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FROM ISOLATION TO COMMONALITY? THE INTERPLAY AMONG NATIONAL CONSTITUTIONAL COURTS IN THE PARADIGM OF EUROPEAN INTEGRATION

Surname: Galimberti Name: Marco

Registration number: 718118

Tutor: Stefania Ninatti

Coordinator: Maurizio Arcari

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Introduction

How, if at all, do national constitutional courts interact? This question has received increasing attention in the study of comparative constitutionalism on a global scale over the last decades[1]. Yet, the very same question seems to be gaining even more relevance within the context of the European integration process. In fact, it is well known that such process has been an inherently relational one, whereby national legal systems overlap or interlock with the supranational legal order[2]. In this respect, it is possible to detect, overall, three distinctive areas of judicial interplay along the ongoing development of European constitutional law.

First of all, one can identify relationships across jurisdictions, i.e. between domestic courts and the Court of Justice of the European Union (CJEU), through the legal instrument of the preliminary ruling procedure being provided for in Article 267 of the Treaty on the Functioning of the European Union (TFEU). Secondly, a further channel of interaction consists of the exchanges that occur between the case law of national constitutional – and, in some legal systems, supreme – courts, quoting more or less frequently excerpts of foreign decisions by means of cross-references. Third, an additional avenue for judicial connection has emerged with the blossoming of either institutionalized or informal networks, forums and meetings, which allow

[1] With regard to the vast literature on this subject, an exemplary reference can be made to M. CARTABIA, S. CASSESE, *How Judges think in a Globalised World? European and American Perspectives*, in Policy Brief, European University Institute, Global Governance Programme, No. 7, 2013, pp. 1-6; N. DORSEN, M. ROSENFELD, A. SAJO, S. BAER, S. MANCINI, *Comparative Constitutional Law. Cases and Materials*, St Paul, West Academic Publishing, 2016; M. ROSENFELD, A. SAJO, *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2013. Among the North American legal scholarship, see B. ACKERMAN, *The Rise of World Constitutionalism*, in 83 Va. L. Rev. 771 (1997); A.M. SLAUGHTER, *A Global Community of Courts*, in 44 Harv. Int'l L.J. 191 (2003) in particular p. 195 et seq.; ID., *A New World Order*, Princeton – Oxford, Princeton Univ. Press, 2004, in particular p. 79 et seq.; V. JACKSON, M. TUSHNET, *Comparative constitutional law*, St. Paul, Foundation Press, 2014; S. CHOUDRY, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, in 74 Ind. L.J. 819 (1999); M.S. FLAHERTY, The Canons of Constitutional Law: Aim Globally, in 17 Const. Commentary 205 (2000); R. TEITEL, Comparative Constitutionalism in a Global Age, in 117 Harv. L. Rev. 2570; R. HIRSCHL, *Globalization, Courts and Judicial Power: the Political Origins of the New Constitutionalism*, in 11 Ind. J. Global Leg. Stud. 71 (2004), in particular p. 97 et seq.

[2] See, *ex multis*, K. LENAERTS, *Interlocking Legal Orders in the European Union and Comparative Law*, in International and Comparative Law Quarterly, 52, 2003, p. 873 et seq.; N. WALKER, *Postnational Constitutionalism and the Problem of Translation*, in J. WEILER, M. WIND (eds.), *European Constitutionalism Beyond the State*, Cambridge, Cambridge University Press, 2003, pp. 27-54; N. MACCORMICK, *Questioning Sovereignty: Law State and Nation in the European Commonwealth*, Oxford, Oxford University Press, 1999; I. PERNICE, *Multilevel Constitutionalism in the EU*, in European Law Review, 17, 2002, p. 511 et seq.

domestic justices to engage and confront more and more often with their counterparts in other Member States.

Against this backdrop, thus far the legal scholarship has focused mostly on the "vertical" relationship between domestic judges and the CJEU, by placing special emphasis on the – albeit still limited – engagement of national constitutional courts in the preliminary ruling procedure under Article 267 of the TFEU[3]. On the contrary, it should be observed that the "horizontal" dimension, namely the interaction among national constitutional courts themselves, still remains a relatively undiscovered subject matter. Indeed, recent studies have offered an in-depth examination of the judicial recourse to comparative reasoning on the part of several highest courts both inside and outside the European Union (hereinafter EU)[4]. However, none of these far-reaching works has addressed the issue of cross-fertilization among national constitutional courts from the peculiar angle of European integration: this is the to date unexplored field of investigation that the present research aims to look into.

In this perspective, the main element of novelty the following pages will seek to bring to the fore lies in the intertwining of such horizontal interaction with another existent interplay, that is the vertical one between national jurisdictions and the CJEU. Accordingly, the analysis will centre on the circulation or, to borrow a successful image used by the literature[5], the "migration" of common argumentative strategies across the jurisprudence of constitutional courts regarding the relationship between national law and EU law. The ultimate goal of the study is, therefore, to

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[3] See, in particular, M. CLAES, M. DE VISSER, P. POPELIER, C. VAN DE HEYNING, *Constitutional Conversations in Europe*, Cambridge, Intersentia, 2012 and the special issue – *Preliminary References to the Court of Justice of The European Union by Constitutional Courts*, in German Law Journal, Vol. 16, No. 6, 2015.

[4] See M. BOBEK, *Comparative Reasoning in European Supreme Courts*, Oxford, Oxford University Press, 2013; T. GROPPI, M.C. PONTHERAU (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, Hart Publishing, 2014; A. JAKAB, A. DYEVRE, G. ITZCOVICH (eds.), *Comparative Constitutional Reasoning*, Cambridge, Cambridge University Press, 2017.

[5] S. CHOUDHRY, *The Migration of Constitutional Ideas*, Cambridge, Cambridge University Press, 2006. As concerns this migration metaphor, it is worth quoting the words of Neil Walker, who argued that migration "is a helpfully ecumenical concept in the context of the inter-state movement of constitutional ideas. Unlike other terms current in the comparativist literature such as borrowing, or transplant or cross-fertilization, it presumes nothing about the attitudes of the giver or the recipient, or about the properties or fate of the legal objects transferred. Rather, […] it refers to all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by giver or receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos". See N. WALKER, *The migration of constitutional ideas and the migration of the constitutional idea: the case of the EU*, in S. CHOUDHRY, *The Migration of Constitutional Ideas*, *cit.*, pp. 320-321.

shed some light on the questions of whether – and, if so, in which direction – this horizontal connectedness has witnessed a trend of substantive convergence across the "European" case law of national constitutional courts; whether, and to what extent, such phenomenon has affected the steady advancement of the European integration process and, the other way around, has been influenced by this latter; and, incidentally, whether or not the model of constitutional justice adopted within the legal systems of the individual Member States may have any relevance for the establishment and subsequent expansion of such common front of national constitutional courts.

In view of the foregoing, before entering into the contents of the narration, two general clarifications need to be made right away. A first *caveat* is one of a merely terminological nature and deals with the word "interplay" that will be recurring in the course of the research. The adoption of such term, which will also be used alternately with the word "interaction", is due to the fact that it sounds more suited to the purposes of the present study than, for instance, the far more widespread expression of judicial or constitutional "dialogue". As a matter of fact, one cannot deny that any dialogic relationship requires by its nature a form of communication, on the basis of a shared language, between two or more interlocutors. This essential pre-condition appears to be met, at most, as regards the "vertical" tie between national judges and the Luxembourg Court, pursuant to Article 267 of the TFEU: upon direct request from domestic courts or tribunals, the reply of the CJEU provides guidance on the validity and interpretation of EU law[6]. On the contrary, the "horizontal" sphere of our specific interest does not seem to fit the fulfilment of the said dialogic requirement. Yet, while avoiding to engage in genuine dialogue understood as a bilateral exchange, constitutional justices interact with each other whenever their decisions – although unilaterally – mention or rely on the case law of its foreign peers.

A second important *caveat* relates to the choice of the national jurisdictions and, as a consequence, of the respective judgments to be discussed. It goes without saying that mapping the relevant constitutional case law in all Member States of the EU would not be a feasible exercise in any way whatsoever. Such a comprehensive overview

[6] Accordingly, the use of the term "dialogue" will be mostly limited to this vertical dimension throughout the present research.

would reach far beyond the scope of this work and the means of its author. Bearing in mind the importance of making a selection from the outset, the analysis will be confined to the survey of those constitutional courts – including supreme courts exercising constitutional review in their own legal system – which have made open cross-citations or, more frequently, have deployed similar judicial reasoning in tackling the issue of the relationships between EU law and municipal law. The read thread that runs through the whole study is, therefore, the search for "commonalities", i.e. lines of reasoning being common to a plurality of national constitutional courts. Such commonalities may move in a twofold direction, depending on whether they are characterized by a *favor integrationis* or, conversely, are oriented towards "resistance", inasmuch as they set constitutional boundaries to the domestic influence of EU law.

Based on these premises, the thesis is structured into three chapters which follow the timeline of the European integration process. Starting from a scrutiny of the principle of primacy of Community law as carved out by the case law of the then European Court of Justice (ECJ), the opening chapter gets to the roots of horizontal interplay in the initial stages of European integration. To this purpose, a comparative overview encompasses the case law of the highest national courts in the six founding Member States of the European Communities, in order to highlight both similarities and divergences in their approach to the *primauté*. In this vein, the analysis recalls both the normative and the jurisprudential "acceptance" of the principle of primacy in the Benelux countries before moving to the case of France. Subsequently, the focus will be on the case law of the German *Bundesverfassungsgericht* and the Italian *Corte costituzionale*, being recognized as the pioneers of the earliest common front in function of constitutional resistance against the ECJ's understanding of the *primauté*.

The second chapter investigates, in a chronological order, the horizontal circulation of the counter-limits narrative in the following phases of the European integration process. After examining the specific case of Ireland, the analysis will delve into the "European" jurisprudence of a set of younger constitutional courts. Going hand in hand with the enlargement of the European Union towards north, west and east, this comparative overview will allow to look at the increasing development of common argumentative strategies, with specific regard to the acceptance of the Maastricht, the

constitutional and the Lisbon treaties. Finally, the post-Lisbon scenario is taken into consideration in order to point at the use of the comparative reasoning within the recent tendency of an ever-growing number of national constitutional courts to revive the counter-limits narrative.

Last but not least, the third chapter shifts the focus on a more innovative phenomenon, that is the discovery of the Charter of Fundamental Rights of the European Union as a potentially ground-breaking tool for horizontal interplay. In this respect, it will be argued that the stances recently taken by a series of national constitutional courts – such as the Italian, Austrian and French ones – may be pointing to a shared vision of the Charter as a standard of review in constitutional adjudication. Theoretical implications in terms of constitutional justice models are also taken into account. As a matter of fact, it will be elaborated on whether the "migration" of such approaches to the Charter would facilitate an ever-closer front of constitutional courts of Kelsenian tradition, being in tension with the federalist system of judicial review established in the EU legal framework. With a certain degree of comparative creativity, the scope of the analysis will be broadened eventually to the approach of the UK Supreme Court: can its recent case law on the direct effect of the Charter be read as an isolated voice out of the "continental" choir?

Chapter I

A first narrative: the mutual interaction on the initial steps of "acceptance"

Contents: 1. At the heart of acceptance: the primacy of Community law – 2. The national constitutional angle: acceptance in the founding Member States of the European Economic Community – 2.1. A glance at "the others": the Benelux countries – 2.2. The case of France: a divisive *primauté* – 2.3. A substantive horizontal interplay: the parallel development of counter-limits in Italy and Germany – 2.3.1. Pioneering constitutional resistance? The Italian "controlimiti" – 2.3.2. Germany: an acceptance made in Karlsruhe – 3. Sowing the seeds of horizontal interplay: towards a convergent perspective?

1. At the heart of acceptance: the primacy of Community law

Although the scope and the purposes of the present research do not allow to plunge into a detailed analysis, it is useful to recall in a nutshell the essentials of the so-called *primauté* of Community law[7]. As a matter of fact, an overview – albeit, inevitably, in broad terms – of the primacy doctrine elaborated by the ECJ's jurisprudence does provide the necessary backdrop for a comparative scrutiny of the subsequent European-related attitude of the Member States and, especially, of the case law developed by their constitutional jurisdictions.

As is well-known, the principle of primacy of Community law over national law was not explicitly envisaged by any provision of the three Treaties existing at the inception of the European Communities[8]. Notwithstanding this lack of any formal basis within the constitutive Treaties, the ECJ set out such principle in a series of foundational cases, starting from the landmark judgment *Costa v ENEL* dating back to 1964[9]. In that famous ruling, the Luxembourg Court derived the theoretical underpinning of the primacy of Community law from the reasoning articulated in

[7] In the course of the present study I will use the term "primacy" rather than "supremacy". Although the literature seems to use these two terms interchangeably, it should be observed that the ECJ's case law never used the word "supremacy". Likewise, Declaration No. 17 annexed to the Lisbon Treaty codified the term "primacy" and not "supremacy" (*infra*, p. 16). For an in-depth analysis of the different conceptualizations of the principle of "primacy" or "supremacy" of EU law, see M. AVBELJ, Supremacy or Primacy of EU Law—(Why) Does it Matter?, in European Law Journal, Vol. 17, Issue 6, 2011, pp. 744-763.

[8] In particular, the Treaty of Paris establishing the European Coal and Steal Community (ECSC) in 1951 and the Treaties of Rome setting up the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) in 1957.

[9] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR-585.

earlier decision *Van Gend en Loos*[10], which had inaugurated the process of "constitutionalisation" of the Treaties conducted by the ECJ[11].

Particularly, in the course of a dispute over an import tax, the Dutch Supreme Court[12] had referred a question to the ECJ as to whether a private party could invoke directly in domestic court proceedings a standstill provision contained in the then EEC Treaty[13]. By replying in the affirmative,[14] the ground-breaking judgment *Van Gend en Loos* distinguished for the first time the EEC Treaty from other international

[10] Case 26/62 Van Gend en Loos v Netherlands Inland Revenue Administration [1963] ECR-1.

[11] To borrow a well-known expression used by Antonio Tizzano, *Van Gend en Loos* decision is considered as one of the "Grands Arrêts" of the ECJ's case law. See A. TIZZANO, *I Grands Arrêts della giurisprudenza dell'Unione europea*, Torino, Giappichelli, 2012.

[12] Notably, the case originated from the first preliminary reference ever made to the ECJ by a national higher court under the EEC Treaty. For a thorough analysis of this judgment see, *ex multis*, B. DE WITTE, *Direct Effect, Supremacy and the Nature of the Legal Order*, in P. CRAIG, G. DE BURCA, *The Evolution of EU Law*, Oxford, Oxford University Press, 2011, p. 326; N. FENNELLY, *The Dangerous Idea of Europe? Van Gend en Loos (1963)*, in E. O'DELL (ed.), *Leading Cases of the Twentieth Century*, Dublin, Sweet & Maxwell, 2000, pp. 220-236; A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, Cambridge, Cambridge University Press, 1994, pp. 48-49; N. MARSH, *Some Reflections on Legal Integration in Europe*, in International and Comparative Law Quarterly, Vol. 12, Issue 4, 1963, pp. 1411-1418; P. HAY, *Federal Jurisdiction of the Common Market Court*, in American Journal of Comparative Law, Vol. 12, No. 1, 1963, pp. 21-40; S. A. RIESENFELD, R. M. BUXBAUM, *N. V. Algemene Transport-En Expeditie Onderneming van Gend en Loos c. Administration Fiscale Neerlandaise: A Pioneering Decision of the Court of Justice of the European Communities*, in American Journal of International Law, No. 58, 1964, pp. 152; P. GORI, *Una pietra miliare nell'affermazione del diritto europeo*, in Giurisprudenza italiana, No. 4, 1963, pp. 49-56; A. MIGLIAZZA, *Ordinamento comunitario e ordinamenti nazionali*, in Rivista di diritto processuale, No 4, 1963, pp. 651-657. More recently, see M. RASMUSSEN, *Revolutionizing European law: A history of the Van Gend en Loos judgment*, in International Journal of Constitutional Law, Volume 12, Issue 1, 2014, pp. 136-163; J.H.H. WEILER, *Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy*, in International Journal of Constitutional Law, Volume 12, Issue 1, 2014, pp. 94-103; P. PESCATORE, *Van Gend en Loos, 3 February 1963 — A View from Within*, in M. POIARES MADURO, L. AZOULAI (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford, Hart, 2010, p. 3 et seq.; B. DE WITTE, *The Continuous Significance of Van Gend en Loos*, *ibi*, p. 9 et seq.; D. HALBERSTAM, *Pluralism in Marbury and Van Gend*, *ibi*, p. 26 et seq.; J. ZILLER, *Relire van Gend en Loos*, in Il Diritto dell'Unione Europea, No. 3, 2012, pp. 513-520; D. CHALMERS, L. BARROSO, *What Van Gend en Loos stands for*, in International Journal of Constitutional Law, Volume 12, Issue 1, 2014, pp. 105–134.

[13] The main question raised by the referring court was whether Article 12 of the EEC Treaty – which read: "Member States shall refrain from introducing between themselves any customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other" – was directly effective. It is no coincidence that such question was raised in the Dutch constitutional context. As a matter of fact, Article 65 of the then Dutch Constitution held that "provisions of agreements which, according to their terms, can be binding on anyone shall have such binding force after having been published". Furthermore, Article 66 of the Dutch Constitution added that "legislation in force in the Kingdom shall not apply if this application would be incompatible with provisions of agreements which are binding upon anyone and which have been entered into either before or after the enactment of such legislation".

[14] Strikingly, the decision of the ECJ was against the Opinion of Advocate General Roemer and the opposition by the three intervening Governments of the Netherlands, Belgium and Germany.

treaties, the rationale being that the Community constitutes "*a new legal order of international law for the benefit of which the Member States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals*"[15]. Drawing on this assumption, the ECJ recognized that the provisions of the Treaty which are clear and unconditional – i.e. not allowing any reservations on the part of the Member States – have direct effect in the national legal systems, without requiring any further implementation measure to be adopted by the domestic authorities or the Community itself[16].

After laying down the principle of direct effect[17], the following step taken by the Luxembourg jurisprudence was to address the issue of what happens whenever a rule of national law clashes with a directly effective rule of Community law. In this respect, the establishment of the doctrine of primacy of Community law was at the

[15] In Case 26/62, *Van Gend en Loos*, p. 12 the ECJ further stated that "[…] *Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only when they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community*". According to Gráinne De Búrca, such conclusion was based on four factors which emerge as "building blocks", i.e. the substantive objective of establishing a common market; the setting up of "institutions endowed with sovereign rights"; the rather weak democratic elements at that time in the institutional structure; and, lastly, the existence of the preliminary reference mechanism of ex-Article 177, which reflects the States' acknowledgment of the authority of Community law that can be invoked by their nationals before domestic courts and tribunals. See G. DE BÚRCA, *Sovereignty and the Supremacy Doctrine of the European Court of Justice*, in N. WALKER (ed.), *Sovereignty in transition*, Oxford, Hart, 2006, p. 453.

[16] Case 26/62, *Van Gend en Loos*, p. 13. In this regard, the ECJ spelled out the direct effect as a general principle of Community law by virtue only of the wording and the content of the specific provisions at hand, regardless of the Contracting Parties' original intent. See J. L. DA CRUZ VILAÇA, *EU Law and Integration. Twenty Years of Judicial Application of EU Law*, Oxford, Hart, 2014, p. 19; C. BARNARD, S. PEERS, *European Union Law*, Oxford, Oxford University Press, 2017, p. . On this issue, see also P. PESCATORE, *The Doctrine of Direct Effect: An Infant Disease of Community Law*, in European Law Review, Issue 40, No. 8, 1983, pp. 135-153.

[17] All in all, the legal scholarship has commonly defined the principle of direct effect as the capacity of Community law provisions to confer rights upon individuals. Along with this emphasis on the creation of rights for individuals, the concept of direct effect has also been described in terms of "invokability" (namely, the enforceability of such rights in national courts) and "justiciability" (as to the duties of national courts to apply directly effective Community law provisions). For a detailed account of the meaning of direct effect of Community law, see M. CLAES, *National Courts' Mandate in the European Constitution*, Oxford, Hart, 2006, pp. 75-84. On the doctrine of direct effect see also, *ex multis*, A. DASHWOOD, *The Principle of Direct Effect in European Community Law*, in Journal of Common Market Studies, Vol. 16, Issue 3, 1977, pp. 229-245; P. P. CRAIG, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, in Oxford Journal of Legal Studies, Vol. 12, Issue 4, 1992, pp. 453-479; P. CRAIG, G. DE BÚRCA, *EU Law: Text, Cases, and Materials*, Oxford, Oxford University Press, 2015, p. 183 et seq.

forefront of judgment *Costa v ENEL*[18]. By overruling a previous decision of the Italian Constitutional Court[19], in *Costa* the ECJ seized the occasion to order national judges to make Community law prevail over inconsistent national statutes. Such conflict rule[20] found its conceptual bedrock in the "special and original nature" of the law stemming from the Rome Treaty[21]. Accordingly, the ECJ insisted on the need to acknowledge that the Community, as was already emphasised in *Van Gend en Loos*, is a separate and autonomous legal order which goes beyond the demands of ordinary international law, thereby involving a transfer of powers and a consequent limitation of Member States' sovereign rights[22].

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[18] The question posed by the referring judge was whether national legislation which was adopted after Italy joined the EEC could unilaterally derogate from Treaty obligations. For an in-depth analysis of the case and the further development of the primacy of Community law see, among others, E. STEIN, *Towards Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case*, in Michigan law review, Vol. 63, No. 3, 1965, pp. 491-518; B. DE WITTE, *Direct Effect, Supremacy and the Nature of the Legal Order*, *cit.*, pp. 328-329; ID., *Retour a "Costa". La primauté du droit communautaire à la lumière du droit international*, in Revue trimestrielle de droit europeen, Vol. 20, No. 3, 1984, pp. 425-454 ; K. LENAERTS, T. CORTHAUT, *Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law*, in European Law Review, Vol. 31, Issue 3, 2006, pp. 287-315; H. LINDAHL, *Sovereignty and Representation in the European Union*, in N. WALKER (ed.), *Sovereignty in transition*, *cit.*, pp. 87-114.

[19] The reference goes to Judgment no. 14 delivered on 7 March 1964 (*Costa v ENEL*), in which the Italian Constitutional Court acknowledged the constitutionality of Community law but, at the same time, firmly excluded its primacy over national constitutional law. Interestingly, whereas the case Van Gend en Loos originated in the monist Dutch legal order, the preliminary reference in *Costa* was made by the national court of a traditionally dualist country.

[20] This reading of the principle of primacy as a "conflict rule, indicating which norm has to be applied where two inconsistent norms collide" emerges in M. CLAES, *The primacy of EU law in European and in national law*, in A. ARNULL, D. CHALMERS (eds.), *The Oxford Handbook of European Union Law*, Oxford, Oxford University Press, 2015, p. 182. Similarly, S. PRECHAL, *Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union*, in C. BARNARD, *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*, Oxford, Oxford University Press, 2007, p. 52.

[21] On the array of arguments the ECJ deployed to justify its conclusion that Community law must be accorded supremacy over national law, see P. CRAIG, G. DE BÚRCA, *EU Law: Text, Cases, and Materials*, *cit.*, p. 268; G. DE BÚRCA, *Sovereignty and the Supremacy Doctrine of the European Court of Justice*, *cit.*, pp. 452-453. With regard to the Court's reasoning in Costa, J. WOUTERS, *National Constitutions and the European Union*, in Legal Issues of Economic Integration, Vol. 25, Issue 1, 2000, p. 68 stated that "perhaps it is the Achilles heel of Costa v ENEL that the judgment puts forward too many, rather than too few, arguments to underpin the principle of primacy".

[22] In particular, the ECJ held that "by contrast with ordinary international treaties, the EU treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply". Subsequently, the Luxembourg Court added that "by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from limitation of sovereignty or transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves". In this regard, Giulio Itzcovich spoke of a "de-internationalisation process of Community law" conducted by the ECJ's case law. See G. ITZCOVICH, *Teorie e ideologie del diritto comunitario*, Torino, Giappichelli, 2006, p. 117. Yet, this alleged character of "novelty" of the

Against this background, in the Court's view the failure to accord precedence to the European norms would be liable to endanger the coherence, uniformity and effectiveness of Community law[23]. As a matter of fact, the ECJ highlighted that letting any unilateral and subsequent domestic provision override a directly applicable rule of Community law is tantamount to jeopardising the achievement of the aims of the Treaty[24] and to ultimately calling into question the legal basis of the Community itself[25]. From this perspective, in the aftermath of *Costa* it was aptly observed that for Community law "*nier sa supériorité revient à nier son existence*"[26]. Additionally, in later judgment *Internationale Handelsgesellschaft*[27] – against which the *Solange* jurisprudence of the German Federal Constitutional Court, as we will see, would have successively crystallized – the ECJ went on to determine the

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Community legal order claimed by the ECJ was contested in D. WYATT, *New Legal Order, or Old?*, in European Law Review, No. 7, 1982, pp. 147-15 and B. DE WITTE, *Retour a "Costa". La primauté du droit communautaire à la lumière du droit international*, *cit.*, pp. 425-454. More recently, E. DENZA, *Two legal orders: divergent or convergent*, in International & Comparative Law Quarterly, Vol. 48, Issue 2, 1999, pp. 257-284 argued that the differences between the Community legal order "of a new kind" and public international law were diminishing. For a detailed discussion of ECJ's paradigm of the Community as an autonomous legal order of a new kind, R. BARENTS, *The Autonomy of Community Law*, The Hague, Kluwer Law International, 2004, pp.

[23] In this regard, M. CLAES, The primacy of EU law in European and in national law, cit., p. 185, underlined that "until this day, the Court has regularly repeated its stance and emphasized the need for absolute and unconditional primacy to secure the effectiveness of EU law", and recalled, by way of example, Case C-409/06, *Winner Wetten* [2010], §61, in which, the ECJ stated that "rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law" as well as the famous Case C-399/11 *Melloni* [2013]. On the reasons

[24] On this issue, in *Costa* decision the ECJ stated that "The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7".

[25] According to the reasoning of the ECJ, "the law stemming from the Treaty, an independent source of law, could not because of its special and original nature be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the Community system of the rights and obligations arising under the Treaty carries with a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail". In this regard, G. ITZCOVICH, *Teorie e ideologie del diritto comunitario*, *cit.*, p. 132 remarked that "in the ECJ's view, the primacy of Community law was not grounded either on a principle of national constitutional law, or on a principle of international law: it was, rather, an intrinsic feature of Community law […] to impose the precedence of this latter in the case of conflict with domestic law".

[26] M. VIRALLY, *Sur un pont aux â nes: les rapports entre droit international et droits internes*, in Mélanges offerts à Henri Rolin, Problèmes de droit des gens, Paris, Editions A. Pedone, 1964, p. 497.

[27] Case C-11/70, *Internationale Handelsgesellschaft Internationale Handelsgesellschaft mbH v.Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125. See A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, *cit.*, pp. 460-461.

boundaries of the realm of the primacy doctrine[28]. Faced with the problem of a Community Regulation granting economic freedoms which could infringe fundamental rights enshrined in the German Basic Law,[29] the European judges made clear that "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure"[30]. In other words, this means that Community law must take precedence over legal rules whatsoever of national law which are at variance with it, regardless of their legal status[31]. Shortly thereafter, ECJ's decision *Commission v Italy* adamantly reiterated the principle that Community law prevails even over the most fundamental constitutional norms of the Member States[32].

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[28] As is well-known, along with Case C-29/69, *Stauder* [1969] ECR 419 and Case C-4/73 *Nold* [1974] ECR 491, judgment *Internationale Handelsgesellschaft* constituted one of the most ground-breaking decisions of the ECJ in terms of fundamental rights protection. By clarifying that the principle of primacy of Community law and the need to guarantee uniform fundamental rights protection must go hand in hand, the ECJ seized the opportunity to reiterate its own power to ensure the protection of fundamental rights and fundamental principles within the Community. In this regard, the Court resolved the case at hand by attributing the status of general principles of supranational law to the constitutional traditions that are common to the Member States. Particularly, the ECJ held that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community".

[29] On the background of the case and the relating decision of the ECJ, see K. ALTER, Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe, Oxford, Oxford University Press, 2001, pp. 88-90.

[30] According to the wording of *Internationale Handelsgesellschaft*, §3, "Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure".

[31] As to the scope of the primacy doctrine developed by the ECJ, in K. LENAERTS, P. VAN NUFFEL, *European Union Law*, London, Sweet & Maxwell, 2011, pp. 754-755 it was noted that decision *Internationale Handelsgesellschaft* upheld the primacy of secondary legislation of Community law on the same grounds as it had been done in *Costa* in relation to a number of provisions of primary Community law.

[32] Case C-48/71 *Commission of the European Communities v Italian Republic* [1972] ECR 527. For a comment on this ruling, J.A. WINTER, *Note on Cases 48/71, 93/71 and 39/72*, in Common Market Law Review, Vol. 10, Issue 3, 1973, pp. 327-332; G. SCACCIA, *L'efficacia del diritto comunitario nella giurisprudenza della Corte di giustizia delle Comunità europee*, in www.cortecostituzionale.it; P. BARILE, *Un impatto tra il diritto comunitario e la Costituzione italiana*, in Giurisprudenza costituzionale, Vol. 23, No. 1, 1978, pp. 641-653. In this judgment, the ECJ explicitly stated that "*The attainment of the objectives of the Community requires that the rules of Community law established by*

What may be inferred, therefore, from the joint reading of cases *Van Gend en Loos*, *Costa v ENEL* and *Internationale Handelsgesellschaft*? As the literature has extensively pointed out, the red thread that runs through such rulings is the unequivocal assertion, on the part of the ECJ, of the absolute and unconditional character of primacy of Community law[33]. From the viewpoint of Luxembourg, the principle of primacy attaches, without distinction, to the whole body of Community law: legal rules of national law of whatever rank, including the national constitutions of the Member States, must inevitably yield before a conflicting directly applicable provision of – primary or secondary – Community law[34]. In this regard, Stephen Weatherill perceptively noticed that "even the most minor piece of technical Community legislation ranks above the most cherished constitutional norm"[35].

The practical effects of such unreserved primacy doctrine were all the more amplified in the following judgment *Simmenthal*[36], where the ECJ was asked to ascertain what consequences flow from the direct applicability of a provision of Community law in the event of incompatibility with a subsequent legislative provision of a Member State[37]. By appealing to the "very foundations of the

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the Treaty itself or arising from procedures which it has instituted are fully applicable at the same time and with identical effects over the whole territory of the Community without the Member States being able to place any obstacles in the way. The grant made by Member States to the Community of rights and powers in accordance with the provisions of the Treaty involves a definitive limitation on their sovereign rights and no provisions whatsoever of national law may be invoked to override this limitation".

[33] Among others, C. BARNARD, S. PEERS, *European Union Law*, Oxford, Oxford University Press, 2017, p. 162 et seq.; R. SCHÜTZE, *European Union Law*, Cambridge, Cambridge University Press, 2015, p. 118 et seq.; M. CLAES, *The primacy of EU law in European and in national law*, *cit.*, p. 178 et seq.

[34] According to R. KOVAR, *The Relationship between Community Law and National Law, in EC Commission, Thirty Years of Community Law*, Luxembourg, The European Perspective Series, 1981, pp. 112-113, "the whole of EU law prevails over the whole of national law".

[35] S. WEATHERILL, *Law and Integration in the European Union*, Oxford, Oxford University Press, 1995, p. 106.

[36] In this regard, R. SCHÜTZE, *European Union Law*, cit., p. 124 et seq. referred to the "executive nature" of primacy by defining this latter as the "executive force" of European law.

[37] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978]. For a thorough analysis of this landmark case, V.A. BARAV, Note on the Simmenthal judgment, "Les effets du droit communautaire directement applicable", in CDE, 1978, pp. 260- ; J. ULSTER, *Legal order of the Communities*, in European Law Review, No. 4, 1978, pp. 214-217; CONSTANTINESCO, R. KOVAR, in JDI, 1979 pp. ; A. FRANCHINI, Il diritto comunitario tra Corte di Giustizia e Corte costituzionale, in Giustizia civile, No. 4, 1978, pp. 116-125; M. BERRI, Brevi riflessioni sulla "lezione" della Corte comunitaria, in Giurisprudenza italiana, No. 1, 1978, pp. 1153-1156; A. MIGLIAZZA, Il giudizio di legittimità costituzionale e la Corte di Giustizia delle Comunità Europee, in Rivista di diritto processuale, No. 2, 1978, pp. 328-343; R. MONACO, Sulla recente giurisprudenza costituzionale e comunitaria in tema di rapporti fra diritto comunitario e diritto interno, in Rivista di diritto europeo, No. 1, 1978, pp. 287-298; L. CONDORELLI, Il caso Simmenthal e il primato del

Community", this renowned ECJ's decision held that a national court being called upon to apply legal rules of Community law 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 law, even if adopted subsequently", and it is not necessary for that court "to request or await the prior setting aside of such provision by legislative or other constitutional means"[38]. The obligation to enforce Community law and to disregard, at the same time, any irreconcilable national rule[39] has empowered all domestic judges to review, thus, the compatibility of national legislation with European law without awaiting the prior intervention of national constitutional courts.

In this context, a *caveat* to be borne in mind relates to the distinction between the remedies of "dis-application" and "invalidity" of internal legal rules[40]. Indeed, the duty to set aside conflicting provisions of national law does not entail the invalidation thereof: domestic courts are not required to quash an inapplicable rule within the national legal system or to render it null and void[41]. Yet, whilst leaving untouched the legislative competences of the Member States, it is also true that in *Simmenthal* the ECJ went so far as to affirm that the primacy of Community rules

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diritto comunitario: due corti a confronto, in Giurisprudenza costituzionale, No. 1, 1978, pp. 669-676; P. GORI, Preminenza ed immediata applicazione del diritto comunitario per forza propria, in Rivista di diritto civile, No. 2, 1978, pp. 681-696; S. CARBONE, F. SORRENTINO, Corte di giustizia o Corte federale delle Comunità europee?, in Giurisprudenza costituzionale, No. 1, 1978, pp. 654-668.

[38] *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, §24. Incidentally, in this judgment the ECJ for the first time expressly referred to primacy of Community law as a "principle" of supranational law.

[39] *Simmenthal*, §21: "It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule".

[40] Particularly, the distinction between "dis-applying" and "nullifying" national law was stressed in Case C-10-22/97 *Ministero delle Finanze v IN.CO.GE '90 Srl* [1998], §21, where the ECJ held that "It cannot […] be inferred from the judgment in *Simmenthal* that the incompatibility with Community law of a subsequently adopted rule of national law has the effect of rendering that rule of national law non-existent. Faced with such a situation, the national court is, however, obliged to dis-apply that rule […]".

[41] Accordingly, the national provision at hand may continue to apply in any situation which is not covered by an incompatible legal rule of European law. As emphasized in R. SCHÜTZE, *European Union Law*, cit., p. 127, the question of who may invalidate national law was instead left to the national legal orders. In this regard, in the more recent judgment C-314/08, *Filipiak* [2009], § 82 the ECJ has stated that "Pursuant to the principle of the primacy of Community law, a conflict between a provision of national law and a directly applicable provision of the Treaty is to be resolved by a national court applying Community law, if necessary by refusing to apply the conflicting national provision, and not by a declaration that the national provision is invalid, the powers of authorities, courts and tribunals in that regard being a matter to be determined by each Member State".

would also "preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions"[42]. This pre-emptive veto on the validity of any piece of municipal legislation being in breach of European law appears as a further indication of ECJ's unrestricted vision of primacy, the latter turning out to be addressed not only to the judicial branches, but rather to all public authorities within the Member States, including the legislative and the administrative bodies[43].

In the light of the above, it results from the combination of primacy and direct effect the setting up of a decentralized enforcement system for Community law in national legal frameworks. This federal-like judicial system, through which the ECJ excludes national constitutional jurisdictions from the judicial review of Community law, rests upon the cooperation between Luxembourg and ordinary judges, acting themselves as European courts by virtue of their own *Simmenthal* "mandate"[44]. It goes without saying that, by reason of the tight connection between the concepts of primacy and direct effect[45] and their major role as building blocks of that system of decentralized

[42] *Simmenthal*, §§ 17-18: "in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – insofar as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions. Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community".

[43] *Simmenthal*, §§ 22-23 "Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law. This would be the case in the event of a conflict between a provision of Community law and a subsequent national law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law, even if such an impediment to the full effectiveness of Community law were only temporary".

[44] This expression is taken from M. CLAES, *National Courts' Mandate in the European Constitution*, *cit.*, p. 69 and 108.

[45] In this regard, the literature has remarked the "synergic effect" of the two principles of primacy and direct effect, which provide for an efficient enforcement mechanism for EU law in national legal systems. See C. BARNARD, S. PEERS, European Union Law, Oxford, Oxford University Press, 2017, p. 162. On the relationship between primacy and direct effect of Community law, M. DOUGAN, When Worlds Collide! Competing Visions of the Relationship between Direct Effect and

enforcement[46], such "twin principles"[47] have been variously described as two stages of the Community's constitutionalisation process[48], as "defining characteristics" of EU law[49] and as "dominating concepts" which govern the relationship between national law and European law[50].

In particular, the principle of primacy shaped by the ECJ as a "logical sequel"[51] or a "natural consequence"[52] from the direct effect doctrine has not hitherto been embedded in the Treaties. The primacy clause originally contained in Article I-6 of the Treaty establishing a Constitution for Europe[53] was dropped from the Lisbon Treaty[54] and then was replaced by a Declaration concerning primacy annexed

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Supremacy, cit., pp. 931-963; A. DASHWOOD, M. DOUGAN, B. RODGER, E. SPAVENTA, D. WYATT, Wyatt and Dashwood's European Union Law, cit., pp. 278-284.

[46] A. DASHWOOD, M. DOUGAN, B. RODGER, E. SPAVENTA, D. WYATT, Wyatt and Dashwood's European Union Law, Oxford, Hart, 2011, p. 235.

[47] G. DE BÚRCA, Sovereignty and the Supremacy Doctrine of the European Court of Justice, cit., p. 450.

[48] J. L. DA CRUZ VILAÇA, EU Law and Integration. Twenty Years of Judicial Application of EU Law, Hart, Oxford, 2014, p. 19. In the same vein, Monica Claes has highlighted that the ECJ's case law elevated direct effect and primacy to the level of constitutional principles. See M. CLAES, National Courts' Mandate in the European Constitution, cit., p. 73.

[49] B. DE WITTE, Direct Effect, Supremacy and the Nature of the Legal Order, in P. CRAIG, G. DE BURCA, The Evolution of EU Law, cit., p. 323. In this respect, it may also be recalled Opinion 1/91 of the ECJ on the Agreement creating a European Economic Area (EEA), which defined both primacy and direct effect as "essential characteristics of the Community legal order". According to that Opinion, §21, "The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves".

[50] S. PRECHAL, Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union, cit., p. 36.

[51] See M. HORSPOOL, M. HUMPHREYS, M. WELLS-GRECO, European Union Law, Oxford, Oxford University Press, 2018, p. 195, where the development of the primacy doctrine is also defined as the "reverse side of the coin" in relation to the direct effect.

[52] G. F. MANCINI, The Making of a Constitution for Europe, in Common Market Law Review, Vol. 26, Issue 4, 1989, p. 600.

[53] Particularly, Article I-6 of the Treaty establishing a Constitution for Europe stated that "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States". Moreover, a formal declaration attached to the Constitutional Treaty explained that Article I-6 of the Constitutional Treaty did not mean anything new, since "Article I-6 reflects the existing case law of the Court of Justice of the European Communities and of the Court of First Instance". With regard to the primacy clause contained in the Constitutional Treaty, see P. CRAIG, The Constitutional Treaty and Sovereignty, in C. KADDOUS, A. AUER (eds.), *Les Principes Fondamentaux de la Constitution Européene/The Fundamental Principles of the European Constitution*, Dossier de Droit Européen No. 15, Helbing & Lictenhahn/Bruylant/LGDJ, 2006, pp. 117-134; P. CRAMÉR, *Does the Codification of the Principle of Supremacy Matter?*, in Cambridge Yearbook of European Legal Studies, Vol. 7, 2005, pp. 57-79.

[54] As explained in P. CRAIG, G. DE BÚRCA, *EU Law: Text, Cases, and Materials*, *cit.*, p. 274, Article I-6 of the Constitutional Treaty was dropped from the Lisbon Treaty by the Brussel European Council in 2007, the rationale being that this provision would have diminished its "constitutional character". On the removal of the primacy clause from the Lisbon Treaty, M. DOUGAN, *The Treaty*

thereto[55]. Yet, the failed attempt to provide it with normative grounds within the Treaties seemingly has not affected the status of primacy as being one of the most prominent characteristics of EU law. In fact, it can be argued that the absence of any express reference in the Lisbon Treaty has not challenged the former conceptions of primacy as an "iconic"[56] or an "inherent" feature[57] and a "constitutional fundamental"[58] of EU law, as a central element of the *aquis communautaire*[59] and as a "*Grundprinzip*" of the European legal system[60].

Nevertheless, if the absolute understanding of this principle is not in question in any way whatsoever from the point of view of Luxembourg, it becomes all the more important for our purposes to look at the reverse side of the coin, namely the reaction(s) of national legal systems and their constitutional courts to such broad interpretation of primacy. In this sense, Joseph Weiler acutely remarked that "the evolutionary nature of the supremacy doctrine is necessarily bi-dimensional. One dimension is the elaboration […] by the European Court. But its full reception, the second dimension, depends on its incorporation into the constitutional orders of the Members States and its affirmation by their supreme courts"[61]. Moreover, Weiler noted that the acceptance of ECJ's view of primacy amounted to a "quiet revolution"

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of Lisbon 2007: Winning Minds not Hearts, in Common Market Law Review, Vol. 45, Issue 3, 2008, p. 700.

[55] According to Declaration No. 17 Concerning Primacy annexed to the Lisbon Treaty, "The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law". Declaration No. 17 further quotes the attached Opinion of the European Council's Legal Service on the primacy of EC law (22 June 2007), which reads that "it results from the case law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case law of the Court of Justice".

[56] K. LENAERTS, T. CORTHAUT, *Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law*, *cit.*, p. 289.

[57] M. CLAES, National Courts' Mandate in the European Constitution, cit., p. 98.

[58] In saying that, M. DOUGAN, *When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy*, in Common Market Law Review, Vol. 44, Issue 4, 2007, p. 932, defined the doctrines of supremacy and direct effect as the principal tools by which Community law produces independent effects within the national legal orders.

[59] G. DE BÚRCA, *Sovereignty and the Supremacy Doctrine of the European Court of Justice*, cit., p. 460.

[60] S. MANGIAMELI, *Integrazione europea e diritto costituzionale*, in S. PATTI, *Annuario di diritto tedesco*, Milano, Giuffrè, 2001, pp. 25-98.

[61] J.H.H. WEILER, *The Community System: the Dual Character of Supranationalism*, in Yearbook of European Law, Vol. 1, Issue 1, 1981, pp. 275-276.

within the legal orders of the original six Member States of the then European Economic Community, which were devoid, in effect, of any "specific constitutional preparation for this European Court-inspired development"[62]. The next section of this chapter aims, thus, to investigate whether and to what extent national constitutional environments have adapted to the primacy doctrine developed by the European case law and, more specifically, to survey which common areas of "resistance" against ECJ's primacy claim may be tracked down in the related jurisprudence of national constitutional courts. After giving a brief overview of the constitutional approaches to primacy of Community law in Benelux and France, the two cases of Italy and Germany will be discussed in more detail. As we will see, a comparative analysis of the Italian and the German constitutional jurisprudence better illustrates the tensions arising, ever since the initial stages of European integration, between the principle of primacy as conceived by the ECJ's case law and its reception into national legal systems.

2. The national constitutional angle: acceptance of primacy in the founding Member States of the European Economic Community

2.1. A glance at "the others": the Benelux countries

Whereas it may be said that national courts embraced with no special efforts the doctrine of direct effect spelled out by the ECJ from *Van Gend en Loos*, it does not come as a surprise that many more difficulties surrounded the compliance with the principle of primacy of Community law set forth by the European Court from *Costa v ENEL* onwards[63]. By and large, all six founding Member States of the EEC generally accepted that Community law takes precedence over national ordinary law[64]. By contrast, the priority that the ECJ ruthlessly awarded to Community law over national law of constitutional rank was not automatically applied by each

[62] *Ibidem*. According to the Author, "the legal *Grundnorm* will have been effectively shifted, placing Community norms at the top of the legal pyramid".
[63] In this regard, Bruno De Witte argued that, in comparison to the "easy acceptance" of the doctrine of direct effect, national courts' acceptance of the principle of primacy of Community law was "slow and difficult". See B. DE WITTE*, Direct Effect, Supremacy and the Nature of the Legal Order*, *cit.*, pp. 347-348.
[64] M. CLAES, *The primacy of EU law in European and in national law*, *cit.*, p. 188.

Member State in its domestic legal framework[65], with the exceptions of two distinctively monist systems such as the Netherlands and Luxembourg.

Out of the original Six, the Dutch legal order is traditionally the one that by far "*presents the least difficulty*"[66] in terms of constitutional receptivity towards international rules and, notably, towards the primacy doctrine elaborated by the ECJ. Indeed, the direct effect of all international treaty provisions and their prevalence over any conflicting source of municipal legislation were both constitutionally prescribed in the Netherlands even prior to the establishment of the EEC in 1957. At the dawn of European integration, a revision to the Dutch Constitution (*Grondwet*) concerning the relationship between international law and municipal law came into force in 1953 and, again, in 1956[67]. Following these early amendments, Article 65 (currently numbered Article 93) of the Netherlands Constitution codified the status of international treaties as the highest law of the land, with the ensuing sanction of setting aside any inconsistent legislative measure of national law[68]. In parallel, Article 66 (now Article 94) awarded provisions of international treaties – as well as decisions of international organizations – primacy over any conflicting source of domestic law, in so far as these are "*binding on any person*"[69]. Such direct effect and primacy rules were also extended to Community law pursuant to Article 67 (now

[65] See C. GRABENWARTER, *National Constitutional Law Relating to the European Union*, in A. VON BOGDANDY, J. BAST, *Principles of European Constitutional Law*, Oxford, Hart, 2006, pp. 84-85. The Author highlighted that the principle of primacy of Community law "is nowadays accepted with regard to ordinary statutory law", while "views on the relationship between national constitutional law and Union law are controversial and inconsistent. In this respect, Member States differ considerably".

[66] M. CLAES, B. DE WITTE, *Report on the Netherlands*, in A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds.), The European Court and National Courts - Doctrine and Jurisprudence. Legal Change in its Social Context, Oxford, Hart, 1998, p. 181.

[67] For an overview of the constitutional reform adopted in 1953 and the following constitutional amendments introduced in 1956, see J.H.F. VAN PANHUYS, *The Netherlands Constitution and International Law: A Decade of Experience*, in The American Journal of International Law, Vol. 58, No. 1, 1964, pp. 88-108; L. ERADES, *International Law and the Netherlands Legal Order*, in J.H.F. VAN PANHUYS et al. (eds.), *International Law in the Netherlands*, T.M.C. Asser Institute, The Hague, 1980, pp. 375-434; K. VAN LEEUWEN, *On Democratic Concerns and Legal Traditions: The Dutch 1953 and 1956 Constitutional Reforms 'Towards' Europe*, in Contemporary European History, Vol. 21, Issue 3 (Towards a New History of European Law), 2012, pp. 357-374.

[68] Article 65 (now numbered Article 93) of the Dutch Constitution read as follows: "legislation in force within the Kingdom shall not apply if its application would be incompatible with agreements that have been published in accordance with Article 66 either before or after the enactment of such legislation".

[69] Article 66 (now Article 94) affirmed that "agreements shall be binding on anyone insofar as they will have been published".

Article 92) of the Constitution, which inserted in the *Grondwet* a provision allowing competences to be transferred to international organizations[70].

Without delving into the vibrant debate that came to surface within the Dutch scholarship about the theories of monism and dualism as well as on whether the reception of primacy in the Netherlands is rooted either on the Constitution or on the very nature of Community law itself[71], what matters either way is that Community law – and, likewise, all international treaties which are binding on everyone – can overrule all national law, including inconsistent provisions of constitutional law. As a result, the Dutch account of primacy has been largely construed, in turn, as an absolute and unqualified one, in full harmony with the monist version of primacy advocated by the Court of Justice. In view of all this, ECJ's case law has been said to perfectly fit into the Dutch legal environment, the latter being "ideal for the acceptance of monism, direct effect and supremacy" of Community law[72].

Most importantly, it should not be overlooked that the concept of "sovereignty" is completely missing from the text of the Dutch Constitution[73]. This aspect, which

[70] According to Article 67 (now Article 92), "legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 paragraph 3". Particularly, Bruno De Witte made clear that in this provision there is no indication as to the scope or extent of the powers that may be devolved to international organizations, nor is it specified that such conferral of powers is temporary or subject to respect for some basic constitutional values. See B. DE WITTE, *Do Not Mention the Word: Sovereignty in Two Europhile Countries, Belgium and the Netherlands*, in N. WALKER (ed.), *Sovereignty in Transition*, *cit.*, p. 361 and 364.

[71] The majority of Dutch legal scholars has defended the view that Community law applies in the Netherlands legal order and enjoys primacy over conflicting national legislation on its own authority, due to its special supranational character, whereas do primacy and direct effect of international treaties derive from the Constitution. On this matter see, *ex multis*, L. ERADES, *International Law and the Netherlands Legal Order*, *cit.*, p. 375 et seq.; A.E. KELLERMANN, *Supremacy of Community Law in the Netherlands*, in European Law Review, 1989, pp. 175-185; L. BESSELINK, *Curing a "Childhood Sickness?" On Direct Effect, Internal Effect, Primacy and Derogation from Civil Rights. The Netherlands Council of State Judgment in the Metten Case*, in Maastricht Journal of European and Comparative Law, Vol. 3, Issue 2, 1996, p. 176 et seq.; ID., *An open Constitution and European Integration: The Kingdom of the Netherlands*, in SEW Tijdschrift voor Europees en economisch recht, 1996, pp. 192-206.

[72] M. CLAES, B. DE WITTE, *Report on the Netherlands*, cit., p. 190. In the same vein, the Authors held that the wording of the Netherlands Constitution "is so well adapted to the requirements of international cooperation and European integration" (*ibi*, pp. 182-183). Similarly, Monica Claes stressed that in the Netherlands "the constitutional system materially coincided with what was expected from the courts by the Court of Justice". See M. CLAES, *National Courts' Mandate in the European Constitution*, *cit.*, p. 150.

[73] L. BESSELINK, M. CLAES, *The Netherlands: The Pragmatics of a Flexible, Europeanised Constitution*, in A. ALBI and S. BARDUTZKY (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, The Hague, Asser Press, 2019, p. 182.

stands out as an "*anomaly in the context of European constitutionalism*"[74], suggests that, contrary to many other Member States, sovereignty does not act in the Dutch constitutional discourse as a hurdle to European integration. Arguably, the absence of a centralised constitutional court, or of any other form of judicial review of the constitutionality of domestic statutes and international agreements[75], has facilitated the very smooth recognition of the primacy of Community law within the Dutch legal order. The lack of a specialised constitutional tribunal claiming to itself the protection of core principles and inalienable values, coupled with the precedence awarded, without any constraint, to international obligations even over the Constitution as well as with the regular judiciary' openness to dialogue with the ECJ[76], has naturally averted the rise of any "counter-limits" or *Solange*-style doctrine in the Netherlands[77].

By shifting from a "vertical" to a "horizontal" angle – that is, from the relationship between supranational and municipal law to the one among national legal orders – the unique structural pattern of the Dutch constitutional order and its Community-friendly aptitude do patently distinguish the Netherlands from the other Member States of the EEC[78]. Consequently, it would be highly improbable to identify, with respect to European-related matters, any cross-reference or direct link whatsoever among the case law of Dutch highest courts and their counterparts in other countries.

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[74] B. DE WITTE, *Do Not Mention the Word: Sovereignty in Two Europhile Countries, Belgium and the Netherlands*, cit., p. 359.

[75] According to Article 131 of the Constitution, replaced by Article 120 in 1983, "*Courts shall not review the constitutionality [grondwettigheid] of Acts of Parliament and treaties*". On the prohibition for Dutch judges to review acts of Parliament against the Constitution, cfr. L. BESSELINK, *Constitutional Adjudication in the Era of Globalization: The Netherlands in Comparative Perspective*, in European Public Law, Vol. 18, Issue 2, 2012, pp. 235-237; M. DE VISSER, *Constitutional Review in Europe: A Comparative Analysis*, Oxford, Hart, 2014, pp. 79-81.

[76] Since the early days of European integration, Dutch courts have frequently referred preliminary rulings to the ECJ by making use of the then Article 177 of the EEC Treaty. See M. CLAES, B. DE WITTE, *Report on the Netherlands*, cit., p. 179 and 193.

[77] M. CLAES, B. DE WITTE, *Report on the Netherlands*, cit., p. 190. On this issue, L. BESSELINK, M. CLAES, *The Netherlands: The Pragmatics of a Flexible, Europeanised Constitution*, *cit.*, p. 188, highlighted that "The *controlimiti* developed in other Member States are not developed in Netherlands constitutional doctrine. There is no *Solange* case law, if only because constitutional rights are less enforceable than EU law and fundamental rights".

[78] In this regard, L. BESSELINK, *Constitutional Adjudication in the Era of Globalization: The Netherlands in Comparative Perspective*, *cit.*, p. 243 argued that, besides other constitutional features, the prohibition judicially to review acts of Parliament against the Constitution brings the Netherlands within the family of the British and Scandinavian constitutional traditions. However, the Author made clear that "the openness of the Netherlands legal order to international legal sources distinguishes it from these".

However, if on the one side Dutch courts do not either need inspiration from or allude to foreign case law, it has been argued that, on the other side, the Dutch constitutional approach appears to have indirectly influenced the jurisprudence of the ECJ, and through it that of other Member States[79].

Alongside the singular case of the Netherlands, immediate and unconditional acceptance of the primacy of Community law as an application of the priority of international law has gone uncontested in Luxembourg too. Similarly to the Dutch legal system, the forthcoming ratification of the EC Treaty in Luxembourg prompted in 1956 the introduction of Article 49bis of the Constitution, which consented the conferral of the exercise of sovereign powers to international institutions[80]. Nonetheless, the Luxembourgeoise *Cour de cassation* held that Community law enjoys primacy over municipal law not on the ground of the Constitution but, in line with the following case law of the Belgian Supreme Court, because of the specific nature of the Community legal order itself[81].

Turning then our gaze to the neighbouring Belgium, the national Constitution has been silent, in stark contrast with constitutional law in the Netherlands, as concerns the primacy and the incorporation of supranational law into the national legal order[82].

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[79] M. CLAES, B. DE WITTE, *Report on the Netherlands*, *cit.*, pp. 192-194. In particular, the Authors stated that "By diffusing the "Dutch approach" to the other countries of the EC (at least with reference to the *Community* treaties), the Court of Justice has ended the isolation of the Netherlands and has thereby helped the Dutch courts to take their Constitution seriously and to recognise direct effect and supremacy of international treaties more bravely than before".

[80] According to Article 49bis of the Constitution, "*The exercise of the powers reserved by the Constitution to the legislature, executive, and judiciary may be temporarily vested by treaty in institutions governed by international law*". With regard to this clause, see E. LEPKA, S. TEREBUS, *Les ratifications nationals, manifestations d'un project politique européen? La face cache du Traité d'Amsterdam*, in Revue trimestrielle de droit européen, Vol. 39, No. 3, 2003, pp. 368-369. In a comparative perspective, a further element of convergence with the Dutch legal system may be found in the lack of a specialised Constitutional Court, which will have been established in Luxembourg in 1996.

[81] *Chambre des Métiers v. Pagani*, Cour Supérieure de Justice de Luxembourg (Cassation criminelle), Judgment of 14 July 1954. On this decision, see L.J. BRINKHORST, H.G. SCHERMERS, *Judicial Remedies in the European Communities: A Case book*, Deventer, Kluwer, 1993, pp. 221-222 and, within a more general overview of primacy and direct effect of Community law in the Luxembourg jurisprudence, M. THILL, *La primautè et l'effet direct du droit communautaire dans la jurisprudence luxembourgeoise*, Revue française de droit administratif, No. 6, 1990, pp. 978-980. For a jurisprudential analysis of the relationship between national law and international treaties in the Luxembourg legal system at the early stages of the European integration, see P. PESCATORE, *L'autorité, en droit interne, des traités internationaux selon la jurisprudence luxembourgeoise*, in Pasicrisie luxembourgeoise, 1962, pp. 97-115.

[82] In spite of several proposals aimed to incorporate into the Constitution a specific provision concerning international law, until 1970 the only provision dealing with sovereignty in Belgium was Article 25, which stated that "*All powers stem from the Nation and are to be exercised in accordance*

The only relevant step was taken to this end in 1970 with the enactment of Article 25bis (now numbered Article 34) of the Constitution, according to which "the exercise of specific powers may be granted by a treaty or by a statute to institutions set up under public international law"[83]. Yet, apart from that isolated provision, in constitutional legislator's reluctance to address this issue resides the willingness to entrust to domestic courts the adjustment of Belgian federal system to the progressive evolution of international and Community law[84].

By analogy with its Dutch counterparts, Belgian judiciary has proven to be active promoter of European integration, especially through its direct engagement in the preliminary rulings procedure[85]. As to the Belgian highest national courts, referrals for a preliminary ruling to the ECJ were made at the outset by the *Conseil d'Etat*[86], the *Cour de cassation*[87] and, after its creation in 1983, by the *Cour d'arbitrage* (renamed, in 2007, *Cour constitutionelle*), this latter being one of the first national constitutional courts to refer a preliminary question to the ECJ in 1997[88]. Against this backdrop, the decision *Franco-Suisse Le Ski* delivered by the Supreme Court of Cassation in 1971 expressed the acceptance of direct effect of international law, including Community law, as well as its primacy over municipal law[89].

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with this Constitution". See H. BRIBOSIA, *Report on Belgium*, in A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds.), *The European Court and National Courts - Doctrine and Jurisprudence. Legal Change in its Social Context*, *cit.*, p. 11. According to Bruno De Witte, another distinguishing feature of Belgian constitutional law resides in the fact that sovereignty occupies therein a more prominent place than it does in the Netherlands legal system. See B. DE WITTE, *Do Not Mention the Word: Sovereignty in Two Europhile Countries, Belgium and the Netherlands*, *cit.*, p. 351.

[83] In particular, Monica Claes concluded that "given the wide political support for membership and the absence of a constitutional court, this never gave rise to legal and constitutional problems, and the situation was mended when a transfer of powers provision was introduced in 1970, 12 years into memberships". See M. CLAES, *The Europeanisation of National Constitutions in the Constitutionalisation of Europe: Some Observations against the Background of the Constitutional Experience of the EU-15*, in Croatian Yearbook of European Law and Policy, Vol. 3, 2007, p. 15. For an in-depth analysis of Article 25bis of the Belgian Constitution, see J.V. LOUIS, *L'article 25 bis de la Constitution belge*, in Revue du Marché commun, Vol. 13, No. 136, 1970, pp. 410-416.

[84] H. BRIBOSIA, *Report on Belgium*, *cit.*, pp. 29-32.

[85] *Ibi*, pp. 13-14; K. LENAERTS, *The Application of Community Law*, in Common Market Law Review, Vol. 23, Issue 2, 1986, p. 279 et seq.

[86] Since 1967, Case 6/67 *Guerra* [1967] ECR 219, this latter being the first judgment given by the ECJ at the request of a Belgian court.

[87] Since 1968, Case 5/68 *Sayag* [1968] ECR 395.

[88] Case C-93/97 *Fédération belge des chambres syndicales de médecins* [1998] ECR I-4837. See F.C. MAYER, *Multilevel Constitutional Jurisdiction*, in A. VON BOGDANDY, J. BAST, *Principles of European Constitutional Law*, *cit.*, p. 405.

[89] For a thorough analysis of crucial *Cour de cassation*'s judgment *Fromagerie Franco-Suisse Le Ski v. État belge* of 27 May 1991, see A. OPPENHEIMER, *The Relationship between European*

Interestingly, this innovative judgment of the Court of Cassation may be read as an early example of both "horizontal" and "vertical" judicial cross fertilization. The argumentation of the Belgian judges in *Le Ski* echoed, horizontally, the wording of the aforesaid Luxembourg *Cour de cassation*, which in turn had founded the primacy of Community law not on the Constitution but on the particular nature of international treaty law[90]. From a "vertical" point of view, the judicial reasoning of the Belgian Supreme Court was instead very close to the language the ECJ used in *Costa v ENEL*[91], although in that circumstance the Court of Justice had gone so far as to invoke a "permanent limitation" of Member States' sovereign rights[92]. Furthermore, *Le Ski* has been defined as a "precursor" of the *Simmenthal* doctrine[93], since in that ruling the Belgian *Cour de cassation* – thereby anticipating the stance the ECJ will have taken just a few years later – enabled all lower courts and tribunals to dis-apply the domestic statutes which deviate from Treaty provisions.[94]

Still, the ambit of the principle of primacy the Court of Cassation laid down in *Le Ski* emerged as a cause for disagreement amongst the Belgian highest courts[95]. As a

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Community Law and National Law: The Cases, *cit.*, p. 245 et seq.; H. BRIBOSIA, *Report on Belgium*, *cit.*, p. 14 et seq.; L.J. BRINKHORST, H.G. SCHERMERS, *Judicial Remedies in the European Communities: A Case book*, *cit.*, pp.173-175; *Conflicts between Treaties and Subsequently Enacted Statutes in Belgium: Etat Belge v. S.A. "Fromagerie Franco-Suisse Le Ski"*, in Michigan Law Review, Vol. 72, No. 1, 1973, pp. 118-128; K. ALTER, *The European Court's Political Power: Selected Essays*, Oxford, Oxford University Press, 2010, p. 81.

[90] Notably, like in Luxembourg the Belgian Constitution has no rule governing the relationship between international treaties and domestic law.

[91] According to *Le Ski*, §§9-10, "*in the event of a conflict between a norm of domestic law and a norm of international law which produces direct effects in the domestic legal system, the rule established by a treaty shall prevail. The primacy of the treaty results from the very nature of international treaty law. This is a fortiori the case when a conflict exists, as in the present case, between a norm of municipal law and a norm of Community law; the reason is that the treaties which have created Community law have instituted a new legal system in whose favour the member-states have restricted the exercise of their sovereign powers in the areas determined by those treaties*". See B. DE WITTE, *Do Not Mention the Word: Sovereignty in Two Europhile Countries, Belgium and the Netherlands*, *cit.*, p. 356; H. BRIBOSIA, *Report on Belgium*, *cit.*, p. 15.

[92] Particularly, in *Costa V ENEL*, p. 594, the ECJ held that "*The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail*".

[93] H. BRIBOSIA, *Report on Belgium*, *cit.*, p. 35.

[94] In *Le Ski*, §§11-12, the Belgian *Cour de cassation* held that "*Article 12 of the Treaty establishing the European Economic Community is immediately effective and confers on individual persons rights which national courts are bound to uphold. It follows* […] *that it was the duty of the judge to set aside the application of provisions of domestic law that are contrary to this Treaty provision*".

[95] In this regard, someone has interpreted the controversy about the hierarchical relation between the Belgian Constitution and international treaties in terms of a potential struggle for power amongst highest national courts. See H. BRIBOSIA, *Report on Belgium*, *cit.*, p. 25 et seq. According to Grabenwarter, the Court of Cassation in *Le Ski* "gave the impression that Community law took

matter of fact, in 1996 the Council of State adhered to the view that Community law took primacy over all sources of national law, including constitutional norms[96]. This interpretation was strongly opposed, though, by the Court of Arbitration[97], which assumed its power to assess the constitutionality of internal acts ratifying a treaty – and, thus, to review the constitutional compatibility of treaty provisions themselves – on the premise that the Constitution enjoys a higher rank than international treaties[98]. That being said, taking into due consideration also the persistent silence of the Constitution thereon, the relation between Community law and national constitutional law today seems to remain rather blurred in the Belgian legal framework[99].

2.2. The case of France: a divisive *primauté*

Separate mention should be made of the *sui generis* reception of the primacy of Community law into the French legal system. Ever since the earliest days of the European integration process, the Constitution of France showed a pronounced opening-up towards supranational law. By means of a formulation that – as will be seen below – resonated also in Article 11 and Article 24, respectively, of the Italian and the German post-War constitutional charters[100], the Preamble to the French Constitution of 1946 declared that "subject to reciprocity, France shall consent to

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primacy over all measures of national law". However, the Author pointed out that *Le Ski* case did not concern a provision of the Constitution but an ordinary legal rule. See C. GRABENWARTER, *National Constitutional Law Relating to the European Union*, *cit.*, p. 87.

[96] Council of State, *Orfinger*, 5 November 1996. In contrast to the Court of Cassation, in *Orfinger* the Belgian Council of State held that the basis for this conflict rule resides not in the particular nature of international or Community law but in Article 34 of the Constitution. On this case, see B. DE WITTE, *Do Not Mention the Word: Sovereignty in Two Europhile Countries, Belgium and the Netherlands*, *cit.*, p. 357; A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 2, Cambridge, Cambridge University Press, 2003, pp. 162-167.

[97] By way of example, see Cour d'arbitrage, Judgment of 16 October 1991, *Commune de Lanaken*, Case no. 26/91; Judgment of 3 February 1994, *École européenne*, Case no. 12/94; Judgment of 26 April 1994, *Van Damme*, Case no. 33/94.

[98] Cfr. H. BRIBOSIA, *Report on Belgium*, *cit.*, p. 22 et seq.; C. GRABENWARTER, National Constitutional Law Relating to the European Union, cit., p. 87. On the different views of the *Conseil d'Etat* and the *Cour d'arbitrage* as concerns the relation between Community law and the Belgian Constitution, see also M. CLAES, *National Courts' Mandate in the European Constitution*, *cit.*, pp. 506-513.

[99] In this sense see, among others, B. DE WITTE, *Do Not Mention the Word: Sovereignty in Two Europhile Countries, Belgium and the Netherlands*, *cit.*, p. 356; K. LENAERTS, P. VAN NUFFEL, *European Union Law*, *cit.*, p. 773.

[100] See *infra*, section 3.3.

those limitations upon its sovereignty that are necessary for the organisation and preservation of peace"[101]. As regards the internal hierarchy of norms, Article 55 of the 1958 French Constitution explicitly accorded priority to international treaty law over conflicting acts of Parliament[102]. Given such precedence that, as a general rule, the Constitution awarded to treaties, the real issue at stake consisted of identifying what judicial organ bears responsibility for ensuring the prevalence of treaties over national law and, therefore, for setting aside French legislation being at variance with them. Indeed, it took some time before the three supreme decision-making bodies – the Court of Cassation (that is, the highest court for civil and criminal law), the Council of State (the highest court for administrative law) and the Constitutional Council – acknowledged their authority to review the conformity of a domestic statute with international law and, specifically, with EEC treaty law[103].

In this respect, who took the lead was the *Cour de cassation*[104], whose *Vabre* ruling handed down in 1975 boldly endorsed the principle of primacy of Community law along with ECJ's *Simmenthal* doctrine[105]. Conversely, the contemporary jurisprudence of the *Conseil d'État* insisted that it was incumbent on the *Conseil Constitutionnel* to enforce the constitutional requirement that treaties should override subsequent national statutes[106]. It took then until 1989 for the long-awaited judicial

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[101] According to S. 15 of the Preamble of the Constitution of 27 October 1946, "*Sous reserve de réciprocité, la France consent aux limitations de souveraineté nécessaires à l'organisation et à la défense de la paix*".

[102] Article 55 of the 1958 French Constitution reads "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party".

[103] Cfr. P. CRAIG, G. DE BÚRCA, *EU Law: Text, Cases, and Materials*, *cit.*, p. 292; M. CLAES, *The primacy of EU law in European and in national law*, *cit.*, p. 189.

[104] In this regard, Jens Plotner argued that the Court of Cassation "has proven to be the most pro-European supreme court of France, and this despite the fact that in the early 1970s its starting position was identical with that of the *Conseil d'Etat*". See J. PLOTNER, *Report on France*, in A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds.), *The European Court and National Courts - Doctrine and Jurisprudence. Legal Change in its Social Context*, *cit.*, p. 44.

[105] *Cour de cassation*, *Administration des Douanes v Société "Cafés Jacques Vabre" et Weigel et Compagnie*, 24 May 1975, § 5: "*the Treaty of 25 March 1957, which by virtue of* [Article 55] *of the Constitution has an authority greater than that of statutes, institutes a separate legal order integrated with that of the member-States. Because of that separateness, the legal order which it has created is directly applicable to the nationals of those States and is binding on their courts* […]". On the *Vabre* decision of the *Cour de Cassation*, see A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, *cit.*, pp. 287-312; K. ALTER, *The European Court's Political Power: Selected Essays*, *cit.*, pp. 147-151; J. PLOTNER, *Report on France*, p. 45 and pp. 59-62.

[106] Particularly, in *Syndicat général de fabricants de Semoules de France*, 1 March 1968, the Council of State held that, since it had no jurisdiction to review the validity of primary legislation, it could not

turnaround of the Council of State in its decision in the *Nicolo* case[107]. In tune with the legal reasoning of the Court of Cassation, in *Nicolo* the *Conseil d'État* finally undertook Community review powers and recognized Article 55 of the Constitution as the sole theoretical basis for the primacy of Community law over acts of Parliament[108].

Last but not least, the *Conseil Constitutionnel* established in 1958 declined its jurisdiction to review the consistency of French legislation with treaty provisions. In its 1975 Abortion Law judgment[109], the French Constitutional Council drew a clear distinction between *contrôle de constitutionnalitè* – the assessment of national bills' constitutional compatibility – which is reserved to the *Conseil Constitutionnel* pursuant to Article 61 of the Constitution[110], and *contrôle de conventionnalitè* – the review of conformity of acts of Parliament with international treaties – which is a

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find such legislation to be incompatible with international treaties and, therefore, it could not accord precedence to the latter over the former. According to the Council of State, this case law applied to Community rules just as much as to ordinary international conventions. On the rationale underlying the *Conseil d'État*'s rejection of the primacy of Community law over later national laws, see J. PLOTNER, *Report on France*, *cit.*, pp. 45-46.

[107] *Conseil d'État*, *Nicolo and Another*, 20 October 1989 (the full text of the decision is available at www.legifrance.gouv.fr). According to P. CRAIG, G. DE BÚRCA, *EU Law: Text, Cases, and Materials*, *cit.*, p. 293, with this ruling the Council of State "finally abandoned its so-called 'splendid isolation' and decided, in its capacity as an electoral court, to adopt the same position as the Conseil Constitutionnel and the Cour de Cassation".

[108] On this judgment see, among many others, P. MANIN, *The Nicolo Case of the Conseil d'Etat: French Constitutional Law and the Supreme Administrative Court's Acceptance of the Primacy of Community Law over Subsequent National Statute Law*, in Common Market Law Review, Vol. 28, Issue 3, 1991, pp. 499-519; A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, *cit.*, pp. 335-356. More generally, with regard to the relationship between the case law of the *Conseil d'État* and the ECJ see P. SABOURIN, *Le conseil d'Etat face au droit communautaire. Méthodes et raisonnements*, in Revue du droit public et de la science politique en France et à l'étranger, 1993, pp. 397-430; R. KOVAR, Le *Conseil d'État et la Cour de Justice des Communautes Européennes: De l'État de guerre à la paix armée*, Dalloz, 1990, p. 57 et seq; J.-C. BONICHOT, *Convergences et divergences entre le Conseil d'État et la Cour de Justice des Communautés Européennes*, in Revue française de droit administratif, Vol., No. , 1989, p. 579 et seq.

[109] *Conseil Constitutionnel*, *Interruption volontaire de grossesse*, 15 January 1975, available at www.conseil-constitutionnel.fr. For a comment on this decision, which may have pushed the Cour de cassation to reverse its case law just a few months later in the *Vabre* ruling, see J. ROBERT, *La décision du Conseil constitutionnel du 15 janvier 1975 sur l'interruption volontaire de grossesse*, in Revue internationale de droit comparé, Vol. 27, No. 4, Octobre-décembre 1975. pp. 873-890.

[110] According to Article 61 of the French Constitution, French legislation "[…] *shall, before coming into force, be referred to the Constitutional Council, which shall rule on their conformity with the Constitution*". In contrast to other national constitutional tribunals of long-standing tradition such as the Italian *Corte costituzionale* and the German *Bundesverfassungsgericht*, the *Conseil Constitutionnel* can only carry out abstract judicial review of bills before they are promulgated and within the short time limit of one month.

task for regular judiciary[111]. In contrast to ECJ's vision of Community law primacy, the following year the *Conseil Constitutionnel* asserted that, whilst the French Constitution agrees to "limitations" of sovereignty, no constitutional provision whatsoever does allow for either full or partial "transfers" of sovereignty[112].

Yet, this distinction between permissible limitations and inadmissible transfers of national sovereignty faded away in a series of later rulings, when the Constitutional Council carried out a preventive control over the constitutionality of the various European treaties from Maastricht to Lisbon[113]. In its first *Maastricht* judgment[114], which was delivered shortly ahead of the namesake decision by the German *Bundesverfassungsgericht*[115], the *Conseil Constitutionnel* considered a number of clauses of the Maastricht Treaty as being in contradiction to the French Constitution or jeopardising the "essential conditions for the exercise of national sovereignty"[116].

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[111] *Conseil Constitutionnel*, *Interruption volontaire de grossesse*, 15 January 1975, §§5-6: "A statute that is inconsistent with a treaty is not ipso facto unconstitutional. Review of the rule stated in Article 55 cannot be effected as part of a review pursuant to Article 61, because the two reviews are different in kind". In this regard, M. CLAES, *National Courts' Mandate in the European Constitution*, *cit.*, p. 458 makes clear that "the French system thus distinguishes between the *contrôle de constitutionnalité concentre a priori* and the *contrôle de conventionnalité diffuse a postériori*".

[112] *Conseil Constitutionnel*, *Re Direct Elections to European Parliament*, 30 December 1976, available at www.conseil-constitutionnel.fr. In the case at issue, the *Conseil Constitutionnel* held that the decision of the Council of the European Communities of 20 September 1976 regarding election to the European Parliament by direct universal suffrage included no clause contrary to the Constitution. See A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, *cit.*, pp. 313-316; K. ALTER, *The European Court's Political Power: Selected Essays*, *cit.*, p. 146.

[113] As a matter of fact, the Constitutional Council has the power to conduct *a priori* review over the constitutionality of primary Community law. In this regard, Article 54 of the French Constitution provides that "if the Constitutional Council […] has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution".

[114] *Conseil Constitutionnel*, *Re Treaty on the European Union (Maastricht I)*, 9 April 1992. Notably, in the same year the *Conseil Constitutionnel* issued three separate decisions regarding the ratification of the Maastricht Treaty (whose official translation is available at www.conseil-constitutionnel.fr). Commentaries on these decisions can be found in L. FAVOREU, L. PHILIP, *Les grandes décisions du Conseil Constitutionnel*, Paris, Dalloz, 1997, pp. 783-828 and in the special issue '*La Constitution française et le Traité de Maastricht*', in Revue française de droit constitutionnel, No. 11, 1992. See also J. ZILLER, *Sovereignty in France: Getting Rid of the Mal de Bodin*, in N. WALKER (ed.), *Sovereignty in Transition*, *cit.*, p. 271 et seq.

[115] *Infra*, Chapter II, section 2.1.

[116] *Conseil Constitutionnel*, *Re Treaty on the European Union (Maastricht I)*, 9 April 1992, §§ 13-14: "*respect for national sovereignty does not prevent France* […] *from concluding, under the reserve of reciprocity, international engagements with a view to participating in the creation or the development of a permanent international organization, with legal personality and invested with the power of decision by effect of a transfer of competences consented to by the member states. Nevertheless, where such international agreements contain a clause contrary to the Constitution or infringe the essential conditions for the exercise of national sovereignty, the authorization to ratify those agreements calls for constitutional revision*". On this decision of the *Conseil Constitutionnel*, see A. OPPENHEIMER,

In so doing, as someone has observed, *Maastricht I* set the landmark precedent that the Constitutional Council must be involved whenever there is an expansion of Community's competences[117]. In the same vein, in the following decision *Maastricht II*[118], issued in the aftermath of the negative vote of the Danish people in a referendum on the Maastricht Treaty[119], the *Conseil Constitutionnel* kept reserving for itself the right to protect national sovereignty and to mark out the boundaries thereof in response to the quickening of European integration[120].

As a consequence of the Constitutional Council's involvement in the Maastricht Treaty ratification procedure in 1992, the constitutional legislature inserted into Title XV of the Constitution ("*The European Communities and the European Union*") a new Article 88,[121] which is regarded as providing the legal basis for the primacy of EU law within the French legal framework since then[122]. Likewise, when it was asked to review the constitutionality of the Amsterdam Treaty in 1997, the *Conseil Constitutionnel* required further amendments to the Constitution for any transfer of

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The Relationship between European Community Law and National Law: The Cases, *cit.*, pp. 384-398; K. ALTER, *The European Court's Political Power: Selected Essays*, *cit.*, pp. 168-169; J. PLOTNER, *Report on France*, *cit.*, pp. 51-52; P. OLIVER, *The French Constitution and the Treaty of Maastricht*, in International and Comparative Law Quarterly, Vol. 43, Issue 1, 1994, p. 11 et seq.

[117] K. ALTER, *The European Court's Political Power: Selected Essays*, *cit.*, p. 170.

[118] *Conseil Constitutionnel*, *Re Treaty on the European Union (Maastricht II)*, 2 September 1992.

[119] *Infra*, Chapter II, section 2.2.

[120] In *Maastricht II*, the Constitutional Council examined the constitutionality of the law authorizing the ratification of the Treaty on the European Union and held that it met the constitutional requirements for treaty ratification, without finding any incompatibility between such treaty and the French Constitution. See A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, *cit.*, pp. 399-408.

[121] Article 88(1): "The Republic shall participate in the European Communities and in the European Union, which have been established by States having freely chosen, by virtue of the constitutive treaties of those entities, to exercise certain of their powers in common"; Article 88(2): "Subject to reciprocity, and in accordance with the procedures laid down in the Treaty on European Union signed on 7 February 1992, France agrees to the transfer of the powers necessary for the establishment of the European Economic and Monetary Union, as well as for the fixing of rules concerning the crossing of the external frontiers of the Member States of the European Community"; Article 88(3): "Subject to reciprocity and in accordance with the procedures laid down in the Treaty on European Union signed on 7 February 1992, the right to vote and to stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France. Such citizens shall neither exercise the office of mayor or deputy mayor nor participate in the designation of Senate electors or in the election of senators. An organic act passed in identical terms by the two assemblies shall determine the conditions for the implementation of this provision"; Article 88(4): "The Government shall submit to the National Assembly and the Senate, as soon as they have been transmitted to the Council of the Communities, proposals for Community acts involving provisions of a legislative nature".

[122] M. CLAES, *The primacy of EU law in European and in national law*, *cit.*, pp. 189-190.

competences that affects the fundamental conditions of the exercise of national sovereignty[123].

Another breakthrough in the French case law took place in 2004 when, as it occurred in Spain[124], the question of constitutional legitimacy of the Treaty establishing a Constitution for Europe was submitted to the justices of Palais Montpensier[125]. First of all, the reply of the *Conseil Constitutionnel* to such referral ruled out the constitutional nature of said treaty, which, notwithstanding its designation, retained the character of an international agreement[126]. Accordingly, the Constitutional

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[123] *Conseil Constitutionnel*, *Treaty of Amsterdam, 1997, Amending the Treaty on European Union and the Treaties Establishing the European Communities*, 31 December 1997, § 8: "It follows that further amendment to the Constitution will be required for the clauses of the Treaty of Amsterdam which transfer powers to the European Community in such a way as to jeopardise the essential conditions for the exercise of national sovereignty, either because these transfers do not relate to European economic and monetary union or the crossing of external borders, or because they lay down conditions not already provided by the Treaty on European Union signed on 7 February 1992 for the exercise of powers the transfer of which was authorised by Article 88-2". The official translation of the judgment is available at www.conseil-constitutionnel.fr. Following this Constitutional Council's decision, the French Parliament adopted a law amending the abovementioned Articles 88(2) and 88(4) of the Constitution. As concerns this decision, see A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 2, Cambridge, Cambridge University Press, 2003, pp. 219-227; S. MILLNS, *The Treaty of Amsterdam and Constitutional Revision in France*, in European Public Law, Vol. 5, Issue 1, 1999, pp. 61-77; A. BONNIE, *The Constitutionality of Transfers of Sovereignty: the French Approach*, in European Public Law, Vol. 4, Issue 4, 1998, pp. 517-532 (also relating to the aforementioned Constitutional Council's decisions on the Maastricht Treaty).

[124] *Infra*, Chapter II, section 2.3.

[125] For an in-depth analysis of the European Constitution and its reception within the national legal frameworks of the signatory States, see A. ALBI, J. ZILLER, *The European Constitution and National Constitutions: Ratification and Beyond*, The Hague, Kluwer Law International, 2007. In France, on the same day the Treaty establishing a Constitution for Europe was signed, the President of the Republic submitted to the *Conseil Constitutionnel* the question of whether authorisation to ratify this new treaty would require a prior revision of the French Constitution. Given the short time limit for the judicial review of national bills, pursuant to Article 61 of the Constitution, it is hardly surprising that the *Conseil Constitutionnel* was the first judicial body ruling on the constitutional compatibility of the treaty.

[126] *Conseil Constitutionnel*, *The Treaty establishing a constitution for Europe*, Decision no. 2004-505 DC, 19 November 2004, §9. The English version of the judgment is available at www.conseil-constitutionnel.fr. For a comment on the Constitutional Treaty decision of the *Conseil Constitutionnel* see, among many others, L. AZOULAI, F.R. AGERBEEK, *Conseil constitutionnel (French Constitutional Court) Decision No 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe*, in Common Market Law Review, Vol. 42, Issue 3, 2005, pp. 871-886; G. CARCASSONNE, *France Conseil constitutionnel on the European Constitutional Treaty. Decision of 19 november 2004, 2004-505 DC*, in European Constitutional Law Review, Vol. 1, Issue 2, 2005, pp. 293-301; F. CHALTIEL, *Une première pour le Conseil constitutionnel: juger un Traité établissant une Constitution*, in Revue du marché commun et de l'Union Européenne, No. 484, 2005, pp. 5-10; V. CHAMPEIL-DESPLATS, *Commentaire de la decision du Conseil constitutionnel No. 2004-505 DC du 19 novembre 2004 relative au Traité établissant une Constitution pour l'Europe*, in Revue trimestrielle de droit européen, Vol. 39, No. 3, 2003, pp. 557-580; J. ROUX, *Le traité établissant une Constitution pour l'Europe à l'épreuve de la Constitution française*, in Revue du droit public et de la science politique en France et à l'étranger, No. 1, janvier-février 2005, pp. 59-110; E. VRANES,

Council held that the title of this new treaty would have no impact upon the place of the French Constitution at the summit of the national legal order[127]. Secondly, the Constitutional Treaty decision made clear that the Community legal framework is "integrated into the domestic legal order and distinct from the international legal order"[128].

In the *Conseil*'s view, this assumes that the treaty at hand would in no way impinge on the nature of the European Union, nor modify the scope of the principle of primacy of EU law as it results from Article 88 of the French Constitution[129]. In this regard, the Constitutional Council implied that the primacy clause entrenched in the new treaty was consistent with the French constitutional system as well as with the European Union's commitment to respect for national identities[130]. For the first time, the *Conseil Constitutionnel* hinted, thus, at national identity as a potential barrier to the primacy of EU law. However, the *Conseil* neither described the essence of the principle of *primauté*[131], nor unveiled what content the notion of *identité nationale* would concretely encompass[132].

Constitutional Foundation of, and Limitation to, Integration in France, in European Public Law, Vol. 19, No. 3, 2013, pp. 525-554; F. DURANTI, *Il Conseil constitutionnel e la nuova Costituzione europea*, in www.forumcostituzionale.it, 6 December 2004 ; A. SCHILLACI, *Il Conseil constitutionnel si pronuncia sul Trattato che istituisce una Costituzione per l'Europa*, in www.associazionedeicostituzionalisti.it, 16 December 2004.

[127] *Conseil Constitutionnel*, *The Treaty establishing a constitution for Europe*, Decision no. 2004-505 DC, 19 November 2004, §10.

[128] *Ibi*, §11.

[129] *Ibi*, §13. According to the Constitutional Council, the interplay between Article 1-5 and Article 1-6 of the Constitutional Treaty shows that this latter "*in no way modifies the nature of the European Union, nor the scope of the principle of the primacy of Union law as duly acknowledged by Article 88-1 of the Constitution, and confirmed by the Constitutional Council in its decisions referred to hereinabove; that hence Article 1-6 submitted for review by the Constitutional Council does not entail any revision of the Constitution*".

[130] *Conseil Constitutionnel*, *The Treaty establishing a constitution for Europe*, Decision no. 2004-505 DC, 19 November 2004, §12. In this regard, the *Conseil Constitutionnel* expressly referred to Article I-5 of the Treaty establishing a Constitution for Europe, which stated that the Union shall respect the national identities of Member States "*inherent in their fundamental structures, political and constitutional*". In commenting this passage of the judgment, K. LENAERTS, P. VAN NUFFEL, *European Union Law*, *cit.*, p. 776 made reference to a "conciliatory approach" adopted by the Constitutional Council, which accommodated the principle of primacy of EU law with the respect for national identity and with the French Constitution's place at the summit of the domestic legal order.

[131] L. AZOULAI, F.R. AGERBEEK, *Conseil constitutionnel (French Constitutional Court) Decision No 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe*, *cit.*, p. 877.

[132] E. VRANES, *Constitutional Foundation of, and Limitation to, Integration in France*, *cit.*, p. 548. In the same vein, M. CLAES, J.H. REESTMAN, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, in German Law Journal, Vol. 16 No. 4, 2015, p. 951 argued that the French *Conseil constitutionnel* has not clarified the notion of constitutional identity. Accordingly, these latter Authors recalled that the then president

Lastly, the Constitutional Treaty decision recalled a set of rulings taken only a few months before, in order to restate the *Conseil*'s competence to exercise its control of constitutionality on acts that implement an EU directive into national law, whenever EU secondary law goes against an express provision of the Constitution[133]. As to this precise reservation, it has been argued that the *Conseil Constitutionnel* thereby took an intermediate position between that of the Austrian Constitutional Court, which had denied any judicial review over EU secondary law against constitutional provisions, and that of other foreign constitutional tribunals – such as the German *Bundesverfassungsgericht*, the Danish Supreme Court and the Italian *Corte costituzionale* – whose case law, on the contrary, had admitted the constitutional immunity of EU secondary law to be somewhat confined[134].

Shortly afterwards, the 2007 Lisbon judgment of the French Constitutional Council confirmed that the Constitution keeps the highest rank within the internal hierarchy

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of the Constitutional Council, Jean-Louis Debré, wrote on the notion of French constitutional identity that "*le Conseil constitutionnel s'est toujours bien gardé d'en définer précisément le contenu*". See F.X. MILLET, *L'Union européenne et l'identité constitutionnelle des États membres*, Paris, Lextenso, 2013, p. xii.

[133] The French judgment on the Constitutional Treaty made explicit reference to Constitutional Council's decision no. 2004-496 DC of 10 June 2004 (§7); decision no. 2004-497 DC of 1 July 2004 (§18); decisions no. 2004-498 DC (§4) and no. 2004-499 DC of 29 July 2004 (§7). According to the relevant passage of these decisions, "[…] *the transposing of a Community Directive into domestic law results from a constitutional requirement with which non-compliance is only possible by reason of an express contrary provision of the Constitution; that in the absence of such an express contrary provision, the European Community judge, upon an application for a preliminary ruling, is alone competent to monitor the respect by a Community Directive of both the powers set forth in the treaties and the fundamental rights guaranteed by article 6 of the Treaty on the European Union*". Cfr. P. CASSIA, *Le juge administratif, la primauté du droit de l'Union européenne et la Constitution française*, in Revue française de droit administratif, No. 3, 2005, pp. 465-472; J.P. KOVAR, *Commentaire des décisions du Conseil constitutionnel du 10 juin et du 1er juillet 2004: rapport entre le droit communautaire et le droit national*, in Revue trimestrielle de droit européen, Vol. 40, No. 3, 2004, pp. 580-597; J.H. REESTMAN, *Conseil constitutionnel on the Status of (Secondary) Community Law in the French Internal Order. Decision of 10 june 2004, 2004-496 DC*, in European Constitutional Law Review, Vol. 1, Issue 2, 2005, pp. 302-317; J.E. SCHOETTL, *Le nouveau régime juridique de la communication en ligne devant le Conseil constitutionnel*, in *Petites affiches*, No. 122, 18 June 2004, pp. 10-25; J. DUTHEIL DE LA ROCHÈRE, *Comment on Conseil Constitutionnel, Decision No. 2004-496 of June 2004*, in Common Market Law Review, Vol. 42, Issue 3, 2005, pp. 859-869; A. SCHILLACI, *Il Conseil Constitutionnel interviene sui rapporti tra diritto comunitario e diritto interno*, in www.associazionedeicostituzionalisti.it, 27 July 2004; O. DUTHEILLET DE LAMOTHE, *Il Conseil constitutionnel ed il processo di integrazione comunitaria*, in www.associazionedeicostituzionalisti.it, 25 October 2006.

[134] As to this comparative survey, see J.E. SCHOETTL, *Le nouveau régime juridique de la communication en ligne devant le Conseil constitutionnel*, *cit.*, p. 17; J. DUTHEIL DE LA ROCHÈRE, *Conseil Constitutionnel (French Constitutional Court), Decision No. 2004-496 of June 2004, Loi pour la confiance dans l'économie numérique (ecommerce), cit.*, pp. 863-864 ; J.H. REESTMAN, *Conseil constitutionnel on the Status of (Secondary) Community Law in the French Internal Order. Decision of 10 june 2004, 2004-496 DC*, *cit.*, pp. 308-309.

of norms[135]. Hence, such ruling of the *Conseil* concluded that EU law must not contain "a clause running counter to the Constitution" which calls into question constitutionally guaranteed rights and freedoms, nor must it "adversely affect the fundamental conditions of the exercising of national sovereignty", unless the Constitution is revised beforehand[136]. By the same token, the Lisbon Treaty provisions that required constitutional adjustments had to do with fields of competences which were referred to by the *Conseil Constitutionnel* as "inherent to national sovereignty"[137].

Overall, one may infer from the quoted decisions that, in the wake of a gradual process of rapprochement, all highest courts in France have generally accepted the principle of primacy of EU law over municipal law. Yet, unlike the legal reasoning provided by the case law of the Court of Justice, the French courts' reception of the *primauté* has been theoretically grounded not on the inherent nature of EU law itself[138], but rather on Article 55 and Article 88 of the Constitution. Consequently, the French jurisprudence has departed from the Luxembourg case law in terms of setting limits to the principle of EU law primacy. In fact, the recognition of the

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[135] *Conseil Constitutionnel*, *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, Decision 2007-560 of 20 December 2007, §8: "*While confirming the place of the Constitution at the summit of the domestic legal order,* [the aforementioned] *constitutional provisions enable France to participate in the creation and development of a permanent European organisation vested with a separate legal personality and decision-taking powers by reason of the transfer of powers agreed to by the Member States*". For a comment on this judgment, J. DUTHEIL DE LA ROCHÈRE, *French Conseil constitutionnel: recent developments*, in I. PERNICE, J.M. BENEYTO PÉREZ (eds.), *Europe's Constitutional Challenges in the Light of the Recent Case Law: Lisbon and Beyond*, Baden-Baden, Nomos, 2011, pp. ; X. MAGNON, *Le Traité de Lisbonne devant le Conseil constitutionnel: non bis in idem?*, in Revue française de droit constitutionnel, No. 74, 2008, pp. 310-337; J. ROUX, *Le Conseil constitutionnel et le contrôle de constitutionnalité du Traité de Lisbonne: bis repetita? A propos de la décision n° 2007-560 DC du 20 décembre 2007*, in Revue trimestrielle de droit européen, Vol. 44, No. 1, 2008, pp. 5-27; G. ALLEGRI, *Il Consiglio costituzionale francese, il Trattato di Lisbona e le modifiche alla Costituzione francese*, in www.europeanrights.eu, 2 March 2008.

[136] *Conseil Constitutionnel*, *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, Decision 2007-560 of 20 December 2007, §9.

[137] *Ibi*, §18: "*The provisions of the Treaty of Lisbon which transfer to the European Union under the 'ordinary legislative procedure' powers inherent in the exercising of national sovereignty require a revision of the Constitution*" and §20: "*Any provision of the Treaty which, in a matter inherent to the exercising of national sovereignty already coming under the jurisdiction of the Union or the Community, modifies rules applicable to decision taking, either by substituting a qualified majority for a unanimous decision of the Council, thus depriving France of any power to oppose a decision, or by conferring decision-taking power on the European Parliament, which is not an emanation of national sovereignty, or by depriving France of any power of acting on its own initiative requires a revision of the Constitution*". See E. VRANES, *Constitutional Foundation of, and Limitation to, Integration in France*, *cit.*, p. 541.

[138] B. DE WITTE, *Community Law and National Constitutional Values*, in Legal Issues of Economic Integration, Vol. 18, Issue 2, 1991, p. 4.

primauté has gone uncontested, on the one hand, over domestic infra-constitutional law. On the other hand, the *Conseil Constitutionnel* – alongside the *Cour de cassation* and the *Conseil d'Etat*, this latter emphasising the existence of a so-called "*noyau dur de souveraineté*"[139] – has firmly stood against the precedence of EU law over core constitutional law[140].

As we mentioned above, such reticence towards ECJ's absolute view of primacy, combined with the placement of the authority of EU law within the national Constitution, was not an isolated attitude within the Member States of the Community, the most notable exception being the Netherlands. The French Constitutional Council, quite the opposite, brought its case law into line with the orientation that other Member States' highly authoritative jurisdictions had hitherto adopted in addressing matters of European integration. Without forgetting the elements of differentiation existing, *ça va sans dire*, among the legal contexts where such courts operate – and, in particular, among the systems of constitutional justice in which they are located – the *Conseil Constitutionnel* seems to have found a source

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[139] See, in particular, *Conseil d'Etat*, *Société Arcelor Atlantique et Lorraine et autres*, Decision 287110 of 8 February 2007 (available at www.legifrance.gouv.fr), in which the Constitutional Council underlined that "*the supremacy thus conferred to international agreements cannot override, in the internal order, constitutional principles and provisions*". For a comment on this ruling, through which the *Conseil d'Etat* referred the case to the ECJ, see, *ex multis*, O. POLLICINO, *The Conseil d'Etat and the relationship between French internal law after Arcelor: Has something really changed?*, in Common Market Law Review, Vol. 45, Issue 5, 2008, pp. 1519-1540; X. MAGNON, *La sanction de la primauté de la Constitution sur le droit communautaire par le Conseil d'Etat. Commentaire sous Conseil d'Etat, Assemblée, 8 février 2007, Société Arcelor Atlantique et Lorraine et autres*, in Revue française de droit administratif, No. 3, 2007, pp. 578-589; F. CHALTIEL, *Le Conseil d'État reconnaît la spécificité constitutionnelle du droit communautaire - À propos de la Décision Arcelor du 8 février 2007*, in Revue du marché commun et de l'Union Européenne, No. 508, 2007, pp. 335-338.

[140] In this regard, it is worth quoting in full the words of C. CHARPY, *The Status of (Secondary) Community Law in the French Legal Order*, in European Constitutional Law Review, Vol. 3, Issue 1, 2007, p. 459, who observed that "*Unquestionably, the reasoning of the Conseil constitutionnel and that of the Conseil d'Etat emphasises the principle of the supremacy of the Constitution vis-à-vis Community law. They consider that the constituent power has incorporated in Article 88-1 of the Constitution the duty to implement directives and, more generally, the existence of the Community legal order integrated into the internal legal order. Thus, it is the Community legal order which is integrated into the national order, and not the other way around. Community law only can be effective in France by virtue of the constituent power's will, the Constitution remains the norm determining the relationship between the legal systems involved and thus has precedence over all other norms. In other words, because they are inscribed in the Constitution, the duty to implement Community law and the principle of its primacy do not alter the place of the Constitution at the top of the hierarchy of norms*". According to the same Author, in its landmark decision in *Arcelor* the French Constitutional Council held that a "*noyau dur de souveraineté demeure opposable à la transposition par un règlement d'une directive communautaire*". See C. CHARPY, *Le statut constitutionnel du droit communautaire dans la jurisprudence (récente) du Conseil constitutionnel et du Conseil d'État) (Contribution à l'étude des rapports de systèmes constitutionnel et communautaire)*, in Revue française de droit constitutionnel, No. 79, 2009, p. 641.

of inspiration in the reservations that the earlier case law of the Italian and the German constitutional courts had devised against the full and unconditional application of European law[141]. The following paragraphs, therefore, will look into the counter-limits theories that arose almost simultaneously in Italy and Germany, through the prism of horizontal convergence between their national constitutional courts.

2.3. A substantive horizontal interplay: the parallel development of counter-limits in Italy and Germany

2.3.1. Pioneering constitutional resistance? The Italian "controlimiti"

Since the very early stages of European integration, the normative foundation of the Italian opening-up to international relationships in general and, by implication, of Italy's membership to the European Communities lies in Article 11 of the Constitution of 1948[142]. This provision textually stipulates that "*Italy* […] *agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations* […]"[143]. The opening clause set out therein goes hand in hand, thus, with the idea of

[141] Such alignment with the Italian and the German case law on the counter-limits was also highlighted in C. CHARPY, *The Status of (Secondary) Community Law in the French Legal Order*, *cit.*, p. 460 and O. DUTHEILLET DE LAMOTHE, *Il Conseil constitutionnel ed il processo di integrazione comunitaria*, *cit.*, pp. 11-13. Conversely, other Authors argued that the *Conseil constitutionnel* distanced itself from the *Corte costituzionale* and the *Bundesverfassungsgericht*, to the extent that in France each violation of an explicit provision of the Constitution (and, thus, not only the infringement of certain core rights and principles) amounted to a breach of national identity. See in particular F. DURANTI, *Il Conseil constitutionnel e la nuova Costituzione europea*, *cit.*, p. 2 and A. SCHILLACI, *Il Conseil Constitutionnel interviene sui rapporti tra diritto comunitario e diritto interno*, *cit.*, p. 3.

[142] Moreover, it is worth mentioning Article 117(1) of the Italian Constitution as amended in 2001, which stipulates that legislative powers shall be vested in the State and the Regions in compliance with the Constitution and within the constraints deriving from EU legislation and international obligations. Nonetheless, Judgments no. 348 and no. 349 of 2007 of the Italian Constitutional Court denied that the Article 117(1) replaced Article 11 as the constitutional basis for EU law in the Italian legal order.

[143] For a comment on Article 11 of the Italian Constitution, cfr. A. CASSESE, *Art. 11*, in G. BRANCA (a cura di), *Commentario della Costituzione*, Vol. 1, Bologna, Zanichelli, 1975, p. 579 et seq.; A. LA PERGOLA, *Costituzione e adattamento del diritto interno al diritto internazionale*, Milano, Giuffrè, 1961, p. 164 n. 28; C. ESPOSITO, *Costituzione, leggi di revisione della Costituzione e "altre" leggi costituzionali*, in C. ESPOSITO, *Diritto costituzionale vivente*, Milano, Giuffrè, 1992, pp. 355-392.

"limitations" – and, notably, not "transfers" – of national sovereignty, by means of the ratification of international treaties through an act of Parliament.

Dealing with the same legal question that, just a few months later, led the ECJ to proclaim the primacy of Community law[144], Judgment no. 14 of 1964 of the Italian *Corte costituzionale* (hereinafter ICC) detected in Article 11 of the Constitution the legal basis of the domestic legislation giving execution to the European Treaties[145]. However, in such ruling the ICC also clarified that

"*the violation of the* [European] *Treaty, although it does not entail the responsibility of the State on the international plane, does not deprive the law that contradicts it of its full efficacy. There is no doubt that the State must honor the commitments it assumes and no doubt that the Treaty has the legal force that the executing laws grant to it. But because it is necessary to maintain the supremacy of the temporal succession of laws, it follows that any possible conflict between one and the others cannot give rise to questions of constitutionality*"[146].

In the ICC's reasoning at that time, the European treaties did not enjoy, therefore, a distinguished status from that of any other international norm. They possessed the same binding authority as the acts of Parliament giving them application and, according to the rule *lex posterior derogat priori* that governs the conflicts between domestic norms endowed with equal legal force, could not take precedence over more recent pieces of national legislation[147].

One year later, in *San Michele* the ICC was confronted with the issue of a supposed contrast between some provisions of the ECSC Treaty and the Italian Constitution[148].

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[144] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR-585.

[145] Judgment no. 14 of 1964 of the Italian Constitutional Court, available at www.cortecostituzionale.it. For a critical analysis of this judgment, see R. MONACO, *Diritto comunitario e diritto interno avanti la Corte costituzionale*, in Giurisprudenza italiana, parte I, sez. 1, 1964, pp. 1312-1318; M. BON VALSASSINA, *Considerazioni sulla sentenza n. 14 della Corte costituzionale*, in Giur. cost., 1964, pp. 133-144; M. MAZZIOTTI DI CELSO, *Appunti sulla sentenza della Corte costituzionale riguardante la legge istitutiva dell'ENEL*, in Giur. cost., 1964, pp. 444-465; N. CATALANO, *Portata dell'art. 11 della Costituzione in relazione ai trattati istitutivi delle Comunità europee*, in Il Foro italiano, 1964, pp. 465-475.

[146] Judgment no. 14 of 1964 of the Italian Constitutional Court, §6 *Conclusions on points of law*.

[147] In this regard, it was observed that "in the first stage of its European journey the Italian Constitutional Court was at odds with the doctrine of the Court of Justice". See V. BARSOTTI, P. CAROZZA, M. CARTABIA, A. SIMONCINI, *Italian Constitutional Justice in Global Context*, Oxford, Oxford University Press, 2015, pp. 208-210.

[148] Judgment no. 98 of 1965 of the Italian Constitutional Court, *Acciaierie San Michele v. CECA*. Particularly, the referring tribunal expressed doubts as to the compatibility of the law ratifying the ECSC with the right to judicial protection under Articles 102 and 113 of the Italian Constitution. The

Answering to such question of constitutionality, Judgment no. 98 of 1965 introduced for the first time two new tenets on which the ICC's future case law will be built upon. Firstly, at odds with the monist tradition of the Luxembourg jurisprudence[149], the Italian justices inaugurated a dualist approach to the system of relationships between national law and Community law[150]. The legal order established by the ECSC was defined as completely autonomous and distinct from the internal one, albeit coordinated in accordance with the division of power laid down and guaranteed by the treaty, to the effect that the Italian and the European judicial bodies could not be placed and perform their duties but "in separate legal orbits"[151]. Moreover, the Court's rationale suggested that the limitations of national sovereignty stemming from Italy's membership to the Community under Article 11 of the Constitution shall be subject, in turn, to certain conditions, being represented by the protection of inviolable rights and fundamental principles of the constitutional order[152].

ICC eventually held that the Community rules at issue were not in breach of the Constitution. For a comment, see M. MAZZIOTTI DI CELSO, *Osservazioni alla sentenza del 27 dicembre 1965*, in Giur. cost., 1965, pp. 1329-1342; M. BERRI, *Ordinamento comunitario e ordinamento interno*, in Giustizia civile, parte III, 1966, pp. 3-7; N. CATALANO, *Compatibilità con la Costituzione italiana della legge di ratifica del Trattato Ceca*, in Il Foro italiano, parte I, 1966, pp. 8-12; F. DURANTE, *Diritto interno e diritto comunitario*, in Rivista di diritto internazionale, 1966, pp. 53-57; A. MIGLIAZZA, *Giudizio di legittimità costituzionale e giudizio innanzi alla Corte di giustizia delle Comunità europee*, in Rivista di diritto processuale, 1966, p. 308 et seq.; M. CARTABIA, *Principi inviolabili e integrazione europea*, Milano, Giuffrè, 1995, p. 97 et seq.; F.P. RUGGERI LADERCHI, *Report on Italy*, in A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds.), *The European Court and National Courts - Doctrine and Jurisprudence. Legal Change in its Social Context*, *cit.*, pp. 160-162.

[149] Cfr. A. LA PERGOLA, *Costituzione e integrazione*, in A. PACE (a cura di), *Studi in onore di Leopoldo Elia*, Vol. I, Milano, Giuffrè, 1999, pp. 819-826; G. SPERDUTI, *Diritto comunitario e diritto interno nella Giuriprudenza della Corte costituzionale italiana e della Corte di Giustizia delle comunità europee: un dissidio da sanare*, in Giur. cost., 1978, pp. 791-819; R. MONACO, *Sulla recente giurisprudenza costituzionale e comunitaria in tema di rapporti fra diritto comunitario e diritto interno*, *cit.*, pp. 291-292.

[150] As regards the relationships between the Italian and the European legal orders and, in particular, the dualist attitude adopted by the ICC, cfr. R. MONACO, *Diritto delle Comunità Europee e Diritto Interno*, Milano, Giuffrè, 1967, pp. 125-129; F. SORRENTINO, *L'influenza del diritto comunitario sulla costituzione italiana*, in A. PACE (a cura di), *Studi in onore di Leopoldo Elia*, *cit.*, pp. 1637-1642; A. LA PERGOLA, *Costituzione e integrazione*, in A. PACE (a cura di), *Studi in onore di Leopoldo Elia*, *cit.*, pp. 826-840; F. SALMONI, *La Corte costituzionale, la Corte di giustizia delle Comunità europee e la tutela dei diritti fondamentali*, in AA.VV., *La Corte costituzionale e le Corti d'Europa*, Torino, Giappichelli, 2003, p. 199 et seq.

[151] Judgment no. 98 of 1965 of the Italian Constitutional Court, §2 *Conclusions on points of law*. In particular, M. MAZZIOTTI DI CELSO, *Osservazioni alla sentenza del 27 dicembre 1965*, *cit.*, p. 1332 described the Italian and the European legal orders as two "bodies belonging to different planetary systems".

[152] As a result, the compliance with such limits shall be ensured through the ICC's judicial review, on the basis of a case-by-case assessment. Such judicial review shall concern only the executing laws

Both the theory of separation of the two legal frameworks and the so-called "counter-limits" doctrine[153] already spelled out, though still at an embryonic stage, in *San Michele* were then upheld and refined in Judgment no. 183 of 1973 (*Frontini*)[154]. In this well-known decision – to which, as will be said, other constitutional and supreme courts, including the German *Bundesverfassungsgericht*, will make reference in their European-related case law – the ICC initially paved the way for the acceptance of primacy and direct effect of Community acts within the national legal context, by virtue of the special status they enjoy:

"*Community norms – which cannot be characterized either as sources of international law, nor of foreign law, nor of the internal law of single States – should have full obligatory effect and direct application in all of the Member States, without the need for laws of incorporation and adaptation, as acts having the force of law in every country of the Community so that they enter into force everywhere simultaneously and have equal and uniform application with respect to all of their subjects*"[155].

In view of the foregoing, the Court went on to maintain, more explicitly than it had done at first in *San Michele*, that the prevalence of Community law upon inconsistent national law – even of constitutional rank – must nevertheless ensure compliance with the *controlimiti*, being identified either in the supreme principles of the Italian Constitution or in the guarantees of fundamental rights:

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rather than the European legislation itself, by reason of the aforesaid separation between the national and the supranational legal orders. *Ibi*, p. 1329.

[153] Notably, the term "*controlimitazioni*" – later converted into "*controlimiti*" – was originally coined by P. BARILE, *Il cammino comunitario della Corte*, in Giur. cost., 1973, pp. 2406-2419.

[154] In this case, the ICC was asked to control whether the then Article 189 of the EEC Treaty, which conferred on European institutions the power to issue normative acts, was compatible with the Italian Constitution. For a comment on this landmark judgment see, *ex pluribus*, G. ITZCOVICH, *Teorie e ideologie del diritto comunitario*, *cit.*, pp. 220-230; A. TOMMASI DI VIGNANO, *In margine alla sentenza della Corte costituzionale del 27 dicembre 1973, n. 183*, in Rivista di diritto europeo, 1974, pp. 18-30; R. MENGOZZI, *Un orientamento radicalmente nuovo in tema di rapporti tra diritto italiano e diritto comunitario*, in Rivista di diritto internazionale, 1974, pp. 708-729; R. MONACO, *La costituzionalità dei regolamenti comunitari*, in Il Foro italiano, parte I, 1974, pp. 314-324; M. CARTABIA, *Principi inviolabili e integrazione europea*, *cit.*, p. 102 et seq.; F.P. RUGGERI LADERCHI, *Report on Italy*, *cit.*, pp. 162-164.

[155] Judgment no. 183 of 1973 of the Italian Constitutional Court, §7 *Conclusions on points of law*. An English translation of the decision is provided in A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, pp. 629-642.

"*On the basis of Article 11, limitations of sovereignty have been allowed solely for the attainment of the goals indicated therein; and it must therefore be ruled out that those limitations concretely delineated in the Treaty of Rome* […] *may in any case entail for the organs of the Community an inadmissible power to violate the fundamental principles of our constitutional order or the inalienable rights of the human person*"[156].

Consequently, in the unlikely event that a treaty provision "should ever be given such an aberrant interpretation", the ICC claimed jurisdiction to check the enduring compatibility of the treaty with the core values and principles of the constitutional system[157]. In sum, *Frontini* warned that in any case of infringement of the aforesaid counter-limits the internal act ratifying the treaty (at least in the part that enforces European law within the national legal framework) would have to be invalidated by the *Corte costituzionale*, which means Italy could no longer be a member of the Community. In so doing, the Court seemed to draw a distinction between two kinds of norms within the national Constitution: "ordinary" constitutional norms, which remain fully subject to the primacy of European law, and other constitutional norms which enshrine the core of constitutional identity, such as inalienable human rights[158], thereby not allowing any derogation whatsoever[159].
According to *Frontini*'s reasoning, whenever provisions of Community regulations clashed with domestic statutes national judges were bound, thus, to make a reference to the ICC due to the possible violation of Article 11 of the Constitution. Such centralized judicial review of municipal legislation in relation to European law came

[156] See Judgment no. 183 of 1973, §9 *Conclusions on points of law*.
[157] *Ibidem*: "*it is obvious that if ever* [a treaty provision] *had to be given such an aberrant interpretation, in such a case the guarantee would always be assured that this Court would control the continuing compatibility of the Treaty with the above-mentioned fundamental principles. But it should be excluded that this Court can control individual regulations, given that Article 134 of the Constitution relates solely to the review of constitutionality of statutes and acts having statutory force of the state and of the regions, and Community regulations, in the present context, are not such*".
[158] In commenting ICC's decision in *Frontini*, Marta Cartabia observed that not only the inalienable rights of man but also fundamental principles of organizational character – such as the principle of democracy – fall within the inviolable values of the national constitutional order. Indeed, the Author noted that the ICC's reasoning in the case of *Frontini* focused mostly on fundamental principles rather than on Constitution's inviolable rights. See M. CARTABIA, *Principi inviolabili e integrazione europea*, *cit.*, p. 106.
[159] This distinction was emphasized in M. BERRI, *Legittimità della normative comunitaria*, in Giurisprudenza italiana, sez. 1, 1974, pp. 513-518.

into a collision course, though, with the diffuse judicial review the ECJ established shortly after in *Simmenthal*, which conferred on each lower court the power to set aside national rules and directly apply conflicting European legislation. A significant step towards the position of the Luxembourg Court and, most crucially, towards the principle of primacy of EU law and the *Simmenthal* doctrine, was taken by the ICC in Judgment no. 170 of 1984 (*Granital*)[160]. In fact, this decision overruled ICC's earlier case law, by asserting that Community regulations

"*must always be applied, whether they precede or follow the ordinary laws incompatible with them. National judges responsible for the application of such regulations may have recourse to the procedure for obtaining a preliminary ruling on questions of interpretation under Article 177* [now Article 267 of the TFEU] *of the Treaty*"[161].

More precisely, whilst remaining faithful to its dualist conception of the relationship between the two legal systems[162], in *Granital* the ICC explained that

"*the effect of a Community regulation is not that of annulling, in the proper meaning of that term, an incompatible internal norm, but rather of preventing that norm from being applied for the resolution of the controversy before the national court. It is in any case necessary to distinguish the phenomenon in question from abrogation or any other form of extinction or derogation* […] *For the very reason of the separation between the two legal orders, the primacy of regulations enacted by the Community means that municipal law does not interfere in the sphere covered by such*

[160] For a comment on this judgment, which we will also come back to *infra*, in Chapter III, section 3, see G. GAJA, *Constitutional Court (Italy), Decision No. 170 of 8 June 1984, S.p.a. Granital v. Amministrazione delle Finanze dello Stato*, in Common Market Law Review, Vol. 21, Issue 4, 1984, pp. 756–772; R. PETRICCIONE, *Italy: Supremacy of Community Law over National Law*, in European Law Review, Vol. 11, Issue 4, 1986, pp. 320-327; A. TIZZANO, *La Corte costituzionale e il diritto comunitario*, in Il Foro italiano, 1984, pp. 2063-2074; M. CARTABIA, *Principi inviolabili e integrazione europea*, *cit.*, p. 102 et seq.; F.P. RUGGERI LADERCHI, *Report on Italy*, *cit.*, pp. 164-166.

[161] Judgment no. 170 of 1984 of the Italian Constitutional Court, §6 *Conclusions on points of law*. See A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, pp. 643-652.

[162] As a matter of fact, in *Granital*'s rationale the ICC firmly reiterated that "the Community and national legal orders, whilst remaining distinct and independent, must necessarily be coordinated as required by the Treaty of Rome".

regulations and that domain is governed entirely by Community law […] *Outside of the substantive and temporal field of application of those Community rules, national legislation preserves its force and continue to produce legal effects*"[163].

In spite of granting to ordinary judges such power not to apply domestic legislation contradicting Community law[164], the ICC eventually retained some authority in residual circumstances, reserving to itself the power to check that the limits of national sovereignty – i.e. either the fundamental rights or the basic principles of the municipal legal order – were not overstepped under Article 11 of the Constitution[165]. It may be argued, therefore, that in *Granital* the ICC attained a "practical concordance"[166] with the same conclusions reached by the ECJ's case law, albeit the still different theoretical premises the two courts relied upon[167] and, besides, without having to give up the counter-limits doctrine.
Later, Judgment no. 232 of 1989 (*Fragd*)[168] redefined the counter-limits as the competence of the ICC to verify, by examining the constitutionality of the executing laws, whether or not a norm of the Treaty, as interpreted and applied by the institutions and organs of the Community, contravened either the fundamental principles of the Italian Constitution or the inalienable rights of the human person[169].

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[163] Judgment no. 170 of 1984 of the Italian Constitutional Court, §5 *Conclusions on points of law*.
[164] As to this point, the ICC made clear that "*ordinary courts are also empowered to review the compatibility of Community regulations even with the provisions of subsequently enacted municipal law, and even though a specific judicial body, such as the Constitutional Court, has special responsibility for controlling the constitutionality of laws. This is also the case of the German legal order, although for reasons somewhat different from those explained above*". *Ibi*, §6 *Conclusions on points of law*.
[165] *Ibi*, §7 *Conclusions on points of law*.
[166] V. BARSOTTI, P. CAROZZA, M. CARTABIA, A. SIMONCINI, *Italian Constitutional Justice in Global Context*, *cit.*, p. 214.
[167] *Ibidem*, it was observed that ECJ's case law was still based on a monist principle whereas the ICC still adhered to a dualist doctrine.
[168] Among the many comments on this decision, see G. GAJA, *New Developments in a Continuing Story: the Relationship between EEC law and Italian law*, in Common Market Law Review, Vol. 27, Issue 1, 1990, pp. 83-95; H.G. SCHERMERS, *The Scale in Balance. National Constitutional Courts v. The Court of Justice*, in Common Market Law Review, Vol. 27, Issue 1, 1990, pp. 97-105; M. CARTABIA *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community*, in Michigan Journal of International Law, Vol. 12, Issue 1, 1990, p. 180 et seq.; ID., *Nuovi sviluppi nelle competenze comunitarie della Corte costituzionale*, in Giur. cost., 1989, pp. 1012-1023; L. DANIELE, *Costituzione italiana ed efficiacia nel tempo delle sentenze della Corte di giustizia comunitaria*, in Il Foro italiano, 1990, pp. 1855-1860.
[169] Judgment no. 232 of 1989 of the Italian Constitutional Court, §3.1 *Conclusions on points of law*. For an English translation of this ruling, see A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, pp. 653-662.

As the legal scholarship has pointed out, such statement virtually shifted the scope of ICC's review of compliance with the fundamental core of the Constitution from the laws implementing Community norms to any act or provision of European law[170]. In the same direction, the ICC specified that the uniform application of Community law as well as the certainty of law could not be invoked in the presence of a possible violation of a fundamental principle of the Constitution[171]. Taking everything into account, *Fragd* judgment envisaged the enforcement of the counter-limits as a scenario being "*utterly unlikely, but still not impossible*"[172]. And indeed such prediction turned out to be correct, since the counter-limits doctrine, with the sole exception of the recent *Taricco* saga[173], has never been applied in any case involving EU legislation brought to the attention of the ICC.[174]

2.3.2. Germany: an acceptance made in Karlsruhe

The approach of the Italian *Corte costituzionale* to the relationship between the national and the European legal orders highlights a number of analogies with the attitude adopted, in the same decades, by the German Federal Constitutional Court

[170] See, in particular, A. ANZON DEMMIG, *I Tribunali costituzionali nell'era di Maastricht*, in A. PACE (a cura di), *Studi in onore di Leopoldo Elia*, *cit.*, p. 93 and M. CARTABIA, *Principi inviolabili e integrazione europea*, *cit.*, p. 114. In the same vein, G. GAJA, *New Developments in a Continuing Story: the Relationship between EEC law and Italian law*, *cit.*, p. 95, observed that "*Unlike Frontini, the Fragd decision shows that the Constitutional Court is willing to test the consistency of individual rules of Community law with the fundamental principles for the protection of human rights that are contained in the Italian Constitution. This significantly widens the way for the exercise by the Constitutional Court of a control which has hitherto been only theoretical* […]". Consequently, M. CARTABIA *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community*, *cit.*, p. 189 underlined that ICC's *Fragd* decision illustrated a trend towards the "constitutionalization" of Community norms.

[171] Judgment no. 232 of 1989 of the Italian Constitutional Court, §4.2 *Conclusions on points of law*.

[172] *Ibi*, §3.1 *Conclusions on points of law*.

[173] See *infra*, Chapter II, section 4.

[174] To be more precise, outside the scope of EU law the ICC applied the counter-limits doctrine in Judgment no. 238 of 2014 in order to temper the international customary rule of State immunity in a case related to the damages that had been claimed by the victims of the Nazi regime, involving gross violations of international humanitarian law. An English translation of this judgment is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf. Among the plenty of comments on the case in question, see E. CANNIZZARO, *Jurisdictional Immunities and Judicial Protection: the Decision of the Italian Constitutional Court No. 238 of 2014*, in Rivista di Diritto Internazionale, No. 1, 2015, pp. 126-134; P. FARAGUNA, *Corte costituzionale contro Corte internazionale di giustizia: i controlimiti in azione*, in www.forumcostituzionale.it, 2 novembre 2014; T. GROPPI, *La Corte costituzionale e la storia profetica. Considerazioni a margine della sentenza n. 238/2014 della Corte costituzionale italiana*, in www.giurcost.org, 9 gennaio 2015; R. BIN, *L'adattamento dell'ordinamento italiano al diritto internazionale non scritto dopo la sent. 238/2014*, in www.forumcostituzionale.it, 11 gennaio 2016.

(*Bundesverfassungsgericht,* hereinafter BVerfG)[175]. Such parallelism has its roots, first of all, in the comparison between the Italian and the German constitutions. At the early stages of the European Communities, the German constitutional legislature, in tune with its Italian counterpart, did not overtly address the issue of European integration. As a matter of fact, Article 24(1) and Article 25 of the 1949 Basic Law of Germany – in a similar way to Article 10[176] and to the abovementioned Article 11 of the Italian Constitution – merely formulate the automatic adaptation of federal law to general rules of international law[177] and allow the transfer of sovereign powers (*Hoheitsrechte*), by means of an act of Parliament, to international organizations[178]. Apart from the similarities that characterize such provisions, the commonality between Italy and Germany was facilitated by the presence, at the heart of both legal systems, of a centralized constitutional court opting for a dualist paradigm[179].

Such adherence to dualism came to the fore when, dismissing the constitutional complaints on the consistency of two EEC regulations with the fundamental rights under the Basic Law of the Federal Republic of Germany, the Karlsruhe judges described Community law and municipal law of the Member States as "two internal legal orders which are distinct and different from each other" as early as 1967[180]. By reason of this clear demarcation line between national and supranational legal systems, the BVerfG concluded that it lacked jurisdiction to review the exercise of

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[175] I. FEUSTEL, *Diritto comunitario e diritto interno nella giurisprudenza italiana e tedesca*, in Rivista di diritto europeo, 1976, pp. 187-226.

[176] According to Article 10(1) of the Italian Constitution, "the Italian legal system shall conform to the generally recognised principles of international law".

[177] As concerns the primacy of international law, Article 25(1) of the German Basic Law stipulates that "The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the in-habitants of the federal territory".

[178] Yet, as was underlined above, it should be borne in mind that, in contrast to Article 24 of the German Basic Law, Article 11 of the Italian Constitution consents only to "limitations" (rather than "transfers") of national sovereignty.

[179] As is well-known, in contrast to the monist doctrine advocated by Hans Kelsen, dualism was elaborated in Germany by Heinrich Triepel and in the Italian legal scholarship by Dionisio Anzilotti and Santi Romano.

[180] Case No. 1 BvR 248/63 and 216/67 of the German *Bundesverfassungsgericht*, 18 October 1967, §2: "*The legal provisions enacted by the Community institutions, within the framework of their competence, derive from the Treaty* […] *which forms its own legal order which is part of neither public international law nor the national law of the Member States. Community law and the municipal law of the Member States 'are two internal legal orders which are distinct and different from each other'*…". See A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, pp. 410-414.

the sovereign powers ceded to the Community pursuant to Article 24(1) of the Basic Law[181].

Nonetheless, unlike the smooth reception of the principle of direct effect deriving from the ECJ's *Van Gend en Loos* jurisprudence, a degree of ambiguity continued to surround the acceptance of the doctrine of the *primauté*[182]. The priority of European law over subsequent ordinary legislation was unequivocally endorsed at first in the 1971 *Lütticke* judgment, where the BVerfG invested lower courts with the competence to set aside those domestic statutes found incompatible with a provision of Community law[183]. Later on, the decision known as *Solange I* ("so long as") of 1974 addressed the still unresolved issue of whether there were constitutional limits to the primacy of European law[184]. Following the obtaining of ECJ's preliminary ruling in *Internationale Handelsgesellschaft*, which had asserted the ultimate priority of Community law over the national constitutions of the Member States, a German administrative tribunal requested a judgment of the BVerfG as to whether such interpretation given by the Luxembourg Court was to be deemed binding even in the hypothetical event of a violation of one of the fundamental rights of the *Grundgesetz*.

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[181] At the end of its judicial reasoning the BVerfG held that "*This decision is limited to the finding that the Federal Constitutional Court cannot be seized directly with constitutional complaint proceedings directed against regulations of the Council and the Commission of the European Communities. No ruling is given here regarding the question of whether the Federal Constitutional Court, within the framework of proceedings properly instituted before it, could examine the compatibility of Community law with the provisions of the Basic Law setting out fundamental rights. Neither is any decision taken here with regard to the question of to what extent such a function could be undertaken by this Court* […]".

[182] In this regard, K. ALTER, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, *cit.*, p. 80 argued that the aforesaid BVerfG's ruling of 1967 had not established the supremacy of European law in Germany.

[183] Case No. 2 BvR 225/69 of the German *Bundesverfassungsgericht*, 9 June 1971, §3: "[…] *The Federal Constitutional Court is not competent to answer the question of whether a norm of ordinary municipal law is incompatible with a provision of European Community law invested with priority. The settlement of such a conflict of norms is a matter left to the courts with competence over the trial proceedings. Within the framework of the exercise of this competence it was for the Federal Fiscal Court* […] *to ensure in this particular case that Article 95 of the EEC Treaty would be given direct effect for individual citizens and that priority would be given to this provision over conflicting provisions of national law*". See A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, pp. 415-419. For a commentary on this case, see K. ALTER, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, *cit.*, pp. 80-87.

[184] Case No. 2 BvL 52/71 of the German *Bundesverfassungsgericht*, 29 May 1974. See A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, pp. 440-452.

After repeating its settled idea of independence of the two legal spheres[185] and stressing that the case at hand was limited to a clash between rules of secondary Community law and the guarantees of fundamental rights in the Constitution[186], the Court took the view that "*only the Bundesverfassungsgericht is entitled, within the framework of the powers granted to it by the Constitution, to protect fundamental rights guaranteed in the Constitution. No other court can deprive it of this duty imposed by constitutional law*"[187].

That being so, the BVerfG drew the conclusion that, in exceptional cases, Community law was not permitted to prevail over entrenched constitutional law[188]. The transfer of sovereign rights to the EEC had to be understood in the overall context of the whole Constitution. That is, it did not open the way to amending the essential structure of the Constitution, which formed the basis of its identity, and the reservation under Article 24 of the *Grundgesetz* applied "*so long as* (*Solange*) *the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided by a parliament of settled validity, which is adequate in comparison to the catalogue of fundamental rights contained in the Constitution*"[189].

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[185] *Bundesverfassungsgericht*, Case No. 2 BvL 52/71 of 29 May 1974, §20: "*The European Court of Justice cannot with binding effect rule on whether a rule of Community law is compatible with the Constitution, nor can the Bundesverfassungsgericht rule on whether, and with what implications, a rule of secondary Community law is compatible with primary Community law"*. In the same vein, at §26 the BVerfG added that "*the European Court of Justice, in accordance with the Treaty rules on jurisdiction, has jurisdiction to rule on the legal validity of the norms of Community law* […] *and on their construction. It does not, however, decide incidental questions of national law of the Federal Republic of Germany (or in any other member-State) with binding force for this State. Statements in the reasoning of its judgments that a particular aspect of a Community norms accords or is compatible in its substance with a constitutional rule of national law – here, with a guarantee of fundamental rights in the Constitution – constitute non-binding obiter dicta*".

[186] *Ibi*, §18.

[187] *Ibi*, §29: "*Thus, accordingly, in so far as citizens of the Federal Republic of Germany have a claim to judicial protection of their fundamental rights guaranteed in the Constitution, their status cannot suffer any impairment merely because they are directly affected by legal acts of authorities or courts of the Federal Republic of Germany which are based on Community law. Otherwise, a perceptible gap in judicial protection might arise precisely for the most elementary status rights of the citizen*".

[188] *Ibi*, § 21 and §24, where the Court held that "*provisionally, therefore, in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Constitution […] the guarantee of fundamental rights in the Constitution prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism*".

[189] *Ibi*, §35. In this regard, at §23 of the same ruling the BVerfG argued that "[…] *the present state of integration of the Community is of crucial importance. The Community still lacks a democratically elected legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level;*

Along the lines of the ICC's contemporary jurisprudence, in *Solange I* the BVerfG then asserted its competence to review derived Community law, by construing the protection of fundamental rights guaranteed in the Constitution as a counter-limit to the limitations of national sovereignty. Besides, the German justices, far more manifestly than their Italian counterparts, opened up the counter-limits narrative to the concept of constitutional identity, which will later find room throughout the case law of other national constitutional courts, including the French *Conseil Constitutionnel* since the 2004 Constitutional Treaty judgment cited above. Finally, Karlsruhe retained the last word on striking a balance between European law primacy and constitutional identity: in the situation of an alleged contrast between Community norms and the national Constitution, domestic courts would always first have to refer a matter to the ECJ before asking the BVerfG, if need be, whether the secondary EU act as interpreted by the ECJ is compatible with the fundamental rights in the *Grundgesetz*[190].

Yet, three out of the Court's eight judges considered the decision taken by the majority in *Solange I* as an inadmissible trespass on the jurisdiction reserved to the ECJ, the recognition of which was dictated by Article 24(1) of the Constitution[191]. Incidentally, in order to buttress their legal argument the dissenting judges quoted the 1973 judgment *Frontini* of the *Corte costituzionale*, which had ruled out that regulations of Community law were subject to review for their compatibility with Italian constitutional law. Taking into account such dissenting opinion as well as the

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it still lacks a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Constitution and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights generally binding in the Community is adequate in the long term measured by the standard of the Constitution with regard to fundamental rights (without prejudice to possible amendments) in such a way that there is no exceeding the limitation indicated, set by Article 24 of the Constitution. As long as this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to the fundamental rights, is not achieved in the course of the further integration of the Community, the reservation derived from Article 24 of the Constitution applies. What is involved is, therefore, a legal difficulty arising exclusively from the Community's continuing integration process, which is still in flux and which will end with the present transitional phase".

[190] *Ibi*, §27.

[191] According to §65 of the dissenting opinion, "*this trespass creates a special status for the Federal Republic of Germany and exposes it to the justified reproach of violating the EEC Treaty and jeopardising the legal system of the Community*". For the relevant part of the dissenting opinion by Judges Rupp, Hirsch and Wand, see A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, pp. 452-460.

many political and doctrinal calls for a reversal of *Solange I*[192], twelve years later the BVerfG tempered its position on the relationship between national constitutional law and European law.

In judgment *Solange II* of 1986, the Court at first insisted that it would not relinquish its reservation of a check on secondary European legislation with a fundamental rights standard equivalent to that of the Basic Law[193]. The transfer of public authority to international institutions, it reaffirmed, was not without constitutional limits: Article 24 of the Constitution did not confer a power to give up the identity of the constitutional order by breaking into its basic framework, that is, into the structures which made it up[194]. Here, it is noteworthy that, for the first time, the BVerfG supported its own standpoint making a reference to the comparable stance taken by a foreign constitutional jurisprudence. To this purpose it is not by chance that, in light of the foregoing, the Court evoked the "similar limits" set under the Italian Constitution and the case law of the Italian *Corte costituzionale*[195].

However, following a thorough assessment of the fundamental rights protection being developed at the European level – and, especially, in the then ECJ's jurisprudence – since 1974[196], the BVerfG held that it would no longer exercise its jurisdiction to decide on the applicability of derived Community law, and would no

[192] On the criticisms raised against judgment *Solange I*, see K. ALTER, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, *cit.*, pp. 91-93.

[193] *Bundesverfassungsgericht*, *Wünsche Handelsgesellschaft* (*Solange II*), Case No. 2 BvR 197/83 of 22 October 1986. The English text of the judgment is provided for in A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, pp. 461-495. For a commentary on this decision see, *ex pluribus*, J. FROWEIN, *Solange II, (BVerfGE 73, 339) Constitutional complaint Firma W*, in Common Market Law Review, Vol. 25, Issue 1, 1988, pp. 201-206; M. CLAES, *National Courts' Mandate in the European Constitution*, *cit.*, pp. 601-602; J. KOKOTT, Report on Germany, in A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds.), *The European Court and National Courts - Doctrine and Jurisprudence. Legal Change in its Social Context*, *cit.*, pp. 89-91; ID., German Constitutional Jurisprudence and European Integration, in European Public Law, Vol. 2, Issue 2, 1996, pp. 249-251; K. ALTER, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, *cit.*, pp. 95-98; M. HARTWIG, *La Corte costituzionale tedesca e il diritto comunitario*, in Quaderni costituzionali, No. 2, 1987, pp. 417-426.

[194] *Bundesverfassungsgericht*, *Solange II*, 22 October 1986, §32.

[195] *Ibi*, note 34. In this regard, the BVerfG expressly recalled the contribution by A. LA PERGOLA, P. DEL DUCA, *Community Law and the Italian Constitution*, in American Journal of International Law, Vol. 79, Issue 3, 1985, pp. 598-621.

[196] In particular, the BVerfG's reasoning pointed to the 1974 ECJ's judgment in the *Nold* case – which had added international treaties to the common constitutional traditions of the Member States as a source of inspiration for fundamental rights protection – and to the accession of all the then Member States of the Community to the European Convention of Human Rights.

longer review such legislation by the standard of the fundamental rights contained in the Constitution

"*so long as the European Communities, and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights* […] *which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights*"[197].

This cutting-edge presumption of conformity, which had no equivalent in the case law of the national constitutional courts in other founding Member States, can be perceived, on the one hand, as the sign of a practical rapprochement between the positions of the BVerfG and the ECJ[198]. On the other hand it appears that, while taking a step back, the German Federal Constitutional Court still sought to preserve its role as a final arbiter on the fundamental rights issue, similarly to the attitude of the ICC in *Frontini* and *Granital*. In fact, the BVerfG did not surrender its authority to step in again, whenever the ECJ may sink below the standard of basic rights protection guaranteed in the national Constitution[199].

The formula originally laid out in *Solange II* was by and large upheld in the subsequent 1993 *Maastricht-Urteil* and 2000 *Bananenmarkt* decisions of the BVerfG. In its fundamental rights section, the *Maastricht* judgment on the constitutionality of the law ratifying the Treaty on the European Union confirmed that the German Court will not intervene as long as Community law generally

[197] *Bundesverfassungsgericht*, *Solange II*, 22 October 1986, §48. Accordingly, the Court concluded that such requests for preliminary ruling under Art. 100 para. 1 of the Basic Law were consequently inadmissible.

[198] In this vein, Juliane Kokott defined *Solange II* as the "highest point of harmony and convergence" between the German Federal Constitutional Court and the ECJ. See J. KOKOTT, *Report on Germany*, in A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds.), *The European Court and National Courts - Doctrine and Jurisprudence. Legal Change in its Social Context*, *cit.*, p. 90.

[199] M. CLAES, *National Courts' Mandate in the European Constitution*, *cit.*, p. 602. Remarkably, in contrast to most observers, Karen Alter interpreted the two *Solange* decisions as a victory for the BVerfG, since it reinforced the Karlsruhe claim that the German constitution was supreme to European law and, thus, reinforced the BVerfG's own authority to review the compatibility of European law with the constitution. Moreover, the Author argued that, in requiring national courts to first send challenges to the validity of European law to the ECJ, the BVerfG stopped the practice of some lower courts to rule autonomously on the validity of European law. See K. ALTER, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, *cit.*, pp. 96-98.

provides for an equivalent fundamental rights protection[200]. In the meantime, the same passage of the German *Maastricht* ruling may be read in a close analogy with the shift the ICC had promoted in *Fragd*[201], inasmuch as the BVerfG, invoking a "cooperative relationship" with the ECJ, seemed to extend indirectly its judicial review – being restricted, until then, to internal measures of German authorities that implemented Community law – to each and every act of secondary European law which would infringe on the fundamental rights enshrined in the Basic Law[202].

Nevertheless, the decision that put an end in 2000 to the so-called "banana litigation"[203] induced most commentators to believe that, notwithstanding its reserve of jurisdiction in the *Maastricht* judgment, the German Court was "all bark and no

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[200] *Bundesverfassungsgericht*, *Brunner and others v. The European Union Treaty* (*Maastricht Treaty*), Case Nos. 2 BvR 2134 and 2159/92 of 12 October 1993, §B.2(b): "*The Federal Costitutional Court guarantees* […] *that persons resident in Germany are assured in general of effective protection of basic rights, even in relation to sovereign powers of the Communities, and that this protection is essentially to be regarded as substantively equivalent to the protection of basic rights laid down as inalienable by the Basic Law, especially as the Court guarantees in general the substance of the basic rights*". See A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, pp. 526-575.

[201] This parallelism between the approach of the BVerfG and of the ICC respectively in *Maastricht* and *Fragd* decisions is also suggested in A. ANZON DEMMIG, *I Tribunali costituzionali nell'era di Maastricht*, in A. PACE (a cura di), *Studi in onore di Leopoldo Elia*, *cit.*, p. 105. Similarly, Marta Cartabia had emphasized the divergences that may be detected between, on the one side, the ICC's position in *Fragd* and, on the other side, the statement of principle contained in *Solange II* of 1986. See M. CARTABIA *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community*, *cit.*, pp. 198-199, in particular note 66.

[202] *Bundesverfassungsgericht*, *Maastricht Treaty* decision of 12 October 1993, §B.2(b): "*The Federal Costitutional Court thus also safeguards that substance vis-à-vis the sovereign power of the Community* […] *The acts of a special public authority of a supranational organization, which is separate from the State auhtoirty of the Member States, also concern those entitled to basic rights in Germany. They thus affect the guarantees contained in the Basic Law and the tasks of the Federal Constitutional Court which have as their object the protection of basic rights in Germany and, to that extent, not only in relation to German State organs of State* […] *However, the Federal Costitutional Court exercises its jurisdiction over the applicability of secondary Community law in Germany in a "relationship of cooperation" with the European Court of Justice. The European Court of Justice guarantees the protection of basic rights in each individual case for the entire territory of the European Communities and the Federal Constitutional Court is therefore able to confine itself to providing a general guarantee of the unalterable standard of basic rights* […]". As to this passage of the *Maastricht* decision, K. ALTER, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, *cit.*, p. 106, argued that the judgment at issue "seemingly reversed the Constitutional Court's *Solange II* position that it would not exercise its right to review whether or not European law violated German basic rights, as long as the ECJ was sufficiently protecting these rights". See also J. KOKOTT, *Report on Germany*, in A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds.), *The European Court and National Courts - Doctrine and Jurisprudence. Legal Change in its Social Context*, *cit.*, p. 81 et seq.; M. CARTABIA, *Principi inviolabili e integrazione europea*, *cit.*, pp. 128-130.

[203] *Bundesverfassungsgericht*, *Banana Market Organization Constitutionality III (Atlanta)*, Case No. 2 BvL 1/97 of 7 June 2000. The English text of the decision is provided for in A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 2, *cit.*, pp. 270-285.

bite"[204]. As a matter of fact, in accordance with its earlier statement of principle in *Solange II*[205], the BVerfG declared a constitutional reference to be inadmissible, because the referring court had failed to prove that the present evolution of European law, including the case law of the ECJ, fell below the minimum threshold of fundamental rights protection unconditionally required by the German Constitution[206].

3. Sowing the seeds of horizontal interplay: towards a convergent perspective?

The parallel analysis of the reactions by the national constitutional (and, in certain national legal orders, supreme) courts of the founding Member States during the initial decades of the European integration process allows to draw some comparative remarks. As we have seen, the reception of the primacy doctrine fashioned by the ECJ since the 1960s onwards was no doubt one of the thorniest issues that all national legal frameworks and, particularly, their own constitutional jurisdictions were confronted with. In this regard, in their replies to the jurisprudence of the ECJ the highest national courts' case law disclosed the internal side of what has been defined as the "bi-dimensional character" of EU law primacy[207]. With the only exceptions of two systems staunchly devoted to monism such as the Netherlands and Luxembourg, which aligned in full with the "absolute" notion of *primauté* espoused by the ECJ, it is no surprise that the highest national courts operating in the other original Six advocated the conditionality of supranational integration, thereby narrowing the scope of the primacy of Community law.

Alongside the distinctive case of Belgium, where the priority of European law has been a cause for disagreement among the *Cour d'arbitrage* and the other highest

[204] This expression appeared in C.U. SCHMIDT, *All Bark and No Bite: Notes on the Federal Constitutional Court's 'Banana Decision'*, in European Law Journal, Vol. 7, Issue 1, pp. 95-113.

[205] Incidentally, at §3.2 of the order at issue the BVerfG held that the referring court's assumption that there was a conflict between the decisions in *Solange II* and *Maastricht* had no sound basis.

[206] Among the various commentaries on the BVerfG's judgment of 7 June 2000, see also A. PETERS, *The Bananas Decision (2000) of the German Federal Constitutional Court: Towards Reconciliation with the ECJ as regards Fundamental Rights Protection in Europe*, in German Yearbook of International Law, Vol. 43, 2000, pp. 276-282; M. AZIZ, *Sovereignty Lost, Sovereignty Regained? The European Integration Project and the Bundesverfassungsgericht*, Robert Schuman Centre Working Paper, EUI, No. 2001/31; K. ALTER, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, *cit.*, pp. 110-117.

[207] *Supra*, notes 61-62.

national courts, a substantial convergence around similar positions can be observed as concerns the acceptance of the *primauté* in Italy, Germany and France. Indeed, the *Corte costituzionale*, the *Bundesverfassungsgericht* and, at a later time, the *Conseil Constitutionnel* recognized quite easily the principle of direct effect and, after a phase of initial distrust, acknowledged the prevalence of Community law over ordinary statutes of municipal law. In this respect, the conceptual foundation for the acceptance of such primacy was generally provided for by the national constitutions, rather than by the *communautaire* reasoning of the ECJ. Though, when being faced with a conflict between provisions of Community law and domestic provisions of constitutional rank, the constitutional jurisprudence in the Italian, German and French legal systems ended up denying, at least theoretically, to give internal application to those European norms that would bring about the encroachment of certain constitutional guarantees.

In a comparative perspective, the ICC and the BVerfG were the first constitutional courts to raise counter-limits doctrines as an insurmountable barrier to the limitations of national sovereignty that result from the membership of Italy and Germany to the Community. In their recalled "European" pathways over the 1970s and the 1980s, both the Italian and the German constitutional courts focused on the narrative of fundamental principles and, in particular, fundamental rights protection in order to resist ECJ's unconditional view of EU law primacy. As it has been said, such analogies between the attitude of the Italian and of the German case law lie upon a set of common theoretical premises[208]. Firstly, the incorporation into the respective national constitutions of specific clauses which consented to limitations of sovereignty in favour of international organizations; secondly, the existence in both legal orders of a centralized constitutional court being endowed with *ex post* judicial review of domestic legislation; furthermore, the agreement of these two courts on a dualist approach, at odds with the long-standing monist tradition of the ECJ, to the relationship between national and supranational legal systems; lastly, the identification of a series of pivotal principles – including, notably, fundamental rights protection – whose content is to be held essentially inviolable.

[208] These similarities were also emphasized in M. CARTABIA, *Principi inviolabili e integrazione europea*, *cit.*, pp. 122-123 and A. ANZON DEMMIG, *I Tribunali costituzionali nell'era di Maastricht*, in A. PACE (a cura di), *Studi in onore di Leopoldo Elia*, *cit.*, pp. 102-103.

Taking the cue from such key commonalities, the Italian and the German constitutional courts, albeit via different routes, gradually overcame their initial reticence towards the primacy of EU law and, as a consequence, the implications of the *Simmenthal* doctrine carved out by the ECJ's jurisprudence. At the same time, it can be argued that the judicial restraint witnessed, on parallel tracks, by the landmark *Granital* and *Solange* rulings was constantly counterbalanced, though, by the restatement of the ICC's and the BVerfG's role as ultimate guardians of their national constitutional orders against any potential "invasion" stemming from the primacy and the direct effect of European law. It seems, therefore, that in Italy and Germany the examined constitutional case law carried out simultaneously a complex operation of judicial bargaining: opening up, on the one side, to the European integration while ensuring, on the other side, that the last word – and, thus, the centrality – of constitutional courts themselves is not undermined.

In this sense, the ICC's and the BVerfG's convergent approach to the *primauté* can be interpreted as a firm reaction on the part of two authoritative centralized courts *vis-à-vis* the risk of being sidestepped by the system of decentralized enforcement of EU law and, particularly, by the power conferred upon lower courts to dis-apply rules of national legislation. This ground-breaking connection between the ICC and the BVerfG becomes even more evident in the light of the overt cross-references that the dissenting opinion in *Solange I* of 1974 and, subsequently, the decision *Solange II* of 1986 made to the *controlimiti* doctrine of the Italian *Corte costituzionale*. Interestingly, this cross-fertilization between the ICC and the BVerfG, although still an episodic one at that period, showed the explicit recourse to a new strategy in the paradigm of European integration: the quotation of foreign constitutional jurisprudence, with the ultimate goal to support its own legal reasoning.

This novel interaction at horizontal level, being triggered at first by the BVerfG to further enhance its counter-limits doctrine in the long-distance interplay with Luxembourg, paved the way to a domino effect that will have involved a variety of national constitutions – and, especially, national constitutional courts – of the younger Member States of the European Union. As a matter of fact, the case law of a significant number of highest national courts, following the example of their Italian and German peers, set boundaries to the ECJ's unconditional and uncompromising

understanding of EU law primacy. This ever-growing migration of counter-limits theories across the jurisprudence of national constitutional courts has shown, as will be observed, the increasing tendency to the use of the comparative legal reasoning as a supportive technique in their vertical interplay with the European Court of Justice. In this context, it has been noted that, in the initial steps of "acceptance" of European integration, the horizontal connectedness between national constitutional courts was mostly entrenched in the issue of fundamental rights protection. Indeed, the circulation of this primary line of constitutional resistance against the ECJ's absolute primacy claims will also be confirmed with the advancement of the integration process and the related enlargement of the European Union to new Member States. Yet, in parallel with the narrative of fundamental rights protection, in the following key steps of "acceptance" – namely the ratification of the Maastricht, the Constitutional and the Lisbon treaties – the case law of national constitutional courts will develop and move along further lines of constitutional resistance against the possible encroachment of national sovereignty, such as the *ultra vires* review and the safeguard of constitutional identity.

Chapter II

A second narrative: the domino effect on the counter-limits use

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1. Ireland: aborting absolute primacy?

After comparing the reactions of the constitutional courts in the original Member States of the European Communities to the principle of *primauté* as fashioned by the ECJ, it is now possible to verify whether – and, if that is the case, to what extent – any profile of commonality may also be detected within the jurisprudence of the highest national courts of some of the younger Member States on the matter of European integration. In this regard, the first example that can be taken into account is the case of the Republic of Ireland, which joined the European Communities in 1973 along with Denmark – which we will come back to later in the course of the present chapter – and the United Kingdom.

In 1972, the Third Amendment to the Constitution Act was adopted in view of the forthcoming accession of Ireland to the European Communities. As a result of such amendment, the new Article 29.4.3 (to date numbered Article 29.4.7) of the Irish Constitution authorised the ratification of the then Communities Treaties[209]; further, it literally stipulated that "*no provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevent laws enacted, acts done or measures adopted by the European Union or by the*

[209] In this respect, Article 29.4.3 of the Irish Constitution explicitly declared that "*the State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957)*".

Communities or by the institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State".

What one can infer from this provision as amended in the early 1970s is, therefore, the assertion of immunity from constitutional review: Community law took precedence over all municipal law, including the national Constitution[210]. In this respect, the reading of Article 29.4.7 suggests the full compliance of the Irish Constitution with the stance adopted by the ECJ in its relevant case law and, particularly, in the aforementioned ruling *Internationale Handelsgesellschaft*. Indeed, this understanding was confirmed by the 1983 *Campus Oil* judgment[211], in which the Irish Supreme Court expressly acknowledged that, by virtue of Article 29.4.7 of the Constitution, even national constitutional provisions must yield to the primacy of Community law[212]. However, the first signs of potential inconsistencies between Dublin and Luxembourg concerning the limitations of national sovereignty arose as early as 1987 in *Crotty v. An Taoiseach*[213]. In addressing the issue of the constitutional validity of certain provisions of the 1986 Single European Act, in

[210] G. HOGAN, *Ireland and the European Union: Constitutional Law and Practice*, in A.E. KELLERMANN et al. (eds.), *EU Enlargement: The Constitutional Impact at EU and at National Level*, The Hague, Asser Press, 2001, p. 89 et seq.

[211] Irish Supreme Court, *Campus Oil Ltd v. Minister for Industry and Energy*, 17 June 1983. See A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, p. 627, note 1.

[212] It is worth reminding that both the High Court and the Supreme Court (this latter not being a centralized constitutional court in the Kelsenian meaning) are endowed with the competence to carry out the constitutional review of legislation in the Irish legal framework. For an in-depth analysis of the Irish system of constitutional justice and the role played therein by the Supreme Court of Ireland, see C. FASONE, *The Supreme Court of Ireland and the Use of Foreign Precedents: the Value of Constitutional History*, in T. GROPPI, M.C. PONTHERAU (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, Hart Publishing, 2014, pp. 107-115.

[213] Irish Supreme Court, *Crotty v. An Taoiseach and Others*, 18 February and 9 April 1987. In particular, the plaintiff had claimed that the Single European Act contained provisions going beyond the original scope and objectives of the European Communities, thereby exceeding Article 29.4.3 of the Constitution, and had sought an injunction preventing Ireland from ratifying the treaty. The text of the decision at issue is provided for in A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, pp. 594-627. For a commentary on this case see, among others, F. MURPHY, A. CRAS, *L'Affaire Crotty: La Cour supreme d'Irlande rejette l'Acte Unique Européen*, in Cahiers de Droit Européen, Vol. 24, No. 3, 1988, pp. 276-305; J. TEMPLE LANG, *The Irish Court Case Which Delayed the Single European Act: Crotty v. an Taoiseach and Others*, in Common Market Law Review, Vol. 24, Issue 4, 1987, pp. 709-718; R. KEANE, *Reconciling Ireland's Sovereignty with Membership of the European Union – the Lessons of Crotty and Pringle*, in K. BRADLEY et al. (eds.), *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly*, Oxford, Hart Publishing, 2014, pp. 196-212.

Crotty the Supreme Court held that the Irish Constitution needed to be amended by referendum in order to allow the Government to ratify the treaty[214].

Shortly thereafter, a ground-breaking conflict between, on the one side, freedom to provide services under Article 60 of the EEC Treaty and, on the other side, right to life of the unborn protected by Article 40.3.3 of the Constitution, came to the fore in the famous case *Grogan*[215]. Faced with this collision between primary Community law and, as is well-known, one of the most sensitive subjects in Irish constitutional law such as the law on abortion, the Supreme Court made clear that Article 29.4.7 may not ensure the priority of Community rules whenever the fundamental rights guaranteed by the Constitution are deemed to be under threat. Accordingly, in an *obiter dictum* Justice Walsh of the Supreme Court argued that "*any answer to the reference from the Court of Justice will have to be considered in the light of our own constitutional provisions. In the last analysis only this Court can decide finally what are the effects of the interaction of the Eight Amendment* [Article 40.3.3] *and the Third Amendment* [Article 29.4.7]"; hence, he explicitly added that "*it cannot be one of the objectives of the European Communities that a Member State should be obliged to set at nought the constitutional guarantees for the protection within the State of a fundamental human right*".

In front of this firm position taken by the Supreme Court, the 1991 preliminary ruling of the ECJ in *Grogan* carefully avoided, though, to enter into direct struggle with the Irish justices. While holding that medical termination of pregnancy did constitute a service within the meaning of Article 60 of the EEC Treaty, the ECJ found that it had no jurisdiction as regards national statutes which, such as in the current case, fall outside the scope of Community law[216]. Besides, Protocol No. 17 annexed to the

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[214] In this regard, the majority of the Irish Supreme Court held that Article 29.4.3 of the Constitution "*must be construed as an authorisation given to the State* […] *also to join in amendments of the Treaties so long as such amendments do not alter the essential scope or objectives of the Communities*". On this point, see Irish Supreme Court, *Crotty v. An Taoiseach and Others*, 18 February and 9 April 1987, §767. Notably, the ratification of the following Treaties of Maastricht, Amsterdam and Nice were all subject to referenda which, pursuant to Article 46 of the Irish Constitution, enacted constitutional amendments.

[215] Irish Supreme Court, *Society for the Protection of Unborn Children (Ireland) Ltd v. Grogan*, 19 December 1989. See G. HOGAN, *Ireland and the European Union: Constitutional Law and Practice*, in A.E. KELLERMANN et al. (eds.), *EU Enlargement: The Constitutional Impact at EU and at National Level*, *cit.*, p. 90 et seq.

[216] Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and Others* [1991] ECR I-4685. For an analysis of this judgment see, *ex pluribus*, D.R. PHELAN, *Right to Life of The Unborn v. Promotion of Trade in Services: The European Court of Justice and the*

Maastricht Treaty did avert the risk of any interference between Community law and Irish legislation on abortion. As a matter of fact, the so-called "*Grogan* Protocol" overtly reassured the Irish courts that "nothing in the TEU, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3. of the Constitution"[217].

Against this backdrop, albeit the lack of any apparent cross-reference to foreign jurisprudence, it seems that the attitude of the Irish Supreme Court toward the principle of primacy of European law showed some similarities with the approach shared by national constitutional courts within the Communities' original Member States. First of all, in contrast to the judicial reasoning of the ECJ, the conceptual foundation for the Irish reception of the *primauté* rested upon the domestic constitution, and not upon the inherent nature of European law as such. This is all the more true if one considers that, unlike the other national constitutional charters taken into account hitherto, Article 29.4.7 of the Irish Constitution accords prevalence to Community law over any rule of Irish law whatsoever, including provisions of constitutional rank. Secondly, it is by no means in question the fact that the Irish Supreme Court accepted the primacy of European law. Yet, as some commentators have observed, it did so "on its own terms"[218], that is to say on the conditions laid down in the Irish Constitution, which ultimately falls under the interpretative monopoly of the Supreme Court itself.

Normative Shaping of the European Union, in Modern Law Review, Vol. 55, Issue 5, 1992, pp.670-689 and C.M. COLVIN, *Irish Abortion Law and the Free Movement of Services in the European Community*, in Fordham International Law Journal, Vol. 15, Issue 2, 1991, pp. 476-526.

[217] On Protocol No. 17, which was later renewed and attached to the Lisbon Treaty, see G. HOGAN, A. WHELAN, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, London, Sweet & Maxwell, 1995, Chapter 9, *Renvoi in Reverse? Protocol No. 17 to the Maastricht Treaty*.

[218] This expression is taken from J. TEMPLE LANG, *The Widening Scope of Community Law*, in D. CURTIN, D. O'KEEFFE (eds.), *Constitutional Adjudication in European Community and national law. Essays for the Hon. Mr. Justice TF O'Higgins*, Dublin, Butterworth, 1992, p. 229 et seq. In particular, the Author stressed that the Irish courts may limit the effects of Article 29.4.7 of the Constitution and accept on the terms of this latter the effects of Community law "on its own terms". Interestingly, he noted that this approach is at odds with the one adopted in the Netherlands, where Articles 93 and 94 of the Constitution are applied in accordance with the case law of the ECJ and, in particular, the preliminary reference made in the seminal case *Van Gend en Loos* was considered as a question of interpretation of the Dutch Constitution devolved to the Luxembourg Court. In the same vein, see also M. CLAES, *National Courts' Mandate in the European Constitution*, *cit.*, pp. 530-531 and, especially, note 133.

As a consequence it may be argued that, similarly to the path undertaken by their Italian and German counterparts, the Irish judges engaged in an autonomous interpretation of Community law through the lens of the national constitution, in order to assess the compatibility of the former with the latter[219]. In tune with the examined case law of the *Corte costituzionale* and the *Bundesverfassungsgericht*, the outcome of such scrutiny carried out by the Irish Supreme Court was that the primacy of European law – and, thus, the limitation of national sovereignty stemming from the membership of Ireland to the Community – is nonetheless subject to qualifications. Also in the Irish Supreme Court's view, as the case of *Grogan* demonstrated in an exemplary way, regulations of European law shall be eventually set aside in the event they may infringe those core values (i.e. fundamental human rights, such as the right to life of the unborn) which characterize the national constitutional order.

2. A source of inspiration: *Maastricht-Urteil* and its sons

2.1. *Maastricht–Urteil*: a new avenue for constitutional resistance

In addition to the relevant case law of the Supreme Court of Ireland, it appears that the advancing process of European integration and, in parallel, the steady enlargement of the Community further facilitated the "horizontal" circulation of the counter-limits narrative. In fact, reservations to the ECJ's assertion of unconditional *primauté* – and, particularly, counter-limitations to the restrictions that the accession to the Community imposes on national sovereignty – similar to the ones that had been raised, at first, by the ICC and the BVerfG did permeate at a later stage the constitutional jurisprudence of an ever-increasing number of Member States. In this perspective, due attention should primarily be paid to the landmark ruling of the German Federal Constitutional Court on the ratification of the Maastricht Treaty. Indeed, we have already touched upon this decision in the course of the previous chapter when dealing with what has been defined as the first line of "national

[219] F.C. MAYER, *Multilevel Constitutional Jurisdiction*, in A. VON BOGDANDY, J. BAST, *Principles of European Constitutional Law*, *cit.*, p. 417.

constitutional resistance"[220], this latter consisting of fundamental rights protection[221]. Arguably, the BVerfG's Maastricht ruling of 12 October 1993 (*Maastricht–Urteil*) paved the way not only to a "quantitative" but also to a "qualitative" leap – in the meaning that will be elucidated hereinafter – in cross-fertilization among national constitutional (and, in certain legal frameworks, supreme) courts.

Taking a quick step backwards to the background of this judgment, it is worth recalling that the entry into force of the Treaty of Maastricht in Germany affected the system of relationships between the internal and the Community legal orders and, consequently, it influenced the following case law of the BVerfG. In particular, on the occasion of the approval of the Maastricht Treaty, the German constitutional legislator had inserted into the *Grundgesetz* an *ad hoc* provision relating to the phenomenon of European integration. First of all, the new Article 23 of the German Constitution revised the ordinary procedure for the ratification of European treaties, being formerly regulated under Article 24[222]. Moreover, the same article, while affirming Germany's cooperation to the development of the European Union, did explicitly recognize the existence of limitations to the transfer of national sovereignty, in harmony with the long-standing position taken by BVerfG's jurisprudence since *Solange I* onwards[223].

Relying upon such acknowledgment of its orientation in European matters within the *Grundgesetz* and envisaging the danger that an evolutionary interpretation of the new

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[220] This expression is taken from M. KUMM, V. FERRERES COMELLA, *The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union*, in International Journal of Constitutional Law, Vol. 3, Issue 2-3, 2005, p. 474 et seq.

[221] *Bundesverfassungsgericht*, *Brunner and others v. The European Union Treaty* (*Maastricht Treaty*), Case Nos. 2 BvR 2134 and 2159/92 of 12 October 1993. The text of the judgment is provided for in A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, pp. 526-575.

[222] In this regard, see J. KOKOTT, *Report on Germany*, in A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds.), *The European Court and National Courts - Doctrine and Jurisprudence. Legal Change in its Social Context*, *cit.*, p. 79 et seq.

[223] According to the opening paragraph of the new Article 23 of the Basic Law, "*To realize a unified Europe, Germany participates in the development of the European Union which is bound to democratic, rule of law, social, and federal principles as well as the principle of subsidiarity and provides a protection of fundamental rights essentially equivalent to that of this Constitution. The federation can, for this purpose and with the consent of the Senate* [Bundesrat]*, delegate sovereign powers. Article 79 II & III is applicable for the foundation of the European Union as well as for changes in its contractual bases and comparable regulations by which the content of this Constitution is changed or amended or by which such changes or amendments are authorized*". For a commentary on this provision, see I. PERNICE, *Commentary on Article 23*, in H. DREIER (ed.), *Grundgesetz: Kommentar*, Vol. II, Tübingen (Mohr Siebeck), 2006, pp.

treaty could undermine its own competences[224], the Karlsruhe Court grasped the opportunity offered by a complaint against the federal law ratifying the Maastricht Treaty to further extend the scope of its power of constitutional review over the domestic applicability of secondary European law[225]. Needless to say, this is certainly not the place to delve into all the multiple profiles of interest that *Maastricht-Urteil* brought to light, on which much ink has been spilled by the literature[226]. Yet, what is important to put the emphasis on for our present purposes is the twofold avenue of constitutional resistance through which the Court structured its judicial reasoning.

The first part of the decision, which centred on the issue of fundamental rights protection, essentially reiterated the *Solange II* formula that, in the meantime, had been codified in the revised Article 23 of the German Constitution. As we have seen above, this implies that the BVerfG will refrain from exercising its (self-attributed) jurisdiction to decide over the applicability of secondary European law in Germany "so long as" the Union generally assures a level of protection being substantively

[224] See K. ALTER, *The European Court's Political Power: Selected Essays*, *cit.*, p. 105. *Ibidem*, the Author defined *Maastricht-Urteil* as the "BVerfG's most defiant and critical commentary on the ECJ's international legal order".

[225] To be more precise, a German citizen (Dr Brunner) and a number of members of the European Parliament lodged constitutional complaints directed against the legitimacy of the federal law approving the Union Treaty and against the federal law amending the Basic Law so as to enable the Federal Republic to accede to the Maastricht Treaty. In particular, Dr Brunner claimed that the laws in questions violated a number of basic rights and that the new Article 23 of the Basic Law was itself unconstitutional and could not, therefore, provide a legal basis for the transfer of sovereign powers to the European Union. Accordingly, he argued that the transfer of substantial competences under the treaty from the German Parliament to European Community institutions significantly reduced the right that Article 38 of the Basic Law granted to every citizen to democratically legitimated representation in the German *Bundestag* and to participate in the exercise of State authority.

[226] For an in-depth analysis on this judgment see, *ex pluribus*, M. HERDEGEN, *Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union" and Document "Extracts from: Brunner v. The European Union Treaty (Bundesverfassungsgericht)"*, in Common Market Law Review, Vol. 31, Issue 2, 1994, pp. 235–262; K. HAILBRONNER, *The European Union from the Perspective of the German Constitutional Court*, in German Yearbook of International Law, Vol. 37, 1994, p. 93 et seq.; J.H.H. WEILER, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, in European Law Journal, Vol. 1, Issue 3, 1995, pp. 219-258; N. MACCORMICK, *The Maastricht-Urteil: Sovereignty now*, in European Law Journal, Vol. 1, Issue 3, 1995, pp. 259-266; U. EVERLING, *The Maastricht Judgment of the German Federal Constitutional Court and the Significance for the Development of the European Union*, in Yearbook of European Law, Vol. 14, Issue 1, 1994, pp. 1-19; J. KOKOTT, *German Constitutional Jurisprudence and European Integration*, in European Public Law, Vol. 2, Issue 3, 1996, pp. 237-269; M. ZULEGG, *The European Constitution under Constitutional Constraints: the German Scenario*, in European Law Review, Vol. 22, 1997, p. 19 et seq.

equivalent to the one laid down as inalienable by the Basic Law[227]. Alongside this element of substantive continuity with its earlier case law, a major turning point in the Court's rationale can actually be detected in the second part of the *Maastricht-Urteil*, where the focus shifted from the field of fundamental rights protection to the theme of the transfer of national competences to the European Union.

With regard to this second line of reasoning, the BVerfG took the view that Germany is one of the so-called "Masters of the Treaties"[228] and that the validity and applicability of European law depend upon the act of accession[229]. Starting from these assumptions, the Court held that the European Union – being qualified as a an "association of states" (*Staatenverbund*) – is not granted *kompetenz-kompetenz*, namely it has no power to determine its own powers[230]. On the contrary, it is undisputed that the Union does exclusively possess those limited and enumerated competences that the Member States have conferred upon it on the basis of the

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[227] *Bundesverfassungsgericht*, *Maastricht Treaty* decision of 12 October 1993, §B.2(b): "*The openness to European integration enshrined in the Preamble to the Basic Law and governed by Articles 23 and 24 of the Basic Law* […] *does not involve any reduction in the standard of basic rights. The Federal Constitutional Court guarantees, by virtue of its jurisdiction, that persons resident in Germany are assured in general of effective protection of basic rights, even in relation to the sovereign power of the Communities, and that this protection is essentially to be regarded as substantively equivalent to the protection of basic rights laid down as inalienable by the Basic Law* […] *The Federal Constitutional Court exercises its jurisdiction over the applicability of secondary Community law in Germany in a 'relationship of cooperation' with the European Court of Justice. The European Court of Justice guarantees the protection of basic rights in each individual case for the entire territory of the European Communities and he Federal Constitutional Court is therefore able to confine itself to providing a general guarantee of the unalterable standard of basic rights*".

[228] This famous expression had already been used by the BVerfG in Case 2 BvR 687/85 *Kloppenburg,* order of 8 April 1987.

[229] *Bundesverfassungsgericht*, *Maastricht Treaty* decision of 12 October 1993, §C.II.1: "*The Federal Republic of Germany therefore remains, even after the entry into force of the Union Treaty, a member of a union of states whose Community authority derives from the Member States and can have binding effect on German sovereign territory only by virtue of the German implementing order . Germany is one of the "masters of the Treaties", who have based their commitment to be bound by the Union Treaty* […] *The validity and application of European law in Germany depend on the implementing order contained in the Law Approving the Treaty*".

[230] On the issue of *kompetenz-kompetenz* see, more in detail, J. KOKOTT, *Report on Germany*, in A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds.), *The European Court and National Courts - Doctrine and Jurisprudence. Legal Change in its Social Context*, *cit.*, pp. 92-107; ID., *German Constitutional Jurisprudence and European Integration*, *cit.*, p. 252 et seq.; M. CLAES, *National Courts' Mandate in the European Constitution*, *cit.*, pp. 606-610; C.U. SCHMID, *From Pont d'Avignon to Ponte Vecchio: The Resolution of Constitutional Conflicts between the European Union and the Member States through the Principles of Public International Law*, in Yearbook of European Law, Vol. 18, Issue 1, 1998, pp. 415-476; M. KUMM, *Who is the final arbiter of Constitutionality in Europe? Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice*, in Common Market Law Review, Vol. 36, Issue 2, 1999, pp. 351-386.

principle of attribution[231]. It follows that *ultra vires* acts adopted by European institutions or bodies, i.e. acts straying beyond the scope of the powers assigned to them in the treaties, would have no effect within the German legal order[232].

Besides retaining its *Solange*-based competence to check whether secondary European law would be in breach of fundamental principles of the national constitutional order (and, especially, basic rights enshrined in the Constitution), in the *Maastricht-Urteil* the BVerfG went, therefore, a step further: it asserted its right to engage in *ultra vires* review over European legislative acts[233]. In so doing, the Court reserved residual authority to determine whether the enactment of European legal acts would either remain within or, conversely, overstep the boundaries of the sovereign powers that the treaties have transferred to the Union, and, in this latter case, to declare such European measures inapplicable in Germany.

Next to the sphere of respect for fundamental rights, this newly articulated "*ultra vires* lock" amounted, then, to a second area of constitutional counter-limitation to the acceptance of EU law primacy[234]. Seemingly, such binomial of fundamental rights review and *ultra vires* review enabled the Court to carry out what someone has perceptively defined as a "far-reaching indirect control over the application of European law by applying the standard of German constitutional law under the guise

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[231] *Bundesverfassungsgericht*, *Maastricht Treaty* decision of 12 October 1993, §C.II.2: "*The Union Treaty incorporates the principle of specific attribution of powers, which already applied to the European Communities previously* […] *That principle is not called into question by Article F(3) of the TEU, which does not establish any power for the Union to determine its competence (Kompetenz-Kompetenz). The scope for assigning further tasks and powers to the European Union and the European Community is limited by sufficiently specific rules* […] *the European Parliament, the Council, the Commission and the Court of Justice may act only if and in so far as there is a provision in the Treaty which confers competences and powers upon them*".

[232] *Ibi*, §C.II.1: "*If, for instance, European institutions or authorities were to apply or extend the Union Treaty in some way which was no longer covered by the Treaty in the form which constituted the basis of the German law approving it, the resulting legal acts would not be binding on German sovereign territory. The German organs of State would be prevented, on constitutional grounds, from applying those legal acts in Germany. Accordingly, the Federal Constitutional Court examines whether legal acts of the European institutions and bodies keep within or exceed the limits of the sovereign rights granted to them*".

[233] Indeed, claims to exercise *ultra vires* review had already emerged in the earlier BVerfG's jurisprudence and, particularly, in Case 2 BvR 255/69 *Lütticke,* order of 9 June 1971 and in Case 2 BvR 687/85 *Kloppenburg,* order of 8 April 1987. A translation of the two judgments is provided for in A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, pp. 415-419 and pp. 496-519.

[234] P. CRAIG, G. DE BÚRCA, *EU Law: Text, Cases, and Materials*, *cit.*, pp. 282-284. In this regard, the Authors argued that the *Maastricht-Urteil* "warned the EU institutions and the ECJ that Germany's acceptance of the supremacy of EU law was conditional".

of the act of assent to the treaties"[235]. Once again, the approach of the German justices in the case at hand can be read, *mutatis mutandis*, in analogy with the attitude of the Italian *Corte costituzionale* in the aforesaid *Fragd* judgment. As a matter of fact, whilst admitting that the encroachment of the right to democratic participation guaranteed by the *Grundgesetz* could in theory justify a legitimate recourse to the counter-limits, the BVerfG in the last resort defused this bomb and found that the German act approving and giving effect to the Maastricht Treaty was compatible with the Constitution.

Before focusing on the horizontal interplay it triggered across the rest of Europe, it can be specified at the end of the present section, due to the well-rooted proximity of the German and Austrian legal traditions, that the *Maastricht-Urteil* is likely to have influenced the so-called "total revision" of the Constitution of Austria occurred upon the 1995 Austrian accession to the Union[236]. In fact, the formulation of the Federal Constitutional Act of Accession that had been adopted one year earlier did not display such inspiration[237]. Yet, in an explanatory memorandum to the bill, the Austrian legislator referred literally to the limits that the Maastricht decision of the BVerfG had laid down on the European integration process. The explanations the Austrian Government provided for therein highlighted the impact of the Maastricht Treaty, this latter being understood as a substantial change to the Austrian constitutional order[238]. Besides, they explicated that clear *ultra vires* acts of the Communities would be void and may even entitle Austria to withdraw unilaterally

[235] F. MAYER, *Multilevel Constitutional Jurisdiction*, in A. VON BOGDANDY, J. BAST, *Principles of European Constitutional Law*, *cit.*, p. 415. In the same vein, it should be kept in mind also Kirchhof's metaphor according to which the law ratifying the treaty operated as a bridge between the German and the European legal orders and all European measures would have to cross over the bridge to be effective in the national legal order. However, at the end of the bridge there must be a guardian, this latter being the *Bundesverfassungsgericht*. See P. KIRCHHOF, *Diritto comunitario europeo e diritto nazionale: atti del Seminario internazionale: Roma, Palazzo della Consulta, 14-15 luglio 1995*, Milano, Giuffrè, 1997, p. 62.

[236] On the transformation of the Austrian legal system as a consequence of the membership of the European Union, see P. FISCHER, A. LENGAUER, *The Adaptation of the Austrian Legal System Following EU Membership*, in Common Market Law Review, Vol. 37, Issue 3, 2000, pp. 763-795. For an in-depth analysis on this matter, see also the study released by the European Parliament, *National Constitutional Law and European Integration*, *cit.*, p. 141 et seq.

[237] Bundesverfassungsgesetz über den Beitritt Österreichs zur Europäischen Union, No. 744/1994.

[238] The Government Bill stated that EU accession would affect especially the fundamental principles of democracy, rule of law, separation of powers and federalism entailed in the Austrian Constitution.

from the European Union[239]. Hence, the jurisprudence of Austrian courts – including the Constitutional Court (*Verfassungsgerichtshof*)[240] – has smoothly accepted, on the one hand, that European law takes precedence *vis-à-vis* any norm of municipal law, whether of ordinary or of constitutional rank[241]. On the other hand, as part of the legal doctrine has contended, it should not be excluded that this rule may encounter barriers deriving from the *ultra vires* review and the basic principles of the Austrian Federal Constitution as they were modified by the accession[242].

2.1. The counter-limits heading north: the cases of Denmark and Sweden

Apart from the similarities that, as we have seen, emerge in the realm of the counter-limits between Italy and Germany, the judicial reasoning elaborated by the BVerfG in the *Maastricht–Urteil* was to a certain extent borrowed by other highest national courts as well as by foreign constitutional legislatures[243]. The first to follow the example provided for by the BVerfG was the Danish Supreme Court (*Højesteret*) in *Carlson and Others v. Rasmussen* in 1998[244].

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[239] J. KOKOTT, *Report on Germany*, in A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds.), *The European Court and National Courts - Doctrine and Jurisprudence. Legal Change in its Social Context*, *cit.*, p. 130.

[240] See, for instance, decisions no. 15.427/1999, no. 17.065/2003 and no. 19.632/2012 of the Austrian Constitutional Court explicitly mentioned in *National report of the Constitutional Court of the Republic of Austria to the XVIth Congress of the Conference of European Constitutional Courts*, 2014, available at www.vfgh.gv.at/cms/vfgh-kongress/downloads/landesberichte/LB_Autriche_EN.pdf, p. 1.

[241] In this regard, Monica Claes has explained that the reception of European law into the Austrian legal order determined a reception also of the consequences following from membership, such as the principles of direct applicability, direct effect, supremacy and the duty to set aside national provisions in the event of a conflict with EU law. See M. CLAES, *National Courts' Mandate in the European Constitution*, *cit.*, p. 163.

[242] As concerns the academic and jurisprudential debate on the acceptance of – and the potential limitations to – the principle of EU law primacy in Austria, see also P. FISCHER, A. LENGAUER, *The Adaptation of the Austrian Legal System Following EU Membership*, *cit.*, pp. 772-774 and European Parliament, *National Constitutional Law and European Integration*, *cit.*, pp. 150-155.

[243] For a comparative overview, see J. BAQUERO CRUZ, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, in European Law Journal, Vol. 14, Issue 4, 2008, pp. 389-422. According to the Author, the *Maastricht-Urteil* "has been a symbol, a catalyst and an incentive in other Member States". In the same vein, in J. DUTHEIL DE LA ROCHÈRE, I. PERNICE, General Report to FIDE XX Congress 2002 in London, BIICL, London, 2002, p. 31, it was argued that the Maastricht judgment "seems to have been a 'leading' case also for other Member States".

[244] *Højesteret*, Case No. I-361/1997, *Carlson and Others v. Rasmussen*, Judgment of 6 April 1998. The English version of the decision is available in A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 2, *cit.*, pp. 185-192. For a commentary on this judgment see, *ex multis*, K. HOEGH, *The Danish Maastricht Judgment*, in European Law Review, Vol. 24, No. 1, 1999, pp. 80-90; H. RASMUSSEN, *Denmark's Maastricht ratification case:*

In a proceedings brought by several Danish citizens, the Supreme Court was asked to consider whether the implementation in Denmark of the Maastricht Treaty was lawfully enacted pursuant to Article 20 of the Constitution[245] or whether such implementation required an amendment to the Constitution pursuant to Article 88. Primarily, the appellants had pleaded that Article 20(1) of the Constitution allows for the transfer of sovereignty only "to such extent as shall be provided by statute"[246], and that this condition had not been complied with in the treaty. Secondly, they had argued that the delegations of sovereignty were on such a scale and of such a nature that they were inconsistent with the Constitution's premise of a democratic form of government.

In its final ruling on the case[247], the Danish Supreme Court dismissed the claims of the applicants with an apparently more conciliatory tone than that of the BVerfG in the *Maastricht–Urteil*. Notably, the rationale of the *Højesteret* stressed that Danish judges must in principle comply with the primacy of EU law[248] and with the power

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some serious questions about constitutionality, in Journal of European integration, Vol. 21, Issue 1, 1998, pp. 1-35; S. HARCX, H. PALMER OLSEN, *Danish Supreme Court Judgment on Constitutionality of Ratification of European Law Treaty and Right of Danish Court to review Validity of EC Measures*, in American Journal of International Law, Vol. 93, 1999, p. 209 et seq.; P. LACHMANN, *The Treaty of Maastricht vs the Danish Constitution, in Nordic Journal of International Law*, Vol. 67, Issue 3, 1998, pp. 365-368.

[245] Article 20 of the Danish Constitution provides as follows: (1) "Powers vested in the authorities of the Realm under this Constitutional Act may, to such extent as shall be provided by statute, be delegated to international bodies established by mutual agreement with other States for the promotion of international rules of law and cooperation"; (2) "For the enactment of a Law dealing with the above matter, a majority of five-sixths of the members of the *Folketing* (Parliament) shall be required. If this majority is not obtained, but the majority required for the passing of an ordinary Law is obtained, and if the Government maintains its support for the measure, it shall be submitted to the electorate for approval or rejection in accordance with the rules for a referendum laid down in Article 42 of the Constitution".

[246] On the lack of clarity that affects this provision, under which delegations of sovereignty are only allowed "to a specified extent" (*i noermere bestemt omfang*), see H. RASMUSSEN, *Confrontation or Peaceful Co-existence? On the Danish Supreme Court's Maastricht Ratification Judgment*, in O'KEEFE (ed.), *Judicial Review in European Union Law, Liber Amicorum Lord Slynn of Hadley*, The Hague, Kluwer, 2000, p. 382.

[247] The judgment at issue was only the latest step of a long ratification process concerning the Maastricht Treaty in Denmark, which involved two *referenda*: in the first (binding) referendum in 1992 the people voted "no", while the second one resulted, one year later, in a "yes". Remarkably, in a prior judgment delivered in 1996 on the Maastricht Treaty, the Danish Supreme Court had highlighted that "*the accession to the Treaty on European Union implies a transfer of legislative powers in a number of general and important aspects of life, so that it is of vital importance to the Danish population in general*". See *Højesteret*, Case No. 272/1994, Judgment of 12 August 1996, §3 *Conclusions on points of law*.

[248] More generally, it is useful to remind that the obligation of Danish courts to consider international law, including European law, is not explicitly dealt with in the Danish constitution or in Danish

of the Luxembourg Court to test the validity and legality of European legal acts. According to the Supreme Court, this interpretative monopoly of the ECJ implies that Danish courts cannot hold that an EC act is inapplicable in Denmark without the question of its compatibility with the Treaty having first been examined by Luxembourg[249].

However, by virtue of the requirement of specification contained in Article 20(1) of the Constitution and of the Danish courts' authority to review the constitutionality of domestic acts[250], the Supreme Court inferred that national courts cannot be deprived of their right to try questions as to whether a particular EC legal act exceeds the limits for the surrender of sovereignty under the Act of Accession[251]. Consequently, the Supreme Court added that

"*Danish courts must rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that it can be established with the required certainty that an EC act which has been upheld by the European Court of Justice is based on the application of the Treaty which lies beyond the transfer of sovereignty brought about by the Act of Accession*"[252].

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legislation. However, it is commonly understood – as an unwritten principle – that Danish courts are obliged to consider Denmark's obligations under international law when interpreting and applying Danish law. See *National report of the Danish Supreme Court to the XVIth Congress of the Conference of European Constitutional Courts*, available at www.vfgh.gv.at/cms/vfgh-kongress/downloads/landesberichte/KF-Danemark-EN.pdf, p. 1.

[249] Accordingly, the Danish Supreme Court added that "when Danish courts base their decisions on such questions on judgments delivered by the Court of Justice, they act properly within the limits of the transfer of sovereignty". See *Højesteret*, Case No. I-361/1997, *Carlson and Others v. Rasmussen*, Judgment of 6 April 1998, §9.6 *Conclusions on points of law*.

[250] In Denmark, all courts are in theory empowered to review the constitutionality of acts passed by the Parliament. However, comparing judicial review in all five Nordic countries, two Authors have spoken of a "traditional Nordic reluctance to embrace judicial constitutional review". See A. FØLLESDAL, M. WIND, *Introduction: Nordic Reluctance towards Judicial Review under Siege*, in Nordic Journal of Human Rights, Vol. 27, No. 2, 2009, pp. 131-141.

[251] According to the Supreme Court, the expression "to such extent as shall be provided by statute" enshrined in Article 20(1) of the Constitution implies that the competences transferred to the Community must be specified and need to be positively delimited "*partly as regards the field of responsibility and partly as regards the nature of the powers. The delimitation must enable an assessment to be made of the extent of the delegation of sovereignty. The fields of responsibility may be described in broad categories, and there is no requirement for the extent of the delegation of sovereignty to be stated so precisely that there is no room left for discretion or interpretation. The powers delegated may be indicated by means of a reference to a treaty. The requirement for specification in Article 20(1) precludes the possibility that it can be left to the international organization itself to specify its powers*". See *Højesteret*, Case No. I-361/1997, *Carlson and Others v. Rasmussen*, Judgment of 6 April 1998, §9.2 *Conclusions on points of law*.

[252] *Ibi*, §9.6 *Conclusions on points of law*.

In addition to the *ultra vires* review, another key passage of the ruling at issue clarified that the Danish courts retain jurisdiction to control the consistency of European legal acts with the fundamental rights entrenched in the Danish Constitution and, in cases of irreconcilable conflict, to declare such European measures inapplicable in Denmark. In this respect, the *Højesteret* stated that

"*Article 20 does not permit an international organization to be entrusted with the promulgation of legal acts or the making of decisions which are contrary to provisions in the Constitution, including its rights and freedoms*"[253].

Despite the absence of any overt quotation it seems quite evident the willingness of the Danish Supreme Court to follow in the footsteps of the German case law and, especially, of the *Maastricht–Urteil*[254]. In its own Maastricht decision, the *Højesteret* moved along the two avenues for national constitutional resistance already launched by the BVerfG: the *ultra vires* review and – albeit to a lesser extent in the Danish context – the safeguard of constitutionally-guaranteed rights and freedoms. As concerns the first avenue, both the BVerfG and the Danish Supreme Court claimed power to challenge a piece of European legislation on the ground that it is enacted *ultra vires* of the competences transferred to the Community[255]. Though, the Danish Maastricht judgment introduced a significant element of novelty inasmuch as it ruled that any question of consonance with the treaty must first be submitted to Luxembourg, thus granting to the ECJ a right to speak first.

At a closer look, a subtle deviation from earlier foreign jurisprudence may also be noticed in relation to the second domain of resistance. Unlike the other constitutional jurisdictions taken into account so far, the Danish Supreme Court did not point to the sole fundamentals or core principles of the national constitutional order, but made reference to virtually any provision of the Constitution, including the rights and

[253] *Ibi*, §9.2 *Conclusions on points of law*.

[254] In particular, the influence of the *Maastricht Urteil* on the Danish case is emphasized in I. PERNICE, F. MAYER, *La costituzione integrata dell'Europa*, in G. ZAGREBELSKY, *Diritti e Costituzione nell'Unione europea*, Bari, Laterza, 2003, p. 47.

[255] This convergence between the stance of the BVerfG and the Danish Supreme Court is highlighted in M. KUMM, V. FERRERES COMELLA, *The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union*, p. 475.

freedoms embedded therein[256]. The Court appeared then to carve out a very general clause – which encompasses, but is not only confined to, basic rights and freedoms – thereby ensuring a wide room for manoeuvre should it come to the concrete identification and raising of counter-limits.

Without neglecting these peculiarities, what can be deduced from the foregoing is that the Danish Supreme Court, in line with the judicial trend common to most other Member States, did not accept the ECJ's doctrine of absolute and unconditional priority of Community law over municipal law. Similarly to other highest national courts such as the BVerfG, the ICC and the Irish Supreme Court, the *Højesteret* set limitations of a constitutional nature; by doing so, it engaged in autonomous interpretation of Community law under the national constitution. The Court took, therefore, a clear position on the European integration project, with the aim to preserve therein an active role not just for itself but, more broadly, in favour of all Danish judges.

Nonetheless, as it was anticipated at the beginning of the present section, the legacy of the *Maastricht–Urteil* did not only involve the case law of the Danish Supreme Court. Rather, in certain instances the German *Maastricht* decision exerted influence on national legislators too, who revised the text of domestic constitutions so as to incorporate principles akin to the ones previously set forth by the BVerfG. Remaining in the Nordic countries, a prominent example is provided by the Constitution of Sweden, which was specifically amended for the purpose of accession to the European Communities[257]. In particular, Article 5 of Chapter 10 of the Swedish Constitution – which was originally enacted as early as 1965 and is now numbered Article 6 of Chapter 10 – read as follows:

"*Within the framework of European Union cooperation, the Riksdag may transfer decision-making authority which does not affect the basic principles by which Sweden is governed. Such transfer presupposes that protection for rights and*

[256] With regard to this aspect, Monica Claes has pointed out that "no distinction is made among constitutional provisions, as does for instance the *Corte costituzionale* and the *Bundesverfassungsgericht*: none can be infringed by Community law". See M. CLAES, *National Courts' Mandate in the European Constitution*, *cit.*, p. 626.

[257] The Constitution of Sweden (Instrument of Government, *Regeringsformen*) was amended in 1994 in view of EU membership, when a new paragraph dealing with the accession to the EU was inserted into Article 5, and was last revised in 2012.

freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms"[258].

From a comparative viewpoint this provision, which enables the Parliament (*Riksdag*) to confer decision-making powers on the European Union to the extent that the level of rights and freedoms protection corresponds to that afforded under the national constitution and the European Convention on Human Rights, reflected the BVerfG's *Solange* formula as well as the *Maastricht-Urteil*, and their subsequent codification into Article 23 of the *Grundgesetz*[259]. Accordingly, it has been observed that the *Solange* doctrine (and, it may be added, the *Maastricht-Urteil*) forms part of the written constitution of Sweden and constitutes the basis of Swedish membership[260]. Jointly to the "basic principles of the form of government"[261], the protection of fundamental rights and freedoms is then envisaged as a constraint to the acceptance of EU law primacy over national constitutional law and to the (further) cession of sovereignty to the Union[262].

2.2. The counter-limits heading west: the Spanish *Tribunal Constitucional*

[258] For a commentary on this constitutional provision, see U. BERNITZ, *Sweden and the European Union: on Sweden's Implementation and Application of European Law*, in Common Market Law Review, Vol. 38, Issue 4, 2001, p. 910 et seq.

[259] The influence of German constitutional law and jurisprudence on the Swedish Constitution is emphasized, among others, in M. CLAES, *Constitutionalizing Europe at its Source: The 'European Clauses' in the National Constitutions: Evolution and Typology*, in Yearbook of European Law, Vol. 24, Issue 1, 2005, p. 105 and U. BERNITZ, *Sweden and the European Union: on Sweden's Implementation and Application of European Law*, *cit.*, pp. 911-913. This cross-fertilization is also underlined in the study issued by the European Parliament (Policy Department – Citizen's rights and Constitutional Affairs) titled *National Constitutional Law and European Integration*, 2011, available at www.europarl.europa.eu/studies, at p. 26 and at pp. 206-208. In particular, this study of the European Parliament at p. 208, note 28, has defined the "German approach" as a role model for Sweden.

[260] U. BERNITZ, *Sweden and the European Union: on Sweden's Implementation and Application of European Law*, *cit.*, p. 912. In the same vein, F. MAYER, *Multilevel Constitutional Jurisdiction*, in A. VON BOGDANDY, J. BAST, *Principles of European Constitutional Law*, Oxford, Hart Publishing, 2006, p. 325, note 263 highlighted that "in the context of the constitutional reform required by the accession to the EU, the Swedish government wanted to make sure that Swedish courts would have the same powers as far as European law is concerned as the BVerfG".

[261] In this respect, it should be made reference to the provisions of the first chapter of the Constitution of Sweden, this latter being entitled "Basic principles of the form of government".

[262] Nevertheless, a scenario of an open conflict between the constitution and EU law is still regarded as a rather "theoretical possibility" in Sweden. See European Parliament, *National Constitutional Law and European Integration*, *cit.*, p. 207.

Among the national constitutional courts of the younger Member States that have been most heavily influenced by the counter-limits doctrines, one may identify the *Tribunal constitucional* created by the Spanish Constitution of 1978[263]. In this regard, it has been noted that, ever since its very first judgment[264], the Spanish Constitutional Court has taken some inspiration from the experience offered by the case law of the German *Bundesverfassungsgericht* and the Italian *Corte costituzionale*[265]. More generally, as other national constitutional courts have done, the *Tribunal constitucional* (hereinafter STC) recognized the principle of primacy of Community law over municipal law – though with the limit, as will be discussed, of the Spanish Constitution – and embraced the ECJ's *Simmenthal* doctrine, in the wake of the accession of Spain to the European Communities[266].

A first case that serves to illustrate the boundaries the STC has set to the scope of application of the *primauté* can be found in one of its earliest pronouncements in European affairs, i.e. the 1991 *General Electoral System* case[267]. In that circumstance, the *Tribunal* made clear that the binding nature of Community law did not signify that the European norms are endowed with constitutional rank and force. Nor did it imply that an occasional violation of Community norms by Spanish legislative provisions would necessarily entail at the same time the contravention of

[263] The operational setting of the Spanish *Tribunal Constitucional* was done by the Organic Law 2/1979 on the Constitutional Court, of 3 October 1979.

[264] Particularly, the reference goes to the judgment of the Constitutional Court settling how the new Spanish Constitution entry into force on December 1978 affected the legislative acts that had been approved before (STC 4/1981, of 2 February, on 1955 local regime laws).

[265] As it was observed in the *National report of the Constitutional Court of the Kingdom of Spain to the XVIth Congress of the Conference of European Constitutional Courts*, 2014, available at www.vfgh.gv.at/cms/vfgh-kongress/downloads/landesberichte/LB-Espagne-EN.pdf, p. 26. In particular, the reference goes to the judgment of the Constitutional Court settling how the new Spanish Constitution entry into force on December 1978 affected the legislative acts that had been approved before (STC 4/1981, of 2 February, on 1955 local regime laws).

[266] The Spanish membership to the European Communities was authorised by Organic Law No. 10/1985 of 2 August 1985. With regard to the major problems involved by the Spanish accession process, see F. SANTAOLALLA GADEA, S. MATRINEZ LAGE, *Spanish Accession to the European Communities: Legal and Constitutional Implications*, in Common Market Law Review, Vol. 23, Issue 1, 1986, pp. 11-37.

[267] *Tribunal constitucional*, judgment no. 28/91 of 14 February 1991, *General Electoral Law Constitutionality* Case. An English translation of the relevant part of the decision is provided for in A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, pp. 702-706.

Article 93 of the Constitution[268], concerning the granting of powers to international organizations[269]. Likewise, it held that neither the Treaty of Accession to the European Communities nor secondary Community legislation are to be considered as a standard of constitutional review pursuant to Article 96(1) of the Spanish Constitution[270]. As a consequence, the STC characterized the possible incompatibility between a Community measure and a subsequently enacted national norm not as a matter affecting the constitutionality of those provisions but rather purely as a problem of the "selection of the rule to be applied" to an individual case. According to the *Tribunal*, this vague statement meant that the resolution of such conflict

"*is a function of the ordinary jurisdiction* […] *Therefore, a possible infringement of Community legislation cannot turn into a constitutional matter what is essentially a conflict of an infra-constitutional nature, which must be solved within the ordinary courts*"[271].

Along the same lines, the priority of the national constitution over Community law was confirmed by the following Spanish jurisprudence related to the European integration[272] and, principally, by the 1992 Declaration of the STC on the

[268] According to Article 93 of the Spanish Constitution, "By means of an organic law, authorization may be granted for concluding treaties by which the exercise of powers derived from the Constitution shall be vested in an international organization or institution".

[269] In its reasoning, the STC explained that Article 93 "*certainly constitutes the ultimate foundation for the binding nature of Community law, given that its acceptance* […] *is an expression of State sovereignty. It must not be forgotten, however, that this constitutional rule is of an organic-procedural nature and merely regulates the manner of conclusion of specific clauses of international treaties. The determination as to whether such treaties are in conflict with Article 93 is a judgment of constitutionality concerning the formal validity of the provisions in question, from the standpoint of basic norms* […]". See *Tribunal constitucional*, judgment No. 28/91 of 14 February 1991, *General Electoral Law Constitutionality* Case, §4.

[270] Article 96(1) of the Spanish Constitution establishes that "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". According to *Tribunal constitucional*, judgment no. 28/91 of 14 February 1991, *General Electoral Law Constitutionality* Case, §5, "*Article 96(1) merely has the effect, for the provisions of every international treaty, that they are granted passive force in and form part of the internal legal order*".

[271] *Ibidem*.

[272] Notably, the principles laid down in *General Electoral Law Constitutionality* were restated by the STC just a few weeks later in its judgment no. 64/91 of 22 March 1991, *APESCO* Case (see A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, pp. 705-706). In *APESCO*, the STC confirmed that "*The accession of Spain to the European Community has altered neither the yardstick for constitutional validity in constitutional complaint actions nor the character of the Constitutional Court as the final interpreter of the Constitution* […]". By the same token, other relevant decisions delivered in the same years by the

constitutionality of the Maastricht Treaty[273]. In the case at hand, the Spanish Government, pursuant to Article 95(2) of the Spanish Constitution[274], had requested the *Tribunal* to pronounce as to whether or not Article 8B(1) of the new treaty[275] was at variance with Article 13(2) of the Constitution[276]; and, by implication, as to whether a constitutional reform would be required under Article 95(1) of the Constitution. The STC concluded that there was a contradiction between the provisions at stake and, therefore, indicated the need to amend the constitution prior to the ratification of the Treaty of Maastricht[277]. Against this background, more important than the *ratio decidendi* itself was the *obiter dictum* of the Declaration, which addressed the question of the status of Community law within the Spanish legal order[278].

The *Tribunal* pointed out at the outset that it is given, on the one side, the function of supreme interpreter and guarantor of the constitution as a whole and, on the other

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STC were judgment no. 64/1991, of 22 March 1991; judgment no. 79/1992, of 28 May 1992; judgment no. 180/1993 of 31 May 1993; and, as we will see in more depth *infra*, opinion no. 1/1992, of 1 July 1992. For a thorough analysis of this early case law on the issue of European integration see, *ex pluribus*, A. ESTELLA DE NORIEGA, *A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration*, in European Public Law, Vol. 5, Issue 2, 1999, p. 277 et seq. and D.J. LIÑAN NOGUERAS, J. ROLDÁN BARBERO, *The Judicial Application of Community Law in Spain*, in Common Market Law Review, Vol. 30, Issue 6, 1993, pp. 1135-1154.

[273] *Tribunal constitucional*, case no. 1236/92 of 1 July 1992, *Treaty on European Union*. An English translation of the decision is provided for in A. OPPENHEIMER, *The Relationship between European Community Law and National Law: The Cases*, Vol. 1, *cit.*, pp. 712-730.

[274] Article 95 of the Spanish Constitution provides: (1) "The conclusion of an international treaty which contains stipulations contrary to the Constitution shall require a prior constitutional revision"; (2) "The Government or either of the Chambers may request the Constitutional Court to declare whether or not such a contradiction exists".

[275] Article 8B(1) of the treaty of Maastricht read as follows: "Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements to be adopted before 31 December 1994 by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State".

[276] Article 13(2) of the Spanish Constitution stipulates that "only Spanish nationals shall have the rights recognized in Article 23, except for the right to vote in municipal elections which, consistently with the criteria of reciprocity, may be established [for other persons] by treaty or by law".

[277] Immediately after the ruling of the Constitutional Court, the Spanish Government proposed a constitutional amendment, which was approved by the Spanish Parliament and became law on 27 August 1992. Subsequently, a draft law ratifying the Maastricht Treaty was approved by the Spanish Parliament and the Law on Ratification was promulgated on 28 December 1992.

[278] In this sense, see unanimously A. ESTELLA DE NORIEGA, *A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration*, *cit.*, p. 279 and F. CASTILLO DE LA TORRE, *Tribunal Constitucional (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe*, in Common Market Law Review, Vol. 42, Issue 4, 2005, p. 1171.

side, the task of ensuring the reliability and stability of Spanish commitments at the international – and, in particular, at the European – level[279]. After restating this twofold competence, the legal argument of the STC turned to Article 93 of the Constitution, which permits the transfer of the right to exercise constitutional powers, thus involving restrictions of the powers and competences of the Spanish public authorities[280]. The *obiter* warned that this provision cannot be considered, though, as a covert means for circumventing the Spanish Constitution[281]. In order to buttress their reasoning, the Spanish justices held that Article 93 must be reconciled with the wording and meaning of Article 95 of the Constitution. If Article 95, dealing with the conclusion of international treaties, consents to primacy of international law over national laws but not over the constitution, then neither Article 93 can be construed as allowing the European treaties to take precedence over a conflicting norm of the constitution[282].

In contrast to other national constitutional courts, such as the Italian and the German ones, in the above cases the STC did not either claim jurisdiction on acts emanating from Community organs or make any – at least explicit – substantive statement on the eventual existence of counter-limits. However, the abovementioned jurisprudence may have already contained the seeds of the constitutional boundaries that, as we will see, the European integration process could meet in the Spanish legal framework. These "warning signals"[283] that the case law of the STC apparently sent in the early 1990s led commentators to develop a doctrine of a so-called "material

[279] *Tribunal constitucional*, case no. 1236/92 of 1 July 1992, *Treaty on European Union*, Grounds of the judgment, §1.

[280] Or, as the STC recalled, limitation of "sovereign rights", in the expression of the Court of Justice of the European Communities in *Costa v. ENEL*.

[281] And, particularly, the *Tribunal* specified that Article 93 is not a legitimate vehicle for the "implicit or tacit reform" of the Constitution. Nor can the contradiction between the terms of the Treaty and the requirements of the Constitution be considered as a grant of the exercise of powers under Article 93. See *Tribunal constitucional*, case no. 1236/92 of 1 July 1992, *Treaty on European Union*, Grounds of the judgment, §4.

[282] *Ibidem*, the STC held that "the safeguarding function of Article 95 must not be contradicted or diminished by Article 93 of the Constitution". As to this key passage of the *obiter*, it is useful to quote in full A. ESTELLA DE NORIEGA, *A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration*, *cit.*, pp. 279-280: "the hypothesis of *tratato contra constitutionem* is negated by Article 95, and is therefore negated by Article 93 as well. Since the Constitution is supreme over both international and Community law, there are, if the logic of the Constitutional Court is followed to its end, only two possibilities in the face of a contradiction: either the Treaty must be reformed or the Constitution must be reformed. But if the Treaty or the Court are not reformed, then the constitutional provision will take precedence over a contradictory Community norm".

[283] This expression is taken from A. ESTELLA DE NORIEGA, *A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration*, *cit.*, p. 298.

constitutional nucleus"[284]. For the first time, such signals were manifestly spelled out as limitations to the ECJ's absolute understanding of EU law primacy in the Opinion that the *Tribunal* delivered, one decade later, on the constitutionality of the Treaty establishing a Constitution for Europe[285].

The STC intervened shortly after Decision no. 2004-505 DC, in which the *Conseil Constitutionnel*, as has been said, had found that the ratification of the Constitutional Treaty in the French legal order urged a revision of the national constitution[286]. Upon request of the Spanish Government[287], in Opinion no. 1/2004 the *Tribunal* analysed whether there was a potential collision between the new treaty and the Constitution of Spain[288]. Departing from its earlier standpoint in the 1992 *Maastricht* ruling, the

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[284] A. LOPEZ-CASTILLO, *Constitución e Integración: el fundamento constitucional de la integración supranacional europea en España y en la RFA*, Madrid, Centro de Estudios Constitucionales, 1996, pp. 374-398.

[285] *Tribunal constitucional*, Declaration no. 1/2004 of 13 December 2004. The text of the decision and an (unofficial) English version are available on the website of the Spanish Constitutional Court, www.tribunalconstitucional.es. For an analysis of the Declaration see, among others, F. CASTILLO DE LA TORRE, *Tribunal Constitucional (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe*, *cit.*, pp. 1169-1202; R. ALONSO GARCÍA, *The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy*, in German Law Journal, Vol. 6, No. 6, 2005, pp. 1001-1024; C. SCHUTTE, *Tribunal Constitucional on the European Constitution: Declaration of 13 December 2004*, in European Constitutional Law Review, Vol. 1, Issue 2, 2005, pp. 281-292; C. PLAZA, *The Constitution for Europe and the Spanish Constitutional Court*, in European Public Law, Vol. 12, Issue 3, 2006, pp. 353-362; F. DURANTI, *Il Tribunal Constitucional e la nuova Costituzione europea*, in www.forumcostituzionale.it, 5 January 2005.

[286] *Conseil Constitutionnel*, *The Treaty establishing a constitution for Europe*, Decision no. 2004-505 DC, 19 November 2004. In this regard, F. DURANTI, *Il Tribunal Constitucional e la nuova Costituzione europea*, *cit.*, highlighted the analogy between the French and the Spanish systems of constitutional justice, whose constitutional courts are both entrusted the power of prior constitutional review of international treaties. For an analysis of this parallelism between the Spanish and the French systems, see M. FROMONT, *Le contrôle de la constitutionnalité des Traités internationaux en Espagne et en France*, in F. FERNÁNDEZ SEGADO (ed.), *The Spanish Constitution in the European Constitutional Context – La Constitución Española en el Contexto Constitucional Europeo*, Madrid, Dykinson, 2003, p. 943 et seq.

[287] The Constitutional Treaty had first been sent to the State Council to deliver an opinion pursuant to Article 22(1) of the Organic Law of the State Council, which requires that the State Council shall be consulted by the Government on the necessity of the *Cortes Generales* giving its acquiescence before the ratification of any international treaty. In its Opinion of 21 October 2004, the State Council declared that "[…] *the fundamental point in which the Constitutional Treaty might enter in conflict with the Spanish Constitution is* […] *that of supremacy of the Spanish Constitution*". As a consequence, on the basis of Article 95(1) of the Spanish Constitution, the State Council considered it "*adequate and convenient for the Government to ask the STC's opinion on the compatibility of the Constitutional Treaty with the Constitution*".

[288] In particular, the Spanish Government requested the STC to issue a binding declaration on the following matters: (1) the existence or inexistence of a contradiction between the Spanish Constitution and Article I-6 of the Treaty establishing a Constitution for Europe, which enshrined the principle of primacy of EU law; (2) the existence or inexistence of a contradiction between Article 10.2 of the Spanish Constitution – according to which "The principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal

STC first recalled that Article 93 of the Constitution is a basic constitutional means for the integration of Spain into the European Communities[289]. This provision, in addition to the "organic-procedural" nature enunciated in the past case law[290], possesses also a substantive or material dimension: metaphorically, it operates as a "hinge" that opens to the entry of other legislations into the Spanish constitutional system through the transfer of the exercise of competences[291]. Nevertheless, the STC emphasized that such transfer pursuant to Article 93 is subject to unwritten material limitations, consisting of the respect for the sovereignty of the State, of the fundamental constitutional structures, and of the system of core principles and values set forth in the Constitution, among which fundamental rights acquire particular importance[292].

Based on this premise, the Spanish judges – in analogy with the French Decision no. 2004-505 DC – acknowledged that the codification of the principle of primacy into Article I-6 of the Constitutional Treaty marks a line of substantial continuity with the far-reaching jurisprudence of the ECJ. Relying on this line of continuity, the STC explained that, as the Luxembourg case law itself has frequently conceded, the *primauté* does not embody a hierarchical superiority but an "existential requirement" of EU law, in order to achieve in practice direct effect and equal application in all states[293]. This is all the more true in light of Article I-2[294] and Article I-5[295] of the

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Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain" – and Articles II-111 and II-112 of the Constitutional Treaty, which form part of the Charter of Fundamental Rights of the European Union; (3) the sufficiency of Article 93 of the Spanish Constitution with regard to the consent of the State to ratify the Constitutional Treaty or if this provision should be amended; (4) where applicable, the channel of constitutional reform to be followed to adapt the text of the Spanish Constitution to the Constitutional Treaty.

[289] *Tribunal constitucional*, Declaration no. 1/2004 of 13 December 2004, Grounds of the judgment, §2. According to the STC, Article 93 is the "*basic constitutional foundation*" of the integration of other legal orders in that of Spain, the latter being legal orders "*that are meant to co-exist with the internal legal systems, as legal frameworks which are originally autonomous*".

[290] See in particular *Tribunal constitucional*, judgment no. 28/91 of 14 February 1991 and *Tribunal constitucional*, case no. 1236/92 of 1 July 1992, *Treaty on European Union*.

[291] *Tribunal constitucional*, Declaration no. 1/2004 of 13 December 2004, Grounds of the judgment, §2.

[292] According to the STC, such limits were scrupulously respected in the Constitutional Treaty.

[293] *Tribunal constitucional*, Declaration no. 1/2004 of 13 December 2004, Grounds of the judgment, §3.

[294] According to Article I-2 of the Constitutional Treaty, "The Union is based on the values of human dignity, freedom, democracy, equality, State of Law and respect for human rights, including the rights of people belonging to minority groups. Said values are common to the member states in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women".

Constitutional Treaty, which affirmed that the Union shall respect the national identity of the Member States – including their basic constitutional structures – as well as their core values, principles and fundamental rights. Most interestingly, from a broader "horizontal" perspective, Opinion no. 1/2004 made a general reference to former decisions of foreign constitutional courts that had raised reservations against the prevalence of EU law upon their national constitutions[296]. According to the STC, the boundaries defended by those constitutional courts are now reflected in the Constitutional Treaty itself, which has come to accommodate its contents to the demands of the Members States' constitutions[297].

More precisely, from a comparative point of view, two further arguments in Opinion no. 1/2004 bring back to memory the approach of the BVerfG and of other constitutional courts. First, the specification that, pursuant to Article 93 of the Spanish Constitution, the *primauté* refers only to the "exercise" of competences – and thus not to the competences themselves – being delegated to the European Union, whilst sovereignty remains with the State[298]. Second, the theoretical distinction between the concepts of primacy ("*primacía*") and supremacy ("*supremacía*"), which echoes the German distinction between *Anwendungsvorrang* and *Geltungsvorrang*: the former leads to the non-application of any lower regulation that contravenes a superior norm; the latter, in the sense of a hierarchically higher

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[295] Article I-5 of the Constitutional Treaty provided that "The Union shall respect the equality of the member states before the Constitution, together with their national identity, inherent to their political and constitutional structures, and with regard to their local and regional autonomy. It shall respect the essential functions of the State, especially those aimed at guaranteeing their territorial integrity, keeping public order and safeguarding national security".

[296] In this regard, the STC held that "*the lack of such a guarantee, or the lack of its explicit proclamation, justified in previous times the reserve against the primacy of Community legislation over national constitutions by well-known decisions of the constitutional courts of several Member States*". See *Tribunal constitucional*, Declaration no. 1/2004 of 13 December 2004, Grounds of the judgment, §3.

[297] *Ibidem*, the Court stated that "[…] *the limits referred to by the reservations of said constitutional justifications now appear proclaimed in an unequivocal way by the Constitutional Treaty, which has adapted its provisions to the requirements of the constitutions of the Member States. Therefore, the primacy proclaimed in the Constitutional Treaty operates in the context of a legal order which is built upon values common to the constitutions of the states integrated into the Union and their constitutional traditions*".

[298] In this respect, the *Tribunal* pointed out that "[…] *the primacy set forth for the Treaty and its resulting legislation in the questioned Article I-6 is reduced expressly to the exercise of the competences attributed to the European Union. Therefore, primacy does not have a general scope, but one that is related exclusively to the competences of the European Union* […]".

rank, gives rise to the invalidity of conflicting subordinate norms[299]. It follows that the primacy of Union legislation does not deprive the Constitution of its supremacy within the Spanish legal framework. On the contrary, the Spanish Constitution, by virtue of Article 93, has accepted the primacy clause as codified in Article I-6 of the Constitutional Treaty[300].

Subsequently, the *Tribunal* stressed that the principle of primacy of EU law over national law had been pacifically recognized in its previous jurisprudence[301]. Nevertheless, while admitting that there was no contradiction whatsoever between the constitution and the new treaty[302], Opinion no. 1/2004 eventually introduced a crucial *caveat*: in the unlikely case where, in the ulterior dynamics of the European integration, EU law would be irreconcilable with the constitution, "*the guarantee of the sovereignty of the Spanish people and the given supremacy of the Constitution*" could prompt the STC, as a last resort, to tackle the problems which would arise[303]. This clarification, labelled by someone as a "Spanish version of *Solange II*", suggests

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[299] *Tribunal constitucional*, Declaration no. 1/2004 of 13 December 2004, Grounds of the judgment, §4. According to the STC, "*supremacy and primacy are categories which are developed in differentiated orders. The former, in that of the application of valid regulations; the latter, in that of regulatory procedures. Supremacy is based on the superior hierarchical character of a norm and therefore is the source of validity of those below, which, consequently, entails the invalidity of any lower norm which contravenes what is provided for imperatively in the superior norm. On the contrary, primacy is not necessarily based on hierarchy, but on the distinction between the scopes of application of different norms, in principle valid, one or several of which, however, may lead to the non-application of others by virtue of its prevailing application. Supremacy always implies primacy* […] *except in the cases where the superior norm provides, in specific areas, for its own removal or disapplication. The supremacy of the Constitution is therefore compatible with application systems which confer priority to the application of norms of other legal systems insofar as the Constitution provides for it, which is what happens with Article 93*". On this point, see C. GRABENWARTER, *National Constitutional Law Relating to the European Union*, *cit.*, p. 88; C. PLAZA, *The Constitution for Europe and the Spanish Constitutional Court*, *cit.*, p. 358.

[300] *Tribunal constitucional*, Declaration no. 1/2004 of 13 December 2004, Grounds of the judgment, §4.

[301] By way of example, Opinion no. 1/2004 of the *Tribunal* recalled judgments TC 28/1991, of 14 February, FJ 6; STC 64/1991, of 22 March, FJ 4 a; SSTC 130/1995, of 11 September, FJ 4; SSTC 120/1998, of 15 June, FJ 4 and SSTC 58/2004, of 19 April, FJ 10.

[302] However, the ruling was not unanimous, since three dissenting judges of the *Tribunal* argued that there was a collision between the Constitutional Treaty and the Spanish Constitution and, therefore, the ratification of the treaty would need a prior constitutional amendment.

[303] Accordingly, the STC held that "*under current circumstances, such problems are considered inexistent* […] *apart from the fact that the safeguarding of the aforementioned sovereignty is always ultimately assured by Article I-60 of the Treaty, a true counterpoint to its Article I-6, which makes it possible to define, in its real dimension, the primacy declared in the latter article, which may not overcome the exercise of a withdrawal, which remains reserved for the supreme, sovereign will of the Member States*". On this withdrawal clause under Article I-60 of the Constitutional Treaty, see R. ALONSO GARCÍA, *The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy*, *cit.*, pp. 1019-1020.

that the STC accepted a pro-European opening-up of the constitutional text, which shall be maintained as long as Spain and the Union continue to share the same essential principles and values consolidated in the Constitutional Treaty[304].

All in all, it can be argued that the case law of the *Tribunal* and, above all, its Opinion no. 1/2004 have in common a number of similarities with the "European" jurisprudence of other highest national courts considered thus far. Amongst the most significant points of convergence are, as has been said, the openness of the domestic constitution towards the European integration; the constitutional conceptual foundation for acceptance of EU law primacy as well as of the EU institutions' exercise of assigned competences; the smooth reception of EU law primacy upon national infra-constitutional legislation and, conversely, the raising of counter-limitations as to the precedence of EU law over the constitution; the recourse to a safeguard clause that protects those values, principles and fundamental rights deemed as underpinning the Spanish constitutional identity; and, lastly, the reserve of jurisdiction in favour of the STC, which retains ultimate authority in (still) exceptional cases, insofar as there may be "excesses" impinging the constitutional identity itself. Despite some inevitable elements of differentiation, such as a greater self-restraint in comparison to the BVerfG and the Danish Supreme Court as regards the issue of the *ultra vires* review[305], the *Tribunal* has joined, therefore, the ever-growing choir of the counter-limits.

Looking at the Iberian peninsula, another example of the horizontal circulation of the counter-limits narrative seems to be offered by Article 8(4) of the Constitution of

[304] In this sense, see R. ALONSO GARCÍA, *The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy*, *cit.*, p. 1024.

[305] However, Antonio Estella de Noriega observed that the case law of the *Tribunal* might already contain the seeds of an *ultra vires kompetenz-kompetenz* approach. In particular, he argued that the respect for national sovereignty and for the basic structures of the constitution claimed by the STC in Opinion no. 1/2004 could become the pretext for the *Tribunal* to review the extent of EU competences. See A. ESTELLA DE NORIEGA, *A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration*, *cit.*, pp. 293-295 and 299. The dissimilar positions of the Spanish and the German judges on the subject of *kompetenz-kompetenz* were also emphasized by Fernando Castillo de la Torre, who found the claims of the STC's jurisprudence to be more in line (although less explicit) with the case law of the Italian *Corte costituzionale* on the protection of basic constitutional principles and national sovereignty. See F. CASTILLO DE LA TORRE, *Tribunal Constitucional (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe*, *cit.*, p. 1984 and pp. 1994-1996.

Portugal[306]. As a matter of fact, this provision, which was adopted in 2004 in view of the ratification of the Treaty establishing a Constitution for Europe, incorporates the principles of primacy and direct effect of EU law "in the terms defined by Union law", but only "in the exercise of the corresponding competences […], without prejudice to the fundamental principles of the democratic State and the rule of law"[307]. In reaction to the primacy clause enshrined in Article I-6 of the Constitutional Treaty, such written references to the "exercise of the corresponding competences" on the part of the European institutions and the limits imposed thereto appear to evoke the rhetoric of constitutional resistance being fashioned, as we have seen, by other Member States' constitutions and developed by the case law of several national constitutional courts, first and foremost the BVerfG in the *Maastricht-Urteil*[308].

2.4. The counter-limits heading east: the cases of Poland and Hungary

Broadening briefly the horizons of the current analysis to the expansion of the EU's boundaries to Central and Eastern Europe[309], one may well wonder whether – and, if so, to what extent – the counter-limits theories encountered so far in older Member States managed to migrate to the constitutional jurisprudence of countries joining the EU since 2004[310]. Indeed, a part of the literature expected that constitutional courts in

[306] Portugal joined the European Union in 1986 without a constitutional authorisation. This gap was filled only in 1992 when the Portuguese legislator proceeded to a constitutional amendment before ratification of the Treaty of Maastricht.
[307] M. CLAES, *The Europeanisation of National Constitutions in the Constitutionalisation of Europe: Some Observations against the Background of the Constitutional Experience of the EU-15*, *cit.*, particularly p. 26.
[308] J. BAQUERO CRUZ, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, *cit.*, p. 11.
[309] For a thorough analysis of the constitutional implications of the EU enlargement to Central and Eastern Europe, this being a topic falling beyond the scope and the limits of the present research, see *ex multis* A.E. KELLERMANN et al. (eds.), *EU Enlargement: The Constitutional Impact at EU and National Level*, *cit.*; A. ALBI, *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge, Cambridge University Press, 2005; A. LAZOWSKI (ed.), *Brave New World: The Application of EU Law in the New Member States*, The Hague, Asser Press, 2010; O. POLLICINO, *Allargamento dell'Europa a Est e rapporto tra Corti costituzionali e Corti europee: verso una teoria generale dell'impatto interordinamentale del diritto sovranazionale?*, Milano, Giuffrè, 2010.
[310] On the emergence and the development of constitutional justice in Central and Eastern Europe see, among others, H. SCHWARTZ, *The Struggle for Constitutional Justice in Post-Communist Europe*, Chicago, University of Chicago Press, 2000; R. PROCHAZKA, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe*, Budapest, Central European University Press, 2002; W. SADURSKI, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Dordrecht, Springer Scientific, 2005.

younger Members States would be tempted to travel the same path of constitutional resistance undertaken by most of their Western European counterparts against unconditional primacy of EU law[311]. In this view, Wojciech Sadurski has rightly pointed out that the German *Solange* (as well as, we may add, the *Maastricht-Urteil*) narrative was well-suited to find fertile ground in Central and Eastern Europe for two major reasons[312]. First, the tradition of judicial activism and the status of powerful players being typical of these constitutional courts within the national legal frameworks of their respective Member States[313]. This is especially true inasmuch as, quoting the words of Sadurski, "one of the most striking features of the ongoing transitions to democracy in these societies is the spectacular growth in the role and prominence of constitutional courts and tribunals in shaping the new constitutional order"[314]. The second reason why these new-generation constitutional courts would be likely to follow the lead of the German and the Italian archetypes of counter-limitations to EU law rests upon the strong concerns, which characterized most post-communist European States both prior and after accession to the Union, around the preservation of the sovereignty they had long sought and had recently rediscovered in the aftermath of the Soviet Union's collapse[315]. Such considerations have been aptly summarized by Jürgen Habermas, who commented that "in [Central and Eastern European] countries there is noticeably little enthusiasm for the transfer of the recently won rights of sovereignty to European level"[316]. Moreover, alongside the two foregoing grounds for constitutional resistance, a further hurdle for full

[311] In particular, see Z. KÜHN, *The Application of European Law in the New Member States: Several (Early) Predictions*, in German Law Journal, Vol. 6, No. 3, 2005, p. 572.
[312] W. SADURSKI, *"Solange, chapter 3": Constitutional Courts in Central Europe – Democracy – European Union*, in European Law Journal, Vol. 14, Issue 1, 2008, p. 3.
[313] *Ibi*, p. 3. According to the Author, accession to the EU "provided these courts with yet another opportunity to reinforce their own powers […]: they could easily (taking their cue from West European courts, and thus abiding by the "follow the well tried model" type of legitimacy) assert a right to establish and enforce criteria of democracy, rule of law and human rights protection, which would inform the relationship between the European and national constitutional orders. Such a power would further increase their position vis-à-vis the political branches in their countries, by delineating those aspects of the supremacy of European law which they deemed unacceptable, or by dictating the need to carry out constitutional amendments if certain dimensions of supremacy were to be accepted".
[314] W. SADURSKI, *Constitutional Justice, East and West: Introduction*, in W. SADURSKI, *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe, in a Comparative Perspective*, The Hague, Kluwer, 2002, p. 1.
[315] W. SADURSKI, *"Solange, chapter 3": Constitutional Courts in Central Europe – Democracy – European Union*, *cit.*, pp. 3-4.
[316] J. HABERMAS, *So, Why Does Europe Need a Constitution?*, in Robert Schuman Centre Policy Papers, Series on Constitutional Reform of the EU, 2001-02, p. 7.

acceptance of EU law primacy lies in the fact that most constitutional charters in Central and Eastern Europe, unlike the constitutions adopted in the founding Member States of the European Communities, expressly set out the principle that the national constitution is the highest legal source within the domestic legal system[317].
In the context of EU enlargement to the East, the first of the newly-established constitutional courts to engage in a judicial reasoning which bears resemblance to those of its influential peers in older Europe was the Constitutional Tribunal of Poland (*Trybunal Konstytucyjny*, hereinafter TK)[318]. As early as 2004, just one month after accession[319], the first EU-related judgment delivered by the TK showed a positive attitude towards reception and application of European law in Poland. As a matter of fact, this ruling underscored that

"*whilst interpreting legislation in force, account should be taken of the constitutional principle of favourable predisposition towards the process of European integration and the cooperation between States*"[320].

One year later, the Polish justices were called twice to confront with the matter of the relationship between national and European legal orders at a distance of a few days. In the first of these two decisions both rendered in 2005, the TK declared the law transposing the Council Framework Decision on the European Arrest Warrant

[317] A. ALBI, *EU Enlargement and the Constitutions of Central and Eastern Europe*, *cit.*, p. 171. See, by way of example, article 8 of the Polish Constitution, article 77(1) of the Hungarian Constitution, article 7 of the Lithuanian Constitution and article 2(2) of the Slovakian Constitution. *Ibi*, p. 172, the Author added that "the supremacy of constitutions has also been reaffirmed in the case law of the Constitutional Courts across the region".
[318] The Polish Constitutional Tribunal was established in 1985 and began its operations the following year.
[319] The Accession Treaty was signed and approved by Poland and other nine candidate countries in April 2003; later, the treaty was approved by the Polish people in a referendum held in June 2003. For an analysis of the Polish legal order's approximation to EU law, see J. BARCZ, *Membership of Poland in the European Union in the Light of the Constitution of 2 April 1997. Constitutional Act of Integration*, in Polish Yearbook of International Law, Vol. 23, 1997-1998, pp. 21-34; S. BIERNAT, *Constitutional Aspects of Poland's Future Membership in the European Union*, in Archiv des Völkerrechts, Vol. 36, No. 4, 1998, pp. 398-424; W. CZAPLINSKI, *Harmonisation of Laws in the European Community and Approximation of Polish Legislation to Community Law*, in Polish Yearbook of International Law, Vol. 25, 2001, pp. 45-55.
[320] *Trybunal Konstytucyjny*, Judgment K 15/04 of 31 May 2004, §10. An English summary of the decision is available in Trybunal Konstytucyjny, *Selected Rulings of the Polish Constitutional Tribunal Concerning the Law of the European Union (2003-2014)*, in Studia i Materialy Trybunalu Konstytucyinego, Vol. LI, Warsaw, 2014, p. 28 et seq.

(EAW) into Polish legislation to be inconsistent with the national constitution[321], without directly addressing the question of EU law primacy[322]. Two weeks after the delivery of such ruling on the EAW, in a judgment concerning the constitutionality of the Accession Treaty to the EU, the *Trybunal* asserted adamantly that the Polish Constitution enjoys superiority in validity and in application above any other piece of legislation within the territory of the Republic of Poland[323].

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[321] *Trybunal Konstytucyjny*, Judgment P 1/05 of 27 April 2005. An English summary of this ruling is available in Trybunal Konstytucyjny, *Selected Rulings of the Polish Constitutional Tribunal Concerning the Law of the European Union (2003-2014)*, *cit.*, p. 41 et seq. For a comment on this judgment, see D. LECZYKIEWICZ, *Trybunal Konstytucyjny (Polish Constitutional Tribunal), Judgment of 27 April 2005, No. P 1/05*, in Common Market Law Review, Vol. 43, Issue 4, 2006, pp. 1181-1191; A. NUSSBERGER, *Poland: The Constitutional Tribunal on the implementation of the European Arrest Warrant*, in International Journal of Constitutional Law, Vol. 6, Issue 1, 2008, pp. 162-170; A. LAZOWSKI, *Poland: Constitutional Tribunal on the Surrender of Polish Citizens under the European Arrest Warrant. Decision of 27 April 2005*, in European Constitutional Law Review, Vol. 1, Issue 3, 2005, pp. 569-581; K. KOWALIK BANCZYK, *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, in German Law Journal, Vol. 6, No. 10, 2005, pp. 1358-1361; A. LAZOWSKI, A. WENTKOWSKA, *Poland: Constitutional Drama and Business as Usual*, in A. LAZOWSKI (ed.), *Brave New World: The Application of EU Law in the New Member States*, cit., pp. 286-289; A. WYROZUMSKA, *Some Comments on the Judgments of the Polish Constitutional Tribunal on the EU Accession Treaty and on the Implementation of the European Arrest Warrant*, in Polish Yearbook of International Law, Vol. 27, 2004-2005, pp. 7-32; W. SADURSKI, *"Solange, chapter 3": Constitutional Courts in Central Europe – Democracy – European Union*, *cit.*, pp. 23-24. For a comparison between the Polish case and the similar challenges that were faced meanwhile in other Member States (such as Germany, Czech Republic and Cyprus) as regards the transposition of the EAW Framework Decision of 2002, see O. POLLICINO, *European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems*, in German Law Journal, Vol. 9, No. 1, 2008, pp. 1313-1355, specifically at p. 1330 et seq.

[322] Nevertheless, the ruling at hand reiterated Poland's obligations, stemming from its membership of the Union, to implement EU secondary legislation and to interpret domestic law in a manner that is favourable to EU law so as to ensure compliance with this latter. In this respect, Krystyna Kowalik Banczyk underlined that, in its decision of 2005 on the EAW, the *Trybunal* "implicitly accepted the supremacy of EU law over constitutional norms". See K. KOWALIK BANCZYK, *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, *cit.*, p. 1361. Similarly, A. NUSSBERGER, *Poland: The Constitutional Tribunal on the implementation of the European Arrest Warrant*, *cit.*, at p. 166 emphasized that "*the judgment might seem to suggest that the Tribunal denies the supremacy of EU law and is adopting a Euroskeptical position; in fact, the opposite is true.* […] *the judgment, as a whole, indicates the generally pro-European attitude on the part of the Tribunal*".

[323] *Trybunal Konstytucyjny*, Judgment K 18/04 of 11 May 2005. An English version of the decision is available at www.trybunal.gov.pl/en/. For an analysis of this judgment, see K. KOWALIK BANCZYK, *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, *cit.*, pp. 1355-1366; A. LAZOWSKI, *Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May 2005*, in European Constitutional Law Review, Vol. 3, Issue 1, 2007, pp. 148-162; A. LAZOWSKI, A. WENTKOWSKA, *Poland: Constitutional Drama and Business as Usual*, *cit.*, pp. 289-292; W. SADURSKI, *"Solange, chapter 3": Constitutional Courts in Central Europe – Democracy – European Union*, *cit.*, pp. 19-26; S. SILEONI, *La Corte costituzionale polacca, il mandato di arresto europeo e la sentenza sul trattato di adesione all'UE* , in Quaderni Costituzionali, No. 4, 2005, pp. 894-896.

The rationale of the TK started off with the statement that, notwithstanding the silence of the Polish constitutional norms on the membership of the Union and the enforcement of EU law upon accession, the process of European integration finds its legal basis in Article 90 of the Constitution[324]. This provision, on the one hand, opens to the transfer of domestic legal powers to Community (Union) institutions or bodies; on the other hand, it does prohibit the delegation "*of all competences of an organ of state authority or competences determining its substantial scope of activity, or competences concerning the entirety of matters within a certain field*"[325]. The said Article 90 is accompanied by further provisions of the Polish Constitution, which affect (indirectly) European law and its status in the domestic legal order. They may be identified in Article 9, which sets a general rule of compliance with international obligations binding upon Poland[326], and in Article 91 of the Constitution, determining the relationship between national and international law[327]. Taken together, these constitutional clauses imply that norms of primary and secondary EU law take precedence in the event of a conflict with acts of Parliament and executive regulations[328]. However, the ruling on the Accession Treaty was careful to reassure that the membership of the Union – and the ensuing primacy of EU law – did not challenge the supremacy of the constitution within the Polish legal order. The TK noted that the prevalence of EU norms over internal statutes may in no way authorise a transfer of competences to the Union to an extent that would allow to issue legal acts or take decisions in contrast with the Polish Constitution[329]: this latter remains

[324] *Trybunal Konstytucyjny*, Judgment K 18/04 of 11 May 2005, especially at §1 and §7.
[325] In this regard, Article 90(1) of the Polish Constitution provides that "the Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters".
[326] Under Article 9 of the Polish Constitution, "The Republic of Poland shall respect international law binding upon it".
[327] Article 91 of the Constitution stipulates that (1) "After promulgation […] a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the adoption of an act of Parliament; (2) "An international agreement ratified upon prior consent granted by an act of Parliament shall have precedence over an act of Parliament if such an agreement cannot be reconciled with the provision of such an act"; (3) "If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws".
[328] For the sake of completeness, we should also take into account Article 87(1) of the Polish Constitution, which provides that "the sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements and regulations".
[329] In this respect, *Trybunal Konstytucyjny*, Judgment K 18/04 of 11 May 2005, §8 added that "*concomitantly, these provisions do not authorise the delegation of competences to such an extent that it would signify the inability of the Republic of Poland to continue functioning as a sovereign and*

the highest source of law pursuant to Article 8(1) of the Constitution itself[330]. To this end, as we will see in a while, the *Trybunal* bolstered its legal arguments by following in the footsteps of other constitutional and supreme courts.

Once more, therefore, a constitutional tribunal came across the thorny issue of the cohabitation of supremacy of the national constitution and primacy of EU law. As if to reply to this conundrum, the TK first acknowledged the relative autonomy of the domestic and the European legal systems[331]. Still, it may be that these two *per se* autonomous spheres are on a collision course, an irreconcilable inconsistency should arise between a provision of EU law and the Polish Constitution. In such a situation, three possible scenarios may occur: revising the Constitution; changing the EU regulations; or, as a last resort, leaving the Union[332]. When putting forward these viable solutions, the *Trybunal* borrowed from the German constitutional jurisprudence and, more recently, from the Spanish Opinion no. 1/2004 a pragmatic way out: drawing a theoretical distinction between the concepts of "primacy" and "supremacy". Accordingly, the presumption of primacy of EU law and the claim to supremacy of the constitution can peacefully coexist, insofar as they respond to two separate logics[333].

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democratic state". *Ibi*, §11, the Polish judges explained that "*given its supreme legal force (Article 8(1)), the Constitution enjoys precedence of binding force and precedence of application within the territory of the Republic of Poland. The precedence over statutes of the application of international agreements which were ratified on the basis of a statutory authorisation or consent granted (in accordance with Article 90(3)) via the procedure of a nationwide referendum, as guaranteed by Article 91(2) of the Constitution, in no way signifies an analogous precedence of these agreements over the Constitution*".

[330] Article 8 of the Polish Constitution stipulates that (1) "the Constitution shall be the supreme law of the Republic of Poland" and that (2) "the provisions of the Constitution shall apply directly, unless the Constitution provides otherwise".

[331] *Ibi*, §12: "*the concept and model of European law created a new situation, wherein, within each Member State, autonomous legal orders coexist and are simultaneously operative*".

[332] *Ibi*, §§12-13. In particular, the Court made clear that such a collision "*could not be eliminated by means of applying an interpretation which respects the mutual autonomy of European law and national law. Such a collision may in no event be resolved by assuming the supremacy of a Community norm over a constitutional norm. Furthermore, it may not lead to a situation whereby a constitutional norm loses its binding force and is substituted by a Community norm, nor may it lead to an application of the constitutional norm restricted to areas beyond the scope the scope of Community regulation. In such an event the Nation as the sovereign, or a State authority organ authorised by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland's withdrawal from the European Union*".

[333] In this regard, S. SILEONI, *La Corte costituzionale polacca, il mandato di arresto europeo e la sentenza sul trattato di adesione all'UE*, *cit.*, pp. 895-896, highlighted that EU law enjoys primacy according to a logic of "competence" which gives it the last word in the matters it is assigned, while

In its Accession Treaty judgment the *Trybunal* acted, in fact, as a sort of Ianus Bifrons. On the one side, the *obiter dictum* of the TK disclosed an EU-supportive face, showing commitment to the *primauté* – which serves as a guarantor of the effectiveness and uniform application of EU law – and to the *Simmenthal* mandate under the ECJ's jurisprudence[334]. Furthermore, the *obiter* sent out an encouraging signal of direct dialogue between Warsaw and Luxembourg, by leaving the door open for the *Trybunal* to request a preliminary ruling on the validity or content of EU law[335]. On the other side, the judicial reasoning underlying this decision insisted that the EU law primacy and the Euro-friendly interpretation of domestic law meet some kinds of limitations. The first boundary was the establishment of a *Solange*-style principle: the constitutional norms concerning individual rights and freedoms set a minimum protection threshold that the enforcement of EU law cannot either lower or question[336]. A second "warning" mirrored, afterwards, the conceptual pattern of the *Maastricht-Urteil* in terms of *ultra vires* review. In this sense, the TK deduced from the domestic foundation of European law its own power to assess whether or not legislative acts of Union organs have fallen outside the scope of the competences delegated from the Member States to the EU level[337].

Seen from the angle of their horizontal interplay, it cannot be denied that the *Trybunal* and the other highest courts taken into account hitherto have certain commonalities, i.e. the acceptance of the *primauté* as grounded in the national constitution and the acknowledgment of EU law precedence over sub-constitutional statutes, but not over the constitution itself. In a nutshell, the TK aligned to the trend of western courts and tribunals claiming both the guardianship of the rights entrenched in domestic constitutions and the possess of *kompetenz-kompetenz*.

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the supremacy of the constitution is based on a hierarchical criterion that preserves national sovereignty.

[334] Particularly, A. LAZOWSKI, *Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May 2005*, *cit.*, p. 156 observed that, although the Constitution remains the supreme law of the land, the Constitutional Tribunal "showed sympathy for the jurisprudence of the Court of Justice on the supremacy of Community law". On the duty for national courts and tribunals to apply EU law binding upon Poland, see *Trybunal Konstytucyjny*, Judgment K 18/04 of 11 May 2005, §17.

[335] In this respect, the decision at issue made clear that the application of Article 234 of the EC Treaty – concerning the ECJ's jurisdiction to give preliminary rulings – neither constituted a threat nor narrowed the competences of the *Trybunal Konstytucyjny* as determined in Article 188 of the Polish Constitution. *Ibi*, §18.

[336] *Ibi*, §14.

[337] *Ibi*, §15.

Meanwhile, a relevant discrepancy seems to be emerging: unlike most of its foreign peers, the *Trybunal* did not point to a "hard core" of supreme principles or fundamental rights embodying the national constitutional identity. Rather, by analogy with the approach of the French *Conseil Constitutionnel*, the TK referred indistinctly to the supremacy of the constitution as a whole. As a result of these blurry confines of the counter-limits, each and every provision of the Polish Constitution becomes as such an integral part – and a distinguishing feature – of the constitutional identity and, thus, enjoys priority over any primary or secondary source of EU law.

In 2005, shortly after the rulings of the Polish *Trybunal* concerning the EAW and the Accession Treaty, the Hungarian Constitutional Court (*Alkotmánybíróság*, hereinafter HCC) delivered a decision – which will be discussed below – whose arguments resembled the judicial reasoning first displayed by the case law of the BVerfG and then followed by the Polish case law. Before looking into this latter judgment of the HCC, it is worth taking a step back and recall that a constitutional amendment was considered in Hungary as an essential part of the preparation for EU membership[338]. Notably, the Act amending the Constitution passed in December 2002 by the Hungarian Parliament introduced a Europe-clause (Article 2/A), which provided for the explicit transfer of powers to the EU[339]. In 2006, the Constitutional Court defined such Europe-related clause as one that

[338] T. TAKACS, *The Application of EU Law in Hungary: Challenges and Emerging Practices*, in A. LAZOWSKI (ed.), *Brave New World: The Application of EU Law in the New Member States*, *cit.*, pp. 383-385.

[339] In particular, the Act amending the Constitution inserted Article 2/A, which provides as follows: "(1) By virtue of a treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary for the exercise of rights and fulfilment of obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as 'European Union'): these powers may be exercised independently and by way of the institutions of the European Union; (2) The ratification and promulgation of the treaty referred to in subsection (1) shall be subject to a two-thirds majority vote of the Parliament". Additionally, Hungary's accession to the EU was inserted amongst the state's general aims of foreign policy in Article 6(4) of the Constitution, which states that "the Republic of Hungary shall participate in establishing European unity for the accomplishment of freedom, welfare and safety of the European peoples".

"*lays down the conditions and framework for Hungary's membership in the European Union and identifies the position of Community law within the Hungarian system of sources of law*"[340].

Two years later, the HCC reaffirmed that Article 2/A essentially provides for the conditions and framework for membership in the EU and highlighted that, by virtue of this provision

"*the Hungarian Republic may enter an international treaty so as to exercise some of its constitutional powers jointly with other Member States or so that the joint exercise would be conducted by the institutions of the European Union*"[341].

By focusing on the limitations to the exercise of competences by the EU, in the same judgment the Hungarian justices emphasised more specifically that

"*the exercise of competence can only be conducted to the extent which is necessary for the exercise of rights and fulfilment of obligations stemming from membership; and the extent of the jointly exercise-able constitutional competences is limited*"[342].

When it comes to the appraisal of the relationship between Hungarian and EU legal orders, an early decision of 1997 – prior to the accession – illustrated the position of the HCC with regard to the nature and the internal application of EU law, revealing similarities with the attitude of the BVerfG[343]. As a matter of fact, the HCC made direct reference to the reactions stemmed from the case law of other national constitutional court, devoting primary attention to the findings of the Karlsruhe Court. Accordingly, the Hungarian justices recognised the primacy of EU law over infra-constitutional domestic law. In the meantime, the HCC emphasised that EU law is not given such priority against the Hungarian Constitution. Thus, the HCC retained

[340] Constitutional Court Decision 1053/E/2005 AB. See E. VARNAY, A.F. TATHAM, *A New Step on the Long Way – How to Find a proper Place for Community Law in the Hungarian Legal Order?*, in Miskolc Journal of International Law, Vol. 3, No. 4, pp. 76-84.
[341] Constitutional Court Decision 61/B/2005 AB.
[342] *Ibidem*.
[343] Constitutional Court Decision 4/1997 (I.22) ABH 1997.

authority to review international agreements which have become domestic law via incorporation. In this respect, the Hungarian Court pointed to the German case law and especially to the *Maastricht-Urteil*, thus arguing that constitutional courts cannot

"*relinquish fulfilling their function as the guardians of constitutionality, and that function includes every form of executing sovereignty based on the Basic Law; consequently, the Constitutional Court upholds its role with regard to reviewing the transfer of competences to the Community*"[344].

This decision prior to accession underlined that the HCC, aligning to the stance taken by other national constitutional courts, acknowledged the principles of primacy and direct effect of EU law. Nevertheless, following the example of their German counterparts, the Hungarian justices maintained the right to oversee the transfer of competences and the exercise of transferred competences and to measure them against the national constitution. In the same vein, in a decision of 1998 concerning the application of EU law, the HCC indicated its willingness to play the role of the guardian of the national constitution against EU law[345].

As it was specified above, the question regarding the primacy of EU law over national law and the Hungarian Constitution was submitted to the HCC immediately after the accession to the Union. In its ruling of 25 May 2005, the Court scrutinized the constitutionality of an act of Parliament implementing two European regulations[346]. This decision showed once again that the HCC regards itself as the guardian of the constitution. Besides, it seemed to largely identify its role as guardian of national sovereignty, similarly to stance taken by the BVerfG, reserving for itself the authority to constitutionally review certain issues and to set limits on the competences of the ECJ. At the same time, the ruling at hand seems not to avert the

[344] *Ibi*, §§51-52.

[345] J. VOLKAI, *The Application of the Europe Agreement and European Law In Hungary: The Judgment Of An Activist Constitutional Court On Activist Notions*, HARVARD JEAN MONNET WORKING PAPER 8/99, Harvard Law School, 2000; I. Vörös, *The legal doctrine and legal policy aspects of the EU-Accession*, 44 ACTA JURIDICA HUNGARICA (AJH) 141, 2003, especially at pp. 149-151.

[346] A. SAJO, *Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy*, 2 ZEITSCHRIFT FÜR STAATS- UND EUROPAWISSENSCHAFTEN (ZSE) 351, 2004; W. SADURSKI, *"Solange, chapter 3": Constitutional Courts in Central Europe – Democracy – European Union*, *cit.*, p. 10 et seq.

danger that the Constitutional Court might eventually ignore EU law, thus pursuing its task of protecting the national constitution as if the Hungarian accession had never occurred[347].

3. A leap forward in horizontal interplay: the Lisbon saga through a comparative lens

After the Czech *Ústavni Soúd* and the Latvian *Satversmes Tiesa*, the BVerfG was the first constitutional court to rule on the constitutional conformity of the Treaty of Lisbon. In its judgment of 30 June 2009 (*Lissabon-Urteil*), the Karlsruhe judges took a clear stance as to the legal consequences of the new treaty, with special regard to the counter-limits doctrine and the protection of constitutional identity. After retracing in detail the origins of the European legal system and after examining the provisions of the Lisbon Treaty, the BVerfG acknowledged that the further advancement of the EU integration process went beyond the boundaries the German legal order set to the legitimate transfer of competences to the Union; it infringed the principle of democracy; and, lastly, it violated the right of the individual to democratic participation protected under Article 38 of the *Grundgesetz*. Particularly, the Court held that this right, which is expressive of the German constitutional identity, cannot be impinged for any reason whatsoever. While curbing the possible developments of the European integration process, the BVerfG reiterated the internal conceptual foundation of EU law. Notably, the doctrine developed in the *Lissabon-Urteil* found its first application in the 2010 ruling *Honeywell*. In this latter decision the BVerfG followed an argumentative pathway similar to the one adopted by the French *Conseil Constitutionnel* in its Lisbon decision: declaring the unconstitutionality of the domestic law that implemented the treaty, whilst recognizing, at the same time, the primacy and direct effect of EU law.

In its Lisbon II decision, the Czech Constitutional Court (*Ústavni Soúd*, hereinafter CCC) bluntly distanced itself from the judicial reasoning of the BVerfG in the *Lissabon-Urteil*. As a matter of fact, in defiance of the BVerfG, the CCC refused to enumerate the state powers that cannot be transferred to the Union.

[347] Z. KÜHN, *The Application of European Law in the New Member States: Several (Early) Predictions*, *cit.*, p. 574.

However, the Constitutional Court held that it
"*does not consider it possible, in view of the position that it holds in the constitutional system of the Czech Republic, to create such a catalogue of non-transferrable powers and authoritatively determine 'substantive limits to the transfer of powers"*".

Accordingly, the HCC held that:

"*These limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion'* [reference to Lisbon I, para 109]. *Responsibility for these political decisions cannot be transferred to the Constitutional Court*". For this reason, "*interference by the Constitutional Court should come into consideration as ultima ratio*"[348].

Moreover, the *Ústavni Soúd* openly objected to the argument of the BVerfG as regards the issue of the multi-levelled character of representative democracy:

"insofar as [Article 10.1] of the TEU provides that 'The functioning of the Union shall be founded on representative democracy', that does not mean that only processes at the European level should ensure fulfilment of that principle. That article is directed at processes both on the European and the domestic level, not only at the European Parliament, as stated by the German Constitutional Court in point 280 of its decision"[349]

In so doing, the HCC cited the Polish Lisbon decision, which did not follow the BVerfG and emphasized the difference between the Polish and the German constitution. According to the Polish judges, it was "the task of the Polish constitution-maker and legislator to resolve the problem of democratic legitimation of the measures provided for in the Treaty, applied by the competent bodies of the

[348] Czech Constitutional Court, Treaty of Lisbon I, §109.
[349] Czech Constitutional Court, Treaty of Lisbon II, §138, with reference to the opinion of A.G. Poiares Maduro of 26 March 2009, Case C-411/06, *Commission v. Parliament and Council*.

Union"[350]. In this regard, the constitutional courts of the member states share "as a vital part of European constitutional traditions" the general view that the national constitution "is of fundamental significance as it reflects and guarantees the state's sovereignty" and also that "the constitutional judiciary plays a unique role as regards the protection of constitutional identity of the Member States, which at the same time determines the treaty identity of the European Union"[351].

4. The post-Lisbon domino effect

In the aftermath of the entry into force of the Lisbon Treaty, it is possible to identify a series of episodes that have witnessed, over the past few years, a trend of revitalisation of the counter-limits narrative across the case law of a growing number of national constitutional courts. The first example is provided, in this regard, by the Czech Constitutional Court (*Ústavni Soúd*, hereinafter CCC). In the *Holubec* case of 2012, the CCC went so far as to declare *ultra vires* a judgment of the CJEU that had recognized the right of Slovak nationals to receive a supplementary pension payment on the same terms as Czech nationals[352]. While failing to send a preliminary reference to the CJEU, the Czech justices complained that the Luxembourg Court had not heard its view before issuing its preliminary ruling. From a horizontal perspective, it should be noticed that the judgment at issue provided concrete evidence of the authoritativeness of the BVerfG and, specifically, of the cross-border effects of the German case law concerning the relationship between the *Grundgesetz* and EU law. As a matter of fact, more than one paragraph of the *Holubec* judgment

[350] §III.2.6.
[351] §III.3.8.
[352] Czech Constitutional Court, Case C-399/09, *Landtová*, judgment of 31 January 2012. For an analysis of this case, see J. KOMAREK, *Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII*, in European Constitutional Law Review, Vol. 8, Issue 2, 2012, pp. 323-337; R. ZBIRAL, *Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12. – A Legal revolution or negligible episode? Court of Justice decision proclaimed ultra vires*, in Common Market Law Review, Vol. 49, Issue 4, 2012, pp. 1475–1491; M. BOBEK, *Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure*, in European Constitutional Law Review, Vol. 10, Issue, 2014, pp. 54–89; Z. KÜHN, *Ultra Vires Review and the Demise of Constitutional Pluralism: The Czecho-Slovak Pension Saga, and the Dangers of State Courts' Defiance of EU Law*, in Maastricht Journal of European and Comparative Law, Vol. 23, Issue 1, 2016, pp. 185-194; F. VECCHIO, *Oltre il Lissabon urteil: la saga delle "pensioni slovacche" e l'applicazione dell'ultra vires review secondo il giudice costituzionale ceco*, in Rivista della cooperazione giuridica internazionale, Vol. 15, No. 43, pp. 74-77.

expressly recalled the well-known "European" jurisprudence originally developed in Karlsruhe. In particular, the Czech Constitutional Court held that

"*a certain parallel to the decisions by the German Federal Constitutional Court ´Solange I`, ´Solange II`, and ´Maastricht Urteil` can be found in judgment file no. PI US 50/04, defining the fundamental viewpoints for evaluation of the relationship between the Constitution of the Czech Republic and European law*"[353].

Against this backdrop, the CCC eventually concluded that

"*based on the principles explicitly stated by the Constitutional Court in judgment file no. PL US 18/09, we cannot do otherwise than state, in connection with the effects of ECJ judgment of 22 June 2011, C-399/09 on analogous cases, that in that case there were excesses on the part of a European Union body, that a situation occurred in which an act by a European Union body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10A of the Constitution*"[354].

A few years after *Holubec*, the protagonist of the second piece of this post-Lisbon "domino" was the German Federal Constitutional Court. As we have seen in the course of the various steps of European integration, younger constitutional and supreme jurisdictions have not hesitated to follow in the footprints of the German lines of reasoning when dealing with European matters. Nonetheless, it was the other way around when, in 2014, the BVerfG referred to the CJEU the issue as to whether

[353] In this regard, CCC's ruling no. PI US 50/04 had stated that "*there is no doubt that, as a result of the Czech Republic's accession to the EC, or EU, a fundamental change occurred within the Czech legal order, as at the moment the Czech Republic took over into its national law the entire mass of European law. Without dubt, then, just such a shift occurred in the legal environment formed by sub-constitutional legal norms, which necessarily must influence the examination of the entire existing legal order, constitutional principles and maxims included, naturally on the condition that the factors which influence the national legal environment are not, in and of themselves, in conflict with the principle of the democratic law-based state or that the interpretation of these factors may not lead to a threat to the democratic law-based state. Such a shift would come into conflict with Art. 9 par. 2, or Art. 9 par. 3 of the Constitution of the Czech Republic* […] *The current standard within the Community for the protection of fundamental rights cannot give rise to the assumption that this standard for the protection of fundamental rights through the assertion of principles arising therefrom, such as otherwise follows from the above-citedcase-law of the ECJ, is of a lower quality than the protection accorded in the Czech Republic, or that the standard of protection markedly diverges from the standard up till now provided in the domestic setting by the Constitutional Court*".
[354] Czech Constitutional Court, Case C-399/09, *Landtová*, judgment of 31 January 2012, §

the outright monetary transactions (OMT) programme of the European Central Bank was compatible with the EU Treaties[355].

In doing so, the referring court pre-emptively threatened non-compliance with the future ruling of the CJEU in the event Luxembourg would not follow the interpretation provided by Karlsruhe. In this respect, the BVerfG held that "*subject to the interpretation by the Court of Justice of the European Union, the Federal Constitutional Court considers the OMT Decision* [of the European Central Bank] *incompatible*" with various provisions of Union law. Accordingly, should the CJEU's interpretation of the OMT Decision not be in line with the detailed conditions set out in the preliminary reference, the BVerfG would declare the act *ultra vires* and, thus, inapplicable under German constitutional law[356]. Moreover, the BVerfG added that the Decision could violate the constitutional identity of the *Grundgesetz* if it would appear that the budgetary autonomy and the overall budgetary responsibility of the German Parliament were affected by the announcement of the OMT Decision or its implementation[357]. In reply to the judgment delivered by the CJEU in the *Gauweiler* case upheld the validity of the European Central Bank's decision, recalling the conditions laid down in it but disregarding the additional requirements of the BVerfG[358]. In the wake of this ruling, it took the German justices one year (and a new hearing) before they rejected the applications against the OMT Decision[359].

Curiously enough, in its request for preliminary ruling in OMT/Gauweiler, the BVerfG made reference to the decisions of other constitutional courts – namely the Danish *Højesteret*, the Estonian *Riigikohus*, the French *Conseil Constitutionnel*, the Supreme Court of Ireland, the Italian *Corte costituzionale*, the Latvian *Satversmes Tiesa*, the Polish Trybunal *Konstytucyjny*, the Spanish *Tribunal Constitucional* and the Czech *Ústavni Soúd*, as well as Chapter 10 Article 6 of the Swedish Form of Government – in order to support its position that ultra vires and identity review could be found in the constitutional law and jurisprudence of a number of Member

[355] Second Senate of the German Constitutional Court, Order of 14 January 2014.
[356] *Ibi*, §55 and §100.
[357] *Ibi*, §102.
[358] Case C-62/14, *Gauweiler*.
[359] German Constitutional Court, Judgment of 21 June 2016. For a comment, see PAYANDEH, *The OMT Judgment of the German Federal Constitutional Court*, in European Constitutional Law Review, 2017, pp.

States[360]. Such cross-reference by the German justices can be understood as a turning point. As we have seen, the jurisprudence of the Karlsruhe Court has often impacted the case law of several constitutional courts in their relationships with EU law and with the CJEU. In this case, it is the other way around: the BVerfG seems to be willing to increase the acceptance of its decision by borrowing legitimacy from the judgments of its foreign brethren. However, as Monica Claes has perceptively observed, the reason for the reference to foreign sources might go beyond the mere search for comparative inspiration or the borrowing of legitimacy from other courts[361]. According to the Author, the BVerfG aimed to play the role of the "leader of the pack", thus presenting itself "as one among many constitutional and highest courts claiming jurisdiction to protect the constitutional identity and the limits of transferred powers"[362]. In so doing, the BVerfG suggests that it is not just one rebellious court, but that it speaks also for others, with the effect to close ranks vis-à-vis the CJEU.

The protagonist of a third case of resistance in the post-Lisbon scenario was the Supreme Court of Denmark in 2016. In the case at hand, the *Højesteret* sent to the CJEU a preliminary reference asking whether the general principle of non-discrimination on grounds of age precluded Danish legislation which, under some conditions, deprived an employee of certain rights depending on his or her age. In its preliminary ruling, the CJEU explained that EU law precludes such domestic rules and the referring court was bound to interpret the Danish provisions in conformity with EU law; in any event, if consistent interpretation were not possible, Danish courts and tribunals would have had to set them aside[363]. After receiving such ruling, the *Højesteret* found that a consistent interpretation of domestic legislation was not a

[360] Second Senate of the German Constitutional Court, Order of 14 January 2014, §30.

[361] M. CLAES, *The Validity and Primacy of EU Law and the Cooperative Relationship between National Constitutional Courts and the Court of Justice of the European Union*, p. 157.

[362] *Ibidem*.

[363] Case C-441/14, *Dansk Industri (on behalf of Ajos A/S) v. Estate of Karsten Eigil Rasmussen*, Judgment of 19 April 2016. For an analysis of the case, see H. KRUNKE, S. KLINGE, *The Danish Ajos Case: the Missing Case from Maastricht and Lisbon*, in European Papers, Vol. 3, No. 1, 2018, pp. 157-182; E. GUALCO, L. LOURENÇO, *Clash of Titans–General principles of EU law: balancing and horizontal direct effect*, in European Papers, 2016, pp. 643-65; G. ZACCARONI, *Is the horizontal application of general principles ultra vires? Dialogue and conflict between supreme European courts in Dansk Industri*, in www.federalismi.it, 25 April 2018, pp. 1-17; O. POLLICINO, *La Corte di giustizia riconosce l'efficacia diretta orizzontale dei principi generali ma non delle direttive*, in Quaderni Costituzionali, 2016, pp. 597-599.

viable way. Furthermore, the Supreme Court surprisingly went on to state that the Danish act of accession to the European Communities did not empower lower courts and tribunals to give precedence to an unwritten general principle of EU law over conflicting provisions of national law in disputes between private parties. In so doing, the *Højesteret* disrespected the pronouncement of the CJEU and, as a consequence, the right granted by the general principle of non-discrimination under EU law[364]. For the second time it can be observed that, within a few years from the *Holubec* decision of the Czech *Ústavni Soúd*, a national court exercising constitutional jurisdiction openly declined, therefore, to comply with a preliminary ruling, thereby coming into direct collision with the CJEU.

A fourth episode of recent constitutional resistance may be traced back to the famous *Taricco* saga. In a preliminary reference (Order No. 24 of 26 January 2017), the Italian *Corte costituzionale* questioned the interpretation of the principle of legality in criminal law contained in a decision of the CJEU, due to the narrower standard of protection being guaranteed under the Italian Constitution[365]. In its earlier judgment the CJEU had held that Italian criminal courts had to set aside a specific aspect of the domestic rules on the interruption of limitation periods should it lead to impunity in a significant number of cases of serious VAT fraud, thus making the protection of the Union's financial interests *de facto* ineffective[366]. Whilst the legal orders of most

[364] Case 15/2014, *Ajos*, Judgment of 6 December 2016. An English translation of the decision is available at www.supremecourt.dk. For a comment, see M. RASK MADSEN, H. PALMER OLSEN, U. SADL, *Legal Disintegration? The Ruling of the Danish Supreme Court in AJOS*, in www.verfassungsblog.de, 30 January 2017; G. ZACCARONI, *Un'altra crepa nella diga del dialogo? La Corte Suprema danese rifiuta di dare applicazione ad un rinvio pregiudiziale della Corte di Giustizia*, in Quaderni Costituzionali, 2017, pp. 155-158.

[365] Italian Constitutional Court, Order no. 24 of 2017. Among the several comments on this judgment, see, from a comparative perspective, M. BASSINI, O. POLLICINO, *The Taricco Decision: A Last Attempt to Avoid a Clash between EU Law and the Italian Constitution*, in www.verfassungsblog.de, 28 January 2017; P. FARAGUNA, *The Italian Constitutional Court in re Taricco: "Gauweiler in the Roman Campagna"*, in www.verfassungsblog.de, 31 January 2017; D. TEGA, *Narrowing the Dialogue: The Italian Constitutional Court and the Court of Justice on the Prosecution of VAT Frauds*, in www.iconnectblog.com, 14 February 2017; A. BERNARDI, *La Corte costituzionale sul caso Taricco: tra dialogo cooperativo e controlimiti, in Quaderni Costituzionali*, No. 1, 2017, pp. 109-111; A. RUGGERI, *Ultimatum della Consulta alla Corte di giustizia su Taricco, in una pronunzia che espone, ma non ancora oppone, i controlimiti (a margine di Corte cost. n. 24 del 2017)*, in www.giurcost., 27 January 2017, pp. 81-88; G. REPETTO, *Una ragionevole apologia della supremacy. In margine all'ordinanza della Corte costituzionale sul caso Taricco*, in www.dirittticomparati.it, 20 February 2017; C. AMALFITANO, *La vicenda Taricco di nuovo al vaglio della Corte di giustizia: qualche riflessione a caldo*, in www.eurojus.it, 29 January 2017; V. FAGGIANI, *Lo strategico rinvio pregiudiziale della Consulta sul caso Taricco*, in Rivista AIC, Vol. 1, 2017, pp. 1-11.

[366] Case C-

Member States and the ECtHR consider rules on limitation periods as procedural provisions not covered by the principle of legality, in line with the stance of the CJEU, Italian constitutional and criminal law see those rules as substantive law protected by that principle, thereby objecting to *Taricco* and requiring full application of the rules being in force at the time of the offence. The ICC claimed for an overruling or, alternatively, the recognition of a specific position for Italy, on the grounds either of Article 53 of the Charter of Fundamental Rights of the European Union or of Article 4(2) TEU. Otherwise, the ICC threatened to go so far as to disregard the CJEU's judgment, with the ultimate goal to protect the Italian Constitution. In a following ruling (*Taricco II*) issued on 5 December 2017, the CJEU partially overruled its previous decision, thus avoiding a constitutional conflict and accepting, on a provisional basis, the potentially defective protection offered by Italy to the financial interests of the EU[367].

The last but not least piece of what appears as a relentless domino-effect in the post-Lisbon scenario can be identified in the decision no. 22/2016 of the Hungarian Constitutional Court regarding the Council Decision (EU) 2015/1601 of 22 September 2015 on the transfer of asylum seekers from Italy and Greece to Hungary[368]. In this judgment, addressing the question as to whether such collective transfer would be in conflict with the fundamental rights protected by the Fundamental Law of Hungary or would be *ultra vires*, the judicial reasoning of the HCC structured into the twofold line of fundamental rights review and *ultra vires* review.

Interestingly, the Hungarian justices followed the lead of other national constitutional courts by expressly referring to – and providing a brief summary of – the landmark "European" case law of several foreign peers, including France, Germany, Ireland,

[367] Case C-42/17, *M.A.S. and M.B.*, Judgment of 5 December 2017. See M. BASSINI, O. POLLICINO, *Defusing the Taricco bomb through fostering constitutional tolerance: all roads lead to Rome*, in www.verfassungsblog.de, 5 December 2017; A. RUGGERI, *La Corte di giustizia porge un ramoscello di ulivo alla Consulta su Taricco e resta in fiduciosa attesa che legislatore e giudici nazionali si prendano cura degli interessi finanziari dell'Unione (a prima lettura della sentenza della Grande Sezione del 5 dicembre 2017)*, in Diritti Comparati, No. 3, 2017, pp. 1-9; M. NISTICÓ, *Taricco II: il passo indietro della Corte di giustizia e le prospettive del supposto dialogo tra le Corti*, in Rivista AIC, Vol. 1, 2018, pp. 1-6; D. SARMIENTO, *To bow at the rhythm of an Italian tune*, in www.despiteourdifferencesblog.wordpress.com, 5 December 2017.

[368] Hungarian Constitutional Court, Decision no. 22/2016 (XII.5.) AB of 30 November 2016.

Italy, Poland, Spain and the Czech Republic[369]. In particular, the HCC explicitly cited the German *Solange* jurisprudence in order to declare that the level of protection for fundamental rights offered by the European Union is adequate. In so doing, the Court reached the same conclusion as the BVerfG, i.e. that fundamental rights review should be performed by the national constitutional court only as an *ultima ratio*[370]. However, as the concurring opinion of Judge Juhász pointed out, the reception of the *Solange* solution appears to be poorly justified, since the HCC analysed the level of protection offered by EU law on the basis of Hungarian constitutional law. In the same vein, in his concurring opinion Judge Stumpf criticised the HCC for having imitated an excerpt from a German judgment, without providing due justification on the basis of the Hungarian Fundamental Law.

[369] *Ibi*, §§32-44.
[370] Ibi, §49.

Chapter III

A model in action: the application of the Charter of Fundamental Rights of the European Union by the national Constitutional Courts

Contents: 1. Is anyone still afraid of the Charter? – 2. The Charter between EU law primacy and constitutional review: Paris and Wien call, Luxembourg replies – 2.1 Melki and Abdeli: the question prioritaire de constitutionnalité under CJEU scrutiny – 2.2 The twist of the Austrian Verfassungsgerichtshof – 2.3 A v. B and others: a conditional opening to the Austrian arrangement – 3. All the roads lead to Rome? The ruling no. 269/2017 of the Italian Constitutional Court – 3.1 An awaited decision: the background of the case – 3.2 Granital revisited: reversing the procedural order – 3.3 Walking through the Brenner: the connection with the Austrian model – 4. A dissenting voice: the Benkharbouche judgment of the UK Supreme Court

1. Is anyone still afraid of the Charter?

Inspired by Edward Albee's famous play "*Who's Afraid of Virginia Woolf?*", in 2013 Daniel Sarmiento published an article perceptively titled "*Who's Afraid of the Charter?*".[371] This contribution highlighted the importance of the Charter of Fundamental Rights of the European Union (henceforth "the Charter") as a unique opportunity to develop a cooperative framework of fundamental rights protection in Europe. In this regard, the article claimed that the time was ripe for the Court of Justice and the constitutional courts of the Member States to move beyond the respective illusions of unilateral supremacy under which they had lived in the area of fundamental rights protection until then.

A few years later, it can be argued that such process of engagement by the Court of Justice and national courts with the Charter is currently under way. The rise in the number of explicit citations of the provisions of the Charter, since its entry into force in 2009, in itself constitutes a quantitative indicator of the ever-growing awareness of the Charter. As to the Court of Justice, the 2017 annual report of the European Commission on the application of the Charter shows that the CJEU has increasingly

[371] D. SARMIENTO, *Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe*, in Common Market Law Review, Vol. 50, Issue 5, 2013, pp. 1267-1304.

referred to the Charter in its decisions.[372] Conversely, since the Charter gained binding legal force, the frequency of references of the CJEU to the European Convention on Human Rights (henceforth "the ECHR") has diminished.[373]

National courts, for their part, often refer to the Charter when submitting questions to the CJEU for preliminary rulings.[374] The EU Fundamental Rights Agency found that, in 2016, national courts sent 349 requests for preliminary rulings, and 48 of these referred to the Charter: that is close to 14% of the total amount, which is a higher proportion than those observed in the past three years.[375] According to the EU Fundamental Rights Agency, national courts in 2017 continued referring to the Charter for guidance and inspiration, even in a substantial range of cases falling outside the scope of EU law.[376]

Nonetheless, while the tendency of the CJEU to the use of the Charter has increased and preliminary references related to such legal instrument from ordinary courts have augmented, it seems that the potential of the Charter is not yet fully exploited by national supreme and constitutional courts. As appears from the reports mentioned above, the cases in which highest national courts directly refer to and apply the Charter still remain quite limited in number. However, what the next pages will seek to elaborate is that a handful of recent rulings delivered by national supreme and constitutional courts can be construed as a significant breakthrough in terms of

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[372] European Commission (2018) 2017 Report on the application of the EU Charter of Fundamental Rights. Luxembourg, Publications Office of the European Union. According to the Report (which takes into account the Court of Justice as well as the General Court and the Civil Service Tribunal), the number of decisions quoting the Charter "increased from 43 in 2011 to 87 in 2012 and further to 113 in 2013 to 210 in 2014. Following a decrease to 167 in 2015, the number increased again to 221 in 2016, only to then fall slightly to 195 in 2017. Overall this reflects a tendency by the EU courts to quote the Charter in their decisions". Furthermore, in 2016 Bronzini argued that the CJEU made over 500 explicit references to the Charter in its post-Lisbon rulings. See G. BRONZINI, *The Charter of Fundamental Rights of the European Union: a tool to strengthen and safeguard the rule of law?*, 2016, available at www.dirittocomparati.it/the-charter-of-fundamental-rights-of-the-european-union-a-tool-to-strengthen-and-safeguard-the-rule/.

[373] G. DE BURCA, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator*, in Maastricht Journal of European and Comparative Law, Vol. 20, 2013, pp. 174-178; D. SPIELMANN, *The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights Or how to remain good neighbours after the Opinion 2/13*, 2017, available at www.fp7-frame.eu/wp-content/uploads/2017/03/ECHRCJUEdialog.BRUSSELS.final_.pdf.

[374] According to the Report, "of those requests submitted by judges in 2017, 44 contained a reference to the Charter, as compared to 60 in 2016". See European Commission (2018) 2017 Report on the application of the EU Charter of Fundamental Rights. *cit.*.

[375] These proportions were 7 % in 2010, 6 % in 2011, 14 % in 2012, 10 % in 2013 and 2014, and 9 % in 2015. See EU Agency for Fundamental Rights' 2017 Annual Report, pp. 40-41.

[376] EU Agency for Fundamental Rights' 2018 Annual Report.

"qualitative" approach to the Charter. Particularly, the analysis will compare the response given by CJEU to the *question prioritaire de constitutionnalité* established in France (*Melki and Abdeli*) and to the relevant jurisprudence of the Austrian Constitutional Court (*A v. B and others*). Paragraph 3 will then address the innovative decision no. 269/17 of the Italian Constitutional Court, which has embraced the Charter as a yardstick for constitutional review of domestic legislation in the Italian legal framework. What will be inferred from this ground-breaking judgment is that, as will be discussed below, the application of the Charter in constitutional adjudication is implicitly envisaged by the Italian Constitutional Court, for the first time, as a legal tool for horizontal commonality among national constitutional courts in Europe.

In this respect, the following sections of the present chapter will argue that the growing use of the Charter by the CJEU and by national supreme courts reflects two reverse phenomena. On the one hand, the "decentralizing" trend underlying the CJEU's post-Lisbon case law, which appears liable to question the well-established role of national constitutional courts as fundamental rights guardians; on the other hand, the stances taken in relation to the Charter by an increasing number of constitutional courts, which seem thus to reclaim their centrality in the fundamental rights domain. Accordingly, the ruling *Benkharbouche* issued by the Supreme Court of the United Kingdom in 2017 will also be taken into account as being a voice standing out of the crowd.

In sum, the analysis of such decisions will suggest that a major shift might be in the making in the context of the post-Charter landscape. Indeed, supreme and constitutional courts no longer quote foreign constitutional jurisprudence only to find solutions to specific controversial cases. By wielding the shield of the Charter, the recent case law of highest national courts actually seems to lay the foundations for the building of a horizontal front of constitutional resistance against the ever-more pervasive attitude of the CJEU in the realm of fundamental rights protection.

2. The Charter between EU law primacy and constitutional review: Paris and Wien call, Luxembourg replies

2.1 *Melki and Abdeli*: the *question prioritaire de constitutionnalité* under CJEU scrutiny

As is well known, the Charter, which had been first proclaimed in 2000, became legally binding since the Lisbon Treaty came into force in late 2009.[377] The codification in a single document of the EU fundamental rights,[378] that the CJEU's jurisprudence had identified for decades as general principles of EU law,[379] was essentially aimed at strengthening the visibility of those rights.[380]

Notwithstanding the doctrinal debate on the legal effects of a written EU catalogue of rights and its impact on EU law,[381] it is generally undisputed that the new binding nature of the Charter has fostered the centrality of fundamental rights in the legal

[377] According to Art. 6 (1) of the Treaty of the European Union, the Charter "shall have the same legal value as the Treaties". In other words, the Charter is primary EU law, on an equal footing with the TEU and the TFEU.

[378] X. GROUSSOT, L. PECH, 'Fundamental Rights Protection in the European Union Post Lisbon Treaty', *Foundation Robert Schuman – Policy Paper*, No. 173 (2010), available at www.robert-schuman.eu/doc/questions_europe/qe-173-en.pdf. As observed by the literature, the Charter systematized "the sources of inspiration scattered in various national and international legal instruments", such as the common constitutional traditions of the Member States and the European Convention on Human Rights. See K. LENAERTS, *Exploring the Limits of the EU Charter of Fundamental Rights*, in European Constitutional Law Review, Vol. 8, Issue 3, 2012, p. 375; P. EECKHOUT, *The EU Charter of Fundamental Rights and the Federal Question*, in Common Market Law Review, Vol. 39, No. 5, 2002, p. 951; L.S. ROSSI, *How Fundamental Are Fundamental Rights? Primacy and Fundamental Rights after Lisbon*, in *Yearbook of European Law*, Volume 27, Issue 1, 2008, p. 77.

[379] In particular, see the judgments delivered by the Court of Justice in Case 29/69, *Stauder* (1969); Case 11/70, *Internationale Handelsgesellschaft* (1970); Case 4/73, *Nold* (1974); Case 44/79, *Hauer* (1979).

[380] European Council, *European Council Decision on the Drawing up of a Charter of Fundamental Rights of the European Union. Presidency Conclusions* (annex X), Cologne, June 1999: "There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens".

[381] *Ex multis*, see J. H. H. WEILER, *Does the European Union Treaty Need a Charter of Rights?*, in European Law Journal, Vol. 6, No. 2, 2000, pp. 95–97; B. DE WITTE, *The legal status of the Charter: Vital question or non-issue?*, in Maastricht Journal of European and Comparative Law, Vol. 8, Issue 1, 2001, p. 81; G. DE BURCA, *The drafting of the European Union Charter of fundamental rights*, in European Law Review, Vol. 26, 2001, pp. 126-138; S. MORANO-FOADI, S. ANDREADAKIS, *Reflections on the architecture of the EU after the Treaty of Lisbon: The European judicial approach to fundamental rights*, in European Law Journal, Vol. 17, Issue 5, 2011, p. 599; A. PACE, *A che serve la Carta dei diritti fondamentali dell'Unione europea? Appunti preliminari*, in Giur. cost., Vol. 46, No. 1, 2001, p. 193 et seq.; R. BIFULCO, M. CARTABIA, A. CELOTTO (a cura di), *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione europea*, Bologna, Il Mulino, 2001; E. GIANFRANCESCO, *Some considerations on the juridical value of the Charter of Fundamental Rights before and after the Lisbon Treaty*, in Forum di Quaderni costituzionali, 2009, available at www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0140_gianfrancesco.pdf.

discourse of the CJEU.[382] Borrowing the words of Iglesias Sanchez, the Charter has become for Luxembourg "the point of departure and the main reference point for the determination of the scope and content of fundamental rights in the EU".[383] This substantive change in the approach of the Court has come to the fore in a line of post-Lisbon seminal rulings, in which the CJEU has placed the Charter at the heart of the EU integration process.[384]

In the first of those landmark cases, the French *Cour de Cassation* challenged before the CJEU the constitutional reform that had introduced in 2009 the so-called *question prioritaire de constitutionnalité* (hereinafter "QPC").[385] According to the new QPC mechanism – similar to the priority rule that was adopted in the same year in Belgium[386] – when the same piece of legislation raises doubts of compatibility both with the French Constitution and with EU and international law, the lower judges are required to submit a question of constitutionality as a priority rule. Yet, this *ex post* constitutional review in the hands of the *Conseil constitutionnel* does not prevent the lower judges from their well-established diffuse review of legislation, but simply delays the exercise thereof. As a matter of fact, ordinary and administrative courts, once the examination of the QPC by the *Conseil constitutionnel* is completed, retain the power to set aside those legislative provisions in contrast with EU law (including

[382] S. IGLESIAS SANCHEZ, *The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the CJEU's approach to fundamental rights*, in Common Market Law Review, Vol. 49, Issue 5, 2012, p. 1576.

[383] *Ibi*, pp. 1565–1568. However, Iglesias Sanchez quoted Rosas and Kaila to underline that "when the Treaty entered into force, the application of the Charter was already a matter of *daily business*". *Ibi*, p. 1572. See also A. ROSAS, H. KAILA, *L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice: Un premier bilan*, in Il Diritto dell'Unione Europea, No. 1, 2011, p. 11.

[384] D. SARMIENTO, *cit.*, pp. 1266-1267; K. LENAERTS, *cit.*, p. 375.

[385] For an in-depth analysis, see D. SIMON, A. RIGAUX, *La priorité de la QPC : harmonie(s) et dissonance(s) des monologues juridictionnels croisés*, in Les Nouveaux Cahiers du Conseil constitutionnel, No. 29 (Dossier QPC), 2010, pp. 63-83.

[386] The Belgian priority rule was introduced on 12 July 2009 in Article 26, §4, of the special majority act on the Constitutional Court, which reads as follows: "If before a jurisdiction it is alleged that a [legal provision] violates a fundamental right which is guaranteed in a totally or partially analogous way in a provision of Title II of the Constitution and in a provision of European or international law, the jurisdiction first asks for a preliminary ruling to the Constitutional Court concerning the conformity with the provision of Title II of the Constitution". See M. BOSSUYT, W. VERRIJDT, *The Full Effect of EU Law and of Constitutional Review in Belgium and France After the Melki Judgment*, in European Constitutional Law Review, Vol. 7, Issue 3, 2011, pp. 366-372; J. VELAERS, *The Protection of Fundamental Rights by the Belgian Constitutional Court and the Melki-Abdeli Judgment of the European Court of Justice*, in M. CLAES, M. DE VISSER, P. POPELIER, C. VAN DE HEYNING, *Constitutional Conversations in Europe*, Cambridge, Intersentia, 2012, pp. 323-342.

the Charter) and international obligations (particularly, the ECHR).[387] The QPC mechanism established by the French constitutional reform aimed, therefore, at putting the *Conseil constitutionnel* at the very centre of the judicial review of legislation.[388]

Drawing on its settled case law, and especially on the principle set forth for the first time in the well-known judgment *Simmenthal,*[389] in *Melki and Abdeli* (2010)[390] – a decision dealing with two Algerian nationals subjected to a police control close to the land border between France and Belgium – the CJEU stressed that a national court which is called upon to apply provisions of EU law has a duty to give full effect to such provisions: if necessary, the national judge in question has to refuse "of its own motion" to apply any conflicting provision of domestic legislation.[391] A national court is then under the obligation, provided for in Article 267 TFEU, to refer questions to the CJEU for a preliminary ruling even in cases when a question of constitutionality is raised.[392] The CJEU thus ruled that the QPC, as interpreted by the *Cour de Cassation*, is inconsistent with EU law and, in particular, with the principle of primacy of that law, since ordinary courts could be prevented from exercising their right or fulfilling their obligation under Article 267 TFEU.[393]

However, the CJEU made clear that EU law does not preclude the QPC, insofar as national courts remain free to refer to the CJEU for a preliminary ruling, at whatever stage of the proceedings, even at the end of an interlocutory procedure for the review of constitutionality, any question they consider necessary.[394] Furthermore, the QPC

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[387] M. BOSSUYT, W. VERRIJDT, *The Full Effect of EU Law and of Constitutional Review in Belgium and France After the Melki Judgment*, *cit.*, pp. 372-373. For this reason, the *Conseil constitutionnel* held that the QPC does not infringe articles 55 and 88-1 of the French Constitution. See C.C., n° 2009-595 DC, 3 Dec. 2009, paras. 14 and 22.

[388] See J. KOMAREK, *The place of constitutional courts in the EU*, in European Constitutional Law Review, Vol. 9, Issue 3, 2013, p. 420; J. KOMAREK, *National constitutional courts and the European Constitutional Democracy*, in *International Journal of Constitutional Law*, Volume 12, Issue 3, 2014, p. 526. According to Paris, the newly-established mechanism "aims at placing the *Conseil constitutionnel* at the centre of fundamental rights protection". See D. PARIS, *Constitutional Courts as Guardians of EU Fundamental Rights? Centralised Judicial Review of Legislation and the Charter of Fundamental Rights of the EU. European Court of Justice (Fifth Chamber), Judgment of 11 September 2014, Case C-112/13, A v B and others*, in European Constitutional Law Review, Vol. 11, Issue 2, 2015, p. 392.

[389] Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (1978).

[390] Joined Cases C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli* (2010).

[391] *Ibi*, paras. 43-44.

[392] *Ibi*, para. 45.

[393] *Ibi*, paras. 46-47.

[394] *Ibi*, para. 52.

must allow national courts to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European legal order and to dis-apply, at the end of an interlocutory constitutionality procedure, the legislative provisions they held to be contrary to EU law.[395]

In the light of the above, some scholars have noted that in *Melki* the Luxembourg Court accepted a weakening of the obligation imposed by *Simmenthal* on ordinary courts "to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent community rules from having full force and effect".[396] Nevertheless, despite the *Simmenthal* doctrine was somewhat attenuated and the door was left open to a prospective compatibility of the QPC with EU law, it appears that in *Melki* the CJEU set strict boundaries to the priority of the *Conseil*'s review designed by the French constitutional reform.[397] Indeed, the CJEU did not intend to downsize the primacy and full effect of EU law: the Luxembourg Court only accepted their enforcement to be postponed – once the constitutional review has already been carried out – guaranteeing that in the end such principles remain intact.[398] In this sense, it seems that *Melki* can ultimately be read as an attempt of the CJEU, on the one side, to reinforce its alliance with ordinary courts – which retain the possibility and, at the same time, the duty to refer to the CJEU for a preliminary ruling – and, on the other side, to curb any "expansionist" ambition the *Conseil constitutionnel* might harbour to the detriment of the primacy of EU law and, thus, of the CJEU itself.

Interestingly, it was not the first time that a similar priority rule was challenged before the Luxembourg Court. As a matter of fact, in 2009 a preliminary question had been raised by the Liège Tribunal of First Instance, which interrogated the CJEU about the conformity with EU law of the precedence given by the Belgian legislation to the review of the constitutionality of national laws (*Chartry* case).[399] In an order

[395] *Ibi*, para. 53.
[396] *Simmenthal*, para. 22. See D. SARMIENTO, *L'affaire Melki: esquisse d'un dialogue des juges constitutionnels et européens sur toile de fond française*, in Revue trimestrielle de droit européen, 2010, p. 591; X. MAGNON, *La QPC face au droit de l'Union: la brute, les bones et le truand*, in Revue française de droit constitutionnel, 84, 2010, pp. 764-765; R. MASTROIANNI, *La Corte di giustizia ed il controllo di costituzionalità: Simmenthal revisited?*, in Giurisprudenza costituzionale, 5, 2014, p. 4097; M. BOSSUYT, W. VERRIJDT, *cit.*, p. 377.
[397] X. MAGNON, *cit.*, p. 786 ; D. PARIS, *cit.*, p. 393.
[398] M. BOSSUYT, W. VERRIJDT, *cit.*, p. 385; D. PARIS, *cit.*, pp. 404-405.
[399] Trib. Liège, 23 Nov. 2009, Claude Chartry v. Belgian State, ON 13 Feb. 2010, C-37/3.

issued on 1 March 2011 the CJEU recalled that, according to its previous case law and particularly to *Melki* decision, EU law precludes any Member State legislation establishing an interlocutory procedure for constitutional review, "in so far as the priority nature of that procedure prevents […] 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".[400] However, procedural reasons prevented the CJEU from addressing the question of the compatibility of the Belgian priority rule with the criteria set out in *Melki*. Indeed, the CJEU declared that it did not possess jurisdiction to answer the question referred by the Belgian judge, as the subject-matter of the dispute was not connected in any way with the scope of application of EU law but concerned a purely domestic situation.[401]

Only a few years later, in *A v. B and others* (2014) the same reasoning adopted in *Melki* was applied by the CJEU to the Austrian system of centralised judicial review of domestic legislation. Before going into the details of the case, it should be taken, though, a step backwards in order to shed some light on the Austrian constitutional case law concerning the Charter. Since Austria's accession to the EU, the Austrian Constitutional Court (*Verfassungsgerichtshof*, hereinafter "VfGH") acknowledged, in line with the CJEU's previous jurisprudence,[402] the primacy of EU law over domestic law. At the same time, the case law of the VfGH repeatedly found that EU law is not a standard of judicial review for its own decisions.[403] Nonetheless, this earlier jurisprudence was overruled by a revolutionary ruling issued by the VfGH on 14 March 2012.[404]

2.2 The twist of the Austrian *Verfassungsgerichtshof*

[400] Case C-457/09, *Chartry* (2011), paras. 19-20.
[401] *Ibi*, para. 25.
[402] In an exemplary way, see CJEU 15/07/1964, Case 6/64, *Costa/ENEL*, [1964], ECR 1253; 17/12/1970, Case 11/70, *Internationale Handelsgesellschaft*, [1970], ECR 1125; 09/03/1978, Case 106/77, *Simmenthal II* [1978], ECR 629.
[403] More precisely, in judgments VfSlg. 14.886/1997, 15.189/1998, 15.215/1998, 15.753/2000, 15.810/2000 and 18.266/2007 the Austrian Constitutional Court held that compliance of a domestic legal provision with EU law is not an object of the constitutional review.
[404] Austrian Constitutional Court, Judgment of 14 March 2012, Joined Cases U 466/11-18 and U 1836/11-13. The full text of the English translation of the judgment is available at www.vfgh.gv.at/downloads/VfGH_U_466-11_U_1836-11_Grundrechtecharta_EN_4.4.2017.pdf.

The case at hand dealt with the application for international protection filed by two Chinese citizens, which was disallowed by the Federal Asylum Office in 2010.[405] The following year, the Federal Asylum Tribunal dismissed the complaint raised against this administrative decision by the applicants, who had requested *inter alia* an oral hearing. The complainants then challenged such ruling before the Constitutional Court, pursuant to Article 114a of the Austrian Federal Constitutional Act, invoking a violation of their rights to an effective remedy and to a fair trial under Article 47 of the Charter.

The VfGH maintained that its jurisprudence on EU law, rendered prior to the entry into force of the Lisbon Treaty, could not be transplanted to the Charter. As a matter of fact, the Austrian constitutional judges defined the Charter as a markedly distinct area from the Treaties, "to which special provisions apply arising from the domestic constitutional set-up".[406] This *revirement* of the VfGH was justified on the basis of a doctrine fashioned by the CJEU's case law over time, the so-called "principle of equivalence". According to this latter,

"[…] in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions […]".[407]

Moving from such assumption, the VfGH developed a three-stage reasoning. First of all, it emphasized that several rights of the Charter correspond with the rights laid down in the ECHR. Next, the Court underlined that the ECHR is directly applicable

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[405] For an in-depth analysis of the case, see E. KLAUSHOFER, R. PALMSTORFER, *Austrian Constitutional Court Uses Charter of Fundamental Rights of the European Union as Standard of Review: Effects on Union Law*, in European Public Law, Vol. 19, No. 1, 2013 pp. 1-12; A. ORATOR, *The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?*, in German Law Journal,Vol. 16, No. 6, 2015, pp. 14429-1448; D. PARIS, *Constitutional Courts as Guardians of EU Fundamental Rights? Centralised Judicial Review of Legislation and the Charter of Fundamental Rights of the EU. European Court of Justice (Fifth Chamber), Judgment of 11 September 2014, Case C-112/13, A v B and others*, *cit.*, pp. ; F. SAITTO, *La Carta di Nizza come parametro di costituzionalità? La Corte costituzionale austriaca tra tutela dei diritti fondamentali, CEDU, principio di equivalenza e disapplicazione*, in www.dirittocomparati.it, 31 May 2012.

[406] Austrian Constitutional Court, Judgment of 14 March 2012, Joined Cases U 466/11-18 and U 1836/11-13, para. 25.

[407] *Ibi*, para. 27, quoting the judgment of the CJEU, Case C-326/96, *Levez* (1998).

and enjoys constitutional status in the Austrian legal framework. By virtue of the constitutional rank recognized to the Convention, the protection of the rights contained in the ECHR is ensured by the VfGH. This is all the more true since the Austrian system of legal protection provides for a "concentration of claims for violation of constitutionally guaranteed rights with one instance, i.e. the Constitutional Court".[408]

As a consequence, on the basis of the said principle of equivalence, the Charter's rights comparable to the rights conferred by the ECHR may also be invoked as constitutionally guaranteed rights. Accordingly, they constitute a standard of judicial review for proceedings before the VfGH in cases falling within the scope of application of the Charter, inasmuch as such rights are similar in their "wording and purpose" to those guaranteed by the Austrian Constitution.[409] As a matter of fact, given the largely overlapping areas of protection between the Charter and the ECHR, it would be unconstitutional if the VfGH were not competent to adjudicate on the rights enshrined in the Charter.[410] Moreover, the VfGH clarified that, in the scope of application of the Charter, it will continue to look at the case law of the CJEU and to refer a matter to the Luxembourg Court for a preliminary ruling "if there are doubts on the interpretation of a provision of EU law, including also the Charter".[411] Conversely, the VfGH made clear that there is no duty to raise a preliminary reference before the CJEU if a constitutionally guaranteed right – especially a right protected in the ECHR – has the same scope of application as a right of the Charter.[412]

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[408] *Ibi*, paras. 31-33. More precisely, the VfGH mentions Articles 144 and 144a of the Federal Constitutional Act, which refer respectively to the VfGH's competence to review last-instance administrative decisions as well as to its function as last resort in asylum matters.

[409] *Ibi*, para. 35.

[410] *Ibi*, para. 34.

[411] *Ibi*, para. 40. Particularly, the VfGH refers to doubts arising in light of the ECHR and pertaining case law of the European Court of Human Rights and other supreme courts.

[412] *Ibi*, para. 44: "[…] there is no duty to bring a matter to the Court of Justice of the European Union 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". In support of this claim, the VfGH mentioned cases like *Cilfit* and *Intermodal*, in which the CJEU had excluded the need for a reference for a preliminary ruling.

In a nutshell, this ground-breaking decision delivered in March 2012 entitled the VfGH "to decide on a case-by-case basis which of the rights of the Charter of Fundamental Rights constitute a standard of review for proceedings before the Constitutional Court".[413] Talking about this crucial change in the VfGH's attitude towards the Charter, Komarek underscored Austrian Constitutional Court's "willingness to embrace EU fundamental rights".[414] From now on, certain rights conferred by the Charter are therefore granted in the Austrian legal framework the same level of protection as the fundamental rights guaranteed by national law. This means that not only a violation of the ECHR but also a violation of the Charter amounts, under the cited conditions, to a violation of the Austrian Constitution.[415] In this perspective of a fully integrated system, the VfGH inferred from Article 52(4) and Article 53 of the Charter the need to interpret the fundamental rights emerging from national Constitutions "as consistently as possible" with those stemming from international law conventions and from the Charter.[416] As reported by Kieber and Klaushofer, the ensuing case law of the Austrian Constitutional Court regarding the application of EU law has aligned with the landmark decision handed down by the VfGH in 2012.[417]

Two years later, in response to the centralized model of judicial review that the VfGH promoted through the lens of the Charter, the CJEU addressed the issue of the consistency of the new Austrian constitutional jurisprudence with the principle of primacy of EU law. In fact, the chance to rule on this matter was offered to the Luxembourg judges by the questions that the *Oberster Gerichtshof* – the highest Austrian court in civil and criminal matters – referred for a preliminary ruling to the CJEU in *A v. B and others* (2014)[418].

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[413] *Ibi*, para. 36.
[414] J. KOMAREK, *National constitutional courts and the European Constitutional Democracy*, *cit.*, p. 423.
[415] D. PARIS, *cit.*, pp. 393-394.
[416] Austrian Constitutional Court, Judgment of 14 March 2012, Joined Cases U 466/11-18 and U 1836/11-13, para. 46.
[417] In their contribution the authors propose an overview of the decisions adopted by the VfGH in relation to EU law, in the aftermath of the said judgment of March 2012. See S. KIEBER, R. KLAUSHOFER, *The Austrian Constitutional Court Post Case-Law After the Landmark Decision on Charter of Fundamental Rights of the European Union*, in European Public Law 23, No. 2, 2017, pp. 221–236.
[418] Case C-112/13, *A v. B and others* (2014). For an in-depth analysis of the case, see D. PARIS, *cit.*, p. 399 et seq.; R. MASTROIANNI, *La Corte di giustizia ed il controllo di costituzionalità: Simmenthal revisited?*, *cit.*, pp. 4089-4101; A. GUAZZAROTTI, *Rinazionalizzare i diritti*

2.3 *A v. B and others: a conditional opening to the Austrian arrangement*

In the context of proceedings *in absentia* concerning an action for damages, an Austrian national alleged before the *Oberster Gerichtshof* an infringement of his rights of defence as guaranteed under Article 6 ECHR and Article 47 of the Charter. The Austrian Supreme Court decided to stay the proceedings and make a request to the CJEU for a preliminary ruling concerning the interpretation of Article 267 TFEU and the notion of "appearance of the defendant" under Article 24 of Council Regulation (EC) No. 44/2001.[419]

In so doing, the *Oberster Gerichtshof* referred three questions for a preliminary ruling to the CJEU. Leaving aside the two questions concerning the merits of the case,[420] the most interesting question submitted to the Luxembourg Court is by far the "procedural" one. As a matter of fact, the Austrian judges seized the opportunity to bring before the CJEU the VfGH's judgment of 14 March 2012. As recalled by the Austrian Supreme Court, such ruling had basically held that, by dint of the principle of equivalence, the VfGH's jurisdiction to review the constitutionality of national statutes must also cover the rights guaranteed under the Charter.[421] Furthermore, the VfGH had ruled that if a right guaranteed under the Austrian Constitution has the same scope as a right guaranteed by the Charter, it is not necessary for Austrian

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fondamentali? Spunti a partire da Corte di Giustizia UE, A c. B e altri, sent. 11 settembre 2014, C-112/13, in www.dirittocomparati.it, 2 ottobre 2014; L. RAIMONDI, *Carta dei diritti fondamentali dell'Unione europea tra controllo accentrato di legittimità costituzionale e disapplicazione: la Corte di giustizia dialoga con il Tribunale costituzionale austriaco*, in Diritto civile e contemporaneo, Anno 1, No. 2, 2014; P. FARAGUNA, *Rinvio pregiudiziale e questione di legittimità costituzionale (nota a Corte di giustizia UE, C-112/13)*, in www.forumcostituzionale.it, 18 settembre 2014; G. MARTINICO, *Il caso A c. B e il suo impatto sul rapporto fra Corti: un diritto per tre giudici*, in Quaderni costituzionali, No. 4, 2014, pp. 950-953; N. LAZZERINI, *Corte di giustizia (Grande sezione), causa C-112/13, A c. B e altri., sent. 11 settembre 2014 (3/2014)*, in www.osservatoriosullefonti.it/archivio-rubriche-2014/fonti-dellunione-europea-e-internazionali/1126-corte-di-giustizia-grande-sezione-causa-c-11213-a-c-b-e-altri-sent-11-settembre-2014-.

[419] Article 24 of Council Regulation (EC) No 44/2001 of 22 December 2000 – which concerns the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – provides that "a Court of a Member State before which a defendant enters an appearance shall have jurisdiction".

[420] With Questions 2 and 3 the referring Court asked the CJEU whether Article 47 of the Charter and Article 24 of the cited Regulation are to be interpreted in the sense that the appearance of a court-appointed representative *in absentia* confers binding international jurisdiction on that court.

[421] Case C-112/13, *A v. B and others* (2014), para. 24.

courts to make a request to the CJEU for a preliminary ruling under Article 267 TFEU.[422]

Under this premise, the referring court asked the CJEU whether the principle of equivalence does mean that, when a piece of national legislation infringes the Charter, ordinary courts cannot simply refrain from applying domestic law, but are under a duty to lodge an application with the Constitutional Court for that legislation to be struck down.[423] According to the *Oberster Gerichtshof*, if the remedy of an interlocutory procedure for the review of constitutionality was also to be available in respect of rights ensured by the Charter, such mechanism would in fact have the effect of prolonging the proceedings and increasing costs.[424]

In its answer to this "procedural" question raised by the referring court, the CJEU deviated from the *Oberster Gerichtshof*'s reading of the VfGH decision. In this regard, the CJEU clarified right away that the obligation to apply to the Constitutional Court for the general striking down of national statutes "does not affect the right of the ordinary courts […] to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate […]".[425] Relying on its settled case law from *Simmenthal* onwards, the CJEU reiterated that a national court that is called upon to apply provisions of EU law "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"; to that end, "it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means".[426]

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[422] *Ibi*, para. 25. According to the referring court, "in such circumstances, the interpretation of the Charter would not be relevant for the purposes of ruling on an application for a statute to be struck down, that being a decision which may be given on the basis of rights guaranteed by the Austrian Constitution".

[423] *Ibi*, para. 27.

[424] *Ibi*, para. 26. In this sense, see also the Opinion of Advocate General Bot, 2 April 2014, para. 68: "In the circumstances, I do not see how refraining, in a given dispute, from applying a national statute that is contrary to EU law would be less favourable for the individual than initiating an interlocutory procedure for the review of constitutionality with a view to having that statute struck down. On the contrary, as the referring court itself points out, the implementation of such a procedure is relatively cumbersome, involving expense and additional delays for the parties to the proceedings, whereas the national court is able, directly in the course of the proceedings before it, to establish that a national statute is incompatible with EU law and to disregard that statute, thus securing immediate protection for the parties".

[425] *Ibi*, para. 32.

[426] Indeed, the CJEU stated that the very essence of EU law is contrary to any national provision and any legislative, administrative or judicial practice that might impair the effectiveness of EU law by

The Luxembourg Court then held that when a provision of national law is considered not only incompatible with EU law, but also unconstitutional, a national court does not lose the right or escape its obligation under Article 267 TFEU by reason of the fact that the declaration of unconstitutionality is subject to the submission of a mandatory reference to the constitutional court.[427] Accordingly, the CJEU stressed that

"in so far as national law lays down an obligation to initiate an interlocutory procedure for the review of constitutionality, the functioning of the system established by Article 267 TFEU requires that the national court be free, first, to adopt any measure necessary to ensure the provisional judicial protection of the rights conferred under the EU legal order; and, second, to dis-apply, at the end of such an interlocutory procedure, that national legislative provision if that court holds it to be contrary to EU law".[428]

In relation to the principle of equivalence on which the VfGH decision was grounded, the CJEU affirmed bluntly that national courts are not relieved of their duty to observe in full the requirements flowing from Article 267 TFEU.[429] In conclusion, the CJEU held that EU law and, in particular, Article 267 TFEU must not be interpreted as precluding the centralized judicial review of legislation devised by the VfGH, as long as the three conditions previously set out in *Melki* are complied with. Ordinary courts must therefore remain free:

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withholding from national courts the power to set aside national legislation that might prevent EU rules from having full force and effect. *Ibi*, paras. 36-37.

[427] *Ibi*, para. 38. Similarly, para. 65 of the Advocate General's Opinion maintained that "[…]the procedure adopted by domestic constitutional law for the implementation of its principles cannot have the effect of abolishing, suspending, diminishing or deferring the right of the national court seised to exercise its duty […]to disregard and to refrain from applying a national law that is contrary to EU law".

[428] *Ibi*, para. 40.

[429] *Ibi*, para. 45. Accordingly, see also para. 70 of the Advocate General's Opinion: "within the scope of EU law, the principle of equivalence does not, in circumstances such as those of the case before the referring court, require national courts to make a reference to a constitutional court regarding the constitutionality of a national statute which they consider to be contrary to the Charter, with a view to having that statute generally struck down. A provision of domestic law imposing such an obligation is not contrary to EU law, provided that it does not give rise to any abolition, suspension, diminution or deferral of the duty of the national court to apply the provisions of EU law and to ensure their full effectiveness — if need be, by refraining of its own motion from applying any provision of national legislation that is contrary to EU law — or of its right to make a reference to the Court for a preliminary ruling".

- to make a reference to the Court at whatever stage of the proceedings they consider appropriate, and even at the end of the interlocutory procedure for the review of constitutionality, in respect of any question which they consider necessary;
- to adopt any measure necessary to ensure interim judicial protection of rights conferred under the EU legal order;
- to dis-apply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.[430]

Curiously enough, in *A v. B and others* the CJEU opted for strict adherence to the reasoning it had already developed in *Melki and Abdeli*,[431] notwithstanding the significant differences existing between the model of judicial review designed by the VfGH in 2012 and the QPC mechanism implemented through legislation in France. As noted by the literature, the most evident element of distinction between the two circumstances is that in *Melki* the *Cour de Cassation*'s submission of a reference for preliminary ruling rested on an act imposing the constitutional review as a priority rule, whereas the Austrian case arose from a *revirement* occurred in the jurisprudence of the VfGH.[432]

In contrast to the pathway taken by the French lawmaker, the examined VfGH judgment was not aimed at establishing a priority rule in favour of the Austrian Constitutional Court. Rather, the VfGH decision carried out a more cutting-edge operation: using the Charter, which enjoys constitutional status in the Austrian legal framework by means of the principle of equivalence, as a yardstick for the review of constitutionality of national legislation. In other words, unlike the QPC mechanism codified in France, the VfGH did not intend to speak first (i.e. prior to the CJEU) but to make sure to have the only say whenever the rights guaranteed by the Charter correspond with constitutional rights. In comparison with the French constitutional reform, the VfGH ruling – and, particularly, its application of the principle of equivalence – seems thus liable to open a deeper breach in the primacy of EU law, by challenging the CJEU's role as final interpreter and guarantor of the rights enumerated in the Charter.

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[430] *Ibi*, para. 46.
[431] In a similar vein, Paris underlined that "the reasoning core is technically a 'copy and paste' of the *Melki* reasoning: paragraphs 34 to 43 of the judgment correspond word-for-word to paragraphs 40-41, 43-45 and 52-56 of the judgment mentioned". See D. PARIS, *cit.*, p. 402.
[432] A. GUAZZAROTTI, *cit.*,; P. FARAGUNA, *cit.*; G. MARTINICO, *cit.*, p. 952.

That being said, it is difficult to believe that the answer given by the CJEU to the *Oberster Gerichtshof* might have truly ignored or, at least, overlooked the peculiarities of the Austrian case. Rather, the close adherence of *A v. B and others* to the *Melki* reasoning might be firstly ascribed to the fact that, as remarked by the CJEU,[433] the VfGH itself relied explicitly upon *Melki* in order to specify that ordinary courts maintain, at whatever stage of their proceedings, the power to refer a matter to the CJEU and to dis-apply the domestic legislation incompatible with EU law.[434] Such clarification offered by the VfGH sounds, on the one hand, as a reminder for Austrian ordinary courts; on the other hand, it can also be read as a reassurance to Luxembourg that the obligations stemming from Article 267 TFEU shall not be undermined in any way. The reference made by the VfGH to *Melki* provided thereby the CJEU with an immediate expedient to unravel the bundle in *A v. B and others*: extending the same *Melki* reasoning from the French constitutional framework to the Austrian one. Furthermore, the "solution" devised by the CJEU in *Melki* and echoed in *A v. B and others* goes beyond the circumstances of the two cases at hand, as it appears flexible enough to adapt to any centralised system of judicial review that a national legal framework within the EU boundaries might opt for.[435]

The cautious openness of the CJEU towards the model proposed by the VfGH, conditional on compliance with the requirements previously laid down in *Melki*, can be interpreted as a way out to avoid direct collision with the Austrian Constitutional Court. More broadly, in the perspective of a multilevel system the attitude shown by the CJEU in *Melki* and confirmed in *A v. B and others* seems oriented to facilitate integration – rather than separation – among the national and supranational legal orders involved, along with their respective catalogues of fundamental rights. In this view, a part of the literature even interpreted *Melki* and *A v. B and others* as reflecting, to the benefit of the centrality of domestic constitutional review of

[433] Case C-112/13, *A v. B and others* (2014), para. 32.
[434] Austrian Constitutional Court, Judgment of 14 March 2012, Joined Cases U 466/11-18 and U 1836/11-13, paras. 41-42.
[435] In this sense, see also P. FARAGUNA, *cit.*; D. PARIS, *cit.*, pp. 402-403.

national legislation, a mitigation of the *Simmenthal* doctrine and of the principle of primacy of EU law.[436]

However, this interpretation does not seem to give due weight to the emphasis that the CJEU puts on ordinary courts' obligations to refer questions to Luxembourg and to set aside domestic statutes clashing with EU law. In fact, what one can infer from *Melki* and *A v. B and others* is that the obligations established under Article 267 TFEU amount to limits that neither the French QPC mechanism nor the Austrian principle of equivalence are in any way allowed to exceed. The analysis of the above rulings leave thus some room for a twofold consideration – which will be further elaborated on below – as regards the role played by national ordinary judges and by the CJEU in the domain of EU fundamental rights. First, ordinary courts see strengthened their position as EU judges at the domestic level, since they reserve the power to dis-apply national legislation even at the end of an interlocutory procedure for the review of constitutionality. Second, the reinforcement of national judges' European mandate goes hand in hand with the awareness that the CJEU, whilst accepting the centralised systems of judicial review at the national level, shall still retain the last word in matters concerning the fundamental rights guaranteed by the Charter.

2.4 Where horizontal interaction arises: EU fundamental rights between "de-centralizing" pressure and "re-centralization"

The empowerment of national ordinary courts and of the CJEU itself in the EU fundamental rights realm appears to find further evidence, incidentally, in the CJEU's earlier case law quoted in *A v. B and others*. In stressing ordinary judges' duty to give full effect to provisions of EU law and to refuse to apply any conflicting provision of domestic legislation without awaiting its prior setting aside by legislative or other constitutional means, the CJEU invoked in an exemplary way the

[436] D. SARMIENTO, *L'affaire Melki: esquisse d'un dialogue des juges constitutionnels et européens sur toile de fond française*, *cit.*, p. 594; R. MASTROIANNI, *cit.*, p. 4097. According to Torres Pérez, the CJEU toned down the *Simmenthal* doctrine in *Melki and Abdeli*. See A. TORRES PÉREZ, *The challenges for Constitutional Courts as Guardians of Fundamental Rights*, in P. POPELIER, A. MAZMANYAN, W. VANDENBRUWAENE (eds.), *The Role of Constitutional Courts in Multilevel Governance*, Cambridge, Intersentia, 2013, p. 52 e pp. 59-60.

relevant paragraphs of *Simmenthal* as well as those of the subsequent rulings *Filipiak*, *Melki and Abdeli* and *Åkerberg Fransson*.[437] In particular, it seems that the CJEU's explicit references to *Filipiak* (2009) and *Åkerberg Fransson* (2013) – which stand alongside the (unsurprising) citation of the "progenitor" *Simmenthal* and of judgment *Melki* described above – should not be underestimated.

As to *Filipiak*, the case at issue involved certain tax provisions in force in Poland, which were suspected of infringing the national Constitution and EU law at the same time.[438] In the circumstances of the case, a decision of the Polish Constitutional Court held those provisions to be unconstitutional, but deferred the date on which they are to lose their validity. In this context, the referring court asked the CJEU whether the deferral set by the national Constitutional Court would prevent ordinary judges from respecting the principle of primacy of EU law and, consequently, from dis-applying domestic provisions in contrast with the latter. In its reply to this petition, the CJEU firmly reiterated that domestic courts are obliged to be faithful to the principle of primacy of EU law and thus to decline to apply conflicting national provisions, regardless of the previous decision by a Constitutional Court keeping them temporarily in force.[439]

The bindingness of such obligations upon national ordinary courts was also emphasized by the CJEU in *Åkerberg Fransson*, a momentous decision dealing with criminal proceedings initiated against a Swedish citizen for tax evasion.[440] In this

[437] Case C-112/13, *A v. B and others* (2014), para. 36.
[438] Case C-314/08, *Filipiak v Dyrektor Izby Skarbowej w Poznaniu* (2009).
[439] *Ibi*, paras. 81-85. In particular, this view of the status of domestic provisions incompatible with Union law is similar to the one adopted by the Italian Constitutional Court in its judgment no. 170/84, *Granital*, as will be discussed *infra*, section 3.
[440] Case C-617/10, *Åkerberg Fransson* (2013). For an analysis of this case see, among others, E. HANCOX, *The meaning of "implementing" EU law under Article 51(1) of the Charter: Åkerberg Fransson*, in Common Market Law Review, Vol. 50, Issue 5, 2013, pp. 1411-1432; B. VAN BOCKEL, P. WATTEL, *New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åklagaren v Hans Åkerberg Fransson*, in European Law Review, Vol. 38, 2013, pp. 863-880; K. LENAERTS, J. GUTIERREZ FONS, *The Place of the Charter in the EU Constitutional Edifice*, in S. PEERS, T. HERVEY, J. KENNER and A. WARD (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Hart Publishers, 2014, pp. 1566-1568; M. SAFJAN, *Fields of Application of the Charter of Fundamental Rights and constitutional dialogues in the European Union*, EUI Working Papers Law 2014/02, pp. 5-10; D. SARMIENTO, *Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe*, *cit.*, p. 1176 et seq.; A. KACZOROWSKA-IRELAND, *European Union Law*, London, Routledge, 2016, pp. 244-246; D. DENMAN, *The EU Charter of Fudamental Rights: How Sharp are its Teeth?*, in Judicial Review, Vol. 19, No. 3, 2014, p. 160 et seq.; F. FONTANELLI, *The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights*, in Columbia Journal of European Law, No. 20, 2014, pp. 193-247; N.

well-known ruling – which was handed down, oddly enough, on the very same day of *Melloni*[441] – the CJEU, sitting in Grand Chamber, offered a broad interpretation of the scope of the Charter as defined in Article 51(1).[442] This latter literally stipulates, in a somewhat cryptic way, that the provisions of the Charter are addressed to the Member States "only when they are implementing Union law".[443] According to the elucidation provided by the Luxembourg judges, such statement generally refers to all cases which fall within the "scope of application" of EU law.[444] Since the Charter applies whenever national legislation falls within the scope of EU law, the CJEU held that

"situations cannot exist which are covered […] by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter".[445]

In a nutshell, the pivotal point made by the CJEU in *Åkerberg Fransson* was that the scope of application of the Charter cannot be narrower than that of EU law itself. Drawing on this "generous" definition of the matters falling within the scope of EU law, the CJEU then found that a national measure does not need to be adopted to transpose an EU measure in order to be within the scope of EU law.[446] As a consequence, the Court finally rejected a Swedish judicial practice which made the

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LAZZERINI, *Il contributo della sentenza Åkerberg Fransson alla determinazione dell'ambito di applicazione e degli effetti della Carta dei diritti fondamentali dell'Unione europea*, in Rivista di diritto internazionale, No. 3, 2013, pp. 883-912.

[441] In particular, judgment *Åkerberg Fransson* expressly referred to paragraph of *Melloni* stating that "national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised". See Case C-617/10, *Åkerberg Fransson* (2013), para. 29.

[442] For a thorough assessment of Article 51 of the Charter and the relating CJEU's case law, see E. SPAVENTA, *The interpretation of Article 51 of the Charter of Fundamental Rights: the dilemma of a stricter or broader application of the Charter to national measures*, Study commissioned by the PETI Committee European Parliament, PE 556.930, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU(2016)556930_EN.pdf; J. ZILLER, *Art. 51. Ambito di applicazione*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI (a cura di), *Carta dei diritti fondamentali dell'Unione europea*, Milano, Giuffrè, 2017, p. 1050 et seq.

[443] However, according to the broader meaning provided by the Explanations Relating to the Charter of Fundamental Rights (to which the CJEU referred to), "the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law". See Explanations Relating to the Charter of Fundamental Rights, in Official Journal of the European Union, 14 December 2007, C 303/17.

[444] Case C-617/10, *Åkerberg Fransson* (2013), para. 19.

[445] *Ibi*, para. 21.

[446] A. KACZOROWSKA-IRELAND, *European Union Law*, *cit.*, p. 245.

obligation to dis-apply a national provision contrary to an EU fundamental right conditional upon that infringement being clear from the text of the Charter or its relating case law.[447]

In the view of the above, it seems therefore that *A v. B and others*, notwithstanding the (undeniable) novelty of its openness to the Austrian VfGH, is not to be read as an extemporary ruling by the CJEU. On the contrary, the exemplary references to the seminal cases *Simmenthal*, *Filipiak*, *Melki and Abdeli* and *Åkerberg Fransson* show that *A v. B and others* moves along the line of a well-established jurisprudential trend which has put the primacy of EU law into a safe, through the steady enhancement of the synergy between the CJEU and national ordinary courts or tribunals. Particularly, the CJEU's decisions so far taken into account suggest that the strengthening of such privileged cooperation via the preliminary ruling procedure under Article 267 TFEU found a breeding ground in the field of fundamental rights protection.

In that regard, pursuant to the CJEU's post-Lisbon case law, national ordinary judges are entitled to review domestic statutes in the light of the Charter on their own authority. What is more, according to the reasoning stressed in *Filipiak* and evoked in the CJEU's following case law, ordinary courts and tribunals are not only empowered to dis-apply national legislation inconsistent with the Charter. In fact, in so doing, ordinary judges are even enabled by the CJEU to disregard any previous decision rendered by a national constitutional court in terms of validity of domestic legislation.

All in all, when it comes to check the conformity of national statutes with EU fundamental rights, ordinary courts will get the guidance from the Luxembourg judges as to the interpretation of the Charter.[448] Arguably, such petitions from national ordinary judges on the meaning of the rights embedded in the Charter may result in an ever-growing legitimization of the CJEU as a human rights court. Both this growing characterization of the CJEU as a fundamental rights adjudicator and the ordinary courts' role as decentralized EU judges are thus likely to be further

[447] According to the CJEU, such judicial practice "withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter". *Ibi*, para. 48.

[448] According to Ferreres Comella, ordinary judges work under the guidance of the CJEU, which is the "supreme interpreter" of EU law. See V. FERRERES COMELLA, *Constitutional Courts and Democratic Values*, New Haven, Yale University Press, 2009, pp. 111, 127 and 131.

enhanced in the aftermath of the ruling *Åkerberg Fransson*, which has expanded, as it was recalled above, the scope of application of the Charter.

In sum, a combined reading of the responses the CJEU provided to the French QPC in *Melki and Abdeli* and to the new arrangement envisaged by the Austrian VfGH in *A v. B and others* seems to make clear that Luxembourg is not willing to tolerate, to the benefit of national constitutional courts, not even the slightest weakening of the principle of primacy of EU law.[449] By contrast, in the wake of the case law from *Simmenthal* onwards, the logic underlying the CJEU's rulings appears to be one of "decentralization". That is, pushing EU fundamental rights guarantee from the hands of national constitutional courts towards the joint action, mainly via the preliminary ruling procedure, of the CJEU and the domestic ordinary courts. Such decentralizing tendencies[450] that have emerged in the recent Charter-related CJEU's jurisprudence seems liable, thus, to erode the centrality that constitutional courts – especially those of Kelsenian tradition – are used to claiming in the field of fundamental rights protection, even though their monopoly on the review of domestic legislation in the light of the constitutional parameter is in no way called into question.[451]

Nevertheless, the same judgments *Melki and Abdeli* and *A v. B and others* – in addition to the Belgian case *Chartry* – highlight that such pressure towards decentralization affecting the CJEU post-Lisbon jurisprudence is at odds with a reverse phenomenon that has occurred in the case law of a bunch of national constitutional courts.[452] Over the last few years, the VfGH decision of March 2012, the mentioned QPC implemented by the French constitutional reform and the Belgian priority rule triggered what might be defined as a rush towards a "re-centralization"[453] of fundamental rights protection in the context of EU law. In other

[449] In this vein, see also M. BOSSUYT, W. VERRIJDT, *cit.*, p. 385; D. PARIS, *cit.*, pp. 404-405.

[450] On the contrary, some scholars used the expression "centralizing tendencies" with reference to the CJEU. See M. DE VISSER, *National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights in a Post-Charter Landscape*, in Human Rights Review, Vol. 15, Issue 1, p. 44. On the centralizing effect generated by the interpretation and application of European fundamental rights, see also M. CLAES, M. DE VISSER, *The Court of Justice as a federal constitutional court: a comparative perspective*, in E. CLOOTS, G. DE BAERE, S. SOTTIAUX (eds.), *Federalism in the European Union*, Oxford, Hart Publishing, 2012, pp. 83-109.

[451] V. FERRERES COMELLA, *Constitutional Courts and Democratic Values*, *cit*., pp. 125-126; A. TORRES PEREZ, *cit.*, p. 53.

[452] See D. PARIS, *cit.*, p. 399.

[453] In this regard, Guazzarotti used the similar expression "re-nationalization". See A. GUAZZAROTTI, *cit.*.

terms, such cases revealed the centripetal tendency of national constitutional courts to rely on the instrument of the Charter in order to reaffirm their own role as fundamental rights guardians.

It is into this dynamic framework, where two opposite "de-centralizing" and "re-centralizing" streams coexist at the same time and are increasingly intertwined with each other, that a third uncharted area of investigation is worth being brought to light. As a matter of fact, the new outlook of a "horizontal" axis between national constitutional courts has recently come to the fore, for the first time, as an innovative approach within the constitutional courts' re-centralizing efforts in the fundamental rights domain.

In this respect, Christoph Grabenwarter perceptively foresaw that the landmark judgment delivered by the VfGH in 2012 would set an example likely to be emulated by other national constitutional courts.[454] Such prevision was confirmed by ruling no. 269 of 2017 of the Italian Constitutional Court, which underpinned the use of the Charter as a standard of review in constitutional adjudication. Strikingly enough, the Italian constitutional justices backed up this cutting-edge conclusion – as will be seen below – by making explicit reference to the VfGH decision of 2012. Going through the novelty of decision no. 269 of 2017, the next paragraphs will thus seek to shed some light, in a comparative perspective, on the circulation of such line of reasoning from the Austrian to the Italian constitutional jurisprudence and on the implications thereof. An attempt will then be made to explore whether and to what extent, at the current stage of the EU integration process, the Charter might be the keystone fostering a horizontal "resistance" among national constitutional courts vis-à-vis the de-centralizing attitude of the CJEU (and of domestic ordinary courts) in the field of fundamental rights protection.

3. All the roads lead to Rome? The ruling no. 269/2017 of the Italian Constitutional Court

3.1 An awaited decision: the background of the case

[454] C. GRABENWARTER, *Verfassungsrecht, Völkerrecht und Unionsrecht als Grundrechtsquellen* in D. MERTEN et al. (eds.), Handbuch der Grundrechte. Band VII/1: Grundrechte in Österreich, Müller, Manz, 2014, p. 69.

In a recent report presented at a quadrilateral workshop involving the Constitutional Courts of Spain, Portugal, France and Italy, the Italian Justice Augusto Barbera envisaged the risk that the privileged channel of communication between the CJEU and national ordinary judges might lead to a progressive downgrading of the Charter and to the marginalization of national Constitutions and constitutional courts.[455] In outlining this possible scenario with specific regard to the Italian constitutional context, the Author pointed out that the case law of the Italian Constitutional Court (hereinafter "ICC") had never been hesitant to make use of the Charter, even earlier than the Lisbon Treaty attributed legally binding effect to this latter in 2009. Overall, according to a report drafted by the ICC's Research Department, the ICC has expressly recalled the Charter in a total of 106 judgments until May 2017.[456] In particular, most of these references – which reflect, on the one side, the citation of a significant number of provisions and, on the other side, a silence on certain rights of the Charter – were intended to substantiate decisions taken by the ICC on the basis of national constitutional provisions.[457]

Yet, it may be argued that the Charter has so far represented an even more seductive siren call for national ordinary courts. Indeed, Italian ordinary judges have often opted for the disapplication (*rectius*: "non-application") of internal laws deemed incompatible with the Charter, rather than raising a question of constitutionality before the ICC, even in cases in which fundamental rights guaranteed by the Charter correspond with rights protected under the Constitution. In this sense, several ordinary courts have proceeded to set aside national statutes without duly bearing in

[455] A. BARBERA, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di giustizia*, report presented at the meeting between the Constitutional Tribunals and Courts of Spain, Portugal, France and Italy (Seville, 26-28 October 2017), in www.rivistaaic.it/la-carta-dei-diritti-per-un-dialogo-fra-la-corte-italiana-e-la-corte-di-giustizia.html.

[456] R. NEVOLA (a cura di), *La Carta dei diritti fondamentali dell'Unione europea e l'interpretazione delle sue clausole finali nella giurisprudenza costituzionale*, Corte costituzionale, Servizio Studi, June 2017, available at www.cortecostituzionale.it.

[457] Particularly, Article 47 (right to an effective remedy and to a fair trial) and Article 49 (principles of legality and proportionality of criminal offences and penalties) are the Charter's provisions most frequently quoted by the ICC, followed by Articles 21 (non-discrimination), 24 (rights of the child), 52 (scope of guaranteed rights), 7 (respect for private and family life), 20 (equality before the law), 3 (right to integrity of the person) and 9 (right to marry and right to found a family). On the contrary, a significant number of provisions of the Charter, such as Articles 2 (right to life), 4 (prohibition of torture and inhuman or degrading treatment or punishment), 5 (prohibition of slavery and forced labour) and 8 (protection of personal data) are still alien to the ICC's case law. *Ibi*, p. 12.

mind that, according to the wording of Article 51 of the Charter, this latter is addressed to the Member States "only when they are implementing Union law".[458]

This widespread failure to abide by the material limits established in Article 51 results in a so-called "spill-over effect" of the Charter,[459] which seems to fuel the aforesaid risk that the direct dialogue between CJEU and ordinary judges might ultimately sidestep the national Constitution and the ICC jurisdiction in the field of fundamental rights protection. With the aim to curtail such "spill-over effect" of the Charter and to defuse a potential "time bomb" that would jeopardize – as noted by the doctrine – the centralized mechanism of the constitutional review of laws,[460] ruling no. 63/2016 of the ICC stressed that

"[…] in order for the Charter to be invoked in a judgment of constitutional legitimacy, it is therefore necessary that the case covered by domestic legislation «be regulated by European law – insofar as it is inherent in Union acts, national acts and conducts implementing EU law […] – and not by national rules lacking any link with such law»".[461]

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[458] Among the most relevant examples may be recalled judgment no. 54467/2016 of the Court of Cassation, which applied directly the principles of the Charter to deny the extradition of a Turkish citizen. In particular, this ruling held that Article 51 of the Charter is to be "interpreted in an extensive way", thus allowing the application of the Charter in all cases in which a piece of domestic legislation, even though it does not implement Union law, affects an area of competence of the EU or a field governed by Union law. According to the Court of Cassation, in cases concerning fundamental rights a single element of connection with Union law – even if not in terms of strict implementation or enforcement of Union law – is sufficient to apply the Charter. Another controversial case can be identified in the judgment delivered on the 4th of April 2017 by the Court of First Instance of Lecco, which disapplied the recent Italian legislation regulating the use of surnames in the event of civil unions. In that decision the ordinary court expressly refused to raise a question of constitutionality before the ICC, by stating of its own motion that the domestic legislation at stake had certainly infringed human dignity and the supreme interest of the child, which are both protected under the Charter.

[459] A. BARBERA, *cit.*, p. 4.

[460] In particular, the expression "time bomb" is quoted from Lamarque, who lucidly predicted that the Charter would have been liable to challenge the centralized system of the constitutional review of laws, once ordinary judges had decided to trigger it by giving direct application to the Charter. See E. LAMARQUE, *Corte costituzionale e giudici nell'Italia repubblicana*, Bari, Laterza, 2012, p. 134.

[461] Judgment no. 63/2016 of the Italian Constitutional Court, §7. In this ruling the ICC – dealing with a constitutional proceedings instituted by the State against regional legislation allegedly infringing Articles 10 (freedom of thought, conscience and religion), 21 (non-discrimination) and 22 (cultural, religious and linguistic diversity) of the Charter – declared the question of constitutionality inadmissible, due to "the absence of any argument regarding the conditions of applicability of EU rules" to the contested legislation and the vagueness of the reference to them, "especially in a case in which the points of contact between the scope of such rules and that of the contested domestic provisions are far from obvious". In commenting this case Marta Cartabia argued that the ICC's conclusions, albeit achieved in the context of a constitutional proceedings instituted by the State against regional legislation, may also be transplanted into an incidental proceedings initiated by ordinary judges. In this regard, the Author highlighted that "it is primarily the responsibility of the

This crucial passage of judgment no. 63 of 2016 was copied and pasted from the ICC's previous decision no. 80 of 2011, which had made a key point in the relations among the Italian legal system, the ECHR and EU law.[462] Notably, in that precedent the ICC put the brakes on the proclivity of certain ordinary courts to extend the principle of direct effect of EU law to the ECHR and, as a consequence, to set aside – bypassing the Constitutional Court's judicial review of national legislation – any rule of domestic law they found incompatible with the Convention.[463] In contrast to this new judicial approach to the ECHR, the ICC resolutely excluded that Article 6 TEU would have incorporated the Convention into EU law after the entry into force of the Lisbon Treaty.[464] As opposed to what was claimed by the referring judge, ICC's decision no. 80 of 2011 insisted on the position taken by the Court since 2007:[465] in

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referring court to fully identify the EU rules, invoked as an intermediate standard" and "to illustrate the conditions of their applicability to the case under consideration in the main proceedings, under penalty of inadmissibility". See M. CARTABIA, *Convergenze e divergenze nell'interpretazione delle clausole finali della Carta dei diritti fondamentali dell'Unione europea*, in AIC, No. 3, 2017, pp. 8-9.

[462] For an analysis of judgment no. 80/2011 of the Italian Constitutional Court, which deals with the right to a public hearing in criminal proceedings, see A. RUGGERI, *La Corte fa il punto sul rilievo interno della CEDU e della Carta di Nizza-Strasburgo*, in www.forumcostituzionale.it, 23 marzo 2011; A. RANDAZZO, *Brevi note a margine della sentenza n. 80 del 2011 della Corte costituzionale*, in www.giurcost.org.

[463] As to the widespread trend of ordinary courts to accord direct effect to the ECHR and to set aside any piece of domestic legislation considered incompatible with the Convention, without sending the question of constitutional legitimacy to the ICC, see A. RUGGERI, *Applicazioni e disapplicazioni dirette della CEDU (lineamenti di un "modello" internamente composito)*, in www.forumcostituzionale.it, 28 febbraio 2011.

[464] Judgment no. 80/2011 of the Italian Constitutional Court, §5. In particular, the referring judge argued that a "communitarization" of the ECHR had been determined by the new version of Article 6 TEU after the entry into force of the Lisbon Treaty, in conjunction with the "equivalence clause" enshrined in Article 52, paragraph 3 of the Charter (which provides that "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention"). In this regard, the referring judge inferred from the mentioned provisions that the rights of the ECHR which correspond to those guaranteed by the Charter would also be protected under EU law. As a consequence, ordinary judges would be allowed to set aside any domestic legislation in conflict with the ECHR, due to the direct effect that, according to the ICC's well-rooted jurisprudence, the provisions of EU law enjoy within the Italian legal framework through Article 11 of the Constitution (which reads that Italy "agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations").

[465] After the constitutional revision adopted in 2001, the so called "twin judgments" no. 348/2007 and 349/2007 of the ICC raised the legal status of the ECHR to an intermediate level between ordinary legislation and constitutional provisions. On the basis of this special rank accorded to the ECHR within the Italian legal system, the Convention is used by the ICC as an "intermediate standard" for judicial review of legislation, due to an eventual violation of Article 117, paragraph 1 of the Constitution (which requires the exercise of the legislative power of the State and the Regions to comply "with the Constitution and with the constraints deriving from EU legislation and international obligations", including the ECHR). Even though international treaties still do not enjoy constitutional status, national legislation in breach of any international treaty obligations can therefore be

the event of an (assumed) inconsistency between internal legislation and the ECHR, ordinary courts are required to send the question of constitutional legitimacy to the ICC,[466] after seeking interpretations of Italian law that are most respectful of the Convention.[467]

Despite such caveats emanating from the ICC's case law on the scope of application of the Charter and the alleged "communitarization" of the ECHR, a certain degree of ambiguity about the interpretation of Article 51 of the Charter still exists, especially in view of CJEU's controversial ruling *Åkerberg Fransson*. The persistence of such grey areas has made it possible for ordinary judges, including the Italian Court of Cassation as well as administrative and tax courts, to keep directly applying the Charter – at times, arguably, in an "audacious" way – over the last few years.[468] It is no coincidence, therefore, that ICC's ground-breaking decision no. 269 of 14 December 2017[469] – which was generally greeted, as will be discussed below, as the inauguration of a new season for ICC's jurisprudence in European affairs – was based on two referral orders issued from a tax judge.[470]

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constitutionally challenged and declared invalid by the ICC. In this sense, see also judgments no. 311/2009 and 319/2009 of the ICC.

[466] In conformity with its well-established case law, the ICC reiterated that Article 11 of the Constitution cannot be extended to the provisions of the ECHR. As a result, ordinary courts do not have the power to set aside Italian legislation deemed inconsistent with the ECHR but are needed to bring the matter before the ICC. With regard to the reasoning through which the ICC denied the application of Article 11 of the Constitution to the ECHR, see Judgment no. 80/2011, §5.1.

[467] Furthermore, it may be noted that the CJEU aligned with the ICC's reaction to national courts' trend to "communitarize" the ECHR. Particularly, the Grand Chamber of the CJEU made clear that "whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the EU has not acceded to it, a legal instrument which has been formally incorporated into EU law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law". See Case C-571/10, *Kamberaj* (2012), §62 and, accordingly, the abovementioned judgment *Åkerberg Fransson*, §44.

[468] A. BARBERA, *cit.*, pp. 4-6.

[469] Judgment no. 269 of 2017 of the Italian Constitutional Court, available at www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2017&numero=269. The full text of the English translation of the judgment is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_269_2017_EN.pdf .

[470] With regard to this decision, *ex multis*, see R. CONTI, *Qualche riflessione, a terza lettura, sulla sentenza n. 269/2017*, in Diritti Comparati, No. 1/2018, pp. 275-290; 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)*, in Diritti Comparati, No. 3/2017, pp. 1-13; A. RUGGERI, *Corte di giustizia e Corte costituzionale alla ricerca di un nuovo, seppur precario, equilibrio: i punti*

In the case under consideration, the Provincial Tax Commission of Rome raised two questions concerning the constitutionality of certain legislative provisions for the protection of competition and the market.[471] In particular, while one of the two referral orders focused exclusively on the alleged conflict between such legislation and the constitutional parameter,[472] the other one brought before the ICC the matter

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(relativamente) fermi, le questioni aperte e un paio di proposte per un ragionevole compromesso, in Freedom, Security & Justice: European Legal Studies, No. 1, 2018, pp. 7-26; A. GUAZZAROTTI, *Un "atto interruttivo dell'usucapione" delle attribuzioni della Corte costituzionale? In margine alla sentenza n. 269/2017*, in www.forumcostituzionale.it, 18 dicembre 2017; C. CARUSO, *La Corte costituzionale riprende il «cammino comunitario»: invito alla discussione sulla sentenza n. 269 del 2017*, in www.forumcostituzionale.it, 18 dicembre 2017; L. SALVATO, *Quattro interrogativi preliminari al dibattito aperto dalla sentenza n. 269 del 2017*, in www.forumcostituzionale.it, 18 dicembre 2017; A. ANZON DEMMIG, *La Corte riprende il proprio ruolo nella garanzia dei diritti costituzionali e fa un altro passo avanti a tutela dei "controlimiti"*, in www.forumcostituzionale.it, 28 febbraio 2018; D. TEGA, *La sentenza n. 269 del 2017 e il concorso di rimedi giurisdizionali costituzionali ed europei*, in www.forumcostituzionale.it, 24 gennaio 2018; G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, in www.forumcostituzionale.it, 25 gennaio 2018; G. SCACCIA, *Giudici comuni e diritto dell'Unione europea nella sentenza della Corte costituzionale n. 269 del 2017*, in AIC, Fasc. 2/2018, 7 maggio 2018, pp. 1-8; 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*, in Federalismi.it, no. 3/2018, pp. 1-9; F. S. MARINI, *I diritti europei e il rapporto tra le Corti: le novità della sentenza n. 269 del 2017*, in Federalismi.it, no. 4/2018, pp. 1-11; G. PISTORIO, *Conferme e precisazioni nel «cammino comunitario» della Corte costituzionale. Commento a prima lettura della sentenza n. 269 del 2017*, in www.dirittticomparati.it, 11 gennaio 2018; A. COZZI, *Diretta applicabilità e sindacato accentrato di costituzionalità relativo alla violazione della Carta europea dei diritti fondamentali*, in www.forumcostituzionale.it, 1 febbraio 2018; P. FARAGUNA, *Constitutional Rights First: The Italian Constitutional Court fine-tunes its "Europarechts freundlichkeit"*, in www.verfassungsblog.de, 14 March 2018; R. DI MARCO, *The "Path Towards European Integration" of the Italian Constitutional Court: the Primacy of EU Law in the Light of Judgment No. 269/17*, in European Papers, European Forum, 14 July 2018, pp. 1-13; C. CHIARIELLO, *Il valore costituzionale della Carta di Nizza: un problema ancora aperto anche alla luce della sentenza n. 269/2017 della Corte costituzionale*, in www.giurcost.org, Studi No. 2018/II, pp. 377-391; C. SCHEPISI, *La Corte costituzionale e il dopo Taricco. Un altro colpo al primato e all'efficacia diretta?*, in Il Diritto dell'Unione Europea, Osservatorio europeo, dicembre 2017, pp. 1-18; F. MARTINES, *Procedimenti pregiudiziali e applicazione di parametri costituzionali ed europei a tutela dei diritti fondamentali*, in Osservatorio sulle fonti, n. 1/2018, pp. 1-24; S. VERNUCCIO, *La sentenza 269/2017: la Corte costituzionale di fronte alla questione dell'efficacia diretta della Carta di Nizza e la prima risposta del giudice comune (Cass. ord. 3831/2018)*, in AIC, Fasc. 2/2018, 29 maggio 2018, pp. 1-20; L. FEDERICI, *Recenti sviluppi della giurisprudenza costituzionale tra teoria dei controlimiti e norme internazionali*, in AIC, Fasc. 2/2018, 26 settembre 2018, p. 101 et seq.; G. REPETTO, *Concorso di questioni pregiudiziali (costituzionale ed europea), tutela dei diritti fondamentali e sindacato di costituzionalità*, in Giur. cost., Vol. 62, No. 6, 2017, pp. 2955-2965; G. COMAZZETTO, *Cronaca di una svolta annunciata: doppia pregiudizialità e dialogo tra Corti, a un anno dalla sentenza n. 269/2017*, in Federalismi.it, no. 3/2018, pp. 1-40.

[471] The referring Commission was called upon to adjudicate proceedings contesting the denial by the Supervisory Authority for Competition and the Market ("Autorità garante della concorrenza e del mercato") of an application for reimbursement of duties paid by the complainants.

[472] Articles 3, 23 and 53 of the Constitution, in relation, respectively, to the principles of equality, reservation to the legislator and ability to pay.

of the simultaneous infringement of both the Constitution and EU law.[473] Unusually, in this latter referral order the referring tax commission inverted the order of review of the questions brought by the complainant, which had originally asked – in tune with the well-rooted ICC's case law – to not apply the challenged provisions due to their noncompliance with the relevant EU regulations endowed with direct effect. In this regard, the referring judge held that it would be "more consistent with the overall legal system" to first look into the legislation's compliance with the domestic legal framework and with internal constitutional principles, rather than to scrutinize the possible incompatibility with the European rule.[474]

Faced with this priority the referring tax commission recognized "by default" to the assessment of the question of constitutionality, the ICC took the opportunity, first of all, to make a preliminary remark: a "specification", to use the language of the Court, on the legal remedies for the resolution of antinomies between EU law and national law.[475] In particular, the premise made by ruling no. 26 of 2017 embodied a restatement of the principles first set forth by the CJEU in the mentioned *Simmenthal* judgment and enforced, thereafter, by the ICC since *Granital* decision dating back to 1984.[476] The ICC's case law launched by this latter judgment has drawn, in fact, a fundamental distinction between self-executing and not self-executing EU law.[477]

Accordingly, when a national piece of legislation contrasts with a EU rule that has direct effect,[478] the lower judge – after having failed to solve the incompatibility on an interpretative basis, or through reference for a preliminary ruling under Article 267 TFEU – must directly apply the European provision in place of the domestic one.[479] Conversely, in those situations in which an internal legal provision clashes

[473] This second referral order mentioned, on the one side, Articles 3 and 53 of the Constitution and, on the other side, Articles 49 and 56 TFEU (right of establishment and right to free provision of services).
[474] Judgment no. 269 of 2017 of the Italian Constitutional Court, §1.1. *Conclusions on points of law*.
[475] Judgment no. 269 of 2017 of the Italian Constitutional Court, §5.1. *Conclusions on points of law*.
[476] Judgment no. 170 of 1984 of the Italian Constitutional Court.
[477] On this point see, most recently, Order no. 207 of 2013 and, likewise, previous Judgments no. 284 of 2007, 28 and 227 of 2010, and 75 of 2012 of the Italian Constitutional Court. These rulings were all expressly recalled in Judgment no. 269 of 2017, §5.1. *Conclusions on points of law*.
[478] As to the phenomenology of self-executing EU rules, *ex multis*, see R. ADAM, A. TIZZANO, *Manuale di Diritto dell'Unione europea*, Torino, Giappichelli, 2014, p. 138 et seq.
[479] In Judgment no. 269 of 2017, the ICC held that this arrangement would meet the primacy of EU law and the principle according to which "judges are subject only to the law" (Article 101 of the Constitution). Furthermore, in Judgment no. 168/1991, §4 the ICC had made clear that the effect of this direct application of EU law "is not […] the fallacy of the incompatible internal rule, but the non-

with a EU rule lacking direct effect – and whenever the pending incompatibility cannot be resolved through interpretation – the common judge is required to raise a question of constitutional legitimacy before the ICC, "without previously determining the grounds on which the internal provision conflicts with European law".[480] In the event of not self-executing EU rules, the examination of the contested legislation falls then under the competence of the ICC, in reference to both European parameters and internal constitutional standards.[481]

Within this general scheme, there may also be cases of so-called "dual preliminarity" (*doppia pregiudizialità*), i.e. disputes that give rise to questions of constitutionality and, in the meantime, raise doubts of compliance with EU law.[482] In such circumstances, the ICC's jurisprudence had constantly stated that questions of compatibility with EU law take "logical and legal precedence" over questions concerning the constitutionality of the same national norm. It follows, therefore, that common judges must first submit the reference for preliminary ruling to the CJEU

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application of the latter by the national court to the present case, which is the object of his knowledge, aspect is attracted in the Community normative plexus. It may be added that this principle, which can be inferred from the Treaty establishing the European Community (through its implementing law), is consistent with Article 11 of the Constitution that recognizes the possibility of limitations to state sovereignty, which can qualify the effect of "non-application" of national law (rather than "disuse" that evokes defects of the rule in reality not subsistent due to the autonomy of the two sorts)". With regard to the legal implications, at national level, of the non-application of an internal rule incompatible with self-executing EU law, see C. CELOTTO, *Fonti del diritto e antinomie*, Torino, Giappichelli, 2014, pp. ….

[480] On the conflict between national provisions and EU law lacking direct effect, see R. MASTROIANNI, *Conflitti tra norme interne e norme comunitarie non dotate di efficacia diretta: il ruolo della Corte costituzionale*, in Diritto dell'Unione europea, No. 3, 2007, pp. 585-608 and, more recently, S. LATTANZI, *Il conflitto tra norma interna e norma dell'Unione priva di effetti diretti nella vicenda dei precari della scuola italiana*, in Diritto dell'Unione europea, No.4, 2015, 897-922.

[481] In this regard, the ICC stated that not self-executing EU provisions would be invoked as "intermediate standard" with respect to Articles 11 and 117 of the Constitution. In doing this, the referring court leaves to the ICC "to assess whether or not a violation exists that cannot be resolved through interpretation and, potentially, to strike down the law that fails to comply with European law". See Judgment no. 269 of 2017, §5.1. *Conclusions on points of law*.

[482] On the issue of "dual preliminarity" within the Italian legal framework, see M. CARTABIA, *Considerazioni sulla posizione del giudice costituzionale di fronte a casi di 'doppia pregiudizialità' comunitaria e costituzionale*, in Il Foro Italiano, Vol. 120, No. 5, 1997, p. 222 et seq.; F. GHERA, *Pregiudiziale comunitaria, pregiudiziale costituzionale e valore di precedente delle sentenze interpretative della Corte di giustizia*, in Giur. cost, Vol. 45, No. 6, 2000, pp. 1193-1223; L. DANIELE, *Corte costituzionale e pregiudiziale comunitaria: alcune questioni aperte*, in I quaderni europei, No. 16, 2009, pp. 11-12; A. CERRI, *La doppia pregiudiziale in una innovativa decisione della Corte*, in Giur. cost., Vol. 58, No. 4, 2013, pp. 2897-2902; M. LOSANA, *La Corte costituzionale e il rinvio pregiudiziale nei giudizi in via incidentale: il diritto costituzionale (processuale) si piega al dialogo tra le Corti*, in AIC, No. 1, 2014, pp. 1-18. For an analysis of the issue of "dual preliminarity" in multilevel contexts, see G. MARTINICO, *Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order*, in International Journal of Constitutional Law, Vol. 10, Issue 3, 1 July 2012, pp. 871–896.

and then, if deemed necessary, knock on the door of the ICC only once the Luxembourg Court has dispelled the doubts on the interpretation of EU law.[483]

This stance that the ICC took since *Granital* onwards, however, has been recently questioned by common judges on several occasions. The last of these latter in chronological order was, as anticipated above, the Provincial Tax Commission of Rome, in the case that led to ICC's judgment no. 269 of 2017. A few years earlier, a similar attempt to challenge the position of the ICC on the issue of "dual preliminarity" was made by the Court of First Instance of Bari. In that circumstance, the referring judge essentially asked the ICC to adjust its long-standing approach by arguing that, "for the purposes of legal certainty and the application thereof", domestic legislation in conflict with EU law should be "necessarily and preliminarily" subject to review of constitutional legitimacy.[484] In this light, the referring court added that only a declaration of unconstitutionality by the ICC would result in the "formal removal from the *corpus* of laws" for the contested provisions. According to the referral order, this solution would in practice ensure that the same rules are no longer enforced by those ordinary courts which "have a different opinion" about the existence of the incompatibility with EU law.

Nevertheless, the question of constitutional legitimacy raised by the above Court of First Instance was held to be manifestly inadmissible by order no. 48 of 2017 of the ICC. Such ruling thoroughly aligned with the ICC's well-established case law, thus leaving no room to the priority nature of the constitutional review advocated by the

[483] In particular, the ICC pointed out that noncompliance with EU law impacts the applicability of the challenged internal legislation to the pending proceeding (and, as a consequence, also affects the relevance of the questions of constitutionality) "only when the European rule is endowed with direct effect". In this regard, the ICC stated since *Granital* decision that contradiction with European law, "concerning the effectiveness of the provision that is the object of the constitutional challenges, goes to the relevance of the questions: therefore, any judge, in raising them, must address it […], or the questions will be inadmissible". See Judgment no. 269 of 2017, §5.1. *Conclusions on points of law* of the Italian Constitutional Court, which quoted in turn its previous Orders no. 269, 79, and 8 of 1991, no. 450, 389 and 78 of 1990, no. 152 of 1987, no. 244 of 1994, no. 38 of 1995 and no. 249 of 2001. In addition to the above rulings expressly mentioned in Judgment no. 269 of 2017, the system of "dual preliminarity" was also clearly explained in Order no. 536 of 1995 and no. 319 of 1996 of the Italian Constitutional Court.

[484] According to the referral order, the challenged provisions were deemed to violate, on the one side, Articles 3 (equality), 25 (rule of law) and 41 (freedom of enterprise) of the Constitution and, on the other side, the abovementioned Articles 49 (right of establishment) and 56 (right to free provision of services) TFEU. As to this specific case, see L. SALVATO, *Quattro interrogativi preliminari al dibattito aperto dalla sentenza n. 269 del 2017*, *cit.*, p. 1; ID., *I limiti strutturali del sindacato di legittimità e le principali cause di inammissibilità "sostanziale" della questione di legittimità*, Relazione al corso della scuola superiore della magistratura, Roma, Palazzo della Consulta, 17 maggio 2018, in www.forumcostituzionale.it, p. 18.

referring court.[485] Without going into too much detail on the case at hand, the Court basically confined itself to reaffirm that the question of compatibility with EU law is a (logical and legal) *prius* in respect of the interlocutory procedure for the review of constitutionality.[486] As it has been noticed, the doubts the referring court cast on the matter of dual preliminarity were not considered such as to justify, therefore, any rethinking of the aforementioned rule laid down in *Granital*.[487] Just one month later, the ICC came to the very same conclusion in judgment no. 111 of 2017.

In this recent case dealing with discrimination between men and women in employment relationships, the referring judge raised issues related to the violation of Articles 11 and 117, para 1, of the Constitution, in light of the possible contrast with both Article 157 TFEU and Article 21 of the Charter, which prohibit any discrimination on grounds of sex.[488] Since such provisions of EU law have direct effect in the national legal system, the ICC considered that the referring court should have set aside the contested legislation in conflict with the principle of equal treatment.[489] In the Court's opinion this process, once it has been embarked upon, would have made the interlocutory review of constitutionality unnecessary.[490] Alternatively, the ICC found that the complexity of the issue could indeed have led

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[485] See Order no. 48 of 2017 of the Italian Constitutional Court, available at www.giurcost.org/decisioni/2017/0048o-17.html.

[486] This consideration relied on the fundamental assumption, entrenched in the cited ICC's case law, that the question of constitutionality "invests the same applicability of the contested provision in the main proceedings and, therefore, the relevance of this question". As a consequence, Order no. 48/2017 reminded the referring court that "national judges must directly apply self-executing EU law and set aside provisions of national law deemed in conflict with the latter".

[487] L. SALVATO, *I limiti strutturali del sindacato di legittimità e le principali cause di inammissibilità "sostanziale" della questione di legittimità*, *cit.*, p. 18.

[488] Judgment no. 111 of 2017 of the Italian Constitutional Court, available at www.giurcost.org/decisioni/2017/0111s-17.html. The English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_111_2017.pdf. For an analysis of this judgment, see R. ROMBOLI, *Nota a Corte cost., sent. n. 111/2017*, in Il Foro italiano, No. 7-8, 2017, pp. 2230- 22 ; G. AMOROSO, *Sindacato di costituzionalità e controllo diffuso di conformità eurounitaria*, in Il Foro italiano, Vol. 142, No. 7-8, 2017, pp. 2237-2255; R. CONTI, *La Cassazione dopo Corte cost. n. 269/2017. Qualche riflessione, a seconda lettura*, in www.forumcostituzionale.it, 28 dicembre 2017, p. 14.

[489] *Ibi*, § 3. By referring to its previous case law, the ICC also added that the case may be subject to a preliminary reference if considered necessary in order to question the CJEU about the correct interpretation of the relevant provisions of EU law, and therefore to resolve any residual doubt regarding the existence of the conflict.

[490] *Ibidem*. In this regard, the ICC restated that "The dis-application of provisions of national law […] is in effect one of the obligations incumbent upon the national courts, which are bound to comply with EU law and to guarantee the rights arising under it, subject to the sole limit of compliance with the fundamental principles of the constitutional order and of inalienable human rights".

the referring court to make a preliminary reference to the CJEU, in order to ascertain whether the national legislation was inconsistent with the right to effective equality of treatment for male and female workers.[491]

In this view, it appears that the approach underpinning the whole reasoning of the ICC was geared towards maintaining good neighbourly relations with the CJEU. As a further example of the cooperative attitude that underlies ruling no. 111 of 2017, the ICC spontaneously engaged in the identification of the respective competences of the EU and the Member States, pursuant to Article 51 of the Charter, before proceeding to verify the compatibility between the challenged legislation and the principles of the Charter itself.[492] By disclosing such degree of autonomy (/maturity) the ICC jurisprudence has achieved in "handling" the Charter to date, the above decision upheld in full, thus, the principle laid down for the first time in *Granital*, according to which ordinary courts must automatically set aside national law that infringe EU provisions endowed with direct effects.

In accordance with the earlier case law, order no. 48 of 2017 and judgment no. 111 of 2017 were just the latest rulings in which the ICC was deaf to lower judges' calls to bring the resolution of clashes between national statutes and EU norms back to the Constitutional Court's centralized review.[493] Taken together, these recent decisions confirmed that the implementation of the *Granital* doctrine remains utterly undisputed whenever internal laws happen to be in conflict with self-executing EU

[491] Judgment no. 111 of 2017 of the Italian Constitutional Court, § 4.

[492] As a result of such scrutiny, the ICC directly applied the Charter, since it was clear that the case at issue involved the implementation of EU law by the national authorities. See M. CARTABIA, *Convergenze e divergenze nell'interpretazione delle clausole finali della Carta dei diritti fondamentali dell'Unione europea*, *cit.*, pp. 7-8.

[493] By the way, the ICC provided the same legal reasoning in its Judgment no. 56/2015, which – as will be mentioned below – would have led to the CJEU's decision *Global Starnet* issued in December 2017. However, it was observed that, despite the private parties' attempt to push for a preliminary reference as to the scope of Article 41 of the Charter, in this ruling the ICC took into account only the internal parameter (Article 3 of the Constitution), since the referring court had invoked no European provision. See R. CONTI, *Qualche riflessione, a terza lettura, sulla sentenza n. 269/2017*, *cit.*, pp. 281-282. For a thorough analysis of decision no. 56/2015, see A. RUGGERI, *Passo falso della Consulta in tema di rinvio pregiudiziale ad opera dello stesso giudice costituzionale (nota minima a corte cost. n. 56 del 2015)*, in www.giurcost.org, No. 1, 2015, pp. 281-284; R. CHIEPPA, *Una decisa affermazione della Corte costituzionale sulla rilevanza degli interessi pubblici sottostanti al regime di monopolio statale di concessione per l'esercizio di attività di gioco pubblico con vincite a denaro e sulla giustificazione di nuovi requisiti ed obblighi imposti con legge e non suscettibili di indennizzo*, in Giurisprudenza costituzionale, No. 2, 2015, pp. 506-518.

provisions, such as free movement of services and equal pay for men and women.[494] This ICC's refusal to recalibrate its standpoint on the priority that the preliminary reference to the CJEU enjoys over the interlocutory procedure for constitutional review demonstrated, in particular, that the same procedural order does surely apply with regard also to the cases in which the Charter is involved.[495] In this context, it was all the more unexpected that, only a few months later, the ICC could come *motu proprio* to a divergent conclusion, which constitutes a real crack in the façade for the centrality of the dis-application mechanism being uncontested until then. As a matter of fact, in ruling no. 269 of 2017 the ICC carved out for the first time – as *obiter dictum* – an exception to its well-rooted case law on the matter of dual preliminarity.

3.2 *Granital* revisited: reversing the procedural order

Turning again, thus, to the analysis of the latter judgment, the ICC eventually declared inadmissible on procedural grounds the questions of constitutionality raised in the referral order in which the tax commission had declined to first address the inconsistency with EU law brought by the complainant.[496] In this respect, the Court maintained that the referring judge had the duty to decide the matter because the European provisions at stake (Articles 49 and 56 TFEU) were endowed with direct effect. Accordingly, the ICC argued that, in compliance with the above rules established by the constitutional jurisprudence, the failure on the part of the referring judge to address the question of incompatibility with EU law amounted to a failure to provide reasoning on the relevance of the challenged provisions and, as a result, on their applicability in the underlying proceedings pending before the tax commission.[497]

Strangely enough, before reaching such declaration of inadmissibility, the ICC followed an argumentative pathway which was characterised by a fairly

[494] D. TEGA, *La sentenza n. 269 del 2017 e il concorso di rimedi giurisdizionali costituzionali ed europei*, *cit.*, p. 2.
[495] R. CONTI, *La Cassazione dopo Corte cost. n. 269/2017. Qualche riflessione, a seconda lettura*, *cit.*, p. 14.
[496] Conversely, the ICC held that these grounds for inadmissibility did not apply to the other referral order, in which the Provincial Tax Commission of Rome had argued that the challenged provisions did not infringe EU law. See Judgment no. 269 of 2017, § 5.4. *Conclusions on points of law*.
[497] Judgment no. 269 of 2017, § 5.3. *Conclusions on points of law*.

unpredictable detour. Having restated its deep-rooted tenets on the resolution of antinomies between domestic law and EU law, the ICC proceeded to an extended *obiter dictum* that took into account the Charter of Fundamental Rights of the European Union, even though this latter was by no means involved in the present case. As a reason to explain this decision to step off the path, the Court merely alleged that a clarification was needed in light of the "transformations" affecting European law and the system of its relationships with national legal systems after the entry into force of the Lisbon Treaty, which, among other things, had given legally binding effect to the Charter.[498]

With this in mind, the specification the ICC provided in the current decision dealt with the hypothesis of "dual preliminarity", in which a national provision would be liable to infringe, at once, both the rights enumerated in the Italian Constitution and those guaranteed under the Charter.[499] By taking the cue from the priority nature that the referring tax commission had assigned to the internal remedy over the European one, the ICC made clear that when an ordinary judge is faced with situations of dual preliminarity in the field of fundamental rights protection, he will first have to raise the question of constitutionality even though the EU provisions at issue – just as it happened in the present case – are self-executing. Notably, this fine-tuning of the ICC's previous case law was based on two key premises: (i) the "typically constitutional stamp" recognized to the Charter's contents and the fact that (ii) the principles and rights enshrined in the Charter largely intersect with the ones that are codified in the Italian Constitution as well as in the Constitutions of the other Member States.

Accordingly, the Court pointed out that violations of rights of the person posit the necessity of an *erga omnes* intervention by the ICC itself, also due to the principle that places a centralized system of constitutional review of laws at the foundation of the Italian constitutional framework.[500] In such instances of dual preliminarity, the ICC will therefore judge "in the light of internal parameters and, possibly, in the light

[498] Judgment no. 269 of 2017, § 5.2. *Conclusions on points of law*.

[499] The ICC made reference, in an exemplary way, to the recent case *Taricco* concerning the principle of the legality of crimes and punishments (European Court of Justice, Grand Chamber, Judgment of 5 December 2017, case C-42/17, *M.A.S., M.B.*).

[500] In this regard, the ICC mentioned Article 134 of the Italian Constitution, which sets forth the matters on which the Constitutional Court shall pass judgments.

of European ones as well, in the order that is appropriate to each individual case".[501] The Court then stipulated that this new arrangement would also be meant to ensure that the rights guaranteed in the Charter will be interpreted as relevant sources of law in this area, in harmony with the "constitutional traditions" as cited in Article 6 TEU and Article 52(4) of the Charter. Most interestingly, in support of its argument the ICC – in a fit of foreign inspiration we will return to in a while – added that "other national constitutional courts with longstanding traditions", such as the Austrian *Verfassungsgerichtshof*, have followed an analogous line of reasoning.[502]

Notwithstanding this radical shift, it should be observed that, at the same time, the ICC endeavoured to keep a European-law friendly register throughout the *obiter dictum*.[503] First of all, in a passage that reads like a reassurance for both the CJEU and the common judges, the ICC was careful to restate its deference to the primacy and direct effect of EU law, by expressly recognizing such principles "as hitherto consolidated in both European and constitutional case law".[504] Thereafter, judgment no. 269 of 2017 specifically referred to its decision *Taricco II*[505] – which had been delivered just a few days earlier – as the latest example of the "dialogue" that national constitutional courts are called to foster with the CJEU. In the words of the ICC, the enhancement of such judicial conversation with Luxembourg falls "within a framework of constructive and loyal cooperation between the different systems of safeguards", in order to ensure the highest protection of fundamental rights at the system-wide level, as provided for by Article 53 of the Charter.[506]

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[501] The ICC stated it will be entrusted with the task to carry out such assessment on a case-by-case basis, by referring to Articles 11 and 117 of the Constitution.

[502] In so doing the ICC made reference, in an exemplary way, to the decision of the Austrian Constitutional Court, Judgment U 466/11-18; U 1836/11-13 of 14 March 2012 analysed above.

[503] As to the "dialogic approach" the ICC opted for in Judgment no. 269 of 2017, see P. FARAGUNA, *Constitutional Rights First: The Italian Constitutional Court fine-tunes its "Europarechts freundlichkeit"*, *cit.*

[504] Judgment no. 269 of 2017, § 5.2. *Conclusions on points of law*.

[505] Order no. 24 of 2017 of the Italian Constitutional Court.

[506] As concerns Article 53 of the Charter see, among others, B. DE WITTE, *Article 53*, in S.PEERS, T. HERVEY, J. KENNEY, A. WARD (eds.), *The EU Charter of Fundamental Rights*, 2014, pp. 1523-1538; J. MARTÍN, PÉREZ DE NANCLARES, *Articulo 53*, in A. MANGAS MARTÍN (ed.), *Carta de los Derechos Fundamentales de la Unión Europea – Comentario artículo por artículo*, Bilbao, Fundación BBVA, 2008, p. 852 et seq.; A. M. WIDMANN, *Article 53: Undermining the Impact of the Charter of Fundamental Rights, in Columbia Journal of European Law*, Vol. 8, Issue 2, 2002, pp. 342-358; J. B. LIISBERG, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?*, in Common Market Law Review, Vol. 38, Issue 5, 2001, pp. 1171-1179; L. F. M. BESSELINK, *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*, in Common Market Law Review, Vol. 35, Issue 3,

In this perspective of maximizing fundamental rights protection, ruling no. 269 of 2017 acknowledged that the overlap between the guarantees set out in the Charter and those laid down by the Italian Constitution may generate concurring judicial remedies.[507] By evoking explicitly the CJEU's case law on the issue of dual preliminarity – a reference which appears as a further sign of the European-law friendly tone permeating the *obiter dictum* – the Court underlined that the CJEU has, in turn, admitted that EU law "does not preclude" the priority nature of the constitutional review falling under the competence of national constitutional courts. However, the "acceptance" of this new procedural order needs to be subject to compliance with the requirements first set out by the CJEU in *Melki and Abdeli* and then upheld, among others, in *A v. B and others*.

These latter rulings, as was mentioned above, did not object to a national legislation which establishes an interlocutory procedure for the review of constitutionality, provided that domestic courts are not prevented from the possibility of exercising their right (and fulfilling their obligation) to refer questions to the CJEU for a preliminary ruling, under Article 267 TFEU, for matters concerning the interpretation or the validity of EU law.[508] By quoting *verbatim* from CJEU's reasoning in *Melki and Abdeli* and *A v. B and others*, the ICC recalled, thus, that ordinary judges need to remain free to submit to the CJEU "any question they deem necessary, at whatever stage of the proceedings they consider appropriate, even at the end of an interlocutory constitutionality procedure"; to "adopt any measure necessary to ensure the provisional judicial protection of the rights conferred under the European Union's legal order"; and, last but not least, to "dis-apply, at the conclusion of the interim judgment of constitutionality, the national legislative

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1998, pp. 629-680; ID., *The Member States, the National Constitutions and the Scope of the Charter*, in Maastricht Journal of European and Comparative Law, Vol. 8, Issue 1, 2001, pp. 68-80. With specific regard to the Italian literature on this issue, see M. CONDINANZI, P. IANNUCCELLI, *Art. 53. Livello di protezione*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI (a cura di), *Carta dei diritti fondamentali dell'Unione europea*, *cit.*, p. 1086 et seq.; M. CARTABIA, *Convergenze e divergenze nell'interpretazione delle clausole finali della Carta dei diritti fondamentali dell'Unione europea*, *cit.*, pp. 14-15.

[507] On competing legal remedies generated by the guarantees provided by the Italian Constitution, the Charter and the ECHR, see E. CANNIZZARO, *Sistemi concorrenti di tutela dei diritti fondamentali e controlimiti costituzionali*, in www.forumcostituzionale.it, 23 October 2016.

[508] Judgment no. 269 of 2017, § 5.2. *Conclusions on points of law*.

provision at issue which has survived constitutional scrutiny, whenever, on other grounds, they consider it to be in conflict with EU law".[509]

What stands out at first glance from the reading of the *obiter dictum* enshrined in decision no. 269 of 2017 is, therefore, the Court's eagerness to show that the new arrangement therein envisaged is fully consistent with the CJEU's case law, on the grounds that the priority nature of the constitutional review the ICC called for is without prejudice to the recourse to the preliminary reference mechanism by common judges. Having clarified this focal point on the alleged compatibility between the interlocutory constitutionality procedure and the position taken by the Luxembourg Court so far, the ICC eventually reminded the referring judge that, in the case at stake, the complainants claimed the violation not of fundamental rights contained in the Charter, but rather of the right of establishment and the free provision of services within the EU, as they are codified in the Treaties.[510] This implies that the concrete situation being submitted by the referring court to the ICC does not fall under the foregoing cases that the *obiter dictum* deals with, in which the dis-application of the internal law – to quote an eloquent statement from the present decision – "inevitably becomes a form of unacceptable decentralized constitutional review of the laws".[511]

In spite of its lack of any material link with the dispute the complainants brought before the Court, the clarification which lies at the core of the judgment reflects, thus, the carrying out of a highly delicate balancing operation: accommodating the Italian centralized system of constitutional review with the "obedience" to the deeply-rooted case law of the CJEU on the issue of dual preliminarity.[512] In addressing ICC's effort to walk the tightrope between, on the one side, a staunch defence of its status as constitutional rights gatekeeper and, on the other side, its concurrent allegiance to the benchmarks set out by the CJEU's jurisprudence, the Italian literature has hailed ruling no. 269 of 2017, by and large, as a major step in

[509] These quotes are taken from the aforementioned Joined Cases C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli* (2010), para. 57 and Case C-112/13, *A v. B and others* (2014), para. 46.

[510] In particular, the complainants invoked the direct effect of such freedoms under Articles 49 and 56 TFEU. For an analogous case, the ICC recalled its recent Judgment no. 111 of 2017.

[511] In this regard, the ICC added that "the referring commission has the duty to decide the question in order to assess the applicability of the internal law in the proceedings brought before it". See Judgment no. 269 of 2017, § 5.3. *Conclusions on points of law*.

[512] As to such "balancing act" carried out by the ICC in order to adjust to EU law, see F. S. MARINI, *I diritti europei e il rapporto tra le Corti: le novità della sentenza n. 269 del 2017*, *cit.*, pp. 8-9.

the so-called "European journey" of the ICC.[513] Accordingly, among the various definitions that were coined within the lively debate triggered by this judgment,[514] it has been labelled as a "momentous ruling";[515] a "breakthrough of the Italian Constitutional Court on the issues concerning EU law";[516] a "real turnaround" for dual preliminarity, in contrast to the ICC's case law until then;[517] a "creative" or "disruptive" *obiter* on the role of ordinary judges when confronted with EU law;[518] and, with an even greater degree of emphasis, a "Copernican revolution"[519] or "the most relevant decision in terms of relations between domestic law and EU law after *Granital*"[520].

It seems no easy task, though, to delve into the genuine message the ICC did mean to convey through its *obiter dictum*, neither to identify the actual recipients of this latter. In this regard, according to an insightful understanding of the judgment at issue, the ICC broadened the scope of its centralized review of constitutionality to all fundamental rights' (assumed) violations, by replacing the "structural" criterion set forth in *Granital* – which distinguished between self-executing EU provisions and EU rules having no direct effects – with an "axiological-substantial" one, that rests on the primacy of the fundamental rights embedded in the Charter, because of the typically constitutional nature of its contents.[521] This newly-established criterion

[513] This expression was first used by P. BARILE, *Il cammino comunitario della Corte*, in Giur. cost., Vol. 18, No. 1, 1973, p. 2406 et seq.

[514] For an overview, see G. COMAZZETTO, *Cronaca di una svolta annunciata: doppia pregiudizialità e dialogo tra Corti, a un anno dalla sentenza n. 269/2017*, *cit.*, p. 3.

[515] S. VERNUCCIO, *La sentenza 269/2017: la Corte costituzionale di fronte alla questione dell'efficacia diretta della Carta di Nizza e la prima risposta del giudice comune (Cass. ord. 3831/2018)*, *cit.*, p. 2.

[516] 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)*, *cit.*, pp. 1-13.

[517] G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, *cit.*, p. 1 et seq.

[518] 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*, *cit.*, p. 1 et seq.

[519] R. CONTI, *La Cassazione dopo Corte cost. n. 269/2017. Qualche riflessione, a seconda lettura*, *cit.*, p. 14.

[520] According to Caruso, the *obiter dictum* turned an ordinary decision of inadmissibility into a potential "constitutional canon". See C. CARUSO, *La Corte costituzionale riprende il «cammino comunitario»: invito alla discussione sulla sentenza n. 269 del 2017*, *cit.*. Similarly, see P. FARAGUNA, *Constitutional Rights First: The Italian Constitutional Court fine-tunes its "Europarechts freundlichkeit"*, *cit.*; G. SCACCIA, *Giudici comuni e diritto dell'Unione europea nella sentenza della Corte costituzionale n. 269 del 2017*, *cit.*, p. 1.

[521] In this respect, Ruggeri argued that "it no longer matters the nature of the provisions, that is to say their being or not being self-executing. The structural criterion, which looks at the way of being of the

acknowledging the substantively constitutional "dignity"[522] of the Charter empowered the ICC to resolve on a case-by-case basis the antinomies between the relevant norms, at both national and European level, without any hierarchy established *a priori*, for the purpose of guaranteeing the highest protection of the fundamental rights being at stake.[523]

By granting priority to the constitutional review in cases of dual preliminarity, judgment no. 269 of 2017 asserted what was defined as a "generalized *jus primi verbi*" of the ICC on the interpretation of the individual rights which are guaranteed, at once, both in the Italian Constitution and in the Charter.[524] Some scholars have not hesitated to describe such stance of the ICC as an *actio finium regundorum*[525] or even as an "act interrupting the usucaption", where the "usucaption" does relate to the powers of the Court and the creeping risk they might wear away, due to the coexistence of three non-hierarchical bills of rights – i.e. the national Constitution, the Charter and the ECHR – within the same legal space.[526]

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norm, is resolutely set aside to make room for an axiological-substantial criterion, that relates to the capacity of the norms to embody the fundamental values of the legal framework, give voice to them and ensure their practical implementation". However, the Author underlined that it is not clear which "meta-principle" would allow to give priority to such axiological-substantial criterion. See 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)*, *cit.*, pp. 6-7; A. RUGGERI, *Corte europea dei diritti dell'uomo e giudici nazionali, alla luce della più recente giurisprudenza costituzionale (tendenze e prospettive)*, in AIC, Fasc. 1/2018, 5 febbraio 2018, p. 7. In the same vein, see also F. S. MARINI, *I diritti europei e il rapporto tra le Corti: le novità della sentenza n. 269 del 2017*, *cit.*, pp. 7-8; G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, *cit.*, p. 3 and 9.

[522] Importantly, Ruggeri also noticed that "by recognizing the materially constitutional nature of the Charter, the ICC implicitly recognized the materially constitutional nature of the CJEU as well, which is the first and institutional guarantor of the Charter". See 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)*, *cit.*, p.6.

[523] C. CHIARIELLO, *Il valore costituzionale della Carta di Nizza: un problema ancora aperto anche alla luce della sentenza n. 269/2017 della Corte costituzionale*, *cit.*, p. 390.

[524] G. SCACCIA, *Giudici comuni e diritto dell'Unione europea nella sentenza della Corte costituzionale n. 269 del 2017*, *cit.*, p. 7.

[525] In this regard, Roberto Bin argued that "On the scale of priorities, each court has its own irreducible opinion and communicate it to the other courts by writing the grounds of its most demanding decisions on the methodological level. They are *actiones finium regundorum*, or perhaps acts interrupting the usucaption – even though we love to call them "dialogue".". See R. BIN, *L'interpretazione conforme. Due o tre cose che so di lei*, in AIC, No. 1, 2015, p. 13.

[526] A. GUAZZAROTTI, *Un "atto interruttivo dell'usucapione" delle attribuzioni della Corte costituzionale? In margine alla sentenza n. 269/2017*, *cit.*, p. 1; V. PICCONE, *A prima lettura della sentenza della Corte di cassazione n. 4223 del 21 febbraio 2018. L'interpretazione conforme come strumento di "sutura" post Corte costituzionale n. 269/2017*, in Diritti Comparati, No. 1/2018, p. 287.

Arguably, this claim of the ICC to a right to have the first word – or, as someone stated, a second to last word[527] – may be considered *prima facie* as a reply to that supranational jurisprudence which, as was seen above, has broadened the scope of the Charter in a federalist outlook,[528] thereby enhancing the status of the CJEU as a fundamental rights court in the post-Lisbon legal landscape.[529] As to this communication channel between Rome and Luxembourg, it is noteworthy the ICC's pledge that it will interpret the rights protected by the Charter in a way consistent with the "constitutional traditions" under Article 6 TEU and Article 52(4) of the Charter.[530] This statement of the *obiter dictum* oozes the ICC's will to raise its voice as a critic interlocutor of the CJEU, by implicitly foreshadowing the development of a set of legal precedents which would ultimately influence the jurisprudence of the CJEU itself. Through the exercise of such function of *viva vox constitutionis*[531] within the European circuit of adjudication, the ICC will offer to the Luxembourg Court the knowledge of the national constitutional issues that may arise before the CJEU, thus undertaking an active role in the shaping of the common constitutional traditions.[532] In particular, the recent *Taricco* case – which is held up by the ICC's judicial reasoning as a valuable example of the fruitful interaction between the two Courts – might have further encouraged the Italian justices to continue along the path of engaging in direct dialogue with the CJEU. By endorsing (at least formally) this spirit of "constructive and loyal cooperation" among different systems of fundamental rights protection, the ICC proves to be well aware, in the wake of the

[527] G. REPETTO, *Concorso di questioni pregiudiziali (costituzionale ed europea), tutela dei diritti fondamentali e sindacato di costituzionalità*, *cit.*, p. 2965.
[528] *Ibi*, p. 2959.
[529] See J. KOMAREK, *National constitutional courts and the European Constitutional Democracy*, *cit.*, p. 527 et seq.
[530] Judgment no. 269 of 2017, § 5.2. *Conclusions on points of law*.
[531] With regard to this openness of the ICC to receive from and to convey to Luxembourg the constitutional problems that some decisions of the CJEU pose, see D. TEGA, *La sentenza n. 269 del 2017 e il concorso di rimedi giurisdizionali costituzionali ed europei*, *cit.*, p. 3.
[532] The relevance of this intervention by the ICC in order to explain the Italian legal tradition and constitutional identity is also highlighted in M. CARTABIA, *Convergenze e divergenze nell'interpretazione delle clausole finali della Carta dei diritti fondamentali dell'Unione europea*, *cit.*; G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, *cit.*, p. 7; A. ANZON DEMMIG, *La Corte riprende il proprio ruolo nella garanzia dei diritti costituzionali e fa un altro passo avanti a tutela dei "controlimiti"*, *cit.*, p. 6.

Taricco saga, of the strategic weight of its own preliminary reference in the logic of an ever-closer interplay with the CJEU.[533]

In view of the foregoing, a closer look at judgment no. 269 of 2017 suggests that the *obiter dictum*, besides speaking to Luxembourg, is addressed first and foremost to national ordinary courts and tribunals.[534] This point of view is widely shared by many interpreters, according to whom the *dictum* represented a "clear call to order"[535], a deliberate "warning"[536] or a "*vademecum*"[537] for lower judges in relation to the enforcement of fundamental rights. As a matter of fact, the ICC moved away from the circumstances of the present proceedings in order to set the rules that ordinary courts must henceforth abide by, in principle, in the event of a (possible) concurrent *vulnus* to the Italian Constitution and the Charter.[538] By doing so, this ruling provided common judges the necessary coordinates to determine which one is the competent judicial body – i.e. the ICC or the CJEU – to be addressed in such situations of dual preliminarity.[539] On the contrary, the failure to request the *erga*

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[533] According to Marini, "the Taricco case has proved, in particular, that through the power of preliminary reference to the CJEU the Constitutional Court decides whether and when to activate the dialogue between courts and to keep the last word on the case". See F. S. MARINI, *I diritti europei e il rapporto tra le Corti: le novità della sentenza n. 269 del 2017*, *cit.*, p. 10. As to the literature interpreting Judgment no. 269/2017 in terms of potential enhancement of ICC's preliminary references to the CJEU, see also F. MARTINES, *Procedimenti pregiudiziali e applicazione di parametri costituzionali ed europei a tutela dei diritti fondamentali*, *cit.*, p. 24; G. SCACCIA, *Giudici comuni e diritto dell'Unione europea nella sentenza della Corte costituzionale n. 269 del 2017*, *cit.*, pp. 6-7; R. CONTI, *Qualche riflessione, a terza lettura, sulla sentenza n. 269/2017*, *cit.*, p. 284.

[534] Among others, see G. REPETTO, *Concorso di questioni pregiudiziali (costituzionale ed europea), tutela dei diritti fondamentali e sindacato di costituzionalità*, *cit.*, p. 2964, who identified ordinary judges as the "ultimate interlocutors" of the ICC in Judgment no. 269/2017.

[535] D. TEGA, *La sentenza n. 269 del 2017 e il concorso di rimedi giurisdizionali costituzionali ed europei*, *cit.*, p. 2.

[536] G. PISTORIO, *Conferme e precisazioni nel «cammino comunitario» della Corte costituzionale. Commento a prima lettura della sentenza n. 269 del 2017*, *cit.*.

[537] A. GUAZZAROTTI, *Un "atto interruttivo dell'usucapione" delle attribuzioni della Corte costituzionale? In margine alla sentenza n. 269/2017*, *cit.*, pp. 1-2.

[538] A. ANZON DEMMIG, *La Corte riprende il proprio ruolo nella garanzia dei diritti costituzionali e fa un altro passo avanti a tutela dei "controlimiti"*, *cit.*, p. 5; 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*, *cit.*, p. 3; C. CHIARIELLO, *Il valore costituzionale della Carta di Nizza: un problema ancora aperto anche alla luce della sentenza n. 269/2017 della Corte costituzionale*, *cit.*, p. 386.

[539] G. COMAZZETTO, *Cronaca di una svolta annunciata: doppia pregiudizialità e dialogo tra Corti, a un anno dalla sentenza n. 269/2017*, *cit.*, p. 4. In this regard, Marta Cartabia made clear that "the ordinary judge should not be, in principle, in the embarrassing position of having to decide which one of the two courts is to be referred to for a preliminary ruling, in order to resolve relevant issues for deciding the main proceedings that he is invested of". See M. CARTABIA, *Considerazioni sulla posizione del giudice comune di fronte a casi di 'doppia pregiudizialità' comunitaria e costituzionale*, *cit.*, p. 222.

omnes intervention of the ICC would otherwise bring about what the Court stigmatized as "a form of inadmissible widespread constitutional review of the laws".[540] What one may infer, therefore, is that the new axiological-substantial criterion and the priority subsequently assigned to the review of constitutionality pursue the aim of bridling the power (and/or the duty) of lower courts to apply directly the Charter and to set aside any clashing domestic statutes.[541] Seemingly, it can be argued that decision no. 269 of 2017 witnesses a renewed centripetal bias in the Italian constitutional jurisprudence: an *actio finium regundorum* targeted not only at the CJEU but at national ordinary judges as well,[542] with a view to strengthening their role as primary interlocutors of the ICC through the use of the Charter.[543]

All in all, the interpretation difficulties surrounding the *obiter dictum* keep open a number of contentious questions that will need to be illuminated by the forthcoming case law of the ICC. To name but a few, a first element of ambiguity rises from the starting point of the Court's reasoning: what are the "transformations of EU law and the system of its relationships to national legal systems after the Lisbon Treaty entered into force" which may account for such a fine-tuning of the Italian

[540] Judgment no. 269 of 2017, § 5.3. *Conclusions on points of law*.

[541] According to Conti, the ICC "anaesthetised the possibility of common judges to apply directly the Charter until after the end of the interlocutory procedure for the review of constitutionality". Similarly, Scaccia argued that the aim of Judgment no. 269/2017 consisted of "averting the direct application of the Charter by ordinary judges in the absence of an interlocutory procedure for the review of constitutionality or a preliminary ruling procedure". See R. CONTI, *Qualche riflessione, a terza lettura, sulla sentenza n. 269/2017*, *cit.*, p. 283; G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, *cit.*, p. 6 et 11; G. SCACCIA, *Giudici comuni e diritto dell'Unione europea nella sentenza della Corte costituzionale n. 269 del 2017*, *cit.*, p. 3 et 6; F. S. MARINI, *I diritti europei e il rapporto tra le Corti: le novità della sentenza n. 269 del 2017*, *cit.*, p. 4; G. REPETTO, *Concorso di questioni pregiudiziali (costituzionale ed europea), tutela dei diritti fondamentali e sindacato di costituzionalità*, *cit.*, p. 2964. In the same vein, Piccone interpreted the *obiter dictum* as a warning "about the impossibility [for lower judges] to have recourse to the non-centralized review of constitutionality with dis-applicative effects by means of the Charter"; that is to say, "every time it is necessary to intervene by setting aside domestic provisions due to the Charter, common judges can only have recourse to the centralized constitutional review". See V. PICCONE, *A prima lettura della sentenza della Corte di cassazione n. 4223 del 21 febbraio 2018. L'interpretazione conforme come strumento di "sutura" post Corte costituzionale n. 269/2017*, *cit.*, pp. 297-298.

[542] This centripetal tendency by the ICC 's jurisprudence is highlighted in B. CARAVITA, *Roma locuta, causa finita? Spunti per un'analisi di una recente actio finium regundorum, in senso centripeto, da parte della Corte costituzionale*, in Federalismi.it, no. 15/2018, p. 7.

[543] See D. TEGA, *La sentenza n. 269 del 2017 e il concorso di rimedi giurisdizionali costituzionali ed europei*, *cit.*, p. 4, where lower judges are defined as "essential allies for the ICC in order to complete the strategy that Judgment no. 269/2017 falls within". Accordingly, Scaccia has speaken about a "renewed alliance" between common judges and the ICC. See G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, *cit.*, p. 13.

constitutional jurisprudence?[544] Moreover, it seems not completely clear how wide the scope of application of the ICC's *revirement* will be. Indeed, the Court referred to the Charter in very general terms, without drawing any distinction between self-executing and not self-executing provisions.[545] One might well wonder, then, whether the axiological-substantial rule recently introduced by the ICC is confined to the Charter in its entirety or only to certain provisions of the latter.[546] If this is not the case, could the Court otherwise extend the same scheme elsewhere, that is to say to all primary EU law – including the norms of the Treaties and the unwritten general principles of EU law – or even to secondary EU law, by reason of the materially constitutional stamp of their contents?[547] And again, the flexibility that the ICC would reserve in using the internal and the European criteria (per Articles 11 and 117 of the Constitution) is yet another "opaque" sentence of the *obiter dictum*. In fact, the statement according to which the Court will judge in light of internal parameters and,

[544] With the exception of Article 6 TEU, which formally recognized to the Charter the same legal value as the Treaties. Indeed, it is well-known that the Charter – as its preamble sets forth – reaffirmed rights and principles as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States. As to the relationships between the EU and national legal systems, the *obiter dictum* subsequently made reference to Articles 52 and 53 of the Charter. However, it can be noticed that the ICC avoided to mention Article 51 which established – in line with Article 6 TEU and the other "horizontal clauses" of the Charter itself – that the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. See R. DI MARCO, *The "Path Towards European Integration" of the Italian Constitutional Court: the Primacy of EU Law in the Light of Judgment No. 269/17*, *cit.*, p. 10; 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*, in Osservatorio sulle fonti, no. 1/2018, pp. 22-23; P. MORI, *Taricco II o del primato della Carta dei diritti fondamentali e delle tradizioni costituzionali comuni agli Stati membri*, in Il Diritto dell'Unione Europea, Osservatorio europeo, dicembre 2017, p. 18; C. SCHEPISI, *La Corte costituzionale e il dopo Taricco. Un altro colpo al primato e all'efficacia diretta?*, *cit.*, pp. 6-7; G. COMAZZETTO, *Cronaca di una svolta annunciata: doppia pregiudizialità e dialogo tra Corti, a un anno dalla sentenza n. 269/2017*, *cit.*, pp. 10-11.

[545] Thus, the ICC seems to imply that all the provisions of the Charter are endowed with direct effect. On this point, see A. COZZI, *Diretta applicabilità e sindacato accentrato di costituzionalità relativo alla violazione della Carta europea dei diritti fondamentali*, *cit.*, pp. 14-16.

[546] The need for further clarification about the ICC's reference to the rights and principles of the Charter as parameters triggering, for lower judges, the duty to raise the question of constitutionality is also highlighted in G. REPETTO, *Concorso di questioni pregiudiziali (costituzionale ed europea), tutela dei diritti fondamentali e sindacato di costituzionalità*, *cit.*, pp. 2957-2958; D. TEGA, *La sentenza n. 269 del 2017 e il concorso di rimedi giurisdizionali costituzionali ed europei*, *cit.*, p. 2.

[547] 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)*, *cit.*, p. 11; C. CARUSO, *La Corte costituzionale riprende il «cammino comunitario»: invito alla discussione sulla sentenza n. 269 del 2017*, *cit.*. p. 3; G. PISTORIO, *Conferme e precisazioni nel «cammino comunitario» della Corte costituzionale. Commento a prima lettura della sentenza n. 269 del 2017*, *cit.*.; G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, *cit.*, pp. 9-10.

"potentially", European ones as well "in the order that is appropriate to the specific case" does sound rather enigmatic.[548]

Bearing in mind these outstanding issues, the new paradigm launched by the ICC seems to cast more shadows than lights in terms of consistency with the EU legal order, with specific regard to the enforcement of the preliminary ruling mechanism under Article 267 TFEU. From this standpoint, it is questionable whether decision no. 269 of 2017 should be construed as an exemption from lower judges' obligation to assess any profile of European compatibility before submitting a question of constitutionality or, rather, as a fully-fledged limitation to their power to have recourse to Luxembourg for receiving guidance on the meaning and scope of the relevant EU provisions. It goes without saying that this second understanding of the ICC's assumption would be manifestly at odds with the very essence of the *Simmenthal* doctrine of the CJEU,[549] which actually enables all domestic courts and tribunals to act as *longa manus* of EU law.[550]

Likewise, the unilateral incorporation of the Charter into ICC's centralized review of constitutionality – based on the assumed axiological coincidence between the national Constitution and the Charter itself – is in sharp contrast to the CJEU's consolidated role as gatekeeper of the Charter. In view of this cornerstone of the EU legal system, the envisaged ICC's "self-entitlement" to interpret the Charter on its own would be highly problematic:[551] any doubt or query concerning the Charter –

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[548] What can be inferred from this controversial passage of the *obiter dictum* is, in particular, the priority nature recognized by the ICC to the review of constitutionality in cases of dual preliminarity. See C. SCHEPISI, *La Corte costituzionale e il dopo Taricco. Un altro colpo al primato e all'efficacia diretta?*, *cit.*, pp. 12-14; F. S. MARINI, *I diritti europei e il rapporto tra le Corti: le novità della sentenza n. 269 del 2017*, *cit.*, p. 9.

[549] Conversely, it is undisputed that no infringement of EU law will occur if the solution envisaged by the ICC aims only at limiting lower judges' duty to examine the European aspects prior to the interlocutory procedure for the review of constitutionality. See 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*, *cit.*, p. 4 et seq.; R. CONTI, *Qualche riflessione, a terza lettura, sulla sentenza n. 269/2017*, *cit.*, p. 289; C. CHIARIELLO, *Il valore costituzionale della Carta di Nizza: un problema ancora aperto anche alla luce della sentenza n. 269/2017 della Corte costituzionale*, *cit.*, p. 387.

[550] In this regard, Marta Cartabia defined ordinary judges as "peripheral arms of the European judicial system". See M. CARTABIA, *La fortuna del giudizio di costituzionalità in via incidentale*, in A. RUGGERI (a cura di), Scritti in onore di Gaetano Silvestri, Vol. 1, Torino, Giappichelli, 2016, p. 485.

[551] 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*, *cit.*, p. 6; G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, *cit.*, p. 6; R. CONTI, *Qualche riflessione, a terza lettura, sulla sentenza n. 269/2017*, *cit.*, p. 279.

and the same goes for any other relevant provision of EU law – should be rather submitted to Luxembourg from lower judges and, if needed, from the Constitutional Court itself.[552] As a result, the ICC's claim to interpret unilaterally the Charter "in a way consistent with constitutional traditions" appears very much debatable on two grounds. First, the vague allusion of the ICC to "constitutional traditions" begs the question whether the Court did refer to the constitutional traditions common to the Member States or, rather, to its own "national" Constitution and constitutional traditions.[553] Second, even if the ICC meant that it will interpret EU fundamental rights – borrowing the words of Article 52(4) of the Charter – "in harmony with the common constitutional traditions of the Member States",[554] this would anyway contravene the nomophylactic competence of EU law, which lies solely with the CJEU.[555]

On the basis of such attraction of the Charter's rights within the ICC's centralized review of constitutionality, it is legitimate to ask whether time is ripe to reconsider, on a theoretical level, the relationship between the domestic and the EU legal orders. According to part of the literature, judgment no. 269 of 2017 essentially reinforces the longstanding dualist and non-hierarchical approach adopted by the ICC jurisprudence – as well as, *mutatis mutandis*, by other constitutional courts – towards

[552] Unless, as highlighted by Martines, the ICC decides to invoke the so-called "*acte clair doctrine*" of the CJEU. See F. MARTINES, *Procedimenti pregiudiziali e applicazione di parametri costituzionali ed europei a tutela dei diritti fondamentali*, *cit.*, p. 15.

[553] As is well known, the jurisprudence of the CJEU since Judgment *Nold* identified common constitutional traditions (along with international human rights agreements) as a primary source of "inspiration" to develop the general principles of EU law, which were eventually laid down in the Charter. The CJEU's case law on general principles of EU law was then codified in Article 6(3) TEU, which holds that "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law". See P. CRAIG, G. DE BURCA , *EU Law: Texts, Cases and Materials*, Oxford, Oxford University Press, 2008, p. 384 et seq.; R. SCHÜTZE, *European Union Law*, Cambridge, Cambridge University Press, 2015, p. 432 et seq.

[554] According to Article 52 (4) of the Charter, "In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions".

[555] I. CAMERON, *Competing rights?*, in S. DE VRIES, U. BERNITZ, S. WEATHERILL, *The Protection of Fundamentl Rights in Europe after Lisbon*, Oxford, Hart Publishing, 2013, pp. 193-194. In the same vein, see 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*, *cit.*, p. 6; F. MARTINES, *Procedimenti pregiudiziali e applicazione di parametri costituzionali ed europei a tutela dei diritti fondamentali*, *cit.*, pp. 15-16; G. SCACCIA, *Giudici comuni e diritto dell'Unione europea nella sentenza della Corte costituzionale n. 269 del 2017*, cit., p. 6.

EU law,[556] as opposed to the monist philosophy that the Luxembourg Court has always advocated since its landmark ruling *Costa v. Enel*[557]. However, the new "axiologically-oriented" position of the ICC suggests that the case law of the Court may be laying the foundations to walk down a third way, which goes beyond the classic dichotomy between monism and dualism. As a matter of fact, the *obiter dictum* appears to insist, on the one hand, on the dualist doctrine that, since judgment no. 389/1989 of the ICC, has classified the domestic and the EU legal frameworks as systems "autonomous but coordinated and communicating with each other".[558] Yet, on the other hand, the enlargement of the constitutional jurisdiction to encompass the rights of the Charter might entail an unprecedented departure from ICC's traditional dualism to embrace what Giorgio Repetto, in comparison to the monism followed by the CJEU, defined as an "inverted constitutional monist" vision of the interplay between domestic law and EU law.[559]

In the end, despite the ICC's reiterated assurances to comply with the principles of primacy and direct effect of EU law and the avowed deference of the Court to the CJEU jurisprudence on the issue of dual preliminarity, judgment no. 269 of 2017 unveils, at the same time, several asperities which may be hard to reconcile with the federalist architecture underlying the system of fundamental rights protection in the EU legal order. This cutting-edge decision of the ICC sketches out, therefore, a discourse which will need to be further developed: a jurisprudential pathway whose extent and destination, for the time being, remain fairly uncertain. In this regard,

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[556] Particularly, such dualist position was at the basis of the remedy of "non-application" of internal laws that the ICC introduced in the aforementioned Judgment no. 170/1984 (*Granital*). See C. CARUSO, *La Corte costituzionale riprende il «cammino comunitario»: invito alla discussione sulla sentenza n. 269 del 2017*, *cit.*. p. 2; A. ANZON DEMMIG, *La Corte riprende il proprio ruolo nella garanzia dei diritti costituzionali e fa un altro passo avanti a tutela dei "controlimiti"*, *cit.*, p. 6; A. BARBERA, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di giustizia*, *cit.*, p. 10.

[557] CJEU 15/07/1964, Case 6/64, *Costa/ENEL*, [1964], ECR 1253.

[558] Judgment no. 389 of 1989 of the Italian Constitutional Court, §4 *Conclusions on points of law*. On this decision see, among others, U. RESCIGNO, *Un sedicente atto di indirizzo e coordinamento che per la Corte non è tale*, in Regioni, No. 5, 1990, p. 1554 et seq.; L. SALAZAR, *Diritto comunitario e diritto nazionale: (due) ulteriori passi in avanti*, in Cassazione penale, no. 4, 1990, p. 574 et seq.

[559] In this regard, the Author hihglighted the risk that the ICC might claim anything that falls within the scope of application of the Charter. See G. REPETTO, *Concorso di questioni pregiudiziali (costituzionale ed europea), tutela dei diritti fondamentali e sindacato di costituzionalità*, *cit.*, p. 2960. Similarly, Comazzetto argued that Judgment no. 269/2017 is to be read not just as an exception to *Granital* but rather as a" restructuring" of the traditional arrangement concerning the relationship between domestic law and supranational law. See G. COMAZZETTO, *Cronaca di una svolta annunciata: doppia pregiudizialità e dialogo tra Corti, a un anno dalla sentenza n. 269/2017*, *cit.*, pp. 28-29.

while the forthcoming case law of the ICC is expected to loosen the above interpretative knots, it seems that the concrete effectiveness of the *obiter dictum* – and, especially, its impact on the remedy of disapplication and on the preliminary reference procedure – will mostly depend on lower judges' adaptability to the new rule laid down therein as well as on the behaviour the CJEU will be assuming in its subsequent jurisprudence.[560]

As regards this latter, shortly after ICC's judgment no. 269 of 2017 the Luxembourg Court delivered the ruling *Global Starnet*, in which the CJEU firmly reiterated that a national court against whose decisions there is no judicial remedy is required, in principle, to refer a question for a preliminary ruling concerning the interpretation of EU law "*even if, in the course of the same national proceedings, the constitutional court of the Member State concerned has assessed the constitutionality of national rules in the light of regulatory parameters with content similar to rules under EU law*".[561] More recently, it seems that in *XC, YB and ZA v. Austria* the CJEU has provided a subtle reply to the ICC's fine-tuning of its case law. As a matter of fact, in that decision the CJEU held that Article 267 TFEU gives national courts "*the widest*

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[560] In this sense, see G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, *cit.*, p. 13. With regard to the first reactions from the Italian judges and, particularly, from the Court of Cassation to ICC's Judgment no. 269 of 2017, see V. PICCONE, *A prima lettura della sentenza della Corte di cassazione n. 4223 del 21 febbraio 2018. L'interpretazione conforme come strumento di "sutura" post Corte costituzionale n. 269/2017*, *cit.*, pp. 293-324; L. S. ROSSI, *Il "triangolo giurisdizionale" e la difficile applicazione della sentenza 269/2017 della Corte costituzionale italiana*, in Federalismi.it, no. 16/2018, pp. 1-14; R. CONTI, *La Cassazione dopo Corte cost. n. 269/2017. Qualche riflessione, a seconda lettura*, in www.forumcostituzionale.it, 28 dicembre 2017; A. RUGGERI, *Una prima, cauta ed interlocutoria risposta della Cassazione a Corte cost. n. 269/2017 (a prima lettura di Cass., II sez. civ., 16 febbraio 2018, n. 3831, Bolognesi c. Consob)*, in www.giurcost.org, 23 febbraio 2018, pp. 82-86; ID., *Dopo la sent. n. 269 del 2017 della Consulta sarà il legislatore a far da paciere tra le Corti?*, in www.giurcost.org, 23 marzo 2018, pp. 155-164; D. TEGA, *Il seguito in Cassazione della pronuncia della Corte costituzionale n. 269 del 2017: prove pratiche di applicazione*, in www.questionegiustizia.it, 12 marzo 2018; 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*, *cit.*, pp. 1-35; G. COMAZZETTO, *Cronaca di una svolta annunciata: doppia pregiudizialità e dialogo tra Corti, a un anno dalla sentenza n. 269/2017*, *cit.*, pp. 31-34; C. CHIARIELLO, *Il valore costituzionale della Carta di Nizza: un problema ancora aperto anche alla luce della sentenza n. 269/2017 della Corte costituzionale*, *cit.*, p. 389 et seq.; F. MARTINES, *Procedimenti pregiudiziali e applicazione di parametri costituzionali ed europei a tutela dei diritti fondamentali*, *cit.*, p. 19 et seq.

[561] Case C-322/16, *Global Starnet* (2017), § 26. For an in-depth analysis of this case, see inter alia A. RUGGERI, *Ancora in tema di congiunte violazioni della Costituzione e del diritto dell'Unione, dal punto di vista della Corte di giustizia (Prima Sez., 20 dicembre 2017, Global Starnet)*, in Diritti Comparati, No. 1/2018, pp. 262-274; S. FELICIONI, *La pronuncia di una Corte costituzionale non può incidere sull'obbligo dei giudici di ultima istanza di sottoporre una questione pregiudiziale alla Corte di Giustizia*, in DPCE online, No. 1/2018, pp. 219-226.

discretion in referring matters to the Court" and that national courts are free to exercise that discretion "*at whatever stage of the proceedings they consider appropriate*".[562] Accordingly, the CJEU added that, pursuant to its settled case law, national courts are called upon, within the exercise of their jurisdiction, to apply provisions of EU law, are under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and – in what sounds as a cautionary reference to the Italian case – "*it is not necessary for that court to request or to await the prior setting aside of that provision of national law by legislative or other constitutional means*".[563]

In parallel to CJEU's decisions *Global Starnet* and *XC, YB and ZA v. Austria*, at the beginning of 2019 the ICC has provided for some urgent clarifications to the controversial *obiter dictum* enshrined in judgment no. 269 of 2017. In particular, in ruling no. 20 of 21 February 2019 the *Corte costituzionale* made clear that its new orientation on the issue of dual preliminarity would also apply whenever a provision of national law was found to be in conflict with the Charter and, in the meantime, with an EU directive, inasmuch as the principles envisaged by such act of secondary EU law were in a "unique connection" with the relevant provisions of the Charter itself[564]. Against this background, the ICC upheld the necessity of its own *erga omnes* intervention and added that its *jus primi verbi* – attributable to a precise choice of the referring court – was "more than justified by the constitutional status of

[562] Case C-234/17, *XC, YB and ZA v. Austria* (2017), § 42. For a comment, see A. RUGGERI, *Colpi di fioretto della Corte dell'Unione al corpo della Consulta, dopo la 269 del 2017 (a prima lettura della sentenza della Grande Sez., 24 ottobre 2018, C-234/17, XC, YB e ZA c. Austria*, in Diritti Comparati, No. 3/2018, pp. 1-12.

[563] Case C-234/17, *XC, YB and ZA v. Austria* (2017), § 44.

[564] Judgment no. 20 of 2019 of the Italian Constitutional Court, § 2.1. *Conclusions on points of law*. The text of the judgment is available at www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2019&numero=20 . Among the earliest commentaries, see O. POLLICINO, G. REPETTO, *Not to be Pushed Aside: the Italian Constitutional Court and the European Court of Justice*, in VerfBlog, 2019/2/27, www.verfassungsblog.de/not-to-be-pushed-aside-the-italian-constitutional-court-and-theeuropean-court-of-justice/; 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. sent. n. 20 del 2019)*, in www.giurcost.org, 25 febbraio 2019, pp. 113-119; A. CATALANO, *Doppia pregiudizialità: una svolta "opportuna" della Corte costituzionale*, in Federalismi.it, n. 10/2019, pp. 1-40; G. VITALE, *I recenti approdi della Consulta sui rapporti tra Carte e Corti. Brevi considerazioni sulle sentenze nn. 20 e 63 del 2019 della Corte costituzionale*, in Federalismi.it, n. 10/2019, pp. 1-15; R. CONTI, *Giudice comune e diritti protetti dalla Carta UE: questo matrimonio s'ha da fare o no?*, in www.giustiziainsieme.it, 4 marzo 2019; G. BRONZINI, *La sentenza n. 20/2019 della Corte costituzionale italiana verso un riavvicinamento all'orientamento della Corte di giustizia?*, in www.questionegiustizia.it, 4 marzo 2019.

the issue and the rights involved"[565]. It goes without saying that this application of the new priority rule to acts of derived European law fuels the concerns of the legal scholarship that the ICC might thereby extend the scope of its constitutionality review to any source of EU law. Yet, the Court expressly reassured domestic ordinary courts that its right to speak first would not affect in any way whatsoever their right to refer to the CJEU, at any stage of the proceedings, any preliminary ruling they would deem as necessary. According to the ICC, the occurrence of the guarantees ensured by the Charter next to those provided for by the national Constitution brings about a "concurrence of judicial remedies"; it enriches the legal instruments of fundamental rights protection; and it rules out, by its very nature, any foreclosure as regards the access to Luxembourg.

In the same vein, ICC's decision no. 63 of 2019 confirmed that lower courts are endowed with the power to raise a preliminary reference before the CJEU even after an interlocutory judgment of constitutionality[566]. Seemingly, this statement of principle suggests that the ICC is willing to temper its newly-established priority rule. Moreover, another noteworthy passage of decision no. 63 of 2019 pointed to the possibility that, in these cases of dual preliminarity, the ICC itself may submit a preliminary reference to the CJEU. Indeed, this opportunity took place shortly afterwards in ICC's judgment no. 117 of 2019[567]. In the case at hand, before proceeding to exercise its own review of constitutionality, the ICC considered it necessary to request the CJEU a clarification on the interpretation and, possibly, the validity of EU law, in the name of "*the aforementioned spirit of loyal cooperation between national and European courts as to the definition of common levels of fundamental rights protection*"[568].

Thus, a joint reading of decisions nos. 20, 63 and 117 of 2019 shows that, on the one side, the ICC has substantially followed in the footsteps of the twist inaugurated in earlier judgment no. 269 of 2017. On the other side, the aforesaid rulings have witnessed an effort by the Court to adjust the most contentious profiles of its highly

[565] Judgment no. 20 of 2019 of the Italian Constitutional Court, § 2.3. *Conclusions on points of law*.
[566] Judgment no. 63 of 2019 of the Italian Constitutional Court, § 4.3. *Conclusions on points of law*.
[567] Judgment no. 117 of 2019 of the Italian Constitutional Court. See A. RUGGERI, *Ancora un passo avanti della Consulta lungo la via del "dialogo" con le Corti europee e i giudici nazionali (a margine di Corte cost. n. 117 del 2019)*, in www.giurcost.org, 13 maggio 2019, pp. 241-248.
[568] Judgment no. 117 of 2019 of the Italian Constitutional Court, § 10 *Conclusions on points of law*.

debated *obiter dictum* in judgment no. 269, thereby defusing an open conflict with Luxembourg. In this regard, the preliminary reference the ICC has made pursuant to Article 267 TFEU in judgment no. 117 of 2019 can be seen, especially after the example of the *Taricco* case, as a significant step forward in the perspective of an ever-closer dialogue with the CJEU. Arguably, the same may be said about the closing statement of judgment no. 20 of 2019, which affirmed the ICC's willingness to contribute, for its own part, to ensure that the corresponding fundamental rights guaranteed by EU law, and in particular by the Charter, are interpreted "in harmony with the constitutional traditions common to the Member States"[569]. Nonetheless, it appears that this proactive assertion by the ICC will need some clarification because, as we have seen, the competence to determine the core of common constitutional traditions does not lie with national constitutional courts but rather with the CJEU.

3.3 Walking through the Brenner: the connection with the Austrian model

Among the elements of novelty characterizing Judgment no. 269 of 2017 of the ICC, one of the most cutting-edge aspects to look into more in deep for the purposes of the present analysis is the comparative scenario in which the Court placed its *obiter dictum*. As was mentioned above, in order to dispel any doubt about the compatibility of the newly-established priority rule with EU law and, in particular, with the Luxembourg case law on the matter of dual preliminarity, the ICC quoted some relevant excerpts from CJEU's rulings *Melki and Abdeli* and *A v. B and others*.[570] This citation of the replies the CJEU had given to the (similar) preliminary questions raised, respectively, by the French *Cour de Cassation* and the Austrian *Oberster Gerichtshof* bears witness to the ICC's gaze on other national legal orders which have likewise recognized the Charter as a yardstick for constitutional review in cases of dual preliminarity. More explicitly, alongside this reference to the

[569] Judgment no. 20 of 2019 of the Italian Constitutional Court, § 2.3. *Conclusions on points of law*.
[570] To the quoted decisions *Melki and Abdeli* and *A v. B and others* must also be added judgment C-5/*14 Kernkraft-werke vs. Hauptzollamt Osnabrueck* of 4 June 2015 of the CJEU. With respect to ICC's reference to the relevant case law of the CJEU, see G. PISTORIO, *Conferme e precisazioni nel «cammino comunitario» della Corte costituzionale. Commento a prima lettura della sentenza n. 269 del 2017*, *cit.*; L. SALVATO, *Quattro interrogativi preliminari al dibattito aperto dalla sentenza n. 269 del 2017*, *cit.*, p. 5; 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*, *cit.*, p. 24.

aforesaid case law of the CJEU on the issue of dual preliminarity, the ICC corroborated its legal arguments by highlighting that "other national constitutional courts with longstanding traditions", such as the Austrian Verfassungsgerichtshof, have followed an analogous line of reasoning.[571]

It is more than evident that the wording of Judgment no. 269 of 2017 in itself does not allow to get the exact degree of influence the jurisprudence of foreign constitutional courts and tribunals had, in practice, on the *obiter dictum* of the ICC.[572] Yet, the exemplary reference to the Charter decision the VfGH delivered in 2012 rests on the fact that the Austrian case is, admittedly, the most akin to the Italian one.[573] The first common trait which can be detected is that both the VfGH and the ICC overruled their past case law by means of an *obiter dictum*, whereas in the French legal system the legislator introduced the *question prioritaire de constitutionnalité* through a constitutional reform.[574] Apart from this lack of a positive foundation for the *revirement* the VfGH and the ICC opted for, a further point of convergence is the constitutional rank that both Wien and Rome have acknowledged to the EU catalogue of fundamental rights. By leveraging on the constitutional status the Charter enjoys in their domestic legal systems, the VfGH and the ICC have then reached the same conclusion that the judicial review of internal legislation in the light of the Charter is a matter for the constitutional court.

Meanwhile, the study of the Italian case in comparison to the Austrian one uncovers also some substantive discrepancies which cannot be neglected.[575] As a matter of fact, one should keep in mind that the Austrian "constitutionalization" of the Charter is grounded in certain assumptions which are typical of that specific legal context.

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[571] In particular, the ICC made reference to Austrian Constitutional Court, Judgment U 466/11-18; U 1836/11-13 of 14 March 2012 analysed in paragraph 2.2 of this chapter. See Judgment no. 269 of 2017 of the Italian Constitutional Court, § 5.2. *Conclusions on points of law*.

[572] This question concerning the incidence of the solutions adopted by foreign constitutional jurisdictions in situations similar to the Italian one is raised in C. CARUSO, *La Corte costituzionale riprende il «cammino comunitario»: invito alla discussione sulla sentenza n. 269 del 2017*, *cit.*. p. 3.

[573] The specific relevance of the Austrian decision due to its closeness to Judgment no. 269/2017 of the ICC was underlined, among others, in A. BARBERA, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di giustizia*, *cit.*, p. 12 and F. MARTINES, *Procedimenti pregiudiziali e applicazione di parametri costituzionali ed europei a tutela dei diritti fondamentali*, *cit.*, p. 13.

[574] On the peculiarity of the French situation in comparison to the Austrian and the Italian cases, see G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, *cit.*, p. 3 and G. REPETTO, *Concorso di questioni pregiudiziali (costituzionale ed europea), tutela dei diritti fondamentali e sindacato di costituzionalità*, *cit.*, p. 2964.

[575] R. CONTI, *Qualche riflessione, a terza lettura, sulla sentenza n. 269/2017*, *cit.*, p. 286.

First of all, as was discussed above, the ECHR rights have formally enjoyed constitutional status in the Austrian legal order. Therefore, the VfGH is used to having recourse to the Convention, as such, as a standard of review in its decisions. Second, the Austrian jurisprudence has constitutionalized the Charter on the basis of a principle of equivalence between the Charter itself and the ECHR. As a consequence, any internal statute found to be in conflict with the Charter is to be struck down at the end of a proceedings before the VfGH, to the extent that the allegedly violated Charter rights would correspond in their "content and purpose" with Constitution and Convention rights.[576]

In view of this peculiar status the ECHR enjoys in the Austrian legal framework, it can be argued that the legal grounds underlying the Charter decision of the VfGH (and its following jurisprudence) are much more consistent – or, put differently, better justified – than the judicial reasoning shaped by the ICC in Judgment no. 269 of 2017. Quite the opposite, the Italian constitutional jurisprudence has always been unwilling to recognize constitutional rank to the Convention. In parallel, the case law of the ICC has proved, overall, to be much less empathetic than the VfGH towards the judgments of the Strasbourg Court so far.[577] In the same vein, another distinctive feature of the Austrian constitutional context in terms of inter-judicial cooperation is the long-standing commitment of the VfGH with the CJEU. As is well-known, the VfGH was one of the very first constitutional and supreme courts within the EU to pioneer the preliminary ruling procedure under Article 267 TFEU.[578] Conversely, the

[576] On this syllogism followed by the VfGH since its Charter decision in 2012, see A. ORATOR, *The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?*, *cit.*, p. 1443; D. PARIS, *Constitutional Courts as Guardians of EU Fundamental Rights? Centralised Judicial Review of Legislation and the Charter of Fundamental Rights of the EU. European Court of Justice (Fifth Chamber), Judgment of 11 September 2014, Case C-112/13, A v B and others*, *cit.*, p. 393 et seq.

[577] In this regard, Orator argued that "for more than 50 years, and more intensively than most other constitutional courts in Europe, the Verfassungsgerichtshof has been citing judgments of the Strasbourg Court" and that "ECHR fundamental rights are now inherent in the domestic fundamental rights culture". See A. ORATOR, *The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?*, *cit.*, p. 1445.

[578] M. BOBEK, *The impact of European mandate on ordinary courts*, in M. CLAES, M. DE VISSER, P. POPELIER, C. VAN DE HEYNING, *Constitutional Conversations in Europe*, *cit.*, p. 301; ORATOR, *The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?*, *cit.*, p. 1430. The Austrian constitutional court made its first referral to the CJEU in decision VfSlg 15.450/1999. On the engagement of the VfGH with the CJEU in the form of the preliminary ruling procedure, K. KORINEK, *Der Verfassungsgerichtshof und das EU-Recht*, in K. KORINEK et al., *10 Jahre EU Mitgliedschaft: Eine Bilanz aus der Sicht der österreichischen Höchstgerichte*, EIF Working Paper 14/2005,

ICC has long been reluctant – as the majority of highest national courts in other EU Member States[579] – to actively engage in direct dialogue with the Luxembourg judges, at least until it accepted to send for the first time a preliminary request to the CJEU in 2008.[580]

These genuinely remarkable inconsistencies between the internal hierarchy of sources of laws in the Austrian and the Italian legal frameworks and, in particular, between the approach of the VfGH and the ICC indicate that great cautiousness is all the more necessary when it comes to evaluating the judicial transplant of the Austrian "solution" into the Italian constitutional landscape. Due to the above motives of differentiation, it must not to be taken for granted, as the doctrine has rightly pointed out, that the case law of the CJEU would consider the Italian situation tantamount to the Austrian one.[581] Regardless of the analogies and the divergences between the Austrian and the Italian cases, the recourse to the comparative reasoning can be understood as a major turning point for the argumentative strategy that the ICC has deployed in its *obiter dictum*.

At first reading, the reference to the Charter decision of the VfGH may appear as a purely additional or ornamental cross-reference aimed at backing the fine-tuning of the Italian constitutional jurisprudence in European affairs. It seems, though, that the ICC is actually seeking to take a more far-reaching step by means of the – exemplary and not exhaustive – citation of the Austrian case: legitimizing its own axiological-substantial twist by giving evidence that a common approach to the Charter has

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Öesterreichische Akademie der Wissenschaften, Wien, 2005, pp. 4-15. Indeed, the first constitutional court of an EU Member State to submit a referral under Article 267 TFEU was the (then) Cour d'arbitrage in Belgium in Case C-93/97, *Federation belge des chambres syndicales de medecins ASBL v. Flemish Government, Government of the French Community, Council of Minister, 1998 E.C.R. 1-04837*. On this latter case, see T. VANDAMME, *Prochain Arrêt: La Belgique!: Explaining Recent Preliminary References of the Belgian Constitutional Court*, in European Constitutional Law Review, Vol. 4, Issue 1, pp. 127-148.

[579] On preliminary references to the CJEU by national constitutional courts, G. MARTINICO, *Preliminary Reference and Constitutional Courts: Are You in the Mood for Dialogue?*, in F. FONTANELLI et al. (eds.), *Shaping Rule of Law through Dialogue: International and Supranational Experiences*, Europa Law Publishing, 2009, pp.

[580] Judgment no. 103/2008 of the Italian Constitutional Court. This first preliminary ruling to the CJEU concerned a regional measure on tax law allegedly in contrast with right of establishment and freedom to provide services. The following preliminary ruling of the ICC was raised with Judgment no. 207/2013 in the context of an incidental procedure of constitutionality. See V. BARSOTTI, P. CAROZZA, M. CARTABIA, A. SIMONCINI, *Italian Constitutional Justice in Global Context*, *cit.*, p. 110 et seq.

[581] Accordingly, Scaccia extended such concerns also to the comparison between the Italian and the French case. See G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, *cit.*, pp. 13-14.

circulated across the judicial reasoning of a range of national constitutional courts.[582] Such interpretation is borne out by the fact that the ICC recalled the Charter-related case law of "other constitutional courts with longstanding traditions" – besides the jurisprudence of the CJEU on the matter of dual preliminarity – not just to find a solution to an individual dispute being under scrutiny. Indeed, the reference to the constitutional case law of other EU Member States is enshrined, not by accident, in an *obiter dictum*. What the ICC carries out represents, rather, a more systemic shift, that is the unfolding of a brand new "horizontal" layer whose protagonists are the national constitutional courts.

Apparently, alongside an ever more vibrant interaction between Luxembourg and highest national courts – owing, first of all, to the increasing recourse of these latter to the preliminary ruling mechanism under Article 267 TFEU – the use of the Charter encourages the development of a dialogic network among constitutional courts themselves. This new horizontal and non-hierarchical relation would take shape in function of resistance to the aforesaid spill-over effect of the Charter and, accordingly, as a reaction to the risk that national constitutional courts might end up being side-lined from the circuit of fundamental rights adjudication.[583] The recent tendency to incorporate the Charter in the judicial review of constitutionality reflects, thus, an effort by a growing number of national constitutional courts to reaffirm their central role as fundamental rights gatekeepers.[584] Such move toward the re-appropriation of fundamental rights protection in favour of constitutional courts

[582] In this regard, Bronzini highlighted that, even though an in-depth and shared understanding among judges is still lacking, "some slow, convergent steps towards a shared vision of the Charter are beginning". See G. BRONZINI, *The Charter of Fundamental Rights of the European Union: a tool to strengthen and safeguard the rule of law?*, *cit.*, p. 6.

[583] Similarly, C. CARUSO, *La Corte costituzionale riprende il «cammino comunitario»: invito alla discussione sulla sentenza n. 269 del 2017*, *cit.*. p. 3; G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, *cit.*, p. 6; F. MARTINES, *Procedimenti pregiudiziali e applicazione di parametri costituzionali ed europei a tutela dei diritti fondamentali*, *cit.*, p. 24.

[584] A. ANZON DEMMIG, *La Corte riprende il proprio ruolo nella garanzia dei diritti costituzionali e fa un altro passo avanti a tutela dei "controlimiti"*, *cit.*, p. ; G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, *cit.*, p. 14. In the same vein, Pistorio underlined that national constitutional courts tend, similarly, to identify an intangible "hard core" of rights and principles which can be strengthened only by national constitutional courts. See G. PISTORIO, *Conferme e precisazioni nel «cammino comunitario» della Corte costituzionale. Commento a prima lettura della sentenza n. 269 del 2017*, *cit.*

stands out as an "act of self-assertion"[585] or as a "rearguard action"[586] which is targeted, at supranational level, at the CJEU and, internally, at domestic courts and tribunals.

In this context, another peculiar aspect to inquire into is the possible relevance of the institutionalized design of the constitutional courts and tribunals that are involved in the horizontal relationship under construction.[587] As a matter of fact, in Judgment no. 269 of 2017 the ICC justified the need for its *erga omnes* intervention on the basis of the principle that places a centralized system of constitutional review of domestic laws at the foundation of the Italian constitutional structure.[588] In reminding the relevant provisions entrenched in the domestic Constitution,[589] the ICC made the point, between the lines, that the centralized arrangement of judicial review of legislation does ensure that legal certainty is not impaired.[590] By contrast, any deviation from centralization towards a diffuse system of constitutional review – and, thus, any shift from the declaration of incompatibility by the ICC to the remedy of disapplication of domestic pieces of legislation by lower judges – would be disruptive of legal certainty, which is one of the main values informing Kelsen's theory of constitutional review.[591] Hence, the *obiter dictum* establishes a link between this defence of the Kelsenian centralized model in the name of legal certainty and ICC's claim to a right to have the first word in cases of dual preliminarity. In this manner, what the judicial reasoning of the ICC seems to say is that, as Ferreres Comella argues as respects the centralized model, "the sooner the constitutional court speaks, the more quickly any legal doubt would be dispelled".[592]

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[585] S. MAYR, *Verfassungsgerichtlicher Prbfungsgegenstand und Prbfungsmapstab im Spannungsfeld nationaler*
konventions- und unionsrechtlicher Grundrechtsgewlihrleistungen, in ZEITSCHRIFT FUR VERWALTUNG 401, 409, 2012.

[586] A. ORATOR, *The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?*, *cit.*, pp. 1442-1444.

[587] On the relation among institutionalized design of constitutional justice and constitutional courts' predisposition to look for argumentative support through references to external authority, see M. BOBEK, *Comparative reasoning in European Supreme Courts*, Oxford, Oxford University Press, 2013, p. 61 et seq.

[588] Judgment no. 269 of 2017 of the Italian Constitutional Court, § 5.2. *Conclusions on points of law*.

[589] The ICC made reference, in particular, to the principles enshrined in the abovementioned Articles 134, 11 and 117 of the Italian Constitution.

[590] G. PISTORIO, *Conferme e precisazioni nel «cammino comunitario» della Corte costituzionale. Commento a prima lettura della sentenza n. 269 del 2017*, *cit.*.

[591] V. FERRERES COMELLA, *Constitutional Courts and Democratic Values*, *cit*., pp. 20-26.

[592] *Ibi*, p. 23.

Likewise, latent implications in terms of constitutional justice models are also entailed by the ICC's exemplary reference to the Charter jurisprudence of the VfGH. The explicit quotation of the Austrian model confirms that the ICC's restatement of its central role as fundamental rights guardian and, therefore, its effort to regain hermeneutic spaces both in the domestic and in the supranational sphere would take place in the sign of the centralized system of judicial review. This being the case, the further circulation of such argumentative strategy throughout the case law of highest national courts would then sharpen the dichotomy between two models of constitutional justice coexisting within the EU legal order. On the one side, the proliferation of analogous Charter-related judgments in the jurisprudence of other constitutional tribunals may facilitate an ever closer union among those centralized courts "with longstanding traditions" – to borrow an expression the ICC used in its *obiter dictum* – which have their roots in the Kelsenian paradigm of judicial review of national legislation.[593] On the other side, this united front of centralized courts of civil-law inspiration would unavoidably be in tension with the de-centralized system of judicial review the CJEU crafted in its *Simmenthal* doctrine, which hinges on the federalist empowerment of domestic judges under EU law,[594] without forgetting that minority of EU Member States which has adopted an American diffuse model of judicial review.

All in all, as Michal Bobek foresaw in the aftermath of the Charter's entry into force, the ongoing discovery of the potential of this tool has made it all the more difficult for national constitutional courts to maintain their original position of so-called "splendid isolation" towards EU law.[595] Arguably, the Charter is liable to become an ever more powerful driving force not only to boost the interplay of constitutional

[593] In particular, De Visser highlighted that Kelsenian constitutional courts risk being side-lined by regular judiciary with regard to the determination of constitutional issues which can also be expressed in terms of EU law. See M. DE VISSER, *Constitutional review in Europe: A Comparative Analysis*, Oxford, Hart Publishing, 2014, p. 427.

[594] As regards the system of de-centralized judicial review that the CJEU established in *Simmenthal*, in combination with the principles of primacy and direct effect of EU law, see J. H. H. WEILER, *The European Court and National Courts—Doctrine and Jurisprudence: Legal Change in Its Social Context*, Oxford, Hart Publishing, 1998; ID., *A quiet revolution: The European Court of Justice and its Interlocutors*, in Comparative Political Studies, Vol. 26, Issue 4, 1994, pp. 510-534. On this point, see also A. DYEVRE, *Domestic Judicial Defiance in the European Union: A Systemic Threat to the Authority of EU Law?*, in Yearbook of European Law, Vol. 35, No. 1, 2016, pp. 106–144.

[595] M. BOBEK, *The impact of European mandate on ordinary courts*, in in M. CLAES, M. DE VISSER, P. POPELIER, C. VAN DE HEYNING, *Constitutional Conversations in Europe*, *cit.*, p. 287 et seq.

courts and the CJEU but also to strengthen the ties with the case law of their foreign peers in other European countries. At the current stage, although the Charter rulings issued by national constitutional courts have taken the joint direction outlined above, it is still hard to predict where this pathway will eventually lead and, above all, which practical effects it will have on the Luxembourg case law. In light of this strategy of "Charterization" of fundamental rights protection carried on by constitutional courts,[596] it cannot be excluded, for instance, that there might be new blood for a question that the Austrian VfGH first raised before the CJEU in 2012: if a comparative legal study of the constitutions of the Member States revealed that they provided a more extensive protection than that of the Charter, may such fact compel Union courts to interpret the said guarantee in such a way that the fundamental rights standard of the Charter will in no case be lower than that afforded by the constitutions of the Member States?[597]

Taking a further step forward, it is then possible to broaden the scope of the present analysis to include – not without a certain degree of comparative creativity – the *Benkharbouche* judgment delivered by the UK Supreme Court in October 2017. Needless to say, one could disregard neither the stark differences emerging between the English case and those examined thus far; nor, in terms of constitutional architecture, the patent distinctiveness of the common-law jurisdiction of the UK Supreme Court, as compared to that of the highest national courts of civil-law tradition to which the previous paragraphs were devoted. Nevertheless, as will be discussed below, the common thread that binds together the abovementioned decisions from "continental" courts and the one recently issued by the UK Supreme Court is the innovative use of the very same parameter, i.e. the application of the Charter as a standard for judicial review.

4. A dissenting voice: the *Benkharbouche* judgment of the UK Supreme Court

[596] This expression is quoted from ORATOR, *The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?*, *cit.*, p. 1446.

[597] Constitutional Court G 47/12-11 G 59/12-10 G 62,70,71/12-11, 28 November 2012, para 5.2. The text of the decision is available in English at www.vfgh.gv.at/downloads/vorabentscheidungsvorlagen/Vorlage_VRDspeicherung_G_47-12_EN_4.4.2017.pdf. See E. KOSTA, *The Way to Luxemburg: National Court Decisions on the Compatibility of the Data Retention Directive with the Rights to Privacy and Data Protection*, in Journal of Law, Technology & Society, 2013.

The joined cases of *Benkharbouche v Embassy of the Republic of Sudan* and *Janah v Libya* originated from the complaints raised by two non-UK nationals formerly working as domestic staff in foreign embassies in London. The applicants pleaded the breach of their employment rights and, most importantly, the failure to comply with the Working Time Regulations 1998 implementing the EU Working Time Directive.[598] In response to these claims, both the Sudanese and the Libyan embassies invoked state immunity in UK courts under sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978 (SIA).[599] The question at issue was whether the two provisions of the SIA were consistent with the European Convention on Human Rights – incorporated into the UK legal system due to the enactment of the Human Rights Act (HRA) in 1998 – and the EU Charter of Fundamental Rights, the availability and enforceability of which in UK law is dependent on the European Communities Act 1972 (ECA)[600].

At the outset, two separate Employment Tribunals dismissed Ms Benkharbouche's and Ms Janah's claims on the ground that the employers were entitled to state immunity under the SIA. Appeals from the first instance decisions were heard together by the Employment Appeal Tribunal (EAT) in 2014.[601] The EAT considered that there had been a breach of Article 6 ECHR insofar as sections 4(2)(b) and

[598] Ms Benkharbouche brought claims against the Sudanese embassy for wrongful dismissal, failure to pay the minimum wage and breach of the Working Time Regulations 1998. Ms Janah brought claims against the Libyan embassy for wrongful dismissal, unpaid wages, racial discrimination, harassment and infringement of the Working Time Regulations 1998.

[599] In particular, section 4(1) SIA removes immunity in proceedings relating to a contract of employment made or due to be performed wholly or partly in the UK. However, section 4(2)(b) SIA reinstates immunity if at the time when the contract was entered into the employee was neither a national of the UK nor habitually resident there. As to Section 16(1)(a) SIA, this provides that the exception to immunity under section 4 SIA does not apply to proceedings concerning the employment of members of a mission within the meaning of the Vienna Convention on Diplomatic Relations (1961) or of members of a consular post within the meaning of the Vienna Convention on Consular Relations (1963).

[600] Directly effective provisions of EU law are incorporated into English law through the ECA 1972. According to section 2(1) of the ECA, "all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly".

[601] Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya UKEAT/0401/12/GE and UKEAT/0020/13/GE [2014] ICR 169. For a comment, A. SANGER, *The State Immunity Act and the Right of Access to a Court*, in Cambridge Law Journal, Vol. 73, Issue 1, 2014, pp. 1-4.

16(1)(a) SIA had been applied.[602] At the same time, the EAT held that the provisions of the SIA were also in conflict with the right of access to a court as guaranteed by Article 47 of the Charter. One year later, the UK Court of Appeal affirmed the prior judgment of the EAT on two grounds.[603] First, the relevant sections of the SIA infringed Article 6 ECHR (in partial conjunction with Article 14 ECHR). Accordingly, the Court issued a declaration of incompatibility pursuant to the HRA.[604] Secondly, the Court of Appeal disapplied the relevant SIA provisions, in their application to those parts of the claims which fall within the scope of EU law, as they were found to be in violation of Article 47 of the Charter. As to the EU law claims of the appellants, the Court of Appeal went on to make clear that the right to an effective remedy reflects a general principle of Union law so that Article 47 falls into the category of Charter provisions endowed with horizontal direct effect.[605]

The order of the Court of Appeal was essentially upheld by the UK Supreme Court in 2017.[606] After a comprehensive scrutiny of international law and the recent European

[602] However, the EAT did not have the power to make a declaration of incompatibility pursuant to section 4(2) of the Human Rights Act 1998. As a matter of fact, the HRA awards the power to issue a declaration of incompatibility between an Act of Parliament and the ECHR only to higher courts. As a result, the Court of Appeal was the first court entitled to issue such a declaration in the present case.

[603] Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya [2015] EWCA Civ 33. For an analysis of the judgment delivered by the UK Court of Appeal, see A. SANGER, *State Immunity and the Right of Access to a Court under the EU Charter of Fundamental Rights*, in International and Comparative Law Quarterly, Vol. 65, Issue 1, 2016, pp. 213-228; K. S. ZIEGLER, *Immunity versus Human Rights: The Right to a Remedy after Benkharbouche*, in Human Rights Law Review, Vol. 17, Issue 1, 2017, pp. 127-151; R. GARNETT, *State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?*, in International and Comparative Law Quarterly, Vol. 64, Issue 4, 2015, pp. 783-827; P. WEBB, *The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?*, in The European Journal of International Law, Vol. 27, No. 3, 2016, p. 753 et seq.; S. PEERS, *Rights, remedies and state immunity: the Court of Appeal judgment in Benkharbouche and Janah*, in European Law Blog, 6 February 2015, available at www.eulawanalysis.blogspot.com/2015/02/rights-remedies-and-state-immunity.html; S. VEZZANI, *Immunità dello Stato estero dalla giurisdizione e diritto di accesso al giudice alla luce della Carta dei diritti fondamentali: riflessioni in margine al caso Benkharbouche e Janah*, in Rivista di diritto internazionale, Vol. 98, No. 3, 2015, pp. 904-911.

[604] In particular, the Court of Appeal found that the relevant provisions of the SIA could not be read down and be given effect in a way which is compatible with ECHR, in accordance to the interpretative obligation imposed by section 3(1) HRA.

[605] Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya [2015] EWCA Civ 33, §§ 76-81.

[606] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs: Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah*, [2017] UKSC 62. For a comment on this decision of the UK Supreme Court, A. SANGER, *The limits of state and diplomatic immunity in employment disputes; "State immunity: claims of domestic embassy staff not barred by state immunity"*, in Cambridge Law Journal, Vol. 77, Issue 1, 2018, pp. 1-39; A. O'NEILL QC, *The UK Supreme Court and EU law in the Legal Year 2016–2017 – Part 2*, available at www.eutopialaw.com/2017/10/27/the-uk-supreme-court-and-eu-law-in-the-legal-year-2016-2017-part-2/; A. YOUNG, *Benkharbouche and the future of disapplication*, available at

Court of Human Rights' case law on this subject, the Supreme Court's decision written by Lord Sumption concluded that sections 4(2)(b) and 16(1)(a) SIA were incompatible with Article 6 ECHR.[607] Having stated this, the Supreme Court concisely held that no separate issue was needed as to the claims derived from EU law: if the Convention was infringed, so was the Charter as well, given the similar – albeit, as the Court reminded, not identical – scope of Article 6 ECHR and Article 47 of the Charter.[608] It follows, therefore, that the contested statutory provisions must be disapplied for their inconsistency with directly effective EU law and that both cases must be remitted to the Employment Tribunal to determine the claims based on EU law on their merits.

Even though the judicial reasoning of the Supreme Court was founded principally on Article 6 ECHR, a few statements of the *Benkharbouche* judgment were sufficient to raise paramount issues of EU law. Particularly, a closing passage of this decision reiterated that in the case of conflict between EU law and English domestic law the former shall necessarily prevail, and the latter shall be disapplied; whereas in the event of an internal statute being inconsistent with the ECHR the former shall be declared incompatible with the latter.[609] In saying that, the Supreme Court put the emphasis, thus, on the critical diversity between the legal effects of the two remedies that may be activated within the UK legal system, depending on whether the claims are grounded on non-compliance with the ECHR – *rectius*, the HRA – or with EU law.

In the light of the above, the Supreme Court could have well resolved the present case on the mere basis of Article 6 ECHR. By doing so, the Supreme Court would have simply declared the incompatibility of the English legislation with the Convention under section 4 of the HRA and, as a result, would have given the floor to the Parliament to consider whether (and, if so, how) such legislation should be

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www.ukconstitutionallaw.org/2017/10/24/alison-young-benkharbouche-and-the-future-of-disapplication/.

[607] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs: Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah*, [2017] UKSC 62, § 76.

[608] *Ibi*, § 78.

[609] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs: Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah*, [2017] UKSC 62, §78: "*a conflict between EU law and English domestic law must be resolved in favour of the former, and the latter must be disapplied; whereas the remedy in the case of inconsistency with article 6 of the ECHR is a declaration of incompatibility*".

amended, replaced or repealed.[610] However, as the claims fell within the scope of EU law, it was possible for the Court to take a step further. The Supreme Court relied upon Article 47 of the Charter to provide immediate relief to individual rights, since UK lower and appeal courts are bound to set aside the contested provisions of the SIA and to give direct application to the Charter itself.

In this regard, it goes without saying that EU law offers a stronger remedy than the one provided by the HRA.[611] The declaration of incompatibility of an internal statute with the ECHR is, indeed, a remedy of limited utility: the claimants would gain a "Pyrrhic victory",[612] as they would still need to bring a claim before the Strasbourg Court, after the exhaustion of domestic remedies, in order to obtain compensation.[613] Instead, the Charter assures to the claimant a more instant and wide-ranging protection, because domestic judges have the chance to set aside an Act of Parliament and to enforce directly EU fundamental rights in accordance with section 2(1) of the ECA 1972.[614] It is not surprising then that, as underscored by Merris Amos, UK courts in many instances – in line with the trend ongoing, as we saw above, within most EU Member States – have utilised Charter provisions to disapply contrary national law.[615]

From this perspective, perhaps the most noteworthy profile of the *Benkharbouche* judgment is the acknowledgment of horizontal direct effect to Article 47 of the

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[610] As regards the declaration of incompatibility, the UK Court of Appeal in its *Benkharbouche* judgment made clear that such remedy "does not affect the operation or validity of the SIA. The declaration acts primarily as a signal to Parliament that it needs to consider amending that legislation". See Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya [2015] EWCA Civ 33, § 72. In a similar vein, see also M. ELLIOTT, S. TIERNEY, A. L. YOUNG, *Human Rights Post-Brexit: The Need for Legislation?*, 8 February 2018, available at www.publiclawforeveryone.com/2018/02/08/human-rights-post-brexit-the-need-for-legislation/.

[611] On this point, the UK Court of Appeal in *Benkharbouche* held that "in EU law, a stronger remedy is available. Both the Charter and general principles of EU law can – but need not always – be used to disapply legislation. This means that the legislative provision which harms human rights does not have legal effect. The rights of the individual before the court can be protected as the legislation harming those rights is not applied to them".

[612] K. S. ZIEGLER, *Immunity versus Human Rights: The Right to a Remedy after Benkharbouche*, *cit.*, p. 150.

[613] T. LOCK, *Human Rights Law in the UK after Brexit*, in Edinburgh School of Law Research Paper, No. 2017/17, p. 11; GARNETT, *State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?*, *cit.*, p. 812; A. SANGER, *State Immunity and the Right of Access to a Court under the EU Charter of Fundamental Rights*, *cit.*, p. 218.

[614] *Ibi*, p. 816; P. WEBB, *The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?*, *cit.*, p. 764;

[615] M. AMOS, *Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill*, 4 October 2017, available at www.ukconstitutionallaw.org/2017/10/04/merris-amos-red-herrings-and-reductions-human-rights-and-the-eu-withdrawal-bill/.

Charter, that is to say the recognition of its direct applicability against private parties.[616] Remarkably, the stance taken in *Benkharbouche*, at first, by the UK Court of Appeal – in the same way as it did also in its *Vidal-Hall* ruling[617] – and then *de facto* subscribed to by the UK Supreme Court goes hand in hand with the constantly evolving case law of the CJEU on the direct effect of Charter rights. As a matter of fact, the UK jurisprudence concerning the direct effect of Article 47 of the Charter has found "confirmation" in the decision *Vera Egenberger* delivered by the CJEU in April 2018.[618]

This recent judgment is one of the latest bricks the Luxembourg Court has added to its controversial line of cases – beginning in *Van Gend and Loos*[619] and passing through, among others, *Defrenne*[620], *Mangold*,[621] *Kücükdeveci*[622] and *Association de médiation sociale*[623] – on the direct effect of fundamental rights in EU law.[624] In *Egenberger* the CJEU established unequivocally that both Article 21 of the Charter on the prohibition of discrimination and Article 47 of the Charter on the right to effective judicial protection produce horizontal direct effect.[625] In this respect the

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[616] Notably, in the case of *Benkharbouche* the EAT, the UK Court of Appeal and the UK Supreme Court treated the respondents as private parties for the purpose of the employment claims, since non-EU States are not bound by EU law as States. See S. PEERS, *Rights, remedies and state immunity: the Court of Appeal judgment in Benkharbouche and Janah*, *cit.*

[617] In the same year of *Benkharbouche*, in *Vidal-Hall* decision concerning data protection the UK Court of Appeal held that Articles 7, 8 and 47 of the Charter enjoy horizontal direct effect. See Vidal-Hall v Google Inc [2015] EWCA Civ 311.

[618] Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (2018).

[619] Case 26/62, *Van Gend and Loos* (1963).

[620] Case C-43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* (1976).

[621] Case C-144/04, *Werner Mangold v Rüdiger Helm* (2005).

[622] Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG* (2010).

[623] Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others* (2014).

[624] On the horizontal direct effect of fundamental rights in EU law and in the ECJ/CJEU jurisprudence see, *inter alia*, E. FRANTZIOU, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis*, Oxford, Oxford University Press, 2019; ID., *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*, in European Law Journal, Vol. 21, No. 5, 2015, pp. 657-679; E. SPAVENTA, *The Horizontal Application of Fundamental Rights as General Principles of Union Law*, in A. ARNULL *et al.* (eds.), A Constitutional Order of States – Essays in Honour of Alan Dashwood, Oxford, Hart Publishing, 2011, pp. 199-218; D. LECZYKIEWICZ, *Horizontal Application of the Charter of Fundamental Rights*, in European Law Review, Vol. 38, Issue 4, 2013, pp. 479-497; D. GALLO, *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali*, Milano, Giuffrè, 2018.

[625] For a comment on this case, see R. MCCREA, *Salvation outside the church? The CJEU rules on religious discrimination in employment*, in European Law Blog, 18 April 2018, available at www.eulawanalysis.blogspot.com/2018/04/salvation-outside-church-CJEU-rules-on.html; E. FRANTZIOU, *Mangold Recast? The CJEU's Flirtation with Drittwirkung in Egenberger*, in European Law Blog, 24 April 2018, available at www.europeanlawblog.eu/2018/04/24/mangold-recast-the-CJEUs-flirtation-with-drittwirkung-in-egenberger/; A. COLOMBI CIACCHI, *Egenberger*

European judges explained that, like Article 21, Article 47 of the Charter is sufficient in itself and it does not need to be made more specific by any provision of EU or national law to confer on individuals "a right they may rely on as such" in disputes between them in a field covered by EU law.[626] By virtue of the direct effect acknowledged to Articles 21 and 47 of the Charter, the CJEU drew the conclusion that national courts are obliged to ensure the judicial protection deriving for individuals from those articles and to guarantee the full effectiveness thereof "by disapplying if need be any contrary provision of national law".[627]

This substantive coherence between Luxembourg and the UK Supreme Court on the issue of direct horizontality of EU fundamental rights would become even stronger whenever the UK Supreme Court decided to follow in the CJEU's footsteps in *Max-Planck-Gesellschaft*[628] as well as in *Bauer and Broßonn*[629] – which have both affirmed the direct effect of Article 31(2) of the Charter[630] – to recognize direct

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and Comparative Law: A Victory of the Direct Horizontal Effect of Fundamental Rights, in European Journal of Comparative Law and Governance, Vol. 5, Issue 3, 2018, pp. 207-211; C. O'MARA, *Horizontal enforcement of general principles of EU employment equality law - Mangold revisited*, in Irish Employment Law Journal, Vol. 15, No. 3, 2018, pp. 91-94; L. CAPPUCCIO, *L'efficacia diretta orizzontale della Carta dei diritti fondamentali nella decisione Vera Egenberger*, in Quaderni costituzionali, No. 3, 2018, pp. 708-711; S. MONTESANO, *La deroga al divieto di discriminazione per motivi religiosi nelle organizzazioni di tendenza. Riflessioni a margine della pronuncia della Corte di Giustizia U.E. (Causa C- 414/2016)*, in www.statoechiese.it, No. 3/2019, pp. 166-185.

[626] Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (2018), §§ 76-78.

[627] *Ibi*, § 79. A recent follow-up to *Egenberger* was represented by judgment *IR v JQ*, in which the CJEU held that "the prohibition of all discrimination on grounds of religion or belief, now enshrined in Article 21 of the Charter, is therefore a mandatory general principle of EU law and is sufficient in itself to confer on individuals a right that they may actually rely on in disputes between them in a field covered by EU law […] Accordingly, in the main proceedings, if it considers that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law, the referring court must disapply that provision". See Case C-68/17, *IR v JQ* (2018), §§ 69-70. For a comment on this case, R. MCCREA, *Religious discrimination at work: Can employees be fired for getting divorced?*, in European Law Blog, 12 September 2018, available at www.eulawanalysis.blogspot.com/2018/09/religious-discrimination-at-work-can.html.

[628] Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu* (2018).

[629] Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* (2018). For a comment on these joined cases, see E. FRANTZIOU, *Joined cases C-569/16 and C-570/16 Bauer et al: (Most of) The Charter of Fundamental Rights Is Horizontally Applicable*, in European Law Blog, 19 November 2018, available at www.europeanlawblog.eu/2018/11/19/joined-cases-c-569-16-and-c-570-16-bauer-et-al-most-of-the-charter-of-fundamental-rights-is-horizontally-applicable/.

[630] In this regard, the CJEU argued that "The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is thus, as regards its very existence, both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law […]It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field

effect to a growing number of Charter provisions, such as for instance social rights; or whenever the Supreme Court did infer from the direct effect of the Charter, in the same direction as the CJEU has recently stated in *Cresco*,[631] not only the obligation for domestic courts to set aside any contrary provision of national law but also the duty to apply, instead, an internal statute capable of granting a higher level of protection to individual rights.[632]

Leaving aside these (at the moment) potential scenarios, it should be noticed that the Charter discourse has come into the picture of the UK Supreme Court's judicial reasoning. On the one side, the increasing relevance of this instrument in the UK jurisprudence stands in continuity with the ever-growing commitment to the Charter to be observed in the domestic case law of most EU Member States. Yet, on the other side, the UK Supreme Court seems to be taking a distinctive approach to the Charter, which makes it a voice out of the choir compared to the jurisprudence of the other highest national courts taken into account. In contrast to these latter, the position of the UK Supreme Court is not to be interpreted as a reaction against a feared spill-over effect of the Charter. Rather, the recourse to Charter rights in *Benkharbouche* aims to provide impetus to the remedy of disapplication: it allows leeway to domestic courts to give direct effect to EU law and set aside internal legislation, in full harmony with the case law of the CJEU. What is more, this European-law friendly approach by the Supreme Court is strikingly at odds with the idea of "bringing rights back home" underpinning the general attitude of criticism that the UK has shown towards the activity of the European Court of Human Rights.[633]

Curiously enough, the Charter turns out to be a very powerful tool for the safeguard of individual rights in the UK in the current context of Brexit and, thus, in the

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covered by EU law and therefore falling within the scope of the Charter". See Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* (2018), § 85.

[631] Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi* (2019). On this case, see M. GENNUSA, *Un nuovo pezzo del puzzle: l'effetto diretto della Carta alla prova del caso Cresco*, in Quaderni costituzionali, No. 2, 2019, pp. 459-462.

[632] In particular, in that case concerning discrimination on grounds of religion under Article 21 of the Charter the CJEU held that "a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and must apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category". See Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi* (2019), § 80.

[633] G. GEE, *Leaving Strasbourg? Reforming the Human Rights Act*, in Quaderni costituzionali, No. 3, 2015, pp. 808-814; A. OSTI, *L'implementazione delle sentenze della Corte europea dei diritti e le resistenze nazionali: tre modelli a confronto*, in Quaderni costituzionali, No. 4, 2017, pp. 851-879.

ongoing process of disentanglement of the English legal system from EU law. Apparently, Brexit and the landmark case *Miller*[634] have affected, as Alison Young has pointed out, not only the timing of *Benkharbouche* – the hearing was moved to June 2017 due to the pending matter of *Miller* – but also its importance.[635] From this standpoint, it seems not to be a case that, in the wake of *Miller*, the UK Supreme Court in *Benkharbouche* is very firm in (implicitly) reaffirming the primacy of EU law over domestic legislation and in (explicitly) upholding the recourse to the disapplication of contrary national provisions.[636] However, given the current state of affairs, in which direction will this framework be evolving in the aftermath of Brexit? What future will loom at the distance for the application of the Charter and, especially, for the remedy of disapplication of internal statutes within the UK legal order?

As is well-known, the European Union (Withdrawal) Bill is predicated on the assumption that EU law as it stands at the moment of exit will be brought into UK law.[637] In particular, Clauses 2 to 4 of the Withdrawal Bill ensure that different sources of EU law will continue to exist within the UK legal system.[638] Nevertheless, such logic underlying the Withdrawal Bill finds a significant exception in Clause 5(4), which expressly excludes the EU Charter of Fundamental Rights from being converted into domestic law on or after exit day. On top of that, a further element of complexity is given by the great uncertainty surrounding the interpretation of Clause 5(5). As a matter of fact, this provision states, with a certain degree of vagueness, that the exclusion of the Charter from UK law does not affect the retention in domestic law of any fundamental rights or principles which exist irrespective of the Charter itself.

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[634] R (Miller) v. The Secretary of State for Exiting the European Union, [2017] UKSC 5.

[635] A. YOUNG, *Bekharbouche and the future of disapplication*, *cit.*

[636] In this regard, it is to be bear in mind that, according to section 2(4) EC Act, directly effective EU law takes priority over incompatible Acts of Parliament. See A. SANGER, *State Immunity and the Right of Access to a Court under the EU Charter of Fundamental Rights*, *cit.*, p. 216; A. O'NEILL QC, *The UK Supreme Court and EU law in the Legal Year 2016–2017 – Part 2*, *cit.*, p. 2; A. YOUNG, *Bekharbouche and the future of disapplication*, *cit.*; K. S. ZIEGLER, *Immunity versus Human Rights: The Right to a Remedy after Benkharbouche*, *cit.*, p. 146.

[637] The full text of the European Union (Withdrawal) Bill is available at www.services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html.

[638] For an in-depth analysis of the Withdrawal Bill with specific regard to the future of the Charter, see A. LANG, V. MILLER, S. CAIRD, *EU (Withdrawal) Bill: the Charter, general principles of EU law, and 'Francovich' damages*, House of Commons Library, Briefing Paper No. 8140, 17 November 2017.

This being the case, the Charter-based stronger remedy available to the claimants will disappear after Brexit: domestic courts will no longer have the chance, as it happened in *Benkharbouche*, to enforce directly the Charter provisions and to disapply an Act of Parliament contravening EU fundamental rights.[639] The non-retention of the Charter does seem likely to determine, therefore, an overall weakening in the level of fundamental rights protection as well as to harm legal certainty within the UK legal framework. In this respect, the loss of the rights guaranteed in the Charter would prevent UK courts – and, particularly, the UK Supreme Court – from the progressive interpretation of the Charter offered by the CJEU and, as such, from continuing, as their foreign peers within the EU, the process of discovery of the Charter's yet unfulfilled potential.

[639] T. LOCK, *Human Rights Law in the UK after Brexit*, *cit.*, p. 1 et seq.; ID., *What Future for the Charter of Fundamental Rights in the UK?*, 6 October 2017, available at www.europeanfutures.ed.ac.uk/article-5607; N. BAMFORT et al., *The EU Charter After Brexit*, Submission to Joint Committee on Human Rights, pp. 1-9, available at https://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2017/11/The-EU-Charter-After-Brexit-.pdf. For an opposite point of view, in favor of the non-retention of the Charter, see B. HARRIS, *The Charter of Fundamental Rights in UK law after Brexit: Why the Charter should not be transposed*, 20 November 2017, pp. 1-26, available at www.lawyersforbritain.org.

Conclusions

At the end of the analysis carried out across the three chapters the thesis is structured into, it is worth dwelling in brief, for the sake of completeness, on a parallel avenue for interaction that has recently arisen among domestic constitutional courts. This further modality of horizontal interplay consists of an ever-growing tendency to develop cross-border networks, meetings and fora, which have brought together more and more often, over the last few years, constitutional justices from various national legal frameworks. In this respect, it should first be noticed that the "substantive" phenomenon of judicial cross-fertilization described thus far has taken place in the field of Community (and, at a later stage, EU) law. As we have seen, several courts both in older and in younger Member States of the EU either cite each other's decisions by means of explicit cross-references or, more implicitly, deploy similar legal arguments to solve concrete cases or to support its own line of reasoning when addressing matters of European integration. Such informal recourse to the tool of comparative reasoning has occurred, as we have seen, with regard to the contentious relationships involving national legal orders and the EU level, national constitutional courts and the CJEU, national constitutions and the Charter. On the contrary, the formal channels for horizontal interplay mentioned below have blossomed mostly in the context of the Council of Europe[640].

The earliest forum for horizontal constitutional engagement can be detected, chronologically, in the Conference of European Constitutional Courts (CECC). The creation of this institutionalized gathering dates back to 1972, at the initiative of the presidents of the constitutional courts of Germany, Austria, Italy and former Yugoslavia[641]. The CECC, being open to all European constitutional courts and similar European institutions exercising constitutional jurisdiction[642], today has 41 full members, including all the courts and tribunals that have been taken into account

[640] On the existence of judicial networks in the European legal context, M. CLAES, M. DE VISSER, *Are You Networked Yet? On Dialogues in European Judicial Networks*, in Utrecht Law Review, No. 8, 2012, p. 100 et seq.; M. DE VISSER, M. CLAES, *Courts United? On European Judicial Networks*, in A. VAUCHEZ, B. DE WITTE (eds.), *Layering Europe : European Law as a Transnational Social Field*, Oxford, Hart Publishing, 2013.

[641] www.confeuconstco.org. For a thorough analysis of this forum, M. DE VISSER, *Constitutional Review in Europe: A Comparative Analysis*, *cit.*, pp. 393-396.

[642] Statute of the Conference of European Constitutional Courts, Art. 6(1)(a).

in the course of the present research. Looking at the aims the CECC pursues, it is useful quoting in full Article 3 of its Statute, which holds that

"[the Conference] *shall promote the exchange of information on the working methods and constitutional case-law of member courts together with the exchange of opinions on institutional, structural and operational issues as regards public-law and constitutional jurisdiction. In addition, it shall take steps to enhance the independence of constitutional courts as an essential factor in guaranteeing and implementing democracy and the rule of law, in particular with a view to securing the protection of human rights. It shall support efforts to maintain regular contacts between the European Constitutional Courts and similar institutions*"[643].

In the same vein, an excerpt from a speech given in 2012 by the then President of the Austrian Constitutional Court Gerhard Holzinger, speaking in his capacity as chair of the Conference, perceptively declared as follows:

"*the growing internationalisation of constitutional law, the dialogue with the European Court of Human Rights, and also the increasing constitutionalisation of the European Union – which is very significant for more than half of the members of the CECC – constantly pose new challenges for constitutional justice in all European states. Thereby comparative constitutional law and comparing constitutional case-law is becoming increasingly important. Against this background, the CECC forms an eminently important forum for the regular, broad and multilateral exchange of opinions, thoughts and experiences. Beyond that, the Conference also takes into account the necessity of 'networking' between the national Constitutional Courts*"[644].

Alongside the CECC, another major forum for cooperation among national constitutional courts can be identified in the European Commission for Democracy through Law, better known as the Venice Commission, which represents the Council of Europe's advisory body on constitutional matters since 1990. The Venice Commission has currently 62 Member States – comprising the 47 components of the Council of Europe, plus 15 other countries – and pursues the goal of upholding

[643] To this end, Article 2 of the Regulations to the Conference stipulates that it holds congresses every three years on selected topics, open to the participation of members, observers and guests.

[644] G. HOLZINGER, *Presentation of Experiences and Expertise from the Conference of European Constitutional Courts, which will provide insight into the Association of Asian Constitutional Court and Equivalent Institutions (AACC) future directions*, Inaugural Congress of the AACC, Seoul, 20-24 May 2012.

democracy, human rights and the rule of law, in a perspective of dissemination and consolidation of a common constitutional heritage. Starting in 1993, the Commission regularly publishes an electronic Bulletin on Constitutional Case-Law ("e-Bulletin"), with the purpose to enhance the exchange of information and cooperation among constitutional courts and courts with equivalent jurisdiction in Europe[645]. Additionally, the e-Bulletin is complemented by an electronic database ("CODICES") which collects, translates and systematizes the most relevant case law of the constitutional courts – as well as domestic constitutions and legislative acts – from the Member States of the Council of Europe[646]. Commenting on the effectiveness of such resources being provided by the Venice Commission, someone has argued that "these publications have proved to play a vital 'cross-fertilization' role in constitutional case law"[647].

Within the context of the Council of Europe and, specifically, of the Venice Commission, justices and appointed liaison officers from national jurisdictions can also enter into contact with each other and exchange information through a restricted online platform for constitutional courts known as the Commission's "Venice Forum". Indeed, the use of this tool for horizontal interaction seems to be rather frequent, as the recent reports for activities of the Venice Commission published on a yearly basis have witnessed[648].

Besides the above "internal" channels for cross-border constitutional cooperation, it can be observed that the Venice Commission collaborates "externally" with other judicial networks both on a regional and on a global scale. Particularly, the Commission was granted the status of observer at the Conference of European Constitutional Courts[649]. Moreover, in 2009 the Venice Commission hosted the first World Conference on Constitutional Justice (WCCJ)[650]. Interestingly enough, the final declaration of this global judicial gathering pointed to the development of a truly worldwide community of courts engaged in constitutional adjudication:

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[645] Venice Commission, *Annual Report for Activities for 2018*, pp. 32-33.
[646] www.codices.coe.int.
[647] M. DE VISSER, *Constitutional Review in Europe: A Comparative Analysis*, *cit.*, p. 397, referring to the website of the Venice Commission.
[648] See, by way of example, Venice Commission, Annual Report for Activities for 2018, p. 33.
[649] In this regard, upon request of the Conference, the Venice Commission submitted a report to the XVIth Congress of the Conference of European Constitutional Courts held in 2014. The document is available at www.venice.coe.int/files/2014-05-02-CECC-e.pdf.
[650] www.venice.coe.int/WebForms/pages/?p=02_WCCJ&lang=EN.

"*mutual inspiration is also increasingly drawn from the case-law of peer Courts of other countries and even continents, which gives rise to cross-fertilisation between the Courts on a worldwide scale. While constitutions differ, the basic principles underlying them, in particular the protection of human rights and human dignity and respect for the Constitution and the rule of law, form a common ground. Legal reasoning in respect of the application of these principles in one country can be a source of inspiration in another country, notwithstanding the differences in their constitutions. Consequently, the exchange of information and experience between the Courts and Councils should be reinforced on a regional and global basis. The participants of the World Conference endorse and support the regional and linguistic groups* [of constitutional courts] *and call upon their members to use the tools for exchange of information and experience provided by the Venice Commission, notably the CODICES database and the on-line Venice Forum*"[651].

Accordingly, the statute of the WCCJ entered into force on 24 September 2011 specified that the overall objective of the Wold Conference lies in the promotion of constitutional justice through the organisation of regular congresses, by taking part in regional conferences and seminars, promoting the exchange of case-law and experiences and offering good services to its members at their request[652]. By the same token, the 2018 annual report for activities of the Venice Commission stressed that the main purpose of the WCCJ, which counts to date as many as 116 constitutional and supreme courts from five continents, consists of facilitating judicial dialogue between constitutional judges on a worldwide scale[653].

To complete the picture of the fora established within the framework of the Council of Europe, even though in a vertical dimension, it should be recalled that on 5 October 2015 the President of the European Court of Human Rights (ECtHR) Dean Spielmann launched what is defined as a "network for the exchange of case-law

[651] Final Declaration of the World Conference on Constitutional Justice, "Influencing Constitutional Justice: its Influence on Society and on Developing a Global Human Rights Jurisprudence", Cape Town, 22-24 January 2009.

[652] The revised statute of the WCCJ as amended in 2017 is available at www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-WCCJ-GA(2017)010-e.

[653] Venice Commission, Annual Report for Activities for 2018, pp. 36-37: "The exchange of information that takes place between judges in the WCCJ further reflects on the arguments which promote the basic goals inherent in national constitutions. Even if these texts often differ substantially, discussion on the underlying constitutional concepts unites constitutional judges from various parts of the world, who are committed to promoting constitutionalism in their own countries".

information with national superior courts"[654]. This so-called Superior Courts Network, which now includes a total of 86 courts from 39 States, was designed to endorse communication and exchange of relevant information between the ECtHR and the highest national courts as concerns the case-law on the European Convention on Human Rights and related matters[655].

Whilst most networks and fora came to light in the context of the Council of Europe, one cannot overlook the recent creation of an institutionalised network in the field of EU law. Shifting thus from Strasbourg to Luxembourg, on 27 March 2017 the President of the Court of Justice and the presidents of the constitutional and supreme courts of the Member States proclaimed the Judicial Network of the European Union (JNEU) on the occasion of the Judges' Forum organised by the CJEU. From January 2018, an *ad hoc* platform was launched for exchange between the courts participating in the JNEU in order to strengthen their judicial cooperation. Most recently, by virtue of the great interest surrounding the information made available on the platform in respect of the development and consistency of EU law, the CJEU and the participating courts have decided to share all (non-confidential) documents in a space dedicated to the JNEU on the website of the Luxembourg Court[656]. The ultimate goal of such online space is to facilitate the circulation of information and documents being useful for the application, dissemination and study of EU law. In this vein, one of the aims of this initiative is exactly the promotion, from a comparative law perspective, of mutual awareness and understanding of laws and systems of each Member State, thus making it easier to take into account the judicial traditions of the individual legal systems.

[654] www.echr.coe.int/Pages/home.aspx?p=court/network&c=.

[655] In particular, see the press release ECHR 298 (2015) of 5 October 2015. For a comment on the establishment of this network and the adhesion by the Italian Court of Cassation, V. NARDONE, *L'Italia e il dialogo con la Corte europea dei diritti dell'uomo: la Corte di Cassazione si candida ad aderire alla rete delle corti supreme nazionali di Strasburgo*, in Ordine internazionale e diritti umani, 2016, pp. 233-241.

[656] Court of Justice of the European Union, Press Release No. 135/19 of 6 November 2019.

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