

RESEARCH ARTICLE

The Elusive Contours of Constitutional Identity: *Taricco* as a Missed Opportunity

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The primacy of EU law continues to be challenged by domestic courts relying on the notion of constitutional identity. These challenges are no longer limited to the *Solange* case law of the German *Bundesverfassungsgericht* (BVerfG) and the *controlimiti* doctrine of the Italian *Corte Costituzionale*. More recently, the Hungarian Constitutional Court introduced the notion of 'historical constitutional identity' – at a time when the rule of law and independence of the judiciary are in retreat in several parts of the EU. Against this backdrop, this article argues that the Court of Justice of the EU (CJEU) missed a formidable opportunity to clarify the outer limits of constitutional identity under Article 4(2) of the Treaty on European Union in *Taricco II*. Given prudential considerations as well as parallel legislative developments, it can be explained why the CJEU chose to side-step the issue. However, in the *Corte Costituzionale*, the CJEU found a cooperative and EU law-friendly interlocutor which would have allowed it to clarify these limits on its own terms. The CJEU cannot and should not hide from this issue forever. The next domestic court to raise this issue may be less interested in judicial dialogue and more in undermining the primacy of EU law in ever more extensive ways.

Keywords: Primacy of EU Law; Constitutional Identity of the Member States; Court of Justice of the European Union; Italian Constitutional Court; Fundamental Rights; Judicial Dialogue; Rule of Law

I. Introduction

In a time when identity politics loom large,¹ and at a time when parts of Europe are experiencing 'rule of law backsliding',² a fundamental legal question in need of clarification is that of constitutional identity. In essence, it should enshrine some fundamental tenets of national identity and hallmarks of a country's legal order. It is about questions such as: Who are we as a political community? What are the essential characteristics of our legal system? In the multilevel legal system of the European Union (EU), it is supposed to be a realm protected and respected according to Article 4(2) of the Treaty on European Union (TEU) – a norm that should take centre-stage in this debate, but which has not been elaborated on by the Court of Justice of the European Union (CJEU) to date.

Article 4(2) TEU stipulates that the Union shall respect the 'national identities, inherent in their fundamental structures, political and constitutional' of the Member States. The CJEU's jurisdiction over this clause was excluded with regard to Article 6(3) of the TEU (Maastricht version), the forerunner of what is now Article 4(2) TEU.³ This limitation was revoked in the Lisbon reform. The debate continues as to what the obligation enshrined in Article 4(2) TEU precisely entails,⁴ and arguably it is time for the CJEU to finally chime in.

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¹ Tanja Börzel and Thomas Risse, 'From the euro to the Schengen crises: European integration theories, politicization, and identity politics' (2018) 25 JEP 83; and Paul Taggart, 'Populism in Western Europe' in Cristóbal Rovira Kaltwasser et al. (eds), *The Oxford Handbook of Populism* (OUP 2017) 248–63.

² Lauren Pech and Kim Lane Schepppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 17 CYELS 3.

³ TEU (pre-Lisbon), art 46; Elke Cloots, *National Identity in EU Law* (OUP 2015) 65.

⁴ Gerhard van der Schyff, 'Exploring Member State and European Union constitutional identity' (2016) 22 EPL 227, 228; see further Michael Rosenfeld, 'Constitutional identity' in Michael Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 756.

Article 4(2) TEU is at the heart of the absolute-relative primacy clash between the CJEU and the Member States and forms a building block of the composite constitutional structure of the EU.⁵ As noted by many prominent scholars, while the CJEU is competent to rule on the scope of Article 4(2) TEU, yet it cannot autonomously decide its content.⁶ Instead, it is the national constitutional courts of a number of Member States which have been engaged in determining the content of their respective constitutional identities, while at the same time underlining their relative interpretation of primacy.⁷

The recent wave of case law that can be described as the '*Taricco saga*' was concluded with the judgment of the CJEU of December 2017 in *MAS & MB* (hereinafter referred to as *Taricco II*).⁸ It would have been a welcome opportunity to clarify the hard outer limits of this fundamental concept of constitutional identity as enshrined in Article 4(2) TEU. However, this was not the case, as the CJEU managed to argue its way out through smart legal tactics and timing. We argue in this article that *Taricco* represents a missed opportunity for two main reasons. First, as a pull-factor, the Italian *Corte Costituzionale* (Constitutional Court) stretched out a helping hand and invited the CJEU to elaborate on the concept of constitutional identity in an EU-law friendly environment. Second, as a push-factor, it should be stressed that the CJEU cannot hide from this question forever. More preliminary references will be forthcoming, possibly from less accommodating – and increasingly less politically independent – courts. Or even worse, they will not, and national highest courts will start to carve out ever-larger areas of 'constitutional identity' by themselves and thus undermine the primacy of EU law.

In order to elaborate on this argument, the article proceeds in three main parts. First, the theoretical discourse on primacy and constitutional identity is briefly outlined to highlight the importance of *Taricco* in the context of the current rule of law crisis. Second, the *Taricco saga*, including its origin and evolution over time, is summarised. Third, in the main substantive part, the *Taricco II* judgment of the CJEU is analysed in detail, in which we point out the legal tactics used to avoid open conflict, offer explanations why the Court did so, and argue why it would have been a welcome opportunity to seize for clarifying the outer limits of constitutional identity.

II. The debate on primacy and constitutional identity

This part outlines the wider context of the *Taricco saga* and how it should be appraised. It summarises the debate about primacy and constitutional identity in European constitutional law. Different narratives on EU constitutionalism have emerged in the course of time,⁹ including 'constitutional pluralism' and 'multilevel constitutionalism'. In essence, these theories share the assumption of the existence of multiple, independent, and incommensurable claims of constitutional autonomy in a non-hierarchical system of norms.¹⁰ To support this, examples are used to show mutual legal permeability, such as domestic EU law 'integration clauses' and Article 4(2) TEU.¹¹ National constitutional and supreme courts as well as other Member State institutions play a crucial part in both cooperating with and in counterbalancing the CJEU.¹² To date, the constitutional relationship between the EU and its Member States remains unsettled. There are essentially two main opposing positions; on the one hand, absolute primacy as defended by the CJEU

⁵ Armin von Bogdandy and Stephan Schill, 'Overcoming absolute primacy: respect for national identity under the Lisbon Treaty' (2011) 48 CMLR 1417, 1418–20; see also Martin Belov, 'The functions of constitutional identity performed in the context of constitutionalization of the EU order and the Europeanization of the legal orders of EU Member States' (2017) 9 *Perspectives on Federalism* 72, 90.

⁶ See von Bogdandy and Schill (n 5) 1448; Leonard Besselink, 'National and constitutional identity before and after Lisbon' (2010) 6 *Utrecht Law Review* 36, 44–45; and Hermann-Josef Blanke and Stelio Mangiameli, 'Article 4 [The relations between the EU and the Member States]' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union: A Commentary* (Springer 2013) 212–14.

⁷ According to Blanke and Mangiameli (n 6) 214–15 and Monica Claes, 'The validity and primacy of EU law and the "cooperative relationship" between national constitutional courts and the Court of Justice of the European Union' (2016) 23 MJECL 151, 157–58, the German, Italian, French, Hungarian, Polish, Czech Republican, and Spanish constitutional courts have explicitly done so, also the constitutional courts of Lithuania, Slovakia, Greece, and Portugal interpret primacy relatively due to their unamendable constitutional principles or due to their constitutions claiming primacy over EU law.

⁸ Case C-42/17 *Criminal proceedings against M.A.S. and M.B. (Taricco II)*, ECLI:EU:C:2017:936.

⁹ See Matej Avbelj, 'Questioning EU constitutionalisms' (2008) 9 *German Law Journal* 1, 8–9.

¹⁰ Neil Walker, 'The idea of constitutional pluralism' (2002) 65 *Modern Law Review* 317, 337; Franz Mayer and Mattias Wendel, 'Multilevel constitutionalism and constitutional pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional pluralism in the European Union and beyond* (Hart Publishing 2012) 135–39.

¹¹ Such as Costituzione della Repubblica Italiana [Constitution of the Republic of Italy], art 11; see also Mayer and Wendel (n 11) 138–9.

¹² See Darinka Piqani, 'Arguments for a Holistic Approach in European Constitutionalism: What Role for National Institutions in Avoiding Constitutional Conflicts between National Constitutions and EU law' (2012) 8 *EuConst* 493.

and, on the other, relative primacy as contended by certain Member State constitutional courts, which rely on the duty that EU respect constitutional identity to bolster their arguments. The CJEU, however, has thus far resisted to engage with national courts, even when prompted explicitly to do so.

Absolute primacy of EU law

In 1964, the CJEU famously created the constitutional doctrine of primacy of EU law – a principle which was never explicitly codified in the EU Treaties.^{13,14} Over the years, the Court clarified the reach of this doctrine. In *Internationale Handelsgesellschaft*, the CJEU ruled that even national constitutional law cannot undermine the effectiveness of EU law.¹⁵ This view of absolute primacy of EU law is echoed through the CJEU's case law ever since.¹⁶

The only two possible exceptions, i.e., where a relative interpretation of the primacy of EU law is used,¹⁷ could be seen in *Omega* and *Sayn Wittgenstein*. In these, the CJEU seemed to depart from the strict, unconditional hierarchy it maintained in its case law discussed above, and which was taken up again later.¹⁸ In *Omega*, the German Federal Administrative Court (*Bundesverwaltungsgericht*) asked the CJEU whether it could prohibit a laser gaming facility from providing services deemed to infringe the principle of human dignity as enshrined in the German constitution,¹⁹ even if it were to restrict the free movement of goods and services in EU law.²⁰ The Court found this prohibition to be justified based on public policy exceptions provided for in the EU Treaties.²¹ In *Sayn Wittgenstein*, the question arose whether a law abolishing nobility as an expression of the constitutional principle of equality in Austria posed a legitimate restriction to the free movement of persons in EU law.²² The CJEU explicitly relied on Article 4(2) TEU in justifying the derogation based on public policy grounds.²³ In both cases the Court allowed for limitations to the EU's fundamental freedoms, but not stemming (only) from domestic constitutional principles, but based on policy objectives it deemed legitimate in EU law.

In the more recent past, the CJEU restated its doctrine of absolute primacy. In 2013, the Court decided in *Melloni* that even constitutional law on higher standards of fundamental rights protection, pursuant to Article 53 of the Charter of Fundamental Rights (CFR), cannot undermine the effectiveness of EU law.²⁴ This case concerned the Spanish constitutional rights standards that were deemed higher than those afforded by the European Arrest Warrant (EAW).²⁵ The CJEU reaffirmed its absolute interpretation of primacy,²⁶ arguably to the detriment of human rights protection.²⁷ Moreover, de Boer pointed out that the judgment did not

¹³ Case C-6/64 *Costa v ENEL*, ECLI:EU:C:1964:66.

¹⁴ The doctrine of primacy is included in Declaration 17 concerning Primacy attached to the Lisbon Treaty [2008] OJ C115/344, which refers back to CJEU case law.

¹⁵ Case C-11/70 *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114, para 3; see also Monica Claes, 'The validity and primacy of EU law and the "cooperative relationship" between national constitutional courts and the Court of Justice of the European Union' (2016) 23 MJECL 151, 154.

¹⁶ See, e.g., Case C-119/05 *Lucchini*, ECLI:EU:C:2007:434, para 61; C-213/89 *Factortame*, ECLI:EU:C:1990:257, paras 17–18; Case C-409/06 *Winner Wetten*, ECLI:EU:C:2010:503, para 61; see further Michal Bobek, 'The effects of EU law in the national legal systems' in Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd edn, OUP 2017) 161; and Armin von Bogdandy and Stephan Schill, 'Overcoming absolute primacy: respect for national identity under the Lisbon Treaty' (2011) 48 CMLR 1417, 1418.

¹⁷ von Bogdandy and Schill (n 16) 1418.

¹⁸ Aido Torres Pérez, 'The federalizing force of the EU Charter of Fundamental Rights' (2017) 15 I-CON 1080, 1086; Nik de Boer, 'Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, Judgment of the Court (Grand Chamber) of 26 February 2013: Addressing rights divergences under the Charter: *Melloni*' (2013) 50 CMLR 1083, 1098; Leonard Besselink, 'Case C-208/09, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010: Respecting constitutional identity in the EU' (2012) 49 CMLR 671, 688.

¹⁹ Case C-36/02 *Omega*, ECLI:EU:C:2004:614; Grundgesetz [German Basic Law], art 1(1).

²⁰ *Omega* (n 21) paras 1–17; see also Wolfgang Weiß, 'Human rights in the EU: Rethinking the role of the European Convention on Human Rights after Lisbon' (2011) 7 EuConst 64, 93–94.

²¹ *Omega* (n 21) paras 35 and 41.

²² Case C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806, paras 1–35; see also Besselink, 'Case C-208/09' (n 20) 672–73.

²³ *Sayn-Wittgenstein* (n 24) paras 92–95; see also Besselink, 'Case C-208/09' (n 20) 675–81; de Boer (n 20) 1098.

²⁴ C-399/11 *Melloni*, ECLI:EU:C:2013:107, paras 57–59; Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 53.

²⁵ Cf. Constitución Española [*Constitution of the Kingdom of Spain*], art 24(2); and Framework Decision 2002/584/JHA on the European Arrest warrant [2002] OJ L190/1; Framework Decision 2009/299/JHA amending other Framework Decisions [2009] OJ L81/24.

²⁶ *Melloni* (n 26) paras 58–59;

²⁷ See Leonard Besselink, 'The parameters of constitutional conflict after *Melloni*' (2014) 39 ELR 531, 533–541 and 552.

address constitutional identity in the sense of Article 4(2) TEU and hence the Court missed an opportunity to provide more legitimacy to its decision.²⁸

Relative primacy and constitutional identity

Switching to the perspective of the constitutional courts of the Member States, their relative interpretation of primacy can be illustrated by a brief overview of a number of prominent national approaches to this issue. In particular, it is shown how national courts justify – and expand – the notion of relative primacy of EU law through determining the content of Article 4(2) TEU.²⁹

First, the well-known case law of the German Federal Constitutional Court (*Bundesverfassungsgericht*; BVerfG) produced an array of case law opposing absolute primacy.³⁰ In its *Solange* saga from 1974 and 1986, the BVerfG ultimately decided that as long as the CJEU ensures effective fundamental rights protection, it will not review EU legislation against German constitutional fundamental rights standards.³¹ In the course of the *Solange* saga and subsequent case law, the BVerfG specified that some provisions of the Basic Law are part of Germany's constitutional identity, especially the eternity clause after its *Maastricht* ruling.³²

More recently, in *Mr R* (dubbed *Solange III* by some),³³ the BVerfG decided that compliance with the principle of human dignity, which is also covered by the eternity clause of the constitution,³⁴ is domestically enforceable notwithstanding EU law.³⁵ Moreover, the BVerfG claimed to be exclusively competent to review Germany's constitutional identity.³⁶ This judgment is far reaching. As pointed out by Julian Nowag, instead of maintaining a conditionality requirement (*solange* is German for 'as long as'), the BVerfG ruled in *Mr R* that German courts now always have to guarantee compliance with the German constitutional principle of human dignity.³⁷ The BVerfG thereby broadened further its powers through abandoning the exceptional conditionality element from its *Solange* cases.³⁸

The Italian Constitutional Court developed similar objections to absolute primacy in what is termed the *controlimiti* doctrine as developed in *Frontini*, *Granital*, and *Fragd*.³⁹ By virtue of Article 11 of the Italian constitution, EU law has a domestic constitutional basis, and thereby enjoys primacy if one condition is met: EU law must comply with Italy's protection of fundamental rights. When activated, the Italian Constitutional Court can declare the legislation incorporating EU law unconstitutional.⁴⁰ The doctrine

²⁸ de Boer (n 20) 1097–103.

²⁹ See also Blanke and Mangiameli (n 6) 212–23.

³⁰ See Bundesverfassungsgericht [German Federal Constitutional Court] judgment of 29 May 1974, 2 BvL 52/71, *Solange I*, BVerfGE 37, 271; Bundesverfassungsgericht [German Federal Constitutional Court] judgement of 22 October 1986, 2 BvR 197/83, *Solange II*, BVerfGE 73, 339; Bundesverfassungsgericht [German Federal Constitutional Court] judgment of 12 October 1993, 2 BvR 2134, 2159/92, *Maastricht*, BVerfGE 89, 155; Bundesverfassungsgericht [German Federal Constitutional Court] judgment of 30 June 2009, 2 BvE 2/08, *Lisbon*, BVerfGE 123, 267; Bundesverfassungsgericht [German Federal Constitutional Court] judgment of 6 July 2010, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286; Bundesverfassungsgericht [German Federal Constitutional Court] judgment of 15 December 2015, 2 BvR 2735/14, *Mr R*, DE:BVerfG:2015:rs20151215.2bvr273514; see also Robert Schütze, 'Constitutionalism and the European Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd edn, OUP 2017) 75–76.

³¹ *Solange II* (n 42); see also Anne Peters, 'The bananas decision (2000) of the Federal German Constitutional Court: towards reconciliation with the European Court of Justice as regards fundamental rights protection in Europe' (2000) 43 *German Yearbook of International Law*, 276, 278–79.

³² *Maastricht* (n 42); Blanke and Mangiameli (n 6) 214–15; *Solange I* (n 42); *Solange II* (n 42); Bill Davies, 'Resistance to European Law and constitutional identity in Germany: Herbert Kraus and Solange in its intellectual context' (2015) 21 *ELJ* 434, 436.

³³ Mathias Hong, 'Human dignity and constitutional identity: the Solange-III-decision of the German Constitutional Court' (*Verfassungsblog*, 18 February 2016) <<https://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court/>> accessed 23 February 2019.

³⁴ Germany's eternity clause entails that fundamental principles enshrined in the constitution can never be amended, *Grundgesetz* [German Basic Law], art 79(3) in conjunction with art 1.

³⁵ *Mr R* (n 42).

³⁶ *Mr R* (n 42); Blanke and Mangiameli (n 70), 216; *Lisbon* (n 42).

³⁷ Julian Nowag, '2 BvR 2735/14, *Mr R* v Order of the Oberlandesgericht Düsseldorf, Order of the Bundesverfassungsgericht (Second Senate) of 15 December 2015 DE:BVerfG:2015:rs20151215.2bvr273514: EU law, constitutional identity, and human dignity: A toxic mix? Bundesverfassungsgericht: *Mr R'* (2016) 53 *CMLR* 1441, 1448.

³⁸ *ibid* 1446–50.

³⁹ Corte Costituzionale [Italian Constitutional Court] judgment of 18 December 1973, No 183/1973, *Frontini*, ECLI:IT:COST:1973:183; *Corte Costituzionale* [Italian Constitutional Court] judgment of 5 June 1984, No 170/1984, *Granital*, ECLI:IT:COST:1984:170; *Corte Costituzionale* [Italian Constitutional Court] judgment of 13 April 1989, No. 232/1989, *Fragd*, ECLI:IT:COST:1989:232.

⁴⁰ Federico Fabbrini and Oreste Pollicino, *Constitutional identity in Italy: European integration as the fulfilment of the constitution* (2017) European University Institute Working Paper 2017/06, 8–9 <http://cadmus.eui.eu/bitstream/handle/1814/45605/LAW_2017_06.pdf?sequence=1&isAllowed=y> accessed 23 February 2019.

has never been applied, being one of the reasons why the outcome of *Taricco I* sparked upheaval from commentators.⁴¹

Moreover, the French Constitutional Council (*Conseil constitutionnel*) decided in 2006 that except where consented to by France's constituent power, the transposition of an EU directive cannot contravene rules or principles inherent to France's constitutional identity.⁴² More recently, the French Constitutional Council ruled that for matters of competence that are shared between the EU and its Member States, it would review allegations of unconstitutionality against the entire body of French constitutional law, whereas for matters of exclusive EU competence, it would limit its review to the principles inherent to the French constitutional identity.⁴³ However, it did not clarify the content of France's constitutional identity.⁴⁴

In addition, arguments using constitutional identity as a way to challenge the (absolute) primacy of EU law can also be found in the courts of the newer Member States. For instance, according to the Polish Constitutional Tribunal (*Trybunał Konstytucyjny*), the protection of human dignity and constitutional rights are included in its interpretation of Poland's constitutional identity.⁴⁵ Furthermore, a judgment of the Hungarian Constitutional Court (*Magyarország Alkotmánybírósága*) of 2016 introduced what could be a vast challenge to the primacy of EU law. Ruling in favour of Viktor Orbán's government, and referring to BVerfG case law, the Court decided to be competent to determine whether Hungary's obligations to the EU would violate its constitutional identity.⁴⁶ This decision is especially problematic as Hungary's constitutional identity is based on its ambiguous concept of its 'historical constitution', which, as Gábor Halmai argues, is in its current interpretation inconsistent with the Union's founding values protected by Article 2 TEU.⁴⁷ Furthermore, the decision is argued to be politically driven to escape Hungary's obligations with regards to the European refugee quota system.⁴⁸

The CJEU's refusal to engage

What is striking is that in response to this case law emanating from Member State courts, the CJEU remains reluctant to explicitly refer to Article 4(2) TEU. The Court upholds primacy, a judicial doctrine not codified in the EU Treaties. By contrast, constitutional identity has a clear textual basis in the Treaties.⁴⁹ In *Sayn Wittgenstein*, the Court mentions Article 4(2) TEU, yet only as a subsidiary point to conclude that the limitation was justified based on public policy grounds.⁵⁰

⁴¹ Case C-105/14 *Taricco I*, ECLI:EU:C:2015:555; see, for instance, Pietro Faraguna, 'The Italian constitutional court in re *Taricco: Gauweiler* in the Roman Campagna' (*Verfassungsblog*, 31 January 2017) <<https://verfassungsblog.de/the-italian-constitutional-court-in-re-taricco-gauweiler-in-the-roman-campagna/>> accessed 23 February 2019; Markus Krajewski, 'A way out for the ECJ in *Taricco II*: Constitutional identity or a more careful proportionality analysis?' (*European Law Blog*, 23 November 2017) <<http://europeanlawblog.eu/2017/11/23/a-way-out-for-the-ecj-in-taricco-ii-constitutional-identity-or-a-more-careful-proportionality-analysis/>> accessed 23 February 2019; Mikhel Timmerman, 'Case C-105/14, Criminal proceedings against Ivo Taricco and Others, Judgment of the Court of Justice (Grand Chamber) of 8 September 2016, EU:C:2015:555: Balancing effective criminal sanctions with effective fundamental rights protection in cases of VAT fraud: *Taricco*' (2016) 53 CMLR 779, 795; Pietro Faraguna et al., 'Developments in Italian constitutional law: The year 2016 in review' (2017) 15 *I-CON* 763, 768; Barbara Guastaferro, 'The unexpectedly talkative 'dumb son': the Italian Constitutional Court's dialogue with the European Court of Justice in protecting temporary workers' rights in the public education sector' (2017) 13 *EuConst* 493, 522; Fabio Giuffrida, 'The limitation period of crimes: Same old Italian story, new intriguing European answers: Case note on C-105/14, *Taricco*' (2016) 7 *NJECL* 100, 111.

⁴² Conseil constitutionnel [French Constitutional Council] judgment of 27 July 2006, 2006-540 DC, *Loi DADVSI*, ECLI:FR:CC:2006:2006:540.DC; Blanke and Mangiameli (n 70) 220–21; Claes (n 17) 162.

⁴³ Conseil constitutionnel [French Constitutional Council] judgment of 31 July 2017, 2017-749 DC, *CETA*, ECLI:FR:CC:2017:2017:749. DC.

⁴⁴ Joris Larik, 'Prêt-à-ratifier: The CETA Decision of the French *Conseil constitutionnel* of 31 July 2017' (2017) 13 *EuConst* 759, 764.

⁴⁵ Blanke and Mangiameli (n 6) 218; Trybunał Konstytucyjny [Polish Constitutional Tribunal] judgment of 24 November 2010, K 32/09, *Lisbon*; Trybunał Konstytucyjny [Polish Constitutional Tribunal] judgment of 11 May 2005, K 18/04, *Accession*.

⁴⁶ Magyarország Alkotmánybírósága [Hungarian Constitutional Court] judgment of 30 November 2016, 22/2016 (XII 5) AB, *Interpretation of Article E) (2) of the Fundamental Law*. See for critical assessment, including regarding the procedure and timing, see Katalin Kelemen, 'The Hungarian constitutional court and the concept of national constitutional identity' (2017) 15/16 *Ianus – Diritto e finanza* 23, 24–28.

⁴⁷ Gábor Halmai, 'The Hungarian constitutional court and constitutional identity' (*Verfassungsblog*, 10 January 2017) <<https://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/>> accessed 23 February 2019; also critical Agoston Mohay and Norbert Tóth, 'Decision 22/2016 (XII 5) AB on the interpretation of article E(2) of the Fundamental Law' (2017) 111 *AJIL* 468, 469–71; and Federico Fabbri and András Sajó, 'The dangers of constitutional identity' (2019) 25 *ELJ* 1, 4–5.

⁴⁸ Gábor Halmai, 'Abuse of constitutional identity. The Hungarian constitutional court on interpretation of article E)(2) of the Fundamental Law' (2018) 43 *Review of Central and East European Law* 23.

⁴⁹ Primacy's only textual basis would be Declaration 17 (n 15), which refers back to CJEU case law.

⁵⁰ *Sayn-Wittgenstein* (n 24) paras 74, 92, and 95; von Bogdandy and Schill (n 6) 1423–24; this notion is challenged by Besselink (n 20) 682.

This reluctance was even clearer in the *Gauweiler* case, in which the BVerfG made its first ever preliminary reference to the CJEU.⁵¹ In this case, the CJEU had to decide on the legality of the European Central Bank's Outright Monetary Transactions programme.⁵² In its reference, the BVerfG voiced serious complaints regarding Germany's constitutional identity, which were formally ignored by the CJEU.⁵³

Subsequently, in 2017, the Italian *Corte Costituzionale* made its first reference to constitutional identity in referral Order 24/2017 in *Taricco*.⁵⁴ Also here, despite the explicit references to constitutional identity by the *Corte Costituzionale*, the CJEU again chose not to elaborate on the concept as enshrined in EU primary law,⁵⁵ even though this would have been an opportune moment to do so.

III. Primacy and Constitutional Identity in *Taricco*

Having provided the background and current state of the debate, this section summarises how the *Taricco* saga came about and how the Italian *Corte Costituzionale* set up the CJEU with a formidable opportunity to delimit the outer limits of constitutional identity.

Taricco I

Between 2005 and 2009, Mr. Taricco and others were charged before the *Tribunale di Cuneo* for value-added tax (VAT) fraud concerning bottles of champagne. Back in 1986, the CJEU ruled in *Greek Maize* that EU Member States must undertake effective measures to counter fraud affecting the financial interests of the Union.⁵⁶ Taking this into consideration, the tribunal decided in March 2014 to send the CJEU a request for a preliminary ruling.⁵⁷

The issue was as follows: Since a 2005 Italian Penal Code (*Codice Penale*; IPC) revision shortened the time by which limitation periods could be extended, VAT fraudsters could often not be adjudicated before their crimes would be time-barred.⁵⁸ According to the IPC, the duration of the limitation period for criminal offences is equal to the maximum duration of the penalty, and can be extended by no more than a quarter of this maximum.⁵⁹ As tax evasion cases usually involve complex investigations, the duration of the proceedings is such that de facto impunity is the norm rather than the exception.⁶⁰

The *Tribunale* thus referred to the CJEU the question whether IPC provisions on limitation periods are at odds with EU law, specifically, Articles 101, 107, 119 of the Treaty on the Functioning of the EU (TFEU) on competition and economic policy and Article 158 of Council Directive 2006/112/EC on warehousing exceptions.⁶¹

In response, in its ruling in *Taricco I* the CJEU empowered the *Tribunale di Cuneo* to disapply the IPC provisions at hand.⁶² In particular, the CJEU ruled that Articles 101, 107, and 119 TFEU do not apply, and reformulated the main question from whether the law on limitation periods added an unlawful EU law exemption to whether the IPC provisions hindered the effective fight against VAT evasion in a manner

⁵¹ Case C-62/14 *Gauweiler*, ECLI:EU:C:2015:400; Nowag (n 50) 1445; Barbora Budinska and Zuzana Vikarska, 'Judicial dialogue after *Taricco II*: Who has the last word, in the end?' (*EU Law Analysis*, 7 December 2017) <<http://eulawanalysis.blogspot.nl/2017/12/criminal-law-human-rights-and.html>> accessed 23 February 2019; Luis Arroyo Jiménez, 'Constitutional empathy and judicial dialogue in the European Union' (2018) 24 *EPL* 57, 67.

⁵² *Gauweiler* (n 64) paras 1–10.

⁵³ Bundesverfassungsgericht [German Federal Constitutional Court] order of 14 January 2014, 2 BvR 2728/13, *Gauweiler reference*, ECLI:DE:BVerfG:2014:rs20140114.2bvr272813; see also Budinska and Vikarska (n 64); see for an analysis of the reference Monica Claes and Jan-Herman Reestman, 'The protection of national constitutional identity and the limits of European integration at the occasion of the *Gauweiler* case' (2015) 16 *GLR* 917.

⁵⁴ Corte Costituzionale [Italian Constitutional Court] order of 23 November 2016, 24/2017, ECLI:IT:COST:2017:24, para 2, English translation available via <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf>, accessed 23 February 2019.

⁵⁵ *Taricco II* (n 8).

⁵⁶ Case C-68/88 *Greek Maize*, ECLI:EU:C:1989:339, paras 22–24. This rule found its way into the treaties and is currently enshrined in TFEU, art 325.

⁵⁷ Request for a preliminary ruling from the *Tribunale di Cuneo* (Italy) lodged on 5 March 2014 – Criminal proceedings against Ivo Taricco and Others (Case C-105/14) [2014] OJ C194/10; Stefano Manacorda, 'The *Taricco* saga: A risk or an opportunity for European Criminal Law' (2018) 9 *NJECI* 4.

⁵⁸ *Taricco I* (n 54) para 24.

⁵⁹ *Codice Penale* [Italian Penal Code], art 157 in conjunction with arts 160 and 161.

⁶⁰ *Taricco I* (n 54) para 24.

⁶¹ ibid, para 27; Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ 2006 L347/1.

⁶² *Taricco I* (n 54) para 58.

incompatible with the Directive, and with EU law more generally.⁶³ The CJEU based its judgment on Article 325 TFEU.⁶⁴ According to this article, Member States must indiscriminately counter fraud affecting the financial interests of the Union through deterrent and effective measures.⁶⁵ The Court established a direct link between VAT fraud and the Union's financial interests and stressed the necessity of criminal proceedings in such cases.⁶⁶ Following this, the Court referred the question back to the national court, stating that if it finds that the IPC provisions (on limitation periods) ran contrary to EU law, the latter must be 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'.⁶⁷ At the same time, the Court noted that if the national court decides to disapply the said provisions, 'it must also ensure that the fundamental rights of the persons concerned are respected'.⁶⁸ Subsequently, the CJEU elaborated on its *procedural* interpretation of limitation periods – which formed the essence of the constitutional clash to come – to show that disapplication would not infringe the rights of the accused, as guaranteed by Article 49 CFR and Article 7 of the European Convention on Human Rights.⁶⁹

In sum, the CJEU deemed the situation of de facto impunity for VAT fraudsters to run counter to the EU Treaties and asked the national court to give full effect to EU law, if need be, by disapplying penal provisions on limitation periods – a straightforward answer in line with absolute primacy.

Order 24/2017

After *Taricco I*, a legal debate arose and Italian courts referred questions to the *Corte Costituzionale* on the constitutionality of the ruling.⁷⁰ In their view, giving full effect to Article 325 TFEU by means of disapplying the IPC provisions might be incompatible with the 'supreme principles of the Italian constitutional order', specifically, the principle of legality in criminal matters.⁷¹ This follows from a *substantive* interpretation of limitation periods in Italian law, making them a manifestation of the principle of legality.⁷² Rather than activating the *controli limiti* doctrine, the *Corte Costituzionale* opted to invite the CJEU to a process of judicial dialogue.⁷³

The argumentation of the *Corte Costituzionale* can be summarised as follows. Firstly, EU-wide harmonisation on limitation periods being absent, Member States should be able to maintain their own legal classification of such rules.⁷⁴ Secondly, in determining whether the inferred rule from *Taricco I* is compatible with the principle of legality, the *Corte Costituzionale* concluded that this rule does not meet the requirements that law must be foreseeable and precise.⁷⁵ Having established the unconstitutionality of the rule, the *Corte* argued that in view of Italy's constitutional identity, the CJEU's decision 'cannot be interpreted as requiring a Member State to give up the supreme principles of its constitutional order'.⁷⁶ Accordingly, the *Corte's* interpretation of *Taricco I* is that Article 325 TFEU applies only to the extent that is compatible with Italy's constitutional identity.⁷⁷ In doing so, the *Corte Costituzionale* qualifies the idea of absolute primacy, though in an EU law-friendly way.

Furthermore, the *Corte Costituzionale* noted that the Italian constitution offers a higher level of fundamental rights protection, in line with Article 53 CFR, pursuant to which Member States may maintain

⁶³ *ibid*, paras 27, 34–35, and 59–65.

⁶⁴ *ibid*, paras 35–37.

⁶⁵ TFEU, art 325(1) and (2).

⁶⁶ *Taricco I* (n 54) paras 41–44.

⁶⁷ *ibid*, para 49.

⁶⁸ *ibid*, para 53.

⁶⁹ *ibid*, paras 53–57.

⁷⁰ See Emmanouil Billis, 'The European Court of Justice: A "quasi-constitutional court" in criminal matters? The *Taricco* judgment and its shortcomings' (2016) 7 NJECL 20; Giuffrida (n 54); Maria Kaiafa-Gbandi, 'ECJ's recent case-law on criminal matters: Protection of fundamental rights in EU law and its importance for Member States' national judiciary' (2017) 7 EuConst 219, 229–30.

⁷¹ Order 24/2017 (n 93) paras 1–2; Costituzione della Repubblica Italiana [*Constitution of the Republic of Italy*], art 25.

⁷² Order 24/2017 (n 93) para 4.

⁷³ Matteo Bonelli, 'The Taricco saga and the consolidation of judicial dialogue in the European Union – CJEU, C-105/14 Ivo Taricco and others, ECLI:EU:C:2015:555. C-42/17 M.A.S, M.B., ECLI:EU:C:2017:936 Italian Constitutional Court, Order no. 24/2017' (2018) 25 MJECL 357, 361.

⁷⁴ Order 24/2017 (n 93) para 4.

⁷⁵ *ibid*, para 5.

⁷⁶ *ibid*, para 6.

⁷⁷ *ibid*, para 7.

higher levels of fundamental rights protection than those provided for under EU law.⁷⁸ In addition, the *Corte* observed that the CJEU overlooked the requirement stemming from the principle of legality that provisions on punishment must be sufficiently precise.⁷⁹ This requirement not only applies to punishment; laws regulating the powers of the criminal courts must also be sufficiently precise in order for courts not to overstep their legal boundaries. Article 325 TFEU formulates an obligation of result, yet, following *Taricco I* it is unclear in how criminal courts must act in order to achieve this result.⁸⁰ All in all, it is acknowledged that the duty of Article 325 TFEU still exists, however, it should rather be for the Italian legislator to enact effective legislation to that end.

Taricco II

In response to the Order from the *Corte Costituzionale*, the CJEU in *Taricco II* first puts the blame on the referring *Tribunale* in *Taricco I* for not drawing to the Court's attention all relevant legal facts.⁸¹ Similar to *Taricco I*, the Court subsequently stresses the obligation stemming from Article 325 TFEU, the direct link between domestic VAT fraud and the Union's financial interests, and the necessity of criminal penalties in combatting serious cases of VAT fraud.⁸² After this, however, the Court acknowledges that limitation was 'at the time' not subject to EU harmonisation, which allowed for Italy's substantive interpretation, subjecting it to the principle of legality.⁸³

The CJEU recalls the requirements of foreseeability, precision, and non-retroactivity of criminal law, as enshrined in Article 49 CFR. It states that in view of Article 51(1) CFR on the scope of the Charter, implementing Article 325 TFEU cannot run counter to Article 49 CFR.⁸⁴ By making explicit references to case law of the European Court of Human Rights, the CJEU outlines the content of the three requirements, after which two pivotal conclusions are drawn.⁸⁵ Firstly, if disapplication of provisions of the IPC leads to a situation of uncertainty, running contrary to the precision requirement, the domestic court is not obliged to disapply the relevant provisions from domestic law.⁸⁶ Secondly, the domestic courts are precluded from disapplying the IPC provisions with regard to persons accused of committing VAT fraud before the *Taricco I* decision.⁸⁷ Hence, the Court upholds the obligation from Article 325 TFEU, yet finds that compliance by means of disapplication of domestic law is not required here, and even precluded if it entails a breach of the principle of legality. Accordingly, in this situation, it is for the national legislature to take the necessary measures to comply with the duties stemming from Article 325 TFEU.⁸⁸ By employing this line of reasoning, the CJEU avoided having to respond to the *Corte Costituzionale*'s point on constitutional identity.

IV. *Taricco* as a Missed Opportunity

The *Taricco* saga is the latest milestone in the decades-long debate on primacy and constitutional identity in the composite and multilevel European constitutional space. Once again, an immediate fallout was avoided. Once again, the CJEU decided not to express itself on – or even acknowledge the notion of – constitutional identity. For the time being, this may seem a reasonable solution. However, we argue that the CJEU cannot, and should not, hide from the issue forever. This position is explained in the present section, which highlights three aspects of *Taricco II*. Firstly, the CJEU's narrative of absolute primacy is discussed in connection with the legal reasoning of the Court. Secondly, the decision is put in the context of pertinent legislative developments. Thirdly, the absence of any reference to constitutional identity is elaborated on. These three aspects provide a framework for understanding why the Court ended the *Taricco* saga in this way and put forward a critique on having missed a welcome opportunity to clarify an issue at the heart of European legal discourse.

⁷⁸ *ibid*, para 8.

⁷⁹ *ibid*, para 9.

⁸⁰ *ibid*.

⁸¹ *Taricco II* (n 8) paras 22–28.

⁸² *ibid*, paras 30–38.

⁸³ *ibid*, paras 44–48.

⁸⁴ *ibid*, paras 51–52.

⁸⁵ *ibid*, para 55. It refers *inter alia* to *Cantoni v France*, CE:ECHR:1996:1115JUD001786291, para 29; and *Yukos v Russia*, CE:ECHR:2001:0920JUD001490204, paras 567–70.

⁸⁶ *Taricco II* (n 8) para 59.

⁸⁷ *ibid*, para 60.

⁸⁸ *ibid*, para 61.

Self-preservation by the CJEU: strategically reinforcing primacy in Taricco II

The CJEU's *Taricco I* judgment adhered the absolute interpretation of primacy espoused in the Court's case law adhered to in the line of case law starting with *Internationale Handelsgesellschaft*, and more recently reaffirmed in *Melloni*.⁸⁹ Subsequently, as multilevel constitutional conflicts arose, the CJEU engaged in a process of judicial dialogue with the *Corte Costituzionale*. This led to a harmonious outcome in *Taricco II*, though not always through entirely straightforward legal reasoning.⁹⁰ Consequently, the critical reception of both judgments has been rather negative, and for compelling reasons.⁹¹

According to the *Corte Costituzionale*, the disapplication of time-limits in national criminal law would undermine a supreme principle of the Italian constitutional order.⁹² As the CJEU acknowledges, strictly implementing *Taricco I* could lead to a situation of uncertainty, in breach of the principle that applicable law must be precise.⁹³ Consequently, the decision to avoid such a situation by the CJEU is to be welcomed. However, when looking at the technical legal reasoning of the Court, its need for strategic self-preservation did not go unnoticed.

The rule emanating from *Taricco I* led to a clash between Italian constitutional principles and EU law. In response, the *Corte Costituzionale* could have activated its *controlimiti* doctrine.⁹⁴ Instead, the *Corte* spoke softly and carried a big stick: It decided to launch a process of judicial dialogue with the CJEU.⁹⁵ The CJEU followed suit in *Taricco II*, as it must have been well aware that if it simply insisted on absolute primacy, the Italian response might be less friendly.⁹⁶

Against this background, the CJEU responded in *Taricco II* that as no harmonisation on criminal proceedings relating to VAT fraud had taken place, the *Corte Costituzionale* could maintain its substantive interpretation of the limitations, and was thus not obliged to disapply the provisions of the IPC at issue.⁹⁷ To arrive at this conclusion, the CJEU draws upon the aforementioned requirements of foreseeability, precision, and non-retroactivity of law.⁹⁸ As Member States must implement EU law with due regard to the CFR and its principle of legality as enshrined in Article 49 of the Charter, the Court found in *Taricco II* that these requirements actually *preclude* the *Corte Costituzionale* from disapplying the IPC provisions at issue.⁹⁹

This conclusion is prone to cause some confusion. To be precluded is to be obliged not to do something, and to be obliged in law requires a rule stemming from a legal order. Yet which legal order commands the domestic court here not to disapply – so, to actually apply – the provisions at issue? The Italian substantive interpretation of limitations barred the *Corte Costituzionale* from implementing *Taricco I*. Subsequently, the CJEU ruled in *Taricco II* that due to the absence of harmonisation, the *Corte Costituzionale* could maintain this substantive interpretation. Following this, it would be Italian law rather than EU law precluding disapplication of the limitation provisions, yet the CJEU came to phrase this as an EU law obligation.

This conclusion does not flow altogether logically from the Court's reasoning. Two contrasting readings of the judgment exist. On the one hand, the *Taricco II* judgment has been argued to introduce a problematic general exception to primacy based on a Member State's constitutional law.¹⁰⁰ However, this would seem too sweeping as this view overlooks a fundamental difference between *Taricco II* and the abovementioned *Melloni* judgment: Though both pertain to matters of shared competence, countering VAT fraud was not

⁸⁹ Faraguna et al. (n 69) 767–68; Emmanouil Billis, 'On the methodology of comparative criminal law research: Paradigmatic approaches to the research method of functional comparison and the heuristic device of ideal types' (2017) 24 MJCL 864, 870–71; Kaifa-Gbandi (n 110) 229–30.

⁹⁰ *Taricco II* (n 8) para 28; Marco Bassini and Oreste Pollicino, 'Defusing the *Taricco* bomb through fostering constitutional tolerance: All roads lead to Rome' (*Verfassungsblog*, 5 December 2017) <<https://verfassungsblog.de/defusing-the-taricco-bomb-through-fostering-constitutional-tolerance-all-roads-lead-to-rome/>> accessed 23 February 2019; Dana Burchardt, 'Belittling the primacy of EU law in *Taricco II*' (*Verfassungsblog*, 7 December 2017) <<https://verfassungsblog.de/belittling-the-primacy-of-eu-law-in-taricco-ii/>> accessed 23 February 2019; Valsamis Mitsilegas, 'Judicial dialogue in three silences: Unpacking *Taricco*' (2018) 9 NJECL 38, 38.

⁹¹ See, for example, Giuffrida (n 54); and Billis (n 110) on *Taricco I*; and Mitsilegas (n 130) on *Taricco II*.

⁹² Order 24/2017 (n 93) paras 2–4.

⁹³ *Taricco II* (n 8) para 59.

⁹⁴ Fabbri and Pollicino (n 53) 8–9.

⁹⁵ Order 24/2017 (n 93); as explained by Bonelli (n 113) 361.

⁹⁶ Davide Paris, 'Carrot and stick. The Italian constitutional court's preliminary reference in the case *Taricco*' (*Questions of International Law*, 31 March 2017) <<http://www.qil-qdi.org/carrot-stick-italian-constitutional-courts-preliminary-reference-case-taricco/>> accessed 23 February 2019.

⁹⁷ *Taricco II* (n 8) paras 45 and 59.

⁹⁸ *Taricco I* (n 54) paras 54–58.

⁹⁹ *Taricco II* (n 8) paras 52 and 60.

¹⁰⁰ Burchardt (n 130).

harmonised, whereas the rules on the EAW were,¹⁰¹ which bolstered the Court's authority to reinforce absolute primacy in *Melloni* as Spain could not unilaterally deviate from such requirements, even when it concerned constitutional human rights safeguards.¹⁰² At the time of *Taricco*, by contrast, no harmonisation of criminal proceedings relating to VAT fraud existed. The importance of making this distinction is supported by a number of authors and made an appearance in the order for reference of the *Corte Costituzionale*.¹⁰³

On the other hand, the *Taricco II* judgment has been argued to temper the constitutional conflict – by pragmatically allowing for the national interpretation of the principle of legality – without appearing to abandon the *Taricco I* ruling.¹⁰⁴ In other words, as Giuffrida points out, the judgment maintains the disapplication of the IPC provisions in theory, yet allows for an exception to the disapplication in practice.¹⁰⁵ This reading is compelling. The CJEU, in essence, grants the much-needed exception to the *Corte Costituzionale* to de-escalate the constitutional conflict, yet phrases this exception as an obligation stemming from EU law to reaffirm primacy. Although adding such a twist to a judgment is understandable, in the case of *Taricco II* it resulted in rather 'intransparent' legal reasoning.¹⁰⁶

Future harmonisation on the horizon

The CJEU's judgment in *Taricco II* must also be seen in the context of surrounding legislative developments at the EU level. In particular, seeing that Directive 2017/1371 was to bring about the harmonisation of the issue of limitations in the area of VAT fraud,¹⁰⁷ this may explain why the Court saw no need to aggravate the conflict any further.

Noting the absence of harmonization of rules on VAT fraud at the time of the *Taricco* saga, the *Corte Costituzionale* stipulated in its order for reference that the task of implementing the *Taricco I* rule, i.e., altering limitation periods, rested with the Italian legislator.¹⁰⁸ In turn, the CJEU in *Taricco II* responded that indeed 'it is primarily for the national legislature to lay down rules on limitation that enable compliance with the obligations under Article 325 TFEU'.¹⁰⁹ With regard to this need for legislation, prior to *Taricco I*, political uncertainty surrounded the new directive as the Council opposed VAT fraud to be covered by it.¹¹⁰ In July 2017, the Directive was adopted, with VAT fraud included. The deadline for transposition by the Member States was 6 July 2019,¹¹¹ by which time limitation periods on VAT fraud are to be harmonised throughout the Union.¹¹² On the one hand, the *Taricco* saga has influenced this legislative process leading to the Directive 2017/1371.¹¹³ On the other, the Directive 2017/1371 was adopted before *Taricco II*, which possibly influenced the Court's reasoning in that case.¹¹⁴

The Court noted with regards to limitation rules applicable to VAT fraud that these were not harmonised 'at the material time'.¹¹⁵ Hence, it may be seen as pointing to harmonisation taking place only two years after the case. The Court seems to warn that upon transposition of the directive, it would uphold more stringent principles instead, akin to those laid down in *Melloni*.¹¹⁶ Nevertheless, voicing criticism towards these

¹⁰¹ At the time of the *Melloni* decision, Council Framework Decision 2009/299/JHA (n 27) harmonised the requirements and procedural rights for individuals concerning the EAW.

¹⁰² *Melloni* (n 26) para 63.

¹⁰³ Order 24/2017 (n 93) para 8; see Vittorio Manes, 'Some lessons from the *Taricco* saga' (2018) 9 NJECL 12, 14–15; and Francesco Viganò, '*Melloni* overruled? Considerations on the *Taricco II* judgment of the Court of Justice' (2018) 9 NJECL 18, 20–21.

¹⁰⁴ Rosaria Sicurella, 'Effectiveness of EU law and protection of fundamental rights: The questions settled and the new challenges after the ECJ decision in the MAS and MB case (C-42/17)' (2018) 9 NJECL 24, 25; Fabio Giuffrida, '*Taricco* principles beyond *Taricco*: Some thoughts on three pending cases (*Scialdone, Kolev and Menci*)' (2018) 9 NJECL 31, 37; Christina Peristeridou and Jannemiek Ouwerkerk, 'A bridge over troubled water – a criminal lawyers' response to *Taricco II*' (*Verfassungsblog*, 12 December 2017) <<https://verfassungsblog.de/a-bridge-over-troubled-water-a-criminal-lawyers-response-to-taricco-ii/>> accessed 23 February 2019.

¹⁰⁵ Giuffrida (n 145).

¹⁰⁶ Clara Rauschegger, 'National constitutional rights and the primacy of EU law: M.A.S.' (2019) 55 CMLR 1522, 1543.

¹⁰⁷ 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 [2017] OJ L198/29.

¹⁰⁸ Order 24/2017 (n 93) para 1.

¹⁰⁹ *Taricco II* (n 8) para 41.

¹¹⁰ Steve Peers, 'The Italian Job: The CJEU strengthens criminal law protection of the EU's finances' (*EU Law Analysis*, 22 September 2015) <<http://eulawanalysis.blogspot.nl/2015/09/the-italian-job-cjeu-strengthens.html>> accessed 23 February 2019.

¹¹¹ Directive 2017/1371 (n 148) art 17.

¹¹² *ibid*, art 12.

¹¹³ See Timmerman (n 54) 790; Giuffrida (n 54) 107.

¹¹⁴ The Directive was adopted on 5 July 2017, *Taricco II* was handed down on 5 December 2017.

¹¹⁵ *Taricco II* (n 8) para 44.

¹¹⁶ Manes (n 144) 13.

harmonisation efforts, Peristeridou and Ouwerkerk note that as the minimum limitation rules of the new Directive do not differ much from their Italian counterparts, it would be strange for the CJEU to decide that the Italian rules must be set aside by virtue of EU law.¹¹⁷ Ordering the *Corte Costituzionale* to disapply these provisions would then seemingly clash with the harmonisation efforts. Last but not least, knowing that the issue at hand was soon going to be harmonised through EU legislation, it was arguably easier for the CJEU to just avoid a constitutional clash with the *Corte Costituzionale* at that moment, instead of grandstanding with regard to the primacy of EU law, which explains the cooperative judicial dialogue and the absence of any reference to Article 4(2) TEU in the CJEU's judgment.

Taricco II as an easy way out

The CJEU's silence on constitutional identity in *Taricco II* speaks louder than words.¹¹⁸ While it is true that the *Corte Costituzionale* did not include this concept in the questions it referred to the CJEU,¹¹⁹ it featured prominently in the reasoning of the Order by which it referred these questions and looms large as a key issue in the entire debate. Hence, and in view of the prospect of courts less friendly than the *Corte Costituzionale* giving meaning to this principle, we argue that the omission of a discussion of Article 4(2) TEU is the most important shortcoming of the *Taricco II* judgment.

Given the constitutionally pluralistic legal order of the EU, judicial dialogue serves as an important tool for courts at different levels of governance to communicate and respond with open-mindedness towards the other court's constitutional arguments and demands.¹²⁰ The *Taricco* saga is a perfect illustration of this, and for both courts, its outcome is a welcome one.¹²¹ Yet the question of constitutional identity, once again ignored by the CJEU, bears deeper significance. As noted above, CJEU case law touching on Article 4(2) TEU is scarce, and the exact scope and outer limits of the concept of constitutional identity remain undefined by the ultimate interpreter of EU law. In its Order for reference, the *Corte Costituzionale*, similar to the BVerfG in its *Gauweiler* reference,¹²² futilely prompted the CJEU for clarification on the identity clause.

The CJEU's reluctance to respond to this can be explained by two principal factors. Firstly, for the CJEU to rule on the identity clause is referred to by some scholars as opening a 'Pandora's box' of exceptions to the primacy of EU law.¹²³ Hence, the clause exists but is left untouched to avoid trouble. Ignoring constitutional identity questions is a matter of self-defence as the Court would set a dangerous precedent if it ruled that Article 4(2) TEU can be rightfully invoked to disapply EU law in cases of constitutional conflict. It would be difficult for the CJEU to maintain the absolute primacy narrative in such cases going forward, as it did in *Taricco II*. Thus, answering constitutional identity questions could be seen as a gateway to undermining the primacy of EU law.

Secondly, a ruling reaffirming absolute primacy by explicitly denying any possibility to raise Article 4(2) TEU in cases pertaining to similar constitutional conflicts would presumably be met with fierce criticism and pushback, not least from Member States with increasingly authoritarian governments and politicised judiciaries. As a matter of principle, it would seemingly contradict the EU Treaties, rendering nugatory Article 4(2) TEU and the obligation enshrined therein for the EU institutions, including the CJEU, to respect the constitutional identities of the Member States.¹²⁴

Following this, the general view with regard to the concept is that Member States themselves are to define the content of their own constitutional identity, whereas the CJEU may delimit its only scope as it is still an autonomous concept of EU law.¹²⁵ In this light, when the issue of constitutional identity is raised before it, the CJEU might be hesitant to overstep its boundaries and deliver a judgment irreconcilable with existing Member State identity interpretations, which would open up new constitutional conflicts. Hence, even though an awkward situation is created by the Court's refusal to respond to constitutional identity claims, its position can be explained by an endeavour to prevent greater harms in the near-term.

However, we must also consider the risks of leaving the concept undefined. As mentioned above, the Hungarian Constitutional Court already delivered a controversial judgment based on Article 4(2) TEU, in

¹¹⁷ Peristeridou and Ouwerkerk (n 145).

¹¹⁸ Mitsilegas (n 130) 41 identifies two other 'silences', i.e. that the CJEU did not question the substantive nature of the Italian interpretation of limitation periods and that the CJEU assumed TFEU art 325 to have direct effect.

¹¹⁹ Bonelli (n 113) 370.

¹²⁰ Maria Poli, 'The judicial dialogue in Europe' (2017) 11 *Vienna on International Constitutional Law* 351, 354; Jiménez (n 64) 58–60.

¹²¹ Mitsilegas (n 130) 41.

¹²² *Gauweiler reference* (n 66).

¹²³ Giuffrida (n 145) 35; Krajewski (n 54); Burchardt (n 130); these three authors refer to exceptions to EU law primacy (including constitutional identity) as opening 'Pandora's box'.

¹²⁴ Besselink (n 6) 47–49.

¹²⁵ Blanke and Mangiameli (n 6) 213.

which it ruled that Hungary's constitutional identity, as protected by the EU Treaties, allows the national court to disapply *inter alia* EU migration policy measures.¹²⁶ As argued by Gábor Halmai, this is a clear instance of abuse of the identity clause.¹²⁷ Thus, in Hungary, not the question of constitutional identity but the CJEU was side-lined by using a wide interpretation of Article 4(2) TEU without involving the CJEU through a preliminary reference. Disregarding its obligation under Article 267(3) TFEU to refer questions to the CJEU, the Hungarian Constitutional Court chose to disapply EU law in an opportunistic fashion, in line with the government's policies, thereby undermining the doctrine of primacy.¹²⁸

In *Taricco I*, CJEU used the following wording 'if the national court decides to disapply', such disapplication being 'subject to the verification by the national court'.¹²⁹ This prompted the *Corte Costituzionale* to ask whether such verification is to be interpreted as a test of constitutional identity, which was to be carried out by the *Corte Costituzionale* itself.¹³⁰ On the one hand, endorsing such an approach would entail granting a national court the power to disapply EU law.¹³¹ On the other, the Hungarian judgment illustrates that the current open-endedness of Article 4(2) TEU and hands-off approach of the CJEU could lead down the same road anyway.

Consequently, either path the CJEU can choose moving forward comes at a cost. This applies also to the current approach of refusing to set the outer limits of what can be covered by Article 4(2) TEU – and what definitely cannot. *Taricco II* provided the Court with an opportunity to clarify the scope of Article 4(2) TEU. With caution and in good faith, the *Corte Costituzionale* opened up a constructive judicial dialogue between the two courts. Moreover, with regard to constitutional identity, the *Corte Costituzionale* merely asked how certain language of the CJEU in *Taricco I* was to be interpreted. Although it is understandable why the Court has not been eager to refer to the identity clause, it is similarly clear that to avoid abuse of this clause, the Court, sooner or later, will have to voice an opinion on the matter. However, the longer the CJEU waits, the more likely it will be that courts less open to dialogue and less 'Euro-friendly' will start to furnish their own expansive interpretations of constitutional identity.¹³² In turn, once national court start using constitutional identity as a '*carte blanche* to disregard EU law',¹³³ the CJEU will find it difficult to pre-empt open conflict in defence of primacy in the future.

V. Conclusion

This article sought to elaborate on primacy and constitutional identity in the European constitutional space after the end of the *Taricco* saga and with the spectre of rule of law backsliding and authoritarianism looming. After outlining the contested nature of primacy and the concept of constitutional identity as a major challenge, and after outlining the developments leading up to the *Taricco II* decision, the article provided an analysis of the outcome of the saga.

The main findings of the article can be summarised in three points. Firstly, in *Taricco II*, the CJEU precluded the *Corte Costituzionale* from disapproving the contested provisions of Italian law. This conclusion does not flow altogether logically from the CJEU's reasoning but is understandable as the Court does not want to abandon its absolute primacy narrative. Secondly, as *Taricco II* was decided, harmonisation was already on its way, which is prone to have influenced the Court's attitude towards the case. Within two years from the CJEU's ruling, the issue would have been resolved, incentivising the Court to avoid a head-on constitutional collision in this case. Thirdly and consequently, the Court chose to sidestep the *Corte Costituzionale*'s prompt regarding constitutional identity. Although this is understandable in light of the above, *Taricco II* provided the Court with a formidable opportunity to start clarifying the scope of Article 4(2) TEU.

This time, the Court was saved by the bell of harmonisation. It opted for a judicial dialogue to temper the constitutional conflict resulting in an amicable outcome. However, the undefined scope of constitutional identity is a double-edged sword. The CJEU circumvents identity questions as a matter of self-defence, combined with a caution not to overstep its judicial boundaries *vis-à-vis* the Member States.

However, the CJEU cannot and should not shy away from clarifying the scope of Article 4(2) TEU forever. In the *Corte Costituzionale*, it found a cooperative and EU law-friendly interlocutor. In a continent where in several countries the rule of law and judicial independence are in retreat, and where some domestic courts

¹²⁶ *Interpretation of Article E (2) of the Fundamental Law* (n 59).

¹²⁷ Halmai (n 60).

¹²⁸ Halmai (n 61) 25 and 38.

¹²⁹ *Taricco I* (n 54) paras 53 and 55 (emphasis added).

¹³⁰ Order 24/2017 (n 93) para 7.

¹³¹ Paris (n 136).

¹³² Bonelli (n 113) 370.

¹³³ Fabbrini and Sajó (n 60) 17.

are already developing expansive notions of 'historical' constitutional identity, burying its head in the sand will not be a wise strategy in the long run.

Competing Interests

The authors have no competing interests to declare.

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