Opinion

NJECL

New Journal of European Criminal Law
1–6

DOI: 10.1177/2032284418761393
njecl.sagepub.com
SAGE

Some lessons from the *Taricco* saga

Vittorio Manes
Full Professor of Criminal Law, University of Bologna, Italy

Abstract

The Taricco saga represents a fundamental step into the evolution of 'EU criminal law' as for the relationship between the Court of Justice and national constitutional courts. The primacy of EU law, the counter-limits, together with the protection of fundamental rights, have come under the spotlight since the Court of Justice has denied in practice the obligation to disapply national provisions contrasting with EU law that in principle is still regarded as necessary. The path of 'European criminal law' appears long and winding, requiring the cooperation among national and supranational level to be strengthened instead of undermined.

Keywords
primacy, counter-limits, constitutional tolerance, cross-fertilization

Vita tua, vita mea

> The *Taricco* saga represents a fundamental 'trilogy' in the evolution of EU (criminal) law on the one hand and the relationship between the Court of Justice and national constitutional courts on the other.

All the main issues of EU (criminal) law have come under the spotlight in this case: from *primacy* to direct effect, from the doctrine of 'counter-limits' to the protection of fundamental rights and the standards thereof. It has also touched upon the sensitive topic of national identity and of who is to be its guardian, although this point has ultimately been left in the shadows.

1. In the most recent – and perhaps most significant – episode of the 'saga' (*M.A.S. and M.B.*, sometimes referred to as '*Taricco II*'),[1] the Grand Chamber has stepped back from the 'judicial adventurism' of the previous *Taricco* judgment.[2] In this way, the Court has prevented a conflict with the Italian Constitutional Court, which had neatly – and somehow kindly – drawn the boundaries of its 'constitutional tolerance'.

1. Case C-42/17, *M.A.S., M.B.*, 5 December 2017.
2. Case C-108/14, *Ivo Taricco and Others*, 8 September 2015.

The *esprit d'escalier* triggered by the request for a preliminary ruling from the Constitutional Court[3] is embodied in the possibility for the national judge not to comply with the obligation to disapply the national provisions on prescription. Laid down in the *Taricco* ruling, such an obligation was eventually denied in the *M.A.S.* judgment, especially when 'the obligation to disapply [. . .] conflicts with the principle that offences and penalties must be defined by law', 'even if compliance with the obligation allowed a national situation incompatible with EU law to be remedied' (para 61).

2. Compared with the *Taricco* judgment, the stance of the Grand Chamber is clear: The Court denies *in practice* an obligation that *in principle* is still regarded as necessary.

The political rationale underpinning *Taricco II* seems likewise clear: it seems that the Grand Chamber felt that it was at a confusing crossroads, or even in a 'one-shot game'. In particular, had the Court safeguarded the need to guarantee the effectiveness of EU law and '*primauté coûte que coûte*', it would have accepted the risk of jeopardizing, if not ruining, the remarkable achievements of EU harmonization in criminal matters.

Therefore, the Court opted for a strategic retreat to avoid a bitter conflict.

Not *mors tua vita mea*, rather *vita tua, vita mea*.

This 'first lesson' confirms the notoriously pragmatic approach of the Court of Justice.

From Melloni to Taricco II

The strong political pressure behind this retreat, however, has overshadowed several relevant legal issues. In that regard, *Taricco II* does not look like a *grand arrêt*.

The reasons for the 'turnaround' of the Court are not well explained, nor is the stance of the Grand Chamber easy to understand compared with its previous case law, especially *Melloni*. The latter case is not mentioned in the *M.A.S.* ruling, which does not even refer to Article 53 of the Charter. The Court only states – as a matter of principle – that

> the 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. (para 47)

1. Although not further clarified, distinguishing *Melloni* could be justified because *Melloni* concerned the European Arrest Warrant. As suggested by the Italian Constitutional Court, the balance to strike between the primacy of EU law and the (higher) national standards of protection of human rights may thus depend on whether EU harmonization instruments have been adopted in a given area of law.

In other words, the Court of Justice seems to imply that, in an area falling among the shared competences of the EU and the Member States, and in which the EU legislator has *not* intervened,

3. Italian Constitutional Court, decision No. 24/17, 26 January 2017.

each legal system has a wider margin of discretion in choosing the standard of protection of fundamental rights.

This seems confirmed by the fact that the Grand Chamber has limited the scope of its decision 'at the material time of the main proceedings' (para 44), that is, before the issue has been harmonized by the PIF directive (paras 44ff). The Court seems to be warning that once such harmonization has eventually taken place, the different and more stringent principles laid down in *Melloni* will be respected instead.

2. In any case, and despite the differences between the two cases, it is worth noting that the Court's previous *tranchante* position on the higher standards of protection afforded by national systems has not been endorsed in *Taricco II*, just as it was not in *Aranyosi e Căldăraru*.

This may be due to the outcry of different European Constitutional Courts in the aftermath of *Melloni*. It remains to be seen whether the Court of Justice will confirm such a trend, namely, to side with the higher standards of protection of human rights, even to the detriment of the primacy of EU law when necessary.

In my view, however, the 'second lesson' to be learned from *Taricco* is that the Court of Justice more jealously safeguards the (efficiency of) judicial cooperation in criminal matters. This seems to be considered the driving force of integration in the field of criminal law, with the consequence that any resistance to it is likely not to be tolerated.

After all, the recent approval (12 October 2017) of the regulation on the establishment of the European Public Prosecutor's Office confirms the primary role that judicial cooperation plays – and is expected to play – in deepening European integration.

In these sectors, therefore, even more attention will be paid to fundamental guarantees.

The protean category of 'direct effects'

The 'third lesson' concerns the doctrine of 'direct effect'. The two *Taricco* judgments, and especially the ruling of the Grand Chamber, confirm not only that 'direct effects' are more and more 'what the Court says they are', but also and above all that such a notion is variable, ambiguous and obscure.

1. That Article 325 TFEU has direct effect, despite the negative consequences for the defendants, was one of the most innovative conclusions of the *Taricco* judgment. It was also one of the most criticized. The Court's stance betrayed the very same theory of direct effect, which was originally developed so that individuals did not pay for the consequences of Member States' infringements of EU law. In *Taricco*, on the contrary, the infringement attributable to the Italian State brings about an aggravation of the position of individuals, whose fundamental rights are therefore pushed into the background.
2. On this issue, the Constitutional Court had decided – at least formally – not to encroach upon the remit of the Court of Justice, refraining from triggering complex dogmatic disputes.

Once more, however, the Grand Chamber seems to have essentially confirmed its previous conclusions in *Taricco* without any further explanation, except for the new fundamental caveat that in some circumstances, the direct effect of Article 325 TFEU may be neutralized.

The Court restates that it is for national courts to give full effect to Article 325 TFEU (para 39). A closer look, however, reveals that the consequences of the direct effect of Article 325 TFEU fade in the concrete case under the scrutiny of the Court, since they conflict with fundamental rights. These 'direct effects' recall the 'imaginary numbers' of Musil's Young Törless: they are very useful for a complex scientific demonstration, from which they then disappear.

On the one hand, indeed, they cannot trigger the national judge's power/obligation of disapplication, although this would be the normal outcome in cases of national legislation conflicting with EU law. Thus, the Grand Chamber overrides its previous stance in *Taricco* and recognizes the respect of the principle of legality as an insurmountable limit (see para 61).

On the other hand, and above all, the *M.A.S.* judgment states 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 the light of the considerations set out by the Court in paragraph 58 of the *Taricco* judgment. (para 41)

And this conclusion seems to run counter to the direct effect of Article 325 TFEU as well.

In sum, the Court of Justice itself seems to recognize the fundamental role to be played by the legislator. It also implicitly acknowledges the impossibility of 'tangoing' only with the national judge through the binomial 'direct effect/disapplication', invoking – at least as a warning – the different scenario of the infringement procedure.[4]

More generally, it seems that 'direct effects' are a 'variable geometry' category which expands or shrinks in the different fields (civil, administrative or criminal law). It also seems that this category is affected by the level of conflict with fundamental rights, in essence disappearing in areas that are strongly 'rights sensitive' as criminal law.

The substantive or procedural nature of the limitation period

According to some authors, a 'fourth lesson' may be learned from the Court's reference to the limitation rules, whose *substantive* – and not *procedural* – nature would now seem endangered.

1. In that regard, the Grand Chamber states that, 'at that time',

> the Italian Republic was [. . .] 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. (para 45)

4. It is not a case that the necessary intervention of the legislator is recalled in the *M.A.S.* judgment also when the Court of Justice recognizes that the national judge is not obliged to comply with the obligation to disapply national legislation (para 61). It is as if the Court reminds us that the obligation stemming from the treaty is addressed to the Italian State, and therefore to its legislator, even when the courts do not comply with it. After all, this had already been envisaged in the literature as the most appropriate solution to remedy the (alleged) infringement of the Italian State in the case at stake. Likewise, the Constitutional Court had argued that the legislator should assess the compatibility of national rules on the limitation periods with EU law.

Therefore, this might imply that, after the harmonization brought about by the PIF directive, it will be for the Court – and not for the Italian Republic – to define the nature of the limitation period. As a consequence, and as anticipated in *Taricco*, the limitation period would be regarded as forming part of criminal procedural law, which is regulated by less favourable principles than substantive criminal law.

It is known that the ruling of the High Courts is often similar to the Delphic oracle: 'it does not affirm, it does not deny, it hints'.

Nevertheless, it seems rather unlikely that the cryptic words of the Court of Justice may lead to an overruling of the well-established case law of the Italian Constitutional Court, which has firmly repeated – also in the request for a preliminary ruling – that the rules on limitation in criminal matters are substantive in character (see para 58 of *Taricco II*).

2. The potential change of regime of the limitation rules – from substantive to procedural criminal law – would realistically mark the relationship between the Court of Justice and the domestic courts. In any case, it would not rest upon solid ground.

In fact, the PIF directive (Article 12) harmonizes in a limited way the limitation period regime, and only for the crimes included in the directive itself. It is frankly difficult to understand how such a 'minimum regulation' may lend support to the conclusion that the limitation period forms part of substantive or procedural criminal law. Only a comprehensive analysis of the rules of the 'general part' of criminal law of each legal system would allow for such an assessment.

Even more, the Court of Justice seems to overlook the fact that the nature of the limitation period not only affects its regime but also concerns fundamental guarantees and their scope.

As a consequence, despite the 'minimum harmonization' achieved by the PIF directive, the scenario does not change. The divide between the Constitutional Court and the Court of Justice concerns precisely the interpretation of the principle of legality and the extension of the guarantees it entails to the limitation rules, in accordance with the constitutional traditions of each Member State (decision No. 24/17).

National identity, common constitutional traditions and fundamental rights

Fifth lesson. Article 4(2) TEU, which requires the EU to respect national identities, has not been mentioned by the Court of Justice, perhaps because its exact scope and meaning are not yet clear. One could also argue that it is impossible for the Court of Justice to regard criminal law as an 'area' falling *tout court* within the exception provided for by Article 4(2) TEU.

Yet, in the *Taricco* case, the role that the Court assigned to the criminal judge seemed to run counter to the Italian principle of legality, or at least to some fundamental features of this principle that define the Italian national identity.[5] In particular, in a civil law system such as the Italian one, the judge can never create an 'offence' in lieu of the legislator.

The choice of the Court not to invoke the so-called 'Christophersen clause' and to conceive it as an option of last resort may risk undermining the potential of this provision, which can turn out to

5. See Articles 25(2) and 101(2) of the Italian Constitution.

be a useful tool for a sustainable development of European integration that carefully balances pluralism and constitutional tolerance.

For sure, the gap left by Article 4(2) TEU has been filled by giving the national judge the last word on (the protection of) fundamental rights, in accordance with the definition endorsed by the national constitutional tribunal.

It is for the Court of Justice to continue to define the 'common constitutional traditions', in keeping with the European Court of Human Rights. It is instead for the national constitutional tribunals – and for any national judge – to enhance the 'cross-fertilization' of rights and liberties and to be the guardians of it, subject to the necessary checks in each case.

Conclusions

The last lesson is a lesson of wisdom coming from the judges of Kirchberg.

They reminded us that the path of European integration, and of 'European criminal law', is long and winding, replete with pauses and recoveries, and with numerous stops and starts.

They have taught us that consistency is not always proof of virtue and that sometimes it is necessary to take a step back, and perhaps to contradict ourselves.

In essence, they have reminded us that 'it is better to limp along the right path than to walk strongly in the wrong direction', and that sometimes a strategic retreat – or even a defeat without fatal wounds – is much better than a bloody victory.