

Italian VAT fraud case sparks debate and divided opinion (MAS and MB (Taricco II))

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Corporate Crime analysis: Discussing the Court of Justice's judgment in MAS and MB (Taricco II), Kathryn Hughes, barrister at QEB Hollis Whiteman Chambers, says that by failing to address significant issues, the court has merely fuelled the ongoing debate about the primacy of EU law vis à vis fundamental rights enshrined in the national constitution.

Original news

On 5 December 2017, the Court of Justice of the European Union handed down its judgment in *MAS and MB (Taricco II)* Case [C-42/17](#), [\[2017\] All ER \(D\) 29 \(Dec\)](#).

What is the background to this case?

Taricco II involved a reference from the Italian Constitutional Court (ICC) to the Court of Justice regarding the obligation to disapply national criminal law that does not comply with primary EU law in circumstances where to do so would breach fundamental constitutional principles.

The questions referred to the Court of Justice arose in the context of a case in which two individuals had been charged with a form of VAT fraud. VAT fraud is inherently complex and often takes a considerable amount of time to investigate. The relatively short limitation periods prescribed by Italian law for these offences therefore meant that, in this and a significant number of other cases, the individuals involved would escape prosecution.

In an earlier judgment, *Taricco I* Case [C-105/14](#), the Court of Justice held that national courts had to disapply short limitation rules if they prevented the effective prosecution of such frauds that affect the financial interest of the Union. According to the Court of Justice, disapplying the rules on limitation would not breach Article 49 of the EU Charter of Fundamental Rights which guarantees that 'no one shall 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'. There was no conflict because Article 49 of the Charter covers only substantive criminal law (ie the definition of criminal offences and the applicable penalties) whereas limitation periods are procedural in nature.

The ICC disagreed and held that under national law limitation periods fell within the substantive criminal law protected by the principle of legality (ie that offences and penalties must be defined by law). The ICC decided to refer back for the Court of Justice to reconsider its position before it applied the so-called 'counter limits' doctrine whereby the ICC would order Italian national courts to uphold Italian constitutional law and apply the statutory limitation periods regardless of the Court of Justice's judgment.

What were the key issues before the court and what did the court decide?

Pursuant to [Article 325](#) of the Treaty on the Functioning of the European Union (TFEU), 'Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union' through deterrent measures. In *Taricco II*, the Court of Justice essentially had to decide whether Article 325 of TFEU required the national court to disapply incompatible limitation periods even where that would entail a breach of the principle of legality.

Put simply, the court concluded that Article 325 of TFEU must be interpreted as requiring the national court to disapply incompatible rules on limitation in cases of VAT fraud (if they form part of substantive law) unless that would entail a breach of the principle of legality.

To what extent does the judgment clarify the law in this area? Are there any unresolved issues remaining?

This decision has sparked much debate, with commentators already divided in their conclusions. On the one hand, it can be said that the court has reached a sensible conclusion to allay the very real concern that its previous ruling would be declared unconstitutional by the ICC.

At the same time, however, the judgment is fairly weak in its reasoning and leaves many issues unresolved. For example, notwithstanding the principle of legal certainty, the exact parameters of Article 325 of TFEU remain very loosely defined, and a great deal of responsibility is placed on national courts to ensure compliance with that provision. In addition, the court did not engage with the argument that the national law afforded a higher standard of fundamental rights protection than EU law. In this context, Article 53 of the Charter was a focus of both the ICC referral and Advocate

General Bot's Opinion. However, this provision does not feature in the court's judgment. By failing to address significant issues, the Court of Justice has merely fuelled the ongoing debate about the primacy of EU law vis à vis fundamental rights enshrined in the national constitution.

Clarification of these issues may come for both commentators and practitioners in the court's ruling in *Scialdone* Case [C-574/15](#), which is a case involving the introduction of more lenient criminal provisions for VAT fraud. In that case, Advocate General Bobek had already concluded that the principle of legal certainty applies to both procedural and substantive legal norms.

What are the practical and/or wider implications of this judgment?

Taricco II must be read in the broader context of the ongoing dialogue between the EU and national constitutional courts.

Following the ruling in *Taricco I*, the ICC was faced with a critical conundrum—declare the ruling unconstitutional or refer back to the Court of Justice for it to revise its position. It opted to give the Court of Justice a chance to rethink its earlier position.

The court's ruling was preceded by the Opinion of Advocate General Bot. He took a strict approach to the supremacy of EU law. In his view, compliance with EU law could not be doubted or challenged. By contrast, the Court of Justice adopted a more co-operative position. It identified that protecting the financial interests of the EU is a shared competence between the EU and its Member States. It allowed for non-compliance with the treaty provision if to comply would breach the principle of legality which is a 'common constitutional tradition' among the Member States.

In the current climate, the EU institutions are coming under increasing pressure and there is a great deal of suspicion levied at them. Though one could argue that the court is far too simplistic in its reasoning, on a broader, political view the tone of the judgment and the court's collaborative approach is to be welcomed.

What are the takeaway points for practitioners in England and Wales, particularly in light of Brexit?

Following *Taricco II*, UK practitioners can take some comfort from the Court of Justice's deference to fundamental rights. This is particularly important in the UK, where there is a high standard of fundamental rights protection. However, with the picture left far from complete this is likely to be an area of much debate, litigation and controversy.

With Brexit looming, the future influence of Court of Justice jurisprudence in the UK is uncertain. The latest 'deal' negotiated in Brussels requires UK courts to pay 'due regard' to the decisions of the Court of Justice but they will not be bound by them. What is left is debate at the EU level on the relationship with fundamental rights and uncertainty at the national level on what future there is for EU law in the UK.

Kathryn Hughes is experienced in business criminal matters with a focus on financial crime and bribery and corruption. She has worked on high-profile SFO investigations, acting for the SFO and private companies, and has expertise in Deferred Prosecution Agreements and Legal Professional Privilege. She has an LLM in European law.

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