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DUAL PRELIMINARITY THROUGH NATIONAL, EU AND COMPARATIVE CASE LAW

SPECIAL ISSUE
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SPECIAL ISSUE ON
Dual Preliminarity through National, EU and Comparative Case Law

GUEST EDITORIAL

DUAL PRELIMINARITY, TODAY. EVALUATING THE IMPACT OF JUDGMENT NO. 269/2017 OF THE ITALIAN CONSTITUTIONAL COURT

Daniele Gallo, Giovanni Piccirilli [*]

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1. Focusing on Italian Judges Dealing with Dual Preliminarity

This *Special Issue* collects the contributions presented at the seminar on the topic "*Sentenza 269/2017 della Corte costituzionale italiana e doppia pregiudizialità, oggi*", held at Luiss Guido Carli on 20 May 2022. The seminar, as well as the Special Issue, were organized and produced with the co-funding from the Erasmus+ Program: Jean Monnet Chair on *Understanding EU Law in Practice: EU Rights in Action before Courts* and the PRIN project on "The Challenge of Inter-legality", funded by the Ministry of University and Research.

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As it is evident from the title of the Seminar, its principal goal was to assess the impact that the landmark Judgment No. 269/2017 rendered by the Italian Constitutional Court (hereinafter ItCC) had on the Italian judiciary. Furthermore, the Seminar was also meant to dive into Judgment No. 269/2017 from the standpoint of the Court of Justice of the EU, as well as of the other Member States.

Against this background, rather than focusing specifically on the decision, its motivations or the (variegated) reactions that followed to it in the scholarly debate, the focus chosen as the *leitmotif* of our debate has been its influence over Italian courts. It was, thus, decided to analyze the trends on dual preliminaries, in practice, by examining not only the subsequent case law of the ItCC, but also and in depth the case law of ordinary and administrative judges, in order to identify the underlying trends and the effective rate of innovation determined by the *obiter dictum* enshrined in that fundamental ruling.

Certainly, one of the profound reasons of this jurisprudential turn was the reaffirmation of the centralized scrutiny on fundamental rights by the ItCC[1]. And the reasons for this re-centralisation must be identified in the capacity of the constitutional judge to deliver *erga omnes* effects judgments on the "rights of the person"[2].

Now, from the point of view of the enforcement of the law in practice, the most fruitful research perspective is looking at the true protagonist of the innovative approach entailed by Judgment No. 269/2017, that is the ordinary and administrative judges. Indeed, having the ItCC itself clarified that the new order of remedies does not constitute an obligation (as it had controversially[3] stated at first), but an "opportunity"[4], it is clear that who ended to be strengthened is, at the end of the day, the judge of the main trial. The latter, in fact, is the

[1] 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', 4 *Eur. Const. Law Rev.* 731-751 (2019); D. Tega, *La Corte nel contesto. Percorsi di «ri-accentramento» della giustizia costituzionale in Italia* (2020).

[2] Judgment No. 269/2017, §5.2 in law.

[3] On this matter, as well as on others, see, for an EU law critique, D. Gallo, 'Challenging EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure', 4 *European Law Journal* 434-456 (2019).

[4] ItCC, Judgment n. 20/2019, §2.1 in law.

one called to apply domestic law on which the twofold doubt of compatibility with both the Constitution and EU law arises[5]. It is therefore a matter for the single judge to decide between a European loyalty or a constitutional one and, condequently, to determine whether or not to adhere to the new course outlined by Judgment No. 269/2017.

In this framework, given the peculiar judicial architecture in Italy, it seemed necessary to distinguish in the discussion the analysis of the activity of ordinary judges from that of administrative ones, to then concentrate in a separate forum on the Court of Cassation.

2. Recent Trends between Italy, the EU and fundamental right protection

To better frame the jurisprudential evolution analyzed in this Special issue, it is perhaps appropriate to recall some elements that can help to reconstruct the institutional context in which Judgment No. 269/2017 took place.

In recent years there have been many important changes in the relationship between the Italian legal system and EU law, both in general and with specific reference to the ItCC. In less than fifteen years since the entry into force of the Treaty of Lisbon and, with it, of the Charter for the Protection of Fundamental rights of the EU (CFREU), numerous innovations arose which, in fact or in law, contributed to reshape the relationship between Italy and the EU, and render it different from the past.

It is no coincidence that in the period between the signing and the entry into force of the Treaty of Lisbon there was the shift in the position of the Constitutional Court with respect to the use of the preliminary ruling. Opening a new phase of its long "European journey"[6], the ItCC has suddenly reversed its position with respect to

[5] This centrality of the moment of application for the purpose of activating the preliminary ruling is moreover consistent with the case law that the Constitutional Court had referred to itself, when it was preparing to open a dialogue with the CJEU in view of the first preliminary reference in 2008. See ItCC, Judgment No. 102/2008, §8.2.8.3. in law.

[6] The expression is notoriously due to P. Barile, 'Il cammino comunitario della Corte, in *Giurisprudenza costituzionale*, 1973, p. 2406-2420.

it. After having long denied even its ability to access the tool[7], first in the limited context of the principaliter proceeding[8] and then also in the incidenter one[9], the ItCC paved the way for formal dialogue with the CJEU.

Furthermore, between 2015 and 2018 the so-called "*Taricco* saga" developed between ordinary judges, the CJEU and the ItCC, which brought the clash between the two legal systems to the highest levels[10]. Although the story ended without the formal application of the counter-limits, *de facto* they appear to have been exercised in practice[11], leading to the non-application of the principles set out by the CJEU in relation to a provision of EU primary law.

These years have also led to further systemic innovations. For example, although without replacing Article 11 of the Constitution as the true European clause, there has been important constitutional amendments. One of them (inserting the balanced budget clause and the sustainability of the public debt "in accordance with the European Union law"[12]) can certainly be defined as "EU- driven". Hence, there has been the concrete confirmation of the judicial doctrine of counter-limits, with their sensational application in the different context of the relationship with public international law, within the well-known *Ferrini case*[13].

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[7] See Order No. 536/1995.

[8] See Order No. 103/2008, M. Dani, *Tracking Judicial Dialogue. The Scope for Preliminary Rulings from the Italian Constitutional Court*, Jean Monnet Working Paper (2008).

[9] Order No. 207/2013, O. Pollicino, 'From Partial to Full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court', 1 *Eur. Const. Law Rev*. 143-153 (2014).

[10] For a recent account in English see G. Piccirilli, 'The "Taricco Saga": the Italian Constitutional Court continues its European journey', 4 *Eur. Const. Law Rev*. 814-833 (2018).

[11] For some observations on this point in English see D. Gallo, 'The *Taricco* Saga: When Direct Effect and the Duty to Disapply Meet the Principle of Legality in Criminal Matters', in P. Craig, R. Schütze (eds.), *Landmark Cases in EU Law*, Oxford, Hart Publishing, forthcoming.

[12] Art. 97(1) of the Constitution, as amended in 2012.

[13] Judgment no. 238/2014 constitutes, among other things, the only case in which the ItCC has explicitly used the term "controllimits" in the motivation on points of law (§3.2.).

More generally, the ItCC has been undergoing a profound rethinking of its institutional role and its procedural tools, also in the light of the evolution of the Italian institutional context [14].

As for the multilevel protection of fundamental rights, further elements of novelty came also in the interaction with the Council of Europe and the refusal by Italy to ratify Protocol no. 16 to the ECHR. Although Italy signed it, and the Government introduced before the Parliament the bill to authorize its ratification together with Protocol no. 15[15], the Parliament decided to take out from it the mechanism for a prior involvement of the Strasbourg Court. The main reason to do so – emerging also in the hearings of scholars during the pre-legislative scrutiny[16] – was exactly in the sense of avoiding the erosion of the monopoly of the ItCC in setting the standard of interpretation for constitutional fundamental rights.

In short, Judgment No. 269/2017 constitutes, at the same time, the arrival point of a long journey (which involves the relationship between Italy and the EU, as well as the role of the ItCC itself) and the starting point of new and important trends.

3. The Structure of the Special Issue

The study of the developments in the case law subsequent to the Judgment n. 269/2017 has made it possible to highlight a point of conjunction between two current lines of research in the Luiss Law Department. The innovative perspective of the evolution in courts on dual preliminarity in relation to the CFREU represented, on the one hand, the natural development of the theme on which the Jean Monnet Chair held by Daniele Gallo is based; on the other, it has been seen a concrete venue for testing the theoretical proposal constituted by inter-legality, authoritatively proposed by a volume edited by Jan Klabbers

[14] D. Tega, 'The Italian Constitutional Court in its Context: A Narrative', 3 *Eur. Const. Law Rev*. 369-393 (2021).

[15] See already, in 2017, the bill no. 2772 (Senate) and then, in the subsequent legislative term, bill no. 1124 (Chamber) in 2018.

[16] E. Albanesi, *Abbiam fatto quindici, possiam fare anche sedici… Sull'approvazione della legge di autorizzazione alla ratifica del Protocollo n. 15 alla CEDU da parte dell'Italia (e sulle prospettive del Protocollo n. 16)*, 1 *Consulta OnLine* 186-191 (2021).

and Gianluigi Palombella[17], and carried out by a PRIN research project also active with a local Luiss unit, led by Giovanni Piccirilli.

The individual reports were entrusted to colleagues from different universities in Italy, who were identified in relation not only to the topics to be covered, but also on the basis of a certain consonance of methodological approach.

The Special Issue starts with the analysis of the Judgment No. 269/2017, as well as of the refinements and developments that the Constitutional Court itself offered in subsequent cases (Repetto). It then moves to ordinary and aministrative courts (respectively, Massa and Lorenzoni), and to the Court of Cassation (Tega). Furthermore, it seemed appropriate to compare the evolution of the Italian legal system with the interpretation of the dual preliminarities doctrine from the persective of the CJEU (Amalfitano-Cecchetti), and with a view to the practice in the legal systems of the other Member States (Martinico). In support of these analyses, an analytical appendix has been added, offering a presentation of the data collected in the *Observatory on the practices of inter-legality by Italian courts*[18], in which dozens of rulings subsequent to 269/2017 were surveyed, in order to verify the follow-up given by the judges (Scarcello).

As the reader will easily grasp, a clear divide can be drawn from the analyzes of the essays regarding the jurisprudential evolution triggered by Judgment No. 269/2017. Indeed, if the ordinary courts are more sensitive to the *ratio* underpining the famous *obiter dictum*, a much higher resistance to this innovation comes from the administrative jurisdictions, which – except for a few isolated cases – seem to have remained solidly anchored to the *Granital* scheme. It should be remembered, however, that the new approach to dual preliminaries outlined by the ItCC, at least according to the development of jurisprudence to date, has in any case been limited to the overlaps between the Constitution and the CFREU relating to "personal rights". And, consequently, the diversity of developments on the part of the ordinary judges and the administrative judges is perhaps understandable.

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[17] J. Klabbers, G. Palombella (eds.), *The Challenge of Inter-Legality* (2019).

[18] https://www.cir.santannapisa.it/observatory-practices-inter-legality-italian-courts-2018-2022

Overall, what can be remarked with regard to the case law of the Italian judiciary, as demonstrated by the practice of the Cassation Court, is the ambivalence in the akwnoledgement and enforcement of the *obiter*'s formula. As a matter of fact, some courts, or some sections of the Cassation Court, in situations of dual preliminarity, tend to preliminarily raise questions of constitutional legitimacy before the ItCC, while other judges issue references before the CJEU pursuant to Article 267 TFEU. Moreover, should EU provisions endowed with direct effect be at stake, what remains today not clear is whether the ItCC should declare as inadmissible the question(s) of constitutionality raised before it[19] or proceed by delivering on its own a decision on such question(s),[20] each court (ItCC and the CJEU) "using their own instruments and each within the scope of their respective competences",[21] possibly after having submitted a preliminary reference to the CJEU.

In the light of the observations above, it is hoped that the contributions collected in this Special Issue will be a useful resource for colleagues, students, judges, practitioners confronted with the doctrine of dual preliminarity and, more generally, with the fascinating matter of the (more or less tense) reationships between the CJEU and national supreme/constitutional courts, incuding the ItCC.

Special thanks go to post-doc fellows Dr. Lorenzo Cecchetti and Dr. Alberto Di Chiara, who offered valuable help for the better realization of the seminar and for the essential editorial work for this publication.

[19] See Judgment No. 67/2022.
[20] See Judgment No. 54/2022.
[21] See Judgment No. 149/2022, §2.2.2. in law.

JUDGMENT NO. 269/2017 AND DUAL PRELIMINARITY IN THE EVOLUTION OF THE JURISPRUDENCE OF THE ITALIAN CONSTITUTIONAL COURT

Giorgio Repetto[*]

Abstract

This article considers the problems and perspectives related to the recent developments of the Italian Constitutional Court's case law with regard to issues of "dual preliminarity", i.e. those situations in which a national judge argues that an internal rule conflicts with the fundamental rights stemming from both the Charter of Fundamental Rights of the EU and the Italian Constitution. In these cases, Judgment No. 269/2017 has affirmed for the first time that the referring judge is entitled to priorly activate constitutional review, so as to reaffirm the integrated protection of national and European rights.

In the first section, the article discusses the reasons and the implications of this turning point, which can be summarized in the judicial strategy of the ItCC aiming at regaining centrality without questioning the main principles of functioning of EU law. In the second section, some undecided issues are considered, with regard to the concurrence of judicial remedies (the preliminary reference procedure and the *incidenter* review), the potential for using both remedies at the same time and the expansion of the ItCC's review beyond the field of fundamental rights. In the last section, doubts are expressed in relation to the possibility that the further expansion of the ItCC's review may be reliant upon the need to safeguard the centralization of judicial review.

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1. Judgment No. 269/2017: the reasons and the direction of a turning point

As is well known, Judgment No. 269/2017 of the Italian Constitutional Court (hereinafter: ItCC) unlocked a new era in its relationship with European Union law, with particular regard to the handling of judicial conflicts between domestic law and the fundamental rights stemming from both the EU Charter and the Italian Constitution. By modifying its previous approach on these issues, according to which similar situations involve exclusively the ordinary judges and the EU Court of Justice, the ItCC affirmed that judges are entitled to priorly raise an *incidenter* review of constitutionality whenever the fundamental rights of the EU Charter do overlap with those enshrined in the Italian Constitution.

There are two key reasons for this turning point.

On the one hand, the ItCC has sought to gain room for *manoeuvre* against the risks of an increasing displacement of its review in issues of fundamental rights in favor of ordinary judges. In the aftermath of Judgment No. 269/2017, this appeared to several commentators the main reason for a sort of repatriation of constitutional review[1].

On the other hand, a further triggering reason for the *revirement* is related to the need to respond to the constitutional evolutions that have impacted EU law in the aftermath of the Charter's entry into force. Its novelty and its "content of typically constitutional imprint" (thus, Judgment No. 269/2017) has posed, not only in Italy, the problem of measuring the impact of its application in national legal

[1] A. Barbera, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di giustizia*, 37 Quad. cost. 1 (2018), at 149.

systems by reviewing the foundations that were forged in the earlier years of the European integration process[2]. In the Italian case, this has led to a critical consideration of the continuing effectiveness of the "Granital model" (as established in Judgment No. 170/1984) in absorbing the impact of a text like the Charter, that indicated from the outset a much higher potential for federalization than that traditionally contained within "classic" EU law[3]. If the "Granital model" was able to effectively secure relations between EU and domestic jurisdictions for decades, this was because it reflected the characters of a mechanism of integration that found in direct effect a useful and (tendentially) unambiguous criterion in separating the tasks between national judges of the Court of Justice, on the one hand, and the Constitutional court on the other.

The Charter of Fundamental Rights, with its set of provisions that no longer refer only to direct or non-direct effect[4], has undoubtedly called into question the functionality of the previous scheme. Whenever the Charter's clauses are invoked and applied in courts, even aside from the fact that they have direct effect[5], the conditions are created for the Charter to occupy operational spaces for which the "Granital model" neither foresees nor provides.

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[2] G. Scaccia, *Sindacato accentrato di costituzionalità e diretta applicazione della Carta dei diritti fondamentali dell'Unione europea*, in C. Amalfitano, M. D'Amico, S. Leone (eds.), *La Carta dei diritti fondamentali dell'Unione europea nel sistema integrato di tutela* 156 (2022).

[3] P. Eeckout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 Com. Mkt. Law Rev. 945 ss. (2002); K. von Papp, *A Federal Question Doctrine for EU Fundamental Rights Law: Making Sense of Articles 51 and 53 of the Charter of Fundamental Righs*, 43 Eur. Law Rev 512 (2018). For a fruitful comparison on the incorporation doctrines elaborated by the US Supreme Court and the CJEU see A. Buratti, *Diritti fondamentali e integrazione federale. Origini, interpretazioni e applicazioni della* due process clause *nella Costituzione americana*, Riv. dir. comparati 1 (2020).

[4] With the words of Sophie Robin-Olivier, "[t]he rise of fundamental rights […] has shown—as has become more obvious with the Charter of Fundamental Rights—that seeking direct effect was not always the most appropriate, or the most effective, method of sustaining claims in situations covered by EU law": *The evolution of direct effect in the EU: Stocktaking, problems, projections*, 12 Int. J. Const. Law 170 (2014).

[5] E.g., because they are linked to provisions emanating from secondary law by virtue of Art. 52 of the EU Charter, or because they support an interpretation consistent with EU law or identify general principles of EU law.

In addition, the federalizing potential of the Charter has over time increased as a result of the Court of Justice's case law with regard to the scope of application of the Charter itself (Art. 51, para. 1). Moving from the famous *Fransson* case[6], the Court of Justice has equated the Charter's scope of application with the more general scope of EU law[7].

Against this background, the ItCC's response leads to a concurrence of judicial remedies available to the ordinary judge, so that the possibility for the latter to refer a preliminary ruling to the Court of Justice no longer precludes, as it has been in the past, the possibility that, as a preliminary step, the Constitutional court is invited to review an internal act with respect to both domestic and European fundamental rights. The key result of the "269 scheme" therefore, is that the Constitutional Court eliminates the separation previously governing the relations between the two remedies, overcoming the impediments that it had erected in its previous case law[8].

This result has been achieved by virtue of of an ongoing adjustment of the principles laid down in Judgment No 269/2017.

Whereas in this case the ItCC seemed to impose upon domestic judges a *duty* to activate constitutional review before the preliminary reference procedure, subsequent decisions delivered in 2019, which

[6] *Åklagaren v. Hans Åkerberg Fransson*, C-617/10 (26 February 2013).

[7] Consequently, "[T]he Charter is the 'shadow' of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter": K. Lenaerts, J.-A. Gutiérrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, in S. Peers, T. Hervey & A. Ward (Eds.), *The EU Charter of Fundamental Rights: A Commentary* 1568 (2014). The implications of such an equation have been investigated, among others, by D. Sarmiento, *Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, 50 CMLR 5 (2013), at 1267 and I. Gambardella, *L'application de la Charte des droits fondamentaux de l'Union européenne aux États membres: le critére de mise en oeuvre du droit de l'Union comme obstacle à son effectivité*, 57 Cahiers de droit européen 1 (2021), at 241.

[8] For an overview see G. Repetto, *Pouring New Wine into New Bottles? The Preliminary Reference to the CJEU by the Italian Constitutional Court*, 16 Ger. L. J. 6 (2015), at 1449, 1451 ff.

the next section will explore in greater detail, reveal the intention of the ItCC to qualify this precedence in terms of a more viable *option*[9].

In so doing, it paved the way to a concurrence of judicial remedies that, while not questioning the power of the Court of Justice to elucidate the scope of the Charter, does not exclude the possibility that, in the same matter, a constitutional review will take place if requested by the national court. Thus, the ItCC's strategy is aimed at granting constitutional review a precise role, that is to eventually give voice to constitutional reasoning prior to Court of Justice's decision, so as to prevent conflicts rather than attempting to resolve them afterwards[10].

This outcome indicates a more general reassessment of the "Granital model". In fact, once direct effect is no longer deemed the sole criterion[11], a new one has to be found so as to specify the sphere within which both courts will be called upon to intervene.

This criterion seems to be identified with the increasing relevance of national authorities' *margin of discretion in the implementation of EU law*, to which ordinary judges may refer in order to activate one or the other judicial remedy[12].

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[9] 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 Riv. AIC 296, 300 (2020).

[10] On the need to preserve self-restraint of national courts in the European context and to give more relevance to the "first word" rather than to the "final say" see N. Lupo, *The Advantage of Having the "First Word" in the Composite European Constitution*, 2 Ital. J. Pub. Law 193 (2018).

[11] In 2009, Marta Cartabia observed that, in light of the constitutional courts' displacement in the field of EU-related fundamental rights, "[d]octrines like direct and indirect effect could easily be interpreted so as to involve also the supreme and constitutional courts, instead of banning them": *Europe and Rights. Taking Dialogue Seriously*, in 5 Eur. Const. Law Rev. 29 (2009).

[12] A. Cardone, *Dalla doppia pregiudizialità al parametro di costituzionalità: il nuovo ruolo della giustizia costituzionale accentrata nel contesto dell'integrazione europea*, 1 Oss. fonti 39 ss. (2020); F. Donati, *Un riaccentramento del giudizio costituzionale? I nuovi spazi del giudice delle leggi, tra Corti europee e giudici comuni*, in B. Caravita (ed.), *Un riaccentramento del giudizio costituzionale? I nuovi spazi del Giudice delle leggi, tra Corti europee e giudici comuni* 19 (2021); G. Martinico, *Corte costituzionale e diritti fra armonie e disarmonie giurisprudenziali*, in C. Caruso, F. Medico & A. Morrone (eds.) *Granital revisited? L'integrazione europea attraverso il diritto giurisprudenziale* 144 (2020); C.

In accordance with such criterion, the emerging picture could be that of a division between: (a) an area entirely monitored by the Court of Justice (where the fundamental rights of the EU Charter are closely linked to European rules that are immediately binding on national authorities); (b) an area entirely presided over by the Constitutional Court (where there is no triggering factor with EU law, as in "purely internal situations") as well as c) a further sphere (that coincides with the discretionary implementation of rules and principles pertaining to Charter's rights) in which *both jurisdictions are entitled to intervene*, without any preclusion, at the request of ordinary judges[13].

Outside of this scheme, because of its transversality to each of the mentioned areas, is the power of the Constitutional Court to intervene with a view to activating the counter-limits. This, however, will not be dealt with in this article.

2. The patterns of the case law of the ItCC after 2017: settlement, enlargement, loyalty

The first and most important development of constitutional jurisprudence following Judgment No. 269/2017 regarding cases of dual preliminarity is articulated in a series of judgments delivered in 2019. Through this jurisprudence[14], the Court improved the operational protocols of the "269 scheme", mitigating some strictures of the 2017 judgment: from the above mentioned obligation, for the common court, to refer in advance to the Court itself (demoted to a mere faculty), to the possibility to make use of the preliminary reference so as to subsequently refer to the Court of Justice any

Masciotta, *La doppia pregiudizialità nella più recente giurisprudenza costituzionale*, 3 Oss. fonti 1283 (2020).

[13] In countries like Belgium, France, Austria and Germany, albeit with minor differences, a similar trend has emerged: on this see M. Wendel, *Europäischer Grundrechtsschutz und nationale Spielräume: Grundlagen und Grundzüge eines Spielaraumtests im europäischen Grundrechtspluralismus*, 3 Europarecht 334 (2022), and Editorial, *Better In than Out: When Constitutional Courts Rely on the Charter*, 16 Eur. Const. Law Rev. 1 (2020).

[14] Judgments Nos. 20, 63 and 112/2019; Order No. 117/2019.

question (interpretative or concerning validity) that it deems necessary (and not only those unexamined by the Constitutional Court).

This approach opens the arena to more ordered concurrence among judicial remedies that "exclude[s] all preclusion" (thus, Judgment No. 20/2019) and introduces the ItCC's review into a course in which the basic assumptions of EU law (i.e. preliminary reference, primacy and direct effect) coexist with the ItCC's decisions[15].

The need to achieve a *settlement* between the role of the two Courts is visible in the emphasis that further decisions of the ItCC placed on the "loyal and constructive cooperation between the different jurisdictions, which are called - each for its part - to safeguard fundamental rights in the perspective of a systemic and non-divided protection". The roots of this cooperation can be found in in Article 19 TEU, which considers "in the same context - so as to reveal its inseparable link - the role of the Court of Justice, called upon to safeguard 'respect for the law in the interpretation and application of the Treaties' (paragraph 1), and the role of all national courts, custodians of the task of ensuring 'effective judicial protection in areas governed by Union law' (paragraph 2)" (Judgment No. 254/2020).

At the same time, Judgment No. 20/2019 deals with the possibility that the ItCC's review affects not only the rights contained in the Charter, but also (as in that case) norms of secondary law, even with direct effect, variously related to those same rights, thus extending its scrutiny to areas until then apparently excluded from it. By ruling on the constitutional legitimacy of the domestic rules concerning the obligation to publish the income and tax data of a large category of public executives with respect to, among others, Articles 6 and 7 of Directive 95/46/EC, as functionally related to Articles 7 and 8 of the Charter, the ItCC showed a clear intention to broaden its scope of judgment, so as to encompass rules of EU law foreign to the Charter.

Such *enlargement* of the ItCC's control *vis-à-vis* EU secondary law is the second pattern that emerged after 2017 with regard to issues of dual preliminarity, although further decisions[16] have merely hinted

[15] S. Sciarra, A. Jr. Golia, *Italy: New Frontiers and Further Developments*, in M. Bobek, J. Adams-Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States* (2020), 239, at 248.

[16] Judgments Nos. 11 and 44/2020.

at that possibility, without providing any a clear statement on this specific point.[17].

It would however be difficult to understand the overall approach taken in the post-2017 case law if a third and final direction were not highlighted, and this concerns the issue of *loyalty* of the ItCC to the aforementioned cornerstones of EU law.

In a case in which the Italian Court of Cassation invoked a confirmation of the direct effect nature of Article 12(1)(e) of Directive 2011/98/EU with regard to social-security benefits for third-country nationals, the ItCC declared the question inadmissible because the case law of the CJEU clearly affirmed the duty for national judges to directly enforce EU rules (Judgment No. 67/2022). On that occasion, the ItCC added in general terms that "the principle of the primacy of EU law and Article 4(2) and (3) TEU are the cornerstones on which the community of national courts rests" and that "the centralized review of constitutionality enshrined in Article 134 of the Constitution is not an alternative to the widespread mechanism for implementing EU law (…), but rather merges with them to build an increasingly well integrated system of protections"[18].

After the epilogue of the "Taricco saga" (Judgment No. 115/2018)[19], the ItCC sought to rebalance its relationships with the ECJ through a cooperational relationship that was aimed at settling the most significant conflicts that had developed with regard to the issue of fundamental rights. It suffices to recall that after 2017, the number of preliminary rulings made by the ItCC was significantly higher than those made in the previous ten years[20] and that were all motivated by the intention to promote a greater and more coordinated protection of national and European rights.

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[17] For a critical reading of these cases see R. Mastroianni, *Sui rapporti tra Carte e Corti: nuovi sviluppi nella ricerca di un sistema rapido ed efficace di tutela dei diritti fondamentali*, in 5 *European papers* 1 (2020), 493, at 501.

[18] On this case see A.O. Cozzi, *Per unelogio del primato, con uno sguardo lontano*, in 2 Consulta Online 410 (2022).

[19] For a joint reading of judgement No. 269/2017 and the *Taricco* saga see D. Gallo, *Challenging EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure*, in 25 Eur. Law J. 434 (2019).

[20] Orders nos. 117/2019, 182/2020, 216 and 217/2021.

The cases concerning the right to silence in administrative procedures in respect of the imposition of substantially criminal sanctions (Order No. 117/2019 and Judgment No. 84/2021) and the discrimination suffered by long-term non-resident foreigners excluded from the maternity allowance and "newborn benefits" (Order No. 182/2020 and Judgment No. 54/2022) may be considered emblematic of what is to be demonstrated.

In the first case, by giving entry to a question raised by the Court of cassation immediately after Judgment No. 269/2017 and by referring to Luxembourg with the aim to introduce a right not provided for in EU law[21], the ItCC finalized dual preliminarity to the expansion of the European catalogue of fundamental rights in a direction fully coherent with the constitutional text[22]. In the second case, the decision to make a reference for a preliminary ruling was determined by the national administrative practice which, although faced with pronouncements that repeatedly set aside domestic law conflicting with norms of secondary law endowed with direct effect, failed to comply with the decisions of ordinary courts, forcing the ItCC to obtain the endorsement of the Court of Justice[23], so as to clothe the latter's *dictum* with the *erga omnes* effect of its pronouncements.

This is an interpretative orientation that reveals the constant search for a *consonant interaction* between the ItCC and the Court of Justice, thanks to which the former does not limit the action of the latter, whereas constitutional review regains its role as a systemic guardian of the implementation, at the domestic level, of both domestic and European fundamental rights[24].

3. Open issues I: how free is the concurrence between judicial remedies?

Against this background, one is tempted to believe that

[21] *DB v. Consob*, C-481/19 (2 February 2021).
[22] D. Sarmiento, *The Consob Way – or how the* Corte Costituzionale *taught Europe (Once Again) a masterclass in constitutional disputes settlement*, in EU Law Live (April 16, 2021).
[23] *OD et al. v. INPS*, C-350/20 (2 September 2021).
[24] S. Sciarra, *Lenti bifocali e parole comuni: antidoti all'accentramento nel giudizio di costituzionalità*, 3 Federalismi.it 37 (2021).

cooperation between courts occurs without any significant problem.

In reality, for the common judge, who lost the certainties of the "Granital model", problems arise when called upon to decide which judicial remedy should be activated (and in what order of priority) whenever a domestic rule is at odds with both the Constitution and the rights guaranteed therein, and with EU law and the Charter of Fundamental Rights.

In fact, the ItCC has not provided judges with any guidelines as to the remedies that may be activated, leaving them at the mercy of a "free competition" that would allow them to turn first to the ItCC and then to the Court of Justice or the reverse, without excluding the possibility of referring to the two courts at the same time[25].

One can attempt, as has been done, to preach in the abstract the prevalence of the constraint, for the common court, to the raising of the incident of constitutionality or, conversely, to the activation of the preliminary reference and the consequent potential disapplication of domestic law. However, if the question were to be addressed at this level of generality, a solution would be difficult to find, because it is not possible to establish a clear order of priority with respect to obligations arising from different legal orders[26].

On the contrary, it seems preferable to consider that the common judges are called upon to pragmatically integrate the two remedies, taking into consideration different variables, which may lead them, from time to time, to opt for one or the other solution.

Therefore, in cases of "dual preliminarity" there may be a preference for the (prior) raising of the preliminary reference in all cases where, alternatively or, even more so, jointly: *i*) the latter is not interpretative, but rather concerns validity; *ii*) where the proceeding court is of last resort; and *iii*) the EU law claiming to be applied is unquestionably endowed with direct effect.

On the contrary, a constitutionality review should be prefered in all cases in which (even if the above-mentioned conditions are met):

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[25] A. Ruggeri, *La Consulta e il tiro alla fune con gli altri giudici*, in G. Campanelli, G. Famiglietti & R. Romboli (eds.), *Il sistema "accentrato" di costituzionalità* 255 (2020); A.O. Cozzi, *Nuovo cammino europeo e cammino convenzionale della Corte costituzionale a confronto*, in *Granital* revisited*?*, cit. at 7, 58.

[26] M. Massa, *The Dual Preliminarity Doctrine in the Case-Law of Ordinary Courts of First Instance and Appeals*, below at 27.

i) the violation of a counter-limit is at stake, or *ii*) the referring court deduces the violation of of a constitutional rule having (logically) preliminary value to that concerning the violation of a Charter right: e.g. a domestic rule allegedly conflicting with a domestic and European fundamental right, but even before contained in a legislative decree in excess of delegated powers (Article 76 It. Cost.) or in a decree law that lacks the characters of necessity and urgency (Article 77 It. Const.).

Further variables may require the judge to weigh the features of the concrete case, for example, considering: (*i)* whether there is a simultaneous violation of the Charter and the Constitution (which, in itself, would prompt favoring the constitutional review), (*ii*) whether a violation of secondary EU law is also at stake and whether or not this falls within a fully harmonized sphere (an element, the latter, that would argue in favor of prior review by the Court of Justice) and, again, (*iii)* whether there are Court of Justice precedents and what kind they are: that is, whether these establish an unconditional obligation to disapply, or delegate to the court the power to balance the principle of EU law with other elements (be they other principles of national law or findings of fact)[27].

From the number of variables taken into consideration, and others that could be added, it can be understood how the choice of remedy to be experienced is far from easy. At the same time, it does not seem that today the judge is called upon to make an assessment fully free from any point of reference, even more so where he or she is dealing with "hints" such as, among others, those mentioned above, that suggest a sharper preference for one remedy or the other.

4. Open issues II: contextual preliminarity?

Another unresolved problem in the current structure of the "269 scheme" is related to the possibility for the common judge to address the two courts at the same time, by simultaneously activating the two judicial remedies.

[27] For a converging view see 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*, in 1 Rivista AIC 305 (2020).

Although the problem has not been discussed yet by the ItCC, indications of a potential new approach have emerged in recent years.

In Judgment No. 31/2022, the Court noted that the referring judge had made a contextual reference for a preliminary ruling, but it had been declared inadmissible by the Court of Justice, which did not prevent the ItCC from noting different and additional profiles of inadmissibility. The Court arrived at similar results, again in the face of a contextual reference and a European decision of inadmissibility, in the Judgment No. 254/2020.

Moreover, in a more recent order (No. 137/2022), with regard to a case of double contextual referral that had already been decided by the Court of Justice on the merits, the Constitutional Court opted for the return of the documents to the referring judge (*restituzione degli atti*), motivated by the fact that the Court of Justice had made the obligation to disapply contingent upon a concrete verification of the facts of the case. At the same time, the ItCC added that the judge deciding to turn (as in that case) first to the Court of Justice and then only later (but while the case in Luxemburg is still pending) to the ItCC, is under a duty to give "an account of the reasons that prompted him to activate the two judicial remedies".

These precedents seem to exclude the rigid approach taken by the ItCC in the past years, when it declared inadmissible that the referring judge turns contextually to both courts, since this potentially deprives constitutional review from a direct influence in the case at stake[28].

More systemic reasons could then be presented in support of the admissibility, in principle, of questions raised at the same time to the two courts.

The Court of Justice has been far less selective in considering preliminary references raised by national courts when these have contextually referred questions of constitutional legitimacy to its own constitutional court[29]. In the light of this approach, the question is

[28] Among others, Order No. 85/2002.

[29] In a significant passage from the decision *Kernkraftwerke Lippe Ems* (Judgment June 4, 2015, in Case C-5/2014), the Court of Justice held that "Article 267 TFEU must be interpreted as meaning that a national court which has doubts as to whether national legislation is compatible with both EU law and with the Constitution of the Member State concerned neither lose the right nor, as the case may be, is exempt from the

whether the restrictive attitude of the ItCC in this regard risks undermining the functioning of the "269 scheme" and the claimed priority of constitutional review, by eventually making the preliminary reference a preferable move for the ordinary judge who detects a conflict with the Constitution and the Charter.

Nor is the point entirely decisive that, by allowing cases of "double referral" or "contextual preliminarity", the ItCC would expose itself to the risk of short-circuits with the Court of Justice[30]. The whole scheme of open, dual investigation by these courts opens up the possibility of them being variously "engaged" on the same issues, and indeed the possibility of a prompt response could facilitate subsequent and contrapunctual interactions between the two courts.

5. Open issues III: dual preliminarity beyond the Charter?

There is a further open issue in the dynamics opened by the "269 scheme" concerning the sphere of action of the dual preliminarity protocol beyond the terrain of fundamental rights.

As discussed above, the ItCC has already addressed this problem, albeit in terms not yet fully defined. Yet it is also the one in which, perhaps, the most significant developments can be expected in the near future.

As a first step, the ItCC could confirm an expansive review whenever the allegedly violated supranational rule, while not fully coinciding with a Charter's right, turns out to be materially and/or functionally connected to it, as often happens when the violation of one of the freedoms of movement guaranteed by the Treaties or a principle contained in a directive is invoked. In all these cases, the ItCC should not be prevented to rule on the merits, whenever it detects the

obligation to submit questions to the Court concerning the interpretation or validity of that law, on the ground that an interlocutory procedure for review of the constitutionality of that legislation is pending before the national court responsible for carrying out such review" (para. 39).

[30] N. Lupo, *Con quattro pronunce dei primi mesi del 2019 la Corte costituzionale completa il suo rientro nel sistema "a rete" di tutela dei diritti in Europa*, 14 Federalismi.it 22 (2019).

substance of a violation of fundamental rights, including European ones[31].

In a broader perspective, however, one could not rule out an inclination of the ItCC to place itself definitively as the domestic body guaranteeing the uniform application of EU law even in areas that *are not related to the protection of fundamental rights*. In this regard, the *erga omnes* effects of its rulings could be invoked as a justification for conforming domestic law to those supranational obligations not adequately enforced by the legislature, so as to pursue a more integrated correspondence between domestic and supranational law.

Even though this scenario has not openly emerged in constitutional jurisprudence, it may nonetheless have potential, both because the material scope of intervention of dual preliminarity has not been entirely clarified, and because the ItCC could find support in some remote precedents[32].

Currently, the aforementioned Judgment No. 67/2022 appears to have excluded such an eventuality, since it highlighted the absence of a reference to the violation of the Charter as a qualifying feature of the case at stake and consequently reaffirmed the importance of the principle of the primacy of EU law, closely linking it to the disapplication of a rule that has direct effect.

In any case, beyond this important precedent, the expansion of the "269 scheme" beyond the protection of fundamental rights entails the risk of a complete abandonment of the "Granital model", precisely because disapplication would then constitute, for the common judge, a remedy whose functioning entirely coincides with the activation of constitutional review, but with the difference that the latter is

[31] This could be even more necessary whenever the CJEU refuses to clarify *erga omnes* meaning and content of a fundamental right enshrined in the Charter: D. Gallo, *Effetto diretto del diritto dell'Unione europea e disapplicazione, oggi*, 3 Oss. fonti (2019), 1, at 39.

[32] In Judgment No. 389/1989, for example, it affirmed (in the full force of the "Granital model") that disapplication may not be a decisive instrument for settling contrasts between legal systems, because it does not affect the existence and content of national provisions, with the consequence that "it remains the case that the Member States must make the necessary amendments or repeals to their domestic law in order to purify it of any incompatibility or disharmony with the prevailing Community rules".

equipped with *erga omnes* effects[33]. It is hard to doubt that this would end up creating overlaps and potential conflicts in the spheres of action of the two courts.

6. The internal point of view: centralized constitutional review vs. interpenetration of national and European legality

The evolutions of the new judicial protocol inaugurated in 2017 by the ItCC reveals both positive and negative aspects.

Many of the open issues dealt with in previous pages can be regarded from different standpoints, be them related to the relationships of national judges with the CJEU or to purely internal dynamics, such as the competition between common judges and the ItCC in the protection of fundamental rights.

Among these different perspectives, some final remarks will be devoted to the role of the ItCC in the integrated system of fundamental rights' protection and the attempt to regain the central role it lost in the decades of the unconditional application of the "Granital model".

One of the central arguments of Judgment No. 269/2017 insisted on placing the need for *erga omnes* intervention in cases of violation of fundamental rights at the foundation of the new jurisprudential approach. Against this background, should the Court wish to make the centralization of its judgment the cornerstone around which the new structure of relations between domestic and supranational jurisdictions have to be built, many of the problems discussed earlier could find accommodation by expanding its review: such as, for example, by extending the margins of operation of the "269 scheme" to cases outside the sphere of fundamental rights or by taking a generous approach to questions of dual preliminarity, even when the referring judge might be entitled to set aside internal rules that conflict with EU law.

However, an excessive insistence on *centralized* constitutional review may not be a useful approach.

[33] For a critical appraisal on this point see C. Pinelli, *Ma cosa ha detto "un'ormai copiosa giurisprudenza costituzionale"? Ancora sul contrasto di leggi nazionali con la Carta dei diritti fondamentali dell'Unione europea*, in 68 Giur. cost. 1574 (2022).

From a first point of view, the intention that has guided the ItCC since 2017 has been to reaffirm its role, but in ways that are fully compatible with respect for the structural assumptions of EU law, i.e., primacy, preliminary ruling and disapplication. Indeed, the re-centralization of constitutional adjudication that has taken place in recent years is marked by a clear collaborative approach and is informed by a principle of loyalty to the Court of Justice, which, while not excluding a close dialectic with it[34], seeks as far as possible to avoid conditions capable of leading to a systemic conflict between jurisdictions and systems of protection. The "269 scheme", as tempered by the criteria laid down in 2019 cases, has proven to be effective in that the ItCC has decided to take part *from within* to operationalize the Charter's rights at the domestic level[35]. This strategy may work as long as it does not jeopardize that balance in relation to the fundamental principles of the functioning of EU law.

From a second point of view, the question is whether the ItCC is able to uphold the principle of centralization. After all, it must be considered that the downgrading of the prior referral of the question of constitutionality from an *obligation* to a *faculty* was also due to the realistic account that, had it remained within the first option, the Court would still have been deprived of the power to enforce that obligation imposed upon the judiciary. In the Italian system, the common judge has the last word about whether and how to lodge an *incidenter* proceeding to the ItCC, and this decision can neither be forced by the Court, nor can it be reviewed by higher courts.

This element leads, in conclusion, to reflect on the significance that the saga of dual preliminarity might assume in the evolution of

[34] The aforementioned case of the right to silence, lastly decided in Judgment No. 84/2021, is a good example of this trend, as highlighted by D. Sarmiento (see above, nt. 22) and L. Lonardo, *The Veiled Irreverence of the Italian Constitutional Court and the Contours of the Right to Silence for Natural Persons in Administrative Proceedings*, 17 *Eur. Const. Law Rev* 707 (2021).

[35] This strategy could be deemed to favor a constitutional pluralist setting in that the ItCC seeks to purport an "[i]nterpretive pluralism within EU law [that] brings the potential conflict inside, so that where interests and views clash the legal conversation is about what EU law is and should be, rather than which legal system is top": G. Davies, *Interpretive pluralism within EU law*, in M. Avbelj and G. Davies (Eds.), *Research Handbook on Legal Pluralism and EU Law* (2018), 323, at 333.

the case law of the ItCC. Many of the questions dealt with, and the connected and (apparently) irresolvable problems, reveal that dual preliminarity is more than a procedural problem, since it is the sign of an increasing *interpenetration between different spheres of legality*. Particularly in the field of fundamental rights, internal judges (and the ItCC among them) have to take constitutional principles, legislative instruments and European rules into account and to merge them in operational arguments and tests that must be enforced in concrete cases.

The distinction and autonomy of the different legal orders, while remaining untouched from the perspective of the *validity* of norms, seem in fact to be significantly reshaped by the coordination between the same orders that manifests itself primarily in the their joint *application*, which takes place today, with more evidence than was the case in the past, with regard to the *material integration* of fundamental rights. If today's dynamics are thus identified by the closer interpenetration between spheres of legality, it could be inferred that the role of the ItCC should be to ensure the centrality and irreplaceability of its contribution in a pluralist system fundamental rights' protection.

THE «DUAL PRELIMINARITY» DOCTRINE IN THE CASE LAW OF ORDINARY COURTS OF FIRST INSTANCE AND APPEALS

*Michele Massa**

Abstract

This essay summarizes and discusses upon how some ordinary (civil and criminal) courts of first instance and appeals have employed the EU Charter of Fundamental Rights in the light of the «dual preliminarity» doctrine affirmed by the Italian Constitutional Court (ItCC) in judgment No. 269 of 2017. Overall, this doctrine fulfilled its aims and the ItCC receives some cooperation from ordinary courts. Yet the new doctrine is not entirely clear in all its respects, and one of them particularly deserves further clarification: whether «dual preliminarity» applies when national law infringes (not only on Charter provisions, but) also on EU secondary legislation endowed with direct effect, and not only on the Charter.

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1. Premises and questions

This essay summarizes and comments upon how ordinary (civil and criminal) courts of first instance and appeals have employed the EU Charter of Fundamental Rights in the light of the «dual preliminarity» [«doppia pregiudizialità»] doctrine first affirmed by the Italian Constitutional Court (ItCC) in an extensive *obiter dictum* in

judgment No. 269/2017[1]. In a nutshell, this doctrine modifies the preexisting «EU preliminarity», with a double aim: preserving the ItCC's jurisdiction on fundamental rights; allowing the ItCC, in such cases, to make preliminary references to the CJEU on its own terms.

The old «EU preliminary» doctrine was established by the ItCC in its *Granital* judgment[2], in the wake of the *Simmenthal* case[3]. It concerns all the instances when national law is questioned for its compatibility with provisions of EU law having direct effect: such a challenge is adjudicated by ordinary courts, which may make preliminary references to the CJEU if needed and must apply EU law instead of national law if the latter is incompatible with the former. In such cases, national law does may not become the object of constitutional challenges before the ItCC: it is simply ignored, not applied, and remains irrelevant to the controversy at hand.

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[1] Judgment 14 December 2017, No. 269, para. 5.2 (law). Translations in English of this and many other recent constitutional rulings are available in the ItCC website (www.cortecostituzionale.it/actionJudgment.do). Italian scholarship on the new doctrine and its developments immediately became torrential. Monographic studies may be found in D. Tega, *La Corte nel contesto* (2020), 183; A. Amato, *Disapplicazione giudiziale della legge e Carta di Nizza* (2021), 123. See also D. Tega, *The Italian Constitutional Court in its Context: A Narrative*, 17 Eur. Const. L. Rev. 369 (2021); 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. L. Rev. 731 (2019). For a collegial discussion, see also C. Caruso, F. Medico & A. Morrone (eds.), *Granital revisited? L'integrazione europea attraverso il diritto giurisprudenziale* (2020). I myself have commented on the «dual preliminarity»: in *La prima parola e l'ultima. Il posto della Corte costituzionale nella tutela integrata dei diritti*, 3 Dir. pubbl. comp. eur. 773 (2019), I have analyzed its legal basis and argued in its favor, as, albeit not entirely aligned with current EU case law, it expresses an existential necessity for the national system of constitutional justice, intensifies communications between the ItCC the CJEU, and helps preventing divergences among them; in *Dopo la «precisazione». Sviluppi di Corte cost. n. 269/2017*, 2 Oss. Fonti 1 (2019), a first assessment was made of the aftermath in Italian and EU case-law, still arguing in favor of the new doctrine, provided it goes hand in hand with a frequent use by the ItCC of preliminary references to the CJEU. The bibliography in these essays is supplemented and updated here but remains merely illustrative and far from complete.

[2] Judgment 8 June 1984, No. 170.

[3] Judgment 6 March 1979, C-106/77.

The new «dual preliminarity» introduces an exception – a «clarification», in the modest language of Judgment No. 269 – concerning only the cases when national law is questioned for its compatibility with rights enshrined both in the Charter and in the Italian Constitution. This double antinomy is not a remote possibility, the ItCC remarks: «[t]he principles and rights laid out in the Charter largely intersect with the principles and rights guaranteed by the Italian Constitution (and by other Member States' Constitutions)». In these cases, irrespective of the direct effect that the Charter and its provisions might have, ordinary courts are not *bound* to ignore and refuse to apply national law, and *may always* challenge it before the ItCC[4], which therefore finds itself in the position to decide whether and how to make a preliminary reference to the CJEU and eventually annul the challenged law, with general and retroactive effect. Ordinary courts may still grant *interim* relief, and if the law is not annulled by the ItCC, they may also make subsequent preliminary references of their own to the CJEU, and still in the end refuse to apply the questioned national provisions.

From the perspective of ordinary courts, the newly minted doctrine displayed a twofold face. On the one hand, especially in its first and tentative wording, it seemed like an attempt at stifling the powers of ordinary court when they act in their EU capacity: ordinary courts were directed not to take the Luxembourg road straight away (preliminary reference and disapplication) when a EU fundamental right was at stake, and instead to pass through Rome first, leaving the ItCC to decide whether to manage the issue with purely national tools, or get their European colleagues involved. This could appear as an attempt to curb the adjudication options of ordinary courts, as well as the feed of high-profile rights cases to the CJEU.

[4] Indeed, Judgment No. 269 of 2017, cit. at 1, couched the new doctrine in a language suggesting that ordinary courts *were bound* to challenge national law before the ItCC, due to «the principle that places a centralized system of the constitutional review of laws at the foundation of the constitutional structure (Article 134 of the Constitution) ». Subsequent rulings toned down this requirement, and reframed it as mere suggestion or possibility, emphasizing the other reason given in Judgment No. 269, i.e., that «violations of individual rights posit the need for an *erga omnes* intervention», which only the ItCC may enact.

On the other hand, especially if one took seriously the collaborative overtones already present in Judgment No. 269[5] and further stressed in subsequent judgments, the «clarification» could be seen as the lending of a helping hand to ordinary courts: not only constitutional rulings may amplify *erga omnes* the courts' censures to national law; but rights' guarantees in the Italian Constitution and the Charter may have more or less significant differences, whose handling requires specific competences, attention to systemic impact, and – when it comes to conversing with the CJEU – an authoritative say on constitutional tradition and its role as an essential part of national identity. Not every court has the time and capacity to handle this, and misunderstandings may arise, as the *Taricco* saga had recently shown when the «clarification» was made[6]. The ItCC can be a powerful ally, as it may share and bring into better focus the doubts and challenges raised by ordinary courts. Ultimately, the new doctrine could also be seen as an initiative to relieve and support lower judges in navigating the complexities of multi-level rights protection.

This ambivalence is even more interesting, as the ItCC lacks any effective tool to enforce the «dual preliminarity» doctrine. The Italian system of constitutional justice does not allow citizens to access the ItCC directly[7]. Only courts may question the constitutionality of a legal

[5] Reference was made there to a «framework of constructive and loyal cooperation between the various systems of safeguards, in which the constitutional courts are called to enhance dialogue with the ECJ» (Judgment No. 269 of 2017, cit. at 1).

[6] A few days before Judgment No. 269 of the ItCC, in Judgment 5 December 2017, *M.A.S. and M.B.*, C-42/1, the CJEU – deciding on a reference from the ItCC – had in its turn clarified a previous Judgment (of 8 September 2015, *Taricco and Others*, C-105/14) – made on a reference from an ordinary Italian court – which had raised concerns for its compatibility with the principle of strict legality in criminal law. See N. Lupo, *The Advantage of Having the "First Word" in the Composite European Constitution*, 10 It. J. Pub. Law 186, 200 (2018). For a joint reading of judgement No. 269/2017 and the *Taricco* saga see D. Gallo, *Challenging EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure*, in 25 Eur. Law J. 434 (2019).

[7] See E. Lamarque, *Direct Constitutional Complaint and* Italian Style *do not Match. Why Is That?* in V. Barsotti, P.G. Carozza, M. Cartabia & A. Simoncini, *Dialogues on Italian Constitutional Justice. A Comparative Perspective* (2020), 143. Direct recourse to the ItCC is only provided for Regions when they challenge national laws (or laws of other Regions) as infringing on their legislative autonomy, and for the Government when it impugns regional laws. See M. Cartabia & N. Lupo, *The Constitution of Italy. A*

provision they would otherwise apply in one of their judgments. Consequently, the ItCC depends on other Italian courts for the provisions of cases, and can neither force them to do so[8], nor prevent them from preferring preliminary references to the CJEU.

Several questions arise: did the new doctrine fulfill its aim? Were ordinary courts persuaded, did they cooperate with the ItCC, or instead did they frustrate its efforts using preliminary references just as they did until 2017? More broadly, how did they act in cases where a national law apparently collided both with the Constitution and the Charter? Or in cases where the collision was also with provisions of other sources of EU law?

2. Answers: summary and examples

To answer these questions, about thirty rulings, in civil and criminal proceedings, were selected as examples of a variety of attitudes that ordinary courts kept in such cases[9]. The rulings were classified depending on the use of the Charter made by the courts: as a mere complementary, or even ornamental, reference, besides the Constitution (or the European Convention on Human Rights, ECHR; as a legal parameter in challenges to national laws, suspected of incompatibility with EU provisions clearly lacking direct effect; as a parameter in constitutional questions raised before the ItCC, in preliminary references to the CJEU, and in judgments who refused to apply national laws due to their incompatibility with EU having direct effect; in some preliminary references made after a constitutional challenge had been dismissed; in a couple of instances where a

Contextual Analysis (2022), 151-152, 187; M. D'Amico, C. Nardocci, *The Constitutional Court*, in V. Onida (ed.), *Constitutional Law in Italy* 234 (2019).

[8] If the parties of a judgment raise a constitutional objection, and the competent court declines to bring the question to the ItCC (i.e. the court considers the question irrelevant or manifestly ill-founded), the parties may raise the objection again at higher levels of judgment (Law 11 March 1953, No. 87, Article 24, second para.). It will still be a (higher) ordinary court that will decide whether the ItCC is to be addressed.

[9] A full listing and analysis can be found in an earlier version of this paper: *La «precisazione» nella giurisprudenza dei giudici ordinari di merito*, in 2 Eurojus 259 (2022). The collection relied also on the work of the *Observatory on the practices of inter-legality by Italian courts*, in www.cir.santannapisa.it.

constitutional question and a preliminary reference were made in parallel.

The main findings of the survey can be summarized as follows:

- ordinary courts often trusted the ItCC and its readiness to answer and help when dealing with rights guaranteed both in the Constitution and in the Charter. This trust also allowed the ItCC to make some important preliminary references to the CJEU[10].
- Immediately after Judgment No. 269, some ordinary judges (above all some sections of the Court of Cassation) manifested their dissatisfaction with the «dual preliminarity» doctrine, considering it a non-binding proposal, a mere and questionable *obiter*. No such discontent was recorded in the survey summarized here.
- However, ordinary courts have preferred preliminary references to the CJEU, when the underlying substantive questions, if framed with internal parameters, appeared likely to be dismissed by the ItCC, in the light of its case law or that of other national high courts[11].
- Superficial or at least cursory uses of the Charter still occur: the Charter is invoked for the simple literal similarity of its provisions to those of the Constitution (or the ECHR), without any reference to how those provisions were elucidated and constructed in the case law concerning same or similar situations.

[10] E.g., ItCC Orders 18 November 2021, Nos. 216 and 2017, on questions raised by the Courts of Appeals of Milan and Bologna (on the European arrest warrant). In this case, the referring courts could not disapply the national provisions (as the relevant EU legislation lacks direct effect) but could nonetheless address the CJEU before the ItCC. Instead, they chose to raise a constitutional challenge, which led to the preliminary references by the ItCC to the CJEU.

[11] E.g., see CJEU Judgment 16 July 2020, C-658/18, *UX*, on a request for a preliminary ruling from the Justice of the Peace of Bologna. This is the turning point of a long controversy on the legal status of justices of the peace in the Italian legal system (subsequently settled in law 30 December 2021, No. 234, Article 1, para. 629 ff.): a long-standing Italian case-law refused to consider justices of the peace as workers, while under EU law it could be argued that they were fixed-term workers.

- Sometimes the Charter has been used as a complement to other EU sources, to signify that certain *fundamental* rights are, indeed, the *foundation* for more precise and detailed guarantees set out in a piece of secondary legislation, which was more immediately relevant to the case at hand[12].
- As noted above, at least in two occasions a constitutional question and a preliminary reference have been made simultaneously by the same judge during the same proceedings[13]. It is still unclear how the ItCC and the CJEU evaluate this strategy: in both cases, the questions raised by ordinary judges were dismissed on different procedural grounds[14].

3. Comments

3.1. The new doctrine in action

Overall, the «clarification» fulfilled its aims[15]. It allowed the ItCC to take an active part in the «jurisprudential workshop» of fundamental rights, at a juncture in time when their protection has acquired a European dimension which has «definitively entered the cognitive and operative horizon of the guardians of national constitutions»[16]. Under the previous doctrine, whenever a right

[12] E.g., see CJEU Judgment 7 April 2022, C-236/20, *PG*, § 26, as one of the questions raised by the referring court is understood as not requesting an autonomous interpretation of the relevant Charter provisions, as they are referred to only in support of the request for interpretation of a directive.

[13] Court of Appeals of Naples, two Orders 18 September 2019; Justice of the Peace of Lanciano, Orders 18 and 28 May 2020.

[14] On the two couples of orders mentioned in the footnote above, see respectively CJEU, Order 4 June 2020, C-32/20, *TJ*, and ItCC, Judgment 26 November 2020, No. 254: CJEU, Order 10 December 2020, C-220/20, *XX*, and ItCC, Judgment 3 February 2022, No. 31.

[15] N. Lupo, *Con quattro pronunce dei primi mesi del 2019 la Corte costituzionale completa il suo rientro nel sistema "a rete" di tutela dei diritti in Europa*, 13 federalismi.it 1-25 (2019).

[16] M. Cartabia, *La tutela multilivello dei diritti fondamentali. Il cammino della giurisprudenza costituzionale italiana dopo l'entrata in vigore del Trattato di Lisbona,* report at the meeting of the Italian, Portuguese and Spanish constitutional courts (2014), in www.cortecostituzionale.it, 20, 21.

enshrined in the Charter had been recognized as having direct effect[17], the ensuing non-application of incompatible national laws would have pre-empted any constitutional question. Now, ordinary courts are requested, invited or at the very least allowed to transfer their doubts – whenever they may be framed both in constitutional and European terms – to the ItCC. The latter, in its turn, finds itself in the position to offer a twofold «constitutional mediation»: in the ascending phase, it can paint a large and detailed depiction of the national legal system and its problems; in the descending phase, it may decide with binding and general effect[18].

3.2. Ordinary courts trust the ItCC

Despite some initial resistance and criticism of the «dual preliminarity», and very likely also a certain degree of surprise and confusion induced by the new doctrine, several (civil and criminal) courts of first instance and appeals were willing to submit their Charter-related doubts to the ItCC. This is not surprising. On the one hand, the ItCC has demonstrated its sincerely collaborative attitude[19] through a significant increase in the number of its preliminary

[17] And the CJEU has not always been shy in this: see some references in T. Guarnier, *Corte costituzionale, Corti sovranazionali, giudici comuni e legislatore. Lo scenario a seguito della sentenza n. 84 del 2021 della Corte costituzionale*, 2 Nomos 15-16 (2021); D. Gallo, F. Nato, *L'accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell'ordinanza n. 182/2020 della Corte costituzionale*, 4 Eurojus 308, 321-322 (2020). See also CJEU, Judgment 8 March 2022, C-205/20, NE (whenever an EU directive requires proportionate penalties, with a clause no more specific than the principle in the Charter, Article 49, para 3, any national judge must disapply the part of the relevant national legislation which triggers a disproportion). This Grande Chambre ruling rightfully prompted even a very Europafreundlich constitutional judge to extol the virtues of the «dual preliminarity» doctrine: see F. Viganò, La proporzionalità della pena tra diritto costituzionale italiano e diritto dell'Unione europea, Sistema penale (2022).

[18] B. Randazzo, *Il 'riaccentramento' del giudizio costituzionale nella prospettiva di un sistema integrato di giustizia costituzionale*, 3 federalismi.it 144, 159 (2021).

[19] See also G. Amato, M. Cartabia, D. de Pretis & S. Sciarra, *Constitutional Adjudication within a European Composite Constitution. A View from the Bench*, 10 It. J. Pub. Law 485 (2018): an interview with four constitutional judges which exemplifies their positive attitude towards the openness of the legal order to international and supranational law.

references[20], thereby allaying concerns that the new doctrine would undermine European jurisdiction, integration, or commitment to fundamental rights[21]. On the other hand, not only is the European system of rights protection remarkably complex, but – as the *Taricco* saga showed – it may work along coordinates which are not perfectly aligned to the national system[22]; this accrues to the intrinsic difficulties that ordinary, non-specialized judges may find in handling EU substantive and procedural law[23]; and the consequence may well be the courts feel relieved that they can voice their doubts to a familiar, eminent and specialized court, such as the ItCC. The ItCC, after all, is in the best position to put any single issue in a broader perspective, and to turn the occasional divergences with the EU system from possible battlegrounds into occasions for diplomatic exchange[24].

3.3. Cursory uses of the Charter must be avoided

There is still work to be done for ordinary courts to become acquainted with the Charter and its judicial enforcement. This becomes evident when one considers how often the Charter is used in a cursory fashion: as a mere normative quotation juxtaposed to the Constitution

[20] P. Faraguna, M. Massa, D. Paris & D. de Pretis, *Italy*, in R. Albert, D. Landau, P. Faraguna, Ŝ. Drugda (eds.), *The I-CONnect-Clough Center 2021 Global Review of Constitutional Law* 186 (2022). Even when, questioned about a possible double antinomy, the ItCC chooses to enforce only the constitutional standard (striking down the suspect provision on these grounds and leaving EU law censures undecided), it still considers EU law and case-law to argue that the decision and its premises are compatible with them: see R. Mastroianni, *Sui rapporti tra Carte e Corti: nuovi sviluppi nella ricerca di un sistema rapido ed efficace di tutela dei diritti fondamentali*, 5 Eur. Papers 493, 520-521, (2020)

[21] Such concerns have been expressed e.g. by A. Ruggeri, *Il giudice e la "doppia pregiudizialità": istruzioni per l'uso*, in 6 federalismi.it 211, 213 (2021); G. Bronzini, *Il lungo viaggio della Carta dei diritti fondamentali nell'ordinamento europeo: dai tribunali al confronto costituzionale sul futuro dell'Unione*, 3 Riv. giur. lavoro 465 (2021).

[22] This has gradually become a staple of some leading Italian public law scholarship: e.g., R. Bin, *Critica della teoria dei diritti* 69 (2018).

[23] A factor strongly highlighted in T. Pavone, *The Ghostwriters. Lawyers and the Politics behind the Judicial Construction of Europe* (2022), 52. Naturally, this consideration may not be valid for courts which have a long-standing expertise in EU law: e.g., for administrative courts, L. Lorenzoni, *The Doctrine of "Dual Preliminarity" in the Case-Law of Italian Administrative Courts*, in this *Issue* 42-69.

[24] T. Guarnier, *Corte costituzionale, Corti sovranazionali*, cit. at 17, 11, 12.

or the ECHR; without any serious analysis of the case law that specifies the content and scope – under Article 51 – of its provisions, particularly whether a given national rule falls within the notion of «implementing Union law». This kind of references to the Charter are considered inadmissible, or merely ancillary and lacking any autonomous legal relevance: in both cases, ultimately pointless. Such superficiality in referring to the ECHR should be avoided.

3.4. A certain degree of ambiguity lingers

This generally positive assessment does not imply that the «dual preliminarity» doctrine is unproblematic. On the contrary, in several aspects it remains remarkably ambiguous[25]: if both a constitutional question and a preliminary reference may be raised, the former must, should or simply may take precedence? If ordinary courts enjoy some discretion in this choice, what criteria should they follow[26]? Surely this can be neither a matter of purely personal preferences[27], nor detached from consideration of the relevant legal texts[28].

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[25] See A. Cosentino, *Doppia pregiudizialità, ordine delle questioni, disordine delle idee*, Quest. giust. (2020). The author is the rapporteur of an important ruling in which the Court of Cassation applied the «dual preliminarity» doctrine (it led to two important constitutional decisions: Judgment 10 May 2019, No. 112, and Order 10 May 2019, No. 117, which referred to the CJEU the preliminary questions decided with Judgment 2 February 2021, C-481/19, *D.B.*; see then ItCC Judgment 30 April 2021, No. 84).

[26] The literature on this question is extensive: e.g., C. Amalfitano, *Il dialogo tra giudice comune, Corte di giustizia e Corte costituzionale dopo l'obiter dictum della sentenza n. 269/2017*, 2 Oss. Fonti 19 (2019); Ead., *Il rapporto tra rinvio pregiudiziale alla Corte di giustizia e rimessione alla Consulta tra disapplicazione e rimessione alla luce della giurisprudenza "comunitaria" e costituzionale*, in 1 Riv. AIC 296, 304, 312 (2020); D. Gallo, F. Nato, *L'accesso agli assegni*, cit. at 17, 314; S. Leone, *Il regime della doppia pregiudizialità alla luce della sentenza n. 20 del 2019 della Corte costituzionale*, in 3 Riv. AIC 642, 648 (2019); N. Lupo, *Con quattro pronunce*, cit. at 15, 19; R. Mastroianni, *Sui rapporti tra Carte e Corti*, cit. at 20, 518.

[27] G. Repetto, *Il significato europeo della più recente giurisprudenza della Corte costituzionale sulla "doppia pregiudizialità" in materia di diritti fondamentali*, in 4 Riv. AIC 1, 11 (2019). On the other hand, C. Amalfitano, *Il rapporto tra rinvio pregiudiziale alla Corte di giustizia e rimessione alla Consulta*, cit. at 23, 308, recognizes some factual relevance also to the personal sensibilty of each judge.

[28] Some commentators split the problem in two: the procedural order of precedence (between constitutional question and preliminary reference) and the choice of the substantive benchmark (national Constitution, Charter or a combination of the two):

Would it be possible to pursue both avenues at the same time, and how should the ensuing scenario be managed by the ItCC and the CJEU? This option has been mostly contested in legal scholarship, as it could overdramatize the issue at stake and provoke divergences among the ItCC and the CJEU[29]: this is indeed a possibility, in the abstract; but such concerns might underestimate the capacity of the two courts to coordinate themselves in practice, also informally, and make the necessary adjustments to their working agenda.

More generally, in the situation which is at the crux of the matter (double antinomy of national law with the national Constitution and the Charter, and ensuing possibility of preliminary questions both before the ItCC and the CJEU) a certain degree of flexibility might be natural and destined to be governed more in concrete constitutional practice, than with a comprehensive and unambiguous theory. It is worth recalling some remarks made by Giuliano Amato at the eve of Judgment No. 269 of 2017: he found it «fascinating that courts (and even Constitutional Courts) can come to a clash in a pluralistic system such as the European one, as they testify the different sensitivities and the different legal cultures that live together in the continent»; he saw «many decisions of Constitutional Courts related to the expansion of EU competences» as «actually postponing a final word» on issues which can eventually find stable answers only in politics, not in law; and pragmatically concluded that, «[i]n general, and with specific regard to the European pluralism, the role of the constitutional judge is to find solutions to huge challenges, finding a way that is procedurally acceptable, legally sustainable and practically viable

A. Cardone, *Dalla doppia pregiudizialità al parametro di costituzionalità: il nuovo ruolo della giustizia costituzionale accentrata nel contesto dell'integrazione europea*, 1 Oss. fonti 13, 48, 57 (2020); C. Masciotta, *La doppia pregiudizialità nella più recente giurisprudenza costituzionale*, 3 Oss. fonti 1259, 1280, 1289 (2020).

[29] See specifically P. Gambatesa, *Sulla scelta di esperire simultaneamente la questione di legittimità costituzionale e il rinvio alla Corte di giustizia nelle ipotesi di doppia pregiudizialità*, 2 Riv. Gruppo di Pisa 150 (2020); M. Losana, *Tutela dei diritti fondamentali e (in)stabilità delle regole processuali*, 2 Quad. cost. 2020, 305, 313. See also G. Bronzini, *Il lungo viaggio della Carta dei diritti fondamentali*, cit. at 21, 476; R. Mastroianni, *Sui rapporti tra Carte e Corti*, cit. at 20, 513. C. Amalfitano is more open to this possibility: see *Il dialogo tra giudice comune, Corte di giustizia e Corte costituzionale*, cit. at 23, 18; *Il rapporto tra rinvio pregiudiziale alla Corte di giustizia e rimessione alla Consulta*, cit. at 23, 311.

(meaning also, up to some extent, in financial and political terms)»[30]. Indeed, the lingering uncertainties of the «dual preliminarity» doctrine reflect the dynamic balance at the core of every constitutional pluralistic construction, which leaves more room to case-by-case management, than to any kind of authoritative closure by any one of the courts involved[31]. In a mobile and delicate environment, pragmatism, restraint, and a constructive use of silence could befit courts more than the vindications of allegedly ultimate supremacy that each of them might advance. Even one of the most vocal critics of the «dual preliminarity» conceded that, over time, conflicts among courts generally end in «honorable compromises», rather than irreconcilable divergences, and that, until now, both the ItCC and the CJEU showed good faith and will on the issue at stake[32]. As long as this endures, it may be also considered acceptable, and not unmanageable, that ordinary judges do a kind of forum shopping, positing their question (framed in purely EU terms) to the CJEU, when they are convinced that

[30] G. Amato, *Constitutional Adjudication*, cit. at 19, 492, 499.

[31] In Italian scholarship, see N. Lupo, *Con quattro pronunce*, cit. at 15, 22 (an order of precedence does not need to be determined *a priori*); I. Massa Pinto, *Il conflitto sulle regole d'ingaggio tra Corte costituzionale e Corte di Giustizia: spunti di riflessione alla ricerca di un soggetto che "chiuda" il sistema*, 19 federalismi 326, 333 (2020) (the ItCC has been wise to leave wide discretion to both ordinary courts and itself); B. Randazzo, *Il 'riaccentramento' del giudizio costituzionale*, cit. at 18, 149 (discretion is intrinsic in some issues, more so when they deal with legal systems which are integrated only in part); O. Pollicino, G. Repetto, *La sentenza della Corte costituzionale n. 20 del 2019. A ciascuno il suo: ancora sui rapporti tra Carte e corti*, 2 Quad. cost. 434, 436 (2019) (the ItCC has designed a framework where interactions among judicial actors are less rigidly codified); G. Repetto, *Il significato europeo*, cit. at 26, 10 (interactions in rights protection have become thicker, and their outcomes may not be shifted entirely towards either the national or supranational axis). In a broader theoretical perspective, A.O. Cozzi, *Interlegality, the Italian Constitutional Court and supranational fundamental rights: a discussion*, Center for Inter-legality Research WP No. 13/2021, 3, places a discussion of the «dual preliminarity» doctrine against a background (i.e., «interlegality») which emphasizes the need for legal instruments of coordination among the plurality of legal systems.

[32] A. Ruggeri, *Il giudice*, cit. at 21, 225; Id., *La Carta di Nizza-Strasburgo nel sistema costituzionale europeo*, in 3 Riv. AIC 130, 137 (2020). Ruggeri generally supports the previous «EU preliminary» doctrine, as paramount for maximum expansion and certainty for rights, through the application on an equal footing of all the relevant constitutional instruments (Constitution, ECHR, Charter etc.), ultimately mediated by ordinary judges presiding on individual litigations.

it (if framed also or only in constitutional terms) would be rejected by the ItCC. As it has been wrily noted[33], here the judge acts somehow like a child that seeks to obtain something and requests it strategically first to a parent, then to the other: in a non-dysfunctional family, this would be physiological, and one parent would not answer without faithfully consulting the other, very possibly agreeing on a common ground.

3.5 One aspect requires further clarification

And yet at least one aspect of the «dual preliminarity» requires some further clarification, as it matters greatly for the actual scope of the new content: what should an ordinary judge do, when national legislation collides not only with a right enshrined in the Italian Constitution and in the Charter, but also with EU secondary legislation (having direct effect) designed to implement the relevant fundamental right. Should the judge follow the «dual preliminarity» doctrine (there is an antinomy with both the Constitution and the Charter), or the traditional «EU preliminary» (there is an antinomy with EU secondary legislation having direct effect)?

In 2020, the Court of Appeals of Florence[34] refused to apply a national provision, restricting the access of non-EU citizens to childbirth allowance[35], as incompatible with both the Charter, Article 21, and Directive 2011/98/EU, Article 12[36]. In the same year, the same provision came before the ItCC, for several constitutional violations, including of Article 117, para. 1, of the Italian Constitution, as it requires national legislation to comply with EU law, Article 21 of the Charter. The ItCC did not invite the remitting court (the Court of Cassation) to follow the example of the Florentine judges: instead,

[33] N. Lupo, *Con quattro pronunce*, cit. at 15, 23-24 (quoting Giuseppe Martinico).
[34] Judgment 12 May 2020, No. 180.
[35] Law No. 190 of 2014, Article 1(125). Access was granted only to non-EU citizens holding a long-term residence permit.
[36] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. Article 12, para. 1(d), grants third-country workers a right to equal treatment in social security.

applying the «dual preliminarity» doctrine, it retained the case, referred a preliminary question to the CJEU[37] and, in 2022, struck down the suspect legal provision[38]. Again in 2022[39], the ItCC refused to judge on the merits of a question for infringement of Article 117, para. 1 of the Italian Constitution, in connection with a similar directive provision[40]: the «dual preliminarity» doctrine was deemed irrelevant, as no Charter provision had been invoked; the referring judge should have simply refused to apply national law and, instead, enforce the individual right arising from a clear, precise, and unconditional State obligation grounded in the directive.

The difference in outcome is noteworthy: constitutional annulment (by the ItCC) under the new «dual preliminarity» doctrine vs. disapplication (by the ordinary judge) under the traditional «EU preliminary». Several questions arise, and one is particularly poignant. Is the existence of secondary EU legislation, besides the Charter, immaterial to the issue at stake? Does the «double preliminarydual preliminarity» apply (and consequently may a constitutional question be raised) when national law infringes also on secondary legislation endowed with direct effect, and not only on the Charter?

The Charter's rights are mostly a codification of guarantees already established in pre-existing legal materials, as the Explanations relating to the Charter make clear[41]. Many individual guarantees set out by secondary legislation can trace their axiological origin to the rights first proclaimed at Nice in 2000. Nevertheless, one thing is applying the Charter *per se*, with «the typically constitutional stamp of its contents»[42]; another is applying secondary legislation and the set of detailed and coordinated definitions, provisions, exceptions etc., in which it develops a right's fundamental core. The former may be

[37] Order 30 July 2020, No. 182. The questions submitted to the CJEU also concerned Article 12 of Directive 2011/98/EU. The CJEU answered with Judgment 2 September 2021, C-350/2021, *O.D.*

[38] Judgment 4 March 2022, No. 54.

[39] Judgment 11 March 2022, No. 67.

[40] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents; Article 11, concerning equal treatment – again – in social security.

[41] See R. Mastroianni, *Sui rapporti tra Carte e Corti*, cit. at 20, 504.

[42] Judgment No. 269 of 2017, cit. at 1.

similar to constitutional adjudication, while the latter is more akin to solving ordinary contradictions in a complex legal system. At any rate, should the «dual preliminarity» apply also when specific secondary legislation is available to solve the controversy at stake, the *Granital* principle would not be only delimited, but virtually subverted in its entire scope: an outcome which the ItCC has been keen to avoid[43] and critics of the CJEU would find excessive[44].

Due to its vast impact on legal practice and theory, this point must be clarified. Until now, the ItCC considered it only in a single instance. It applied «dual preliminarity» in a case where the remitting judge had invoked the principles of proportionality, pertinence, and non-excessiveness in personal data processing, as sanctioned both in Directive 95/46/EC[45] and in the Charter (Articles 7, 8 and 52). The ItCC noted that «the principles laid out by the directive are marked […] by a singular connection with the relevant provisions of the [Charter], not only in the sense that they provide it with detail or implement it, but also in quite the opposite sense that they constituted the "model" for those rules». In this case, primary and secondary provisions shared the same stamp and bore the same principles. Would the same conclusion be valid, if secondary legislation goes well beyond fundamental principles, and weaves around them a thick network of detailed provisions, entirely sufficient for determining the outcome of a dispute? Several scholarly opinions point to a negative answer: they suggest that the «dual preliminarity» is not appropriate if EU law entirely predetermines the legal regime of a situation[46], does not leave

[43] E.g., in Judgments No. 269 of 2017, cit. at 1, para. 5.1 (law), and No. 67 of 2022, cit. at 38.

[44] R. Bin, *Perché* Granital *serve ancora*, in C. Caruso, F. Medico & A. Morrone (eds.), *Granital revisited?*, cit. at 1, 15.

[45] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals regarding the processing of personal data and on the free movement of such data.

[46] E.g. A. Cardone, *Dalla doppia pregiudizialità*, cit. at 27, 53; F. Donati, *I principi del primato e dell'effetto diretto del diritto dell'Unione in un sistema di tutele concorrenti dei diritti fondamentali*, 12 Federalismi.it 104, 121-122 (2020). This conclusion is modelled on a certain reading of CJEU Judgment 26 February 2013, C-617/10, Åkerberg Fransson, as it leaves some room for national rights standard in situations «where action of the Member States is not entirely determined by European Union law»

room to a national balancing of the relevant interests[47], and immediately offers a specific solution to a concrete controversy[48].

(para. 29). See also G. Repetto, *Il significato europeo*, cit. at 26, 8-9; R. Mastroianni, *Sui rapporti tra Carte e Corti*, cit. at 20, 497, 515.

[47] D. Gallo e F. Nato, *L'accesso agli assegni*, cit. at 17, 314.

[48] S. Leone, *Il regime della doppia pregiudizialità*, cit. at 25, 654-655.

THE DOCTRINE OF DUAL PRELIMINARITY IN THE CASE LAW OF ITALIAN ADMINISTRATIVE COURTS

Livia Lorenzoni[*]

Abstract

This paper analyses the case law of the Regional Administrative Courts and the Council of State on the "dual preliminarity" doctrine established by the Italian Constitutional Court in its Judgment No. 269/2017 in the field of protection of fundamental rights. When rights protected by the Constitution and the CFREU are at stake, the Italian administrative courts tend to prefer to submit a reference for a preliminary ruling to the ECJ. This paper attempts to highlight the possible reasons behind this attitude, its benefits, and drawbacks, given the peculiarity of administrative case law.

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1. Foreword

This article will provide an overview of the interpretation offered by the Regional Administrative Courts and the Council of State of the "dual preliminarity" doctrine, established by the Italian Constitutional Court (ItCC) in its Judgment No. 269/2017, in the field of protection of fundamental rights.

In that judgement, with an historic *obiter dictum*, the ItCC stated that «where a law is the object of doubts concerning the rights enshrined in the Italian Constitution or those guaranteed by the Charter of Fundamental Rights of the European Union in those contexts where EU law applies, the question of constitutionality must be raised, leaving in place the possibility of making a referral for a preliminary ruling for matters of interpretation or of invalidity of Union law, under Article 267 TFUE»[1].

[1] Constitutional Court, Judgement of 07th November 2017, No. 269. The number and breadth of comments on the judgement are boundless. We limit ourselves here to recalling a few contributions, without any claim to exhaustiveness. G. Repetto, *Concorso di questioni pregiudiziali (costituzionale ed europea), tutela dei diritti fondamentali e sindacato di costituzionalità*, Giur. cost. 2958 (2017); 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 ss. (2017); G. Scaccia, *Giudici comuni e diritto dell'Unione europea nella sentenza della Corte costituzionale n. 269 del 2017*, 6 Giur. cost. 2948 (2017); D. Tega, *La sentenza n. 269 del*

This statement was described by the Court itself as a "clarification" of established case law since Judgment No. 170 of 1984 (Granital), made necessary by the recognition of binding legal effects to the Charter of Fundamental Rights of the European Union (hereafter, CFREU or Nice Charter). The Charter, thus, presents a «typically constitutional content» and expresses principles and rights that largely intersect the principles and rights guaranteed by the Italian Constitution (and other national constitutions of member states), making *erga omnes* intervention by the judge of laws appropriate.

In the subsequent judgments of the ItCC, Nos. 20/2019, 63/2019, 102/2019, 11/2020, 254/2020, and Orders 117/2019, 182/2020, the above guidance was taken up and further clarified[2]. In

2017 e il concorso di rimedi giurisdizionali costituzionali ed europei, in Forum di Quad. Cost. (2018); A. Guazzarotti, *Un "atto interruttivo dell'usucapione" delle attribuzioni della Corte costituzionale? In margine alla sentenza n. 269 del 2017*, 2 Forum di Quad. cost. (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 (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. 1 (2019) 11-14; 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 (2019); C. Caruso, F. Medico, A. Morrone (eds.), *Granital revisited? L'integrazione europea attraverso il diritto giurisprudenziale*, Bononia University press, 2020; P. Cruz Mantilla de los Ríos, *Doble prejudicialidad: dos aproximaciones diversas ante una misma encrucijada,* 75 Revista de estudios europeos, (2020), 27-40. G. Martinico, *La doppia pregiudizialità nel diritto comparato*, 3 Diritto pubblico (2022), 757-774; M. Bobek, J. Adams-Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States*, Oxford, 2020; A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford University Press, 2022.

[2] G. Repetto, *Il significato europeo della più recente giurisprudenza della Corte costituzionale sulla "doppia pregiudizialità" in materia di diritti fondamentali*, 4 Rivista AIC (2019); D. Tega, *Tra incidente di costituzionalità e rinvio pregiudiziale: lavori in corso*, 3 Quad. cost. 635 (2019); S. Catalano, *Rinvio pregiudiziale nei casi di doppia pregiudizialità. Osservazioni a margine dell'opportuna scelta compiuta con l'ordinanza n. 117 del 2019 della Corte costituzionale*, 4 Rivista AIC (2019); M. Massa, *Dopo la «precisazione». Sviluppi di Corte cost. n. 269/2017*, 2 Osservatorio sulle fonti (2019); 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 (2020); Id., *Rapporti di forza tra corti, sconfinamento di competenze e complessivo indebolimento del sistema UE?*, https://www.lalegislazionepenale.eu/wp-content/uploads/2019/02/Amalfinato-Rapporti-pdf.pdf; N. Lupo, *Con quattro pronunce dei primi mesi del 2019 la Corte costituzionale completa il suo rientro nel sistema*

particular, the prior referral to the ItCC was qualified as an opportunity, rather than a duty, and the possibility for the ordinary Courts to refer to the CJEU any preliminary question they deem necessary on the same profiles tackled by the ItCC was confirmed (while it was originally excluded by Judgement No. 269/2017).

The point of greatest interest, for the purposes of this paper, lies in the extension of the possibility of prior referral to the ItCC even in the event of a conflict between national laws and EU secondary legislation, when principles provided for therein are «in singular connection with the relevant provisions of the CFREU»[3]. In fact, most administrative law cases concern the application of secondary EU legislation, somehow linked to fundamental rights, by the public administration.

The analysis of administrative jurisprudence offers a mixed picture, with a prevalence of referrals to the CJEU over incidents of constitutional legitimacy. This paper will, therefore, attempt to verify the reasons behind the attitude of administrative law judges in the presence of the requisites for applying the doctrine of "dual preliminarity", inaugurated by ItCC ruling 269/2017.

2. An overview of the Administrative Courts case law that did not apply the "dual preliminarity" doctrine

2.1. The case law on the State-owned maritime concessions with tourist-recreational purposes

The most recent and controversial issue concerns the compatibility with EU law of the *ex lege* extension of State-owned

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'*a rete*' *di tutela dei diritti in Europa*, 13 Federalismi.it (2019); D. Tega, *Tra incidente di costituzionalità e rinvio pregiudiziale: lavori in corso*, in 3 Quad. cost., 615 ss. (2019); D. Gallo, F. Nato, *L'accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell'ordinanza n. 182/2020 della Corte costituzionale*, in 4 Eurojus 308, 321-322 (2020); N. Lazzerini, *Dual Preliminarity Within the Scope of the EU Charter of Fundamental Rights in the Light of Order 182/2020 of the Italian Constitutional Court*, 5.3 European Papers 1463 ss. (2020); S. Leone, *Doppia pregiudizialità: i rischi di un dialogo senza ordine*, 1 Quad. Cost. 183 ss. (2021).

[3] Constitutional Court, Judgement of 23rd January 2019 No.20, point No. 2.1.

maritime concessions with tourist-recreational purposes[4]. The national measure which permitted the automatic extension of existing concessions, without any selection procedure, was declared by the ECJ as conflicting with Article 12(1) and (2) of Directive 2006/123/EC on services in the internal market[5] and with Article 49 TFEU, in so far as those concessions are of certain cross-border interest[6]. Nevertheless, the Italian legislature has continued to extend the expiration date of existing concessions, until the administrative law judge intervened with the two well-known pronouncements of the Plenary Assembly of the Council of State of November the 9th, 2021, numbers 17 and 18[7],

[4] Provided by Article 1, paragraphs 682 and 683, Law No. 145 of 2018 and by Article 100, paragraph 1, of Decree-Law No. 104 of August 14, 2020, converted, with amendments, by Law No. 126 of October 13, 2020.

[5] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (so-called Bolkestein). See, among others, N. Longobardi, *Liberalizzazioni e libertà di impresa*, in Riv. it. dir. pubbl. comunit., 2013, 607; E. L. Camilli, *Il recepimento della direttiva servizi in Italia*, in Giorn. Dir. Amm., 2010, 12.

[6] ECJ, Fifth Chamber, judgment of 14th July 2016 Promoimpresa s.r.l. In Joined Cases C-458/14 and C-67/15C, on which see, among many, E. Boscolo, *Beni pubblici e concorrenza: le concessioni demaniali marittime*, in Urb. app., 2016, 11, 1217; L. Di Giovanni, *Le concessioni demaniali marittime e il divieto di proroga ex lege*, in Riv. it. dir. pubbl. com., 2016, 912; A. Squazzoni, *Il regime di proroga delle concessioni demaniali marittime non resiste al vaglio della Corte di giustizia*, in Riv. regolaz. mercati, 2016, 166.

[7] Council of State, Ad. Plen., Judgements of 9th November 2021, No.17 and No.18. The comments on these two judgements are countless. See, among others, M.A. Sandulli, *Sulle "concessioni balneari" alla luce delle sentenze nn. 17 e 18 del 2021 dell'Adunanza Plenaria*, Giustiziainsieme.it (16 feb. 2022)); F. Francario, *Se questa è nomofilachia. Il diritto amministrativo 2.0 secondo l'adunanza plenaria del Consiglio di Stato (recensione al fascicolo monotematico dalla Rivista Diritto e Società n. 3/2021 "La proroga delle "concessioni balneari" alla luce delle sentenze 17 e 18 del 2021 dell'Adunanza Plenaria")*, Giustiziainsieme.it (2022); C. Contessa, *Recentissime - Consiglio di Stato*, 1 Giur. it. 22-28 (2022); A. Cossiri, *Il bilanciamento degli interessi in materia di concessioni balneari*, 9 Federalismi.it (2022); E. Zampetti, *Le concessioni balneari dopo le pronunce Ad. Plen. 17 e 18/2021. Definito il giudizio di rinvio innanzi al C.G.A.R.S. (nota a Cgars, 24 gennaio 2022, n. 116)*, Giustiziainsieme.it (2022); M. Santini, "*Save the date*" *dalla Plenaria per le gare balneari: prime note (su tasti bianchi)*, 1 Urbanistica e appalti 67-76 (2022); C. Feliziani, *Norma interna in contrasto con il diritto europeo, doveri del funzionario pubblico e sorte del provvedimento amministrativo "antieuropeo"*, 2 Diritto processuale amministrativo 459-488 (2022); E. Lubrano, *Le concessioni demaniali marittime ieri, oggi e domani. L'applicazione delle regole sulla concorrenza, secondo i principi del Diritto Europeo [nota a sentenza: Cons. Stato, Ad. Plen., 9 novembre 2021, nn. 17 e 18]*, in 2 GiustAmm.it

2 (2022); A. Lazzaro, *Le concessioni demaniali marittime ad uso turistico-ricreativo tra principi europei e norme interne. La soluzione del conflitto nelle sentenze dell'Adunanza plenaria n. 17-18 del 9 novembre 2021 [Nota a sentenza: Cons. Stato, ad. plen., 9 novembre 2021, nn. 17 e 18]*, 1 Diritto dei trasporti 120-129 (2022); R. Coroneo, *Spunti di riflessione sulle sentenze del Consiglio di Stato in Adunanza Plenaria nn. 17 e 18 del 9 novembre 2021 in merito alle proroghe delle concessioni demaniali marittime*, 1 Vita notarile 123 (2022); G. Finocchiaro, *Qualche risposta ai numerosi interrogativi suscitati dall'anticipata retrocessione delle concessioni demaniali marittime al 31 dicembre 2023*, 1 Vita notarile 127 (2022); B. Caravita, G. Carlomagno, *La proroga "ex lege" delle concessioni demaniali marittime. Tra tutela della concorrenza ed economia sociale di mercato. Una prospettiva di riforma*, 20 Federalismi.it 1-20 (2021); A. De Siano, *Disapplicazione per difformità dal diritto UE e protagonismo giurisprudenziale*, 18 Federalismi.it 1-23 (2021); E. Di Salvatore, *Proroghe legislative automatiche, non applicazione e disapplicazione: l'Adunanza plenaria del Consiglio di Stato si pronuncia sulla direttiva servizi*, 6 Giur. cost., 2935 (2021); A. Giannelli, G. Tropea, *Il funzionalismo creativo dell'Adunanza Plenaria in tema di concessioni demaniali marittime e l'esigenza del "katékon"*, in 5-6 Riv. it. dir. pubb. com., 723-760 (2021); M.P. Chiti, *"Juger l'administration c'est aussi légiférer"? L'Adunanza Plenaria sulle concessioni demaniali marittime*, 5-6- Riv. it. dir. pubb. com. 869-884 (2021); R. Rolli, D. Granata, *Concessioni demaniali marittime: la tutela della concorrenza quale Nemesi del legittimo affidamento*, 5 Rivista giuridica dell'edilizia 1624-1694 (2021); A.M. Colarusso, *Concessioni demaniali: le "relazioni pericolose" tra illegittimità comunitaria e il giudicato amministrativo sui rapporti di durata. Spunti a margine delle sentenze dell'Adunanza Plenaria del Consiglio di Stato, nn. 17 e 18/2021* in 4 Amministrativ@mente 841-870 (2021); E. Cannizzaro, *Demanio marittimo. Effetti in malam partem di direttive europee? In margine alle sentenze 17 e 18 dell'Ad. plen. del Consiglio di Stato*, Giustiziainsieme.it (2021); F.P. Bello, *Primissime considerazioni sulla "nuova" disciplina delle concessioni balneari nella lettura dell'Adunanza plenaria del Consiglio di Stato*, Giustiziainsieme.it (2021); M. Timo, *Concessioni balneari senza gara… all'ultima spiaggia*, 5 Riv. giur. edil. (2021); AA. VV., *La proroga delle "concessioni balneari" alla luce delle sentenze 17 e 18 del 2021 dell'Adunanza Plenariaia,* 3 *Dir. soc.*, (2021); A. Circolo, *L'epilogo della proroga ex lege delle concessioni balneari*, 3 Studi sull'integrazione europea 573-590 (2021); F. Capelli, *Evoluzioni, splendori e decadenza delle direttive comunitarie. Impatto della direttiva CE n. 2006/123 in materia di servizi: il caso delle concessioni balneari* (2021); A. Lucarelli, B. De Maria & M.C. Girardi, *Governo e gestione delle concessioni demaniali marittime, Principi Costituzionali, beni pubblici e concorrenza tra ordinamento europeo e ordinamento interno*, in 7 Quaderni della Rassegna di diritto pubblico europeo (2021); R. Dipace, *All'Adunanza plenaria le questioni relative alla proroga legislativa delle concessioni demaniali marittime per finalità turistico ricreative*, Giustiziainsieme.it. (2021); A. Giannaccari, *"À la guerre comme à la guerre". Concessioni demaniali marittime, Adunanza plenaria e procedure selettive (al 2023?)*, in 3 Mercato concorrenza regole 581-591 (2021); P. Gaggero, *Diritto comunitario, disapplicazione del diritto interno e creatività della giurisprudenza (a proposito della proroga della durata delle concessioni demaniali marittime)*, in 2 Riv. trim. dir. econ. 76 (2021); A. Cossiri, *L'Adunanza Plenaria del Consiglio di Stato si pronuncia sulle concessioni demaniali a scopo*

followed by the annual Market and Competition Law 2021, that enshrined the obligation to award concessions on the basis of public procurement procedures starting from December 2023 (or, under certain conditions, 2024) and delegated the government to reorganize and simplify existing regulations[8].

In this matter, the Council of State radically ruled out the applicability of the "dual preliminarity" doctrine to the case at hand. The Plenary Assembly of the Council of State denied the existence of both the two criteria for activating the incidental constitutionality review on the national anti-community law, prior to a possible preliminary reference to the ECJ. These requirements have been identified in the infringement of fundamental personal rights, protected both by the Constitution and by the Nice Charter, and in the contrast with a non-self-executing EU directive[9].

Some authors, on the contrary, have advocated the application of the "dual preliminarity" doctrine precisely in cases like that,

turistico-ricreativo. Note a prima lettura, 2 Diritto Pubblico Europeo - Rassegna online 232-248 (2021).

[8] See Articles 3 and 4 Law of 5th August 2022, No. 118. Lastly, art. 10 quater of Law Decree of 29 dicembre 2022, n. 198 as modified by Law 24 febbraio 2023, n. 14. - Disposizioni urgenti in materia di termini legislativi (MILLEPROROGHE 2023) established a technical comittee to define «the technical criteria for determining the existence of scarcity of the available natural resource, taking into account both the overall national and regionally disaggregated data, and transboundary economic significance» and extended the deadline for opening the market to december 2025.

[9] The judgement stated that: «a national law in conflict with a European norm having direct effect, even if contained in a self-executing directive, cannot be applied either by the judge or by the public administration, without there being any need (as clarified by the Constitutional Court starting from Judgement No. 170 of 1984) for a question of constitutional legitimacy. Indeed, it should be recalled that an incidental review of constitutionality on an anti-EU national law is nowadays possible only if that law is in conflict with a non-self-executing EU directive or, according to the recent theory of the so-called dual preliminarity, in cases where the national law is in conflict with the fundamental rights of the person protected both by the Constitution and by the Charter of Fundamental Rights of the European Union (see, in particular, Corte Cost. Judgments No. 289/2017 (*rectius* 269/2017), No. 20/2019, No. 63/2019, No. 112/2019). Neither of the two "exceptions" applies in the present case, because the Community rules infringed are self-executing and no constitutionally protected fundamental personal rights are at stake» Council of State, Ad. Plen., Judgements of 9th November 2021, No.17 and No.18.

namely, when the national legislature has persisted in circumventing the content of European directives[10]. Many comments on the Council of State's position have observed how the latter has "borrowed," unduly, instruments typical of the ItCC, to exercise, in fact, a power that belongs to the latter[11], thus, implicitly, affirming the need for its intervention.

On the other hand, the ItCC, in fact, has already judged on the matter on several occasions, affirming the need to adapt EU the Italian regulation of State-owned maritime concessions for tourism-recreational purposes to EU law. However, the Court's decisions only concerned the compatibility of regional laws on the matter with the division of legislative powers between the State and the Regions established in the Constitution. In fact, the constitutional legitimacy of the State law, providing for the extension of the concessions, was never brought to the Court's attention[12].

A recent order of the Lecce Regional Administrative Court, while expressly referring to the protection of fundamental rights

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[10] 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 (2020).

[11] E. Lamarque, *Le due sentenze dell'Adunanza plenaria… le gemelle di Shining?*, 3 Dir. soc. 474 – 475 (2021). See, also, M.A. Sandulli, *Introduzione al numero speciale sulle "concessioni balneari"*, 3 Diritto e società 351-352 (2021).

[12] See, among others, Constitutional Court, Judgement of 20th May 2010 No. 180; Id. 26th November 2010 No. 340; Id. 4th July 2013 No. 171; 26th June 2015 No. 117; Id., 11 January 2017, No. 40; Id. 5th December 2018 No. 221; Id. 11th April 2018 No. 109; Id. 9 January 2019 No. 1, with comment of A. Lucarelli, *Il nodo delle concessioni demaniali marittime tra non attuazione della Bolkestein, regola della concorrenza ed insorgere della nuova categoria "giuridica" dei beni comuni (Nota a C. cost., sentenza n. 1/2019)*, 1 Diritti fondamentali (2019); G. Dalla Valentina, *La proroga ope legis delle concessioni demaniali marittime dalla sentenza n. 1/2019 della Corte costituzionale al Decreto Rilancio*, 3 Forum di Quad. Cost. (2020). See also Constitutional Court, Judgement of 29 January 2021 No. 10. Among the recent articles on the constitutional jurisprudence on the matter, see S. De Nardi, *Il sindacato della Corte costituzionale sulle (cosiddette) proroghe regionali delle concessioni demaniali marittime ad uso turistico-ricreativo*, 1 Munus 373 ss. (2018); A Lucarelli, *La concorrenza principio tiranno? Per una lettura costituzionalmente orientata del governo dei beni pubblici,* 6 Giur. cost. 2898 (2020); M. Conticelli, *Effetti e paradossi del legislatore statale nel conformare la disciplina delle concessioni del demanio marittimo per finalità turistico-ricreative al diritto europeo della concorrenza*, 5 Giur. cost. 2475 ss. (2020); M. Mazzarella, *Le concessioni dei beni demaniali marittimi: conflitto Stato – Regioni e tutela della concorrenza*, Diritti regionali (2022).

«recognized as deserving privileged protection in the EU legal system and in the Charter of Fundamental Rights»[13], proposed a preliminary reference before the ECJ, rather than raising the issue of constitutional legitimacy. The judgement is in line with the previous stance taken by the same Tribunal, that disagreed with the Council of State and denied the PA's power to disapply the Italian anti-EU provision on extensions of maritime State concessions. While considering the incident of constitutionality before the ItCC, among the interpretative support tools available to national judges, the Tribunal referred to the ECJ, pursuant to Article 267 TFEU, a set of complex questions. These concerned, *inter alia*, the relationship between the immediate applicability, the self-executing character, and the effectiveness of a European harmonisation directive; the public administration's power of disapplication with the effect of mere exclusion or merely obstruction of the national law[14]; and a series of critical elements that had emerged in previous case law, such as the cross-border relevance and scarcity of the resource in question. Although the matter is currently pending before the ECJ, the Council of State, in a later Judgement, addressed the same issues raised by the Lecce Regional Administrative Court order, providing an interpretive clarification on the nature and applicability of Article 12 of directive 2006/123/CE[15].

A further issue, related to the maritime concessions legislation, was referred by the Council of State to the ECJ for a preliminary ruling. The case concerned the compatibility with EU of Article 49 of the Code of Navigation with EU law in so far as it provides for «the transfer, free of charge and without compensation (…) of the building works carried out on the State-owned land»[16]. In fact, Article 49 of the Code of

[13] TAR Puglia – Lecce, Sez. I, ord. of 11th May 2022 n. 743. On the former jurisprudence of the same Tribunal on the matter see E. Chiti, *False piste: il T.A.R. Lecce e le concessioni demaniali marittime,* 6 Giorn. dir. amm., (2021), pp. 801-810.

14 For an exhaustive and critical analysis of these issues, see D. Gallo, L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa, Milano, 2018.

[15] Council of State, sez. VI, 1st March 2023, Judgement No. 2195.

[16] Council of State, sez. VII, 15 September 2022, Order No. 8010. The order posed the following question to the ECJ: «do Articles 49 and 56 TFEU and the principles inferable from the Laezza judgment (C- 375/14), if deemed applicable, preclude the interpretation of a national provision such as Article 49 of the Code of Navigation. In the sense of determining the transfer for non-interest and without compensation by

Navigation provides for a regime of provisional ownership by the concessionaire over the non-removable works built on the State property, and the subsequent forfeiture of the latter by the State, without compensation, on expiry of the concessionary relationship[17]. Administrative jurisprudence clarified that this mechanism does not operate in the presence of an automatic extension but applies in the case of a renewal of the concession by virtue of a new measure[18]. Even in this case, the Italian provision at stake affects a fundamental right protected both by the Nice Charter and the Italian Constitution, as it narrows the scope of the concessionaire's right of ownership over the non-removable construction works which it has built[19].

2.2. The case law on the State concessions in the field of gaming and betting

The choice of the Lecce Regional Administrative Court to refer the case to the ECJ is in line with a lesser-known strand of case law about the Italian extension of administrative concessions in the field of gaming and betting.

In this case law, the subject of the review was an administrative measure that provided the extension of the concession in favour of the national incumbent for the activity of collection of national instant lotteries (so-called scratch cards), without competitive procedures. The applicants claimed the infringement of both the European principles of freedom of establishment, competition, equal treatment, transparency, and proportionality, as well as of constitutionally protected principles of equality (Art. 3 Const.), freedom of economic

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the concessionaire on expiry of the concession when it is renewed, without interruption, even under a new measure, of the construction works carried out on the State-owned area forming part of the set of assets organized for the operation of the bathing business, since such an effect of immediate forfeiture could configure a restriction exceeding what is necessary to achieve the objective actually pursued by the national legislator and therefore disproportionate to the aim».

[17] Royal Decree of 30 March 1942 - No. 327 (Code of Navigation), Article 49, entitled 'Devolution of non-removable works'. On the effect of this provision on concessionary fees, see Corte cost. sent. of 10 January 2017, no. 29.

[18] Council of State, Sez. VI, 10 June 2013 n. 3196; Sez. VI, 17 February 2017 n. 729; Sez. IV, 13 February 2020 n. 1146.

[19] See M. Calabrò, *Concessioni demaniali marittime ad uso turistico-ricreativo e acquisizione al patrimonio dello Stato delle opere non amovibili: una riforma necessaria*, 3 Dir. soc. 441 ss. (2021).

initiative (41 Cost.) and freedom of competition (Article 117, second paragraph, letter e) Cost.).

The Council of State ruled out the possibility of invoking the ItCC's guideline set out in ruling No. 269/2017, considering that there was no question of the protection of a subjective situation, protected by the Charter of Fundamental Rights of the European Union, but, instead, a question of interpretation of Union law, under Article 267 TFEU. The Court also specified that «even in the hypothesis of a conflict with the said Charter, nevertheless, the prior raising of the issue of constitutionality should be understood as a possibility, and not an obligation, for the judge *a quo*»[20].

The Administrative Court emphasised the necessary priority of the European preliminary ruling, as opposed to the issue of constitutionality, even in situations of dual protection (internal and European) of subjective legal situations. The Council of State stated that «at the procedural level, the possible raising of the issue of constitutionality, postulates the positive appreciation of the relevance and not manifestly unfoundedness of the question. In the logic of a possible order of referral to the ItCC, in fact, the domestic Court has the burden of deliberating the European question, to assess the applicability of the domestic law in the case before it, giving reasons on the relevance of the question, which is always pegged to a prognostic assessment of the applicability of the rule to the specific case»[21]. Therefore, the Court reserved the right to raise the question of constitutional legitimacy, only in cases of a prior favourable ruling by the ECJ on the European compatibility of the challenged Italian provision.

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[20] Council of State sez. IV, Judgements of 3rd September 2019, Nos. 6079 and 6080; Council of State, sez. IV, Orders of 5th September 2019, Nos. 6101 and 6102.

[21] The Chamber expressly reserves the right to examine at a later date the non-manifest groundlessness and the relevance of the question of constitutionality, according to the internal parameters (namely Articles 3, 24 and 117 of the Constitution), considering also that, in the event that a possible judgement before the Constitutional Court concludes with a ruling that the provision is unconstitutional, this would entail the expulsion of the rule from the Order with *erga omnes* effects, rather than limited effects, as in the other hypothesis, to the disapplication in the individual case. See Council of State sez. IV, 3 September 2019, Judgement No. 6080; Council of State sect. IV, 3 September 2019, Judgement No. 6079.

Further arguments for giving priority to the reference for a preliminary ruling to the ECJ were the mandatory character of such European reference, when the referring court is also a court of last instance; the importance of the interpretative question underlying the double reference, such as to shape, for the future, the exercise of discretion by the domestic legislature; the specific nature of the case, which requires the prompt resolution of the dispute.

2.3. The case law on age discrimination

Several orders by Regional Administrative Courts and the Council of State have referred to the ECJ regulatory hypotheses for which a possible violation of Article 21 of the Charter of Fundamental Rights of the European Union, paragraph 1, emerged[22].

The contested national frameworks imposed, for example, an upper age limit of 50 years for participation in the notary competition[23]; an age limit of 30 years for the competition for technical psychologist commissioner in the career of State Police officers[24]; a ban on former retired PA employees from receiving remuneration for consultancy assignments[25], with a possible age discrimination effect in public competitions.

Here too, the question of constitutionality could have been raised, with reference to the principle of equality and the right to work, in conjunction with the principle of non- discrimination enshrined in the Nice Charter. However, similar to the cases examined above, the administrative judge chose the path of a preliminary reference to the ECJ, using the European directive on equal treatment in employment and occupation[26] as a European parameter.

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[22] According to that article, «any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation» is prohibited.

[23] Council of State, IV Sec. Ord. of 28 November 2019, No 8154.

[24] Council of State, IV sec. Ord. of 02 September 2021, No. 6206; Council of State, IV sec. Ord. 23 April 2021, N. 3272.

[25] TAR per la Sardegna, I sez., ord. of 19 October 2018, No. 881.

[26] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

2.4. Other judgments that did not apply the "dual preliminarity" doctrine

A further case of preliminary referral to the ECJ by the administrative law judge concerned the right of pre-emption of the special company and its employees, in the event of the transfer of the ownership of a municipal pharmacy. Also in this case, an internal provision distorting free competition was contested for having disregarded the principles of freedom of establishment, non-discrimination, equal treatment, competition, and free movement of workers. Articles 15 and 16 of the Charter of Fundamental Rights of the EU were also mentioned, nonetheless, the Court omitted to mention the doctrine established in judgment No. 269/2017[27].

Lastly, the Council of State referred to the ECJ the interpretation of EU law, with regard to an Italian provision that excludes price revisions in contracts with an instrumental link to the so-called "special sectors" in public procurement law (gas, electricity, water, transports…), such as the cleaning of stations, installations, offices and workshops, inherent to the railway transport network[28]. In that case, the right of workers and employers «to negotiate and conclude collective agreements» protected by art. 28 of the Nice Charter was at stake.

3. Cases referred to the ECJ following a previous ruling by the ItCC, but *outside* the scope of the 269/2017 doctrine

3.1. The case law on mutual cooperative banks

In some cases, the administrative law judge referred the question to the ECJ for a preliminary ruling, following a statement of inadmissibility or unfoundedness by the ItCC, but without following the 269/2017 doctrine. This approach has been adopted in relation to the Italian legislation requiring the transformation of a mutual cooperative bank into a joint stock company if a certain asset threshold is exceeded, providing for limitations on the redemption of shares by the shareholder in the event of withdrawal, to avoid the possible liquidation of the transformed bank. The ItCC had intervened on the

[27] Council of State, sez. III, ord. del 4 luglio 2018, n. 4102.
[28] Council of State, sez. IV, ord. del 15 luglio 2019, n. 4949.

issue, in Judgment No. 99/2018, which found the rules on shareholder withdrawal to be largely compliant with the relevant EU law. The ItCC mentioned the Nice Charter only to deny the existence of «a disproportionate and intolerable interference with the right to property recognised by Article 17 CFREU» and to exclude the need for a reference to the ECJ for a preliminary ruling on the validity of the above-mentioned European legislation under the third paragraph of Article 267 TFEU[29]. It did not make any reference to judgment 269/2017.

Nevertheless, the Council of State did later refer the issue to the ECJ[30]. The Court of Luxembourg was called upon to assess the compatibility of Italian regulatory framework with several articles of the TFEU on competition and State aid, with some European regulations[31], and the legitimacy the relevant EU secondary legislation in the light of Articles 16 and 17 CFREU on freedom of enterprise and the right to property.

3.2. The case law on incentives for renewable energies

Another issue that was raised, first, before the ItCC and, later, before the ECJ, but without mentioning the 269/2017 doctrine, concerns the changes to the incentive regime to produce energy from renewable sources. The Italian regulation has forced operators in the sector to switch to a different tariff system, remodeled in a pejorative sense.

Judgment 16/2017 of the ItCC (issued before judgment 269/2017) found such an intervention to be in line with the public interest «in terms of a fair balancing of the opposing interests at stake,

[29] ItCC Judgement of 21 March 2018, n.99.

[30] Council of State VI sec. ord. of 26 October 2018 nos. 6086, 6129; Council of State VI sec. ord. of 05 February 2019 No. 883, that requested the ECJ to «assess the European legitimacy of Article 10 of EU Delegated Regulation No. 241/2014 of the Commission, in light of Article 16 and Article 17 of the Charter of Fundamental Rights of the European Union».

[31] Regulation (Eu) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation Commission Delegated Regulation (EU) No 241/2014 of 7 January 2014, supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds requirements for institutions.

aimed at combining the policy of support for the production of energy from renewable sources with the greater sustainability of the correlative costs to be borne by end users of electricity»[32]. The ItCC also confirmed the legitimacy of the internal rule in relation to EU law concerning the violation of the users' trusts on the quantification of the incentives.

The Regional Administrative Court, however, considering that certain aspects not covered by the ItCC's judgment were unresolved, deemed it necessary to obtain a ruling from the ECJ. It was necessary, according to the referring Court, to clarify, also in the light of secondary EU legislation on energy production, whether the relevant national provision is compatible with the general EU law principles of legitimate expectations, legal certainty, loyal cooperation, and useful effect, as well as with Articles 16 and 17 of the CFREU[33].

3.3. The case law on the pension of administrative judges

The last question referred to the ECJ, following a ruling by the ItCC, but without following the "dual preliminarity" doctrine, concerned the prohibition for persons already receiving a pension from a public body or administration to receive, from another public body or administration, all-inclusive payments which, when added to their pension, exceed the gross annual amount equal to that granted to the First President of the Court of Cassation. Here too, the question of constitutionality was declared unfounded by the Court in Judgment No. 124/2017[34], before Judgement No. 269/2017 was issued. Also here, the Lazio Regional Administrative Court referred the matter to the ECJ, considering that the Italian rule, by discriminating against certain workers only on the grounds of their personal wealth, violated Article 21 of the CFREU. To highlight the relevance of the issue, the Regional Administrative Court emphasised that there were 21 other appeals pending, brought by magistrates of the Council of State, and concerning the same question of law (and 10 other appeals with identical content)[35].

[32] Constitutional Court, Judgement 7 December 2016, No. 16.
[33] TAR Lazio, sez III ter, ord. of 16 November 2018, no. 11124; TAR Lazio, sez III ter, ord. of 20 November 2018, 11206.
[34] Constitutional Court, Judgement of 22 March 2017, No. 124.
[35] TAR Lazio, Roma, I sez., ord. 04 December 2018, no. 11755; TAR Lazio, Roma, I sez., ord. 13 December 2018, no. 12153.

4. The Administrative Courts' orders submitting a prior reference to the ItCC based on fundamental rights protection

4.1. The case law on bingo concessions operating under technical extension regime

In a recent case, again concerning the extension of concessions for games and betting, contrary to the case law previously described (par. 2.2), the Lazio Regional Administrative Court opted to raise the issue of constitutionality first, in line with the "dual preliminarity" doctrine[36]. In this case, Italian law postponed the deadline for calling for tenders for the re-allocation of concessions for the game of bingo, at the same time increasing the amounts owed monthly by concessionaires operating under the technical extension regime. The question of constitutionality was raised in relation to the principles of free economic initiative, equality, and non-discrimination, enshrined in the Constitution and the Nice Charter.

In its Judgment No. 49/2021, the ItCC declared unfounded the questions raised by the Lazio Regional Administrative Tribunal. The increase in the concession fee, under the technical extension regime, was considered reasonable, given the competitive advantages deriving therefrom for private parties. The ItCC recognised the overlap between the CFREU principles and the constitutional values of equality, reasonableness and freedom of private economic initiative: «in fact, the protection of the principle of equality and of the freedom to conduct a business takes place in our Constitution and in the CFREU on the basis of normative formulations and interpretative criteria that may be considered to coincide. Therefore, in the case at hand, having ascertained the non-existence of the infringement of the canon of reasonableness, there is also no infringement of the similar principles, inferable from Articles 20 and 21 of the CFREU, of equality before the law and non-discrimination. Similarly - the infringement of the freedom of private economic initiative having been excluded - there is

[36] TAR Lazio, Roma, sez. II, order of 26 March 2019, nn. 4021 and 4022.

also no breach of Article 16 of the CFREU, which contains the recognition of the freedom to conduct a business»[37].

It must be emphasised that this case did not concern, as those examined above, a new operator willing to penetrate a monopolistic market. This case dealt with an incumbent operator complaining about legal uncertainty and infringement of their right to choose freely whether to continue operating under a prolongation regime, with all the burdens that this entails, or to move to different markets. Therefore, the issue of freedom of enterprise, in this case, was not related to the principle of competition within the single market, but rather to the protection of the certainty of economic relations for incumbent entrepreneurs.

Nevertheless, in a later order, also on the extension of bingo concessions, the Council of State, regardless of the ItCC ruling No. 49/2021, revived the exact same arguments of the jurisprudence on game and betting concessions described at par.2.2 for excluding the applicability of the "dual preliminarity" doctrine to the case and referred the issue to the ECJ for preliminary ruling, excluding the involvement of fundamental rights in the matter[38].

4.2. The case on the duty to publish public managers income data

In only one case, the administrative judge raised the sole issue of constitutional legitimacy, with reference to an alleged violation of constitutional provisions and of the Nice Charter.

The Lazio Regional Administrative Court's order is known to have led to the ItCC's ruling 20/2019, which took up the theory of "dual preliminarity", with some 'temperaments' with respect to what was stated in ruling 269/2017[39]. The order was issued in September

[37] Constitutional Court, Judgment of 23 February 2021, No. 49.

[38] Council of State VII sec. Ord. of 21 November 2022 no. 10261 and 10264.

[39] For the comments to this Judgment, see the literature mentioned at note No. 2. See, also, among others, A. Ruggeri, *La Consulta rimette a punto i rapporti tra diritto eurounitario e diritto interno con una pronunzia in chiaroscuro (a prima lettura di Corte cost. n. 20 del 2019)*, Consulta Online, 25 febbraio 2019, 1, p. 113 ss., www.giurcost.org; C. Amalfitano, *Il dialogo tra giudice comune, Corte di giustizia e Corte costituzionale dopo l'obiter dictum della sentenza n. 269/2017*, 2 Oss. Fonti (2019); O. Pollicino, G. Repetto,

2017, a few months before the ItCC Judgment No. 269/2017 was published. Therefore, of course, it cannot be stated that the administrative court has followed the dual preliminary doctrine in this case[40].

The case dealt with the delicate relationship between the transparency of public administration and the confidentiality of personal data. The rule brought to the attention of the ItCC concerned the obligation of public administrations to publish on their website certain data on holders of managerial positions, about their income situation[41].

The issue of constitutional legitimacy was addressed with reference to a number of European and constitutional principles (such as proportionality, relevance and non-excessiveness in the processing of personal data; the principle of formal and substantive equality), but also with reference to secondary with EU law on the protection of privacy (Directive 95/46/EC, replaced by Regulation No. 2016/679/EU), which was considered to be similar in nature and underlying principles to the relevant provisions of the CFREU.

The ItCC concluded in the sense of declaring the extension of the obligation of publicity to all holders of managerial positions, for any reason whatsoever conferred, including those conferred discretely by the political body without public selection procedures, rather than only for the holders of managerial positions, to be constitutionally unlawful due to violation of Article 3 of the Constitution.

The other questions raised with reference to EU law were declared inadmissible and unfounded. In particular, the Court held that it was the responsibility of the legislature, in the context of the

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Not to be Pushed Aside: the Italian Constitutional Court and the European Court of Justice, Verfassungsblog, https://verfassungsblog.de/not-to-be-pushed-aside-the-italian-constitutional-court-and-the-european-court-of-justice/; 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*, Eur. Const. Law Rev., 2019, p. 731 ss.; G. Repetto, *Judgment No. 269/2017 and dual preliminarity in the evolution of the jurisprudence of the Italian Constitutional Court*, in this Special Issue, p. 8-24.

[40] TAR Lazio, Roma, sez. I quater, 19 September 2017, No. 9828.

[41] Article 14(1-bis) and (1-ter) of Legislative Decree No 33 of 14 March 2013 - Reorganisation of the rules concerning the obligations of publicity, transparency, and dissemination of information by public authorities.

urgent overall revision of the subject, the provision of less pervasive ways of publication and the pursuit of similar transparency requirements in relation to other types of managerial positions in all administrations, not only state administrations.

5. The different approaches taken by the Administrative Courts while dealing with fundamental rights

In the light of the case law so far examined, a possible explanation for the administrative Court's heterogeneous attitude may lie in the nature of the EU legislative principles allegedly violated by national law.

In the first line of case law examined (concerning the extension of the duration of maritime concessions and game and betting concessions), the fundamental rights in question are mainly related to economic relations, especially, freedom of enterprise, the protection of competition and the rights to property. These constitutional parameters have been profoundly affected by the set of values and principles of EU law.

European rules on competition and freedom of economic initiative have been interpreted in the context of the fundamental principles of the common market and, consequently, have been extended to state measures to ensure that companies can operate on an equal ground, without privileges arising from distorting public interventions. The growing influence of the principle of competition led the legislators of the Member States to drastically reduce public interventions that alter the functioning of the markets[42]. EU law has shaped the institutional set-ups of the Member States and, consequently, their administrative rights[43], leading to limitations in the

[42] M. D'Alberti, *Riforme amministrative e sistema economico*, in G. D'Alessio; F. Di Lascio (eds.), *Il sistema amministrativo a dieci anni dalla "riforma Bassanini". Proceedings of the international conference* (Rome, 30-31 January 2008), 3 (2009).

[43] F. Merusi, *Nuove avventure e disavventure della legalità amministrativa*, 4 Dir. Amm. 747 (2011).

use of certain instruments typical of administrative law, among which concessions[44].

The ItCC has interpreted the European notion of competition according to an evolutionary-dynamic meaning that, in connection with the principles of freedom of movement, «embraces as a whole the competitive relations on the market»[45] , including «State interventions aimed at both promoting and protecting the competitive structure of the market»[46]. The protection of competition has been conceived as one of the levers of state economic policy, to the point of conforming the notion of social utility, provided for in Article 41 of the Constitution, as a limit to the free development of private economic initiative, in the sense of including the interest of economic operators, consumers and workers in operating on a market not distorted by an unjustifiably

[44] M. D'Alberti, *Gli studi di diritto amministrativo: continuità e cesure fra primo e secondo novecento*, 4 Riv. Trim. Dir. Pubbl. 1317 (2001); M. D'Alberti (eds.), Concessioni e concorrenza (1998).

[45] See Constitutional Court, Judgement of 17 July 2012, No. 200; Constitutional Court, Judgement of 11 December 2012, No. 299; Constitutional Court, Judgement of 7 May 2014, No. 125. See, among others, F. Saitto, *La Corte Costituzionale, la tutela della concorrenza e il "principio generale della liberalizzazione" tra Stato e Regioni*, 4 Rivista AIC (2012); V. Onida, *Quando la Corte smentisce se stessa*, 1 Rivista AIC, (2013). Constitutional Court, Judgement of 18 December 2003 - 13 January 2004, No. 14. Among the many comments on the judgment see V. Onida, *Applicazione flessibile e interpretazione correttiva del riparto di competenze in due sentenze "storiche*; A. Anzon Demmig, *Istanze di unità e istanze autonomistiche nel 'secondo regionalismo': le sentenze nn. 303 del 2003 e 14 del 2004 della Corte costituzionale e il loro seguito*; R. Bifulco, *La tutela della concorrenza tra parte I e II della Costituzione (in margine alla sent. 14/2004 della Corte costituzionale,* 4-5 Le Regioni 771 ss. (2008); L. Buffoni, *La "tutela della concorrenza" dopo la riforma del Titolo V: il fondamento costituzionale ed il riparto di competenze legislative*, Ist. Federalismo 345-387 (2003); D. Gallo, *Functional Approach and Economic Activity in EU Competition Law, Today: The Case of Social Security and Healthcare*, 3 European Public Law 26 (2020), 569 – 586; Id. *Public services and EU competition law. The social market economy in action*, Routledge-Giappichelli, 2021.

[46] Constitutional Court, Judgement of 13th July 2004, No. 272, with comment by F. Casalotti, *La Corte costituzionale e i criteri di riparto delle competenze con riferimento ai servizi pubblici locali dopo la riforma del Titolo V Parte II della Cost.: la sentenza n. 272 e l'ordinanza n. 274 del 2004*, Le Regioni 262 (2005).

intrusive regulation of economic activities[47]. This way, «economic freedoms have become fundamental rights»[48].

Moreover, according to the well-established orientation of the ECJ, the European rules protecting competition and the four fundamental freedoms of movement attribute subjective legal situations to private individuals and, therefore, have direct effect, both vertically and horizontally, and this should, as a rule, automatically render national law that conflicts with them inapplicable[49].

The influence of EU law on the economic rights at stake in the examined case law, however, does not appear conclusive for explaining the Italian Administrative Courts attitude.

Firstly, the referral to the Court of Luxembourg has also been chosen in cases not concerning economic relationships. For example, the several orders of the Regional Administrative Courts and the Council of State that have referred to the ECJ for possible age discrimination in the Italian legislation on public employment concerned a personal right, rather than an economic one. The issue was raised in relation to Article 21 of the CFREU, that protects the right of non-discrimination, falling within the title on equality.

At the same time, the maritime concessions case law also involves profiles of personal freedom, of rule of law in criminal matters and of non-retroactivity of the criminal law, given the possible criminal liability of operators who illegally occupy State-owned land based on concessions extended by an anti-European state law. The Council of State expressly mentioned those principles «also recognised by the EU Court of Justice, are part of the constitutional traditions of the Member

[47] See L. Lorenzoni, *I principi di diritto comune nell'attività amministrativa*, Napoli, Jovene, 2018, 267 ss.

[48] G. Morbidelli, *Corte costituzionale e Corti europee: la tutela dei diritti (dal punto di vista della Corte del Lussemburgo)*, 2 Dir. proc. amm. 285 (2006).

[49] With regard to EU competition law, ECJ 9 September 2003, case C-198/01, Consorzio Industrie Fiammiferi (CIF), Giorn. Dir. Amm. 2003, 11, 1129, La prevalenza del diritto comunitario sul diritto nazionale in materia di concorrenza with comments by S. Cassese, *Il diritto comunitario della concorrenza prevale sul diritto amministrativo nazionale*; M. Libertini, *La disapplicazione delle norme contrastanti con il principio comunitario di tutela della concorrenza*; G. Napolitano, *Il diritto della concorrenza svela le ambiguità della regolamentazione amministrativa*. As for freedom of establishment, see ECJ, 21 June 1974, case 2-74, Reyners.

States and as such are an integral part of the Community order itself (and would in any case represent internal counter-limits to the principle of primacy) »[50].

Secondly, in different occasions, the administrative Courts chose to first raise the issue to the ItCC and, only later, to the ECJ, when the same above-mentioned economic rights were at stake. This was, for example, the case of the extension of concession for the game of bingo where free competition principles were claimed to be violated. Also, the case of mutual cooperative banks dealt with articles 16 and 17 CFREU on freedom of enterprise and the right to property, as one of the main points regarded the expropriatory effect of the contested provision.

Thirdly, heterogeneous attitudes of the administrative law judges show in the case law regarding the right to good administration and, specifically, the protection of the citizen's legitimate expectations. This right finds its foundation in the principles affirmed by Articles 3, 23, 53 and 97 of the Constitution, and permeates all public law relationships[51]. In the context of EU law, the principle of the protection of legitimate expectations is a corollary of the principle of the certainty of legal situations and constitutes one of the foundations of the rule of law in its various articulations, limiting administrative (and legislative) activity. It implies that all subjects operating in the Community sphere must be guaranteed the legal framework of their action and relations with the institutions, since the predictability of legal situations and relations must always be ensured and, therefore, the position of those in whom «well-founded hopes have been raised because of precise assurances» must be protected[52].

In the case of legislative extension of State maritime concessions, the protection of legitimate expectations emerged

[50] Council of State, Ad. Plen., Judgements 9 novembre 2021, No. 17 and No. 18, cit.

[51] Central to the theme remains the work of F. Merusi, *L'affidamento del Cittadino* (1970), republished in Id. *Buona fede e affidamento nel diritto pubblico: dagli anni Trenta all'alternanza* (2001).

[52] Cfr. CJEU, Judgement of 28th February 2008, Case C-293/06, Deutsche Shell; Id. 10 settembre 2009, Case C-201/08, Plantanol; Court of First Instance of the European Union, Judgement of 14th April 2011, No. 461, case Visa Europe Ltd; Id., 29 April 2004, in cases T-236/01, T-239/01, from T-244/01 to T-246/01, T-251/01, T-252/01, Tokai Carbon e a./Commissione.

regarding historical concession holders, who, for decades, have constantly seen their concessions automatically renewed[53]. The same right was at stake in the case law regarding the modification of incentive regime to produce energy from renewable sources, where existing operators have been compelled to switch to a different tariff system, which affected in a pejorative sense their position. Also, the case of concessions for bingo gaming dealt with the legitimate expectations of concessionaires under the technical extension regime, who have seen increased their concession fee. Nevertheless, while maritime concessions issue was directly raised before the ECJ, these last two issues were brought before the ItCC first. Finally, a different case, still concerning the right to good administration, specifically, the duty of transparency of public administrations, was raised only before the ItCC.

6. The self-executing nature and direct effects of the relevant EU directives

The consolidation and incorporation into the Constitution of the theory of integration between European and national legal systems has led administrative jurisprudence to consider EU law as a direct parameter of legality of administrative activity[54]. By contrast to civil law and criminal case law, administrative law judgments concern the

[53] The need to protect legitimate expectations was recognised by the Advocate General's conclusions of 25 February 2016 in Promoimpresa judgment of 14 July 2016 quoted above (note no.6) for justifying the admissibility of a 'case-by-case' extension of state concessions, based on the possible need to amortise the concession holder's excess investments, as opposed to the indiscriminate and generalised ex lege extension, which is contrary to EU law.

[54] See, *ex multis*, Council of State sez. V, 10 January 2003, n. 35, 4 Urbanistica e Appalti 422 (2003), with coment by C.E. Gallo, *Impugnazione, disapplicazione ed integrazione del bando di gara nei contratti della p.a.: una pronuncia di assestamento.* On the effects of the administrative act in violation of EU law see, among many, G. Gardini, *Rinvio pregiudiziale, disapplicazione, interpretazione conforme: i deboli anticorpi europei e la "forza sovrana" dell'atto amministrativo inoppugnabile*, 1-2 Dir. amm. 217-263 (2014); G. Massari, *L'atto amministrativo antieuropeo: verso una tutela possibile*, 3-4 Riv. ital. dir. pubbl. comunitario 648-651 (2014). C. Feliziani, *Il provvedimento amministrativo nazionale in contrasto con il diritto europeo. Profili di natura sostanziale e processuale*, Ed. Scientifica, Naples, 2023.

legitimacy of a decision assumed by a public body, that is itself compelled by EU law, to the extent that it must give direct application to secondary EU law, «when the conditions under which individuals may rely on the provisions of a directive before the national courts are met»[55]. Most administrative law cases concern the application of secondary EU legislation, as large areas of administrative law are regulated by EU provisions. Therefore, in this field, the choice to refer the issue to the ECJ is often justified by the need to clarify the direct applicability of EU secondary legislation by the public administration in that specific case.

Regarding the case of beach concessions, the Lecce Regional Administrative Court ruled out the direct applicability of the EU directive, holding that its disapplication would result in a regulatory vacuum and a state of absolute legal uncertainty, being a so-called disapplication in the absolute sense, with an effect of "mere exclusion" (obstructive disapplication), with the risk of attributing excessive discretion to the individual public servant. Moreover, the literature expressed its concerns over the effects in *malam partem* that the non-application of national law may produce[56] and on the 'inverted vertical effect' of the directive[57]. Concerns that seem to be confirmed by the Criminal Court of Cassation's decision that ascertained the offence of abusive occupation of State-owned space, in relation to a concession that was not considered to fall within the scope of the tacit extensions provided for by Italian law[58].

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[55] ECJ, 22 June 1989, in case- 103/88, Fratelli Costanzo. See also Constitutional Court, Judgment of 11 July 1989, No. 389. On the interplay between direct effect, primacy, and disapplication and on the legitimate derogations from the obligation to disapply see D. Gallo *Effetto diretto del diritto dell'Unione europea e disapplicazione, oggi*, 3 Oss. fonti 5 (2019), and Id. *Rethinking direct effect and its evolution: a proposal*, 1 European Law Open 576-605 (2022).

[56] E. Cannizzaro, *Demanio marittimo. Effetti in malam partem di direttive europee? In margine alle sentenze 17 e 18 dell'Ad. plen. del Consiglio di Stato*, cit.

[57] P. Otranto, *Illegittima proroga ex lege della concessione balneare e reato di "abusiva occupazione dello spazio demaniale". Cronaca di un finale annunciato (nota a Cass. pen.22 aprile 2022 n. 15676)*, Giustiziainsieme.it (2022). On the notion of reverse vertical effects of directives see, for all, L. Daniele, *Diritto dell'Unione europea*, 292 ss. (2020).

[58] Court of Cassation, third section, Judgement No. 15676 del 13 aprile 2022, in Diritto & Giustizia, fasc. 78, 2022, pag. 10, with comment by D. Galasso, *La proroga legale non scrimina l'occupazione abusiva se non c'è una precedente concessione*. See, also, L. Boccacci,

Also, in the case law on game and betting concession, the Council of State denied the direct application of the so-called Concessions Directive[59], since the reasons for the possible conflict with EU law would not have been immediate, nor sufficiently clear, precise, and unconditional. The power of disapplication was, therefore, subject to a previous ruling by the Court of Luxembourg with the aim of clarifying the compatibility of the domestic provision with EU law. Finally, in the age discrimination case law, the Courts considered that «the possible conflict is not such that it can be overcome by direct application of the national rule in favour of the European rule»[60], (namely, the directive on equal treatment in employment and occupation).

7. Concluding remarks

The analysis carried out shows an overall reluctancy of the Administrative Courts to adhere to the "dual preliminarity" doctrine stated in the ItCC Judgement No. 269/2017. When rights protected by the Constitution and the CFREU are at stake, the administrative law judges tend to prefer to raise the issue before the ECJ for a preliminary ruling, even when the ItCC has already stated on the issue.

In the case law examined in part 2, Administrative Courts have simply excluded the relevance of fundamental rights and referred the issue only to the ECJ.

In the case law analysed in part 3, the Courts raised the constitutional legitimacy issue first, without considering the "dual preliminarity" doctrine. However, after a judgment of inadmissibility or unfoundedness by the ItCC, Administrative Courts referred the issue to the ECJ for a preliminary ruling, often claiming the incompatibility of the relevant Italian provisions with the CFRUE.

In the two cases considered in part. 4, Administrative Law orders raised the constitutional legitimacy issue first, expressly

Le concessioni demaniali marittime: tra Consiglio di Stato, Cassazione e Corte di giustizia UE, 2 La Giustizia Penale 93-107 (2022).

[59] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts

[60] Council of State, IV sec. Ord. 23 April 2021, No. 3272.

considering the rights enshrined by the CFREU.

In the bingo concessions case law, even though the Regional Administrative Tribunal and the ItCC adhered to the 269/2017 doctrine, in a following ruling on the same matter, the Council of State explicitly excluded the applicability of theory of "dual preliminarity". Inexplicably, it argued for a priority referral to the CJEU, employing the exact same arguments of the case law on game and betting concessions, where the issue was only raised before the Luxemburg Court and excluded the involvement of fundamental rights.

In the case on the duty to publish public managers income data, the Administrative Court's order was issued earlier than judgement No. 269/2017. Nevertheless, the following ItCC judgment was issued later and expressly considered the "dual preliminarity" doctrine, adding some further clarifications to it. It specified that the application of the doctrine is possible when secondary legislations a stake (in that case, concerning the right of privacy) is «in singular connection with the relevant provisions of the CFREU: not only in the sense that they provide specification or implementation of them, but also, in the reverse sense, that they have constituted "models" for those norms, and therefore participate in the evidence of their very nature»[61].

The majority of the administrative case law examined concerned the application of EU secondary legislation, and contain a generic reference to the Charter, «for the simple literal similarity of its provisions to those of the Constitution (or the ECHR), without any reference to how those provisions were elucidated and constructed in the case law concerning same or similar situations»[62].

This is particularly evident in the first orders examined, where the fundamental rights at stake concern economic relations, linked to the requirements of liberalization, protection of competition and integration of the single market. In the beach concessions cases, for example, the referral to the ECJ appears justified by the fact that the constitutional principles in these matters have been profoundly affected by EU law, that Italian legislation on the matter was already subject of an infringement proceeding, that the ECJ already ruled on

[61] Constitutional Court, Judgement of 23rd January 2019 No.20, point No. 2.1.
[62] M. Massa, *The «dual preliminarity» doctrine in the case-law of ordinary courts of first instance and appeals*, in this Special Issue, 30.

the matter, leaving open some questions, and that the national Courts have taken conflicting positions with reference to the direct effect of the relevant directive.

More generally, it appears that the Administrative Courts did not deepen the nature of the secondary legislation considered and tend to choose the Luxembourg route even in cases concerning, for example, the principle of equality or the right to work.

In some cases, the same issues were referred to the ECJ, as questions of interpretation of EU law, after a declaration of unfoundedness, in terms of constitutional legitimacy. The possibility of referral to the CJEU for a preliminary ruling, even in cases already examined by the ItCC, has been confirmed by the ItCC itself and constitutes a fundamental guarantee of the maintenance of the principle of the primacy of EU law over national rights.

Nonetheless, some of the issues examined by the administrative jurisprudence are of fundamental importance, from an economic, political, social, and of the interests at stake, point of view. This seems to make it advisable for the judge of laws to intervene, also in the light of EU law, and not to allow that the same issue is subsequently called into question by a different judge, endowed with different sensitivities and powers, as to avoid that «kind of forum shopping» referred to in the previous chapter[63].

In the light of the reconstruction carried out, it seems desirable that the administrative law judges will be more prone to exploit fully the potential applicability of the doctrine of ItCC Judgment No. 269/2017.

The assessment of the constitutional legitimacy of the legislative provisions contested in the examined case law would have been enriched, if the inherent nature of the fundamental rights contained in the Charter of Nice and constitutionally protected had been taken into consideration. The referral to the ItCC of the decision would have allowed for a more complete weighing, aware of the implications of the decision on the right of free competition, of ownership, on the protection of the legitimate expectations, as well as

[63] M. Massa, *The «dual preliminarity» doctrine in the case-law of ordinary courts of first instance and appeals*, in this Special Issue, 37.

on the free private economic initiative, interpreted in light of European principles.

Secondly, such a solution would have allowed the administrative Court to overcome the problem of the debated relationship between direct effectiveness and direct applicability of the directives in the domestic legal system and would have removed it from the criticism of adopting decisions, in fact, exceeding the boundaries of jurisdictional power (especially in the case of maritime concessions).

THE ITALIAN COURT OF CASSATION AND DUAL PRELIMINARITY

*Diletta Tega**

Abstract

The essay analyses how case law by the Court of Cassation has interpreted the dual preliminary doctrine, which the Constitutional Court unexpectedly proposed in Judgment No. 269/2017, subsequently qualified – and, to some extent, complicated - in 2019 and 2020. The Constitutional Court has no way to force ordinary courts, including the Court of Cassation, to follow this doctrine: they can only be encouraged in this direction. Case law on the matter remains limited and of varying outcomes. Yet, when the doctrine of dual preliminarity was followed by the Court of Cassation, the Constitutional Court was effectively provided with good opportunities to open a dialogue with the Court of Justice; in almost every case, the relevant national legislation was annulled definitively, and with general effects. On many occasions, the Court of Cassation chose to refer preliminary questions to the Court of Justice, or to disregard national legislation altogether, directly refusing its application: this was correct, as those were not true cases of dual preliminarity.

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1. The Court of Cassation faced with the *clarification* of 2017

From my perspective[1], the *clarification* in Judgment No. 269/

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[1] D. Tega, *The Italian Constitutional Court in its context. A narrative*, 17 Eur. Const. Law Rev., 3 (2021), 369; Id., *La Corte nel contesto* (2020), 183-257.

2017 and the subsequent new judicial doctrine[2] serve as an update that contains elements of reassurance both for national courts and for the EU Court of Justice[3]. They also represent a departure from the so-called "Granital doctrine" (170/1984[4]).

I have explained elsewhere the elements that led to this bypass in the name of defending the review of constitutional legitimacy. The proclamation of the EU Charter of Fundamental Rights [CFREU] certainly played a crucial role[5] – the Treaty of Lisbon equates it to Treaties as far as its legal value is concerned – with the direct effect of some of its articles being recognised by the Court of Justice. But there is also the huge success that the reference for a preliminary ruling has enjoyed in the Italian legal system. The risk that the Constitutional Court (ItCC) saw and had to avoid was that of the circuit of European jurisprudence (the national courts and EU Court of Justice together) overlapping with that of constitutional justice, to the point of pushing it into the background. A prime example is the so-called 'Taricco saga', which began with a preliminary ruling (which missed the mark) by an ordinary judge in Cuneo, and ended a few years later following a foreseeable, albeit also criticised, preliminary ruling by the

[2] On the meaning of Constitutional Court's judicial doctrine see D. Tega, *La Corte nel contesto*, cit. at 1, 61.

[3] For a partially different reading of Judgment No. 269/2017 see G. Martinico and 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(4) Eur. Const. Law Rev. 731 (2019). For the critical EU scholar's appraisal on the Judgment, in particular regarding its compatibility with EU law, see 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).

[4] On the thoughts of the judge rapporteur, Antonio La Pergola, see the extensive work by C. Pinelli, *Limiti degli ordinamenti e rilevanza di un ordinamento per un altro nel pensiero di Santi Romano*, 1 Giur. cost. 1856 (1986); Id., *Antonio La Pergola, giurista costruttore*, 2 Dir. pubb. 571 (2007); Id., *Intervento*, in *Atti della giornata in ricordo del Presidente emerito della Corte costituzionale Antonio La Pergola*, Palazzo della Consulta, 17 December 2008, 43.

[5] A.O. Cozzi, *Sindacato accentrato di costituzionalità e contributo alla normatività della Carta europea dei diritti fondamentali a vent'anni dalla sua proclamazione*, 3 Dir. pubb. 659 (2020).

Constitutional Court[6] to the EU Court of Justice[7]. This conduct is not only based on the *institutional responsibility* of the constitutional judge but also in seeking out *legitimacy*, to be understood as the ability to attract questions of legitimacy that emerge before ordinary judges[8].

I concluded my reflections postponing the evaluation of the type of follow-up that the *clarification* would have had with the ordinary judges.

Would the judges have found themselves *gravely embarrassed* in their dual capacity as national judges and judges of EU law? Would they have felt as if their hands were tied, so to speak, seeing as though their intervention was not only delayed by an appeal to the Constitutional Court but also *stripped of* many crucial assessments, including the most expedient and quickest way to deliver justice as soon as possible[9]?

After some years, it is time to verify if and how the nudging of the Constitutional Court was *effective* as regards the position of the Court of Cassation[10].

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[6] It was referred by the Court of Milan and the Court of Cassation, which, although they could have made a reference to the Court of Justice for a preliminary ruling on the interpretation of the correct meaning to be given to Article 325 TFEU and the 'Taricco ruling', preferred to refer the matter to the Constitutional Court.

[7] It was only after the referral made by Order No. 24/2017 that the ECJ clarified that the obligation of disapplication was not intended to apply in cases where such would have entailed a breach of criminal procedure law of the participating state, or rather of a constitutional principle that, concluding the 'Taricco saga', ItCC' Sentence No. 115/2018 defined as supreme. See G. Piccirilli, *The "Taricco Saga": The Italian Constitutional Court continues its European journey*, 14 European Constitutional Law Review, 4 (2018), 814.

[8] D. Tega, *La Corte nel contesto*, at 1, 84.

[9] G. Bronzini, *La sentenza n. 20/2019 della Corte costituzionale italiana verso un riavvicinamento all'orientamento della Corte di giustizia? Questione giustizia*, (2019), at https://www.questionegiustizia.it/articolo/la-sentenza-n-202019-della-corte-costituzionale-it_04-03-2019.php.

[10] On the position of the Court of Cassation see A. Cosentino, *La Carta di Nizza nella giurisprudenza di legittimità dopo la sentenza della Corte costituzionale n. 269 del 2017*, 3 Oss. Fonti 1 (2018); Id., *La sentenza della Corte costituzionale n. 269/2017, ed i suoi seguiti, nella giurisprudenza del giudice comune*, in C. Amalfitano, M. D'Amico & S. Leone (eds.), *La Carta dei diritti fondamentali dell'Unione europea nel sistema integrato di tutela, Atti del convegno svoltosi nell'Università degli Studi di Milano a venti anni dalla sua proclamazione* 213 (2022). See also La giurisprudenza delle Sezioni Civili Anno 2019, Gli orientamenti delle Sezioni Civili, vol. I,

Examining the answers of the Court of Cassation is certainly significant given its obligation to provide a preliminary ruling (Art. 267.3 TFEU).

This behaviour is not uniform, at least as of now.

Significant questions have emerged with respect to this new doctrine: *i*) should the question of constitutionality always be raised before a preliminary ruling? *ii*) following a rejection (or only partial acceptance) on the merits of the issues raised, is the referring judge precluded from contacting the Court of Luxembourg? And, based on the answers received, is it possible to not apply Italian law? *iii*) can the innovative solution, while certainly not lacking in its logic and rationale, be considered in line with EU jurisprudence? *iv*) does the guarantee of priority intervention by the Constitutional Court also extends to cases where an overlap exists between rights guaranteed in the Constitution and fundamental rights that are *not* included in the Charter, or *not only* in it, such as those because they are recognised by EU directives?

2. Acceptance of the *clarification*

Cases in which the *clarification* is accepted are limited. Almost all of them offered the Constitutional Court the opportunity to make a preliminary reference followed by a ruling on the merits[11]. The establishment of dual preliminarity thus seems to have had a clear initial effect: it was accompanied by the enhancement of the

https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Rassegna_civile_2019-vol_1-2-3.pdf.

[11] Reference is made to decisions nos. 84/2021 e 54/2022. Regarding the first decision see T. Guarnier, *Corte costituzionale, Corti sovranazionali, giudici comuni e legislatore. Lo scenario a seguito della sentenza n. 84 del 2021 della Corte costituzionale*, 2 Nomos (2021); S. Filippi, *Sulle più recenti evoluzioni dei rapporti tra Corti: riflessioni a partire da Corte cost, sent. 30 aprile 2021, n. 84*, 3 ConsultaOnline 767 (2021). Regarding the second decision, see B. Nascimbene e I. Anrò, *Primato del diritto dell'Unione europea e disapplicazione. Un confronto fra Corte costituzionale, Corte di Cassazione e Corte di giustizia in materia di sicurezza sociale*, *Giustizia Insieme*, 31 March 2022; A. Ruggeri**,** *Alla Cassazione restìa a far luogo all'applicazione diretta del diritto eurounitario la Consulta replica alimentando il fecondo "dialogo" tra le Corti (a prima lettura della sent. n. 67/2022)*, 1 ConsultaOnline 252 (2022).

preliminary ruling as an instrument of dialogue with the Court of Justice.

It is no coincidence that in 2020 (Constitutional Court Order No. 182, see below) the Constitutional Court specified that the referral for a preliminary ruling takes place "within a framework of constructive and loyal cooperation between the various systems of safeguards, in which the constitutional courts are called to enhance dialogue with the [Court of Justice] […], so that the maximum protection of rights is assured at the system-wide level (Article 53 [CFREU]) (Judgment No 269 of 2017, point 5.2 of the Conclusions on points of law)." The intervention seeking clarification requested to the Court of Justice was also functional to ensure the uniform interpretation of the rights and obligations deriving from European Union law.

In addition, the Constitutional Court demonstrated, as is already seen in the referral regarding the 'Taricco saga', to understand the preliminary reference as the channel of communication functioning not only to *receive* but also to *transmit* constitutional problems to the EU Court of Justice posed by certain its decisions, as suggested by Weiler at the AIC Conference in Perugia in 1999[12].

The very first application of the *clarification* led to truly positive results. On 16 February 2018, with Order n. 54 Bolognesi v. CONSOB - just under two months after the publication of Sentence no. 269/2017 - the Second Civil Section applied the *clarification* while also highlighting its critical profiles. For example, the order asked the Court whether the phrase "on other grounds" contained in the clarification meant that the violations of the CFREU excluded in the constitutional judgment could no longer be the subject of review by the ordinary courts.

In summary, the Court of Cassation, faced with a case of sanctions applied by CONSOB for the abuse of privileged information and obstruction of investigations by the CONSOB itself, was confronted with two sets of problems that called the fundamental principles of criminal law into question (*nemo tenetur se detegere* and the

[12] Id., *L'Unione e gli Stati membri: competenze e sovranità*, 1 Quad. cost. 5 (2000); M. Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 Eur. Const. Law Rev. 1(2009); 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 220 (2019); N. Lupo, *The Advantage of Having The "First Word" In The Composite European Constitution*, 10 IJPL 186 (2018).

proportionality between offences and sanctions), which were of such importance that they had both national and supranational importance. The varied dimensions of these principles led to a problem of dual preliminarity for each of them: violation of both the Constitution (and of international sources, such as the ECHR, which operate through the mediation of Article 117(1) of the Constitution) and the CFREU was suspected.

The referral order was notable for its precision and detail. The Constitutional Court, for its part, was not unprepared: it made a particularly complex preliminary ruling on both the interpretation and validity. It argued the need to fully recognise a "right to silence"[13], referring to articles 6 ECHR, 14 of the International Covenant on Civil and Political Rights, 48 and 49 of the CFREU and Art. 24 of the Constitution. Based on the clarification stated in the *obiter* of Judgment No. 269/2017, when examining potential issues of contravention of the provisions of national laws to the Charter, the Court is in a position to assess whether the challenged provision violates the assurances provided simultaneously by both the Constitution and the CFREU, also by "submitting a request for a preliminary ruling to the EU Court of Justice whenever that proves necessary to clarify the meaning and the effects of the Charter's rules [...]"[14].

In the 2019 preliminary reference, the ItCC specified the need to understand (i) whether national legislation – which provides for the obligation to sanction non-cooperation with supervisory authorities of financial markets, in implementation of EU law – must be interpreted as enabling Member States not to sanction those who refuse to answer questions from the competent authority if such could reveal their liability for wrongdoing punished with administrative sanctions of a "punitive" nature; (ii) whether, if the answer is negative, this obligation is compatible with Articles 47 and 48 of the Charter, also in light of case law of the European Court of Human Rights on Article 6

[13] In proving to be very up-to-date and aware of case law of both the Strasbourg and Luxembourg Courts, the order does not fail to explain the so-called right to silence. Although it does not enjoy express constitutional recognition it constitutes an essential corollary of the inviolability of the right of defence, a right recognised by Article 24 of the Constitution, which characterises the Italian constitutional identity.
[14] The reference for a preliminary ruling had been recommended by multiple subjects among others, L.S. Rossi, *Il "triangolo giurisdizionale"*, 16 federalismi.it 7 (2018).

ECHR and constitutional traditions shared amongst Member States, insofar as those provisions require sanctions to also be imposed on persons who refuse to answer questions posed by the competent authority that could reveal their liability for wrongdoing punished with administrative sanctions of a "punitive" nature.

The preliminary ruling thus turned out to be more complex than that hypothesised by the order of the Court of Cassation, as it essentially was a reference that concerns the validity of secondary legislation, as well as the interpretation of the CFREU. The Constitutional Court seemed to master this instrument with extreme familiarity, so much so that the dialogue with the EU Court of Justice was further complicated (considering the more limited scope of the referral hypothesis elaborated by the Court of Cassation). The *quid pluris* was given by the singular nature of the task entrusted to constitutional adjudication. This preliminary reference was a response to those who, in the aftermath of the *clarification*, contentiously wondered in what respects the referral might differ, depending on whether it was proposed by the Constitutional Court or ordinary courts.

But the third actor of this trifecta did not behave differently.

The response that the Court of Justice gave to this order in its decision of 2 February 2021, DB v. CONSOB, Case C-481/19[15], was striking for the first time it recognised that an individual cannot be penalised for his refusal to provide the competent authority with answers that could determine his liability for an offence punishable by administrative penalties of a criminal nature or criminal liability. The recognition of this 'right to silence' was obtained thanks to the arguments put forward by the Italian constitutional judge, in the absence of direct precedents in national case law. Nothing further was said by the Luxembourg court concerning the compatibility of the clarification with the primacy of EU law[16].

[15] L. Lonardo, *The Veiled Irreverence of the Italian Constitutional Court and the Contours of the Right to Silence for Natural Persons in Administrative Proceedings: Judgment of the Court (Grand Chamber) 2 February 2021, Case C-481/19, DB v Consob*, 17(4) Eur. Const. Law Rev. 707 (2021).

[16] The new role acquired by Italian Constitutional Court is eulogizes by D. Sarmiento, *The Consob Way – Or how the Corte Costituzionale Taught Europe (once again) a*

In this case, it seems to me that the three leading courts have shown their wisdom: the first because, even if it was ready to make a reference for a preliminary ruling, as can be seen from the in-depth rationale contained in the order for reference, had the clarity and flexibility to take the uncertain path indicated by Judgment No. 269/ 2017, without feeling in any way defrauded of its role as a European judge; the second was willing and able to make a preliminary referral, reassuring the Court of Justice of its loyalty to the primacy of EU law; the third enhanced the efforts of the first two, offering a virtuous example of a real multi-level protection of rights.

In 2019, the orders of the Court of Cassation, Labour section, Nos. 175, 177-182, 188-190, addressed a question of legitimacy to the Court concerning the discrimination of foreigners in accessing the birth allowance (a subject on which the dispute with INPS is substantial). Although they acknowledged that the issue could have been examined in light of EU anti-discrimination law, possibly after a preliminary ruling, they opted for the issue of constitutional illegitimacy, quoting, *ad colorandum*[17], Article 34 of the Charter to obtain an assessment of reasonableness capable of producing effects *erga omnes*[18].

With Order No. 182/2020, the Constitutional Court also turned to the Court of Justice for an interpretative clarification. Once again,

Masterclass in Constitutional Dispute Settlement, in *EU Law Live*, Weekend Edition 54, 16 April 2021.

[17] As S. Giubboni writes in a comment criticising Order No. 182/2020, *L'accesso all'assistenza sociale degli stranieri alla luce (fioca) dell'art. 34 della Carta dei diritti fondamentali dell'Unione europea (a margine di un recente rinvio pregiudiziale della Corte costituzionale)*, 4 Giur. cost. 1982 (2020).

[18] A. Cosentino, *La sentenza della Corte costituzionale n. 269/2017, ed i suoi seguiti, nella giurisprudenza del giudice comune*, at 10.

the referral was carefully structure[19]. The Court of Luxembourg[20] affirmed the incompatibility of Italian legislation with Art. 12(1)(e) of Directive 2011/98/EU, on equal treatment between third-country nationals and nationals of Member States (§ 34). It was specified that the question submitted by the Constitutional Court should only be examined considering Directive 2011/98/EU, and not with reference to Art. 34 of the Charter to which the directive gives effect[21].

In 2021, the Court of Cassation[22] made an eccentric use of the *clarification* in a case regarding the recognition of the household allowance, offering the Constitutional Court the opportunity to make an important elucidation.

The Court of Cassation referred the matter twice: firstly, to the Court of Justice and secondly to the Constitutional Court. The Court of Justice stated that the contested rule on the recognition of the household allowance was contrary to European Union law (25 November 2020, Cases C-302/19 and C-303/19). The Court of Cassation decided to not proceed with the non-application of the provision.

On the contrary, it addressed to the ItCC two referral orders claimed the violation of Articles 11 and 117, first paragraph of the

[19] Even at this juncture, a well-founded sentence was reached: Sent no. 54/2022. It declares the constitutional illegitimacy of the provisions that exclude non-EU foreigners who do not hold a long-term EU residence permit from certain social benefits (baby bonus and maternity allowance), because "[…] By introducing stringent income requirements for entitlement to support measures for the neediest families, the challenged provisions establish a system that is irrationally more cumbersome solely for third-country nationals, reaching beyond the albeit legitimate goal of granting welfare benefits only to those who reside regularly and not just occasionally in the country", and deny appropriate protection precisely to those who find themselves in conditions of more serious need.

[20] Judgment 2 September 2021, *O.D. e altri c. INPS* (C-350/20).

[21] "It is apparent from the Court's case-law that, where they adopt measures which come within the scope of application of a directive which gives specific expression to a fundamental right provided for by the Charter, the Member States must comply with that directive (see the judgment of 11 November 2014, Schmitzer, C-530/13, EU:C:2014:2359, paragraph 23 and cited case-law). It follows that the question referred must be examined considering Directive 2011/98. The scope of Article 12(1)(e) of this directive is determined by Regulation No. 883/2004. § 47". See S. Giubboni, *L'accesso all'assistenza sociale degli stranieri, cit., at 17.*

[22] Labour section, Ord. nos. 110 and 111 of 8 April 2021.

Constitution, in relation to Directives No. 2003/109/EC, on the status of third-country nationals who are long-term residents, and No. 2011/98/EU, on the status of third-country nationals who hold a single residence and work permit.

Neither order referred to the violation of the Charter of Fundamental Rights of the European Union.

In the referral orders, the Court of Cassation held that it could not proceed with the non-application of the provision as, concerning the social benefit in question, EU law does not dictate a complete provision that is to be applied in place of that declared incompatible[23].

The Court of Cassation made a mistake that the Constitutional Court, with Decision no. 67/2022[24], led back to inadmissibility, with a call for non-enforcement of the national provision with a clear reaffirmation of the primacy of EU law[25].

3. Refusal of the *clarification*

[23] For a very critical comment on the Court of Cassation's choice concerning disapplication, see S. Giubboni, N. Lazzerini, *L'assistenza sociale degli stranieri e gli strani dubbi della Cassazione*, Questione Giustizia, 6 May 2021. See also D. Gallo, A. Nato, L'accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell'ordinanza n. 182/2020 della Corte Costituzionale, 4 Eurojus, 308 (2020).

[24] Regarding this decision see B. Nascimbene, I. Anrò, *Primato del diritto dell'Unione europea e disapplicazione. Un confronto fra Corte costituzionale, Corte di Cassazione e Corte di giustizia in material di sicurezza sociale*, cit. at 11; A. Ruggeri, *Alla Cassazione restia a far luogo all'applicazione diretto del diretto eurounitario la Consulta replica alimentando il fecondo "dialogo" tra le Corti (a prima lettura della sent. n. 67/2022)*, cit. at 11; A.O. Cozzi, *Per un elogio del primato, con uno sguardo lontano. Note a Corte cost. n. 67 del 2022*, 2 Consulta Online 410 (2022).

[25] "[…] Thus, the object of the aforementioned directives is not to regulate social security benefits – specifically the family unit allowance. As the Court of Justice explained in its judgments in response to the twofold reference for a preliminary ruling, organizing the social security systems falls under the competences of the Member States, which may conform and modify the benefits system in keeping with domestic needs to attain overall sustainability. […] The substance of the European Union's intervention is, therefore, to establish the duty not to distinguish the treatment of third-party nationals from that reserved for citizens of the states where they legally work. The duty is imposed by the directives cited above in a clear, precise, and unconditional way, and is, thus, endowed with direct applicability."§ 12. Silvana Sciarra, rapporteur of the decision, also expressed this position very clearly in Id., *Lenti bifocali e parole comuni: antidoti all'accentramento nel giudizio di costituzionalità*, 3 federalismi.it 40 (2021).

In other cases, the nudging of the ItCC was not welcomed because i) the approach of the interpretative preliminary referral followed by non-application has been deemed prevalent, and sufficient; ii) because immediate non-application took place. These are cases in which the binding value of the *clarification* is denied; in which judges deal with secondary EU law with direct effect, or in which they recognise direct and immediate application to the CFRUE.

The Court of Cassation, Labour section, Decision No. 4223 of 21 February 2018, reprising a judgment – brought by an intermittent worker dismissed when he turned 25 – after its suspension following a preliminary referral[26], ruled out further room for questions of constitutionality, as the worker's defence had requested. Although there is no explicit mention of the *clarification*, the court states that there is no reason to believe that constitutional adjudication offers more intense anti-discrimination protection to young people.

With Decision No. 12108 of 17 May 2018, the Labour Section disapplied national legislation on the retirement age of dancers, as the EU Court of Justice, on the basis of a preliminary referral made in the same proceeding, established that it is discriminatory to fire female dancers for reaching retirement age if this is different from that provided for men (given the prohibition of discrimination based on sex according to Article 14 of Directive 2006/54/EC, self-executing). The

[26] The referring court asks whether Article 21 of the Charter and Article 2(1), Article 2(2)(a) and Article 6(1) of Directive 2000/78 must be interpreted as precluding a provision, such as that at issue in the main proceedings (Legislative Decree no. 276 of 2003, Art. 34) , which authorises an employer to conclude an on-call contract with a worker under 25 years of age, regardless of the nature of the services to be provided, and to dismiss such worker as soon as he reaches the age of 25 years.On 19 July 2017 (C-143/2016, Abercrombie and Fitch v. A.B.), the Court of Justice ruled that Article 21 of the Charter of Fundamental Rights of the European Union and Article 2(1), Article 2(2)(a) and Article 6(1) of Council Directive 2000/78/EC of 27 November 2000, in establishing a general framework for equal treatment in employment and occupation, must be interpreted as not precluding a provision, such as that at issue in the main proceedings, which authorises an employer to conclude an on-call contract with a worker of under 25 years of age, regardless of the nature of the services to be provided, and to dismiss such worker as soon as he reaches the age of 25 years, since that provision pursues a legitimate aim of employment and labour market policy and the means laid down for the attainment of that objective are appropriate and necessary.

Court of Cassation did not deem it appropriate to raise a question of constitutional legitimacy because the *clarification* does not have a binding nature. Furthermore, the conflict between Italian legislation and EU law did not involve the Charter of Rights and its Art. 21. In fact, the Charter remained completely extraneous to the argument of the Court of Luxembourg, and it was not used as a primary source of EU law even beforehand[27].

As regards the retirement age, another referral was made for a preliminary ruling by the Labour Section[28]. It stated: *i)* that the automatic termination of the employment relationship, upon reaching the age of 60, for pilots (employed by a company operating for the secret services) conflicted with Directive 2000/78 and Art. 21 CFREU; *ii*) the non-binding nature of the 2017 *clarification* and that the direct dialogue with the Court of Justice was the most direct and effective tool[29].

The issue of dual preliminarity also resurfaces in two well-known sentences of the Court of Cassation on the matter of *ne bis in idem*[30]. Decisions which, starting from the response received from the Court of Justice[31], gave a direct and immediate application to the provisions of Art. 50 CFRUE[32]. Such application, according to the judges, was not in conflict with domestic law. The interpretation embraced by the Court of Cassation prevented both the emergence of a question of non-application of national provisions by reason of the primacy of EU law and the relevance of doubts of constitutionality that may be abstractly conceivable.

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[27] A. Cosentino, *La sentenza della Corte costituzionale n. 269/2017, ed i suoi seguiti, nella giurisprudenza del giudice comune*, cit. at 10, 216.

[28] Ord. No. 13678 of 30 May 2018.

[29] A. Cosentino, *La sentenza della Corte costituzionale n. 269/2017, ed i suoi seguiti, nella giurisprudenza del giudice comune*, cit. at 10, wrote that the order created a criterion for choosing between the preliminary ruling and the question of constitutional legitimacy - that of the national or European prevalence - which was then variously elaborated upon within the subsequent doctrinal debate.

[30] Civil Section, nos. 31632 (Di Puma) and 31633 (Zucca) of 26 September 2018.

[31] Judgment of 30 March 2018 in combined cases C-596/16 and C-597/16.

[32] No one shall be liable to be tried or punished again in criminal proceedings for an offence for which they have already been finally acquitted or convicted within the Union in accordance with the law.

The Court of Cassation, Labour Section, in its Order No. 451 of 10 January 2019[33], articulated a preliminary reference centred on whether the employee is entitled to compensation for unused vacation time in the period between wrongful dismissal to reinstatement. The Court did not consider it necessary to follow the *clarification* because it was not binding and because the Constitutional Court did not prejudice the power of the ordinary judge to order a preliminary referral according to Art. 267 of the TFEU. The Court of Cassation stated that direct dialogue with the Court of Justice appears to be the most direct and effective tool in this case.

4. Conclusion

The Constitutional Court modified the original Granital doctrine, seeking for a renewed centrality. The ItCC updated the procedure relating to cases giving rise to the dual preliminarity by nudging ordinary judges to raise a question of constitutionality first, looking for a sort of "re-centralization" [34] regarding the scrutiny of fundamental rights questions.

This shift is primarly a consequence of the way EU law (especially as regards fundamental rights) and case law of the Court of Justice (especially concerning the primacy of EU law) have evolved. The very same attitude of several ordinary courts toward the national Constitution surely was an additional push of the ItCC. Many ordinary courts have developed the (wrong) belief that the national Constitution is not one and only, but consists of a plurality of instruments that can be assimilated with each other (including the ECHR and the EU Charter) and, to some extent, can be mixed at discretion to achieve substantive judicial outcomes. The risk that the EU justice circuit (made up by the dialogue between ordinary national judges and the CJEU) could overshadow the constitutional justice circuit (which comprised ordinary national judges and the ItCC) pushed the Italian

[33] The referral order from the Labour Section was also expressed in the same terms, as decided on 27 November 2018, and filed with the Court of Luxembourg on 21 January 2019.

[34] I have discussed that expression in The Italian Constitutional Court in its context, quoted at fn 1.

Constitutional court to re-establish its position by 're-entering' the arena.

It is still too early to have an idea of how the *clarification* will impact relevant jurisprudence. To date, the attitude is still unclear and varied. As specifically shown by the referral orders to which the Constitutional Court responded in ruling No. 67/2022, there is a need to help the national courts not to confuse the application of the new doctrine with the violation of the primacy of EU law when directly effective EU secondary law is at stake (in the name of clear, precise and unconditional content) on the subject of rights or the principle of equality (both of which are provided for in the Charter). On this point, the Constitutional Court should provide further clarifications[35].

The issues identified in the *clarification* and the following constitutional case law do not constitute many cases. Consequently, and correctly, the decisions for a preliminary ruling or direct non-application prevail, in line with the so-called Granital doctrine.

It is equally clear that when the Court of Cassation had applied the *clarification*, correctly providing the Constitutional Court with valuable material the ItCC had the chance not to miss the opportunity to hold a dialogue with the Court of Justice, finally abandoning the judicial ego[36] that had restricted it for far too many decades. More importantly, it achieved the *erga omnes* elimination of the challenged provision from the national legal system. From this point of view, the Romboli proposal of 2014[37] could be useful to eliminate instrumental uses of the new doctrine, as the Court of Cassation seems to have done in 2019 by raising a question to the Constitutional Court on the childbirth allowance (see above).

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[35] See, for example, the proposal drafted by M. Massa in this same publication.

[36] J.H.H. Weiler, '*Editorial: Judicial Ego*', 9 Int. J. Const. Law 1 (2011).

[37] Before the clarification of 2017, Roberto Romboli proposed in 2014 that the judge of last instance - even if he proceeds to disapply national law - refer the question of constitutionality to the Constitutional Court, on the sole basis of no manifest lack of grounds (by definition, disapplication excludes relevance). This would allow the Court to proceed with the declaration of unconstitutionality and eliminate the act from the legal system or provide indications for the purposes of the interpretation and application of the contested provision, Id., *Corte di giustizia e giudici nazionali: il rinvio pregiudiziale come strumento di dialogo*, 3 Rivista AIC 1 (2014).

Through this path, the Constitutional Court ensured the systemic and non-fractional protection[38] it wrote about in reference to the ECHR in the well-known Swiss pension case decided upon in 2012[39].

The message that the Constitutional Court seeks to pass on is ultimately as follows: considering the catalogues of rights contained in the Constitution, the CFREU or ECHR as conceptually superimposable is erroneous, not only due to the different content or degree of protection ensured, but rather because the former is part of a composite constitutional architecture that the law is incidentally called upon to guarantee through the systemic and integrated protection of rights. In the cases mentioned in this article, the word 'systemic' appears to acquire a less defensive and more collaborative meaning than in 2012.

[38] A. Cosentino, *La Carta di Nizza nella giurisprudenza di legittimità*, cit., mentions this in reference to the Consob affair.

[39] "[…] the comparison between the protection provided for under the Convention and the constitutional protection of fundamental rights must be carried out whilst aiming to achieve the broadest scope for guarantees, a concept which – as clarified in judgments no. 348 and no. 349 of 2007 – must be deemed to include a balance with other interests protected under constitutional law, that is, with other provisions of the Constitution that in turn guarantee fundamental rights liable to be affected by the expansion of individual protection. […] within the assessments of this Court, […] the protection of fundamental rights must be systemic and not gradually across a series of uncoordinated provisions in potential conflict with one another" Judgment No. 264 of 2012.

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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Although the article is the result of the Authors' common reflections, Professor Amalfitano has written Sections 1 and 4, while Dr Cecchetti has written Sections 2, 3, 5, and 6.

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.

DUAL PRELIMINARITY IN COMPARATIVE LAW

Giuseppe Martinico[*]

Abstract

In this essay I shall analyse the question of dual preliminarity in five legal experiences: France, Austria, Belgium, Germany, and Spain. The priority granted to one of the two preliminary questions, as we shall see, can have different origins. In the French and Belgian cases, the priority criterion is established by the legislative formant (to be understood in a broad sense, as it can also refer to super-primary legislation), while in the Austrian, German and Spanish cases the formant to be considered is the judicial one. After clarifying what is meant by dual preliminarity and analysing the case studies I shall offer some brief final reflections on the trends offered by comparative law.

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1. Introduction and structure of the essay

National judges in Europe are called upon to be loyal to several legal systems[1] at the same time and the question of dual preliminarity has contributed to creating tensions between domestic and EU law. In the following essay I shall look at five legal systems that, like the Italian one, have experienced the phenomenon of dual preliminarity. However, before

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[1] G. Martinico, *Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order*, 3 International Journal of Constitutional Law 871 (2012).

justifying and illustrating the case studies analysed here, it is worth dwelling on the terminology used in this work.

The Italian Council of State recently defined the dual preliminarity as that situation "in which questions of constitutional legitimacy and conformity with Union law concerning the same domestic rules are raised simultaneously in the same proceedings"[2].

Dual preliminarity cases are thus characterised by a "cierta identidad material"[3] and, in the definition of the Council of State, also by a subjective identity, since the referring judge is the same; in this case one can speak of dual preliminarity in the narrow sense.

At the same time, however- think of the Berlusconi case[4]- the concept of dual preliminarity (in a broad sense) can be used to describe those cases where the referring judges were different. Indeed, dual preliminarity may be also triggered by two different referring judges. This was, for example, the situation at the origin of Order 165/2004 delivered by the Italian Constitutional Court.

In that case the Court of Milan and the Court of Appeal of Lecce had raised a preliminary question to the Court of Justice, while the Court of Palermo had raised a question of constitutionality to the Italian Constitutional Court. On that occasion, the Italian Constitutional Court decided to change its order of business "in view of the substantial coincidence between the question of constitutionality, relating to the alleged conflict between the contested provisions and Community law, and that which is the subject of the aforesaid cases"[5].

Dual preliminarity is a mechanism that can be used in different ways, for example, looking at the Italian case, it was employed as a technique of hidden dialogue (an alternative way of dialogue other than the official way represented by the preliminary ruling procedure)[6]. Indeed, dual preliminarity was once deployed by the Constitutional Court to take the Luxembourg Court out of the preliminary ruling procedure. Then the Italian

[2] Consiglio di Stato, sez. IV, 16 luglio 2021, n. 5361.

[3] P. Cruz Villalón, J. L. Requejo Pagés, *La relación entre la cuestión prejudicial y la cuestión de inconstitucionalidad*, 50 Revista de Derecho Comunitario Europeo, 173 (2015), 182.

[4] CJEU, C-387/02, Berlusconi e a., ERC., 2005 I-03565.

[5] Corte costituzionale, ordinanza 165/2004.

[6] F. Fontanelli, G. Martinico, *Alla ricerca della coerenza: le tecniche del "dialogo nascosto" fra i giudici nell'ordinamento costituzionale multi-livello*, 58 Rivista trimestrale di diritto pubblico 351 (2008). G. Martinico, *Judging in the multilevel legal order: exploring the techniques of 'hidden dialogue*, 21 King's Law Journal 257 (2010).

Constitutional Court accepted to consider itself a judge under Art. 267 TFEU[7] and since then dual preliminarity has performed other functions.

The definition of dual preliminarity that I referred to at the beginning has a descriptive value; that is, it says nothing about the precedence (or priority) to be given to one of the two preliminary questions.

Instead, in the case law we shall explore, reference is made to mechanisms aimed at granting the right to the first word to one of the two courts involved, acknowledging the priority of one question over the other. As the Italian case is widely known[8],in this contribution I shall look at five experiences: France, Austria, Belgium, Germany and Spain. Dual preliminarity can have different origins. In the French and Belgian cases, dual preliminarity has its matrix in the legislative formant[9] (to be understood in a broad sense, as it can also refer to super-primary legislation as we shall see), whereas in the Austrian, German and Spanish cases the formant is the judicial one.

A final premise is necessary before analysing the selected cases: research such as this must necessarily consider an apparently extra-legal factor, namely the interpretative competition that exists between courts. In a context in which different constitutional levels (or poles, according to other terminology) share "multi-sourced equivalent norms" [10], interpreters develop forms of competition, trying to impose their view so as to have the last word on the interpretation of certain shared normative materials. I shall return to this later in the essay.

The idea of competition ("inter-court competition") between judges is not new in European studies, having been used by Alter [11] who has shown that

[7] Starting with: Corte costituzionale, ordinanza 103/2008.

[8] I focused on this subject in: G. Martinico, *Conflitti interpretativi e concorrenza fra corti nel diritto costituzionale europeo*, 46 Diritto e società 691 (2019). For a complete and up-to-date view of the Italian picture see, for all: G. Repetto, *Concorso di questioni pregiudiziali (costituzionale e comunitaria), tutela dei diritti fondamentali e sindacato di costituzionalità*, 57 Giurisprudenza costituzionale 2955 (2017).; G. Repetto, *Sentenza 269 e doppia pregiudizialità nella giurisprudenza della Corte costituzionale* (2022) http://rivista.eurojus.it/?s=repetto

[9] On the concept of "formant" in comparative law see: R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 American Journal of Comparative Law 4 (1991).

[10] Y. Shany, T.Broude (eds.), *Multi-Sourced Equivalent Norms in International Law* (2011).

[11] K. Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in A. Slaughter, A. Stone Sweet, J.H.H. Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context* 227 (1998).

judges of the same court system often use EU law to induce judicial changes in the case law of supreme or constitutional courts.

2. Dual Preliminarity and legislative formant: France and Belgium

The Melki[12] case was prompted by a reform introduced in France by which the so-called priority question of constitutionality was introduced. By Organic Law No. 1523 of 10 December 2009 relating to the application of Art. 61-1 of the Constitution, a new Chapter II bis had been inserted in Title II of Ordonnance No. 1067 of 7 November 1958. The new chapter was entitled "The application for a priority preliminary ruling on the issue of constitutionality".

According to the model designed by the reform, a common judge who doubts the constitutionality of a national provision must submit the question to the *Cour de cassation* (if the referring judge is an ordinary court) or the *Conseil d'État* (if the referring court is an administrative judge), so that they may assess the need to submit the question to the *Conseil Constitutionnel*.

In any case, the disputed "point" of the reform concerns the so-called priority question of constitutionality, according to which "in any event, where pleas are made before the *Conseil d'État* or the *Cour de cassation* challenging whether a legislative provision is consistent, first, with the rights and freedoms guaranteed by the Constitution and, secondly, with France's international commitments, it must rule as a matter of priority on the referral of the question on constitutionality to the *Conseil constitutionnel*"[13].

[12]ECJ, C-188/10 and C-189/10, Melki.

[13] Articles 23-5: "A plea alleging that a legislative provision prejudices the rights and freedoms guaranteed by the Constitution may be raised, including for the first time on appeal on a point of law, in proceedings before the Conseil d'État or the Cour de cassation. The plea shall be submitted in a separate, reasoned document, failing which it shall be inadmissible. The court may not raise the issue of its own motion.
In any event, where pleas are made before the Conseil d'État or the Cour de cassation challenging whether a legislative provision is consistent, first, with the rights and freedoms guaranteed by the Constitution and, secondly, with France's international commitments, it must rule as a matter of priority on the referral of the question on constitutionality to the Conseil constitutionnel.
The Conseil d'État or the Cour de Cassation shall have a period of three months from the date on which the plea is submitted to deliver its decision. The priority question on constitutionality shall be referred to the Conseil constitutionnel where the conditions laid down in Articles 23-2(1) and (2) are met and the question is new or of substance.

This mechanism ended, according to the *Cour de cassation* – the referring judge in the Melki case – by threatening the European mandate of the national court and based on these considerations it raised the preliminary question to the Court of Justice:

"The Cour de Cassation infers from Articles 23-2 and 23-5 of Order No 58-1067, and from Article 62 of the Constitution, that courts adjudicating on the substance, like itself, are denied, by the effect of Organic Law No 2009-1523 which introduced those articles into Order No 58-1067, the opportunity to refer a question to the ECJ for a preliminary ruling, where a priority question on constitutionality has been referred to the Conseil constitutionnel"[14].

As mentioned, to better frame the issue we must adopt the perspective of the interpretative competition existing between the two apex courts, the Court of Cassation and the Constitutional Council[15]. As a matter of fact, the reform had been the subject of two different interpretations by the rival courts. It is no coincidence that, shortly before the intervention of the Court of Justice, the French Constitutional Council intervened (using the procedure governed by Art. 61 of the Constitution) by providing a consistent interpretation of the domestic reform[16], making it compatible with EU law:

"Il (le juge) peut ainsi suspendre immédiatement tout éventuel effet de la loi incompatible avec le droit de l'Union, […] l'article 61-1 de la Constitution pas plus que les articles 23 1 et suivants de l'ordonnance du 7 novembre 1958 susvisée ne font obstacle à ce que le juge saisi d'un litige dans lequel est invoquée l'incompatibilité d'une loi avec le droit de l'Union européenne

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Where a reference has been made to the Conseil constitutionnel, the Conseil d'État or the Cour de Cassation shall stay proceedings until it has made its ruling. That shall not apply where the party concerned is deprived of his liberty by reason of the proceedings and legislation provides that the Cour de Cassation is to rule within a fixed period. If the Conseil d'État or the Cour de Cassation is required to rule as a matter of urgency, it is possible for the proceedings not to be stayed." Conseil constitutionnel", L.O.N. 2009-1523.

[14]ECJ, C-188/10 and C-189/10, Melki, par. 21.

[15] A. Dyevre, *The Melki Way: The Melki Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)* (2011) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1929807

[16] F. Fabbrini, *Sulla 'legittimità comunitaria' del nuovo modello di giustizia costituzionale francese: la pronuncia della Corte di giustizia nel caso Melki*, 4 Quaderni Costituzionali 840 (2010).

fasse, à tout moment, ce qui est nécessaire pour empêcher que des dispositions législatives qui feraient obstacle à la pleine efficacité des normes de l'Union soient appliquées dans ce litige"[17].

Taking note of this decision, the Court of Justice later reaffirmed the validity of Simmenthal[18], Rheinmühlen I[19]and Foto Frost[20] and concluded that the subsequent question of constitutionality (as interpreted by the Constitutional Council) was not necessarily incompatible with EU law[21].

It should be noted that the Belgian government[22]. intervened in support of the reasons presented by the French government and this is not a mere detail because Belgium also has its own history on dual preliminarity, as will be discussed.

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[17]*Conseil Constitutionnel*, decision n. 2010-605, 12 May 2010, www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis–1959/2010/2010–605-dc/decision-n–2010–605-dc-du–12-mai–2010.48186.html (par. 14). The French Conseil d'Etat would also intervened before the ruling of the Court of Justice.

[18] ECJ, 106/77, Simmenthal,

[19]**ECJ,166/73,** Rheinmühlen-Düsseldorf contro Einfuhr- und Vorratsstelle für Getreide und Futtermittel,**.**

[20]ECJ, 314/85, Foto Frost.

[21] "Accordingly, the reply to the first question referred is that Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. On the other hand, Article 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free:

–to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary,

–to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and

–to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.

It is for the referring court to ascertain whether the national legislation at issue in the main proceedings can be interpreted in accordance with those requirements of EU law." ECJ, C-188/10 and C-189/10, Melki, par.57.

[22] ECJ, C-188/10 and C-189/10, Melki, par. 36.

Melki is a decision that has been much commented on, but not everyone has grasped, in my opinion, its true nature. It is, above all, a "guidance case", in the terminology of Tridimas[23], i.e., a case in which the Court of Justice, after having constructed a judicial test, delegated the solution of the same to the referring court:

"In that regard, it should be borne in mind that it is for the referring court to determine, in the cases before it, what the correct interpretation of national law is"[24].

The guidelines offered by the Court of Justice to the referring judge also say a lot about the nature of Simmenthal[25] and the fact that the latter is not only about disapplication, but above all about the immediacy of protection offered to the right stemming from EU law norms.

Accordingly, the ECJ replied by arguing that Art. 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free:

"– to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary,
– to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and
– to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.
It is for the referring court to ascertain whether the national legislation at issue in the main proceedings can be interpreted in accordance with those requirements of EU law." [26].

It follows from this passage that the only way to allow immediate non-application before the end of the interlocutory proceedings is to guarantee the court the availability of a "any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order"[27].This is what the case law in France in the aftermath of

[23] T. Tridimas, *Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction*, 9 International Journal of Constitutional Law, 737 (2011).
[24] ECJ, C-188/10 e C-189/10, Melki, par. 49.
[25] ECJ, 106/77, Simmenthal.
[26] ECJ, C-188/10 e C-189/10, Melki, par. 57.
[27] ECJ, C-188/10 e C-189/10, Melki, par. 57.

Melki[28]. also seems to suggest. Only in this way the core of Simmenthal can be saved, since, as recalled, Simmenthal is not only about disapplication, but is above all about the national court's obligation 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"[29].

We shall return to this when discussing the Austrian case.

The other case of constitutional priority that can be traced back to the legislative formant is Chartry[30], which concerned a preliminary question raised by the Tribunal de première instance of Liège. The question raised by the referring court concerned Art. 26 of the Special Law of 6 January 1989 about the Cour d'arbitrage[31]. In particular, the referring court asked the Court of Justice:

"Do Article 6 [EU] and Article 234 [EC] preclude national legislation, such as the Law of 12 July 2009 amending Article 26 of the Special Law of 6 January 1989 on the Cour d'arbitrage, from requiring the national court to make a reference to the Constitutional Court for a preliminary ruling, if it finds that a citizen taxpayer has been deprived of the effective judicial protection guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950; "the ECHR"], as incorporated into Community law, by another national law, namely: Article 49 of the Programme Law of 9 July 2004, without that national court's being able to ensure immediately the direct effect of Community law in the proceedings before it or to carry out a review of compatibility with the ECHR when the Constitutional Court has recognised

[28]M.Bossuyt, W. Verrijdt, *The Full Effect of EU Law and of Constitutional Review in Belgium and France after the Melki Judgment*, 7 European Constitutional Law Review 355 (2011).

[29] ECJ, 106/77, Simmenthal.

[30] ECJ, C-457/09, Claude Chartry v Belgian State, in ECR. 2011 I-00819.

[31] Par. 4: "When it is alleged before a court of law that a statute, a decree or a rule referred to in Article 134 of the Constitution infringes a fundamental right guaranteed in a wholly or partly similar manner by a provision of Title II of the Constitution and by a provision of European or international law, that court of law shall first refer the question of compatibility with the provision of Title II of the Constitution to the Cour d'arbitrage for a preliminary ruling.
In derogation from paragraph 1, the obligation to refer a preliminary question to the Constitutional Court shall not apply:
1° in the cases referred to in paragraphs 2 and 3;".

the compatibility of the national legislation with the fundamental rights guaranteed by Title II of the Belgian Constitution?"[32].

As an illustration of the link between Melki and Chartry[33], one may recall that the former was also mentioned in the latter[34]. It should be made clear that Chartry referred to the pre-Lisbon scenario, in which, Art. 6 TEU did not yet provide for the accession (which, moreover, has not yet taken place) of the Union to the European Convention on Human Rights. With his request, however, the referring judge seemed to infer that the Convention could be part of the yardstick ("incorporated into Community law"[35]) on which the Court of Justice had to decide. The ECJ easily avoided the question, stating that "It follows that it has not been established that the Court has jurisdiction to answer this reference for a preliminary ruling"[36].

After the Chartry affair, there have been no other relevant questions, also because, now courts can either alternatively refer the question to the ECJ or the Constitutional Court or send the question to both at the same time[37].

3. Dual preliminarity and legal formants: Austria, Germany and Spain

The other three cases discussed in the article concern contexts in which the order of priority in favour of one of the questions for a preliminary ruling was established by the judicial formant. The first case to be analysed

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[32] ECJ, C-457/09, Claude Chartry v Belgian State, in ECR. 2011 I-00819, par. 15.
[33] ECJ, C-457/09, Claude Chartry v Belgian State, in ECR. 2011 I-00819.
[34] ECJ, C-188/10 and C-189/10, Melki,.par. 19-20: "According to the referring court, Mr Melki and Mr Abdeli claim that Article 78-2, fourth paragraph, of the Code of Criminal Procedure is contrary to the Constitution, given that the French Republic's commitments resulting from the Treaty of Lisbon have constitutional value in the light of Article 88-1 of the Constitution, and that that provision of the Code of Criminal Procedure, in so far as it authorises border controls at the borders with other Member States, is contrary to the principle of freedom of movement for persons set out in Article 67(2) TFEU, which provides that the European Union is to ensure the absence of internal border controls for persons.
The referring court considers, first, that the issue arises whether Article 78-2, fourth paragraph of the Code of Criminal Procedure is consistent both with European Union Law ('EU law') and with the Constitution.".
[35] ECJ, C-457/09, Claude Chartry v Belgian State, in ECR. 2011 I-00819, par. 15.
[36] ECJ, C-188/10 e C-189/10, Melki.
[37] Thanks to Patricia Popelier for this piece of information. For an updated overview: M. Bossuyt, W. Verrijdt, *The Full Effect cit*,

is the Austrian case. It is worth starting with the case A. v. B[38], which originated from a preliminary question by the Austrian Supreme Court, which had consulted with the Court of Justice to question the compatibility of a new judicial trend of the Austrian Constitutional Court. In a truly innovative ruling[39], the Austrian Constitutional Court had extended the special treatment accorded to the ECHR (regarded as a "shadow constitution"[40]) to the corresponding provisions contained in the EU Charter of Fundamental Rights. In this way it attempted to centralise the control of compatibility between domestic law and the Charter, creating another exception to the mechanism designed by Simmenthal[41]:

"In that context, the Oberster Gerichtshof states that an established line of authority required it, in recognition of the primacy of EU law, to refrain on a case-by-case basis from applying statutory provisions that were contrary to EU law. However, by judgment U 466/11 of 14 March 2012, the Verfassungsgerichtshof departed from that case law, ruling that its jurisdiction to review the constitutionality of national statutes, in proceedings under Paragraph 140 of the B-VG for the review, in general terms, of the legality of legislation (Verfahren der generellen Normenkontrolle), covers the provisions of the Charter. In the context of such proceedings, the rights guaranteed by the ECHR may be relied upon before the Verfassungsgerichtshof as constitutional rights. According to the Verfassungsgerichtshof, it follows that, by dint of the principle of equivalence, as established by the case law of the Court of Justice, the general

[38] ECJ, C-112/13, A c. B e altri.

[39] Austrian Constitutional Court, U 466/11-18; U 1836/11-13.

[40] P. Cede, *Report on Austria and Germany* in G. Martinico, O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* 55 (2010), 63.

[41] "The referring court is uncertain whether the principle of equivalence requires the remedy of an interlocutory procedure for the review of constitutionality also to be available in respect of rights guaranteed by the Charter, given that it would prolong the proceedings and increase costs. The objective of securing a general correction of the law through the striking down of a statute that is contrary to the Charter could also be achieved after the proceedings have come to a close. Furthermore, the fact that a right under the Austrian Constitution has the same scope as a right under the Charter does not trigger a waiver of the obligation to make a reference for a preliminary ruling. The possibility cannot be ruled out that the Verfassungsgerichtshof might construe that fundamental right differently from the Court and that, as a consequence, its decision might encroach on the obligations flowing from Regulation No 44/2001.", ECJ, C-112/13, A v. B, par. 26.

review of legislation must also cover the rights guaranteed by the Charter." [42].

Also in that decision, the *Verfassungsgerichtshof* (the Austrian Constitutional Court), after mentioning cases such as Cilfit, emphasised that:

"[I]t remains to be emphasized that there is no duty to bring a matter to the CJEU for a preliminary ruling if the issue is not relevant for the decision […] meaning that the answer, whatever it is, can have no impact on the decision of the case. Concerning the Charter of Fundamental Rights, this is the case if a constitutionally guaranteed right, especially a right of the ECHR, has the same scope of application as a right of the Charter of Fundamental Rights. In such a case, the Constitutional Court will base its decision on the Austrian Constitution without there being a need for reference for a preliminary ruling under the terms of Article 267 TFEU"[43].

On this basis, the Austrian Supreme Court asked the ECJ how to interpret Article 24 of Reg. 44/2001 and Article 267 TFEU. In particular, the referring court focused on the existing relationship between disapplication and the judicial review of legislation before the constitutional court, if the review of constitutionality also included the review of compatibility between national law and the Charter. According to the Austrian Constitutional Court this would also be desirable to avoid interpretative discrepancies, as well as on the basis of the argument of the *erga omnes* effect of decisions of unconstitutionality (already used by the Belgian and French governments in Melki)[44].

The ECJ referred to Melki, recalling the well-known guidelines already developed. This would also explain the decision to refer the matter not to the Grand Chamber, but only to the fifth Chamber. A v. B, therefore,

[42] ECJ, C-112/13, A v. B, par. 24.

[43] Austrian Constitutional Court, U 466/11-18; U 1836/11-13, par. 44.

[44] "In light of the fact that Article 47(2) CFR recognizes a fundamental right which is derived not only from the ECHR but also from constitutional traditions common to the Member States, it must be heeded also when interpreting the constitutionally guaranteed right to effective legal protection (as an emanation of the duty of interpreting national law in line with Union law and of avoiding situations that discriminate nationals). Conversely, the interpretation of Article 47(2) CFR must heed the constitutional traditions of the Member States and therefore the distinct characteristics of the rule of law in the Member States. This avoids discrepancies in the interpretation of constitutionally guaranteed rights and of the corresponding Charter rights". Austrian Constitutional Court, U 466/11-18, U 1836/11-13, par. 59.

also presented itself as a "guidance case", however, as scholars[45] have pointed out there are also differences between Melki and A. v. B. First, the Verfassungsgerichtshof, in the decision referred to by the Supreme Court, expressly quoted Melki, in order to demonstrate its adherence to the ECJ's solution. Second, the origin of the Austrian decision needs to be stressed. The case law of the Austrian constitutional court which was questioned in A. v. B. did not originate from a preliminary question of constitutionality, but from an individual constitutional complaint. There are thus differences between Melki and A. v B., which perhaps would have suggested a different composition of the Court of Justice for the resolution of the case. In the decision of the Austrian Constitutional Court, which was challenged by the Supreme Court, the *Verfassungsgerichtshof* had decided to centralise the resolution of the dispute, reminding the ECJ that "the interpretation of Article 47(2) CFR must heed the constitutional traditions of the Member States and therefore the distinct characteristics of the rule of law in the Member States. This avoids discrepancies in the interpretation of constitutionally guaranteed rights and of the corresponding Charter rights".[46]

The Austrian Constitutional Court probably intended to send a message to the ECJ, but then again, conflicts of interpretation have always been the driving force behind supranational integration. Unlike in the past, however, we are now faced with conflicts of convergence and not of divergence[47]. This is a paradoxical consequence of the constitutionalisation of EU law: whereas once upon a time conflicts were due to the absence of a supranational rule functional to the protection of a right[48], today conflicts arise from the attempt to get the interpretative monopoly of certain norms that are perceived as belonging to both levels.

The issue of the problematic implementation of the Charter is still debated in Austria. According to Klamert, "the primary law status of the Charter under EU law has created frictions in the established division of competences between the highest courts in Austria"[49]. More recently, the Austrian

[45] A. Guazzarotti, *Rinazionalizzare i diritti fondamentali? Spunti a partire da Corte di Giustizia UE, A c. B e altri, sent. 11 settembre 2014, C-112/13* (2014) https://www.dirittocomparati.it/rinazionalizzare-i-diritti-fondamentali-spunti-a-partire-da-corte-di-giustizia-ue-a-c-b-e-altri-sent/

[46] Austrian Constitutional Court, U 466/11-18; U 1836/11-13, par. 59.

[47] G. Martinico, *Lo spirito polemico del diritto europeo Studio sulle ambizioni costituzionali dell'Unione* (2011).

[48] See ECJ, 1/58, Stork.

[49] M. Klammert, *The implementation and application of the Charter of Fundamental Rights of the EU in Austria*, 4 Acta Universitatis Carolinae Iuridica 88 (2018).

Supreme Court again relied on the concept of equivalence of protection to ask some preliminary questions to the Court of Justice in Case 234/17, XC, YB and ZA[50]. That was a case concerning the possibility of extending to EU law what the legislator provided for the ECHR, i.e., the possibility of overriding a domestic judgment covered by *res iudicata*. The Court of Justice, caught in the middle of a true judicial civil war between the Austrian apex courts, concluded as follows:

After this case, the interpretative competition between the Supreme Court and the Constitutional Court subsided and there have been no further attempts to involve the Court of Justice in the internal battle between Austrian judges.

Unlike in other areas, the German case does not seem to be particularly interesting, although there is no lack of jurisprudential insights that could give rise to relevant developments in the future.

On the specific topic of dual preliminarity, according to the German Constitutional Court, the Basic Law does not impose a precise order in the case of dual preliminarity and therefore, in the case of uncertainty, national judges can choose between the two procedures at its own discretion: However, in 2011, the German Constitutional Court ruled that:

"The obligation incumbent on the ordinary courts prior to making a submission to the Federal Constitutional Court to clarify the content and binding nature of Union law, where appropriate by initiating preliminary ruling proceedings according to Article 267.1 TFEU, does not contradict the possibility of the ordinary courts, confirmed by the Federal Constitutional Court, to select between a review of statutes according to Article 100.1 sentence 1 of the Basic Law and submission to the ECJ, given that this relates to different case constellations. If there is a dispute as to whether a legal provision which is material to the decision in the original proceedings is compatible with Union law and constitutional law, there is – according to the case law of the Federal Constitutional Court from the point of view of German constitutional law – in principle no established sequence among any interim proceedings which might have to be initiated by the ordinary court according to Article 267.2 or 267.3 TFEU and submission according to Article 100.1 sentence 1 of the Basic Law. A court which has doubts under both Union and constitutional law may hence rule according to its own expediency considerations as to which set of interim proceedings it initially initiates (see BVerfGE 116, 202 <214>). In contradistinction to this, the binding of the national legislature by primary Union law which is at issue

[50] ECJ, C-234/17, XC and Others.

here is a matter of determining the power of the Federal Constitutional Court to review and is hence a preliminary question which imperatively must be clarified for the admissibility of a review of statutes"[51].

The German system itself, as is well known, has stubbornly pursued a strategy of distinction between systems[52], even if more recently, within the case law concerning individual constitutional complaints there have been interesting novelties. I refer, of course, to the cases on the so-called right to be forgotten[53], in which the *Bundesverfassungsgericht* established a new framework of "parallel applicability" of domestic and supranational rules on fundamental rights[54].

As this article is being finalised, the consequences of this development on the issue of double jeopardy have not yet been clarified by the German Constitutional Court.

The last case analysed is the Spanish case, for the framing of which some premises are necessary. In Spain, the *Tribunal Constitucional* has based state participation in the Union on Art. 93 of the Spanish Constitution[55], defined at first as a procedural precept and, only later, re-evaluated as a substantive norm[56]. The provision in question provides that an organic laws

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[51] 1 BvL 3/08, par. 55 e 56

[52] A. Di Martino, *Giurisdizione costituzionale e applicabilità della Carta dei diritti fondamentali dell'Unione europea: profili comparativi*, 3 Diritto pubblico comparato ed europeo 759 (2019), 768.

[53] 1 BvR 276/17 and 1 BvR 16/13.

[54] D. Burchardt, *Backlash against the CJEU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review*, S1 German Law Journal 1 (2020).

[55] Article 93, Spanish Constitution: "By means of an organic law, authorisation may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organisation or institution. It is incumbent on the Cortes Generales or the Government, as the case may be, to guarantee compliance with these treaties and with the resolutions emanating from the international and supranational organisations in which the powers have been vested."

[56] See Decision 28/1991 of the Spanish Constitutional Court, BOE No. 64, 15 March 1991. On Article 93 of the Spanish Constitution see A. López Castillo, *La Unión Europea «en constitución y la Constitución estatal en (espera de) reformas. A propósito de la DTC 1/2004 de 13 diciembre*, in A. Lopez Castillo-A. Saiz Arnaiz-V. Ferreres Comella, *Constitución española y constitución europea*, 13 (2004) 22; see also A. Saiz Arnaiz, *De primacía, supremacía y derechos fundamentales en la Europa integrada: la Declaración del Tribunal Constitucional de 13 diciembre de 2004 y el Tratado por el que establece una Constitución para Europa*, A. Lopez Castillo-A. Saiz Arnaiz-V. Ferreres Comella, *Constitución española y constitución europea*, 51 (2004).

must be passed by an absolute majority of Parliament to authorise the conclusion of treaties conferring on international organisations the exercise of competences provided for by the Constitution. This reading, in conjunction with the provisions of Art. 96.1 of the Spanish Constitution[57], has given Union law a super-primary value that Spanish scholars refer to as "infra-constitucional"[58].

This view does not entail, traditionally, the recognition of constitutional status to the rules of EU law. As a consequence, in Spain EU law does not enjoy constitutional status in the technical sense and, consequently, a case of conflict between national and EU law cannot be grounds for unconstitutionality for national legislation. The Spanish *Tribunal Constitucional*, in short, declares itself incompetent to resolve possible conflicts between domestic and EU rules that, in its reconstruction, give rise "only" to questions of legality and not, precisely, of constitutionality.

In Case 58/2004[59], the Spanish Constitutional Court, for the first time, admitted that a judge's refusal to refer a question to the Court of Justice for a preliminary ruling may ground an *amparo* claim (i.e., the individual constitutional complaint) if that refusal affects a fundamental right that can be protected by *amparo* itself. Moreover, the *Tribunal Constitucional* has made it clear that the mere refusal to make a reference for a preliminary ruling (in cases where there is an obligation for the judge to make a reference, according to the letter of the then 234 TEC – now 267 TFEU – and there are no previous rulings on identical or similar cases by the Court of Justice) is not sufficient. In this regard, EU law continued – and continues – to have no constitutional status. The possibility of sanctioning failure to make a reference for a preliminary ruling is also recognised in Austria (and Germany)[60], and this certainly makes Spain an interesting case for the purposes of the proposed comparative analysis. Specifically on the issue of dual preliminarity, the

[57]Article 96 Spanish Constitution: "1. Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order. Their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law. 2. The same procedure shall be used for denouncing international treaties and agreements as that, provided in Article 94, for entering into them".

[58]See, for instance, Judgment 64/1991 of the Spanish Constitutional Court, BOE n..98, 24 April 1991

[59]Spanish Constitutional Court, judgment n. 58/2004, www.tribunalconstitucional.es.

[60] For a comparative overview C. Lacchi, *Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question to the CJEU*, 16 German Law Journal 1663 (2015), 1671.

Tribunal Constitucional pronounced itself for the first time in Order No. 168/2016, in which it declared a question of constitutionality inadmissible, saying that if a common judge has both doubts of constitutionality and compatibility with EU law, it must give priority to the latter. The reason for this lies in the fact that any doubts about the compatibility of the norm with EU law make it inapplicable to the specific case and this removes one of the necessary requirements for raising the question of constitutionality.

The interesting question on which scholars have recently focused concerns the possibility of extending Article 10.2 of the Constitution to European Union law[61]. Article 10.2 of the Spanish Constitution embodies the constitutional openness of the Spanish system to the law of international human rights treaties:

"The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain"[62].

Given the economic matrix of EU law, Article 10.2 has not been called into question for supranational Treaties. However, EU law changed nature with Lisbon, given the binding nature of the Charter of Fundamental Rights, and today it is difficult to deny that "en realidad, al ámbito de los derechos fundamentales, es evidente que el pronunciamiento del Tribunal de Justicia es constitucionalmente relevante a los efectos del artículo 10.2 CE"[63]. On this matter, however, we must wait for judicial developments.

4. Conclusions

From this comparative analysis one might wonder whether the trend present in the case law of some Constitutional Courts might be a symptom of a worrying anti-Europeanism. I do not think this is the case. Constitutional Courts have inevitably sought to contain the risk of a spread of constitutional review disguised as a check on compatibility with supranational norms with regard tothe issue of fundamental rights. The Simmenthal doctrine, moreover, as we have seen, does not reduce itself to the question of disapplication, but requires the immediacy of the protection of rights derived

[61] P. Cruz Villalón, J. L. Requejo Pagés, *La relación cit.*,.191.
[62] Article 10.2 Spanish Constitution.
[63] P. Cruz Villalón, J. L. Requejo Pagés, *La relación cit.*,.191.

from EU law. In Melki[64], the ECJ gave important guidelines to balance this attempt to repatriate fundamental rights with that of guaranteeing the core of its doctrine[65].

In general, it would therefore be incongruous to describe this comparative trend as anti-European, because on closer inspection in the judgments commented on, the Constitutional Courts have never closed themselves off in interpretative solipsism. On the contrary, what has been described here seems to me to be tensions due to the pursuit of a strategy of progressive integration between EU law and national constitutional law, a strategy that is not taken for granted, as comparative law shows[66].

In particular, the Constitutional Courts of Austria and Belgium are among those most loyal to the Court of Luxembourg and, moreover, the *erga omnes* argument is not in itself negative provided that the guidelines established in Melki and A. v B. are applied. At the same time, the risk of instrumentalisation cannot be ruled out; it is not by chance that Melki has been invoked in some cases in Poland and Romania[67] by the referring judges to defend the authority of the common judges in problematic contexts where the Constitutional Courts have been captured or otherwise put under pressure by contingent majorities. In this, EU law is confirmed as a powerful antidote against the populist wave in some Member States.

[64] ECJ, C-188/10 e C-189/10, Melki.

[65] According to a different reading: "The Melki judgment does not downsize this full effect doctrine: it only states that one of its features, the immediacy rule, can be replaced by another feature, i.e., provisional measures, as long as the full effect of EU law remains guaranteed. This judgment has, moreover, granted the domestic judge a pretext to declare the QPC procedure contrary to EU law and to avoid mandatory constitutional review, and this pretext has indeed been used by the referring judge", M. Bossuyt, W. Verrijdt, *The Full Effect cit*, 385.

[66] A. Di Martino, *Giurisdizione costituzionale cit.*

[67] C-521/21, Rzecznik Praw Obywatelskich and C-357/19, Euro Box Promotion e a.

AN EMPIRICAL ANALYSIS: PRACTICES OF ITALIAN COURTS ON DUAL PRELIMINARITY (2018-2022). A MIXED RESPONSE

Orlando Scarcello[*]

Abstract

In this paper, I examine, from an empirical perspective, the reaction of Italian courts from every rank and specialization to the 269-doctrine. A sample of around sixty cases was collected over a period of 5 years (2018-2022) and cases were coded based on whether they accepted (A) or dismissed (D) the doctrine. Data on which rights were mentioned more often and how acceptance rates changed in time are reported as well. The study shows a split judiciary, since in roughly half of the cases judges refused to follow the 269-doctrine (around 55% of the sample). A few notable cases are then examined separately and in more detail. Decisions on how these were classified are also explained.

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1. Introduction

In this paper I consider how Italian judges reacted to Judgement No. 269/2017 of the Italian Constitutional Court (ItCC). The decision exposed a new doctrine of "dual preliminarity", commanding

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ordinary courts to refer first to the ItCC and only later to the Court of Justice (ECJ) when national law was suspected to contrast with rights enshrined in both the Charter of Fundamental Rights of the European Union (CFREU) and in the national Constitution. What originally seemed like a mandate was later fine-tuned by the ItCC into a mere invitation to revert the order of preliminary references, but the issue remains whether judges abided by this doctrine or not.

In the paper, I first explain the context in which the doctrine was developed: I specify why it was important for the ItCC to elaborate and expose the 269-doctrine in the first place (§ 2). I then expose the methodology followed to collect the sample of cases (§3) and explain the results (§ 4). The latter, I can anticipate, show a mixed response to the 269-doctrine, as it turns out that broadly half of the judges have followed it, while the other half have not. I then briefly underline the specificities of some notable cases among those collected in the sample (§ 5). Finally, a few concluding remarks are added at the end of the paper (§ 6).

2. Context: Shaping the 269-Doctrine

In December 2017 the pivotal Judgment No. 269 was published[1] and was immediately perceived as the most significant innovation in the relations between Italian law and EU law since *Granital*[2].

Significant changes at the EU level led to the new stance inaugurated by Judgement No. 269-2017. The Maastricht Treaty and the later Lisbon Treaty enlarged the competences of the Union and, consequently, also expanded the actions potentially labelled as "implementation" of EU law. In Lisbon, the CFREU acquired binding value too[3] and its scope of application was interpreted in a quite expansive manner in judgments like *Fransson*[4]. As a result, the scope

[1] ItCC Judgment of 14 December 2017 No. 269.
[2] ItCC Judgment of 8 June 1984 No. 170.
[3] See article 6(1) of the Treaty on the European Union (TEU): "The Union recognises the rights, freedoms and Principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".
[4] C-617/10 Åklagaren v Hans Åkerberg Fransson of 26 February 2013. See also the following case Siragusa, C-206/13 Cruciano Siragusa v Regione Sicilia –

of application of EU rights inevitably grew, as did the circumstances under which national judges would therefore be able to disapply national law due to its conflict with the CFREU.

If we also consider the large substantive overlap between EU rights and rights enshrined under the Italian Constitution, we face a scenario under which Italian judges could potentially begin to review rights autonomously by disapplying provisions inconsistent with the CFREU and possibly by referring to the ECJ through the preliminary ruling mechanism (Article 267 of the Treaty on the Functioning of the EU, TFEU), right when they may have been expected to refer to the ItCC instead.

The risk for the ItCC was that of being "cut off", while a de facto de-centralized mechanism of judicial review of rights was established[5]. This risk was quite clearly identified by one of the members of the ItCC, Justice Augusto Barbera, just a few months before the 269 judgment[6].

Moreover, in 2017 Italy was right in the middle of the *Taricco* saga[7] and prominent scholars even considered the possibility of activating the counter-limits for the first time against EU law as an acceptable scenario[8]. Thus, the risk of diverging interpretations of extremely similar provisions on rights (the so-called "parallel" or "tandem" applicability[9]) was tangible.

Soprintendenza Beni Culturali e Ambientali di Palermo of 6 March 2014. On Fransson see the commentary by F. Fontanelli, Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog: Court of Justice of the European Union, 9 Eur. Const. Law Rev. 315 (2013).

[5] Such risk for constitutional courts had been assessed in the literature even before the Charter became binding. See V. Ferrares Comella, *The European Model of Constitutional Review of Legislation: Toward Decentralization*, 2 Int'l J. Const. L. 461 (2004) 479-482.

[6] https://perma.cc/NNG7-EZPR

[7] The *Taricco* saga has been widely discussed. For a reconstruction in English from a constitutional law perspective, see G. Piccirilli, *The "Taricco Saga": The Italian Constitutional Court Continues Its European Journey*, 14 Eur. Const. Law Rev. 814 (2018).

[8] See e.g., M. Luciani, Il brusco risveglio. I controlimiti e la fine mancata della storia costituzionale, 2 Rivista AIC 1 (2016).

[9] S. Iglesias Sánchez, Article 51: The Scope of Application of the Charter, in M. Bobek, J. Adams-Prassl (eds.), The EU Charter of Fundamental Rights in the Member States (2020), 410-412.

Judgment No. 269/2017 was published in this context 2017 with a double function. On the one hand, it acknowledged the objectively "constitutional stamp" of the CFREU, something that the German Constitutional Court too would do soon enough[10]. On the other hand, the ItCC also stated that in cases of "dual preliminarity" (when a domestic provision could be deemed in conflict with both EU rights in the CFREU and domestic constitutional rights), and with the exception of directly effective EU norms, Italian judges were under a duty to *first* refer to the ItCC and then *later*, if they still found it necessary, to the ECJ. This mandate to ordinary judges was explicitly motivated by recalling the risk of a de facto de-centralized system of judicial review[11]. By speaking first, the Constitutional Court aimed at gaining a decisive advantage in legally qualifying the case[12]. Moreover, the ItCC also stressed that it would have used *directly* both the Constitution and the CFREU to assess the compatibility of the provisions under scrutiny with rights preserved by Italian law, be them of EU or domestic origin, mirroring what had already happened in Austria in 2012 and preannouncing what was going to happen in Germany in 2019[13].

Briefly, Judgement No. 269/2017 issued a directive to Italian judges to reverse their ordinary practice in cases of dual preliminarity, switching from "Luxemburg-then-Rome" to "Rome-then-

[10] BVerfG 2 BvR 1845/18, para. 37.

[11] 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. 1 (2019) 11-14.

[12] N. Lupo, *The Advantage of Having the "First Word" in the Composite European Constitution*, 10 IJPL 186 (2018) 193: "All this helps to explain why, in the European inter-judicial dialogue, a crucial role is eventually assigned to the Court that speaks first, not to the one that speaks last: the authority that first submits a legal challenge inevitably takes the centre stage and may affect to a significant extent the resolution of a judicial dispute and the prevailing interpretation of the legal provisions at stake".

[13] Verfassungsgerichtshof (VfGH) U 466/11-18, U 1836/11-13 (Austria) and BVerfG Right to Be Forgotten I 1 BvR 16/13; Right to Be Forgotten II 1 BvR 267/17 (Germany). For a comparative analysis of the Austrian, Italian, and German cases see C. Rauchegger National Constitutional Courts as Guardians of the Charter: A Comparative Appraisal of the German Federal Constitutional Court's *Right to Be Forgotten* Judgments 22 Camb. Yearb. Eur. Leg. Stud. 258 (2020) 272-275 and C. Rauchegger, *The Charter as a Standard of Constitutional Review in the Member States*, in M. Bobek, J. Adams-Prassl (eds.), *The EU Charter*, cit. at 10, 489–493.

Luxemburg". This would help recentralizing the protection of fundamental rights in the hands of the ItCC[14].

Two later judgements adjusted what appeared to be a mandate to national courts in Judgement No. 269/2017: they clarified that more than *requiring* judges to reverse the order of preliminary questions, Judgement No. 269 had to be interpreted as merely *allowing* this reversal[15]. Moreover, the ItCC confirmed its mostly (although not exclusively) Europhile tradition in later references to the ECJ: *Consob*[16], *Inps*[17], and ultimately the still pending Orders No. 216/21 and 217/21. By using article 267 TFEU, the ItCC confirmed it had no intention of dropping its dialogue with the ECJ[18]. Indeed, re-centralization does not necessarily entail closure towards the ECJ[19].

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[14] D. Tega, The Italian Constitutional Court in Its Context: A Narrative, 17 Eur. Const. Law Rev. 369 (2021).

[15] ItCC Judgement of 21 February 2019 No. 20 and Judgement of 21 March 2019 No. 63.

[16] ItCC Order of 10 May 2019 No. 117. The ECJ eventually confirmed the interpretation of EU law suggested by the ItCC (C-481/19 *DB v Commissione Nazionale per le Società e la Borsa (Consob)* of 2 February 2021). Scholars saw this new reference as a particularly effective coordination between the ECJ and a constitutional court. See D. Sarmiento, 'Long Read: "The Consob Way - or How the Corte Costituzionale Taught Europe (Once Again) a Masterclass in Constitutional Dispute Settlement"' (*EU Law Live*, 16 April 2021) https://eulawlive.com/long-read-the-consob-way-or-how-the-corte-costituzionale-taught-europe-once-again-a-masterclass-in-constitutional-dispute-settlement-by-daniel-sarmiento/ . The ItCC spelled its final word on the case in Judgement of 30 April 2021 No. 84.

[17] ItCC Order of 30 July 2020 No. 182. See the commentary by N. Lazzerini, *Dual Preliminarity Within the Scope of the EU Charter of Fundamental Rights in the Light of Order 182/2020 of the Italian Constitutional Court*, 5 European Papers 1463 (2020) and D. Gallo, A. Nato, *L'accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell'ordinanza No. 182/2020 della Corte Costituzionale*, 4 Euro Jus 308 (2020). Decided by the Grand Chamber in C-350/20 O.D. and Others v Istituto nazionale della previdenza sociale (INPS) of 2 September 2021. The Constitutional Court followed up with Judgement of 4 March 2022 No. 54.

[18] 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).

[19] See also further judgements by the ItCC: Judgement of 11 March 2022 No. 67 (especially para 11), Judgement of 16 June No. 149, and Judgement of 26 July 2022 No. 198. The first one was commented by Ilaria Gambardella, *The Italian Constitutional Court and the Court of Justice of the European Union – A Step towards a More Constructive Dialogue on Fundamental Rights Matters?*, Public Law 470 (2022).

To summarize, the reversal of dual preliminarity as stated in judgement No. 269-2017 must be placed in a context of generally cooperative relations between the ItCC and the ECJ: later judgements fine-tuned the original 269-mandate and transformed it into an advice, way less threatening for the obligation established in *Simmenthal* to disapply immediately national law in conflict with EU law[20]. Even cases in which the constitutional need for a centralized system of review has been especially remarked (e.g., Judgements No. 67 and 149/2022), the ItCC has also been careful to reassure that judges retain their power of disapplication, with no procedural obligations under constitutional law delaying it.

That said, a question still remains: what was the reaction of Italian judges to the "269-mandate" (later the "269-advice")? In the past, cases of judicial disobedience to specific directives from the ItCC happened, e.g., in the *Kamberaj* case, in which the "twin-decisions" concerning the judicial treatment of the ECHR required by the ItCC were defied[21]. What was the reaction of Italian judges to what we may call the "269-doctrine"?

3. Methodology

To answer this question, I looked for references both to the ECJ and to the ItCC by Italian judges to verify whether the 269-doctrine was accepted or not. For reasons of reliability, I summarize here the procedure used to collect the cases, so that other scholars can replicate or update the research. It is worth mentioning immediately that the collection of cases was influenced by the way the search forms of the ECJ and of the ItCC are designed. Indeed, as it will be immediately apparent, they are quite different one another. However, this is a necessary step, since the two courts are the only institutions storing the

[20] C-106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA of 9 March 1978.

[21] Case C-571/10 *Servet Kamberaj v Social Housing Institute of the Autonomous Province of Bolzano (IPES) and others* of 24 April 2012. The referring judge tried to involve the ECJ by arguing that conflict between Italian law and the ECHR would be equal to conflict with EU law via article 6 TEU. The ECJ replied that, insofar as the accession to the ECHR was not completed, such equation would be mistaken.

relevant data. I have tried to set the forms of the two institutions in such way to filter the large number of cases lodged by Italian judges and restitute only those relevant to the research question. To do that, some choices (arbitrary to a certain extent) were necessary. Moreover, some cases worth considering may well have remained excluded from the selection. Thus, although the case selection still seems to me reasonable, the method has its inevitable limitations and probably does not collect all relevant cases.

Given these *caveats*, I enlist the methods for both repositories.

As for the ItCC, I simply searched for decisions in the years 2018-2022 in which the "269-2017" judgment was recalled in completed *incidenter* proceedings[22]. I also considered pending *incidenter* proceedings (which have a different search form[23]). In the case of pending proceedings, because of the way the search form is designed (not allowing for textual research), I looked at the cases in which the parameter of scrutiny between 2018 and 2022 was the CFREU[24]. The initial results of both searches were then assessed on a case-by-case basis to discard irrelevant cases: for instance, because Judgment No. 269/2017 was recalled for reasons different from the reverse preliminarity (e.g., the judgement has an autonomous significance in tax law) or because the Charter was recalled for merely rhetorical purposes by the referring judge. Of course, other researchers may disagree to a certain extent and include in the sample a few cases that I discarded.

As for the ECJ, I set the CURIA search form as follows. I looked at both decided and pending cases in front of the Court of Justice only (of course, the GC and the former Civil Service Tribunal do not decide on preliminary references right now). Only cases lodged between 01 June 2018 and 31 December 2022 were considered. Indeed, Judgement No. 269/2017 was decided in December 2017: references based on the Charter only but issued in, say, March 2018, may *look* like disobedience to Judgment No. 269/2017, but be simply based on ignorance of the

[22] https://www.cortecostituzionale.it/actionPronuncia.do .
[23] https://www.cortecostituzionale.it/actionOrdinanze.do .
[24] The website of the ItCC has two different wordings for the CFREU: "Carta dei diritti fondamentali dell'Unione europea di Nizza" (Charter of Fundamental Rights of the EU of Nice) and "Carta dei diritti fondamentali UE" (Charter of EU Fundamental Rights). I looked for both.

judgment and of its implications. I assumed that a lag of approximatively 6 months was enough for the Italian judiciary at large to keep up with the 269-doctrine and start meaningfully deciding whether to abide by it. Of course, other researchers may make different assumptions on this point. I set the "procedure and result" command on "Reference for a preliminary ruling" and "Preliminary reference - urgent procedure" and set the "case law or legislation" command (grounds of judgement) to "Treaty" and "Charter of Fundamental Rights of the EU (2007)". Finally, and naturally, I limited the origin of the question to Italian courts. The CURIA database often allowed to directly read the preliminary reference to the ECJ. When this was not published, the content was reconstructed by looking at either the ECJ's decision or at the summary of the reference. Again, and as in the case if the ItCC, it was then necessary to look at the cases one by one to check whether they were relevant to the research question (e.g., discarding cases of provisions with direct effect, not under the 269-doctrine, or cases in which the Charter was recalled directly by the ECJ rather than by the referring judge). This assessment of the cases is of course debatable too.

Cases C-419/19 and C-334/21 and their corresponding preliminary references were erased from the ECJ's register, but they are still included in this survey. Lastly, the preliminary references that led to the Judgements C-762/18 and C-37/19, C-282/19, C-497/20, and C-302-303/21 (perfectly good examples of disregard for the 269-doctrine) were added separately, as they were not spotted via the search on CURIA. This shows, again, the limits of the designed research, which surely misses other pertinent cases as well. However, the goal of this paper is to give a broad picture of the Italian courts' reaction to the 269/2017 judgement and, therefore, remains valid as long as a sufficiently wide sample is collected.

4. Results

The cases collected in both repositories were then coded as follows. Cases in which Italian judges mentioned constitutional rights, Charter rights, or both and referred first to the ItCC were coded as cases of acceptance of the 269-doctrine (A), while cases in which they first referred to the ECJ were coded as cases of refusal of the doctrine

(D). I also tried to assess how the doctrine was followed throughout the time, especially to see whether it was more strictly followed before Judgment No. 63/2019 by the ItCC transformed the mandate into mere advice, and to find out what articles from both the Italian Constitution and the CFREU were recalled more often. I excluded articles 11 and 117 of the Italian Constitution, as they are always recalled: indeed, these are the clauses that allow for the Italian participation to the EU and, according to Judgement No. 269/2017, for the ItCC to adjudicate on the CFREU. Therefore, they have a merely procedural role and do not provide any meaningful information on what substantive rights are more often recalled. Finally, the outcome of the references is shown as well, recalling the resulting decisions of either the ItCC or the ECJ after the first reference (or both in case of simultaneous references). Cases still to be decided by either the ItCC or the ECJ on 31 December 2022 are labelled with "TBD". Further information, such as reference numbers, the substantive rights at issue, or links to the orders and to decisions available online, can be found at the webpage of the *Observatory on the Practices of Inter-legality by Italian Courts*[25]. The Observatory is part of a broader research project on the phenomenon of inter-legality, namely the peculiar situation in which a variety of norms from different legal systems regulate simultaneously the same event. The project, which was developed by a series of scholars since 2018, is an attempt to study systematically a series of such cases in various areas of law and contexts. Particular emphasis was given to the role of judges, the officials that more frequently have to find ways to coordinate the simultaneous normative claims while performing their tasks.[26] Dual preliminarity, characterized by the simultaneous applicability of the CFREU and of the Constitution, is an example of an inter-legal situation and the 269-doctrine a possible criterion to handle the intermingled scenario. A study in the ways in which Italian judges responded to the 269-doctrine is an empirical enquiry in the way in which a specific case of inter-legality was handled.

Briefly, excepting a few notable cases examined in the next section, this paper does not engage into a qualitative analysis of the

[25] https://perma.cc/2Y4U-MF24

[26] See the collection of essays in J. Klabbers, G. Palombella (eds.), *The Challenge of Inter-legality* (2019).

references, does not develop a specific taxonomy to that aim, and does not evaluate the results from a normative perspective. I only examine whether the 269-doctrine was accepted or denied, the evolution in time, and the mentioned rights.

The cases are summarized in the following table (tab. 1).

TABLE 1

No	Date of the first referring order	Judge	A/D on 269-doctrine	Mentioned Const. Articles	Mentioned CFREU Articles	Outcome
1	15/06/2018	Cassation	D	-	21	ECJ C-396/18
2	28/06/2018	Tribunal of Milan	D	-	47	ECJ C-422/18 PPU
3	16/07/2018	Council of State	D	-	15, 16	ECJ C-465/18
4	01/10/2018	Justice of the peace, L'Aquila	D	36, 97, 102, 106, 111	31, 47	ECJ C-618/18
5	22/10/2018	Justice of the peace, Bologna	D	-	31	ECJ C-658/18
6	29/10/2018	Regional Administrative Court, Sardegna	D	-	21	ECJ C-670/18
7	05/11/2018	Council of State	D	-	16, 17	ECJ C-686/18
8	26/09/2018	Regional Administrative Court, Lazio	D	21, 41	11, 49	ECJ C-719/18
9	12/12/2018	Regional Administrative Court, Lazio	D	-	15, 20, 21, 31	ECJ C-789/18 and C-790/18
10	17/12/2018	Regional Administrative Court, Lazio	D	-	16, 17	ECJ C-798/18 and C-799/18
11	21/01/2019	Cassation	D	36	31	ECJ C-762/18 and C-37/19
12	19/02/2019	Cassation	D	-	20, 21	ECJ C-129/19
13	26/03/2019	Regional Administrative Court, Lazio (Order 99)	A	3, 41	16, 20, 21	ItCC Judgement 49/2021
14	26/03/2019	Regional Administrative Court, Lazio (Order 100)	A	3, 41	16, 20, 21	ItCC Judgement 49/2021
15	03/04/2019	Tribunal of Naples	D	-	21	ECJ C-282/19
16	15/04/2019	Regional Administrative Court, Lazio	D	-	16, 17	ECJ C-306/19, C-512/19, C-595/19 and

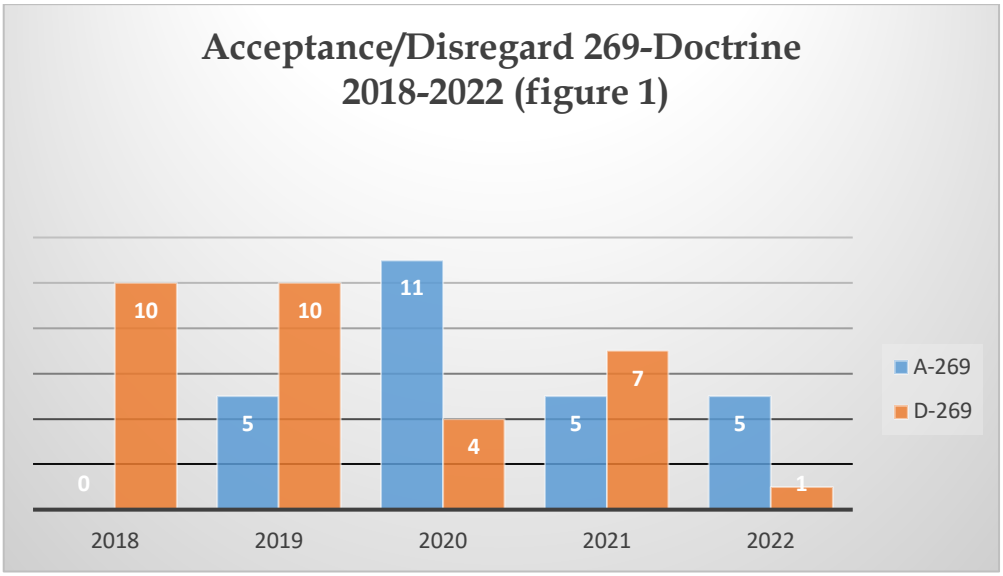
						from C-608/20 to C-611/20
17	29/05/2019	Regional Administrative Court, Lazio	D	-	54	ECJ C-419/19
18	17/06/2019	Cassation	A	3, 31	20, 21, 23, 33, 34	ItCC referred to the ECJ (Order 182/2020). C-350/20
19	23/07/2019	Council of State	D	-	16, 28	ECJ C-561/19
20	02/09/2019	Tribunal of Milan	D	-	20, 30	ECJ C-652/19
21	13/09/2019	Tribunal of Milan	D	-	47	ECJ C-693/19
22	18/09/2019 and 22/01/2020	Court of Appeal, Naples	D	3, 34, 38	20, 21, 30, 34, 47	ECJ C-32/20 and ItCC Judgement 254/2020
23	17/10/2019	Tribunal of Bolzano	A	2, 3, 29	7, 21	ItCC Judgement 131/2022
24	12/12/2019	Council of State	D	-	21	ECJ C-914/19
25	16/12/2019	Arbitration Chamber of the Italian Anti-corruption Authority	A	3, 97	-	ItCC, Judgement 239/2021
26	14/01/2020	Regional Administrative Court, Puglia	D	-	41	ECJ C-17/20
27	04/02/2020	Cassation	A	3, 27	7, 21	ItCC Order 60/2021
28	10/02/2020	Regional Administrative Court, Lazio	A	3, 24, 28, 47, 97, 101, 102, 103, 111, 113	47	ItCC Judgement 248/2021
29	02/05/2020	Tribunal of Brescia	A	2, 3, 38	20, 31, 34	ItCC Judgement 196/2021
30	18/05/2020 and 28/05/2020	Justice of the peace, Lanciano	D	3, 4, 32, 36, 38, 76, 77, 97, 101, 102, 104, 106, 107, 108, 111	1, 6, 15, 20, 21, 30, 31, 34, 45, 47	ECJ C-220/20 and ItCC Judgement 31/2022
31	04/06/2020	Regional Administrative Court, Emilia-Romagna	D	-	20, 21, 31, 33, 34, 47	ECJ C-236/20
32	02/07/2020	Cassation	A	3, 41, 45, 47, 53	16, 41	ItCC, Judgment 149/2021

33	10/07/2020	Tribunal of Bergamo	A	2, 3, 31, 38	20, 21	ItCC, Judgement 19/2022
34	17/09/2020	Court of Appeal, Milan	A	2, 3, 32, 111	35	ItCC referred to the ECJ (Order 216/2021). Pending
35	06/10/2020	Tribunal of Trieste	A	2, 3, 23, 42, 48, 51, 53, 64, 67, 68, 69, 97	21, 25	ItCC Judgement 182/2022
36	30/09/2020	Cassation	D	111	47	ECJ C-497/20
37	27/10/2020	Court of Appeal, Bologna	A	2, 3, 27	7	ItCC referred to the ECJ (order 217/2021). Pending
38	06/11/2020	Court of Appeal, Lecce	A	-	48	ItCC, Judgment 182/2021
39	10/11/2020	Tribunal of Rome	A	3, 27	48	ItCC, Judgement 152/2022
40	11/12/2020	Court of Appeal, Lecce	A	-	48	ItCC, Judgment 182/2021
41	29/12/2020	Court of Appeal, Salerno	A	2, 3, 24, 29, 30, 111	24	ItCC, Judgement 177/2022
42	10/03/2021	Court of Auditors, Campania	D	-	47	C-161/21
43	26/03/2021	Arbitral Board, Vicenza	A	3, 24, 41, 111	16, 52	TBD
44	11/04/2021	Cassation	D	-	34	ECJ C-302/19 and C-303/19
45	21/04/2021	Council of State	D	-	47	ECJ C-261/21
46	26/04/2021	Council of State	A	3	49	ItCC Judgement 198/2022
47	12/05/2021	Council of State	D		21	ECJ C-304/21
48	26/05/2021	Tribunal of Rieti	D	-	7, 8, 11, 52	ECJ C-334/21
49	23/06/2021	Cassation	A	3, 10, 24, 111	18, 19, 47	ItCC Judgement 13/2022
50	12/07/2021	Tribunal of Florence	A	2, 3, 23, 24, 41, 42, 45, 47, 111	17, 47	ItCC Judgement 225/2022
51	20/07/2021	Tribunal of Vercelli	D	-	14, 20, 21	ECJ C-450/21

52	16/09/2021	Council of State	D	-	21	ECJ C-569/21
53	27/01/2022	Tribunal of Milan	A	3, 27, 42, 111	17, 48, 49	TBD
54	06/04/2022	Justice of the peace, Lecce	D	-	49	ECJ C-243/22
55	28/04/2022	Tribunal of Padova	A	3, 4, 32, 35	52	TBD
56	12/05/2022	Court of Appeal, Salerno	A	2, 3, 13	7	TBD
57	31/05/2022	Court of Appeal, Milan	A	3	21, 34	TBD
58	27/06/2022	Justice of the peace, La Spezia	A	3, 4, 16, 27, 34	47, 49	TBD

The selected sample shows 26 cases in which the referring judges followed the 269-doctrine (A - 45%) and 32 cases in which they did not follow it (D - 55%) out of 58 overall.

When a sample is small (slightly more than 50 observations), and probably incomplete too, it is extremely dangerous to identify trends or make causal inferences, as one may be tempted to do. One result, however, seems solid: the 269-doctrine was not immediately and uniformly accepted by ordinary judges in Italy: the sample is split into two. This is the main upshot of this article. Limited as the sample can be and questionable as the interpretation of the individual cases may be, the existence of two separate groups of cases, one accepting the 269-doctrine, the other refusing it, seems too pronounced to disappear, even if a larger sample were selected and even to scholars having a somewhat different view of whether a case is or is not a form of "disregard" for the 269-doctrine.



A certain growth of the cases of acceptance in time seems to be a plausible result as well. Future research may confirm this view, perhaps based on larger samples and after the doctrine has had more years to be absorbed by courts. Judgment No. 63/2019, decided in February 2019 and theoretically making the final clarification on behalf of the ItCC that the 269-mandate was indeed only advisory rather than binding, does not seem to have a clearly identifiable impact.

When disaggregating for the origin of the cases, and specifically when looking at whether the judge was an ordinary or an administrative one, ordinary judges seem more inclined to accept the 269-doctrine (20 cases of acceptance, 16 of denial) than their administrative counterparts (4 cases of acceptance, 15 of denial). Once more, the limited size of the sample demands particular caution in drawing conclusions, but a more pronounced acceptance from ordinary courts seems in line with the findings of Massa and Lorenzoni in this issue of the journal.[27] Moreover, all the preliminary references

[27] M. Massa, The Dual Preliminarity Doctrine in the Case-Law of Ordinary Courts of First Instance and Appeal and L. Lorenzoni, The Doctrine of Dual Preliminarity in the Case-Law of Italian Administrative Courts both in this *Special issue*.

from the ItCC to the ECJ after Judgement No. 269/2017 were based on submissions from ordinary courts.[28]

Another point to be further evaluated in the future is the rather nonchalant manner in which some judges accepting the 269-doctrine operate with the Charter: internal legislation often is challenged on multiple grounds, the Charter being one of them.[29] Little space is saved to verify whether the domestic provision is indeed implementing EU law and therefore falls into the scope of application of the Charter as in article 51(1) CFREU.

The most quoted article of the Italian Constitution is Article 3 (equality and non-discrimination), followed by Article 111 (jurisdiction and due process). Article 21 (non-discrimination) is the most quoted article of the CFREU, followed by Article 47 on effective judicial protection and article 20 (equality before the law). All in all, the two most quoted groups of provisions in the two catalogues of rights, namely equality and due process, are quite similar. Tables 2 and 3 and figures 2 and 3 illustrate these data for, respectively, the Italian Constitution (table 2 and figure 2) and the CFREU (table 3 and figure 3).

TABLE 2

Articles (Italian Constitution)	Mentions
3	26
111	10
2	9
41	6
97	5
27	5

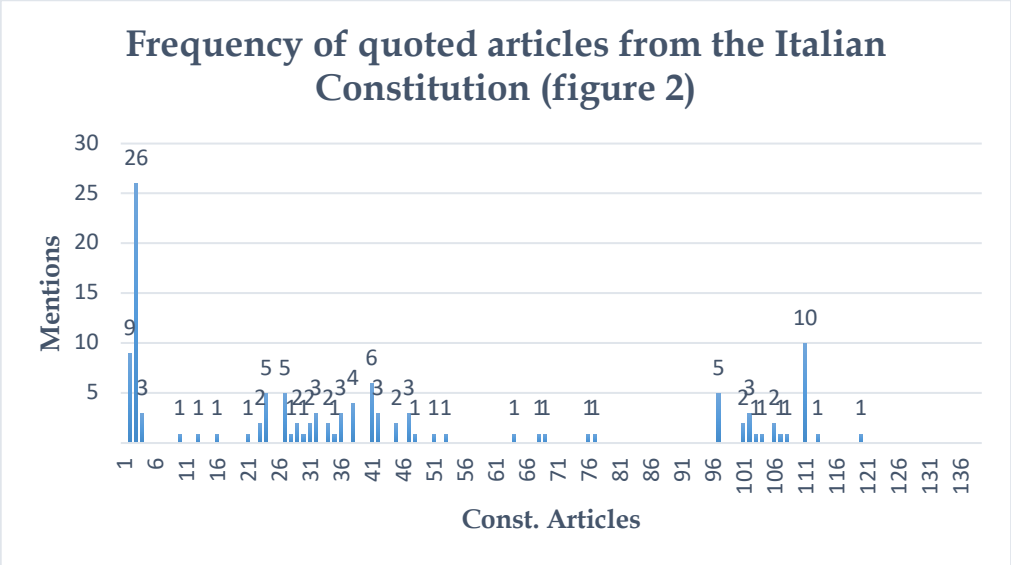
[28] ItCC Order of 10 May 2019 No. 117; Order of 30 July 2020 No. 182 (table 1, No. 18; Order of 18 November 2021 No. 216 and 217 (table 1, No. 34 and 37 respectively). ItCC Order No. 117/2019 is not coded in table 1 since the reference to the ItCC was submitted in February 2018, during the 6-month lag in 2018 (January to June) not accounted for in the data (see para 3 on methodology).

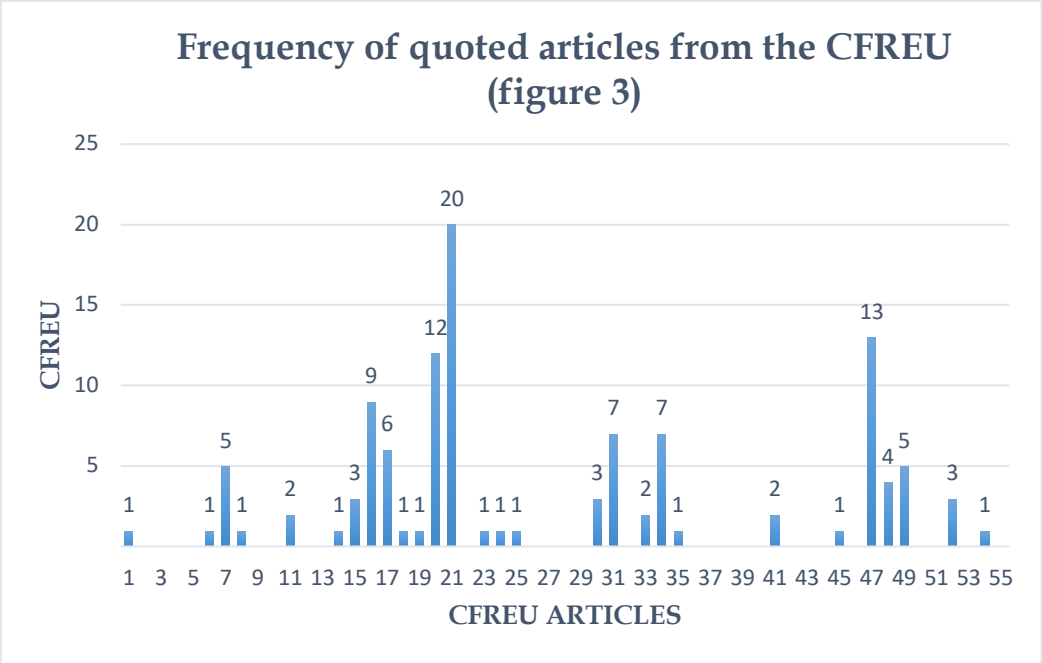
[29] As a proxy to evaluate this phenomenon, table 1 suggests that in around one third of the cases, 19 out of 58, the referring court relied on 5 provisions or more from either the Constitution or the Charter to challenge legislation.

24	5
38	4
102	3
47	3
42	3
36	3
32	3
4	3
106	2
101	2
45	2
34	2
31	2
29	2
23	2
120	1
113	1
108	1
107	1
104	1
103	1
77	1
76	1
69	1
68	1
64	1
53	1
51	1
48	1
35	1
30	1
28	1
21	1
16	1
13	1
10	1

TABLE 3	
Articles (CFREU)	**Mentions**
21	20
47	13
20	12
16	9
31	7
34	7
17	6

7	5
49	5
48	4
15	3
30	3
52	3
11	2
33	2
41	2
1	1
6	1
8	1
14	1
18	1
19	1
23	1
24	1
25	1
35	1
45	1
54	1





5. Notable Cases

Some of the examined cases have special characteristics when it comes to the adoption of the 269-doctrine. They are briefly summarized here.

Occasionally, referring judges have *explicitly* recalled Judgment 269/2017, either to endorse it or to criticize it. In cases like Order No. 183/2020 issued by the Court of Cassation on 02 July 2020 and later decided by the ItCC (Decision No. 149/2021), the referring judge relied explicitly on Judgment No. 269/2017 to justify the prior involvement of the ItCC (table 1, No. 32). More recently, on 31 May 2022, the Court of Appeal of Milan quoted Judgement 269-2017 at length and recalled the later judgements by the ItCC to justify its previous reference to the Constitutional Court in a controversy concerning non-discrimination of EU citizens and the right to social security (table 1, No. 57). To exemplify the opposite inclination, the Justice of the Peace for L'Aquila on 1 October 2018, openly questioned the centralization in the hands

of the ItCC and decided to refer to the ECJ instead (table 1, No. 4)[30]. The same is true of the Court of Cassation in its preliminary reference of 21 January 2019: in referring to the ECJ, the Cassation explicitly denied the binding value of the 269-doctrine, specifying that it was merely expressed in an *obiter dictum* (table 1, No. 11).

Similarly, a particularly well-known judgement, the *Randstad* case, showed how judges may still try to overcome explicit statements by the ItCC relying on the ECJ, even after Judgment No. 269/2017[31]. In the case at stake, by referring to the ECJ the Court of Cassation attempted to establish its own interpretation of the right to effective judicial and circumvent the opposite understanding offered by the ItCC in interpreting Article 111(8) of the Constitution (table 1, No. 36). In *Randstad*, the 269-doctrine was ignored, as it was clear that a reference to the ItCC would fail in obtaining the desired interpretation, while the "road to Luxemburg" was still open. Eventually, the Court of Justice rejected the proposed interpretation of the right to effective judicial protection and did not intrude into the quarrel on the meaning of Article 111(8) between the Cassation and the Constitutional Court[32].

In two cases, the 269-doctrine was interpreted as allowing a simultaneous reference to both the ECJ and the ItCC (table 1, No. 22 and No. 30). Both attempts failed. In this report, cases of simultaneous reference were considered as refusals to follow the 269-doctrine (D), as they likely jeopardize the aim of centralizing the review in the hands of the ItCC and take away from the ItCC the chance to have the "first word".

A question of constitutionality asked by the Arbitral Board for Vicenza on 26 March 2021 is equally hard to classify: an arbitral board, as the order points out too, is not allowed to use the preliminary reference mechanism, so that in case of dual preliminarity referring to the ItCC using parameters from both the Charter and the Constitution

[30] The reference was then deemed inadmissible by the ECJ (C-618/18 *Gabriele Di Girolamo v Ministero della Giustizia* of 17 December 2019).

[31] I have commented on the entire Randstad saga in O. Scarcello, *Effective judicial protection and procedural autonomy beyond rule of law judgments: Randstad Italia*, 59 Common Mark. Law Rev. 1445 (2022).

[32] Case C-497/2021 Randstad Italia SpA v Umana SpA and Others of 21 December 2021.

is simply the only viable path (table 1, No. 43). It was still coded as a form of acceptance of the 269-doctrine.

The twin references of 6 and 11 November 2020 by the Corte d'Appello di Lecce are the only case in which a judge referred to the ItCC first (269-acceptance) and used supranational parameters as sole substantive parameters of constitutionality, namely article 48 CFREU and article 6 ECHR (table 1, No. 38 and No. 40). Articles 11 and 117 were the only recalled constitutional norms and these, as already mentioned, merely have the function of allowing Italy's participation to supranational integration, while not preserving any substantive right. The referring judge explicitly mentioned the 269/2017 judgement to argue that Article 48 CFREU was a pertinent provision to review Italian legislation in the case at stake. The court also reconstructed the supranational notion of presumption of innocence looking extensively at the case law of the Court of Strasbourg and of the ECJ. The case is particularly interesting as supranational rights are proposed instead of national constitutional provisions in front of the ItCC regarding criminal procedure, one typically associated with the reserved domain of the Member States. This may be explained by recalling that the parallel provision under the Italian Constitution, namely Article 27(2), is quite laconic. The ItCC discussed the proposed interpretation in Judgement No. 182/2021 but disagreed with the referring judge on the merits: the relevant legislation was not found to be inconsistent with the proposed supranational parameters. However, it is worth mentioning that at the same time the ItCC did not question the use of Article 6 ECHR and 48 CFREU to adjudicate on the constitutionality of internal legislation. If anything, the ItCC recalled its previous case law on dual preliminarity in deciding the admissibility of the case and granted it. Indeed, in Judgement No. 182/2021 "dual" preliminarity seems to merely mean abstract overlap between constitutional rights and Charter rights. Theoretically, we may assist again in the next future to cases in which CFREU rights are used as sole parameters of constitutionality in front of the ItCC.

Lastly, in fall 2020, the Courts of Appeal of Milan and Bologna referred to the ItCC questions concerning the Italian implementation of the European Arrest Warrant (table 1, No. 34 and No. 37). One year later, with the two already mentioned orders drafted by Justice Viganò, the ItCC used the preliminary reference mechanism and referred the

questions to the Court of Justice.[33] It is worth noting how, despite the area is fully harmonized by EU law, the courts of Milan and Bologna relied only cursorily on the CFREU (especially the court of Milan) and focused more on the possible violation of the national Constitution. Moreover, Judgement No. 269/2017 was de facto followed but not quoted by the two courts of appeal. It was the Constitutional Court which, on the other hand, clearly stated that national and EU rights overlapped in the matter at stake and that the 269-doctrine required to ask for the interpretation of EU law given by the Court of Justice[34].

6. Conclusion

Five years have now passed since Judgement No. 269/2017, so that it is possible to draw preliminary conclusions on the consequences of the decision. Judgement No. 269/2017 was not entirely successful in overcoming the previous *Granital* doctrine and making of the ItCC the court that ordinary judges consult when fundamental rights are at stake. Trying to completely recentralize protection of fundamental rights in the hands of the ItCC probably was not a realistic aim to reach in the short term for a court like the ItCC, which is particularly dependent on the cooperation of ordinary judges[35]. Indeed, the responses of ordinary judges to the 269-doctrine seem overall mixed: some embraced it (more or less) enthusiastically, other openly or implicitly defied it. Full recentralization was not accomplished. Italian judges will likely keep using both channels and occasionally ignore the initial 269-doctrine for a variety of reasons, including open disagreement with the ItCC.

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[33] ItCC, Orders of 18 November 2021 No. 216 and 217.

[34] At the time of writing, the cases have not been decided yet by the ECJ, but the Opinions of Advocate General Manuel Campos Sánchez-Bordona were published (C-699/21 and C-700/21 respectively) and they seem to propose outcomes quite close to those suggested by the ItCC. See C-699/21 E.D.L. of 1 December 2022 and C-700/21 O.G of 15 December 2022.

[35] A. von Bogdandy, D. Paris, *Power Is Perfected in Weakness: On the Authority of the Italian Constitutional Court*, in V. Barsotti and others (eds.) *Dialogues on Italian Constitutional Justice: a Comparative Perspective* 267-269 (2021).

On the other hand, if the aim of the ItCC was simply to gain a more active role in fundamental rights protection, instead of reaching full-recentralization, then the 269-doctrine turned out to be effective. Despite cases of open disagreement, a good number of judges (almost half of cases in this sample) have indeed embraced the 269-doctrine. Most importantly, this number seems to be growing, although more empirical research will be needed before this claim can be made convincingly. Moreover, when the ItCC was called by ordinary courts, it did not show closure to its role of "European" judges and, as cases as *Consob* show, proved that the Judgement No. 269/2017 did not entail that the ItCC would give up using the 267 TFEU mechanism. Only time will tell what the future reaction of judges will be, and the full acceptance of this doctrine by ordinary judges may turn out to be a very slow process.