014 - 2 BvR 2728/13. The reference to the ECJ, the first one in the history of the German *Bundesverfassungsgericht*, regarded the OMT program proposed by the European Central Bank. The order was quite controversial, since the referring court was suggesting the interpretation to give and threatened to apply that interpretation itself, seeking to protect the national identity (which comprised the democratic principle and parliamentary control on budgetary measures, allegedly endangered by the OMT program itself).

¹⁴ Court of Justice of the European Union, Opinion of Advocate General Bot, delivered on 18 July 2017, Case C-42/17, EU:C:2017:564. For a critical review, see M. Bassini, O. Pollicino, *The Opinion of Advocate General Bot in Taricco II: Seven "Deadly" Sins and a Modest Proposal*, *VerfassungsBlog*, 2 August 2017 and M. Krajewski, *A way out for the ECJ in Taricco II: constitutional identity or a more careful proportionality analysis?*, *European Law Blog*, 23 November 2017.

¹⁵ Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936.

difficult to identify the common ground with the former decision and distinguish the new points precisely, I will try to analyze this judgment with a theme-based approach.

3.1 *Reframing the principle of legality.*

The ECJ structured its reasoning by clearly recalling the previous *Taricco* judgment: the national court, in disapplying the identified provisions of the criminal code, has to ensure that the fundamental rights are respected. Then, the Court added that “national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised”.¹⁶

The subsequent element is of vital importance: the ECJ took the chance of the preliminary reference under analysis to better frame the principle of legality by extensively drawing from the case law of the European Court of Human Rights, hence representing another proficient example of horizontal dialogue between the two European Courts. More in detail, the ECJ established that “offences and penalties must be defined by law” and this made “the foreseeability, precision and non-retroactivity of the criminal law applicable” necessary.¹⁷ The principle of legality was subsequently characterized as requiring “accessibility and foreseeability, as regards both the definition of the offence and the determination of the penalty”¹⁸, as well as precision and non-retroactivity of the criminal-law provisions. Hence, the national court should take into account all these prevailing before disapplying the national provisions of the statute of limitations concerning VAT frauds.

3.2 *The turning point: a constitutional tradition common to the Member States.*

The entire reasoning of the ECJ is based on a particular assumption, made explicit at para. 53: the principle of legality has attained European value not only because it is enshrined in the Charter of Fundamental Rights of the European Union or in the European Convention for the Protection of Human Rights and Fundamental Freedoms, but also because it is a constitutional tradition common to the Member States. Hence, the different Italian interpretation has been valued not because it was part of the national identity, but because it described the European attitude towards fundamental rights.

Thus, tradition has indeed overridden identity as the main parameter constitutional courts are encouraged to use in the judicial dialogue with the ECJ. This

¹⁶ See para. 47 of the *Taricco II* judgment cited.

¹⁷ See para. 51 of the *Taricco II* judgment cited.

¹⁸ See paras. 55, 56 and 57 of the *Taricco II* judgment cited.

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element is undoubtedly what characterizes the *Taricco II* judgment beyond any consequence on the single case at issue: the ECJ showed a particular openness to consider the national understanding of a fundamental right, even when it could compromise the primacy, unity and effectiveness of EU law. In the next few paragraphs, I am going to analyze in depth the actual capacity of this statement to influence the future development of the European legal framework, especially for what concerns the issue of the protection of the financial interests of the Union.

3.3 *A partial judicial revirement?*

Some influential scholars have already welcomed the *Taricco II* judgment in several and opposite ways.¹⁹ Some of them argued that it would amount to a judicial revirement in respect of both the *Melloni* and *Taricco* decisions. In the next paragraphs, I will try to support my idea that this is not the case, since a revirement needs not only to produce an outcome that appears to be in contrast with the preceding judgments, but also that the clash produced has the potential of staying over time and affecting the entire legal order. In the next sections, I will try to discuss my point that the latter requirement is not met.

But anyway, concerning the possible diverging impact of the *Taricco II* judgment if compared to *Taricco*'s, it is evident that the specified requirement of foreseeability of the change in the limitation rules implies the impossibility of the *Taricco* doctrine to be applied before the issue of that judgment. In this perspective, the ECJ has seemingly made a step towards the Italian Constitutional Court, which had emphasized this requirement in the order for reference and had hinted for a possible limitation of the disapplication.

4. *Future perspectives.*

¹⁹ See, for example, the two diverging perspectives reported in M. Bassini, O. Pollicino, *Defusing the Taricco Bomb through Fostering Constitutional Tolerance: All Roads Lead to Rome*, *VerfassungsBlog*, 5 December 2017 and D. BUCHARDT, *Belittling the Primacy of EU Law in Taricco II*, *VerfassungsBlog*, 7 December 2017. For other critical views, see G. Ziccardi Capaldo, *The global fight against impunity and the European Court of Justice: a new approach to tax fraud as a crime against human rights*, *European Law Blog*, 8 December 2017 and M. Krajewski, *"Conditional" primacy of EU law and its deliberative value: an imperfect illustration from Taricco II*, *European Law Blog*, 18 December 2017. Other Italian considerations are reported in A. Ruggeri, *La Corte di giustizia porge un ramoscello di ulivo alla Consulta su Taricco e resta in fiduciosa attesa che legislatore e giudici nazionali si prendano cura degli interessi finanziari dell'Unione (a prima lettura della sentenza della Grande Sezione del 5 dicembre 2017)*, *Rivista di Diritti Comparati*, 11 December 2017 and in G. Repetto, *Quello che Lussemburgo (non) dice. Note minime su Taricco II*, *Rivista di Diritti Comparati*, 21 December 2017.

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Even though the *Taricco II* judgment represents a decisive moment in the dialogue between the ECJ and national constitutional courts across the continent, we cannot lose the focus on the specific question under analysis, *id est* the protection of the financial interests of the Union. I shall try to develop these two aspects separately in order to draw up some tentative conclusions. By considering the latter, it will also be possible for me to discuss my opinion according to which the judgment should not be considered as a true revirement.

4.1 *A new season for judicial dialogue? The future decision of the Italian Constitutional Court.*

In light of the wording of the new judgment, the Italian Constitutional Court will presumably close the case and declare unfounded the questions of constitutionality raised. However, the greatest victory of the referring court must be related to ideology: although mentioning the rhetoric of national identity, which is divisive by definition, the Italian Constitutional Court privileged the language of constitutional traditions, specifically emphasizing the European level already attained by the principle of legality. The ECJ took the chance to welcome this new language, which should marginalize the most radical stances already expressed in its dialogue with national (especially constitutional) courts.²⁰

With a farsighted approach, the ECJ has even avoided answering the specific question that could pave the way to the counter-limits procedure.

However, another episode has already changed the state of the art: in a recent judgment²¹, the Italian Constitutional Court has partially deviated from its consolidated case law. “In light of the transformations that have affected EU law and the system of relationships with national legal orders after the entry into force of the Lisbon Treaty” – the Court stated – when a law is suspected to violate fundamental rights protected by both the Italian Constitution and the Charter of Fundamental Rights of the European Union, a question of constitutionality must be raised, without prejudice to the specific instrument of the preliminary reference for what concerns the validity and interpretation of EU law. In other words, the *Corte Costituzionale* requested ordinary judges to raise a question of constitutionality (and not to directly set aside the national provision) when there is an axiologically-weighty balancing to be done.

²⁰ There is no need to remind the reader of the recent radical stances assumed by eastern governments and courts, especially in the field of European migration policy.

²¹ *Corte Costituzionale*, Judgment 269/2017, already noted (in Italian) by A. Ruggeri, *Svolta della Consulta sulle questioni di diritto eurounitario assiologicamente pregnanti, attratte nell’orbita del sindacato accentratore di costituzionalità, pur se riguardanti norme dell’Unione self-executing*, *Rivista di Diritti Comparati*, 18 December 2017 and by L. Salvato, *Quattro interrogativi preliminari al dibattito aperto dalla sentenza n. 269 del 2017*, *Forum di Quaderni Costituzionali*, 18 December 2017.

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The impact that this judgment will have on the dialogue with the ECJ (and on the proficiency of this dialogue) remains to be seen, as the European Court might not positively welcome a deviation from a point of law that dates back to the *Simmenthal* decision.²²

4.2 *The evolution of the EU legal framework.*

There are two passages of the *Taricco II* judgment that should not be underestimated. By adding a third ingredient, we may have the recipe for the future development of the EU and national legal frameworks on the issue at stake and we could even understand if the decision really represents a judicial revirement.

The first ingredient of our recipe is the statement²³ that “[i]t is primarily for the national legislature to lay down rules on limitation that enable compliance with the obligations under Article 325 TFEU”. In other words, the substantial addressee of the *Taricco* judgment was not only the national judge, but even the legislature, which was called upon to intervene on the origin of the judicial unease, e.g. by laying down a statute of limitations that did not prevent the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union.

We also have a second consideration to make: the quick reference the Court did²⁴ in relation with the intervened adoption of a Directive²⁵ harmonizing part of the provisions at stake is not without meaning. For future references (and, precisely, from the 6 July 2019) the entire legal framework in which to assess cases like *Taricco* and *Taricco II* will be different, since Article 12(1) of the Directive obliges Member States to “take the necessary measures to provide for a limitation period that enables the investigation, prosecution, trial and judicial decision of criminal offences [affecting the financial interests of the Union] for a sufficient period of time after the commission of those criminal offences, in order for those criminal offences to be tackled effectively”. This basically means that Italy has a further duty to revise national rules that make this kind of crimes time-barred, since the *Taricco* judgment itself may legitimately be

²² Court of Justice of the European Union, Judgment of the Court of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case 106/77, EU:C:1978:49. This judgment, which represented a milestone in the judicial dialogue with national constitutional courts, substantially affirmed that ordinary judges that “are to apply provisions of [European] law are under a duty to give full effect to those provisions, if necessary refusing of [their] own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and [they are] not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means”.

²³ See para. 41 of the *Taricco II* judgment cited

²⁴ See para. 44 of the *Taricco II* judgment cited.

²⁵ 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 (OJ 2017 L 198, p. 29).

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interpreted as a preliminary assessment of the inadequacy of the statute of limitations currently in force. Moreover, since the Court held that “the Italian Republic was [at the time of the *Taricco* judgment] free to provide that in its legal system those rules, like the rules on the definition of offences and the determination of penalties, form part of substantive criminal law, and are thereby, like those rules, subject to the principle that offences and penalties must be defined by law”²⁶ and “[for this reason] the requirements of foreseeability, precision and non-retroactivity inherent in the principle that offences and penalties must be defined by law apply also, in the Italian legal system, to the limitation rules for criminal offences relating to VAT”²⁷ it can be deduced that, reasoning a contrariis, when the Directive harmonization is completed, there will be no room for a different national qualification of the time-barring provisions.

The third ingredient of our recipe consists of a Regulation²⁸ implementing enhanced cooperation among 20 Member States for the establishment of the European Public Prosecutor’s Office (“EPPO”) to counter criminal offences affecting the financial interests of the EU. Since Italy is part of the enhanced cooperation, the Regulation will apply and national prosecutors will cooperate with the EPPO to effectively protect the financial interests of the Union within the new legal framework.

Curiously enough, the three components we mentioned refer directly to the three powers the classic theory identifies within any state: the legislature (that should enact the legislation in conformity with the *Taricco* and *Taricco II* judgment), the executive (which in Italy is normally mandated by Parliament to implement European Directives in the national legal order) and the judiciary (which should cooperate with European authorities in the framework of the EPPO). This consideration strengthens the idea that Italy, as a Member State of the Union, is strongly called upon to intervene in the protection of its financial interests, at any level.

In case any of the three ingredients we mentioned should not be enacted effectively, there could be room for the European Commission to launch an infringement procedure against Italy. In that scenario, the protection of fundamental rights will be unable to play any role and the primacy, unity and effectiveness of the European legal order will remain untouched. This might be defined as a victory for the Court of Justice of the European Union: even though it is likely that the financial interests of the Union will temporarily be sacrificed (in light of the recognized prevalence of the principle of legality, declined as foreseeability of the criminal punishment), the final result will anyway be in favor of their protection, since the comprehensive enforcement of the new legal framework will consistently affect the definition and countering of these criminal offences. In other terms, we may say that the *Taricco II* judgment represents only a

²⁶ See para. 45 of the *Taricco II* judgment cited.

²⁷ See para. 58 of the *Taricco II* judgment cited.

²⁸ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (OJ 2017 L 283, p.1).

temporary judicial revirement, given the prevalence of EU law even on the medium term.

4.3 *A modest proposal.*

The current legislation, substantially criticized by European institutions²⁹ and deemed inadequate by the public opinion and international observers, provides for a unique limitation period, running from the time at which the crime was committed to the issue of the final judgment. Certain acts of investigation or of the criminal trial may only make this period last one quarter longer than originally provided for by the legislation.

Given the new general framework, a comprehensive revision of the statute of limitation in Italy is not only desirable, but necessary to cope with the obligations deriving from the evolved legal framework. In fact, a sectorial reform concerning only the criminal offences affecting the financial interests of the Union may damage the rationale of the system and make similar crimes be treated in a consistently different way.

A possible way out of this impasse could be to redefine the structure of the statute of limitation within the Italian legal framework: since its rationale is to both protect legal certainty and encourage the prosecution of crimes within a reasonable time, it could be possible to define two different kinds of time-barring provisions. A first period should occur between the time at which the crime was committed (*tempus commissi delicti*) and the moment in which the penal suit is brought before national courts. A second period should be defined between the exercise of the criminal action and the issue of a final judgment. Both periods may be determined proportionally to the complexity of the crime (identified through the maximum punishment defined by the law), since they mainly refer to the difficulty of investigating upon an alleged criminal offence and of ascertaining the defendant's responsibility during a legal proceeding. Hence, the two periods may even have different duration, if one phase is deemed to be more complex than the other for structural reasons.

Such a differentiation of the time-barring provisions, together with an overall analysis to verify the proportionality of the system of punishments, may well make Italy complain with the new obligations deriving from the European Directive mentioned above, hold national prosecutors responsible for the timely exercise of their duties and encourage defendants to argue on the merits, rather than using an inefficient statute of limitations as their main shelter.

²⁹ Beyond the *Taricco* case, I may just mention Annex 12 to the EU Anti-Corruption Report from the Commission to the Council and the European Parliament — Italy, 3 February 2014 (COM(2014) 38 final), the Council Recommendation on the National Reform Programme 2013 of Italy and delivering a Council on the Stability Programme of Italy, 2012-2017 (OJ 2013 C 217, p. 42), especially at recital 12 and recommendation 2.

5. Conclusions.

In conclusion, the different trends mentioned above can be summarized as follows: the Italian Constitutional Court may have won on the ground of ideology and legal theory (having convinced the ECJ to privilege the language of constitutional traditions to the one of national identities) and might have convinced the ECJ to temporarily give up its primacy mandate in favor of a wider national understanding of fundamental rights. However, the protection of the financial interests of the Union is far from being compromised, given the decisive evolution of the EU legal framework I outlined. As a consequence, the *Taricco II* judgment has only a provisional value for what concerns the systematic point of view and this might have encouraged the European judges not to entice a clash that is only temporary in nature.

In general terms, it seems to be possible for me to identify three phases for the actual implementation of the *Taricco* doctrine concerning the protection of the financial interests of the Union:

- For those crimes committed before the *Taricco* judgment, the unforeseeability of the disapplication of the statute of limitation will prevent any change to occur. The statute of limitation currently in force will still apply.
- Those criminal offences committed in the period between the *Taricco* judgment and the entry into force of Directive 2017/1371 will presumably oblige the ordinary judge to apply the *Taricco* test. Hence, if the statute of limitation is considered to prevent an effective and dissuasive punishment in a significant number of cases of serious frauds affecting the financial interests of the Union, the time-barring provisions may be disapplied by the national court to make EU law prevail. This test will presumably lead to the conviction of the defendants, given the preliminary assessment the *Taricco* saga represents.
- After the entry into force of Directive 2017/1371, there should be no contrasting statute of limitation to be disapplied. If this should still be the case, the ordinary judge should act as in the previous case and the European Commission may open an infringement procedure against Italy for the absent or incorrect transposition of the Directive. A separate and correlated reasoning may be conducted on the basis of the Regulation implementing enhanced cooperation for the establishment of the EPPO.

The gradual entry into force of the new doctrine strengthens the idea that the change in the approach to the protection of the financial interests of the Union is systemic rather than episodic and will consistently affect and be influenced by both

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judicial cooperation and legislative harmonization. In this perspective, the *Taricco* saga will represent only a hiccup in the far vaster scenario.

ABSTRACT: This paper aims at framing the first-hand impressions on the ECJ decision of the *Taricco II* affair by analyzing its reasoning and comparing its outcome with the former judgment on *Taricco*. After having tried to understand the implications of this judgment in the fields of Italian and European constitutional law, I will draw up some tentative conclusions and a modest proposal from these cases on the issues at stake.

KEYWORDS: Counterlimits; Financial interests of the EU; Judicial dialogue; *Taricco*.