

**Carrot and Stick.
The Italian Constitutional Court's
Preliminary Reference in the Case Taricco**

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1. *A new type of preliminary reference: the 'threatening reference of appeal'*

Order 24/2017 is the third request for a preliminary ruling the Italian Constitutional Court ('ICC') has referred to the European Court of Justice ('ECJ'),¹ but it significantly differs from the previous two.

The first and the second request – orders 103/2008 and 207/2013 – arose from two proceedings in which EU law served as a *yardstick* for constitutional review. The ICC was essentially asked to review the domestic legislation's compliance with EU law. Having doubts regarding the correct interpretation of certain EU law provisions, it decided to stay the proceedings and to ask the ECJ whether EU law was to be interpreted as precluding the domestic rule, on the constitutionality of which it had to rule. When posing the questions, the ICC did not suggest to the ECJ any preferred answer. In both cases the ECJ considered that the domestic provisions at stake were not compatible with EU law. As a consequence thereof, the ICC ruled unconstitutional the domestic provisions under review because of their violation of EU law.

By contrast, in the main proceedings of order 24/2017, EU law was not a yardstick for constitutional review: rather it was its *object*. The ICC is not required to assess whether domestic legislation complies with EU law but whether EU law itself is compatible with the supreme principles

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¹ Order no 24 of 2017, English translation available at the ICC website <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf>.



of the Italian constitution. More precisely, what comes under the ICC's scrutiny is a specific ECJ decision, the Grand Chamber judgment of 8 September 2015 in case C-105/14, *Taricco*. Through order 24/2017, the ICC not only refers three questions to the ECJ, it also advises on the right answers and makes clear the consequences that the ECJ is likely to face, should it decide to rule otherwise. The preliminary reference explains to the ECJ the reasons why its *Taricco* judgment infringes upon the Italian constitution's supreme principles and invites the ECJ to correct or to qualify its decision. But it also makes clear that, should the ECJ uphold its unacceptable judgment, the ICC is likely to declare this judgment contrary to the supreme principles of the Italian constitution, thereby freeing Italian courts from the duty to enforce it. From this perspective, this preliminary reference's structure – a mix of questions and threats – closely reminds us of the preliminary reference of the German constitutional court in the case *Gauweiler*.²

2. *The point of contention*

In a nutshell, the two courts diverge in answering the following question: Besides (a) the right to not be held guilty of any criminal offence on account of any act which did not constitute a criminal offence at the time when it was committed, and besides (b) the right not to have a heavier penalty imposed than that which was applicable at the time the criminal offence was committed, *does the individual also have the right (c) not to be prosecuted beyond the limitation period that was applicable at the time the criminal offence was committed?*

In the ECJ's view such a right does not exist under EU law. Article 49 of the Charter only ensures that no one can be convicted for an act which did not constitute a criminal offence under national law at the time when it was committed and that no penalty is applied, which, at that time, was not laid down by national law. By contrast the limitation period escapes the guarantees of Article 49. No fundamental rights' violation occurs when the limitation period is extended after the commitment of a

² BVerfG, Order of the Second Senate of 14 January 2014 – 2 BvR 2728/13, ECLI:DE:BVerfG:2014:rs20140114.2bvr272813; English translation available at <www.bverfg.de/e/rs20140114_2bvr272813en.html>.



criminal offence and the extended limitation period is immediately applied to the detriment of the accused person. When dealing with the Italian rule on the limitation period, the ECJ's main concern does not lie in potential fundamental rights' violations but in the Member State's obligation under Article 325 TFEU to effectively counter illegal activities affecting the financial interests of the EU. Then, if the limitation period is too short to enable the courts to combat VAT evasion in an effective and dissuasive manner with the result essentially of de facto impunity, national courts are obliged to disapply domestic rules on limitation periods for their conflict with Article 325 TFEU.³ This is *Taricco's* main finding, as para 58 of the judgment makes clear.

Conversely, in the ICC's view this right exists, is enshrined in the Constitution, and even enjoys the rank of a supreme principle of the Italian constitution. When an individual is about to commit a criminal offence, the Italian constitution guarantees him or her the right to know in advance: a) whether that act constitutes a criminal offence or not; b) by which penalties it is sanctioned; c) for how long he or she can be prosecuted for that act. After the commitment of the criminal offence, none of these three elements can be modified to the detriment of the accused person.

In the light of this open disagreement, soon after *Taricco* was handed down, the Appeal court of Milan and the Court of Cassation, instead of simply enforcing the ECJ's judgment in the proceedings pending before them and disapplying the statute concerning the limitation period, decided to stay the proceedings and to ask the ICC to rule on the compatibility of *Taricco* with the supreme principles of the constitution.⁴ More precisely, they referred to the ICC a question of constitutionality concerning the domestic law for the ratification and execution of the Lisbon Treaty, *insofar as it ratifies and executes Article 325 TFEU, as interpreted*

³ The same applies if the national rule 'provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the EU'.

⁴ Other courts, including the same Court of Cassation, took opposite views: see Cassazione penale, sez III, judgment of 17 November 2015, no 2210, which enforced *Taricco* and did not consider it necessary to refer the question to the constitutional court; Cassazione penale, sez IV, judgment of 25 January 2016, no 7914, qualifying the obligation to disapply the limitation period to the sole cases in which that period has not expired yet; Cassazione penale, sez III, judgment of 7 June 2016, no 44584, setting out the criteria for disapplication.

by the ECJ in *Taricco*. This is how the *controlimiti* doctrine works in the Italian legal order. Ordinary courts cannot deny the application of EU law in cases where there is an alleged violation of the constitutional supreme principles, the ICC having exclusive jurisdiction on that. But they can trigger the ICC's review through a question of constitutionality, thereby postponing their duty to comply with EU law until the ICC renders its decision. The ICC's judgment formally concerns the domestic statute that authorizes the ratification and gives execution to the last EU Treaty, the Lisbon Treaty in the present case. In the substance, however, the ICC rules on the compatibility of a specific ECJ judgment with the supreme principles of the Italian constitution.

Although the contrast between the ECJ and the ICC's understandings of the principle of legality of criminal offences and penalties is apparent, the ICC decided not to directly and openly declare *Taricco*'s incompatibility with the constitutional supreme principles. It chose to give the ECJ a chance to review its judgment and to avoid an open conflict. The ICC then referred three questions to the ECJ for a preliminary ruling, which will be briefly discussed in the following paragraphs.

3. *The limitation period's 'substantial' reading as a supreme constitutional principle*

The first question⁵ touches upon the core of the dispute between the two courts. The ICC stresses that in the Italian legal order the limitation period falls within the scope of application of the principle of legality in criminal offences. While other EU Member States' legal orders stick to a procedural reading of the limitation period similar to the one the ECJ subscribed to in *Taricco*, in Italy the limitation period is part of substantial criminal law and cannot be excluded from the guarantee against post factum changes detrimental to the accused person. But there is more. The principle of legality in criminal offences, *in all its aspects* – ie including the limitation period – is to be considered a supreme principle of the Constitution, prevailing over conflicting EU law (paras 2 and 4).

⁵ In the reasoning of order 24/2017 this question is dealt with firstly, while in the final formulation of the questions it takes the second place.



What is striking about this part of the order is the ease with which the ICC confers the status of a supreme principle of the constitution on all aspects of the principle of legality in criminal offences. In the whole of order 24/2017, one would be hard pressed to find a single line explaining why this principle is more than a constitutional principle and in fact belongs to the constitution's untouchable core.

Admittedly, distinguishing between the *normal* and *supreme* principles of the constitution is anything but easy. The concept of 'supreme constitutional principles' has been created by the same ICC and does not have any textual basis in the constitution.⁶ Furthermore, a certain lack of precision exists in the previous ICC case-law: it sometimes refers to 'fundamental principles of the constitutional orders', sometimes to 'inalienable human rights', and sometimes to 'supreme constitutional principles', without making clear the difference between these concepts. The ICC enjoys then the widest discretion in defining the content of these supreme principles. It can essentially freely decide whether a certain principle is 'supreme' and therefore trumps conflicting EU law, or it is not and therefore cedes to conflicting EU law.

Still, if supreme principles coincide with all constitutional principles the very concept of supreme principles becomes useless. One difference between the wider constitution and its supreme principles is postulated by the jurisprudence of the same ICC. In particular, the ICC holds that while international treaties, and notably the ECHR, have to respect the whole constitution,⁷ the primacy of EU law can only be limited by the supreme constitutional principles. One consequence of the privileged status of EU law, among others, is that, unlike international law, it enjoys primacy even over conflicting constitutional provisions, with the sole exception of the supreme constitutional principles. But if all constitutional principles were to be considered as supreme without any need to justify this choice, then it would be necessary to conclude that the ICC does not accept the primacy of EU law over domestic constitutional law at all.

⁶ Firstly, with regard to EU law, see judgments no 183/1973 and 170/1984, referring to the 'fundamental principles of the constitutional order' and to 'inalienable human rights'.

⁷ See in particular the so-called twin judgments on the ECHR: judgment no 348/2007, at para 4.7 and judgment no 349/2008, at para 6.2.

Furthermore, supreme constitutional principles have always been conceived by the ICC as a unitary category. They represent the constitution's most rigid core, which cannot be infringed by any authority, no matter whether domestic or external. They are not only protected against potential violation by any EU or international law, they also cannot be modified by way of a constitutional amendment.⁸ Including the legality of the limitation period in the supreme principles means that there is no way – not even through a constitutional amendment – that the Italian legal order could move toward a procedural conception of the limitation period. A hypothetical, and hardly foreseeable, constitutional amendment expressly excluding the limitation period from the scope of application of the principle of legality, would likely be ruled as unconstitutional by the ICC. But it is difficult to see any sound reason, or at least no such reason within order 24/2017, why the Italian legal order, by way of a proper constitutional amendment, could not move toward a procedural reading of the limitation period in line with other European countries that share the same constitutional values.

While subject to criticism under the perspective of the correctness of its legal reasoning, the ICC's decision not to dwell extensively on the precise scope of this supreme principle may prove to be a sound strategic move in the confrontation with the ECJ. Once the ECJ answers the ICC's request for a preliminary ruling, the case will go back to the ICC, which will have to definitively decide whether the new ECJ's judgment is compatible with the supreme constitutional principles or not. A rigid definition of the supreme principle at stake in the preliminary reference would have seriously limited the ICC's leeway in its final judgment. Conversely, by not already defining in the preliminary reference the precise scope and the limits of the supreme principle that prevent compliance with *Taricco*, the ICC guarantees itself a broader margin of appreciation when it will need to assess the ECJ's new judgment. Should the ECJ be eager to somehow correct *Taricco*, the ICC could then more easily state that the ECJ's correction suffices to meet the requirements of the supreme principle, with the ICC now clarifying the precise scope. The lack of extensive reasoning on the scope and the limits of the mentioned supreme principle

⁸ See judgment no 238/2014, at para 3.2, with reference to the previous relevant case-law.



can then be seen as a pure strategic choice, by which the ICC keeps its hands free in view of its final decision.

4. *The lack of precision of the Taricco criteria*

With its second question, the ICC challenges the vagueness of the criteria Italian courts should follow in order to decide on the disapplication of the rule on limitation period. In the ECJ's view, national courts are under a duty to refuse to apply a domestic rule on limitation periods such as the Italian one, 'if that national rule prevents the imposition of effective and dissuasive penalties *in a significant number of cases of serious fraud* affecting the financial interests of the European Union' (para 58). But the ECJ does not give courts any guidance in order to establish either when the number of cases is significant enough to justify disapplication, or what serious fraud is. The ICC's criticisms on this part of the ECJ's judgment are particularly harsh and convincing. The ICC points out twice, at paras 5 and 9, that the activity of the judiciary must be strictly bound by procedural rules established by the legislature. By contrast, it is unacceptable to set courts a goal, like the effective prosecution of VAT related crimes, and enable them to get rid of any legal obstacle that might jeopardize this goal's achievement, such as the rule on limitation period. This is essentially what the ECJ did in *Taricco*.

The ICC's reasoning is grounded on the principle of the separation of powers. It is for the legislature to establish general rules on the limitation period, while a single judge cannot decide whether or not to apply them on the basis of his own assessment of the seriousness of the crimes and the number of cases that would become time-barred. A reference to the principle of equality, whose strict connection with the principle of separation of powers is undeniable, would have probably increased the persuasiveness of the ICC's arguments. After all, following *Taricco*, every single judge is to a certain extent free to decide whether to respect the limitation period or to ignore it. All it has to do is argue that its enforcement would prevent the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud. Accused persons in

equal situations might be treated completely differently, simply because of the single judge's personal assessment.⁹

5. *Constitutional identity as an implicit and general reservation to EU law*

While the first and the second questions aim at giving the ECJ the opportunity to correct one of its judgments, the third question has potentially a far greater and more general impact on the scope of the principle of primacy of EU law. The ICC asks the ECJ whether the *Taricco* judgment has to be complied with even if compliance with this judgment conflicts with the supreme principles of the Italian constitution. In a nutshell, the ICC's reasoning unfolds as follows:

- a) The EU is based on a balance between unity and diversity;
- b) Preservation of national constitutional identities is an essential part of this balance;
- c) The ECJ cannot be entrusted with the task to ensure that EU law, and its own judgments interpreting it, are compatible with the constitutional identity of every single Member State;
- d) It is then for domestic authorities – in Italy: for the ICC – to assess whether a certain EU law provision, as interpreted by the ECJ, is compatible with a Member State's constitutional identity;
- e) The application of a ECJ's judgment is therefore always¹⁰ conditional on its compatibility with the Member State's constitutional identity, which has to be assessed by domestic authorities and, in Italy, by the ICC specifically.

Despite the reference to the most up to date terminology of 'constitutional identity', the third question does not raise a new question. Quite the opposite. It re-opens the old question that the ECJ has frequently dealt with, of whether the validity of EU law can be made conditional upon the respect of a Member State's constitutional law. It is common knowledge that the ECJ's answer has always been in the negative. In its view, the primacy of EU law over domestic constitutional law is a case of

⁹ This is actually what, at least partially, occurred following *Taricco*: see (n 4).

¹⁰ More precisely, in the ICC's view an assessment of an ECJ's judgment's compatibility with a Member State's constitutional identity is required when this compatibility is 'not immediately apparent' (para 6).



do or die. Para 3 of its famous judgment *Internationale Handelsgesellschaft*¹¹ offers perhaps the clearest summary of the ECJ's view:

‘Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore *the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.*’

It also well known that national constitutional courts have never fully accepted such an absolute understanding of the primacy of EU law and, starting with *Solange I*, they developed specific reservations to the primacy of EU law. Whatever their name – counter-limits, fundamental rights’ review, ultra vires review or constitutional identity review –, these reservations essentially enable constitutional courts, in very exceptional circumstances that have so far practically never occurred, to deny the application of EU law within the domestic legal order.

Now the ICC seeks to turn these exceptional review mechanisms into a general rule. In its view, no provision of EU law and no ECJ judgment can be understood as requiring a Member State to give up the supreme principles of its constitutional order. Accordingly, the applicability of all EU law provisions and the ECJ judgments should be conditional upon their compatibility with a Member State’s supreme constitutional principles, whose assessment in Italy is the constitutional court’s exclusive jurisdiction. The key point in relation to this is Article 4(2) TEU. In the ICC’s reading, this provision does not confine itself to requiring EU authorities, and notably the ECJ, to respect a Member States’ constitutional

¹¹ Case C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 01125.

identity. It also and most importantly enables domestic authorities to review EU law provisions and the ECJ judgments in the light of a Member State's constitutional identity. Put bluntly, it is not the ECJ but rather national constitutional courts which are the guardians of constitutional identities.

Should the ICC's understanding of constitutional identity be accepted by the ECJ – which is extremely unlikely to happen –, the principle of the primacy of EU law would undergo a deep change. The mechanisms constitutional courts developed to review EU law in very exceptional cases, and that the ECJ never accepted, would turn into a regular review on the compatibility of EU law with a Member State's constitutional identity. Considering the vagueness of the concept of constitutional identity – a notion that can be put at the service of the most oddly assorted goals, as the recent decision of the Hungarian constitutional court proves¹² – the ICC's reading of Article 4(2) TEU risks turning it into a request to the ECJ to endorse national authorities' power to pick and choose which EU law provision and which ECJ judgment they are willing to comply with. Not much would remain of the principle the ECJ has always stuck to, i.e. that no allegation of conflicting domestic constitutional law can affect the validity of EU law.

6. *The language of dialogue and its techniques*

While voicing a deep conflict with the ECJ, the ICC takes care to express it as an open dialogue. Beside the 'stick' of threatening to declare

¹² Hungarian constitutional court, Decision 22/2016 (XII.5.) AB on the Interpretation of Article E) (2) of the Fundamental Law. In this decision the Hungarian constitutional court held that it can exercise a fundamental rights review and an ultra vires review, the latter encompassing a sovereignty and a constitutional identity review. Strikingly enough, the decision was handed down in the context of a petition of the commissioner for fundamental rights challenging the EU Council's decision to relocate in Hungary 1294 asylum seekers under the Dublin III system. In the petitioner's view, the Council's decision would infringe the fundamental rights enshrined in the Hungarian Fundamental Law and notably the prohibition of collective expulsion (!). Although it did not rule that the Council's decision violates fundamental rights, the Hungarian constitutional court envisaged this option in the abstract and showed it would be eager to examine it in the future. Full English translation available at <<http://hunconcourt.hu/case-law/translations>>.



Taricco not binding on Italian courts, the ICC resorted to the 'carrot' of conciliatory language too.

First, the ICC carefully backs up its contentions on EU law grounds by frequently quoting Treaty provisions as well as ECJ decisions. It struggles to legitimize its decision in terms of EU law and to present its preliminary reference as the performance of a duty under EU law rather than an act of rebellion. In a sense, the ICC seems to hint that its decision is more faithful to EU law than the one of the ECJ. This is apparent when the ICC refers to Article 4(2) TEU. Note that until now, the concept of constitutional identity was essentially unknown to the ICC's jurisprudence.¹³ As abovementioned, to refer to the untouchable core of the constitution, the ICC has instead used notions such as the supreme or the fundamental constitutional principles or, simply, fundamental rights. Now the ICC has entered the concept of constitutional identity into its language as it chose to rephrase its previous jurisprudence in terms of EU law to ensure better dialogue with the ECJ.

The reference to constitutional identity is not the only evidence of the ICC's willingness to speak the language of EU law. The ICC also stresses, for example, that under EU law, and in particular under Article 49 of the Charter, there is no need for a uniform understanding of the limitation period. Or that the principle of legal certainty, which entails the need to clearly define criminal offences, has been recognized by the same ECJ as part of the constitutional traditions common to the Member States. Again, the ICC makes a reference to Article 53 of the Charter, which in its view should allow a higher protection of the principle of legality in criminal offences in Italy than at the EU level, and distinguishes this case from *Melloni*.

Second, the ICC strives to soften as much as possible the conflict's real sharpness, in particular by showing deference to the ECJ. Twice, in para 5 and in para 8, the ICC stresses that it does not intend to question the interpretation of Article 325 TFEU which the ECJ gave in *Taricco*. The ICC considers itself bound by this interpretation and cannot substitute the ECJ's reading of Article 325 TFEU with its own. The ICC's task is confined to assessing whether this interpretation complies with the supreme principles of the Italian constitution. Similarly, the ICC does its

¹³ So far, the ICC referred to the notion of 'constitutional identity' only once, in a case with no EU law implications: see judgment no 262/2009, at para 7.3.2.2.

best to convince the ECJ that denying the application of *Taricco* in Italy would not jeopardize the uniform application of EU law (para 8). In particular, the ICC stresses the difference between *Melloni* and *Taricco*. While in *Melloni* respecting the higher protection the Spanish constitution affords to the right of fair trial would have broken the uniformity of EU law, the same does not hold true in the case at hand, since it is not the *Taricco* judgment which is questioned, but only ‘the existence of a constitutional bar on its direct application by the courts’.

In its effort to temper the conflict, however, the ICC sometimes goes too far and its arguments appear far-fetched. This is so, for example, when it claims that, should the ECJ accept the ICC’s view according to which *Taricco* can be denied application in Italy in the name of constitutional identity, then ‘any reason of conflict would cease’ (para 7). It is fairly obvious that if EU law is denied binding force, then no conflict exists with constitutional law. Similarly, at para 8, the ICC claims that in this case there is no real opposition between a domestic provision and EU law, which is hard to believe since the whole order is based on the conflict between *Taricco* and the Italian supreme constitutional principles.

Third, the ICC strives to make the most of some passages of *Taricco* that, due to their lack of clarity, might be read as supporting the ICC’s arguments. The ICC, in particular, notices that the ECJ stated that ‘if the national court decides to disapply the national provisions at issue, it must also ensure that the fundamental rights of the persons concerned are respected’ (para 53) and made the disapplication of the limitation period ‘subject to verification by the national court’ of the respect of fundamental rights (para 55). In the ICC’s view, these references mean that *Taricco* is only applicable if the national authorities – in Italy: the ICC – consider that it does not clash with a Member State’s constitutional identity. Order 24/2017 is aimed precisely at asking the ECJ to confirm this interpretation of *Taricco*. But it is quite apparent that *Taricco*’s plain wording does not mean what the ICC asserts it means. It is nevertheless interesting to note the ICC’s struggle to present its view as a potential interpretation of *Taricco* and not as an open rebuttal of it.

Finally, the ICC takes care to provide the ECJ with some escape-lines to ‘surrender’ with dignity, i.e. without expressly going back to its judgment. The proposed re-reading of *Taricco* clearly goes in this direction. At para 7, the ICC offers the ECJ another interesting escape-line. It



stresses that, even if Italian courts were relieved from the obligation to disapply the limitation period, Italy would still be responsible for its failure to effectively counter the financial frauds affecting the EU financial interests. The message to the ECJ is clear: Certain Treaties' violations are to be redressed through an infringement procedure, not through a preliminary ruling enabling courts to get rid of procedural rules to the detriment of the accused person's rights. The responsibility for Italy's violation of Article 325 TFEU rests on the legislature that did not pass appropriate rules to counter VAT frauds and not on the courts that apply these rules. Should the ECJ acknowledge that, the ICC would be ready to cooperate with the ECJ to solve, *in the proper way*, a problem whose seriousness the ICC does not deny. This is what the ICC seems to hint at when it maintains that, should it appear that, even after an amendment passed in 2011, Italy does not effectively protect the EU financial interests, then an intervention of the Italian legislature would be 'urgent'.

This is an interesting perspective. Instead of fighting each other, the ECJ and the ICC might work as allies to press the real responsible of Italy's failure to comply with Article 325 TFEU – the Italian legislature – to take on its own responsibilities. Judicial dialogue alone cannot redress all the legislature's faults.

7. *Three potential scenarios for the awaited judgment of the ECJ*

Now the ECJ's decision has generated great expectation. As has often be the case, the ECJ is likely to do its utmost to protect the primacy and the uniform application of EU law in the most effective way. In this sense, the ECJ's judgment might be seen as an act of judicial policy rather than a purely technical interpretation of EU law. However, it is anything but simple to say which solution would best pursue this goal. Undoubtedly, when deciding, the ECJ will not only consider the impact its judgment will have on the Italian legal order, but will also take into account how supreme and constitutional courts of *other Member States* will react to its judgment. Its new judgment will not only deal with a potential clash between EU law and the Italian constitutional identity, but will also send a message to all Member States' supreme and constitutional courts on the ECJ's understanding of judicial dialogue.



In the first scenario, the ECJ might think that a strict defence both of the principle of primacy and of *Taricco* is needed in order to head off any potential challenge to the authority of EU law and of the ECJ itself. It might therefore simply ignore the concerns carefully raised by the ICC by clarifying that Article 4(2) TEU does not allow any national court to challenge the primacy of EU law and by fully upholding *Taricco*. This way, the Court would make clear that the preliminary reference cannot be turned into an appeal against its own judgments. However, one can seriously doubt that this would help the primacy of EU law.

First, if this was the answer by the ECJ, the ICC could not help but declare *Taricco* inapplicable in Italy. It actually would have very little option, unless going back on its own word, which the ICC is very unlikely to be eager to do. But considering that the enforcement of EU law relies essentially on the cooperation of domestic courts, triggering an open conflict with the constitutional court that has proven to be – or at least has tried to be – the most cooperative in the EU is probably not a good idea. Put bluntly, it might perhaps be convenient playing hardball with the Hungarian constitutional court, whose recent decision envisages an open conflict with the values of Article 2 TEU. But a constitutional court that expresses its concerns through an open dialogue in the light of the values of Article 2 TEU deserves perhaps a different treatment.

Second, turning a blind eye to a well-reasoned request to review a previous decision risks making the acceptance of the principle of primacy an act of faith. After all, as with all human institutions, the ECJ may sometimes be mistaken in its decisions. From this perspective, taking seriously into consideration the concerns expressed by another court might prove to be a sign of strength rather than of weakness, especially when the request to review is phrased in conciliatory terms and through an open dialogue. Despite potential conflicts, the ECJ and domestic constitutional courts share the responsibility to create a legal space where the rule of law and fundamental rights are protected. Judicial dialogue can be a good way to reach this goal.

In the second scenario, the ECJ might consider that the time is now ripe to soften its absolute understanding of the primacy of EU law and to endorse the ICC's understanding of constitutional identity. One cannot conceive of a display of trust from the ECJ towards constitutional courts which would be bigger than this. The ECJ would accept that the binding

force of every single EU law provision and every single ECJ judgment would become conditional upon constitutional courts' approval.

But bearing in mind the context in which constitutional identity has been invoked in the recent decision of the Hungarian constitutional court, the ECJ would be advised to think twice before endorsing the ICC's reading of constitutional identity. It is one thing that constitutional courts claim the power to review EU law in the light of fundamental rights/supreme constitutional principles in very exceptional circumstances, *despite the ECJ's open denial of it*. Quite another thing is that the ECJ would endorse and bless this power and encourage constitutional courts to exercise it. The former perspective has somehow ensured a certain balance between the ECJ and domestic constitutional courts starting from *Solange II* and ongoing until recent years. The latter is likely to jeopardize the primacy and autonomy of EU law. EU law would lose its binding force as an independent source of law and would always be subject to constitutional courts' confirmation of its compatibility with a Member State's constitutional identity. As mentioned, this might lead in the worst case to a 'pick and choose' approach by Member States, where what a Member State is willing to accept is binding and the rest conflicts with its constitutional identity.¹⁴

In a third scenario, the ECJ might choose a middle-way solution. While upholding its absolute reading of the primacy of EU law, it might acknowledge that its previous judgment, insofar as it requires courts to disapply a procedural rule on the basis of extremely vague criteria, is found wanting in terms of fundamental rights' protection and legal certainty and review it accordingly. By so doing, the ECJ would also show that it takes seriously into consideration national courts' fundamental rights concerns and, not least, it would likely avoid the ICC declaring *Taricco* inapplicable because of its conflict with the Italian constitution's

¹⁴ Similar considerations apply to the reference to art 53 of the Charter. Accepting that Italian courts can refuse application to *Taricco* because of a higher protection of the accused person's rights in Italy is likely to pave the way to a widespread request to escape the obligation to comply with EU law in the name of a domestic higher standard of fundamental rights' protection that the ECJ did not take into account. This is what Melloni ruled out when stating that 'national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised' (para 60).

supreme principles. Put differently, the ECJ might think it worthwhile sacrificing *Taricco*, at least to a certain extent, to protect the primacy of EU law.

On the one hand, the ECJ could agree to correct *Taricco* to bring it in line with some of the ICC's proposals and qualify or clarify the scope of courts' obligation to disapply the Italian rule on the limitation period. Much as the ICC framed its rebellion in the language of dialogue, the ECJ also could resort to the appropriate words in order to make less apparent and less painful a correction of its previous decision and show it simply as a consistent clarification.

On the other hand, the ECJ might reject the ICC's reading of Article 4(2) TEU and deny that the reference to the Member States' constitutional identity enables domestic authorities, notably constitutional courts, to review EU law in the light of a Member State's supreme constitutional principles. Constitutional courts are likely to be unhappy with this decision and to go on claiming their power to overcome the prohibition to rule on the validity of EU law. But this is what they have been doing since *Solange II* and the ECJ's refusal to accept the ICC's view on constitutional identity would not affect the current status quo. An endorsement from Luxembourg on the constitutional identity review can wait, especially if one considers the current growing tendency of Member States and their courts to multiply reservations to EU law.

This scenario would lead the ECJ to accept that the preliminary reference might be used as a de facto appeal against its own judgments. The ECJ might well be unhappy with this development. Yet from this perspective it would still be for the ECJ to decide whether and to what extent to review its judgments. This is better than seeing constitutional courts invoking constitutional identity to decide whether and to what the Member States shall comply with EU law, without the ECJ having the opportunity to express its view.