

The Italian Constitutional Court on *Taricco*: Unleashing the normative potential of ‘national identity’?

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1. Introduction

Much ink has been spilt over this case. The facts are probably well known, at least in general terms. In 2015, two incidental referrals of constitutional questions were lodged with the Italian Constitutional Court (ICC). The referring courts, ie the Milan Court of Appeal and the Court of Cassation had some doubt as to the compatibility of the ECJ’s interpretation of Article 325 Treaty on the Functioning of the European Union (TFEU) as set forth in the *Taricco* judgment,¹ with a number of core principles of Italian constitutional law, namely the principles of legality in matters of criminal law, with specific regard to the legislation on limitation periods of criminal offences. Article 325 TFEU – it is worth highlighting – relates to anti-fraud measures seeking to protect the financial interests of the EU.

In the run-up to the decision by the ICC, a heated debate took place among scholars and pundits. Some urged the Italian Constitutional Court to apply the counter-limits doctrine (*controlimiti*). Others argued in favour of requesting a preliminary ruling by the ECJ. Eventually, the Italian Constitutional Court chose the approach of open dialogue and reached out to its ‘counterpart’ in Luxembourg, with a view to obtaining some clarification as to the meaning and scope of the ECJ’s judgment in *Taricco*. To this effect, the ICC adopted referral order no 24/2017.²

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¹ Case C-105/14 *Criminal Proceedings against Ivo Taricco and Others* (ECJ, 8 September 2015).

² Order no 24 of 2017, English translation available at the ICC website <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf>.



This entry intends to give a reading of this referral order from a European law perspective. In particular, it focuses on the concept of ‘national identity’ as used by the ICC in its referral order. Indeed, some reflections on the relevance of this concept for the relationships between European and national polities would seem to be of the utmost importance, especially given the recent nationalistic (if not chauvinistic) reading of ‘national identity’ in the case-law of the Hungarian constitutional court.

2. *Referral order of the ICC: an overall assessment*

Interestingly enough, in its reference for a preliminary ruling, the ICC framed the whole controversy under Article 4(2) TEU, ie the national identity clause (‘[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities’). As evidence of this, one might note that, throughout the referral order, the term ‘national/constitutional identity’ appears at least four times, whereas there is no trace of the term ‘counter-limits’. In addition, the ICC’s referral order is devoid of any phrase or rhetoric concerning Member States’ sovereignty. Unlike the German Federal Constitutional Court in the case of *Gauweiler*, no reference is made to the ‘Masters of the Treaties’ (*Herren der Verträge*) or to similar, even loosely-related notions. This clearly indicates that the ICC is willing to set the dialogue with the ECJ within a conceptual context that might be suitable for both courts.

To my eyes, choosing the concept of ‘national identity’ is not only politically appropriate, but also legally sound. In fact, the ICC has always construed the principle of legality in criminal matters so as to encompass not only the norms defining crimes and penalties, but also the rules on limitation of offences.³ One might indeed say that this is a distinguishing – read: identity-making – feature of the Italian constitutional order.

I believe the ICC’s referral order to be constructive for two reasons. From a political perspective, it reveals the ICC’s non-confrontational, open attitude *vis-à-vis* the ECJ. From a doctrinal and judicial perspective, it contains some interesting remarks on how the relationships between constitutional courts and ECJ might be devised. I will come back to this point shortly.

³ See, eg, Judgment no 393 of 2006, available at <www.cortecostituzionale.it>.



Let me also introduce a caveat: I do not think this case will bring about a paradigm shift. It is indeed extremely unlikely that, in the near future, the ECJ will develop a one size-fits-all approach as regards the application of the national identity clause. Instead, one would expect the ECJ to follow what AG Cruz Villalón called – paraphrasing Cass Sunstein – the ‘one case at a time’ approach (see AG’s opinion in *Gauweiler*).⁴ Yet, I do feel that this case has the potential to significantly contribute to the political and scholarly discourse on how to structure the coexistence of different legal orders within the European legal space, if only because it will add to the scant case-law material currently available to legal scholarship for framing and systematizing this emerging field.

3. ‘National identity’: a concept (still) ‘in search of an author’

The concept of national identity entered the European legal discourse with the Maastricht Treaty in 1993. Article F stated: ‘The Union shall respect the national identities of its Member States’. The concept received a more detailed definition with the Lisbon Treaty in 2009. According to Article 4(2) TEU, ‘[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’ (emphases added). Hence, ‘national identity’ is to be so interpreted as including a *structural* and a *functional* dimension.

Despite the concept being present in the relevant Treaties since 1993 and having been subject of many academic studies, it has not yet found relevant use by the European judiciary. As a matter of fact, the references to ‘national identity’ in the ECJ’s case-law are extremely rare and not particularly fruitful. The concept entered into the European jurisprudential realm in a case decided by the Court of Justice in 1996 (*Commission v*

⁴ Case C-62/14 *Gauweiler and Others v Deutscher Bundestag*, Opinion of AG Cruz Villalón.

Luxembourg)⁵ and, to date, can be traced to no more than ten cases in total (the last one being *Remondis*).⁶ In addition, an analysis of the case-law relating to Article 4(2) TEU hints that, whenever referring courts make reference to ‘national identity’ in their preliminary questions, the ECJ has carried out a conceptual twist, namely by substituting this latter concept with the more traditional and perhaps less controversial public policy doctrine (see, more recently, *Bogendorff von Wolffersdorff*)⁷. In short, one gets the impression that the ECJ has not been particularly keen on framing conflicts between EU law and national constitutional orders under the aegis of Article 4(2) TEU.

Somewhat different is the more recent approach of national constitutional courts. Indeed, they have shown greater interest in the concept and in its (possibly manifold) applications. One might consider the latest jurisprudence of the German,⁸ Hungarian⁹ and Belgian¹⁰ constitutional courts. Article 4(2) TEU is a very powerful legal device, but its normative potential and limits have not been fully explored yet.

4. *The core argument in the ICC’s referral order and its essentially cooperative nature*

The case at hand puts both the ICC and the ECJ in good stead to contribute to the pan-European discussion on the essence of the national-identity clause. As ‘national identity’ is not an autonomous concept of EU law (maintaining otherwise would be illogical), defining its content and scope is likely to be an incremental process, requiring a good deal of cooperation, back-and-forth exchanges and an attitude of compromise by all parties involved. Most likely, it is also going to be an exercise in reductionism, in the sense that, in order for the meaning of Article 4(2)

⁵ Case C-473/93 *Commission of the European Communities v Grand Duchy of Luxembourg* [1996] ECR I-03207.

⁶ Case C-51/15 *Remondis GmbH & Co KG Region Nord v Region Hannover* (ECJ, 21 December 2016).

⁷ Case C-438/14 *Nabiel Peter Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe* (ECJ, 2 June 2016).

⁸ Order no 2735 of 2014, DE:BVerfG:2015:rs20151215.2bvr273514.

⁹ Decision no 22 of 2016.

¹⁰ Judgment no 62 of 2016.



TEU to be defined and agreed upon, it will probably be necessary to resort to a lowest-common-denominator approach.

Be that as it may, in its referral order, the ICC clearly proves itself eager to find common ground. In fact, instead of confining itself to criticizing the ECJ's case-law and to threatening the application of counter-limits, the ICC provided the European Court of Justice with a possible get out from the current situation. Let's have a look at it.

In para 8 of its order of reference, the ICC states that the ECJ's judgment in *Taricco* 'does not consider the compatibility of [Article 325 TFEU] with the supreme principles of the Italian constitutional order, but appears to have expressly delegated this task to the competent national bodies. In fact, para 53 of the [ECJ's] judgment asserts that 'if the national court decides to disapply the national provisions [conflicting with Article 325 TFEU], it must also ensure that the fundamental rights of the persons concerned are respected'. Para 55 goes on to add that the disapplication is to be ordered 'subject to verification by the national court of respect for the rights of the accused'. The ICC also states that '[its] conviction (...), confirmation of which is sought from the Court of Justice, is that the intention in making these assertions was to state that the rule inferred from Article 325 TFEU is only applicable if it is compatible with the constitutional identity of the Member State, and that it falls to the competent authorities of that State to carry out such an assessment' (para 7 of the order of reference).

In order to substantiate its appraisal, the ICC added that '[t]he bar on the direct application by the national courts of the rule laid down by the Court [in the *Taricco* judgment] does not result from an alternative interpretation of EU law, but exclusively from the fact, which in itself falls outside the substantive scope of EU law, that the Italian legal system classifies the legislation on the limitation of offences as provisions of substantive criminal law and subjects them to the principle of legality [in criminal matters] as laid down by Article 25(2) of the Constitution. This is a separate consideration from the meaning of Article 325 TFEU, which does not depend upon European law but exclusively upon national law' (para 8 of the order of reference).

The ICC is claiming that, in the case at hand, the primacy of EU law is not under threat. In fact, here there is no *head-on collision* between EU law and a supreme constitutional principle of a Member State. Rather, there is a *constitutional impediment*, which, on a case-by-case basis, might

require national judges to disregard EU law for the sake of better protecting the rights of prosecuted persons. According to the ICC, a head-on collision arises when a supreme constitutional principle of a Member State *directly* affects the scope and content of an EU policy field (this was the case in *Melloni*).¹¹ Differently, a constitutional impediment arises when a supreme constitutional principle which governs a Member States' policy field (in this case, the principle of non-retroactivity of criminal offences) might *occasionally* have some bearing on the application of EU law (in this case, the norms concerning the protection of the financial interests of the EU). According to the ICC, constitutional impediments should not be considered as a threat to the unity and uniformity of the EU legal order, but only as a minor, case-specific hindrance of EU law normativity. This should thus prompt the ECJ to allow the Italian supreme constitutional principles to take full effect.

Although this argument needs some fine-tuning, it has some legal commonsense. Hence, it provides a good starting point for a compromise solution. The ECJ might take this part of the ICC's referral order and re-elaborate it, re-shape it, insert it into a partly revisited argumentative structure, and enrich it with new legal arguments and concepts (this is what Roman poets called *limae labor*). After that, it will again be the turn of the ICC, which, in interpreting and applying the ECJ's ruling to the questions pending before it, will enjoy some leeway of its own. This is what actually happened in the *OMT* case between the German Federal Constitutional Court and the ECJ.

I believe that judicial dialogue could be better understood by resorting to what social psychologists and game theorists call tit-for-tat strategy, ie a conflict resolution technique, the effectiveness of which depends on the behaviour demonstrated by the parties involved. If the tit-for-tat strategy begins with cooperation, then cooperation therefore ensues. If a party is open to making concessions, then the other party is likely to follow suit. By so doing, parties can reach an agreed solution. As regards the case at hand, due to the cooperative attitude shown by the ICC, one might reasonably expect the ECJ to be cooperative as well. Therefore, the referral order of the Italian Constitutional Court, as a cooperation-inducing tool, should be hailed with delight.

¹¹ Case C-399/11, *Stefano Melloni v Ministero Fiscal* (ECJ, 26 February 2013).



5. *Depriving Article 325 TFEU of direct effect: a viable option?*

In order to smooth out the difference with the ICC, the ECJ might reconsider its position in *Taricco*, notably by depriving Article 325 TFEU of direct effect. As a matter of fact, if the ECJ did so, the collision with the legality principle as enshrined in the Italian Constitution would immediately cease. However, this option might be difficult to pursue, because it entails a complete turnaround of the *Taricco* judgment and, in broader terms, a deviation from the ECJ's case law on direct effect. Indeed, in the eyes of the ECJ, EU law enjoys a 'presumption of direct effect'.¹² This holds true insofar as there are no convincing grounds for concluding the contrary. Under these circumstances, the ECJ might believe that following such a suggestion is too compromising an option for its authority. Or, to put it bluntly, it might consider such a course of action as a sort of self-overruling.

In light of this, I feel that Article 4(2) TEU represents a more acceptable (and, therefore, more effective) conflict-resolution option. As I have tried to explain above, the concept of 'national identity' as set out in the European Treaties, together with the preliminary ruling procedure, are inherently relational, in the sense that they bring judicial actors from different legal orders together, with a view to making them co-define the limits and conditions of the mutual relationships between EU and national constitutional law. This makes constitutional courts feel that they are taking part in a joint enterprise. No one really loses, no one really wins. Both yield and, at the same time, both gain something. And this, furthermore, facilitates the attainment of common solutions.

6. *Some concluding observations*

Let me add some short remarks as regards the ICC's understanding of the legality principle, which would be such as to encompass the rules on limitation periods. Indeed, some commentators maintain that, in endorsing this understanding, the ICC would have 'accidentally' deprived

¹² In this respect, see C Wohlfahrt, *Die Vermutung unmittelbarer Wirkung des Unionsrechts. Ein Plädoyer für die Aufgabe der Kriterien hinreichender Genauigkeit und Unbedingtheit* (Springer 2016).



future constitutional legislators of the possibility of embracing a procedural conception of limitation. This would be so, because, according to long-standing case-law of the ICC, supreme constitutional principles, such as the principle of legality, cannot be changed or modified in their essence, not even by amending the Constitution.

In this respect, I would like to underscore that:

- i) The principle of legality is considered, both in Italy and in the other EU Member States, as an inalienable right. This makes it, for Italian constitutional law, a supreme principle.
- ii) The ICC has affirmed for some time that limitation periods fall within the scope of the legality principle. Arguably, this is the first time where the ICC expressly says that the principle of legality, *as covering the rules on limitation*, belongs to the unalterable ‘hard core’ of the Constitution. To all intents and purposes, though, that was already the case before the ICC launched this preliminary reference procedure. Therefore, as for the constitutional case-law on this matter, order no 24/2017 has brought about no real relevant changes.

In addition, the ICC could not have acted differently without seriously undermining its legitimacy. Could one really expect the ICC to abruptly change its established case-law on limitation periods only for the sake of avoiding an open conflict with the ECJ? Under these circumstances, the Italian Constitutional Court made the best decision possible or, to put it differently, the least harmful one. In its referral order, it struck a fair balance between cooperation and firmness, acting as the responsible ‘watchdog’ of the Italian constitutional identity and as an influential institution in the European polity.

Some legal scholars criticize the concepts of ‘judicial dialogue’ and ‘national identity’ for being too fuzzy and, therefore, not particularly useful in describing, structuring and steering the relationships between sovereign judicial institutions in the European legal space. I believe that this critique depends on the fact that these concepts, more than any others, call for a change of mindset. Indeed, they challenge the long-established processes of legal concept formation, by requiring the integration of, and familiarity with, different knowledge areas (law, political sciences, sociology, economy etc). In other words, they lead lawyers into uncharted territory. However, one cannot overlook the fact that ‘judicial dialogue’ and ‘national identity’ are at the heart of the current discourses on the future



of Europe and on our ‘staying together’. These concepts have strong ties with the increasingly relevant discussion on the ultimate object of the European integration process as encapsulated in the formula ‘ever closer union among the peoples of Europe’. Their perceived fuzziness is a sign of their yet-to-be-untapped normative potential. Against this backdrop, referral order no 24/2017 lays one more tile in the right direction.

