THE ECJ'S APPROACH TO DUAL PRELIMINARITY 5 YEARS AFTER THE ITCC'S JUDGMENT NO. 269/2017

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Abstract

This article examines the European Court of Justice (ECJ)'s perspective on dual preliminarity (*doppia pregiudizialità*) five years after the notorious *obiter dictum* of the Italian Constitutional Court (ItCC) in its judgment No. 269/2017. More precisely, the article aims at unravelling the essential requirements that any such "triangular" relation (between ordinary national courts, national Constitutional Courts, and the *Kirchberg* Court) shall satisfy to comply with European Union (EU) law. This analysis builds both on the "classics" and on the recent cases involving (blatant or disguised) restrictions on Hungarian and Romanian judges to refer to the ECJ or apply EU law. Against this backdrop, the compatibility of the current configuration of dual preliminarity in Italy with EU law will be assessed. Although a specific assessment in this regard has not been carried out by the ECJ (yet?), we contend that the refinements and adjustments in the more recent ItCC's case law have remedied the main issues envisaged in the *obiter dictum*. Therefore, the current configuration seems to pose no serious threats to the EU systemic principles involved nor to EU law's uniformity, coherence, and effectiveness. Indeed, provided that national judges continue to enjoy the *actual* power to refer freely to the ECJ and immediately set aside national law provisions incompatible with EU law rules, the ECJ has adopted a "secularist" approach and respects the Member States' constitutional models. This article also argues that the early-stage involvement of ItCC's ("first word") in the dialogue with the ECJ may well serve the interests of a composite and pluralist system of fundamental rights protection in the EU. We will

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offer as an example the recent case on the Italian rules on childbirth and maternity allowances, which marks a step down the path of a "cooperative" dialogue between the two courts and shows the potentialities (and the little drawbacks) of such an early involvement.

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1. Introduction

This article analyses the ECJ's "approach" to dual preliminarity (*doppia pregiudizialità*)[1], with specific regard to the so-called "tempered

[1] Both the concept of "dual preliminarity" and the ItCC's findings in the notorious Judgment of 14 December 2017, No. 269 have been examined in previous contributions to this Special Issue, see esp. G. Repetto, *Judgment No. 269/2017 and dual preliminarity in the evolution of the jurisprudence of the Italian Constitutional Court*, and G. Martinico, *Dual preliminarity in comparative law*. On Judgment No. 269/2017, see, *inter alia*, A. Ruggeri, *Svolta della Consulta sulle questioni di diritto eurounitario assiologicamente pregnanti, attratte nell'orbita del sindacato accentrato di costituzionalità, pur se riguardanti norme dell'Unione self-executing (a margine di Corte cost. n. 269 del 2017)*, 3 Rivista di diritti comparati 234 (2017); C. Caruso, *La Corte costituzionale riprende il «cammino comunitario»: invito alla discussione sulla sentenza n. 269 del 2017*, Forum di Quaderni costituzionali (2017); G. Scaccia, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269/2017: presupposti teorici e problemi applicativi*, Forum di Quaderni Costituzionali (2018); L. S. Rossi, *La sentenza 269/2017 della Corte costituzionale italiana: obiter"creativi" (o distruttivi?) sul ruolo dei giudici italiani di fronte al diritto dell'Unione Europea*, 3 Federalismi.it 1 (2018); D. Tega, *La sentenza n. 269 del 2017 e il concorso di rimedi giurisdizionali costituzionali ed europei*, 1 Quaderni Costituzionali 197 (2018); D. Gallo, *Challenging EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure*, 25 Eur. Law J. 434 (2019). On the aftermath of this judgment, see, amongst others, D. Gallo, *Efficacia diretta del diritto UE, procedimento pregiudiziale e Corte Costituzionale: una lettura congiunta delle sentenze n. 269/2017 e 115/2018*, 1 Rivista AIC 159 (2019); G. Repetto, *Il significato europeo della più recente giurisprudenza della Corte Costituzionale sulla "doppia pregiudizialità" in materia di diritti fondamentali*, 1 Rivista AIC (2019); G. Martinico & G. Repetto, *Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath*, 15 Eur. Const. Law Rev. 731 (2019); C. Caruso, F. Medico, & A. Morrone (eds.), *Granital Revisited? L'integrazione europea attraverso il diritto giurisprudenziale* (2020); F. Donati, *La questione prioritaria di costituzionalità: presupposti e limiti*, 3 federalismi.it 1 (2021); S. Sciarra, *Lenti bifocali e parole comuni: antidoti all'accentramento nel giudizio di costituzionalità*, 3 federalismi.it 37 (2021).

269" model shaping the "triangular relationship"[2] between Italian ordinary courts, the ItCC, and the ECJ.

Some terminological preliminary remarks seem needed.

By dual preliminarity, we refer to those cases where national courts are confronted with doubts on the compatibility of some provisions applicable to the case at issue with both national constitution and EU law, thereby considering necessary to refer both a preliminary question to the ECJ and a question of constitutionality to the ItCC[3]. When these doubts arise before the very same national court (dual preliminarity "in the strict sense")[4], the issue of determining to which preliminary question shall be given priority (and thus raised first) also comes under the spotlight.

By "tempered 269"[5] model, we intend the scheme of triangular relationship amongst the Italian ordinary courts, the ItCC, and the ECJ – via questions of constitutional legitimacy and preliminary reference mechanism – laid down in the *obiter dictum* of the ItCC's judgment no 269/2017 as refined and adjusted in a series of subsequent decisions handed down – primarily – in 2019. Both the issues posed by the *obiter* and these refinements and adjustments will be outlined in Section 3 below.

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[2] L.S. Rossi, *Il "triangolo giurisdizionale" e la difficile applicazione della sentenza 269/2017 della Corte costituzionale italiana*, 16 federalismi.it 1 (2018); C. Amalfitano, *Il dialogo tra giudice comune, Corte di giustizia e Corte costituzionale dopo l'obiter dictum della sentenza n. 269/2017*, 2 Osservatorio sulle fonti 1 (2019); A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (2022).

[3] On dual preliminarity, see M. Cartabia, *Considerazioni sulla posizione del giudice comune di fronte a casi di «doppia pregiudizialità», comunitaria e costituzionale*, 120(5) Foro italiano 222 (1997); G. Martinico, *Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order*, 10 Int. J. Const. Law 871 (2012); G. Scaccia, *Corte costituzionale e doppia pregiudizialità: la priorità del giudizio incidentale oltre la Carta dei diritti?*, Forum di Quaderni Costituzionali (2020); G. Tesauro & P. De Pasquale, *La doppia pregiudizialità*, in F. Ferraro & C. Iannone (eds.), *Il rinvio pregiudiziale*, 289 (2020).

[4] Besides this scenario, we will also mention some cases in which the preliminary questions on the compatibility, on the one hand, with the national constitution, and, on the other, with EU law are raised by difference national courts. These cases can be named dual preliminarity "in the broad sense".

[5] This term is used by C. Amalfitano, Il dialogo tra giudice comune, Corte di giustizia e Corte costituzionale dopo l'obiter dictum della sentenza n. 269/2017, cit. at 2, 14-17.

Finally, by "approach", we are referring to the – explicit but even implicit – assessment on the compatibility of the tempered 269 model with EU law.

Most notably, our aim is to assess whether this model is compatible with EU law, and, should this be the case, to what extent and at which conditions it is so. To this end, particular attention will be paid to the well-established *Kirchberg* Court's case law that has shaped the "systemic principles"[6] of the EU legal system – such as primacy and direct effect – and the powers and obligations of national judges as common judges of EU law, with specific regard to the preliminary reference mechanism. Indeed, this case law has not only profoundly impacted on the relations between national and EU legal systems. It has also examined the compatibility of the domestic systems of constitutional justice with the EU legal order. Suffice it to recall, for instance, the rulings in *Simmenthal*[7], *Mecanarte*[8], *Melki*[9], and *A v B*[10].

The article unfolds as follows. First, we will briefly recall the *noyau dur* of the ECJ case law on the "magic triangle" of EU law: primacy, direct effect, preliminary reference (Section 2). It is precisely against this backdrop that we will outline the main issues posed by the ItCC's judgment No. 269/2017, and how those issues were progressively eased by subsequent case law (Section 3). Absent any explicit assessment by the ECJ, we will then consider the recent dialogue between this Court and the ItCC, with specific regard to the recent case concerning childbirth and maternity allowances (Section 4). The recent cases involving (blatant or disguised) restrictions to refer to the ECJ or apply EU law on Hungarian and Romanian judges show the relevance of the *noyau dur* and give new insights on the Court's approach to dual preliminarity, and, from a broader perspective to domestic systems of constitutional justice (Section 5). Some brief concluding remarks will be also offered (Section 6).

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[6] According to Tridimas' taxonomy, see T. Tridimas, *The General Principles of EU Law* 4-5 (2006).

[7] ECJ, Judgment of 9 March 1978, Case 106/77, *Simmenthal*.

[8] ECJ, Judgment of 27 June 1991, Case C-348/89, *Mecanarte*.

[9] ECJ, Judgment of 22 June 2010, Joined cases C-188/10 and C-189/10, *Melki and Abdeli*.

[10] ECJ, Judgment of 11 September 2014, Case C-112/13, *A v B and Others*.

2. The national judges as EU law judges and the Member States' competence

The cornerstones of the ECJ's case law on the Union role of national judges and courts have been laid down in *Simmenthal*, and then clarified over time by other well-known rulings, including *Mecanarte*, and *Melki*, and *A v B*[11]. Cases of dual preliminarity necessarily involve issues tackled by the ECJ in this case law, to which we will refer, jointly considered, as "*Melki* and *A v B* case law".

2.1. The European function of the national judges in the context of the preliminary ruling procedure

As regards the preliminary reference procedure, it is necessary to recall, firstly, that when national courts are faced with doubts as to the interpretation of a provision of EU law[12], they must have the possibility of referring the question of interpretation to the ECJ[13]. Hence, from a functional perspective, national courts are EU law courts[14]. This "possibility" turns, as is well known, into an "obligation" to make a reference for national courts of last instance, except for

[11] Although many other cases have contributed to shape the EU mandate of national judges, see, for instance, ECJ, Judgment of 5 April 2016, Case C-689/13, *Puligienica Facility Esco SpA (PFE) v Airgest SpA*.

[12] It is worth clarifying that a question of "interpretation" must be understood as not only concerning doubts as to the "literal meaning" to be attributed to a provision of EU law. On the contrary, this concept also encompasses the doubts as to the possibility for an EU law provision to have "direct effect" as well as questions as to the "compatibility" of national law with EU law. On the "polysemy" inherent in the term "interpretation", see P. Pescatore, *L'interpretation du droit communautaire et la doctrine de l'acte clair*, 49 Bulletin de l'association des juristes européens, 54 (1971); and A. Barav, *Some aspects of the preliminary ruling procedure in EEC Law*, 3 Eur. Law Rev., 3 (1977).

[13] Article 267(2) TFEU.

[14] J.T. Lang, *The Duties of National Courts under Community Constitutional Law*, 22 Eur. Law Rev. 3 (1997); M. Claes, *The National Courts' Mandate in the European Constitution* 58 (2006); R. Schütze, *European Union Law* 406 (2021). In the ECJ's case-law, see, e.g., ECJ, Opinion of 8 March 2011, Opinion 1/09, Agreement creating a Unified Patent Litigation System, paras. 66-69; ECJ, Judgment of 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas, para. 32 ff.

where one of the *Cilfit* conditions[15], as recently refined in *Consorzio Italian Management II*[16], is met.

Although the Court has rendered a number of other rulings in relation to national rules limiting the possibility of referral to it for a preliminary ruling[17], *Mecanarte*, *Melki* and *A v B* are a good example of cases where the ECJ has assessed the compatibility of such rules resulting from the Portuguese, French, and Austrian systems of constitutional justice, respectively. In *Mecanarte*, for instance, the ECJ found to be incompatible with EU law a national system prescribing a compulsory proceeding before the Portuguese Constitutional Court essentially preventing national courts from submitting preliminary references. Such incompatibility was grounded on the Court's established case law, which can be traced back to its findings in *Cilfit*. Most notably, it is held that national courts shall have a power of assessment as to both the "need" for and the "relevance" of referring a question to the ECJ[18]. Moreover, they enjoy the same discretion as to "when" to refer, *i.e.*, the procedural stage at which a question for a preliminary ruling should be submitted[19]. According to this case law, a reference for a preliminary ruling can be made at *any* procedural stage, thereby even *after* having raised a reference to the domestic Constitutional Court.

Second, it is well known that *any* national court doubting the validity of an EU law act – not only those of last instance, then – must refer the preliminary questions to the ECJ[20]. In such cases, an involvement of the domestic Constitutional Court must not preclude, in any event, national courts from complying with that duty to refer nor from taking interim measures to ensure the protection of the rights conferred by EU law at risk of prejudice[21].

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[15] ECJ, Judgment of 6 October 1982, Case C-561/19, *Cilfit*.
[16] ECJ, Judgment of 6 October 2021, Case C-561/19, *Consorzio Italian Management II*.
[17] See Section 5 below.
[18] In other terms on "whether or not" to refer, see *Mecanarte*, cit. at 8, para. 47.
[19] *Mecanarte*, cit. at 8, para. 48.
[20] ECJ, Judgment of 22 October 1987, Case 314/85, *Foto-Frost*.
[21] ECJ, Judgment of 21 February 1991, Joined cases C-143/88 and C-92/89, *Zuckerfabrik*, para. 22 ff.

2.2. The cornerstones of direct effect and primacy of EU law in the ECJ's case law

Firstly, it is only for the ECJ to acknowledge the possibility of having direct effect for an EU law provision, and this capacity may cover both rules of primary and secondary law.

Secondly, when confronted with an - alleged - incompatibility between national law and EU law, national courts[22] are under a duty to trying to solve that incompatibility by interpreting the former in line with the latter[23]. This duty of consistent interpretation must be carried out respecting the limits set by the ECJ, namely the principles of legal certainty and non-retroactivity[24] and the prohibition of *contra legem* interpretation[25]. Should the national court find impossible to interpret the national provision in conformity with EU law, it is nonetheless under an obligation to provide the legal protection which individuals derive from EU law, disapplying any provision of national legislation contrary to a provision of EU law having direct effect[26].

Indeed, thirdly, the disapplication of the national provision incompatible with EU law is only possible if the latter has direct effect[27].

Fourthly, the fulfilment of the three, traditional criteria of the direct effect test – according to which an EU law provision must be precise, clear and unconditional – does not *per se* ensure that the national court can disapply the incompatible national law provision. Indeed, in *Thelen Technopark*[28], the ECJ clarified that although a

[22] It is well known that a similar duty is imposed upon public administrations.
[23] ECJ, Judgment of 10 April 1984, Case 14/82, *Von Colson*, para. 26; ECJ, Judgment of 13 November 1990, Case C-106/89, *Marleasing*, para. 8; ECJ, Judgment of 5 October 2004, Joined Cases C-397/01 to C-403/01, *Pfeiffer*, para. 112.
[24] ECJ, Judgment of 8 October 1987, Case 80/86, *Kolpinghuis*, para. 13.
[25] ECJ, Judgment of 4 July 2006, Case C-212/04, *Adeneler*, para. 110.
[26] ECJ, Judgment of 19 April 2016, Case C-441/14, *Dansk Industri*, para. 35; ECJ, Judgment of 6 November 2018, Joined Cases C-569/16 and C-570/16, *Bauer & Broßonn*, para. 65, where the Court states that "[…] it should be recalled that the question whether a national provision must be disapplied in as much as it conflicts with EU law arises only if no interpretation of that provision which is compatible with EU law proves possible".
[27] ECJ, Judgment of 24 June 2019, Case C-573/17, *Popławski II*, para. 59 ff., esp. para. 62.
[28] ECJ, Judgment of 18 January 2022, Case C-261/20, *Thelen Technopark*.

directive provision met the above-mentioned criteria[29], that directly effective provision cannot lead to the disapplication of a national provision in a horizontal dispute. The prohibition of the horizontal direct effect of directives is nothing new and has been considered as the major "mental cramp" of the ECJ's case law on horizontal direct effect for some time now[30].

Fifthly, in *Simmenthal*, the ECJ held that it is incompatible with the requirements inherent in the very nature of EU law "any provision of a national legal system and any legislative, administrative or judicial practice" which prevents national court from "do[ing] everything necessary […] to set aside national legislative provisions which might prevent [EU] rules from having full force and effect"[31]. Indeed, that national court "is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means"[32]. It is worth pointing out, however, that this duty imposed on domestic courts does not preclude a referral to the national Constitutional Court as well. The Court's findings in *Simmenthal* prohibits only to reserve exclusively to the Constitutional Court the power to assess the unlawfulness of domestic rules for conflict with EU law[33], as was the case in *Frontini*[34] and *ICIC*[35].

Overall, the *noyau dur* of the ECJ's established case law consists of three conditions summed up in *Melki* and *A v B*[36]. First, national

[29] The impact of non-technical elements – *i.e.*, aspects not linked the said three criteria – on the possibility of having "direct effect" for an EU law provision had been already stressed in the literature, see P. Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 40 Eur. Law Rev. 135 (2015); S. Prechal, *Directives in EC Law* 250-253 (2005).

[30] O. Pollicino, *L'efficacia orizzontale dei diritti fondamentali previsti dalla Carta – La giurisprudenza della Corte di giustizia in materia di digital privacy come osservatorio privilegiato*, 3 MediaLaws - Rivista di diritto dei media 138 (2018).

[31] *Simmenthal*, cit. at 7, para. 22.

[32] *Simmenthal*, cit. at 7, para. 24.

[33] *Simmenthal*, cit. at 7, para. 23.

[34] ItCC, Judgment of 27 December 1973, No. 183.

[35] ItCC, Judgment of 8 October 1975, No. 232.

[36] See *Melki*, cit. at 9, para. 45 ff.; *A v B*, cit. at 10, para. 38 ff.

courts shall enjoy the power to refer a question for a preliminary ruling at any time or stage of the proceedings at which it considers it appropriate, *i.e.* even after a reference to the domestic Constitutional Court, if any.[37] Second, they shall enjoy the power to take all necessary interim measures to ensure the protection of the rights conferred by EU law at risk of prejudice. Third, national courts shall enjoy the power to disapply the national provisions it considers in irreconcilable conflict with EU law[38], even at the end of proceedings before the national Constitutional Court, if any, and irrespective of the outcome thereof.

3. The ItCC's Judgment No. 269/2017, the main issues it posed and how they were progressively eased

To illustrate why the refinements and adjustments to the *obiter dictum* have defused the risk of conflict with the said *noyau dur*, the necessary point of departure is *Granital*[39], which – prior to judgment No. 269/2017 – had fashioned the functioning of the triangular relationship between Italian ordinary courts, the ItCC and the ECJ for more than thirty years. With *Granital*, the ItCC's case law drew closer – and realigned the Italian legal system – to the findings of the ECJ in *Simmenthal*: in essence, Italian ordinary courts must immediately set aside national law provisions which were found to be incompatible with directly applicable EU law norms or EU law provisions having direct effect. "Immediately" means that no prior involvement of the ItCC was required. According to such "*Granital* model", such involvement is needed in two main cases: where the EU law provisions has not direct effect (and the incompatibility cannot be overcome by means of consistent interpretation); and, where the application of the EU law is considered to impinge upon the supreme constitutional principle of the Italian legal order (counter-limits scenario)[40].

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[37] This principle has been later confirmed by ECJ, Judgment of 4 June 2015, Case C-5/14, *Kernkraftwerke Lippe-Ems*, paras. 29-38.

[38] This being the case when consistent interpretation cannot serve the purpose of realigning the interpretation of national law with EU law.

[39] ItCC, Judgment of 27 December 1984, No. 170.

[40] This "doctrine" has been elaborated by the ItCC in *Frontini*, cit. at 34, and is considered to be *de facto* applied in the well-known *Taricco* saga. On this well-known

3.1. The ItCC's *obiter dictum* in Judgment No. 269/2017

It is against this backdrop that the notorious *obiter*[41] – and the refinements occurred in the following years – can be fully appreciated.

Most notably, the ItCC held that "where a law is the object of doubts concerning the rights enshrined in the Italian Constitution or those guaranteed by the [Charter] in those contexts where EU law applies," the national court *must first* raise the question of constitutionality[42]. This marked a complete "reversal" in cases of dual preliminarity[43] *vis-à-vis* its previous, well-established case law, according to which preliminary questions on EU law have – and shall have – "functional and juridical precedence" over the questions of constitutionality[44]. Such order was deemed to ensure consistency of the ItCC's decisions with the ECJ's case law[45] at a time during which,

'saga', see, *inter alia*, A. Bernardi & C. Cupelli (eds.), *Il caso Taricco e il dialogo tra le Corti. L'ordinanza 24/2017 della Corte costituzionale* (2017); F. Viganò, *Supremacy of EU Law vs. (Constitutional) National Identity: A New Challenge for the Court of Justice from the Italian Constitutional Court*, 7 Eur. Crim. Law Rev. 103 (2017); C. Amalfitano (eds.), *Primato del diritto dell'Unione europea e controlimiti alla prova della "Saga Taricco"* (2018); G. Piccirilli, *The 'Taricco Saga': the Italian Constitutional Court continues its European journey*, 14 Eur. Const. Law Rev. 814 (2018).

[41] Although being – by its very nature – "not binding", this paragraph undoubtedly lies among the most commented passages of the entire body of ItCC's case-law, see, *inter alia*, the contributions cit. at 1 and 3.

[42] Judgment No. 269/2017, cit. at 1, point 5.2. of the conclusions on points of law.

[43] G. Scaccia, L'inversione della "doppia pregiudiziale", cit. at 1.

[44] See ItCC, Order of 28 December 2006, No. 454; and ItCC, Judgment of 13 July 2007, No. 284, point 3. of the conclusions on points of law, which use the Italian wording "*priorità logica e giuridica*". However, the inadmissibility of questions of constitutionality for lack of "relevance" in cases of dual preliminarity (in the strict sense) where no prior involvement of Luxembourg had been sought is based on the duty imposed upon national courts by Article 23 of Law No. 87 of 11 March 1953 (Rules on the establishment and the functioning of the Constitutional Court) and can be traced back to several decisions handed down in the Nineties, see ItCC, Orders of 26 March 1990, No. 144; of 30 July 1992, No. 391; of 29 December 1995, No. 536; and of 26 July 1996, No. 319.

[45] F. Ghera, *Pregiudiziale comunitaria, pregiudiziale costituzionale e valore di precedente delle sentenze interpretative della Corte di giustizia*, Giur. Cost. 1193 (2000).

prior to the U-turn made in 2008[46] in 2013[47], the Court excluded itself from the preliminary ruling procedure[48].

In the *obiter*, the ItCC also added that in cases where the national provisions are found to be compatible with the Constitution, national courts would have the power to set aside those provisions only if they were considered incompatible with EU law "on other grounds"[49].

Amongst the motivations behind such profound shift lie[50]: a) the "typically constitutional stamp" of the Charter positing the need for an *erga omnes* intervention of the ItCC, in accordance with the principle of centralised system of the constitutional review of laws at the centre of the Italian constitutional structure[51]; and, b) the need to enhance the dialogue between national Constitutional Courts and the ECJ[52].

3.2. The *obiter dictum* "on trial": The refinements and adjustments in the following ItCC's case law

Three adjustments to the *obiter dictum* are directly relevant to this article and thus deserved to be briefly outlined[53].

As to the first one, in judgment No. 20/2019, the ItCC affirmed that - in cases of dual preliminarity – ordinary courts have merely the

[46] ItCC, Order of 12 February 2008, no. 103, which resulted in Case C-169/08.
[47] On occasion of an incidental procedure, see ItCC, Order of 18 July 2013, No. 207, which resulted in Case C-418/13. For an overview of the incidental procedure before the ItCC, see, *inter alia*, M. Cartabia & N. Lupo, *The Constitution of Italy: A Contextual Analysis* 199 (2022).
[48] Such self-imposed exclusion was based on the denial of being a "court or tribunal of a Member State" under Article 267 TFEU, see ItCC, Judgment of 23 March 1960, No. 13; ItCC, Order of 29 December 1995, No. 536. On this case-law and for further references on the possibility for the ItCC to directly raise a reference under Article 267 TFEU, see C. Amalfitano, *Il dialogo tra giudice comune, Corte di giustizia e Corte costituzionale dopo l'obiter dictum della sentenza n. 269/2017*, cit. at 2.
[49] Judgment No. 269/2017, cit. at 1, point 5.2. of the conclusions on points of law.
[50] On the reasons behind this change of direction, see G. Repetto, *Judgment No. 269/2017 and dual preliminarity in the evolution of the jurisprudence of the Italian Constitutional Court*, cit. at 1.
[51] *Ibid*. This principle is enshrined in Article 134 of the Italian Constitution.
[52] Ibid.
[53] On the ItCC's case law following judgment No. 269/2017, see G. Repetto, Judgment No. 269/2017 and dual preliminarity in the evolution of the jurisprudence of the Italian Constitutional Court, cit. at 1.

"opportunity" to firstly refer to the Constitutional Court[54]. They are only "invited", not "obliged", to firstly raise a question of constitutionality. Following this adjustment, therefore, national courts remain free to raise, in the first instance, a preliminary question under Article 267 TFEU even when confronted with cases of dual preliminarity concerning fundamental rights. In so doing, the "meshes" of the relevance criterion for the admissibility of the questions of constitutionality have been widened *vis-à-vis* the previous ItCC's case law[55], thereby extending the situations of dual preliminary, in which national courts must decide whether to raise a preliminary question or a question of constitutional legitimacy.

The second adjustment made in the same judgment concerns the Italian ordinary courts' possibility – even after having raised a question of constitutionality – to refer to the ECJ "*any* preliminary question they deem necessary"[56], thus even in relation to the same legislative provisions that had been the subject of the judicial review before the Constitutional Court[57].

The third refinement concerns the "power" of disapplication: in judgment No. 63/2019, the ItCC stressed that raising a question of constitutionality does not "prejudice […] the power of ordinary courts – if the prerequisites are satisfied – not to apply, in the specific case of

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[54] ItCC, Judgment of 21 February 2019 No. 20, point 2.1. of the conclusions on points of law.

[55] C. Amalfitano, *Il rapporto tra rinvio pregiudiziale alla Corte di giustizia e rimessione alla Consulta e tra disapplicazione e rimessione alla luce della giurisprudenza "comunitaria" e costituzionale*, 1 Rivista AIC 296 (2020); G. Amoroso, *Le sentenze della Corte di giustizia sulle ferie del lavoratore: rinvio pregiudiziale interpretativo versus questione incidentale di costituzionalità*, 10 federalismi.it (2019). See also A. Barbera, *Corte costituzionale e giudici di fronte ai «vincoli comunitari»: una ridefinizione dei confini?*, Quad. cost. 335 (2007), where the Author suggests that assessing the compatibility of national law with general principles of EU law is a constitutional adjudication function that shall be reserved to the ItCC.

[56] Judgment No. 20/2019, cit. at 54, point 2.3. of the conclusions on points of law.

[57] *Ibid*. See *Kernkraftwerke Lippe-Ems*, cit. at 37, paras. 29-38, where the Court states that national legislation can never call into question the right/obligation to make a reference for a preliminary ruling under Article 267 TFEU even in relation to the same national legislative provisions that has undergone a scrutiny by the national Constitutional Court. In this vein, see C. Amalfitano, *Il dialogo tra giudice comune, Corte di giustizia e Corte costituzionale dopo l'obiter dictum della sentenza n. 269/2017*, cit. at 2, 9-10.

which they are seized, the domestic provision in conflict with the rights enshrined in the Charter"[58] or – it shall be added – in any other piece of primary and secondary EU law[59].

Furthermore, where the direct effect of an EU provision cannot be doubted – for instance, because there is an established Luxembourg case law –, even the ItCC conceives the disapplication as an actual "duty"[60], as confirmed in judgment No. 67/2022[61]. Here, in respect to family unit allowance, the questions of constitutionality submitted by the Supreme Court of Cassation were considered inadmissible for lack of "relevance" due to the direct (vertical) effect acknowledged by the ECJ[62] to the prohibition of discrimination of third-country nationals[63] *vis-à-vis* citizens of the Member States where they legally work, enshrined in Articles 11(1)(d) of Directive 2003/109/EC and 12(1)(e) of Directive 2011/98/EU.

4. The post-269's impact on the dialogue between the ECJ and the ItCC: Between "first" and "last" word

4.1. Any clue on the soundness of the tempered-269 model from the *O.D. and Others v INPS* case?

In respect of the above, a sort of intermediate conclusion can be drawn: the tempered 269 model does not seem to be at odds with the *noyau dur* of the EU legal order as national courts remain free both to refer to the ECJ and to disapply incompatible national law.

Indeed, although a direct, "explicit" scrutiny by the ECJ with respect to this model has not been carried out yet, we argue that the

[58] ItCC, Judgment of 21 March 2019, No. 63, point 4.3. of the conclusions on points of law.
[59] Judgment No. 20/2019, cit. at 54, point 2.2. of the conclusions on points of law.
[60] Cf. ItCC, Order of 10 May 2019, No. 117, point 2. of the conclusions on points of law.
[61] ItCC, Judgment of 11 March 2022, No. 67.
[62] See ECJ, Judgment of 25 November 2020, Case C-302/19, *Istituto nazionale della previdenza sociale v WS*; and ECJ, Judgment of 25 November 2020, Case C-303/19, *Istituto nazionale della previdenza sociale v VR*.
[63] ItCC, Judgment No. 67/2022, cit. at 61, points 10-12. of the conclusions on points of law.

recent case on childbirth and maternity allowances confirms this conclusion.

There is no need to explore in detail the legal issues underlying the case. Suffice it to recall the main procedural steps, namely: the questions of constitutionality submitted by the Supreme Court of Cassation to the ItCC in June 2019[64]; the preliminary questions referred to the *Kirchberg* Court at the end of July 2020[65]; the ruling rendered by the Grand Chamber of the ECJ on 2 September 2021[66]; and, finally, the judgment No. 54 rendered by the ItCC in March 2022[67].

The reason why this case can be considered as an implicit "green light" to the tempered 269 model by the ECJ is twofold.

The first argument can be drawn from the passage of the ECJ's judgment that analyses the admissibility of the preliminary reference questions, where the references made by the ItCC are endorsed and acknowledged with a sort of "presumption of relevance"[68]. More precisely, with a remark that finds no echo in its previous case law[69], the *Kirchberg* Court stresses the specific constitutional role performed by the ItCC, which "is not the court called upon to rule directly in the disputes in the main proceedings, but rather a constitutional court to which a question of pure law has been referred, independent of the facts raised before the court adjudicating on the substance of the case. It must answer that question in respect both of the rules of national law and of the rules of EU law, in order to provide not only to its own referring court but also to all the Italian courts a decision having *erga omnes* effect, which those courts must apply in any relevant dispute upon which they may be called to adjudicate"[70].

Albeit not explicitly, this passage can be considered as an endorsement of the tempered 269 model since it eases the access to the

[64] Italian Court of Cassation, Orders of 17 June 2019, Nos. 175, 177-182, and 188-190.
[65] ItCC, Order of 30 July 2020, No. 182.
[66] ECJ, Judgment of 2 September 2021, Case C-350/20, O.D. and Others v Istituto nazionale della previdenza sociale (INPS).
[67] ItCC, Judgment of 4 March 2022, No. 54.
[68] S. Sciarra, *First and Last Word: Can Constitutional Courts and the CJEU Speak Common Words?*, 3 Eurojus.it 74 (2022).
[69] D. Gallo, *Migrants' Social Rights in the Dialogue between the ECJ and the Italian Constitutional Court: Long Live Article 267 TFEU!*, EU Law Live (8 September 2021).
[70] *O.D. and Others v INPS*, cit. at 66, para. 40.

preliminary ruling procedure, thereby enhancing the EU role of the ItCC while respecting its prerogatives in the Italian legal order.

A second argument, even more subtle, can be added. Although the ItCC's request for the accelerated procedure under to Article 105(1) of the Rules of Procedure of the Court of Justice was not granted and notwithstanding the normal slowdown in its activities in August, the ECJ's preliminary ruling has been rendered in only 13 months[71]. This length is significantly below the average duration of the preliminary ruling procedures in 2020 and in 2021, which was 15.8 and 16.7 months, respectively[72]. The fact that the ECJ has provided the ItCC with the preliminary ruling in the shortest possible time could indicate its intention to contribute to ensuring the effectiveness and immediacy of the protection of rights granted by EU law, which – under the tempered 269 model – cannot occur before the ItCC's and the ordinary court's decisions. In other terms, the ECJ tries to contribute for its own part to ensuring that the final decision in the main proceeding is taken within a reasonable timeframe. Indeed, the lengthening of procedural timeframes resulting from this model (where both the ItCC and the ECJ are involved) is of some concern for ordinary courts – and understandably so – and can have an impact on their decision to refer to the ECJ or to the ItCC. In this respect, the order resulting from the pre-269 established case law – described in Section 3.1 above and determined by the self-imposed impossibility for the ItCC to use Article 267 TFEU – better satisfied the interests of "procedural economy".

4.2. What the "first word" is, and what this means for the triangular relationship between ordinary national courts, the ItCC, and the ECJ: Unresolved issues

In summary, thanks to its specific constitutional role and authoritative standing, the involvement of the ItCC in the direct dialogue with the ECJ can contribute to fixing the "structure" within

[71] Indeed, the reference for preliminary ruling was raised at the end of July 2020, and the ECJ's judgment has been issued at the beginning of September 2021.
[72] See CJEU, Annual Report 2020 – Judicial Activity 14 (2021); CJEU, Annual Report 2021 – Judicial Activity 227 (2022).

which that dialogue will take place[73]. As the *Taricco* saga shows, the formulation of the preliminary ruling questions can also render easier for the *Kirchberg* Court to become aware of peculiarities and constitutional traditions of the national legal order, if any, which are not always easily noticeable from Luxembourg[74]. As the *O.D. and Others v INPS* case confirms, the ECJ does not oppose the prior involvement of national Constitutional Courts – and to some extent seems to even appreciate their "first word" –, provided that, in any case, the three conditions set in *Melki* and *A v B* are fulfilled[75].

At this point of the analysis, it is possible to make a first point: five years after the ItCC's judgment No. 269/2017, for the reasons stated so far, the main issues raised by its notorious *obiter dictum* seem thus to have been overcome. Nonetheless, the issue of the triangular relationship between ordinary national courts, ItCC and ECJ is certainly not settled once for all. Quite the contrary, it rather seems a "work in progress". Indeed, the actual configuration of the relationships between the EU and national legal orders and between the centralised system of the constitutional review in the hands of the ItCC and the widespread disapplication/non-application of incompatible national law imposed by ECJ's case law still represents an open issue, but so was even after *Granital*[76]. This is the reason why the role of doctrinal reflection in this respect cannot certainly be said to be over.

The first consequence of what we have mentioned so far is the renewed centrality of the ItCC in the dialogue with the ECJ and in the EU system of fundamental rights adjudication. The impact on the said

[73] C. Amalfitano, *Il rapporto tra rinvio pregiudiziale alla Corte di giustizia e rimessione alla Consulta e tra disapplicazione e rimessione alla luce della giurisprudenza "comunitaria" e costituzionale*, cit. at 55, 298-299.

[74] C. Amalfitano, Il dialogo tra giudice comune, Corte di giustizia e Corte costituzionale dopo l'obiter dictum della sentenza n. 269/2017, cit. at 2, 23.

[75] See Section 2.2 above.

[76] Although the predominant narrative is different, it cannot be overlooked that ItCC's case-law following *Granital* clarified several important aspects of the findings in that ruling, such as the fact that the concept of "directly effective Community law" shall be deemed to encompass not only regulations by any EU law provisions so considered by the ECJ, including directive provisions, see ItCC, Judgments of 23 April 1985, No. 113; of 11 July 1989, No. 389; of 2 February 1990, No. 64; of 18 April 1991, No. 168; and of 16 June 1995, No. 249.

triangular relationship is thus evident, suffice it to think that with order Nos. 216 and 217 of November 2021[77], the ItCC raised its fifth and sixth references under Article 267 TFEU[78], respectively. This dialogue is conducted in a spirit of loyal and constructive cooperation[79], already evoked in judgment No. 269/2017[80]: the ItCC proposes its understanding of the relevant Charter provisions taking into consideration the constitutional traditions common to the Member States, thereby contributing to the strengthening of the EU system of protection of fundamental rights[81]. The order Nos. 117/2019 and 182/2020 – resulting in the ECJ's judgments in *D.B. v Consob*[82] and *O.D. and Others v INPS* are a clear illustration of this fruitful collaboration, and one may expect the same as regards the pending cases followings the fifth and sixth references just mentioned[83].

The other side of the coin, however, is the following: it is still not clear from the perspective of ordinary courts how they should proceed where they are confronted with a national law that is incompatible with an EU law norm that has direct effect. On the one hand, should the norm not be devoted to the protection of a fundamental rights, under the *Granital* model, they are expected to immediately set aside the conflicting national provisions. On the other, when EU fundamental rights provisions having direct effect are at stake, according to the 269-temperated model, the choice about

[77] On these references, see, inter alia, S. Barbieri, *La «restaurazione» del giudice penale e la «garanzia» della consulta: in margine alle ordinanze n. 216 e n. 217 del 2021*, SIDIBlog (7 December 2021); C. Amalfitano & M. Aranci, *Mandato di arresto europeo e due nuove occasioni di dialogo tra corte costituzionale e corte di giustizia. Nota a Corte cost., ordd. 18 novembre 2021, nn. 216 e 217, Pres. Coraggio, Red. Viganò*, 1 Sistema Penale 5 (2022).
[78] Fifth and sixth references in absolute terms, the previous references being ItCC, Order No. 207/2013, cit. at 47; Order of 26 January 2017, No. 24; Order No. 117/2019, cit. at 60; Order No. 182/2020, cit. at 65. While, if one considers the period following Judgment No. 269/2017, these references amount to the third and fourth ones, respectively.
[79] Order No. 182/2020, cit. at 65, point 3.1. of the conclusions on points of law.
[80] Judgment No. 269/2017, cit. at 1, point 5.2. of the conclusions on points of law.
[81] Judgment No. 20/2019, cit. at 54, point 2.13. of the conclusions on points of law, Order No. 117/2019, cit. at 60, point 2. of the conclusions on points of law.
[82] ECJ, Judgment of 2 February 2021, Case C-481/19, DB v Commissione Nazionale per le Società e la Borsa (Consob).
[83] Cases C-699/2021 and C-700/2021.

whether to first refer to the ECJ or the ItCC is left in the hands of domestic courts in the absence of any "guidelines". In this respect, it has been argued that this choice shall be based on a case-by-case analysis, centred on the peculiarities of the proceeding before the national court and of the legal issues underlying that case[84]. Conversely, other authors have proposed as a sort of guiding criterion the "proximity principle": the question of constitutionality should be preferred when at stake are areas of law where there is no EU harmonisation, so that national legislators still enjoy some margins of discretion[85].

As of today, however, the actual practice of the ItCC, on a closer look, offers little help. Consider the "inadmissibility" of the questions of constitutional legitimacy stated in judgment No. 67/2022, mentioned above[86]. In that case, the referring court (the Cassation Court) did not invoke as parameters for the constitutional review any fundamental right protected by the Charter – but merely referred to Articles 11 and 117 of the Constitution in relation to the provisions of the said directives, namely Articles 11(1)(d) of Directive 2003/109/EC and 12(1)(e) of Directive 2011/98/EU. This aspect has arguably play a role in the declaration of inadmissibility since it has been stressed by ItCC itself[87]. Therefore, from a formalist viewpoint, this case does not represent an actual case of dual preliminarity[88], and the inadmissibility can be considered as resulting from the *Granital* model.

One might wonder whether a different approach could have been preferable. Indeed, the ItCC could have certainly supplemented the parameters of the constitutional review invoked by the Cassation Court with Article 34 of the Charter, and then ruled on the substance

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[84] C. Amalfitano, *Il rapporto tra rinvio pregiudiziale alla Corte di giustizia e rimessione alla Consulta e tra disapplicazione e rimessione alla luce della giurisprudenza "comunitaria" e costituzionale*, cit. at 55, 303-304.

[85] R. Mastroianni, *Da Taricco a Bolognesi passando per la Ceramica Sant'Agostino: il difficile cammino verso una nuova sistemazione del rapporto tra Carte e Corti*, 1 Osservatorio sulle fonti 35 (2018); R. Mastroianni, *Sui rapporti tra Carte e Corti: nuovi sviluppi nella ricerca di un sistema rapido ed efficace di tutela dei diritti fondamentali*, 5 European Papers 515 (2020).

[86] See Section 3.2 above.

[87] Judgment No. 67/2022, cit. at 61, point 1.2.1. of the conclusions on points of law.

[88] Judgment No. 67/2022, cit. at 61, point 4.2. of the whereas.

of the question of constitutional legitimacy according to the 269-tempered model. In so doing, the ItCC could have easily provided the ECJ's findings with actual *erga omnes* effects. We hold the view that – in the case at stake – the declaration of inadmissibility better served the purpose of a cooperative dialogue between the two Courts. Indeed, ruling on the substance could have delivered the wrong message to ordinary courts: in essence, "do not set aside incompatible national provisions, raise, instead, a question of constitutionality". In the long run, such approach would have liable to transform the character of EU law into a sub-constitutional parameter of judicial review, thereby jeopardizing the autonomy of that legal order[89].

Nonetheless, even after a preliminary ruling rendered by the ECJ and even if the direct effect of an EU law provision (other than the Charter) is undoubted, it is not so difficult to imagine that reasons of procedural economy and legal certainty could induce the ItCC to change its approach and consider itself the "judge, albeit of constitutional nature, in charge of settling the dispute", thereby overcoming the issue of inadmissibility for lack of relevance. In other terms, this change would extend the scope of application of the tempered-269 model to questions of constitutional legitimacy *not directly* concerning the Charter but rather focusing on rights protected in secondary law or treaty provisions somewhat connected to the Charter. Indeed, the relationship between EU primary and secondary law is far from clear, and there are cases in which these two are inextricably linked to each other[90], and it is no secret that several fundamental rights protected by the Charter are also enshrined in the Treaties[91]. This is another reason why the "axiological criterion"

[89] A. Tizzano, *Sui rapporti tra giurisdizioni in Europa*, 1 Il Diritto dell'Unione europea 17 (2019); P. Mori, *La Carta UE dei diritti fondamentali fa gola o fa paura?*, Giustizia insieme (2019).

[90] See, for instance, Judgment No. 20/2019, cit. at 54. On the relationship between primary and secondary law, see L.S. Rossi, *The relationship between the EU Charter of Fundamental Rights and Directives in horizontal situations*, EU Law Analysis (25 February 2019); P. Syrpis, *The relationship between primary and secondary law in the EU*, 52 Common Mark. Law Rev. 461 (2015).

[91] This is explicitly acknoledged in Article 52 (2) of the Charter, which reads: "Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties".

resulting from the 269 model (the fundamental right character of the EU provision at stake) is not convincing.

Should the ItCC opt for taking a step in this direction, the principles set out in *Melki* and *A v B* seem not under treath. Indeed, if question of constitutional legitimacy turns to be founded, the referring judge will not be able to apply the national norm and – we believe – the correct and uniform application of EU law would benefit from the *erga omnes* effects ensured by the ItCC's decision.

4.3. Recent trends in the ECJ's case law deserving attention

On top of this, the reflections on the national approach towards dual preliminarity cannot ignore some recent trends registered in the ECJ's case law.

To begin with, when reflecting on the two models (*Granital* and tempered 269), one must consider that the process of "constitutionalisation" of the EU legal order[92] tends to favour the application of the second model. Indeed, the binding character acquired by the Charter with Lisbon has triggered a sharp increase in the number of rulings involving fundamental rights protected by the Charter, which have increased from 27 to 356 over the first 10-year period of its application[93].

Secondly, besides the clarifications rendered in *Popławski II* and *Thelen Technopark*, the ECJ's case law on direct effect, primacy, and disapplication in cases involving fundamental rights continues to provide plenty of food for thought to academia. Suffice it to recall the recent Grand Chamber's judgment of 8 March 2022 in *NE II*[94], concerning the direct effect of the principle of proportionality of penalties set out in Article 20 of Directive 2014/67/EU[95], and now enshrined also in Article 49(3) of the Charter.

[92] Highlighted by the ItCC in the *obiter dictum*, see Section 3.1 above.

[93] European Commission, *2018 Report on the application of the EU Charter of Fundamental Rights*, COM (2019)257 29 (2019). Please note that this is the last report providing the public with the data mentioned in the text.

[94] ECJ, Judgment of 8 March 2022, Case C-205/20, *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld*.

[95] The very same principle of proportionality of penalties is also enshrined in several other – not "criminal law" – directives.

The ECJ's intent to ensure the protection of fundamental rights is self-evident from *NE II*[96] and certainly worthy of praise. This judgment raises the level of protection of individuals and, via the disapplication of the part of national provisions that imposes a disproportionate penalty, ensures the immediacy of that protection. Nonetheless, the consequences for national legal orders of this judgment[97] are serious: according to the Court's findings, when a dispute falls within the scope of EU law, individuals can directly rely upon the said principle before national courts to determine the non-application of national law to the extent that it imposes "disproportionate sanctions", and only to the extent that the national judge deems them to be "disproportionate".

It should also be noted that, in *NE II*, the Court endorsed a "surgical" disapplication of the provision of national criminal law, which can be disapplied by the national court only to the extent is incompatible with the principle of proportionality of penalties set out in Article 20 of Directive 2014/67/EU. Although, contrary to *Taricco*, the disapplication envisaged here is in *bonam partem* (*i.e.*, favouring the individual), those findings raise some concerns as to the respect of several principles forming the backbone of the value of the "rule of law", including the principle of legality, the principle of legal certainty and the principle of the separation of powers[98].

Since the ECJ's ruling in *NE II* concerned the direct effect of Article 20 of the Directive – not directly the Charter rights –, based on what we have seen in Sections 3 and 4.2. above, in Italy, similar cases risk to be treated according to the *Granital* model: ordinary national judges will be required to immediately set aside any national provision

[96] But there are several other recent judgments that are underlain by the same intent, see, for example, ECJ, Judgment of 16 July 2020, Case C-129/19, *Presidenza del Consiglio dei Ministri v BV*, which concerns compensation to victims of violent intentional crimes.

[97] On this judgment, see F. Viganò, *La proporzionalità della pena tra diritto costituzionale italiano e diritto dell'Unione europea: sull'effetto diretto dell'art. 49, paragrafo 3, della Carta alla luce di una recentissima sentenza della Corte di giustizia*, Sistema Penale (26 April 2022).

[98] Cf. Case C-205/20, *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld*, Opinion of AG Bobek delivered on 23 September 2021, para. 92 ff.; Case C-40/21, *T.A.C. v ANI*, Opinion of AG Emiliou delivered on 10 November 2022, paras. 36-79.

– to the extent it is – incompatible with that provision to the detriment of the "relevance" (and thus the admissibility) of a question of constitutionality in that regard.

Conversely, we hold the view that such cases – involving the re-determination of penalties based on the disapplication in *bonam partem* of national criminal law provisions – are examples of cases where the ItCC's involvement can be helpful, and even "required"[99]. This sort of extension of the 269 tempered model can be carried out by relaxing of the interpretation of the relevance criterion, thus allowing the national courts to raise a question of constitutionality[100]. Given that, during the proceeding before the ItCC, the penalty is not applied, the immediate non-application of the national provision incompatible with EU law would be guaranteed[101], and the conditions summed up in *Melki* and *A v B* would be complied with. In addition to reasons of legal certainty and procedural economy that any *erga omnes* decision entails, in situations such as that at issue in *NE II*, the need for full compliance with principle of legality and the principle of the separation of powers ought to urge the ItCC to reconsider its approach to relevance/admissibility.

5. What really matters to the ECJ and why: Insights from the recent rule of law case law

[99] C. Amalfitano, *Il dialogo tra giudice comune, Corte di giustizia e Corte costituzionale dopo l'obiter dictum della sentenza n. 269/2017*, cit. at 2, 19-20. Another way to remedy – with erga omnes effects – an incompatibility between the Italian legal order and EU law, once acknowledged by the ECJ, would be by means of «European Law» («Legge europea») pursuant to Article 30(3) of Law No. 234 of 24 December 2012.

[100] Such approach seems already envisaged by the ItCC in point 2.2.2. of the conclusions on points of law of Judgment of 16 June 2022, No. 149, where it is stated that "the possible direct effect in the Member States' legal systems of the rights enshrined in the Charter (and the rules of secondary legislation implementing those rights) does not render inadmissible questions of constitutional legitimacy exposing a conflict between a domestic provision and these rights, which to a large extent overlap with the principles and rights protected by the Italian Constitution itself".

[101] Cf. F. Viganò, La proporzionalità della pena tra diritto costituzionale italiano e diritto dell'Unione europea: sull'effetto diretto dell'art. 49, paragrafo 3, della Carta alla luce di una recentissima sentenza della Corte di giustizia, cit. at 97, 17-19.

5.1. Preliminary remarks: distinguishing and interesting features of the rule of law crisis case law

Considering the foregoing, the involvement of the national Constitutional Courts is certainly not precluded by EU law, and it can even be an opportune path to follow in some cases. On the contrary, EU law prohibits any restriction – imposed by reason of such involvement – on the "room for manoeuvre" of national judges as to the possibility of raising a question for a preliminary ruling and of departing from the ruling rendered by the Constitutional Court.

In this respect, some interesting insights emerge from the recent ECJ's case law on Hungarian and Romanian national legal provisions restricting, in various ways, the performing by national courts of their EU mandate. Most notably, we will refer, in relation to the Hungarian legal system, to the Court's ruling in *IS*[102]. As to the Romanian legal system, instead, reference will be made to the judgments in *Asociația*[103], *Euro Box Promotion and Others*[104], and, more extensively, *RS*[105].

Before proceeding with the analysis, however, some preliminary remarks on the relationship between this recent case law, which forms part of what is commonly referred to by the expression "rule of law crisis"[106], and the first part of the analysis seem to be necessary.

Firstly, it must be stressed that the in-depth examination of the rule of law crisis falls well beyond the purposes of this article. Therefore, the ECJ's case law on the independence of national judges as functionally judges of the Union under Articles 19 TEU and 47 of the Charter will not be examined.

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[102] ECJ, Judgment of 23 November 2021, Case C-564/19, *Criminal proceedings against IS*.

[103] ECJ, Judgment of 18 May 2021, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' and Others v Inspecția Judiciară and Others*.

[104] ECJ, Judgment of 21 December 2021, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*.

[105] ECJ, Judgment of 22 February 2022, Case C-430/21, *Proceedings brought by RS*.

[106] For an analysis of IS from this perspective, see A. Correra, *Il giudice nazionale deve disattendere qualsiasi prassi giurisdizionale interna che pregiudichi la sua facoltà di interrogare la Corte di giustizia*, BlogDUE (12 January 2022).

Secondly – and consequently –, insofar as this broader issue underlies the abovementioned judgments, it cannot be overlooked that they are not cases of "dual preliminarity" in the strict sense. Moreover, contrary to the case law analysed in Section 2, these recent cases are characterised by the need to ensure the independence of national judges and by the questioning – or, sometimes, by an actual denial[107] – of the principle of primacy of Union law[108], which is difficult to consider as part of the "normal" dialogue between Constitutional/Supreme Courts of the Member States and the ECJ. In this respect, suffice it to briefly recall two recent developments. The first development is the notorious ruling rendered by the Polish Constitutional Tribunal on 7 October 2021,[109] which has – *inter alia* – asserted the "primacy" of the national Constitution over EU law and that has been swiftly backed by Victor Orbán[110]. The second development concerns the Romanian Constitutional Court (RCC)'s ruling of 8 June 2021 – according to which a national court would not be competent to examine the compatibility with EU law of a national rule considered to be compliant with the national constitution, and its press release of 23 December 2021 declaring the ECJ's ruling in *Euro Box Promotion and Others* not to be applicable in Romania[111].

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[107] R. Palladino, A. Festa, *Il primato del diritto dell'Unione europea nei dissoi logoi tra la Corte di giustizia e le Alte Corti ungherese, polacca e rumena. Questioni sullo Stato di diritto,* 2 Eurojus 46-71 (2022).

[108] And, as a matter of fact, not only of this principle.

[109] Polish Constitutional Tribunal, Judgment of 7 October 2021, No. K 3/21.

[110] On this declaration, see V. Manancourt, *Viktor Orbán backs Poland in EU law spat*, Politico.eu (9 October 2021), available at https://www.politico.eu/article/viktor-orban-poland-eu-law-constitution-polexit/ .

[111] The press release is available at the following link: https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021/ . On a closer look, however, the two cases present some important differences. Firstly, in the Romanian case, we are talking about a "press release", not a "judgment". Secondly, the Romanian Minister of Justice immediately distanced himself from the press release and pointed out that *Euro Box Promotion and Others* shall certainly apply in Romania, see https://adevarul.ro/news/politica/ciuca-despre-disputa-privind-suprematia-dreptului-european-legislatiei-nationale-se-aplica-romania-spune-ministrul-justitiei-1_61cc72d15163ec42711ad586/index.html .

Thirdly, these recent cases have, however, some points of contact with core of the ECJ's established case law on the Union mandate of national courts[112], and present some interesting features.

A first common aspect is that both lines of case law deal with national rules or practices which are able, *de facto* or *de jure*, to hinder ordinary national courts from raising a preliminary question under Article 267 TFEU. With AG Tanchev, such national rules "not only undermines the functioning of the preliminary ruling procedure, but also is likely to influence the decisions of other national judges in the future as to whether to make a reference, thus giving rise to a 'chilling effect'"[113]. More specifically, those rules rendered possible for higher courts to interfere in ordinary courts' work and expose these national judges to the risk of disciplinary proceedings, for having made a preliminary reference to the ECJ[114] or for not having followed a certain interpretation given by higher national court[115]. Particular attention is therefore paid to the *effectiveness* of the conditions set in the ECJ's case law.

A second aspect of primary interest for the present analysis concerns the fact that some of these cases, although they do not go back one step with respect to the *Melki* and *A v B* case law, seem to be characterised by a "conciliatory" approach. In other terms, the *Kirchberg* Court is trying to develop a dialogue based on "common words" and respectful of national identities[116] as well as of the Member States' systems of constitutional justice. This is particularly the case in the most recent rulings relating to Romania and – albeit to a lesser extent – *IS*, concerning Hungary. In this light, the involvement of the national Constitutional Courts in the performance of ordinary courts' EU mandate can play a role in taking the particularities of the national constitutional systems "seriously"[117].

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[112] See Section 2 above.
[113] ECJ, Case C-791/19, *European Commission v Republic of Poland*, Opinion of AG Tanchev delivered on 6 May 2021.
[114] *IS*, cit. at 102, para. 83 ff.
[115] See the Romanian cases below.
[116] S. Sciarra, *First and Last Word*, cit. at 68, 67.
[117] M. Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 Eur. Const. Law Rev., 25 (2009).

5.2. The "advance protection" guaranteed to the national courts' power to use Article 267 TFEU

The incompatibility with EU law of disciplinary proceedings against national judges is nothing new, having been already stated in relation, *inter alia*, to the Polish[118] and the Bulgarian[119] legal systems.

In *IS*, the interpretative preliminary questions[120] raised by the Central District Court of Pest (Hungary) concerned (a) the compatibility of a system of control by the Supreme Court (*Kúria*) on ordinary national judges as the one we are about to illustrate, and (b) the possibility for the national court to disregard the *Kúria*'s rulings to that effect.

Most notably, such system of control allowed[121] the Hungarian General Prosecutor to bring an appeal in the interest of the law before the *Kúria* to have an order for a preliminary ruling declared "unlawful"[122]. This is precisely what occurred in the case at issue,

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[118] ECJ, Judgment of 26 March 2020, Joined Cases C-558/18 and C-563/18, *Miasto Łowicz*, paras. 54-59; ECJ, Judgment of 15 July 2021, Case C-791/19, *European Commission v Republic of Poland*; ECJ, Judgment of 2 March 2021, Case C-824/18, *A.B. and Others v Krajowa Rada Sądownictwa and Others*, para. 100.

[119] ECJ, Judgment of 5 July 2016, Case C-614/14, *Criminal proceedings against Atanas Ognyanov*, paras. 14-26. In this case, it was found to be in breach of EU law – a certain interpretation of – the Bulgarian legislation according to which the referring court would have had to declare its lack of jurisdiction and would have been exposed to disciplinary action for having set out - as required by Article 94 of the Rules of Procedure of the Court of Justice – the factual and legal context of the case in its request for a preliminary ruling.

[120] The preliminary questions concerned the interpretation of several provisions of Directives 2010/64/EU and 2012/13/EU; of Article 19 TEU, of Article 47 of the Charter with regard to the principle of independence of national judges; and - following a "supplementary" reference for a preliminary ruling – of Article 267 TFEU, see *IS*, cit. at 102, paras. 38-40.

[121] This possibility was provided for by the Hungarian Code of Criminal Procedure.

[122] *IS*, cit. at 102, paras. 22-23. Thus, the *Kúria*'s ruling would have *not* "annulled" the legal effects of the order for reference, contrary to the national provisions analysed by the Court in *Cartesio*. See ECJ, Judgment of 16 December 2008, Case C-210/06, *Cartesio*, where, on appeal, the higher national court could set aside that order for reference, thereby rendering the reference for a preliminary ruling "ineffective" and order the court that made the order to resume the national proceedings that had been suspended. For a more recent case where similar (Slovak) national provisions were at stake, see ECJ, Judgment of 27 February 2014, Case C-470/12, *Pohotovosť s. r. o. v Miroslav Vašuta*. However, the in-depth analysis of this case is not completely

where the *Kúria* found, in essence, that "the questions referred were not relevant for the resolution of the dispute in the main proceedings"[123]. This also led to the commencement of a disciplinary proceeding against the referring judge, although this decision was later withdrawn[124].

In relation to both aspects, the Court found that such a system was not compatible with Article 267 TFEU. Indeed, although the *Kúria*'s declaration of illegality did not affect the legal effects of the order for reference, such declaration was "liable to weaken both the authority of the answers that the Court will provide to the referring judge and the decision which he will give in the light of those answers"[125]. As a consequence, it would have been "likely to prompt the Hungarian courts to refrain from referring questions for a preliminary ruling to the Court"[126] and, therefore, "prejudicial to the prerogatives granted to national courts and tribunals by Article 267 TFEU and […] to the effectiveness of the cooperation between the Court and the national court and tribunals established by the preliminary ruling mechanism"[127].

As regards the "closely connected"[128] question on the disciplinary proceedings, it is stressed that "the mere prospect of being the subject of disciplinary proceedings as a result of making such a reference, or deciding to maintain that reference after it was made, is likely to undermine the effective exercise by the national judges concerned of their discretion to make a reference to the Court and of their role as judges responsible for the application of EU law"[129]. Since those proceedings "are liable to deter all national courts from making

relevant because the questions referred for a preliminary ruling did not directly concern this aspect, which is instead only relevant in the section of the judgment dealing with the admissibility of the preliminary reference (para. 25 ff., see para. 31).

[123] *IS*, cit. at 102, para. 40.
[124] *IS*, cit. at 102, paras. 47-50.
[125] *IS*, cit. at 102, para. 74.
[126] *IS*, cit. at 102, para. 75.
[127] *IS*, cit. at 102, para. 77.
[128] *IS*, cit. at 102, para. 86.
[129] *IS*, cit. at 102, para. 90.

such references"[130] they "could [thus] jeopardise the uniform application of EU law"[131].

The same conclusion was reached as to the impossibility for ordinary courts to disregard the Hungarian Supreme Court's rulings declaring illegal the references for preliminary ruling. Indeed, the ECJ stated that the "principle of the primacy of EU law requires a lower court to disregard a decision of the supreme court of the Member State concerned if it considers that the latter is prejudicial to the prerogatives granted to that lower court by Article 267 TFEU"[132].

Moving on with *RS*, it is necessary to point out that this case shall be considered against the backdrop of the other judgments rendered in relation to Romania over the last few years, and, most notably, taking into consideration *Asociația* and *Euro Box Promotion and Others*, where similar issues were at stake.

In *RS*, the referring court doubted the compatibility with EU law of a provision of the Romanian Constitution that, as interpreted by the RCC[133], precluded the national courts from examining the conformity of a national provision with the provisions of EU law, once declared constitutionally valid by a decision of the RCC. Moreover, should the national court consider applying EU law as interpreted by the ECJ, thus departing from the RCC's case law, it would have been possible to initiate disciplinary proceedings against the national judges.

In respect of the analysis carried out above, the fact that such system has been found to be incompatible with EU law shall come as no surprise: indeed, both the impossibility for national judges to disregard the RCC's interpretation and disapply national law and being exposed to disciplinary proceedings are certainly in breach of the Union mandate of national courts under Article 267 TFEU. Even AG Collins, in his Opinion delivered in the case, had proposed that the Court considered the Romanian legislation in breach of EU law[134], although some differences can be spotted out. Among these lies the different role attributed to Article 267. While this provision is not

[130] *IS*, cit. at 102, para. 93.
[131] Ibid.
[132] *IS*, cit. at 102, para. 81.
[133] See RCC, Judgment of 8 June 2021, No. 390.
[134] See Case C-430/21, *RS*, Opinion of AG Collins delivered on 20 January 2022.

directly addressed by the preliminary questions nor is considered relevant in the AG's Opinion, its interpretation is pivotal in the Court's reasoning, being also used in the operative part of the judgment.

Overall, this recent case law sheds some new light on the criteria set out in the *Melki* and *A v B* case law. More specifically, if it is certainly necessary that national courts enjoy the power to refer a question for a preliminary ruling to the ECJ, these cases clarify that the "legal possibility" to refer is not enough. National courts must be granted an "actual", *de facto* power to *freely* refer to Luxembourg. Therefore, national provisions capable of having a sort of "chilling effect" on those courts are not compatible with EU law since they have the capacity to hinder the proper functioning of the cooperation mechanism enshrined in Article 267 TFEU. In other terms, the "keystone" of the Union's judicial system[135] or – with Gormley – the "jewel in the crown of the Community legal architecture"[136] calls for an "advanced" protection: the possibility to exercise of their Union's mandate shall be, for national courts, *actual* and *effective*, and cannot even be "discouraged" by the national legal systems. National provisions such as those in force in Hungary and Romania have instead a serious impact on the triangular relationship between ordinary national courts, the ECJ, and national Constitutional/Supreme Courts, since they tend to bend the "multiple loyalties"[137] of the lowest courts in favour of the latter[138].

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[135] ECJ, Opinion of 18 December 2014, Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, para. 176.

[136] L. W. Gormley, *References for a Preliminary Ruling: Article 234 EC from a United Kingdom Viewpoint*, 66 Rabels Zeitschrift für ausländisches und internationales Privatrecht 460 (2002); J. Langer, *Article 267 TFEU-Celebrating the Jewel in the Crown of the Community Legal Architecture and Some Hot Potatoes*, in F. Amtenbrink, G. Davies, D. Kochenov, & J. Lindeboom (eds.), *The Internal Market and the Future of European Integration Essays in Honour of Laurence W. Gormley* 455 (2019).

[137] G. Martinico, cit. at 1; G. Martinico, *Multiple loyalties and dual preliminarity*, cit. at 3.

[138] U. Lattanzi, *Rinvio pregiudiziale ex art. 267 TFUE e procedimenti disciplinari nazionali nell'ambito della crisi del rule of law: CGUE, sentenza del 23 novembre 2021, C-564/19, IS*, Diritti Comparati Blog (27 January 2022).

5.3. The ECJ's "conciliatory" approach: taking the models of constitutional justice of the Member States seriously?

The second interesting aspect of recent case law concerns the remarkable – or at least explicit – sensitivity shown by the ECJ towards the peculiarities of the models of constitutional justice of Member States[139]. This is the *trait d'union* between this recent case law rendered in the context of the rule of law crisis and that examined in Section 2: how to reconcile the systemic principles of the EU legal system with the peculiarities resulting from the Member States' constitutional traditions?

The need to balance these two interests is evident in *RS*. Here, the ECJ stressed that "the relationships between the ordinary courts and the constitutional court of a Member State [and] the organisation of justice in the Member States, including the establishment, composition and functioning of a constitutional court […] fal[l] within the competence of those Member States"[140]. Moreover, the Union does not require the Member State "to adopt a particular constitutional model governing the relationships and interaction between the various branches of the State, in particular as regards the definition and delimitation of their competences"[141]. Indeed, "under Article 4(2) TEU, the European Union must respect the national identities of the Member States, inherent in their fundamental political and constitutional structures"[142]. The ECJ is thus explicitly acknowledging that the organisation of justice and the system of constitutional justice in the Member States, including the centralised system of the constitutional review of laws that lies at the foundation of the Italian constitutional structure pursuant to Article 134 of the Constitution[143], are the expression of their national identity[144], as had been argued in

[139] Cf. Section 1 above.
[140] *RS*, cit. at 105, para. 38. In the same vein, see *Euro Box Promotion and Others*, cit. at 104, paras. 133, 216, 229.
[141] *RS*, cit. at 105, para. 43.
[142] Ibid.
[143] Cf. Judgment No. 269/2017, cit. at 1, point 5.2. of the conclusions on points of law.
[144] On this concept, see F.-X. Millet, *L'Union européenne et l'identité constitutionnelle des Etats members* (2013); E. Cloots, *National identity in EU law* (2015); G. Di Federico, *L'identità nazionale degli Stati membri nel diritto dell'Unione Europea. Natura e portata dell'art. 4 par. 2 TUE* (2017). See also ItCC and ECJ, Member States' National Identity,

literature[145].

That being said, there is however a capital "but" in the Court's reasoning. Although they are exercising their competences, Member States "are required to comply with their obligations deriving from EU law and, in particular, from Articles 2 and 19 TEU"[146]. This is an example[147] of the principle of *encadrement*[148] and implies that Article 4(2) TEU shall not be understood as a "unbridled permission" given to national Constitutional Courts. Quite to the contrary, the ECJ continues to enjoy its "jurisdictional autonomy"[149] having the exclusive jurisdiction over the definitive interpretation of this provision, as for the interpretation of any other provision of EU law[150]. Consequently, those retained competences can – and will – be "framed" by the ECJ to the extent necessary to ensure that the criteria set out in the *Melki* and *A v B* case law[151], the proper functioning of the preliminary ruling mechanism, and the requirements inherent in the independence of national judiciary are ensured[152].

Primacy of European Union Law, Rule of Law and Independence of National Judges - Celebrating the CJEUropean Union's 70th Anniversary-Rome, Palazzo della Consulta, September 5th, 2022 (2022).

145 A. Cardone, *La tutela multilivello dei diritti fondamentali* 92 (2012); G. Di Federico, *The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards*, 25 Eur. Public Law 376 (2019).

146 *RS*, cit. at 105, para. 38.

147 See, *e.g.*, Opinion 1/09, cit. at 14, paras. 66-69; *Associação Sindical dos Juízes Portugueses*, cit. at 14, para. 29 ff.

148 P. Mengozzi & C. Morviducci, *Istituzioni di Diritto dell'Unione europea* 92 (2018), where the Authors use this expression (from the French term from "to frame", "*encadré*") to refer to those cases where EU law – according to the ECJ's case-law – can to some extent bind branches of national law falling within Member States' retained competences. Examples of this principle are ECJ, Judgment of 18 December 2007, Case C-341/05, *Laval*, para. 87; and ECJ, Judgment of 11 December 2007, Case C-438/05, *Viking*, para. 40.

149 C. Vajda, *Achmea and the Autonomy of the EU Legal Order*, LAwTTIP Working Papers 10 (2019). On the principle of autonomy of EU law, see K. Lenaerts, *The Autonomy of European Union Law*, Il Diritto dell'Unione Europea 617 (2018).

150 Opinion 2/13, cit. at 135, para. 246; *RS*, cit. at 105, para. 52. In the same vein, see again C. Vajda, *Achmea and the Autonomy of the EU Legal Order*, cit. at 149, 10.

151 See Section 2 above.

152 *RS*, cit. at 105, para. 38 ff.

The emphasis placed by the ECJ on the importance to respect the prerogatives and peculiarities enshrined in the national systems of constitutional justice and the explicit link between the latter and Article 4(2) TEU is however remarkable. It shows its clear intent, amid one of the most severe crises experienced so far by the European integration process, to refuse conflict and prefer, instead, a conciliatory approach: to seek – as it has been said – "common words"[153], thereby showing to be willing to "take the dialogue seriously"[154].

Finally, the very same conciliatory intent can be detected in the ECJ's ruling in *IS*. In this case, as mentioned above, although the Court was confronted with a preliminary question on Article 19 TEU, the ruling heavily relied on its case law on Article 267 TFEU, not even quoted in the order submitted by the referring court. Focusing on this equally effective – but arguably less conflicting – line of case law can certainly be considered as "strategic choice"[155] to be read in the context of the developments illustrated so far.

6. Concluding remarks

The conclusions that can be drawn from this analysis of the ECJ's approach to *dual preliminarity* – with specific regard to the triangular relationships between Italian ordinary courts, the ItCC, and the ECJ in light of the 269 tempered model – can be summed up in five key points.

Firstly, to the ECJ, the *de jure* possibility for national courts to use Article 267 TFEU and to set aside incompatible national law is certainly necessary, yet not sufficient. Indeed, there must also be an actual, *de facto* power to freely refer to the ECJ and, as the case may be, to immediately disapply provisions of national law that are incompatible with the rules of EU law, which is irreparably hindered if national courts risk to be exposed to disciplinary proceedings for such decision.

[153] S. Sciarra, *First and Last* Word, cit. at 68.
[154] M. Cartabia, Europe and Rights: Taking Dialogue Seriously, cit. at 117, 25.
[155] U. Lattanzi, Rinvio pregiudiziale ex art. 267 TFUE e procedimenti disciplinari nazionali nell'ambito della crisi del rule of law, cit. at 138, 4.

Secondly, the tempered 269 model described above does not appear to pose any insuperable issues as to the compliance with the systemic principles of the EU legal order set out in the ECJ's case law, although an explicit assessment in this regard has not been carried out yet. To put it bluntly, to the extent that the prerogatives inherent in the EU mandate of the national courts are not hindered, the ECJ adopts a "neutral" or "secularist" approach to dual preliminarity.

Thirdly, neutral approach does not rhyme with absence of open issues. If not "pains"[156], being a national judge in a multilevel legal system is certainly source of some concerns about how to perform their national and EU mandate simultaneously and correctly. In fact, considering the Member States' competence on the organisation of justice, the national systems legitimately present some peculiarities resulting from their own constitutional history and legal culture – peculiarities that must be carefully balanced with the fundamental principles of the EU system. With specific regard to the open issues faced by the Italian ordinary courts, it has been pointed out that, on the one hand, the choice between the *Granital* model and the temperate 269 is not always crystal clear as fundamental rights – at least – at the EU level are enshrined in even in secondary law provisions; and, on the other, that, in some cases, the prior involvement of the ItCC can certainly be preferrable. Indeed, in addition to ensuring an *erga omnes* intervention, its "first word" can serve the purposes of better illustrating the peculiarities of the Italian legal order to the *Kirchberg* Court and contributing to the shaping of the constitutional traditions common to the Member States.

Fourthly – and consequently –, the re-centralisation pursued by the ItCC via the "first word" guaranteed by the tempered 269 model seems also capable of preventing – in the next future - misunderstandings and thus more serious judicial *conflicts* – in Komarek's understanding of this phenomenon as cases of resistance or attitudes motivated by strategic considerations[157]. The ECJ's ruling in

[156] Cf. G. Martinico, *Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order*, cit. at 3.

[157] J. Komárek, *The Place of Constitutional Courts in the EU*, 9 Eur. Const. L. Rev. 422 (2013). For a different stance on the role of "conflicts" between national Constitutional Courts and the ECJ, see G. Martinico, *The "Polemical" Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law*, 16 Ger. Law J. 1343 (2015).

O.D. and Others v INPS – for the reasons stated above – can be considered as an endorsement – albeit not explicit – of this model and acknowledges the specific constitutional role performed by the ItCC, which cannot be equated to those of ordinary courts[158]. The emphasis on the link between the organisation of the national (even constitutional) justice model and the duty for the EU to respect the national identities of the Member States - which can be noted in the case law on Hungary and Romania – points at the same direction.

Fifthly, such conciliatory approach does not operate in only "one direction" (meaning: from Luxembourg to the domestic Constitutional Courts) but is rather bidirectional. Even the ItCC itself has taken significant steps along the path of a more collaborative dialogue with the ECJ[159], as it is evident from its recent judgments Nos. 54 and 67/2022 on the access to childbirth and maternity allowances and on family unit allowance, respectively. Suffice it to mention that in the latter, the ItCC has first held that "the principle of the primacy of EU law and Article 4(2) and (3) TEU are the cornerstone on which the community of national courts rests, held together by convergent rights and duties"[160] and that its case law "has consistently upheld that principle, affirming the value of its driving effects with regard to the domestic legal system"[161]. Moreover, the ItCC then proposed a complementary understanding of the centralised review of constitutionality enshrined in Article 134 of the Italian Constitution and of the EU mandate of ordinary national courts resulting from the *Melki* and *A v B* case law[162]. Most notably, explicitly relying on the *obiter dictum* and on order No. 117/2019, it is affirmed that such centralised system of constitutional review "merges with [the widespread mechanism for implementing EU law in the hands of ordinary judges] to build an increasingly well integrated system of protections"[163].

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158 *O.D. and Others v INPS*, cit. at 66, para. 40.

159 Although we have referred to the latest cases concerning the ItCC, this bidirectional conciliatory approach is not a new trend, see, *e.g.*, G. Martinico, F. Fontanelli, *The Hidden Dialogue: When Judicial Competitors Collaborate*, 8 Global Jurist 1 (2008).

160 Judgment No. 67/2022, cit. at 61, point 11. of the conclusions on points of law.

161 Ibid.

162 Ibid.

163 Ibid.

Although not explicitly mentioned, this passage undoubtedly evokes judgment No. 20/2019, where the binding character acquired by the Charter is considered able to "generat[e] more legal remedies [and to] enric[h] the tools for protecting fundamental rights, [thereby], by definition, exlud[ing] any preclusion"[164].

Moreover, one might even argue that the very swift adoption of these several adjustments and refinements in the aftermath of the *obiter* is *per se* an indication of a the ItCC's conciliatory intent.

Overall, these concluding remarks bode well for the future of the triangular relationships between the Italian national courts, the ItCC, and the ECJ, the open issues highlighted above notwithstanding. Indeed, both the *Kirchberg* Court and the ItCC have shown the intent to walk – hand in hand– down the collaborative path of mutual respect for the prerogatives of the counterpart. Although it is hard to say whether such approach will be of any help regarding the Supreme/Constitutional Courts of the Member States mentioned in Section 5, one aspect stands out clearly. The ECJ approach to dual preliminary analysed in this article will nourish the dialogue between Rome and Luxembourg, with the result that – besides the pending cases following orders Nos. 216 and 217 of November 2021 – the occasions for the *direct dialogue* on fundamental rights will increase in the next future.

[164] Judgment No. 20/2019, cit. at 54, point 2.3. of the conclusions on points of law; Judgment No. 149/2022, cit. at 100, point 2.2.2. of the conclusions on points of law.