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Preliminary Reference to the European Court of Justice and Multilevel Protection of Human Rights: The Complex Dialogue Between the European Court of Justice and Constitutional Courts

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Abstract

The purpose of this work is to focus on the issues relating on one side to the relation between the preliminary references and the human rights protection and, on the other side, to the use that Constitutional Courts have made of it and on how this process can foster the effectiveness of human rights protection in Europe. After having described the evolution of the preliminary ruling's instrument - showing how it has become one of the most useful tools to implement the European normative integration - there will be highlighted some problematic aspects concerning the possible questions that can be addressed to the European Court of Justice (ECJ), the margin of discretion of national courts, and the right/obligation to refer a question for preliminary ruling. The third part of the work will address to the difficulties posed by the possible (for a long time denied) dialogue between the ECJ and national Constitutional Courts. While, in the final part of this work there will be highlighted some critical points and reflections on some new perspectives connected, on one side, to the EU accession system to the ECHR and, on the other, to the approval of Protocol n. 16, added to the ECHR.

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Introduction

The purpose of this work is to focus on the issues relating on one side to the relation between the preliminary references and the human rights protection and, on the other side, to the use that Constitutional Courts have made of it and on how this process, in my opinion, can foster the effectiveness of human rights protection in Europe.

Firstly, I will describe the evolution of the preliminary ruling's instrument, showing how it has become one of the most useful tools to implement the European normative integration.

Secondly, I will highlight some problematic aspects concerning the possible questions that can be addressed to the European Court of Justice (ECJ), the margin of discretion of national courts, and the right/obligation to refer a question for preliminary ruling.

In the third part, instead, I will concentrate on the difficulties posed by the possible (for a long time denied) dialogue with national Constitutional Courts. For years the recognition of the primacy of European legal order and, consequently, of the European law on the national law systems has certainly represented a thorny issue. Such primacy, nevertheless, is a rather peculiar one. Acutely, it has been defined "primacy by cooperation almost voluntary"¹ and not based on hierarchy². In a context where the rapid evolution of the so called "European living law" was (and still is) needed, taking into account how modern society quickly changes, a contemporary reflection on the role of constitutional judges along with the "dilution" of the State sovereignty³ is definitely required. I will focus my research mainly

1 On this point, S. CASSESE, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale*, Donzelli, Roma, 2009, 7.

2 Prof. A. RUGGERI, in his essay "*La ricomposizione multilivello del sistema delle fonti*" in G. D'IGNAZIO (ed), *Multilevel constitutionalism tra integrazione europea e riforme degli ordinamenti decentrati*, Giuffè, Milano, 2011, 17 ff., suggests an interesting theory proposing the transition from hierarchy based on form to a new concept of hierarchy based on value.

3 The theme in the background is the one of the peculiarity of the European Union and its not having always a linear relationship with the

national law. Indeed they are relationships that are based on a complex balance between the principle of autonomy of national legal orders and the principle of primacy and the principle of direct effect of European law. On this the literature is really vast. For some scholars it is necessary the creation of a legal order in network and not pyramidal (A. COSIO, *Diritti fondamentali nell'Unione Europea*, in A. COSIO, R. FOGLIA (eds.), *Il diritto europeo nel dialogo delle corti*, Giuffrè, Milan, 2013, 58. As astutely pointed out by S. CASSESE (in *I tribunali di Babele*, quoted, 3), “the State sovereignty dilutes [...] the public authorities rearticulate in pluralistic and polycentric forms [...] this pluralism needs an order: one must fill the voids between the different systems [...] induce them to cooperate; establish hierarchies of values and principles”.

But on those points see also A.CELOTTO, J. TAJADURA, J DE MIGUEL BARCENA, *Giustizia costituzionale e Unione europea: una comparazione tra Austria, Francia, Germania, Italia, Spagna e Portogallo*, ESI, Napoli, 2011; A. RUGGERI, *Sistema integrato di fonti e sistema integrato di interpretazioni nella prospettiva di un'Europa Unita*, in M PEDRAZZA GORLEO (ed.), *Corti Costituzionali e Corti europee dopo il Trattato di Lisbona*, ESI, Napoli, 2010, 25 ff.; S. BARTOLE, *Separazione o integrazione fra ordinamenti?*, in VV.AA., *Diritto comunitario e diritto interno*, Giuffrè, Milano, 2008, 121 ff.; VV.AA., *Sovranità, rappresentanza, democrazia. Rapporti fra ordinamento comunitario e ordinamenti nazionali*, Jovene, Napoli, 2000; F. SORRENTINO, *Profili costituzionali dell'integrazione europea*, Giappichelli, Turin, 1994.

Also relevant is the opinion 1/09 of the ECJ, 8 March 2011. The Court stated that “It should also be recalled that Article 267 TFEU, which is essential for the preservation of the Community character of the law established by the Treaties, aims to ensure that, in all circumstances, that law has the same effect in all Member States. The preliminary ruling mechanism thus established aims to avoid divergences in the interpretation of European Union law which the national courts have to apply and tends to ensure this application by making available to national judges a means of eliminating difficulties which may be occasioned by the requirement of giving European Union law its full effect within the framework of the judicial systems of the Member States. Further, the national courts have the most extensive power, or even the obligation, to make a reference to the Court if they consider that a case pending before them raises issues involving an interpretation or assessment of the validity of the provisions of European Union law and requiring a decision by them [...] It follows from all of the foregoing that the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties.”, § 83 and 85.

on the case of Italy and the evolution of the Italian constitutional court case law, without forgetting the analysis of some significant comparative experiences.

In the final part of this work I will try to highlight some critical points and reflect on some new perspectives connected, on one side, to the EU accession system to the ECHR and, on the other, to the approval of Protocol n. 16, added to the ECHR.

The Preliminary reference: the evolution of an integration tool

The instrument of the reference for a preliminary ruling was defined and provided by the Treaty of Rome (article 177 of TCC, then article 234 TEC and now article 267 TFEU)⁴.

On the complex relationship between the principle of autonomy of national legal orders and principles of primacy and direct effect of European law see also the ECJ's opinion 1/91, 14 December 1991.

- 4 On the preliminary ruling procedure see *ex multis*: M. BROBERG, N. FENGER, *Preliminary references to the European Court of Justice*, 2nd ed., Oxford University press, Oxford, 2014; F. POCAR, M.C. BARUFFI (eds.), *Commentario breve ai Trattati della Comunità e dell'Unione europea*, 2nd ed., Cedam, Padova, 2014; C. BARNARD, S. PEERS (eds.), *European Union law*, Oxford University press, New York, 2014; R. CONTI, *Il rinvio pregiudiziale alla Corte di giustizia. Dalla pratica alla teoria*, in www.europeanrights.eu, 31/05/2013; VV.AA., *Diritto comunitario e diritto interno*, quoted above.

On the role played by the ECJ see, *ex multis*, V. KRONENBERGER, M.T. D'ALESSIO, V. PLACCO, *De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins : mélanges en l'honneur de Paolo Mengozzi*, Bruylant, Bruxelles, 2013; A. ROSAS, E. LEVITS, Y. BO, *The Court of Justice and the construction of Europe: analyses and perspectives on sixty years of case law*, Court of Justice of the European Union, The Hague, Asser press; Springer Berlin, 2013; C. NAÔMÉ, *Le renvoi préjudiciel en droit européen*, 2nd, Larcier, Bruxelles, 2010; B. RODGER (ed.), *Article 234 and competition law: an analysis*, Kluwer Law International, Alphen aan den Rijn, 2008, 3 ff.; M.C.REALE, M. BORRACCETTI, *Da giudice a giudice. Il dialogo tra giudice italiano e Corte di giustizia delle Comunità europee*, Giuffrè, Milano, 2008; P. BIAVATI, *Diritto processuale dell'Unione europea*, 4a ed., Giuffrè, Milano, 2009; G. RAITI, *La collaborazione giudiziaria nell'esperienza del rinvio pregiudiziale comunitario*, Giuffrè, Milano, 2003; D. O'KEEFFE, *Judicial review in European Union law*; Kluwer law international, The Hague, 2000,

Because such an instrument has never been frequently used by national judges⁵, the Court of Justice of the European Union (ECJ) has tried not to discourage national references by sustaining a broad notion of what was to be considered a national body that could submit a reference⁶.

According to the 1st paragraph of article 267 TFEU, a reference for a preliminary ruling is a request that a national court of a Member State addresses to the ECJ to obtain: a) the interpretation of the EU treaty law or b) an authoritative interpretation on a act of an European institution or a decision on the validity of such an act.

It must be stressed that in this situation the ECJ cannot be considered as a mere court of appeal asked to rule on the outcome of a main proceeding pending before the national court. The Court does not pronounce itself on the concrete application of the European law in a main proceeding before a referring court. Neither it adjudicates on the facts of domestic proceedings, nor on the interpretation and application of national law. What the Court may be addressed for is only the interpretation or the validity of European law or acts. Moreover, even though the decision of the ECJ on a reference for a preliminary ruling is given in the same form of a judgment, such a verdict is only destined to the referring court and not directly to the main proceeding's parties. Consequently, it can be said that the preliminary reference mechanism is the expression of an interplay of tasks between national courts and the ECJ⁷.

spec. 119 ff.; A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER, *The European Court and National Courts. Doctrine and Jurisprudence*, Hart Publishing, Oxford, 1998.

5 For the firsts two decades (the 1st case was the Judgment of 6 April 1962, *De Geus en Uitdenbogerd c. Bosch and others* (C- 13/61)) the number of preliminary references was very limited.

6 See *infra*, § 3.

7 M. BROBERG, N. FENGER, *Preliminary references to the European Court of Justice*, quoted above, p. 2 ff.

For a discussion on whether the relationship between national courts and the Court of Justice is in reality hierarchical or rather has the character of cooperation between equals see, *ex multis*, V.

That said, the preliminary ruling procedure fulfils several important functions.

First of all, it provides national courts with key support in resolving European law interpretational issues. Secondly, it guarantees that a uniform interpretation of the European law is applied throughout the Member States. Thirdly, it ensures a form of control on the compatibility of national acts with respect to the European Union⁸. Lastly, it completes the system of judicial control on the legitimacy of EU acts and it plays a crucial role in the political integration of the community⁹. Inspired to a certain

KRONENBERGER, M.T. D'ALESSIO, V. PLACCO, *De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins: mélanges en l'honneur de Paolo Mengozzi*, quoted above; A. ROSAS, E. LEVITS, Y. BO, *The Court of Justice and the construction of Europe: analyses and perspectives on sixty years of case law*, quoted above; T. DE LA MARE, D. DONNELLY, *Preliminary Ruling and the EU Legal Integration: Evolution and Stasis*, in P. CRAIG, G. DE BÜRCA (eds.), *The Evolution of EU Law*, 2nd ed., 2011, Oxford University Press, Oxford, 363 ff.; A. RUGGERI, *La ricomposizione multilivello del sistema delle fonti*, quoted above, 17 ss; M. CARTABIA, *La Corte costituzionale italiana e la Corte di Giustizia europea: argomenti per un dialogo diretto*, in VV.AA., *Diritto comunitario e diritto interno*, quoted above, 153 ff.; A. TIZZANO, *Ancora sui rapporti tra Corti europee: principi comunitari e c.d. controlimiti costituzionali*, in VV.AA., *Diritto comunitario e diritto interno*, quoted above, 479 ff.; M. DOUGAN, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation*, Hart Publishing, Oxford, 2004; A. DASHWOOD, A.C. JOHNSON (eds.), *The Future of Judicial System of the European Union*, Hart Publishing, Oxford, 2001; A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER, *The European Court and National Courts. Doctrine and Jurisprudence*, quoted above.

- 8 Indeed, as specified by the ECJ, “By Article 173 and Article 184 (now Article 241 EC), on the one hand, and by Article 177, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts”, (now the articles are 263, 277 and 267 TFEU). Case C- 50/00, *Unión de Pequeños Agricultores v. Council of European Union*, judgment of 25 July 2002, § 40.
- 9 See *ex multis*, V. KRONENBERGER, M.T. D'ALESSIO, V. PLACCO, *De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins: mélanges en l'honneur de Paolo Mengozzi*, Bruylant, Bruxelles, 2013; A. ROSAS, E. LEVITS, Y. BO, *The Court of Justice and the construction of Europe :*

extent by various references coming from the founding member states (notably Germany and Italy)¹⁰, preliminary rulings have in fact played an important role in the development of the European legal order¹¹. Some of the most fundamental principles of the European law have been laid down in connection with preliminary rulings¹², e.g. the principle of “direct effect” and the “primacy of European law”¹³. Furthermore, the preliminary ruling mechanism made another important consequence possible: by strengthening the ties between national courts and the ECJ, it actually made them functioning as “real” European courts¹⁴.

analyses and perspectives on sixty years of case law, Court of Justice of the European Union, The Hague, Asser press; Springer Berlin, 2013; A. COSIO, R. FOGLIA (eds.), *Il diritto europeo nel dialogo delle corti*, quoted above; A. BURLEY W MATTILI, *Europe Before the Court: A political Theory of Legal Integration*, in *International Organization* 47, 1, 1993, 41 ff.; J. WEILER, *Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, in *Journal of Common Market Studies*, 31,4, 1993 417 ff.; H. RASMUSSEN, *On Law and Policy in the European Court of Justice, A Comparative Study in Judicial Policymaking*, Nijhoff Publisher, Dordrecht, 1986.

- 10 Indeed we can find some similarities with the Italian and German process’ of constitutional adjudication.
- 11 The preliminary ruling procedure has been one of the very first forms of advanced cooperation between national courts and an international one.
- 12 See above footnotes 4 and 7.
- 13 In the decisions C-26/62, *van Gend & Loos*, judgment of 5.2.1963 the ECJ affirmed the “direct effect of European Law”; then in C- 6/64, *Costa/ENEL*, judgment of 15.7.1964, it was affirmed its primacy on national law. Another important principle that has been lay down in connection with preliminary rulings is the non-contractual liability of Member States for breach of European law (C-6/90 e C-9/90, *Francovich e.a.*, judgment of 19.11.1991; C-46/93 e C-48/93 *Brasserie du pêcheur e Factortame*, judgment of 5.3.1996).
- 14 One can add that, since article 267 has direct effect, many member states have made no supplementary national provisions regulating how and when a preliminary reference should be made or how a preliminary ruling should be finally applied by national courts. Often such questions find their regulation in a combination of case law of the ECJ and procedural codes’ provisions of the different member states. See above footnotes 4 and 7.

According to the ECJ case law, the preliminary ruling mechanism, far from being a mere procedural instrument, represents an element which is “essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community”. It then complies with the purpose, on one side, “to avoid divergences in the interpretation of Community law which the national courts have to apply”, on the other, it “tends to ensure this application by making available to the national judge a means of eliminating difficulties which may be occasioned by the requirement of giving Community law its full effect within the framework of the judicial systems of the Member States”¹⁵.

15 ECJ C-166/73, *Rheinmühlen-Düsseldorf c. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, judgment of 16.01.1974, § 2. The Court continues specifying that “Consequently any gap in the system so organized could undermine the effectiveness of the provisions of the Treaty and of the secondary Community law.

The provisions of Article 177, which enable every national court or tribunal without distinction to refer a case to the Court for a preliminary ruling when it considers that a decision on the question is necessary to enable it to give judgment, must be seen in this light. [...] The provisions of Article 177 are absolutely binding on the national judge and, in so far as the second paragraph is concerned, enable him to refer a case to the Court of Justice for a preliminary ruling on interpretation or validity. This Article given national courts the power and, where appropriate, imposes on them the obligation to refer a case for a preliminary ruling, as soon as the judge perceives either of his own motion or at the request of the parties that the litigation depends on a point referred to in the first paragraph of Article 177.” § 2-Consequently, “it follows that national courts have the widest discretion in referring matters to the Court of Justice if they consider that a case pending before them raises questions involving interpretation, or consideration of the validity, of provisions of Community law, necessitating a decision on their part.

It follows from these factors that a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot deprive the inferior courts of their power to refer to the Court questions of interpretation of Community law involving such rulings. It would be otherwise if the questions put by the inferior court were substantially the same as questions already put by the superior court.

On the other hand the inferior court must be free, if it considers that the ruling on law made by the superior court could lead it to give a judgment contrary to Community law, to refer to the Court questions which concern it.

Clearly, *the function of* ensuring a uniform interpretation of the EU law throughout the Community (which in Italy we would call *nomofilattica*) has also become, over the decades, a fundamental instrument for the protection of the rights guaranteed by the EU law and, in particular, for the judicial protection of individuals both before the European institutions and within its Member States' systems¹⁶. As said above, the ECJ case law has over the years consistently confirmed a broad interpretation of the admissibility conditions¹⁷ of the preliminary reference procedure, especially in all those cases in which the protection of fundamental rights stemmed from the common constitutional traditions. And, more recently, this is even more true after the coming into force of the Treaty of Lisbon and after that the Charter of fundamental rights of the EU has acquired the same legal value of the Treaties¹⁸.

If inferior courts were bound without being able to refer matters to the Court, the jurisdiction of the latter to give preliminary rulings and the application of Community law at all levels of the judicial systems of the Member States would be compromised.” § 3- 4.

16 R. ADAM, A. TIZZANO, *Lineamenti di diritto dell'Unione europea*, 2nd ed., Giappichelli, Turin, 2010, 350.

17 Since the late 80's the Court of Justice has affirmed its jurisdiction in two cases: when States act to implement the European legal provision and when they invoke one of the grounds of justification provided by the Treaties to limit a fundamental economic freedoms.

The Charter of Fundamental Rights provides today that its provisions are addressed to the Member States only when they are implementing the Union law.

18 On this point see . KRONENBERGER, M.T. D'ALESSIO, V. PLACCO, *De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins: mélanges en l'honneur de Paolo Mengozzi*, quoted above; VV.AA., *Diritto comunitario e diritto interno*, quoted above; G. RAITI, *La collaborazione giudiziaria nell'esperienza del rinvio pregiudiziale comunitario*, quoted above. About the relationship between fundamental rights protection and article 267 TFUE procedure see also some recent cases: C- 617/10, *Åklagaren v. Hans Åkerberg Fransson*, judgment of 26.02.2013 and C-176/12, *Association de médiation sociale v. Union locale des syndicats CGT et al*, judgment of 15.01.2014.

In other words, thanks to such a “linkage tool” (the preliminary ruling) operating between the European and the national level, the Court of justice disposes of “*an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases upon which they are called to adjudicate*”¹⁹. Indeed it is settled case-law that where, as in the main proceedings, a national situation falls within the scope of Community law and a reference for a preliminary ruling is submitted, the Court has to provide the national courts with all the criteria of interpretation needed to determine whether that situation is compatible with the fundamental rights or not²⁰.

For a reconstruction of this issue see R. COSIO, *Il ruolo dei diritti fondamentali nel rinvio pregiudiziale alla Corte di giustizia*, in www.europeanrights.eu, 15/05/2013.

19 In this sense: C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge Autriche*, judgment of 12.06.2003, § 30. The same concept, however, had already been express by the ECJ in the case C-16/65, *Schwarze*, judgment of 01.12.1965, according to which the preliminary reference mechanism “requires the national court and the Court of Justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision.

Any other approach would have the effect of allowing the national courts to decide themselves on the validity of Community measures”.

20 C- 112/00 quoted above. According to the ECJ, “*It is settled case-law that where, as in the main proceedings, a national situation falls within the scope of Community law and a reference for a preliminary ruling is made to the Court, it must provide the national courts with all the criteria of interpretation needed to determine whether that situation is compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the ECHR [...] In the present case, the national authorities relied on the need to respect fundamental rights guaranteed by both the ECHR and the Constitution of the Member State concerned in deciding to allow a restriction to be imposed on one of the fundamental freedoms enshrined in the Treaty. [...] The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression*

Besides being a key element to preserve the uniformity of the European law system²¹, as well as an essential tool to enhance the dialogue between the European Court and the national jurisdictions, the preliminary reference mechanism also allows to provide individuals with “*effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*”²².

According to the European case law, indeed, by “*Article 173 and Article 184 (now Article 241 EC), on the one hand, and by Article 177 (now 267), on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the community Courts*”²³.

and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.” §§ 75-78.

- 21 S. AGOSTA, *Il rinvio pregiudiziale ex art 234 Trattato CE*, in P. FALZEA, A. SPADARO, L. VENTURA (eds.), *La Corte costituzionale e le Corti d'Europa*, Giappichelli, Turin, 2003, 351.
- 22 § 39, C-50/00, quoted above, footnote 8. But see also C- 222/84, *M. Johnston v. Chief Constable of the Royal Ulster Constabulary*, judgment of 15.05.1986, § 18 and C-424/99, *Commission v. Austria*, judgment of 27.11.2001, § 45.
- 23 § 40, C-50/00 quoted above, footnote 8. The ECJ continue specifying that “[u]nder that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid (see Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20), to make a reference to the Court of Justice for a preliminary ruling on validity”. To deepen this point see D.U. GALLETTA, *Una sentenza storica sul principio di proporzionalità con talune ombre in ordine al rinvio pregiudiziale alla Corte di giustizia*, *Riv. It. Dir. Pubbl. comunit.* 1999, 2, 459 ff.; A. ALEN, *Le relazioni*

The aforementioned decisions of the ECJ are, at least formally, in line with what the Italian Constitutional Court has reiterated since judgment n. 98 of 1965 which legitimized the transfer of powers from national courts to the European Court insomuch as they were not jeopardizing the rights to judicial protection of individuals. Such rights are in fact considered part of those “*inalienable human rights*” guaranteed by Article n. 2 of the Italian Constitution²⁴.

Who can really make a reference? The right to refer and the obligation to refer. When are national courts obliged to refer questions?

According to the 2nd paragraph of article 267 TFEU, when the interpretation or the validity of an EU act come into question every national court or tribunal (and not the parties directly), “*if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon*”.

The 3rd paragraph of the same article provides that if the court or the tribunal is a judge of last instance, such judge shall bring the matter before the Court²⁵. These two norms may appear to be clear, however some remarks on the judicial bodies entitled or obliged to refer questions for preliminary rulings are needed. “Who” can submit a reference for a preliminary ruling, “when” a judge can (or is obliged) to raise such a reference: these are examples of unclear issues.

The identification of the national bodies entitled to raise references for a preliminary ruling has often caused confrontations between the EU member States and the ECJ, the

tra la Corte di Giustizia delle Comunità Europee e le Corti Costituzionali degli Stati membri, in E. CASTORINA (ed.), *Profili attuali e prospettive di diritto costituzionale europeo*, Giappichelli, Torino, 2007.

²⁴ ICC, decision n. 98/1965, in www.giurcost.org.

²⁵ It must be recalled that the last paragraph of article 267 TFEU has been modified after the Lisbon Treaty and now it is provided that if a question for preliminary ruling “*is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay*”.

latter relying on a key reading in article 267 TFEU which is not always matching with the ones adopted under national laws²⁶.

Indeed the decision of whether a given body constitutes a “*court or tribunal*” entitled to make a reference for a preliminary ruling has not to be made on the basis of national law, but it is an autonomous concept of the European law²⁷, whose boundaries have been defined by the ECJ itself that has given to it a uniform and independent definition under European law. This means, on the one hand, that a reference for a preliminary ruling could be submitted not only by those bodies that under national law are expressly designated as courts and tribunals. On the other, that the mere “nominal” aspect is not sufficient to entitle a body to raise such a reference.

In concrete, the criteria to individuate the bodies which are to be regarded as a Court or tribunal within the meaning of article 267 TFEU have been determined by the rich and articulated case law of the ECJ²⁸. The Court, on one side, paraphrasing the text of art. 267 TFEU, gave legitimacy to submit a reference to all the judicial bodies being part of a Member State’s jurisdictional power. On the other, by pointing out the incompleteness of this definition, it

26 To deepen this point see M. BROBERG, N. FENGER, *Preliminary references to the European Court of Justice*, quoted above, 60 ff.; C. NAÔMÉ, *Le renvoi préjudiciel en droit européen*, 2nd, Larcier, Bruxelles, 2010; M.C.REALE, M. BORRACCETTI, *Da giudice a giudice. Il dialogo tra giudice italiano e Corte di giustizia delle Comunità europee*, quoted above; P. BIAVATI, *Diritto processuale dell’Unione europea*, quoted above; G. RAITI, *La collaborazione giudiziaria nell’esperienza del rinvio pregiudiziale comunitario*, quoted above, 16 ff.; M. CLACS, *The National Courts’ Mandate in the European Constitution*, Hart Publisher, Oxford, 2006; F.C. MEYER, *The European Constitution and the Courts*, in A. VON BOGDANDY, J. BAST (eds.), *Principles of European Constitutional Law*, Hart Publisher, Oxford, 2006, 281 ff., but also D. BASILE, *La nozione di “giurisdizione nazionale” nella giurisprudenza della Corte di Giustizia. Aspetti problematici e profili comparativi*, in *Foro Amm. CDS*, 2006, 3, 696 ff.; F. JACOBS, *Which Court or Tribunals are Bound to Refer to the European Court?*, *European Law Review*, 2, 1977, 119 ff.

27 Case C-69/97, *Garofalo and others v. Ministero della Sanità and USL n° 58 di Palermo*, judgment of 16.10.1997.

28 See above footnotes 26 and 4.

indicated a number of additional “index detectors” framing which national bodies can be considered a “court or tribunal” entitled to submit a reference for a preliminary ruling²⁹.

Consequently, in order to determine whether a judicial body submitting a reference is a court or a tribunal meeting the purposes of Article 267 TFEU, we need to consider both the structural and the functional criteria, “*such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent*”³⁰.

These requirements have been variously combined and reiterated in many subsequent judgments.

The ECJ then has elaborated a notion of “national jurisdiction” entitled to submit a reference for a preliminary ruling that is not “general” but based on a rich and flexible case law. As a consequence, it is not always easy to understand if a certain body is entitled or not to submit a reference for a preliminary ruling³¹. To sum up, in light of the most recent jurisprudence we can affirm that a reference for a preliminary ruling can be submitted by a body if it is: a) established by the law³²; b) with a permanent

29 C- 54/96, *Dorsch Consult Ingenieurgesellschaft v. Bundesbaugesellschaft Berlin*, judgment of 17.9.1997.

30 § 23, C- 54/96, quoted above; but see also C- 61/65, *Vaassen (née Göbbels) c. Beamtenfonds voor het Mijnbedrijf*, judgment of 30.06.1966; C- 14/86, *Pretore di Salò v. Personunkown*, judgment of 11.06.1987, § 7; C- 109/88 *Handels- og Kontorfunktionærernes Forbund i Danmark contro Dansk Arbejdsgiverforening*, judgment of 17.10.1989, § 7 and 8; C-393/92 *Comune di Almelo e altri contro NV Energiebedrijf Ijsselmij NV*, judgment of 27.04.1994; C - III/94 *Job Centre Coop, arl*, judgment of 19.10.1995, §9.

31 Recently, see, for example C- 53/03, *Synetairismos Farmakopoion Aitolias & Akarmanias (Syfait) et al. v. GlaxoSmithKline plc e GlaxoSmithKline AEVE*, judgment of 31.05.2005, §29; C-96/04, *Standesamt Stadt Niebüll*, judgment 17.04.2006, § 13. To deepen the analysis of this case law see above, footnote 26.

32 See *inter alia* C- 61/65, quoted above; C-110/98 and 147/98, *Gabalfrisa SL e a. contro Agencia Estatal de Administración Tributaria (AEAT)*, judgment of 21.03.2000, §34; C-9/97 and 118/97, *Raija-Liisa Jokela e Laura Pitkäranta*, judgment of 22.10.1998, §19; C-54/96, quoted above,

character³³; c) with an independent nature³⁴, d) having compulsory jurisdiction³⁵; and if it is one e) that uses an adversary procedure³⁶ and f) that takes decisions on the basis of legal rules. Moreover a national body has to issue decisions of a judicial nature (in the context of the Preliminary reference)³⁷.

§22-38. In particular, from this last case emerges that the criterion that a body must be established by the law to be qualified a “national court” relevant for the preliminary reference procedure is primarily a formal requirement.

- ³³ See *inter alia* C- 61/65, quoted above and C-54/96, quoted above, § 22.
- ³⁴ See *inter alia* C-246/05, *Armin Häupl v. Lidl Stiftung & Co. KG.*, judgment of 14.06.2007, §15-21; C-195/06, *Kommunikationsbehörde Austria (Komm.Austria) v. Österreichischer Rundfunk (ORF)*, judgment of 18.10.2007, § 18-22; C-516/99, *Walter Schmid*, 30.05.2002, § 34-44; C- 53/03 quoted above, § 30-37; C- 506/04, *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, judgment of 19.09.2006, § 49-53. More recently see also C- 109/07, *Jonathan Pilato v. Jean-Claude Bourgault*, judgment of 14.05.2008; C-517/09, *RTL Belgium SA*, judgment 22.12.2010, § 31-49; C-363/11, *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v. Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou*, judgment of 19.12.2012, § 23-5
- ³⁵ C-110/98 and 147/98, quoted above, § 36; C-102/81, *"Nordsee" Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG e Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG.*, judgment of 23.03.1982, § 35.
- ³⁶ See *inter alia* C- 61/65, quoted above; C-363/11, quoted above, § 29/32. However it must be stressed that the use of an adversary procedure is not always an indispensable condition. See, for example C-70/77, *Simmenthal SpA v. Amministrazione delle finanze*, judgment of 28.06.1978, § 9-11 and, more recently, C- 54/96, quoted above and C-17/00, *François De Coster v. Collège des bourgmestre et échevins de Watermael-Boitsfort*, judgment of 29.11.2001, §14.
- ³⁷ If a national body just appears to have the qualities of a court or tribunal” that is competent to make references ex art 267 TFUE, but with a closer examination the ECJ realize that its’ decisions are not of a judicial nature, the reference can be held inadmissible. See, for example C-363/11, quoted above § 22.

In light of the above described, it derives the jurisdiction of the ECJ to determine also the notion of “courts of last instance” set out in the 3rd paragraph of article 267 TFEU.

Even so, however, the definition of the concept of “last instance”, at least according to a merely literal analysis of the Treaties’ text, was not undisputed. On the one hand this is because of the interference of the Member States in the definition-making of the concept, on the other hand it is because the Court of Justice, considering itself as the only body entitled to substantiate this notion, has made with its case law a substantial rewriting of the provision.

Moreover, another issue needs to be considered. Those national judicial bodies whose decisions cannot be appealed may not be obliged to submit references under article 267 TFEU. Conversely, such an obligation might be found in cases of national judicial bodies emitting appealable decisions.

On this, what appears to be crucial is the analysis of the *CILFIT* case, where the ECJ affirmed that “tribunals, including those referred to in the third paragraph of Article 177, remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so. [...] the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.”³⁸

Thus, the obligation to submit a reference is excluded not only when the interpretation of the Community’s provisions relevant to the case are sufficiently clear (so called theory of *acte claire*), but also when the ECJ’s case law is expression of a unique orientation that makes possible to subsume under it the question

³⁸ C-283/81, *Srl CILFIT e Lanificio di Gavardo spa v. Ministero della Sanità*, judgment of 06/10/1982, § 16.

submitted to the national court, or when the controversial matter coincides with an earlier issue already settled by a specific precedent of the Court of Justice (so called theory of *acte éclairé*). The evaluation concerning the existence of these conditions is to be made by the national courts, taking into account the specific characteristics of Community law, the particular difficulties that present its interpretation and the risk of divergence of judicial decisions within the Community³⁹.

Moreover, last instance jurisdictions “*are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case*”⁴⁰.

Subsequent case law of the Court of Justice did not deviate from the criteria stated in *Cilfit*: several times the ECJ had clarified the contents of those criteria and the scholars, especially with reference to the theory of *acte claire*, often called for “a proper sense of responsibility on the part of national courts, in making use of exceptions to the obligation of referral identified by the European case law”⁴¹.

The proper individuation of the cases in which a reference for a preliminary ruling can/shall be made is connected with “the other side of the coin”: what happens if a national body fails to submit such a reference? What happens if a national court or tribunal, even of last instance, fails to comply with the obligation to submit a reference for a preliminary ruling to the Court of Justice of the European Union under the conditions laid down in Article 267 TFEU and developed in the case-law of the Court?

³⁹ C-283/81 quoted above, § 15, 17.

⁴⁰ C-283/81 quoted above, § 10.

⁴¹ In this sense see D. U. Galletta, *Una sentenza storica sul principio di proporzionalità con talune ombre in ordine al rinvio pregiudiziale alla Corte di giustizia*, quoted above, 463. See also H. RASMUSSEN, *The European Court's Acte Claire strategy in Cilfit*, in *European Law Review*, 9, 1984, 242 ff.

Such issues are huge and would deserve a deep analysis⁴². However, in this context, it is useful to be reminded that the European Court of Human Rights case law has established some criteria that national courts are required to bring into play in order to substantiate an arbitrary decision not to refer a question for a preliminary ruling, because this could infringe the right to a fair trial provided by article 6 of European convention of Human rights⁴³. In any case, we must bear in mind that the link between the ECJ and the European Court of Human Rights will be greatly enhanced as soon as the process of accession of the EU to the ECHR will be finalized⁴⁴.

Constitutional Courts as “referring courts”? Problematic issues.

When we study the preliminary reference mechanism another problematic issue concerns the qualification of Constitutional Courts (or Constitutional Tribunals) as bodies that can (or even shall) activate the preliminary reference procedure. The procedure within article 267 TFEU certainly can be conceived as an instrument of dialogue between the ECJ and national constitutional judges, but for years, the majority of European constitutional judges expressly refused to conceive themselves as national body entitled or obliged to make such a reference.

This is a challenging, and heavy, point that involves the relationship between the European legal order and national ones,

42 There is no room to make this analysis here, but to deepen this topic see: M. BROBERG, N. FENGER, *Preliminary references to the European Court of Justice*, quoted above, 222 ff.; R. VALUTYTÉ, *State Liability for the Infringement of the Obligation to Refer for a Preliminary Ruling under the European Convention on Human Rights*, in *Jurisprudence*, 19(1), 2012, 7 ff.; B. HOFSTOTTER, *Non-Compliance of National Courts. Remedies in European Community Law and Beyond*, Asser Press, The Hague, 2005.

43 R. VALUTYTÉ, *State Liability for the Infringement of the Obligation to Refer for a Preliminary Ruling under the European Convention on Human Rights*, quoted above, 8-9.

44 See here § 6.

i.e. the primacy of the EU law on member States' legal orders⁴⁵. As it is known, Constitutional Courts are *sui generis* courts because of their procedures of appointment, composition and function. And one of the reasons that inhibits many Constitutional Courts to use the mechanism of the reference for a preliminary ruling lies mainly in the fear of being subject to the jurisdiction of the European Union and to be bound by the ECJ if considered "*last instance bodies*". Understandably, however, in the body of their decisions we do usually not find such concerns – at least not in open form – because there is the tendency to highlight how the constitutionality proceedings settle on a different level from the one on European provisions⁴⁶.

Moreover, if usually the ECJ and national Constitutional Courts agree on the interpretation of the European law and national (constitutional) law, there are situations in which a clash in their case law appears. I am referring to all those situations where judges are called upon to balance fundamental rights with the objectives of the European integration⁴⁷

45 On this point see above, footnotes 2 and 3, but also, M. CLACS, *The National Courts' Mandate in the European Constitution*, quoted above; F.C. MEYER, *The European Constitution and the Courts*, quoted above, 281 ff.; C. VIDAL PRADO, *El impacto del nuevo derecho europeo en los Tribunales Constitucionales*, Colex, Madrid, 2004.

46 This can be argued from the analysis of the constitutional jurisprudence of the French and the German Constitutional Court, long stuck in an attitude of closure about the opportunity to make references for preliminary ruling. But see *infra*.

47 See for example, the case of the European Arrest Warrant, or the case of the Data Retention Directive, and lastly the case of the enforcement of the Charter of Fundamental Rights in the EU, as in the *Melloni* case (C-399/11, judgment of 26th February 2013). The case of the European Arrest Warrant clearly shows as several tensions existing between Constitutional Courts and the ECJ emerge in the field of what was the "third pillar" of EU, and maybe it is not a coincidence that the recent "first time" of some Constitutional courts originated from cases in which it was to be interpreted the European Arrest Warrant. See *infra*, the cases of Spain and France.

To deepen the issue of the European Arrest Warrant see, *inter alia*, J. KOMAREK, *European Constitutionalism and the European Arrest Warrant: in*

For a long time several European Constitutional Courts have preferred an indirect “dialogue” with the Luxembourg’s Court, and only progressively, especially in the last decade, some of them have started to be engaged in a direct – by means of the preliminary reference procedure- dialogue with the ECJ.

The reasons of this change are not always clear and some problematic issues still persist. Probably these Courts, in the activation of a “direct dialogue” with the ECJ, have started to see an opportunity to enrich the implementation of the European constitutional protection of rights rather than a threat to their independence or constitutional supremacy. Albeit it would be an oversimplification to claim that they have started to relate to the ECJ with the same dynamics of the ordinary judges.

However the phenomenon is surely relevant and, in this regard, one of the Constitutional Court’s most activist is the Belgian one.

The Belgian Constitutional judge, indeed, consistently with the approach monist that governs the relationship between the Belgian law and the European one, has never adopted positions of net closure against the possibility of making references for preliminary rulings to the ECJ. Indeed, if in his first case law is possible to identify a cautious attitude, then it has been subject to an evolutionary process of cooperation with the ECJ. This process has led the Belgian constitutional judge, since the 2nd half of the 90’s⁴⁸, to become one of the most activist in the direct dialogue with the ECJ⁴⁹.

search of the limits of contrapunctual principles, Jean Monnet Working paper, 10/05; O. POLLICINO, *New Emerging Judicial Dynamics of the Relationship Between National and the European Courts after the Enlargement of Europe*, Jean Monnet Working Paper, 14/08.

48 *Cour d’Arbitrage*, 19 Febr.1997, no. 6/97, available at www.arbitrage.be/fr/common/home.html.

49 For further information on the evolution of the jurisprudence of the Belgian Constitutional Court see: L.C. SCIANNELLA, *La giurisprudenza della Cour constitutionnelle belge nel biennio 2007/2008*, in *Giurisprudenza costituzionale*, 2008, 05, 4179 ff.; T. VANDAMME, “*Prochain Arrêt: La Belgique! Explaining Recent Preliminary References of the Belgian Constitutional Court*”, *European Constitutional Law Review*, 2008, 127 ff.

Also the Austrian *Verfassungsgerichtshof*⁵⁰ (since 1999), and the Latvian Constitutional Court (*Lietuvos Aukščiausias Teismas*)⁵¹ (since 2007), did not hesitate to consider themselves as “national courts” entitled to make a reference for a preliminary ruling to the ECJ. Although their case law on the point is not as rich as that of Belgium, these organs do not conceive themselves threatened from the setting of a direct dialogue with the ECJ.

Opened to a dialogue with ECJ are also the TC of Portugal and several TC of Eastern Europe countries, such as Poland, Czech Republic, Slovakia and Slovenia, although not all of them have made a reference for a preliminary ruling yet⁵².

What appears to be significant is a decision of the Polish Constitutional Court (*Trybunał Konstytucyjny*)⁵³ according to which the preliminary ruling mechanism does not undermine the structure of the Polish constitutional powers of the Judge as defined in art. 188 of the Constitution. Consequently, if it “*decides to raise a question concerning the validity or interpretation of Community law, it would make such a reference in the exercise of its powers and just in case it is obliged to apply Community law*”⁵⁴. This position has remained constant in the Polish case law and it is the recognition of primacy of Community law that

50 *VjGH*, 10 March 1999, B 2251/97, B 2594/97, available at www.vfgh.gv.at/cms/vfgh-site. On this case see: U. JEDLICZKA, *The Austrian Constitutional Court and the European Court of Justice*, *Journal of International Constitutional Law*, 4/2008, 301 ff.

51 *Lietuvos Respublikos Konstitucinis Teismas*, decision of 8 May 2007, available at www.lrkt.lt/dokumentai/2007/d070508.htm

52 For further information about the positions of Constitutional Courts in Central and Eastern Europe and their attitude towards European Integration see D. PIQANI, *Constitutional Courts in Central and Eastern Europe and their attitude towards European Integration*, in *European Journal of Legal Studies*, 2007, available at <http://www.ejls.eu/2/28UK.pdf>.

53 See the so called “Accession Treaty case”, K. 18/04 of 11 May 2005, but also the Procedural Decision no. 176/11/A/2006 on the Excise Duty Tax, 19 Dec. 2006, No 37/05 – in www.trybunal.gov.pl

54 *Abstract* della decisione in www.trybunal.gov.pl

leads to exclude that there are obstacles in the activation of the preliminary reference mechanism⁵⁵.

Coming to consider more recent developments, the last four years have been really interesting because several constitutional judges changed their previous case law and decided to make a reference within article 267 TFEU. Spain, France, Germany and Italy's constitutional jurisprudence made a shift and those constitutional judges decided to activate a direct cooperation with the Luxembourg Court.

The reasons for this significant change in orientation are declined differently depending on the national legal order, but it can be argued that, in this process, a significant role has been exercised by the acquisition of the Charter of Fundamental rights of the same legal value of the EU Treaties, since the coming into force of the Treaty of Lisbon. Indeed it cannot certainly be considered a mere coincidence that the references for a preliminary ruling made by Spain, France, Germany and Italy (at least in 2013) involved, at a certain extent, some constitutional fundamental rights and principles.

The Constitutional Tribunal of Spain made its first reference for a preliminary ruling in 2011⁵⁶. Before 2011, the constitutional case

⁵⁵ See, for example, the decision K 3/08 of 18 feb. 2009 or the decision P 37/05, quoted above.

⁵⁶ Order ATC 86/2011, 9th June 2011, available in <http://hj.tribunalconstitucional.es/en/Resolucion/Show/22561>.

On this case see, A. TORRES PÉREZ, *Spanish Constitutional Court, Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door*; *Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011*, *European Constitutional Law Review*, 8, 2012, 105 ff.; A. CALAHORRO, *La primera cuestión prejudicial planteada por el Tribunal constitucional al Tribunal de justicia de la Union europea. Auto del TC 86/2011, de 9 de junio*, available in <http://www.ugr.es/~redce/REDCE16/articulos/12AAguilar.htm>); A. JIMENEZ, *Sobre la primera cuestión prejudicial planteada por el Tribunal constitucional. Bases, contenido y consecuencias. Papeles de derecho europeo e integracion regional*, Ideir, Madrid, 2011. See also M. IACOMETTI, *Il caso Melloni e l'interpretazione dell'art. 53 della Carta dei diritti fondamentali dell'Unione europea tra Corte di giustizia e Tribunale costituzionale spagnolo*, in

law had stressed the fact that the refusal to make a reference under article 267 TFEU founded its reasons on the net separation of the respective sphere of competence⁵⁷. The contrast between provisions of the national legal order and European ones was considered as if it had a sub-constitutional nature and consequently it was believed it could not interfere with the process of constitutional adjudication, relying, on the contrary, on the sphere of competence of ordinary judges⁵⁸.

However, progressively, the Constitutional judge has begun to show timid openings, especially when it came to emphasize the need to protect fundamental rights. So three years ago, in a dispute in which it was in relief the application of the legislation on the European arrest warrant, it acknowledged its nature as Court entitled to make a reference under 267 TFEU (in view of the fact that its decisions do not allow an appeal). The Constitutional Tribunal, indeed, has been pushed by the necessity to clarify the content, opposable to the authorities of other countries, of the right of defense, given that, pursuant to article 10, paragraph 2, of the Spanish Constitution, fundamental rights shall be interpreted in accordance with international treaties that Spain has ratified. Consequently, in that case it was

www.osservatorioaic.it, October 2013; A. RUGGERI, *La Corte di giustizia e il bilanciamento mancato (a margine della sentenza Melloni)*, in ID, "Itinerari" di una ricerca sul sistema delle fonti, XVII studi dell'anno 2013, Giappichelli, Torino, 2013, 87 ff.

57 See, *inter alia*, P. TENORIO, *A Contribution from the Spanish Constitutional Court to the European construction process: requesting preliminary ruling*, in *Creighton International and Comparative Law Journal*, 1, 2011, 31 ff.; J DE MIGUEL BARCENA, *Spagna*, in A. CELOTTO, J. TAJADURA, J DE MIGUEL BARCENA (eds.), *Giustizia costituzionale e Unione europea : una comparazione tra Austria, Francia, Germania, Italia, Spagna e Portogallo*, quoted above, 155 ff.

58 See, for example, the decision n. 64/1991 or the decision n. 372/1993. See also C. VIDAL PRADO, *El impacto del nuevo derecho europeo en los Tribunales Constitucionales*, quoted above, 156 ff. according to which the possible contrast between the EU law and national law is a mere question of legality and not one of "constitutionality".

necessary to understand the correct interpretation of the European law, as integrative of the fundamental right of defense.

The case in question was not considered in contrast to the established Spanish case-law since it was considered as having a direct constitutional nature and not as concerning a mere situation of national provision conflicting with European law. Indeed it was required that the ECJ interpret provisions whose meaning would have taken on a meaning directly integrative the constitutional provisions.

More recently, in 2013, the French *Conseil Constitutionnel* has made its first reference for preliminary ruling⁵⁹ to the ECJ asking, as the Spanish constitutional Tribunal, the interpretation of some norms of the European arrest warrant⁶⁰.

Until last year, the *Conseil* had never made such references: both because, before the constitutional reform that introduced the *question prioritaire de constitutionnalité*⁶¹, the constitutional review could be done only *a priori* and in a very short delay (one month); and this is because, according to consolidated case law, the competence to assess the contrast between national provisions and European ones, as well as the compliance by the first to the Treaties, was considered a competence of ordinary judges, within the control of conventionality. The only exception to this scheme were the situations in which: a) the national

⁵⁹ *Conseil Constitutionnel* - Decision n. 2013-314P QPC, 4th April 2013, available in <http://www.conseil-constitutionnel.fr/>

⁶⁰ The reference for preliminary ruling was made in context of the "new" competence of *Conseil* to syndicate, *a posteriori* and as "indirect proceeding", the constitutionality of a law. The case was referred to the *Conseil* by the Court of Cassation. This Court would obviously have been able to bring itself the matter to the Court of Justice, but it decided instead to raise the question of the constitutionality of a provision of the Code of Criminal Procedure that excluded the appeal against a decision authorizing the delivery of the condemned in the application of the European arrest warrant, claiming the violation of the principle of equality and the right of defense.

⁶¹ Reform of 2008. On this reform see, *inter alia*, X. MAGNON, X. BIOY, W. MASTOR, S. MOUTON (eds.), *Le réflexe constitutionnel: Question sur la question prioritaire de constitutionnalité*, Bruylant, Bruxelles, 2013.

legislator would exceed the margins allowed by European law; or b) the European provisions can be considered in direct contrast with a constitutional norm or with a principle inherent to the constitutional identity of the Nation.

Despite the intervention of the constitutional reform of 2008, scholars were still doubters about the possibility that there could be a sudden change in the case law of the *Conseil* on the use of the mechanism provided for Article 267 TFEU. Indeed, according to scholars, the assertion of the “priority” of constitutional questions appeared to mark an even clearer separation between the two types of control (constitutionality and conventionality)⁶².

In 2013, however, the *Conseil* has been requested by the Court of Cassation to rule on the constitutionality of a provision of the Criminal Procedure Code (affecting on a fundamental right such as the personal freedom). And the *Conseil* referred the question to the ECJ asking if the content of the contested provision could be considered the result of a discretionary choice of the national legislator (which had possibly exceeded the margins allowed by the Directive) or if it was to be considered a direct implementation of European provisions. Only in the first case it would have had jurisdiction to assess its constitutionality. In that case the national provisions were suspected both to implement incorrectly the European arrest warrant and to infringe a right guaranteed by the Constitution. What appeared, therefore, was the need for an interpretation of the European provisions in order to define if the content of the national norm was imposed from it.

Commenting on this first reference for a preliminary ruling, many scholars believe that, although representing an element of substantial novelty, it does not deviate from the principles established by settled case-law of the *Conseil*⁶³.

⁶² See X. MAGNON, X. BIOY, W. MASTOR, S. MOUTON (eds.), *Le réflexe constitutionnel: Question sur la question prioritaire de constitutionnalité*, quoted above.

⁶³ For a reconstruction of the debate see: S. CATALANO, *Il primo rinvio pregiudiziale del Conseil Constitutionnel alla Corte di giustizia dell'unione europea: contesto e ragioni di una decisione non rivoluzionaria*, in www.osservatorioaic.it, October 2013; see also A. ROVAGNATI, *Il primo caso di rinvio pregiudiziale*

At the beginning of 2014 the German *Bundesverfassungsgericht* also made its first reference for a preliminary ruling to the ECJ⁶⁴.

Up to this time the German Constitutional judge, despite having recognized its nature of “judge of last instance” abstractly entailed to make references under Article 267 TFEU, had shown a remarkable reluctance to make such a reference, since it considered, in general, that the competence to assess the compatibility between the domestic law and the European one relied on ordinary judges⁶⁵.

However, the evolution of the relationship between the German legal order and the European one has been very articulated. Until 2014, the case law tended to recognize to the Constitutional judge the power to ascertain whether acts of organs or European Institutions had overstepped their powers⁶⁶ or interfered with the national identity, not transferred or transferrable to the Union (so

promosso dal Conseil constitutionnel, in *Quaderni costituzionali*, 3, 2013, 641 ff. On the relationship between French legal order and European one see also G. ALBERTON, *Francia*, in A.CELOTTO, J. TAJADURA, J DE MIGUEL BARCENA (EDS.), *Giustizia costituzionale e Unione europea : una comparazione tra Austria, Francia, Germania, Italia, Spagna e Portogallo*, quoted above, 203 ff.

64 *Bundesverfassungsgericht* [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2728/13, (Jan. 14, 2014), available in https://www.bundesverfassungsgericht.de/en/decisions/rs20140114_2bvr272813en.html.

65 On the evolution of the case law of the BVerfG on the relationship between the European Law and the national law, see the reconstruction of A. DI MARTINO, *Il Bundesverfassungsgericht dichiara l'incostituzionalità della data retention e torna sul rapporto tra libertà e sicurezza*, in *Giurisprudenza Costituzionale*, 2010, 4059 ff., but also C. VIDAL, *Germania*, in in A.CELOTTO, J. TAJADURA, J DE MIGUEL BARCENA (EDS.), *Giustizia costituzionale e Unione europea : una comparazione tra Austria, Francia, Germania, Italia, Spagna e Portogallo*, quoted above, 65 ff.

66 This happens when such bodies or institutions have gone beyond the boundaries of their competence in a way that has injured specifically the principle of “limited single attribution”, that is, when the violation of competence is “sufficiently serious.” In these situations it is excluded that constitutional bodies, authorities or national courts may in some way implement such measures.

called *ultra vires control*)⁶⁷. Therefore, the relationships between the ECJ and the *Bundesverfassungsgericht* were articulated in a spirit of cooperation, being up to the former the interpretation of the measures adopted, while the latter had to assess the untouchable core of the constitutional identity, verifying whether those measures, in the interpretation given by the ECJ invade that core.

The first reference for a preliminary ruling of the *Bundesverfassungsgericht* follows the path of the established constitutional case law and, in particular it is due to the need that the interpretation of the European provisions precedes the *ultra vires* control. Indeed, in this case, with a direct (and non-appealable) recourse, was challenged a decision of the European Central Bank containing measures to save the euro (in particular by the purchase of government bonds of the member countries of the European Union), stressing the need to protect the democratic principle, denouncing an *ultra vires* act of an organ of

⁶⁷ On the limits within which the Court may exercise the *ultra vires* control and its relationships with the interpretative function of the Court of Justice (and therefore with the court preliminary ruling), the previous case law of finds a precise point of reference in the case *Mangold-Honeywell* of July 6, 2010.

This case states that according to the German legal order it must be recognized the primacy of application of Union law. Consequently the controlling power of the *Bundesverfassungsgericht* is to be exercised only in a limited manner and with *favor* to the European law. This means that the *ultra vires*' control should respect the decisions of the Court of Justice as a binding interpretation of the EU law, with the result that, before declaring the existence of an *ultra vires* act of European organs and institutions, the Constitutional Tribunal shall, in the context of the preliminary ruling procedure under article. 267 TFEU, allow an interpretation of the Treaty and a decision on the validity and interpretation of the legal acts in question. On this case see: A. WIESTBROCK, *The Implications of Mangold for Domestic Legal Systems: The Honeywell Case*, in *Maastricht Journal of European and Comparative Law*, 18, 2011, 201 ff.; P. FARAGUNA, *GERMANIA: Il Mangold-Urteil del BverfG. Controllo ultra-vires sì, ma da maneggiare europarechtsfreundlich.*, in www.forumcostituzionale.it.

the Union⁶⁸. In that situation, considering the previous constitutional case law of the constitutional judge⁶⁹, it would be hardly conceivable that it could refused to make a reference for preliminary ruling, being seized of the matter as a result of direct action.

Albeit following the path of consolidate case law, this first reference for a preliminary ruling of the German constitutional judge has been considered “a turning point in favor of supranational conception of the Union”⁷⁰ for the reasoning expressed by the *Bundesverfassungsgericht* and its implications on the definition of the relationships with the European Union.

Also the Italian Constitutional Court (ICC), after a long period of uncertainty, in 2008 and in 2013 made its first preliminary references to the court of justice, as it will be examined in the next paragraph.

Focus on the Italian experience: The Italian Constitutional Court as a referring court to the European Court of Justice

Before analyzing the approach of the Italian Constitutional Court (ICC) to the preliminary reference mechanism we shall do a step back describing briefly how it had accepted the primacy of the European law.

After the foundation of the EEC, the ICC accepted the entry of the European law in the national legal order – and its nature of

68 On this case see A. DI MARTINO, *Le outright monetary transactions tra Francoforte, Karlsruhe e Lussemburgo. Il primo rinvio pregiudiziale del BVerfG*, in *www.federalismi.it*, 19 Feb. 2014, n. 4); T. BEUKERS, *The Bundesverfassungsgericht Preliminary Reference on the OMT Program: “In the ECB We Do Not Trust. What About You?”*, *German law journal*, 15,2, 2014, 343 ff.

69 See above footnote n. 67.

70 C. PINELLI, *Karlsruhe dichiara vincitore il diritto Ue*, in *www.affarinternazionali.it/articolo.asp?ID=2531*, 11.02.2014. See also A. DI MARTINO, *Le outright monetary transactions tra Francoforte, Karlsruhe e Lussemburgo. Il primo rinvio pregiudiziale del BVerfG*, quoted above.

supranational law with primacy and direct effect – under the provisions of article n. 11 of the Constitution⁷¹, since there was not an explicit European Clause in the Italian Constitution.

This result, however, did not emerge clearly from the beginning, but it was achieved only after a difficult dialogue with the ECJ and after an articulated series of judgments⁷².

The situation changed in 2001, when the Parliament approved the constitutional reform of Title V, 2nd part, of the Constitution, and revised the 1st paragraph of the article 117, that now provides that “*legislative power belongs to the state and regions in accordance with the Constitution and within the limit set by European union law and international obligations*”. For the first time, therefore, at the constitutional level it has been expressly codified that supranational obligations represent a limit for domestic law. This constitutional innovation introduced a judicial parameter that provoked a rich debate among scholars⁷³ and some interesting changes in the ICC’s case law.

71 Article 11 of the Italian constitution provides for an express limitation of sovereignty, in conditions of reciprocity with other states, in order to create a “word ensuring peace and justice among nations”.

72 On this see, *inter alia*: A. RUGGERI, *Sistema integrato di fonti e sistema integrato di interpretazioni nella prospettiva di un’Europa Unita*, in M. PEDRAZZA GORLEO (ed.), *Corti Costituzionali e Corti europee dopo il Trattato di Lisbona*, quoted above, 25 ff.; A. CELOTTO, *Italia*, in A. CELOTTO, J. TAJADURA, J. DE MIGUEL BARCENA (EDS.), *Giustizia costituzionale e Unione europea : una comparazione tra Austria, Francia, Germania, Italia, Spagna e Portogallo*, quoted above, 245 ff.; S. BARTOLE, *Separazione o integrazione fra ordinamenti?*, in VV.AA., *Diritto comunitario e diritto interno*, quoted above, 121 ff.; VV.AA., *Sovranità, rappresentanza, democrazia. Rapporti fra ordinamento comunitario e ordinamenti nazionali*, quoted above; F. SORRENTINO, *Profili costituzionali dell’integrazione europea*, quoted above; V. KRONENBERGER, M.T. D’ALESSIO, V. PLACCO, *De Rome à Lisbonne: les juridictions de l’Union européenne à la croisée des chemins : mélanges en l’honneur de Paolo Mengozzi*, quoted above.

73 Soon after this reform the interpretation of this provision created a division among scholars. According to some of them, the norm we are about to comment would simply codify the preexisting situation. According to other, instead, it should be emphasized that by recognizing

Moreover, it must be recalled that the ICC, since 1973, in accepting the primacy of the EU law, had elaborated the so called *counter-limits doctrine*⁷⁴. With the purpose to react to the ECJ's statements according to which it should be recognized the primacy of the European law over the domestic law (including national constitutional principles)⁷⁵, the ICC denied the monist

at constitutional level the European primacy, Italy seemed to not be so adverse to the monist thesis.

For an overview, see, *inter alia*: G. MARTINICO, O. POLLICINO, *The impact of the European courts on the Italian Constitutional Court*, in P. POPELIER, C. VAN DE HEYNING, P. VAN NUFFEL (eds.), *Human rights protection in the European legal order: The Interaction between the European and the national courts*, Intersentia, Cambridge, 2011, 261 ff.; G. MARTINICO, *Preliminary reference and constitutional Courts: Are you in the mood for dialogue?*, Tilburg Institute of comparative and transnational law—working paper n. 2009/10, available at SSRN:<http://ssrn.com/abstract=1483664>; R. CHIEPPA, *Nuove prospettive per il controllo di compatibilità comunitaria da parte della Corte Costituzionale*, *Il Diritto dell'Unione Europea*, 3/2007, 493 ff.; A. RUGGERI, *Riforma del titolo V e giudizi di "comunitarietà" delle leggi*, 2007, available at <http://www.associazionedeicostituzionalisti.it/dottrina/ordinamentieuropei/ruggeri.html>; S. CATALANO, *L'incidenza del nuovo articolo 117, comma 1, Cost. sui rapporti fra norme interne e norme comunitarie*, in N. ZANON (ed.), *Le Corti dell'integrazione europea e la Corte Costituzionale italiana*, Napoli 2006, 110 ff.; A. BARBERA, *Corte costituzionale e giudici di fronte ai vincoli comunitari: una ridefinizione dei confini?*, in www.forumcostituzionale.it.

⁷⁴ This doctrine was sustained by the ICC in reaction to the case *International handelsgesellschaft* [C- 11/70] with which the ECJ pointed out the primacy of the European law over the national law including national constitutional principles.

It shall be recalled that the expression "*counter-limits*" has been introduced by an Italian scholar in 1969: see P. BARILE, *Ancora sul diritto comunitario e diritto interno*, in *Studi per il XX anniversario dell'assemblea costituente*, VI, *Autonomie e garanzie costituzionali*, Vallecchi, Firenze, 1969, 33 ff., 49.

⁷⁵ On the relationships among ICC and ECJ see supra footnotes 71 and 72 and see also, *inter alia*, P. COSTANZO, L. MEZZETTI, A. RUGGERI, *Lineamenti di diritto costituzionale dell'Unione europea*, Giappichelli, Torino, 2014; VV.AA., *Diritto comunitario e diritto interno*, Giuffrè, Milano, 2008; P. FALZEA, A. SPADARO, L. VENTURA, *La Corte Costituzionale e le corti*

vision affirmed at European level, perceiving it as dangerous. So it took upon itself the role of guardian of the national constitutional identity, raising some ultimate barriers against an uncontrolled penetration of the EU law in the national legal order, in order to define the real core of the fundamental principles that characterize its constitutional core⁷⁶. If at the beginning the *counter-limits doctrine* was considered as a condition for evaluating the legitimacy of the limitation of sovereignty accepted by the Italian adhesion to the European venture, gradually it has changed its nature. Now it is no more considered as an element that could put in discussion the Italian membership to the EU, but it has become an element useful just to verify the compatibility of the EU law with the Constitution⁷⁷. Consequently, this doctrine now works as a sort of limitation of

d'Europa, Giappichelli, Torino, 2003; M. CARTABIA, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union*, in M. A. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER, *The European Court and National Courts. Doctrine and Jurisprudence*, quoted above, 133 ff.; M. CARTABIA, *Principi inviolabili e integrazione europea*, Giuffrè, Milano, 1995.

On the *counter limits doctrine*, see, *inter alia*: A. TIZZANO, *Ancora sui rapporti tra Corti europee: principi comunitari e c.d. controlimiti costituzionali*, in VV.AA., *Diritto comunitario e diritto interno*, quoted above, 479 ff.; F. DONATI, *Corte costituzionale, "controlimiti" e rinvio pregiudiziale ex art. 234 trattato CE*, *ibidem*, 250 ff.; V. ONIDA, *Nuove prospettive per la giurisprudenza costituzionale in tema di applicazione del diritto comunitario*, *ibidem*, pp. 66; A. CELOTTO, T. GROPPI, *Diritto UE e diritti nazionali: Primauté vs. controlimiti*, *Rivista italiana di diritto pubblico comunitario*, 2004, 1309 ff.; A. RUGGERI, *Riforma del titolo V e giudizi di "comunitarietà" delle leggi*, quoted above.

⁷⁶ So, we could hypothetically imagine that, if a European norm conflicts with the fundamental principles of the national legal order, the ICC could strike down the national law or statute executing the EC treaty. Obviously, this would cause a "rupture" between national and supranational legal orders.

⁷⁷ G. MARTINICO, O. POLLICINO, *The impact of the European courts on the Italian Constitutional Court*, in P. POPELIER, C. VAN DE HEYNING, P. VAN NUFFEL (eds.), *Human rights protection in the European legal order: The Interaction between the European and the national courts*, quoted above, 265-266.

the European primacy, entailing, if necessary, the non-applicability of European legal provisions.

Those considerations on the *counter-limit doctrine* are relevant also when we analyze the approach of the ICC to the preliminary ruling mechanism.

In this field emerges with clarity the divergent position of the ICC and the ECJ, since for decades the Constitutional Court had refused to conceive itself as “judge” within the meaning of article 267 TFEU⁷⁸. This position, apparently rigid, can be considered as a way through which the ICC has kept avoiding a direct dialogue (and confrontation) with the ECJ, maybe lest to be believed somehow inferior to the latter. Scholars, however, have had occasion to stress the fact that the ICC possesses all the requirements that the ECJ considers qualifying the notion of “national jurisdiction” enabled / obliged to make a reference for a preliminary ruling. In addition, to criticize the Italian position, it has been pointed out the divergent position of other constitutional jurisdictions⁷⁹.

Nevertheless for a long time the ICC has been deaf to these reliefs and only on April 2008, for the first time in its history, it agreed to refer a reference for a preliminary ruling to the ECJ, recognizing itself as “judge of last (sole) instance” entailed to act under article 267 TFEU.

It must be stressed, however, that even before 2008, it would be imprecise believe that the self-exclusion of the ICC from the preliminary ruling mechanism would mean the denial of any form of cooperation with the ECJ. On the contrary, over the years the ICC had devised some alternative ways to cooperate and dialogue with the Luxembourg’s Court in order to combine the respect for the EU obligations with the protection of the national constitutional core.

In other words, despite not having established a direct and open dialogue with the ECJ, however, the ICC has taken a

⁷⁸ See above, footnote 74.

⁷⁹ On this see A. PACE, *La sentenza Granital, ventitré anni dopo*, in www.associazionedeicostituzionalisti.it, 2007.

collaborative approach, albeit in an indirect way⁸⁰. This because the refrain from the preliminary ruling procedure was not enough to protect the Constitutional Court by the influences of the European case-law, and probably represented only the loss of an important opportunity of participation and influence in the European circuit⁸¹.

First of all, the direct effect to the preliminary rulings made by the ECJ has been recognized, and consequently, the same ICC has considered itself bound by the findings of the interpretation identified at the European level⁸².

Consistent with this position is, then, the practice under which the occurrence of a decision of the ECJ, pending a constitutionality proceeding of laws, was considered *jus superveniens* justifying the return of the case to the ordinary national court for a re-examination of the requirement of “relevance” in light of the interpretations given by the European Court⁸³.

80 See, *inter alia*: M. CARTABIA, *Rinvio pregiudiziale alla Corte di Giustizia Europea*, quoted above, 100 ff.; T.F. GIUPPONI, *Diritto comunitario, esercizio della funzione giurisdizionale e ruolo della Corte Costituzionale*, in L.S. ROSSI, G. DI FEDERICO, *L'incidenza del diritto dell'Unione Europea sullo studio delle discipline giuridiche*, quoted above; S. BARTOLE, *Pregiudiziale comunitaria ed «integrazione» di ordinamenti*, *Le regioni*, n. 4-5, 2008, 898 ff.; T. E. FROSINI, *Brevi note sul problematico rapporto fra la Corte costituzionale italiana e le Corti europee*, in G. F. FERRARI (eds.), *Corti nazionali e Corti europee*, Napoli 2006; S. CATALANO, *L'incidenza del nuovo articolo 117, comma 1, Cost. sui rapporti fra norme interne e norme comunitarie*, quoted above; F. SALMONI, *La Corte costituzionale, la Corte di giustizia delle Comunità Europee e la tutela dei diritti fondamentali*, in P. FALZEA, A. SPADARO, L. VENTURA (eds.), *La Corte costituzionale e le Corti d'Europa*, quoted above, 289 ff.

81 M. CARTABIA, *Rinvio pregiudiziale alla Corte di Giustizia Europea*, quoted above, 100 ff.

82 For example with the decision n. 113/85, available in www.giurcost.org.

83 See, for example, orders n. 62/03; 125/2004 and 268/2005, available in www.giurcost.org. On this see also M. CARTABIA, *Rinvio pregiudiziale alla Corte di Giustizia Europea*, quoted above, 103.

Finally, what is particularly significant is the so called “*dual preliminary mechanism*” according to which the ICC could be called upon to solve a constitutional question on an Italian norm strictly related to another preliminary ruling question (on the meaning/validity of an EU act) contemporarily referred to the ECJ⁸⁴. Because of the relationship between these two questions, two courses are opened to the ICC: it can decide to declare inadmissible the question retuning it to the ordinary judge⁸⁵ or it can decide to postpone its decision on the merit until the ECJ’s preliminary ruling⁸⁶. Acting so, the ICC recognizes a sort of “interpretive priority” to the ECJ’s judgment on the reference for a preliminary ruling, suspending, *de facto*, the constitutional adjudication trial⁸⁷. Consequently, even without using the preliminary ruling mechanism, it has reached an effect that is substantially equivalent to the one requested by article 267 TFEU.

With the decision n. 102/2008 and the order n.103/ 2008⁸⁸, we have witnessed the first step of a significant, although somewhat cautious, change in relations between the two courts.

84 Also recently the ICC, in the decision n. 75/2012, has stated that any doubts on the compatibility of a national rule with European law have to be solved before raising the question of constitutionality and possibly with the intervention of the ECJ, otherwise the question is declared inadmissible. On this see also M. CARTABIA, “*Taking the dialogue seriously*”. *The renewed need for a judicial dialogue at the time of constitutional activism in the European Union*, Jean Monnet Working paper 12/07/2007, available in <http://www.jeanmonnetprogram.org/papers/07/071201.html>.

85 See for example the order n. 536/1995, available in www.giurcost.org.

86 See for example the decision n. 165/2004, available in www.giurcost.org.

87 G. MARTINICO, O. POLLICINO, *The impact of the European courts on the Italian Constitutional Court*, quoted above, 266 ff.

88 On those cases, see F. FONTANELLI, G. MARTINICO, *Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice*, in *European Law Journal*, 16, 3, 2010, 345 ff.; E. DE STEFANO, *Verso un patrimonio costituzionale comune. Riflessioni a margine della sentenza n. 102 del 2008*, *Consulta Online*, 2008, A. COSSIRI, *La prima volta della Corte Costituzionale e Lussemburgo. Dialogo diretto tra Corti, costituzionale e di giustizia, ma nei soli giudizi in via*

The decision to make a reference under article 267 TFEU is relevant for several reasons. First of all, the ICC formally recognized itself as “judge” entitled to make a reference for a preliminary ruling, formally acknowledging the ECJ’s interpretative authority. But, the ICC was careful to distinguish its position when it acts as judge of direct proceedings and when there are indirect proceedings.

Only in the first case it is “judge of last (sole) instance”, while in the other case there is an ordinary judge that would have to state on the main proceeding (*giudizio a quo*): in this last case the ICC would have only the power to define the question of constitutionality that arises from that.

According to the ICC this distinction is crucial in the choice on the approach to the European law and to its way of “using” it when called upon to solve questions of constitutionality.

Moreover, although this “distinction”, the ICC showed a significant change of its positions: no longer firm on the procedural impermeability between constitutional procedural law and European Law that has characterized the ICC case law for decades.

Many are the factors that led the ICC to make this shift in its case law: the constitutional reform of 2001⁸⁹, the evolution of its case law concerning the relationship between the ECHR and Article 117, paragraph 1 of the Italian Constitution, a certain degree of inconsistency in constitutional jurisprudence on the definition of its nature (judicial or non-judicial)⁹⁰ and, maybe, also the “good example” of other constitutional judges.

principale, in www.forumcostituzionale.it, 2008; L. PESOLE, *La Corte Costituzionale ricorre per la prima volta al rinvio pregiudiziale. Spunti di riflessione sull’ordinanza n. 103 del 2008*, in www.federalismi.it, 2008; F. SORRENTINO, *Svolta della Corte sul rinvio pregiudiziale: le decisioni 102 e 103 del 2008*, *Giurisprudenza costituzionale*, 2, 2008, 1288 ff.

⁸⁹ See above footnote n. 72.

⁹⁰ F. FONTANELLI, G. MARTINICO, *Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice*, quoted above.

This first reference for a preliminary ruling occurred in a type of constitutional review in which the ICC was acting as judge of a direct (*principaliter*) proceeding⁹¹ and it was the only judge involved⁹².

The Court, settling in the wake of the reasoning already made in the judgments n. 406/2005 and n. 129/2006, has expressly declared that, in direct proceedings (in which is questioned the constitutionality of regional norms), is admissible the evocation of European provisions as elements that integrate the parameter of constitutionality of art. 117, 1st paragraph, of the Constitution, descending such admissibility from the “particular nature of those judgments”⁹³ and representing a real “necessary precondition” for the establishment of such judgments⁹⁴.

According to the Court, then, in direct proceeding, directly enforceable European provisions have the function of ‘interposed norms’, which satisfy the pre-requirement for the assessment of the constitutionality of regional rules under Article 117(1) of the

91 Those proceedings may take place in case of conflict between central government and regions via a direct recourse to the ICC. In this case ordinary courts are not involved, while they usually are involved when it is necessary to promote a constitutional review of the legislation via an incidental proceeding (“giudizio in via incidentale”). For an overview in English on the system of constitutional justice in Italy see J. ORLANDO FROSINI, *Constitutional justice*, in G.F.FERRARI (ed.), *Introduction to Italian public law*, Giuffrè, Milano, 2008, 183 ss.

92 We can say that such types of cases represent an exception within Italian law. The basic rule, indeed, states that nobody is allowed to apply directly to the constitutional court other than a court before which a claim of unconstitutionality is raised during ordinary proceedings. Indeed the only case in which direct recourse may be made to the ICC is either when the government acts on a breach of the constitution allegedly perpetrated by regional legislation or when a region claims that a parliamentary statute infringes a regional legislative competence guaranteed by the Constitution. Consequently, in this case, the only possible claimants are either the central government or the representatives of Regions.

93 Order n. 103/2008 quoted above.

94 Order n. 103/2008 quoted above.

Constitution⁹⁵. Consequently, the Court stated that article 117 of the Constitution is infringed when both State or Regional legislation do not comply with the European legal system. Therefore, in the case it had to judge on, the ICC recognized that making a reference for a preliminary ruling to the ECJ would be the only viable means to guarantee the general interest in the uniform application of the European law as interpreted by the ECJ.

Moreover the ICC, for the first time, hinted at an integration of legal orders (a circumstance, that, according to scholars, cannot be accidental⁹⁶). And it has pointed out as Italy, as a result of the ratification of EU Treaties, have come to be part of an independent legal system, integrated and coordinated with the national one. Consequently, under article 11 of the Constitution, the exercise of normative powers in specific areas defined by EU Treaties had been transferred at the European level. It must be stressed, however, albeit making a reference under article 267 TFEU, the ICC had pedantically justified its choice by the assumed exceptionality of the decisional contest and reaffirming the validity of the *couter-limits doctrine*. Indeed the ICC, after having conducted a survey of the various modes of operation of the above-mentioned constraint depending on the subjects called to apply the European law, pointed out that Italy is variously bound by the rules of European law, albeit with the “limit of the inviolability of the fundamental principles of the constitutional order and the inviolable rights of people guaranteed by the Constitution”⁹⁷.

95 With the concept of “interposed norms” the ICC means all those legal provisions which, because they are a direct expression of a constitutional provision, when violated, can determine a breach of the constitution itself.

96 See, for example, S. BARTOLE, *Pregiudiziale comunitaria ed «integrazione» di ordinamenti*, quoted above.

97 See on this: A. COSSIRI, *La prima volta della Corte Costituzionale e Lussemburgo. Dialogo diretto tra Corti, costituzionale e di giustizia, ma nei soli giudizi in via principale*, in www.forumcostituzionale.it, quoted above.

The constitutional case law subsequent to 2008 showed an attitude of progressive opening of the ICC positions⁹⁸ and finally, in 2013, with the order n. 207⁹⁹, also the last barrier had fallen. The ICC decided to be entitled to make a reference under article 267 TFEU also when it has to define a question of constitutionality arose from an indirect proceeding. However, as pointed out, despite the 'historical' significance of the ruling, the ICC does not linger to justify the shift¹⁰⁰ because in the reasoning of the Court one cannot find the same distinctions and concerns so clearly expressed in its previous case law.

The ICC confines itself to state that, in this case, it is necessary make a reference for a preliminary ruling to the ECJ to obtain the interpretation of an European provision, as there is a doubt about its precise interpretation and the subsequent compatibility of national legislation. Then the ICC, recalling what it had stated in the order 103/2008, has recalled that when there is a constitutional proceeding due to the incompatibility of national rules with European ones, "*the latter, if they have no direct effect, make concretely operating the parameters under Articles. 11 and 117 of the Constitution*". The Court added that "*the question referred to the Court of Justice is relevant in the constitutional proceeding, since the interpretation request to that court appears*

⁹⁸ See, in particular, the decisions n. 439/2008, n. 20/2010, n. 227/2010.

⁹⁹ On this case see: S. CIVITARESE MATTEUCCI, *The Italian Constitutional Court Strengthens the Dialogue with the European Court of Justice Lodging for the first Time a Preliminary Ruling in an Indirect ("incidenter") Proceeding*, Dec. 5, 2013, available at SSRN: <http://ssrn.com/abstract=2363893>; M.P. IADICICCO, *Il precariato scolastico tra Giudici nazionali e Corte di Giustizia: osservazioni sul primo rinvio pregiudiziale della Corte costituzionale nell'ambito di un giudizio in via incidentale*, in www.osservatorioaic.it, Jan. 2014; G. REPETTO, *La Corte costituzionale effettua il rinvio pregiudiziale alla Corte di giustizia UE anche in sede di giudizio incidentale: non c'è mai fine ai nuovi inizi, (sull'ordinanza n. 207 del 2013 della Corte costituzionale)*, in www.diritticomparati.it, Oct 2013; B. GUASTAFERRO, *La Corte Costituzionale e il primo rinvio pregiudiziale in un giudizio di legittimità costituzionale in via incidentale*, riflessioni sull'ordinanza n. 207 del 2013, in www.forumcostituzionale.it, Oct. 2013.

¹⁰⁰ S. CIVITARESE MATTEUCCI, *The Italian Constitutional Court Strengthens the Dialogue with the European Court of Justice Lodging for the first Time a Preliminary Ruling in an Indirect ("incidenter") Proceeding*, quoted above.

necessary to define the exact meaning of the Community rules, required in the subsequent constitutional proceeding that this Court will have to make with respect to the constitutional parameter integrated with the aforementioned Community legislation". Consequently the ICC confines itself to noting that as with the order no. 103 of 2008 specifying that the "Court referred a question for a preliminary ruling within proceedings in which it had been seized directly" so "it must be concluded that this Court also has the status of a "national court" within the meaning of Article 267(3) of the Treaty on the Functioning of the European Union within proceedings in which it has been seized on an interlocutory basis".

However the ICC seems to believe that, in general, ordinary courts should continue to perform the main work in the process of actualization of the European law because, in case of European provision directly enforceable "it is for the ordinary national court to assess the compatibility with the European law of the contested national legislation by making – if appropriate – a reference for a preliminary ruling to the Court of Justice, and in the event that they are incompatible to rule itself that the provision of the European law should apply in place of the national provision"¹⁰¹. While, when there are European provision not directly enforceable, the ICC, recalling its previous case law¹⁰², stated that, if there is no room for a consistent interpretation, "the ordinary court must refer a question of constitutionality to the Constitutional Court, whereupon it will then be for this Court to assess whether there is a contrast which cannot be resolved through interpretation and, as the case may be, to annul the law that is incompatible with the European law"¹⁰³.

Some scholars highlighted that, from the order we are commenting, emerges a sort of- inconsistency with the previous case law because here "the absence of a direct effect of EU law was not brighter than in the previous cases where the ICC had

101 Order 207/2013 quoted above.

102 See the decisions n. 284/2007, n. 28 and n. 227/2010, n. 75/2012.

103 Order 207/2013 quoted above.

refused to assess the constitutionality of norms simultaneously affected by a possible illegality under the European law”¹⁰⁴.

How, then, is the case of the order 207 different? Probably, a plausible answer is that in this case are involved both important constitutional principles and principles relating to the compliance with the European law. In this case, indeed, is involved the combination of social policies and social rights (rights of workers): rights that are considered fundamental not only in the Italian constitutional framework, but also in the context of the Charter of fundamental Rights of the EU.

Moreover, this referral to the ECJ brings out some problematic issues. Firstly, one can find hardly reconcilable the persisting different claims of the ICC: on the one hand, that EU law is super-ordinate to domestic law, on the other hand, that these two orders are nonetheless reciprocally autonomous and what *the counter-limit doctrine* implies is that the ICC retains the power of the last word¹⁰⁵. Secondly, in making the reference for a preliminary ruling, the ICC has clearly set up its own line of argument suggesting, *de facto* a reading of the question compatible with both the national legal system and the European one. But what could happen whether, in cases like this, the ECJ would not agree with the ICC’s reasoning? Could we imagine that the ECJ would have a different sensitiveness, would act differently depending on whether a preliminary ruling is from a constitutional court instead of an ordinary court? If so, it could be argued that the practical difference between a preliminary ruling involving constitutional matters whether raised by the ICC or by an ordinary court lies in the weight (political and symbolic) that the former can add in terms of pressure on the ECJ¹⁰⁶.

104 G. REPETTO, *La Corte costituzionale effettua il rinvio pregiudiziale alla Corte di giustizia UE anche in sede di giudizio incidentale: non c’è mai fine ai nuovi inizi, (sull’ordinanza n. 207 del 2013 della Corte costituzionale)*, quoted above.

105 This kind of inconsistency, however, seems to be one of the most peculiar element of the European integrated legal order. On this see also ICC decisions n. 28 and 227/2010.

106 From this observation another question arises. Once the window for the dialogue between the two courts has been opened, and cases similar to the present one are likely to increase, does it make any sense to keep drawing the limit of the ICC intervention over the not very significant –

What it is interesting now is to keep under observation how deep will be the change of attitude of the ICC in its relationship with the ECJ.

This year, the ICC had occasion to pronounce itself on three constitutional questions that arose in an indirect proceeding, and in which at least one of the parties asked it to make a preliminary reference under article 267 TFEU. The case law of the last year, however, shows a cautious attitude of the Constitutional Court which seems to suggest that in the activation of the instrument of article 267 TFEU, the main actors still remain the ordinary court¹⁰⁷. In particular, with the decision n. 226/2014, the ICC confirmed its consolidated positions stating that “*in case of provision of European Union law directly effective, is to the national court to assess the compatibility of common EU internal regulations censored, using – where appropriate – the reference to the Court of Justice, and in the case of contrast to make his own application of European law instead of the national provision; while, in case of conflict with a provision of European law that has not direct effect – contrast possibly ascertained by recourse to the Court of Justice – and in the impossibility of resolving the conflict grace to interpretation, the ordinary judge should raise the constitutional question, being up to this Court to assess the existence of an irreconcilable interpretive conflict and if needed annul the law incompatible with Community law*”.¹⁰⁸

from a substantive point of view – distinction between direct/indirect conflict? On this see S. CIVITARESE MATTEUCCI, *The Italian Constitutional Court Strengthens the Dialogue with the European Court of Justice Lodging for the first Time a Preliminary Ruling in an Indirect (“incidenter”) Proceeding*, quoted above; but also G. REPETTO, *La Corte costituzionale effettua il rinvio pregiudiziale alla Corte di giustizia UE anche in sede di giudizio incidentale: non c’è mai fine ai nuovi inizi*, (sull’ordinanza n. 207 del 2013 della Corte costituzionale), quoted above.

¹⁰⁷ See the decision n. 10/2014; n. 216/14 and n. 226/14.

¹⁰⁸ The ICC expressly recalled some precedents: the order n. 207/2013 and the decisions n. 75/2012; n. 28 and 227/2010, n. 284/2007.

Final remarks and future perspectives

To conclude, it appears important to draw some final remarks on the role of the preliminary reference mechanism, especially with regard to the use that Constitutional Courts have made of it and, also, to its future developments.

While being uncontested that the mechanism of article 267 TFEU has been quite functional to the European integration's process and to the multilevel protection of fundamental rights, some critical aspects concerning its efficiency shortcomings are also evident. As a matter of fact, too many references for a preliminary ruling are pending in front of the ECJ. For this reason, in recent years specific measures to reduce the procedures' time as well as to increase the Court's efficiency have been adopted¹⁰⁹. Also, some "deflationary" proposals have been tabled¹¹⁰.

With reference to the use that Constitutional Courts have made of the preliminary reference mechanism, some considerations are required. The evolution of the European and national case law has shown that the procedure of art. 267 TFEU (which is strictly related to "decentralised models") can affect the configuration of a centralized model of constitutional review even when such procedure is activated by ordinary judges. That is the case for Italy¹¹¹.

The involvement of Constitutional Courts implies, on the one hand, the activation of a stronger dialogic circuit between the European and the domestic law systems, while on the other hand, it leaves some questions open.

Can it really be argued that the reasoning made by Constitutional Courts in making referrals under article 267 TFEU will be categorized as those made by any other ordinary judge?

109 For an overview see M. BROBERG, N. FENGER, *Preliminary references to the European Court of Justice*, quoted above, 7.

110 For a reconstruction of the various proposal see: R. ROMBOLI, *Corte di Giustizia e giudici nazionali: il rinvio pregiudiziale come strumento di dialogo*, in *www.rivistaic.it*, 3, 2014, 29 ff.

111 R. ROMBOLI, *Corte di Giustizia e giudici nazionali: il rinvio pregiudiziale come strumento di dialogo*, quoted above, 29 ff.

Will the ECJ actually take in greater account the “political” (and symbolic) weight of Constitutional Courts, notably when it’s their national protection system of fundamental principles to be put under scrutiny?

The recent case of the German *Bundesverfassungsgericht*¹¹² highlights the risk that a direct complaint based on the need to protect a democratic principle could be used as a sort of “popular action” inspired by eurosceptic feelings¹¹³.

With reference to the French case, scholars tend to exclude the possibility of a wider use of the preliminary reference mechanism by the *Conseil*. First of all because of the short deadlines imposed by law to decide on the constitutional complaints¹¹⁴. Secondly, for the peculiar situation that has to occur (for the mechanism to be activated): it could only be when the interpretation of the European law is needed to restrict the scope of a law which is supposed to contrast with a right or a freedom guaranteed by the Constitution¹¹⁵.

As to the Italian case, on one side, stepping into the European legal sphere and breaking the isolation was a necessary move for the ICC; yet on the other side, its caution in doing it “entailed, though, the implausible idea that in the European integrated order it would be possible to store in separate non communicating rooms questions relating to the national constitution and questions relating to EU law”¹¹⁶.

If, then, the ICC change of direction is significant and proves a progressive shift towards the creation of a real European

112 See above paragraph 4.

113 A. DI MARTINO, *Le outright monetary transactions tra Francoforte, Karlsruhe e Lussemburgo. Il primo rinvio pregiudiziale del BVerfG*, quoted above.

114 Three months.

115 R. ROMBOLI, *Corte di Giustizia e giudici nazionali: il rinvio pregiudiziale come strumento di dialogo*, quoted above, 29 ff.

116 S. CIVITARESE MATTEUCCI, *The Italian Constitutional Court Strengthens the Dialogue with the European Court of Justice Lodging for the first Time a Preliminary Ruling in an Indirect (“incidenter”) Proceeding*, quoted above, 12.

constitutional law¹¹⁷, one needs not to forget that the ICC still keeps on – wisely – avoiding a direct relationship with the ECJ as much as possible. We must bear in mind that, for a long time, the refusal of the ICC to raise preliminary references to the ECJ involved not only technical elements, but also political motivations¹¹⁸. One of them is that the ICC (but also other Constitutional Courts) believed that a higher level of fundamental rights' protection could be granted only at the national level; another lies on the purported lack of the democratic legitimacy of the European Institutions.

Significantly though, after the approval of the Treaty of Lisbon, the recent constitutional case law clearly attests the gradual implementation of cooperation and dialogue between the ICC and the ECJ. Also, many of the fears of supremacy of one over the other seem to be fading away, especially when the Constitutional Court acknowledges that such cooperation enhances the protection of fundamental rights, a protection whose level is always hoped to be improving¹¹⁹.

Some questions, though, still remain opened. What would happen if the Constitutional Court was to decide not to follow a decision of the ECJ because it was deemed to be in breach of the “*counter-limits*”?

While it is true that the ECJ is bound to operate within the *counter-limits*, still, as acutely pointed out, “the same *counter-limits* can help generating a transnational balancing, particularly when the invoked supranational law proves to be falling within articles 2 and 3 of the Charter, that is the provisions which are key in keeping high the safeguard level for constitutionally protected values and that, by doing so in connection with all the other fundamental principles, represent the core of the whole system”¹²⁰.

117 Especially after the Treaty of Lisbon.

118 Similar political concerns can be found in the German constitutional case law.

119 See above, paragraph n. 5.

120 A. RUGGERI, *Ragionando sui possibili sviluppi dei rapporti tra le Corti europee e i giudici nazionali (con specifico riguardo all'adesione dell'Unione alla CEDU e all'entrata in vigore del Profocollo 16)*, in www.rivistaic.it, 1/2014, 14.

Moreover the same scholar argued that today “discussing on the *counter-limits* makes sense and, at the same time, does not make any sense” especially when we are facing legal provisions characterized by an axiological nature. Among them we cannot state any pre-established hierarchy, “but only an order that is made and renewed on the bases of the concrete cases, when it comes to determine at what level (national and supranational) it places the more intense level of protection”¹²¹.

As a result of the Treaty of Lisbon – and, hence, of the presence of a substantially constitutional normative text added to the national constitutions without replacing them – it has been pointed out that also the Italian model of constitutional review is changing.

We are facing the gradual abandonment of a centralized model of judicial review in favor of a more decentralized one, based on the role of ordinary courts. Or, at least, we are facing the progressive configuration of a model of constitutional justice “no longer “mixed” but “dual”, characterized by the coexistence of both diffused and centralized controls, differently coordinated among themselves”¹²².

Eventually, is the use of the preliminary reference mechanism by the Constitutional Courts to be considered more a resource or more a problem?

In the articulation of the relationships between ordinary courts, there is no doubt that both the Constitutional Courts and the

On this see also: A. RUGGERI, *Rapporti tra Corte costituzionale e Corti europee, bilanciamenti interordinamentali “controlimiti” mobili, a garanzia dei diritti fondamentali*, in www.rivistaaic.it, 1/2011).

121 A. RUGGERI, *Rapporti tra Corte costituzionale e Corti europee, bilanciamenti interordinamentali “controlimiti” mobili, a garanzia dei diritti fondamentali*, quoted above. See in particular, page 10 ff. and footnote n. 37.

See also F. VECCHIO, *Primazia del diritto europeo e salvaguardia delle identità costituzionali, Effetti asimmetrici dell'uropeizzazione dei contro limiti*, Giappichelli, Torino, 2012.

122 R. ROMBOLI, *Corte di Giustizia e giudici nazionali: il rinvio pregiudiziale come strumento di dialogo*, quoted above, 31.

ECJ are facing formal, theoretical and substantive issues concerning the use of the preliminary reference mechanism and of the judicial review of legislation (especially in indirect proceedings)¹²³. However, it is equally true that the ECJ, since the recognition of the value of constitutional traditions common to the Member States (article 6, paragraph 3 TEU)¹²⁴, has gained a role that could be defined essentially constitutional. The ECJ has contributed not only to the elaboration of principles and rights that have been incorporated in the Charter of Fundamental Rights of the European Union of 7 December 2000 (as adapted at Strasbourg, on 12 December 2007), but on them it has “built” the European legal order. Concretely, thanks to the contribution of the ordinary judges and of those Constitutional Courts which have decided to raise a reference under article 267 TFEU, the ECJ has built the European constitutional law by balancing, case by case, the fundamental rights of the individuals as well as the economical and social needs of the Union.

123 G. MARTINICO, *Preliminary reference and constitutional Courts: Are you in the mood for dialogue?*, quoted above, 3 ff. ; A. RUGGERI, *Il rinvio pregiudiziale alla Corte dell'Unione: risorsa o problema? (nota minima su una questione controversa)*, in www.diritticomparati.it, 24 nov. 2011. See also M. POIARES MADURO, *Interpreting European Law: Judicial Adjudication in a context of constitutional pluralism*, *European Journal of Legal Studies*, 2/2007, available in <http://www.ejls.eu/2/25UK.pdf>.

124 According to this article “1. *The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.*

2. *The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*

3. *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.”*

Thus, back to the question posed above, we may agree with those scholars according to which the reference for a preliminary ruling can be either a resource either a problem, depending on the actual use made of it¹²⁵.

Much will depend on how all the players involved will act and on the way in which the ECJ will be able to exert a leading role in orienting the legal practices of domestic law without “abusing” the margin of action and the authority of Constitutional judges.

In addition to the above considerations, it should be noted that, as many scholars believe, the process of EU accession to the ECHR, provided for in article 6, 2nd paragraph, TEU¹²⁶ may influence the future of the preliminary reference mechanism¹²⁷. By now, the accession process is not yet complete and many points remain to be clarified, as to the manner and the implications it will have, albeit it is already possible to make some observations on it. According to article 6, 2nd paragraph, TEU, however, the process of accession should not modify the institutional powers defined in the Treaties, even those regarding the ECJ jurisdiction.

125 A. RUGGERI, *Il rinvio pregiudiziale alla Corte dell'Unione: risorsa o problema? (nota minima su una questione controversa)*, quoted above; see also F. VECCHIO, *Primazia del diritto europeo e salvaguardia delle identità costituzionali, Effetti asimmetrici dell'europeizzazione dei contro limiti*, quoted above.

126 This process is a fundamental step for the development and the protection of human rights in Europe.

127 To follow the process of accession see the web site of the Council of Europe:

http://www.coe.int/t/dghl/standardsetting/hrpolicy/accesion/Working_documents_en.asp.

For an overview see also A. TIZZANO, *Les Cours européennes et l'adhésion de l'Union à la CEDH*, in *Diritto dell'Unione Europea*, 1, 2011, 38 ff.; J. MARTÍN, P. DE NANCLARES, *The accession of the European Union to the ECHR: More than just a legal issue*, WP IDEIR n° 15, 2013, available in <https://www.ucm.es/data/cont/docs/595-2013-11-07-the%20accession.pdf>; M. KUIJER, *The Accession of the European Union to the ECHR: A Gift for the ECHR's 60th anniversary or an Unwelcome intruder at the Party?*, in *Amsterdam Law Forum*, 3-4, 2011, 17 ff.

As to the purpose of our investigation here, it is still not clear how the relationships between the two courts (the ECJ and the European Court of Human Rights)¹²⁸ will be managed. It would be unthinkable for such a relationship to be ruled by a system of upper/lower alternate ordination.

Probably the Strasbourg Court will be entitled to monitor the respect of the ECHR's provisions both by the Member States and by the European Union. Consequently, one could imagine that an ECJ's decision could be appealed to the Court of Human Rights alleging an infringement of the ECHR's provisions.

Precisely in this context it had been suggested to configure a preliminary ruling mechanism, similar to the one provided by article 267 TFEU, with the purpose to help the interpretation of conventional provisions¹²⁹.

According to some scholars, the approval of Protocol No. 16¹³⁰ to the ECHR can be interpreted exactly in that way. This new protocol will allow the highest courts and tribunals of a State Party to request the European Court of Human Rights to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto¹³¹.

It is not possible here make a deep analysis of all the possible implications of this Protocol, however, it appears interesting to highlight that this protocol will probably affect the way in which

128 Some interesting reflections on this issue are posed by A. RUGGERI, *Ragionando sui possibili sviluppi dei rapporti tra le Corti europee e i giudici nazionali (con specifico riguardo all'adesione dell'Unione alla CEDU e all'entrata in vigore del protocollo n. 16*, in *www.rivistaic.it*, 1, 2014. See also R. ROMBOLI, *Corte di Giustizia e giudici nazionali: il rinvio pregiudiziale come strumento di dialogo*, quoted above, 29 ff.

129 R. ROMBOLI, *Corte di Giustizia e giudici nazionali: il rinvio pregiudiziale come strumento di dialogo*, quoted above, 32.

130 Opened to the signature of the States member of the ECHR in October 2013. According to the article n. 8 of the Protocol, it will come into force when at least 10 States ratifies it.

131 See the *Explanatory report* of the Protocol, available in http://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf

the Courts will raise the reference under article 267 TFEU and perhaps also the question of constitutionality (in indirect proceedings).

Importantly, according to some scholar, this Protocol may introduce in the European landscape another type of preliminary decision¹³², and it is not clear how it could relate with the preliminary reference mechanism provided for article 267 TFEU.

If some scholars tend to highlight the similarities with the mechanism of article 267 TFEU¹³³, others diverge¹³⁴.

In general it is believed that the process of accession to the ECHR and the future entry into force of Protocol 16 can contribute to enhance the level of protection of fundamental rights in the European context, as well as facilitate judicial cooperation, albeit in ways that are not today entirely clear. For sure it will be necessary to implement a “plural and complex convergent operation” at each institutional and jurisdictional level¹³⁵ in order to achieve the objective of an effective cooperation.

132 R. ROMBOLI, *Corte di Giustizia e giudici nazionali: il rinvio pregiudiziale come strumento di dialogo*, quoted above, 32.

133 R. CONTI, *La richiesta di “parere consultivo” alla Corte europea delle Alte Corti introdotto dal Protocollo n. 16 annesso alla cEDU e il rinvio alla Corte di Giustizia UE. prove d’orchestra per una nomofilachia europea*, Consulta Online, 2014.

134 R. ROMBOLI, *Corte di Giustizia e giudici nazionali: il rinvio pregiudiziale come strumento di dialogo*, quoted above, 29 ff. On these themes see also O. POLLICINO, *La Corte costituzionale è una “alta giurisdizione nazionale” ai fini della richiesta di parere alla Corte EDU ex Protocollo 16?*, www.forumcostituzionale.it, 2.04.2014

135 A. RUGGERI, *Il rinvio pregiudiziale alla Corte dell’Unione: risorsa o problema? (nota minima su una questione controversa)*, quoted above, 3.