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COOPERATIVE ANTAGONISTS

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THE ITALIAN CONSTITUTIONAL COURT AND THE PRELIMINARY REFERENCE: ARE WE DEALING WITH A TURNING POINT?

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Abstract

On April 15, 2008, for the first time in its history, the Italian Constitutional Court (ICC) accepted to raise a preliminary question to the European Court of justice (ECJ). This decision (order no. 103/2008) represents a turning point in the ICC's case law. The aim of this paper is to provide a well-considered analysis of this order by exploring two themes: i) the developments of the ICC's case-law as regards the role of EC Law and of the ECJ, and ii) the potential reading of the judicial relationship between the ICC and the ECJ in the light of the notion of "interpretive competition."

Keywords

preliminary ruling, interpretive competition, judicial cooperation, order no. 103/2008, Italian Constitutional Court, European Court of Justice

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Cooperative Antagonists - The Italian Constitutional Court and the Preliminary Reference: Are We Dealing with a Turning Point?

Filippo Fontanelli and Giuseppe Martinico*

1. Why dwelling on this judgment?

On the 15th of April 2008, for the first time in its history, the Italian Constitutional Court (the “ICC”) accepted to raise a preliminary question to the European Court of Justice (the “ECJ”).¹

The decision we are about to comment is relevant for the reasons schematically resumed as follows:

1. the ICC accepted the preliminary ruling mechanism under Art. 234 of the European Community Treaty (the “ECT”), and fully acknowledged the ECJ’s interpretative authority;
2. the ICC confirmed its views on the distinction between direct (*principaliter*) proceedings and indirect (*incidenter*) proceedings (as the two ways in which the constitutionality of a domestic norm can be reviewed), and made clear how this distinction is reflected in the choice on whether to “make use” of EC law or not, when solving a question of constitutionality;²
3. in light of the above, this decision represents a veritable shift from the *procedural impermeability* between constitutional procedural law and EC law, which the ICC had devised since the earliest years of its case law.

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¹ ICC, Order No. 103/2008, available at www.cortecostituzionale.it.

² The *principaliter* proceedings is the ordinary definition for constitutional claims lodged directly before the Constitutional Court by the Central Government or the Regions. The *incidenter* proceedings, on the contrary, consists of a claim filed by an ordinary judge (known as judge *a quo*, a Latin expression meaning “from which”, since the question stems “from” the judge) and is carried out while the underlying proceedings is pending (it is suspended). The former is a direct review of a piece of legislation which also entails an abstract nature, while the latter is a form of indirect review of legislation that bears a concrete nature (i.e., the outcome of the constitutionality review is decisive for the settlement of the dispute before the referring judge). In this work we refer to *incidenter* and *principaliter* proceedings by using descriptive definitions concerning the quality of the control involved, as the Latin expressions could be misleading for non-Italian readers: namely, we will use indirect/concrete (*incidenter*) and direct/abstract (*principaliter*), when referring to this distinction.

After a brief description of the first part of the ICC's No. 102 decision (where the ICC dealt with the legal issues underpinning the original question of constitutionality), concerning the relationship between Italian law and EC law, we will focus on Order No. 103, in which the ICC adopted its historical decision to raise the preliminary ruling to the ECJ.

The ICC, in fact, dealt with the questions of constitutionality raised by the ordinary judge adopting a two-step approach: a first set of issues was tackled and solved in the No. 102 judgment, while the decision upon a second set of issues was postponed: the ICC preferred to rule on those questions only after having obtained the ECJ's suggestion. A careful reading of the text of the decision will allow us to draw a distinction between the legal reasoning (the "how" level) and the political motivations (the "why" level)³ put forward by the judges, whilst at the same time we will describe the context in which this ruling is set, and the technical premises (as well as the political consequences) of this decision.

2. The background of the decision

If we take a look at the history of ICC's case-law regarding EC Law, it is possible to notice a progressive departure from the pure monistic view that the Court adopted since the very beginning.

During the years this pureness was overcome and the ICC – when referring to the domestic order and to the EC order - began to talk about two "autonomous and separated, although coordinated"⁴ systems; it is worth noting that at the same time the ECJ has demonstrated to appreciate similar efforts of national actors by adopting - sometimes - a benign and tolerant attitude; some scholars have defined such a situation of partial convergence by using the formula of *(limited) flexibilization of supremacies*.⁵

Despite this rapprochement, the expansion of the European Community's competences often gave rise to some degree of tension between the domestic judiciary and the EC courts, each time that the allocation of competence on borderline issues was at stake.

First of all, the ECJ has progressively obtained the trust of the national ordinary judges, who play a fundamental role in the constitutional review proceedings at the domestic level as well. Such an influence resulted in the deterioration of the relationship between ordinary judges and ICC: whenever ordinary judges want to obtain an explanation regarding the

³ According to Weiler's distinction. On this see: J. H. H. Weiler, "The Constitution of the Common Market Place: The Free Movement of Goods", in P. Craig - G. De Burca (eds.) *The Evolution of EC Law*, Oxford University Press, 1999; Id. "Epilogue: Towards a Common Law of International Trade", in J. H. H. Weiler (ed.), *The EU, the WTO and the NAFTA*, Collected Courses of the Academy of European Law, Oxford University Press, 2000. See also M. Poiares Maduro, *We The Court. The European Court of Justice and the European Economic Constitution*, Hart Publishing, Oxford, 1998. We are indebted to Prof. Oreste Pollicino for his comments and suggestions on this point.

⁴ ICC, judgment No. 170/84, available at www.cortecostituzionale.it.

⁵ V. Ferreres Comella, "La Constitución española ante la clausola de primacia del Derecho de la Unión europea. Un comentario a la Declaración 1/2004 del Tribunal Constitucional 1/2004", in A. Lopez Castillo - A. Saiz Arnaiz - V. Ferreres Comella, *Constitución española y constitución europea*, Madrid, 2005, 77-100, 80-89.

relationship between the EC law and the national constitutions, they do not refer to the ICC, but to the ECJ.

This is a consequence of the self-exiled status of the ICC, that normally preferred not to address questions concerning the relationship between legal orders:⁶ suffice here to recall that in 2002, for instance, the ICC decided only upon ten cases (among 500 in total) that were related to the EC legal order.⁷

In case No. 14/1964⁸ the Italian Court interpreted the relationship between national and EC acts in light of the chronological criterion *lex posterior derogat priori* (since the enabling domestic act ratifying the Treaties was an ordinary legislative act); later on, in case no. 183/1973⁹ the Court changed its position, and claimed that the constitutional basis of EC law primacy can be found in Art. 11 of the Italian Constitution: “Italy... agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed.” This provision was originally conceived to justify Italy’s membership to the United Nations, rather than to the EC. Membership to the EC, in fact, imposes limitations of sovereignty for goals that clearly go beyond “peace and justice between nations;” thus ICC was forced to “manipulate” the original meaning of Art. 11, in order to allow for these limitations.¹⁰ The ICC had kept the task of monitoring the respect of the EC primacy (as a control of indirect violation of Art. 11 occurring when national provisions are found to be in conflict EC law), but the consistency of EC law with the Italian Constitution could not be looked after by the ICC, given that it can rule on the validity of Italian norms only.

3. The 1984 “turn” and the counter-limits doctrine

In 1984¹¹ the ICC started to accept that the ordinary judge could be entrusted with the control of the respect of EC primacy, with a procedural specification to be added: technically, the judge cannot “disapply”¹² the national law conflicting with the EC law, but he must “not apply” the national provision conflicting with directly applicable EC law (in the case at stake, an EC regulation, but the same applies also for self-executing directives, see case no. 64/1990,¹³ and interpretative judgments concerning directly effective and directly applicable norms: see cases no. 113/1985¹⁴ and 389/1989¹⁵). Disapplication, in the ICC’s

⁶ That is why the two recent decisions regarding the relationship between the Italian legal system and the European Convention of Human Rights (judgments no. 348 and 349/2007, available at www.cortecostituzionale.it) came at some surprise.

⁷ M. Cartabia - A. Celotto, “La giustizia costituzionale in Italia dopo la Carta di Nizza”, in *Giur. cost.*, 2002, 4477 ff.

⁸ ICC, judgment No. 14/1964, available at www.cortecostituzionale.it.

⁹ ICC, judgment No. 183/1973, available at www.cortecostituzionale.it.

¹⁰ After 2001 (revision of the 5th Title of the Italian Constitution) an explicit reference to the EC legal order is contained in Art. 117.

¹¹ ICC, judgment No. 170/1984, available at www.cortecostituzionale.it.

¹² Case 106/77 Simmenthal [1978] ECR 629.

¹³ ICC, judgment No. 64/1990, available at www.cortecostituzionale.it.

¹⁴ ICC, judgment No. 113/1985, available at www.cortecostituzionale.it.

¹⁵ ICC, judgment No. 389/1989, available at www.cortecostituzionale.it.

reasoning, is a specimen of invalidity,¹⁶ which would presume a hierarchical relationship between supranational and national legal orders. Hence, the notion of disapplication itself would imply the subordination of the ICC to the ECJ (the hierarchy between orders, reflecting the hierarchy of courts), whereas the non-application concept is more similar to that of inefficacy, that is a consequence whose effects are limited to the specific case before the national judge.

On the other hand, the ICC sought to maintain its own role without exceptions. As a matter of fact, European constitutional courts have in principle refused to accept dangerous monistic visions, with the view to preserve the constitutional identity of their legal orders: they preferred to be excluded from the dynamics of the preliminary ruling by refusing to define themselves as “tribunals or courts” under EC law. Moreover, the ICC has raised some ultimate barriers (“*controlimiti*”)¹⁷ against the penetration of EC law, whereby the fundamental principles that the Court is called to protect can work as a safeguard for the legal order *vis-à-vis* external influences.¹⁸

Something similar happened also in other European countries: in Spain, for instance, the *Tribunal Constitucional* construed Art. 93 of the Spanish Constitution as a foundation of the concept of EC law primacy, still without giving EC law a constitutional degree in the domestic system of legal sources. Nevertheless, it is possible to trace a strong evolution in

¹⁶ ICC, judgment No.168/1991 available at www.cortecostituzionale.it.

¹⁷ The counter-limits doctrine (“*dottrina dei controlimiti*”) was *de facto* formulated in the *Solange I* decision by the German *Bundesverfassungsgericht* - an English version is available at 1 *Decisions of the Bundesverfassungsgericht, Federal Constitutional Court, Federal Republic of Germany: International law and the Law of the European Communities 1951-1989* (pt. I), Baden-Baden, Nomos, 1992, 270, 274 - and in case no. 183/73 of the ICC - an English version is available (Italian Frontini Case, No. 183) in 2 *CMLR*, 386, 1974, 387; see also judgment 170/84 (Granital), available in English in 21 *CMLR*, 1984, 756. Many other constitutional courts embraced this doctrine in the following years: it was recently recalled by the *Conseil Constitutionnel* (see decision 2004-505 DC) and the *Tribunal Constitucional* in Spain (see D-1/2004), but before them the British High Court (High Court, *Thoburn v. Sunderland City Council*, *CMLR*, 50, [2002]) claimed the primacy of EC law together with the existence of hard core of untouchable national principles. One of the most interesting cases is the Danish one, (see the *Carlsen* decision, *Højesteret, Carlsen v Rasmussen*, [1999] 3 *CMLR* 854), where the Supreme Court adopted a similar position, and clarified its implications.

On the Italian and German Constitutional Courts’ doctrines see: F. Ruggeri Laderchi, “Report on Italy”, in A. M. Slaughter - A. Stone Sweet - J. H. H. Weiler (eds), *The European Court and National Courts. Doctrine and Jurisprudence*, Oxford, Hart, 1997, 147-170; J. Kokott, “Report on Germany”, *Ibidem*, 77-132.

On the Spanish case D-1/2004 see R. Alonso Garcia, “The Spanish Constitution and the European Constitution: the script for a virtual collision and other observations on the principle of primacy”, in *German Law Journal*, 6, 2005, 1001-1024; on the French case 2004-505 DC see G. Carcassonne, “France. Conseil Constitutionnel on the European Constitutional Treaty. Decision of 19 November 2004, 2004-505 DC”, in *European Constitutional Law Review*, 1, 2005, 293-301.

The formula “counter-limits” (“*controlimiti*”) has been introduced in the Italian scholarly debate by Paolo Barile, see P. Barile, *Ancora su diritto comunitario e diritto interno*, in *Studi per il XX anniversario dell’Assemblea costituente*, VI, Firenze, 1969, 49 and ff.

¹⁸ On the Italian case see: M. Cartabia, “The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union”, in A. Slaughter - A. Stone Sweet - J. H. H. Weiler (eds), “The European Courts & National Courts - Doctrine and Jurisprudence”, OUP, 1998, 133-146; P. Ruggeri Laderchi, “Report on Italy”, in A. Slaughter - A. Stone Sweet - J. H. H. Weiler (eds), “The European Courts & National Courts - Doctrine and Jurisprudence”, OUP, 1998, 147-170.

the *Tribunal Constitucional* case-law started with judgment no. 28/1991¹⁹ and *Declaración* no. 1/1992,²⁰ up to the recent *Declaración* no. 1/2004. In this last case, the Spanish justices adopted a somehow new reading of Art. 93 of the Constitution, since this provision is therein interpreted as substantive norm, rather than as a merely procedural rule, as it was before that decision.

According to the *Tribunal Constitucional*, the conflict between EC law and national law cannot be considered as a matter of unconstitutionality of the national rule: it is rather a question of legality, which must therefore be addressed by the ordinary judges.

This comparative overview allow us to put the ICC's decision in context. There is a broader set of decisions that reflected the change of the approach taken by constitutional courts with respect to their permanent "judicial conversation" with the ECJ.

From the procedural point of view, the ICC had always denied the possibility to raise the preliminary question to the ECJ, stressing how its very special mandate (monitoring the consistency between statutory norms and the Constitution) would differentiate it from the rest of the judicial branch.

At the same time the ICC, trying to combine the rationales of constitutional primacy and of EC law supremacy ("*primacia y supremacia*" according to the wording of the Spanish *Tribunal Constitucional*²¹), has refused to use the EC law as a constitutional parameter (that is, as an interposed standard of review, upon which to assess the constitutionality of Italian provisions).

Despite of this inveterate custom (the non-usability of EC law in constitutional proceedings), the Italian Constitutional Court admitted some exceptions, that is some situations under which the extraneousness between domestic and EC law could be mitigated. These exceptions can be schematically listed as follows:

1. the *direct* proceedings,²²
2. cases of conflict between national norms and EC norms lacking a direct effect or a direct applicability,²³
3. cases of breach of domestic *counter-limits*,²⁴

¹⁹ *Tribunal Constitucional*, sentencia No. 28/1991, available at www.tribunalconstitucional.es.

²⁰ *Tribunal Constitucional*, declaración No. 1/1992, available at www.tribunalconstitucional.es. About this, see also P. Pérez Tremps, *Constitución española y comunidad europea*, Madrid, 1993.

²¹ *Tribunal Constitucional*, declaración No. 1/2004. On this, see V. Ferreres Comella, "La Constitución española ante la clausola de primacia del Derecho de la Unión europea. Un comentario a la Declaración 1/2004 del Tribunal Constitucional 1/2004", in A. Lopez Castillo - A. Saiz Arnaiz - V. Ferreres Comella, *Constitución española y constitución europea* (Centro de estudios políticos y constitucionales, 2005), 77-100, 80-89.

²² ICC, judgment No. 384/1994 and no. 94/1995, available at www.cortecostituzionale.it.

²³ As maintained in the *Granital* case (ICC judgment No. 170/84 cit.), see P. Costanzo - L. Mezzetti - A. Ruggeri, *Lineamenti di diritto costituzionale dell'Unione europea*, Torino, Giappichelli, 2006, 284.

4. the control on the admissibility of the abrogative referenda: in cases no. 64/1990²⁵ and no. 41/2000²⁶ some EC directives were considered relevant to the admissibility control, as their content led to the reject of the referendum proposals aimed at abrogating domestic provisions adopted in compliance with the obligations undertaken by Member States under the EC (see also case no. 45/2000²⁷). By doing this, the Court extended the limit set in Art. 75 of the Italian Constitution, under which “[n]o such referenda are allowed for tax or budget laws, amnesties, pardons, or ratification of international treaties”,
5. the permanent contrast between internal norms and any of the fundamental principles of the European Community.²⁸

The final part of this work is focused on the first hypothesis listed above: as a matter of fact, the distinction between direct and indirect proceedings is crucial to understand - at least under the judicial policy perspective - the *revirement* made by the ICC in the decision commented.

4. The case under consideration - background

The decision handed down by the Court concerned the constitutionality of Art. 2, 3 and 4 of Regional Law (“RL”) of Sardinia no. 5 of May 11, 2006,²⁹ both in their original version and in the version amended following the adoption of the Regional Law of Sardinia no. 2 of May 29, 2007³⁰ (see in particular Art. 1, 2 and 3), and the constitutionality of Art. 5 of this last statute.³¹

These seven provisions (the three articles in both their original and amended versions, plus Art. 5 of RL 2/2007) were challenged under multiple standards of review, either of regional (constitutional), national (constitutional) and international nature.

Namely, Art. 2, 3 and 4 of RL 4/2006, as well as Art. 5 of the RL 2/2007, were challenged under Art. 8, let. i) of the Regional Charter,³² under Art. 117 and 119 of the Constitution (in relation with Art. 10 of Constitutional Law no. 3 of October 18, 2001), under Art. 3 and 53 of the Constitution, and under Art. 117, para. 1 of the Constitution, in relation with Art. 12 of the ECT.

²⁴ ICC, judgments No. 183/73 and 170/84 cit.

²⁵ ICC, judgment No. 64/1990, available at www.cortecostituzionale.it.

²⁶ ICC, judgment No. 41/2000, available at www.cortecostituzionale.it.

²⁷ ICC, judgment No. 45/2000, available at www.cortecostituzionale.it. On this, see M. Cartabia - J. H. H. Weiler, *L'Italia in Europa*, Bologna 2000, 188-190.

²⁸ ICC, judgment No. 286/1986, available at www.cortecostituzionale.it.

²⁹ Containing several provisions on tax incomes, public expenditure requalification, social policies and development.

³⁰ Containing the annual and multiannual budget, and the Regional finance act.

³¹ The referrals were submitted to the Court with two orders of the President of the Council of Ministers, that were filed with the Court’s register respectively on July 13, 2006 (registration no. 91/2006) and on August 7, 2007 (36/2007).

³² By this term we refer to the “Statuto Regionale”, the fundamental charter of every Region, a normative act that plays, within the regional order, the same role played by the Constitution at the State level.

These regional provisions placed themselves in a wider tax reform promoted by the regional executive and implemented by the regional legislative council. Indeed, they form part of a policy designed to increase the fiscal pressure on those activities carried out by non-resident subjects on the territory of the Region, that are connected, in principle, with some form of economic exploitation of Sardinia's tourism attractiveness (the so called "luxury taxes").³³

Art. 8, let i) of the Regional Charter, when listing the fiscal incomes of the Region, reads "taxes and duties on tourism activities, and other fiscal incomes set forth by the Region with a statute, consistently with the principles of the State fiscal system."

The Council of Ministers, acting as the plaintiff, claimed that this Charter's provision directly justifies only taxes on tourism, whilst other taxes need a statutory source besides the Charter to be duly adopted.

Since, in its view, neither of the challenged provisions concerns primary tourism services (*i.e.*, the referrals say, "services designed for the utility of the tourist during his staying in the region"), they are not covered by the first part of Art. 8, and thus they cannot be duly adopted unless a further legal source intervenes to found their legitimacy.

We will not provide an in-depth analysis of the constitutional review carried out by the ICC on the majority of the challenged provisions: suffice it here to say that Articles 2, 3 (of the 2006 RL) and Article 5 (of the 2007 RL) were declared unconstitutional.³⁴

³³ Namely, the first three norms (Articles 2, 3 and 4 of the 2006 RL) levied several regional taxes, respectively, on the added value of real estate properties used as second houses, on second houses used for tourism purposes, and on the supply of air vehicles and pleasure boats services. The last norm, instead, provided for a regional residence tax, levied upon every person - who is not registered as resident with the municipal register - spending some time in Sardinia during the summer period (from June 15 to September 15).

³⁴ The tax set forth by Art. 2 applied on the purchase of houses (or of non-listed shares/quotas of companies owning houses), when the seller is not resident in Sardinia (or has been resident for less than two years) and the houses are placed within three kilometers from the seashore, unless the seller has used them as main residence for most of the time since their purchase/building.

Art. 3 of RL 4/2006 levied a tax on buildings placed within three kilometers from the seashore, that applies when the owner does not use them as his main residence, and he is neither born in Sardinia nor son of, or married with, someone born in Sardinia.

Art. 5 of the RL 2/2007, on its turn, levied a residence tax whose aim is to fund "sustainable tourism". This tax applied on individuals who are not registered as residents in Sardinia, and who reside on the island's territory during the summer, in hotel or hotel-like facilities, in second houses (with the exclusion of the actual owner and of his family), or in rented first houses. Only workers, students and minors are excluded from the application of this residence tax.

The Constitutional Court examined all of these three provisions, and they were found to be in violation of the relevant constitutional standards. Thus, the Court declared their unconstitutionality. As for Art. 5 of the RL 2/2007, instead, the Court claimed that it does not present an unconstitutional nature, and thus this provision is still valid and fully efficient. Indeed, there is no real discrimination - the Court says - in treating differently different categories, such as real residents and non-residents. Non-residents are duly asked to contribute for the funding of those services they enjoy during their staying, whilst registered residents already pay "several tributes and contributions".

We are interested in describing the position of the ICC as regards Art. 4 of the 2006 RL.³⁵ This provision was challenged also under a very peculiar aspect, since the Council of Ministers claimed that it violates Art. 117, paragraph 1 of the Constitution, in relation with the TEC.³⁶ Namely, the norm would be in conflict with three TEC provisions:

- Art. 49 (regarding the freedom of services);
- Art. 81, in connection with Art 3, let. g and Art. 10 (aimed at protecting the competition) and
- Art. 87 (ruling the prohibition of state aids).

5. The “how level” - legal reasoning of the ICC

The Council of Ministers asked the Constitutional Court to declare the unconstitutionality of this last provision (Art. 4 of RL no. 4/2006), due to its incompatibility with EC law; in the Region’s view, in fact, these allegations were groundless, since the right interpretation of the TEC articles invoked – an interpretation that the ECJ only can assess – makes them compatible with the regional norm challenged. In relation to the above, the opinion of the ECJ seemed to be the only decisive element for the constitutionality question before the Court.

Under this aspect, the Constitutional Court starts by listing three questions that must be answered before the preliminary ruling request can be considered and, if it is the case, accepted (by entering a similar set of considerations, as we will see more in detail, the Court pretends to deem the request of preliminary referral as a normal request, even if it had always rejected similar instances in the past).

- A) Can the EC provisions be invoked as a constitutional standard of review, using them to integrate Art. 117, paragraph 1 of the Constitution?
- B) How should the Court treat these “interposed” standards of review in the framework of the direct proceedings? Should it limit its referral to the ECJ to the provisions invoked by the plaintiff?
- C) Are there any prerequisites needed to lodge an interpretive preliminary ruling, and if there are any, are they satisfied in the case at stake?

A) The Constitutional Court recalls how Art. 11 of the Constitution provides for the necessary “limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed”,

³⁵ This provision sets a tax on planes and boats (not including cruise ferries, boats used in sport competitions and boats spending the whole year in Sardinia’s harbors); this tax levies from June 1st to September 30th, and its payment is due i) in case of each call made in regional airports for the purpose of transport of individuals, and ii) yearly, by the owner of any boat larger than 14 meters who intends to make call at any harbor or mooring point placed on the territory of the Region.

³⁶ See § 8.2.8.

and then mentions some of its own decisions, whereby it had acknowledged the primacy of EC law in the domestic order,³⁷ and those in which the Court had reassessed the counter-limits theory.³⁸

After this preamble, the Court moves forward and gives a sound justification to the sudden revirement that its recourse to the preliminary referral represents. Indeed, a distinction must be made, depending on which forum is called to rule on the doubt of consistency between a regional statute and EC law.

If this doubt is put forward before the ordinary judge, he can deem it grounded, and therefore has to disapply³⁹ the regional norm, given the direct effect of EC law.

In the direct proceedings, instead, the Community provisions make the standard of review of Art. 117, paragraph 1 immediately effective,⁴⁰ thus a constitutional conflict between the regional provisions and the Constitution can occur, and has to be ascertained by the Constitutional Court.⁴¹

This difference, the Court continues, is reflected in, and depends on, the difference existing between the two proceedings.

The ordinary judge must first verify the consistency between the regional norm and the Community order (and must use the preliminary referral to the ECJ if there is a doubt on the interpretation of the EC provision), he shall then lodge a constitutionality question only if he deems that a contrast between the regional norm and the Italian Constitution exists.

On the contrary, the Constitutional Court seized in direct proceedings is the only judicial body involved in the scrutiny of a domestic provision allegedly in conflict with EU law. No pre-emptive intervention by the ordinary judge backs the Constitutional Court's task, and no recourse to the disapplication remedy can be made, since there is not an actual proceeding underneath, nor an ordinary judge chairing it. For these reasons, the

³⁷ Three decisions are mentioned, namely decisions no. 349 and 284 of 2007, and no. 170 of 1984. It is worth here to note that the no. 349/2007 decision contains the acknowledgement of the primacy of EC law in a lengthy *obiter dictum*, whereas its main subject is the role of the European Convention of Human Rights in the domestic order (which, in fact, cannot equal the role of EC law). See F. Biondi Dal Monte and F. Fontanelli, "The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System", in *German Law Journal*, 9, 2008, 889-932.

³⁸ Judgments no. 349, 348 and 284 of 2007, and judgment no. 170 of 1984.

³⁹ From a terminological point of view, in fact, it is interesting to stress the abandonment of the term "non application" and the use of the term "disapplication" in these judgements: in the past the ICC had used this distinction as a tool to support another conceptual distinction, that between "primacy" and "supremacy".

⁴⁰ See, again, judgment no. 348 of 2007.

⁴¹ This obviously implies a re-interpretation of the previous construction, according to which the relationship between EC law and the Constitution was a relationship between two autonomous and separate legal orders.

Constitutional Court, when facing a doubt on EU law, cannot refuse to address the Luxembourg Court.⁴²

B) In addition, the set of EC norms invoked by the Council of Ministers must be treated as a peremptory list: the Constitutional Court cannot enlarge it with the view of submitting a more complete object to the ECJ.

As the Court points out,⁴³ recalling its own rules of procedure,⁴⁴ the constitutionality scrutiny can regard only the constitutional parameters listed in the referral, and other constitutional provisions can be used only to support the legitimacy of the challenged provision.

The principle of *jura novit curia*, under which the judge knows the law and must not stick to the legal reasoning put forward by the parties to solve a dispute, does not apply to the Constitutional Court.

This rule of strict connection with (and limitation to) the *petitum* also applies to the EC provisions invoked to “complete” Art. 117, paragraph 1.

C) As to the possibility for the Court to be covered by the concept of “tribunal or court” under Art. 234 TEC, last paragraph,⁴⁵ the Court unexpectedly enters a detailed reasoning and paves the way to a veritable overruling.⁴⁶

Indeed, the Constitutional Court, in its own view, although being in a peculiar position (it acts as the ultimate constitutional warrantor) is clearly a judge of final (and sole) instance, as no appeal is admitted against its decisions.⁴⁷

Therefore “within the direct proceedings of constitutionality, [the Constitutional Court] is entitled to lodge a preliminary referral under Art. 234, paragraph 3 of the EC Treaty”.⁴⁸

After this neat conclusion, the Court is concerned to justify its unpredicted choice, still without admitting that a revirement actually occurred.

⁴² In other words, the Constitutional Court is not asked to apply the challenged norm, as the ordinary judge is, therefore it cannot disapply the non-EC-consistent provision. Since the only remedy available to the Court is the declaration of unconstitutionality (against the joint parameter Art. 117 / EC provision invoked), it is entitled to reinforce its persuasion on the EC half of the parameter by asking the ECJ’s support.

⁴³ See § 8.2.8.2.

⁴⁴ Namely Art. 23, 27 and 34 of Law no. 87/53.

⁴⁵ That reads: “Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”

⁴⁶ See F. Jacobs, “Which courts and tribunals are bound to refer to the European Court?” in 2, *ELR*, 1977, 119, for a wider overview on this matter.

⁴⁷ See Art. 137, paragraph 3 of the Constitution.

⁴⁸ See § 8.2.8.3.

In particular, the Court underlines how the concept of “court or tribunal of a Member State”⁴⁹ has to be construed in accordance with EC law, and cannot depend on how the referring judge is qualified within the domestic legal order.⁵⁰ By this consideration, the Court means that, still without being a court under Italian law, it fits the wording of Art. 234 TEC.

Besides, since in the direct proceedings it is the only judicial body called to rule on a dispute, refusing to refer a question on the interpretation of EC law to the ECJ would imply “an unacceptable harm to the general interest to a consistent application of Community law, as interpreted by the Court of Justice of the EC.”

The court has then to verify whether the allegations of violation of EC law are manifestly groundless.

It starts by noting how the challenged provision aims to create a tax for companies not having their tax domicile in Sardinia. Hence, a discrimination is created between similar companies, depending on where they are domiciled for tax purposes.

This additional tax determines, for those companies upon which it weighs, an increase of the costs for the services they provide, and this can imply – at least *prima facie* – a contrast with Art. 49 of the EC Treaty (free movement of services) and with Art. 87 (on state aids), and a distortion of competition.

The ICC recalls the existing case-law of the ECJ, and how the Luxembourg Court declared the discriminatory nature of national measures whose effect is to make the transborder performance of services more onerous than internal one.⁵¹ The discrimination sanctioned by the ECJ in these cases, however, was based on the transnational character of the service provided, rather than on the place of origin of the provider.

A margin of doubt was therefore still persisting, making it necessary to “lodge the preliminary referral to the ECJ, under Art. 234 of the EC Treaty.” The questions referred to the European Court are:

- a) whether Art. 49 is in contrast with the challenged provision, that applies only on i) companies running general aviation businesses through the use of aircrafts for passenger transport services and ii) companies providing pleasures boating services to third parties, that are domiciled outside Sardinia;
- b) whether the challenged norm, imposing an additional fiscal burden on these two categories, represent a State aid under Art. 87 of the EC Treaty, for the benefit of similar Sardinia-domiciled companies.

⁴⁹ The decision refers to the Italian translation: “*giurisdizione nazionale*.”

⁵⁰ See C-246/80 *Broekmeulen v. Huisarts Registratie Commissie*, [1981] ECR 2311 and C-54/96 *Dorsch Consult*, [1997] ECR I-4961.

⁵¹ Decisions C-269/05 *Commission / Greece*, [2007] ECR I-4; C-92/01 *Stylianakis* [2003] ECR I-1291; C-70/99 *Commission / Portugal* [2001] ECR I-4845.

The Court then confirms the relevance of these interpretive preliminary questions, since their outcomes is necessary for the Court itself to issue (part of) its decision in the constitutionality proceedings.

6. The decision in context

It is possible to appreciate the groundbreaking nature of such a decision simply by contrasting its findings with the previous case-law on the preliminary reference mechanism.

In the last years, the ICC's case-law was characterized by a sort of procedural mutual exclusion between EC law and domestic constitutional law (that is, the non-usability of EC law within the framework of the domestic constitutional review). The ICC refused to use the preliminary reference on the basis of this exclusion: the ICC does not use EC law as a constitutional parameter, hence, it is not interested in asking for the exact meaning of an EC act, because it would not be relevant for the resolution of the case.

Moreover, the ICC recalled another technicality.

Since 1995,⁵² the Constitutional Court emphasized the nature of its functions and the peculiarity of its task, and consequently refused to raise the preliminary question to the ECJ; nevertheless, we could also maintain that the constitutional review of the national legislation shares some features with the normal jurisdictional function, we will try to provide some short remarks on this point.

First of all, scholars have stressed the Constitutional Courts' distinguishing features, that are rooted (i) on the broadness of the constitutional norms regulating the Court's activity, (ii) on the inapplicability of the set of general rules on interpretation (codified by Art. 12 of the preliminary provisions to the Civil Code),⁵³ (iii) on the impossibility to apply those constitutional provisions conceived to regulate the judicial function (since in principle they are addressed to the ordinary and administrative judges only), and (iv) on the uniqueness of the constitutional proceedings.⁵⁴

In order to describe the mandate of the ICC the scholars have conceived a fifth function/power (the function of "constitutional control, the supreme guarantee of the Constitution⁵⁵"), along with the classic tripartite division of powers (legislative, judicial and executive power), and in addition to the fourth function of "political direction" ("*indirizzo*

⁵²ICC judgment no. 536/1995, www.cortecostituzionale.it

⁵³ On the peculiarity of the constitutional interpretation see V. Crisafulli, *La Costituzione e le sue disposizioni di principio*, Milano, Giuffrè, 1952, 11; M. Dogliani, *Interpretazioni della Costituzione*, Milano, 1982, 90.

⁵⁴ On this, see G. Zagrebelsky, *Diritto processuale costituzionale?*, in AA.VV., "Giudizio a 'quo' e promovimento del processo costituzionale", Milano, 1990, 105 ff.; A. Pizzorusso, "Uso e abuso del diritto processuale costituzionale", in AA.VV., *Diritto giurisprudenziale*, Torino, 1996, 133 ff.

⁵⁵ M. Cartabia, Taking cit.

*politico*⁵⁶), owned by the constitutional subject who is capable of deciding and defining the State's fundamental policies (in a given historical period), and of adopting "political acts" (that is, acts escaping any judicial review).

The Italian Constitutional Court's *revirement*, therefore, can be explained as consequence of several factors:

- the 2001 constitutional reform,
- the distinction between the *principaliter* (direct) proceedings and the *incidenter* (indirect) proceedings,
- The "good" example given by the Belgian and Austrian Constitutional Courts,
- the previous case-law concerning the relationship between the ECHR and Art. 117, par.1 of the Constitution,
- the lack of coherence concerning the ICC's nature (judicial or non-judicial) within the case-law of the Court itself, and
- the external pressure coming from cases like *Traghetti* and *Köbler*.

These six factors are explored here, with the aim of coming across the reasons that might have led the Italian Constitutional Court to review its jurisprudence.

A pre-emptive remark is needed, in fact, before entering the analysis of the factors mentioned above: as obvious, the refusal by the Italian Constitutional Court to raise the preliminary question to the ECJ cannot be explained only by technical elements, as it involves also political motivations. The Italian (and German) Constitutional Courts supported their refusal to consider themselves as judges in the meaning of Art. 234 ECT with some typically political considerations, such as their poor consideration of the level of protection of fundamental rights provided by the EC, and with the purported non-democratic nature of the Community.⁵⁷

However, there are also some important "technical" (i.e. "purely legal") factors, which can be very helpful to appreciate the Italian *Consulta's* coherence, and this is the reason why a study of these judicial practices can be of much importance, even if we acknowledge the influence of the political choices drawn by the Court.

⁵⁶ E. Cheli, *Atto politico e funzione di indirizzo politico*, Giuffrè, Milano, 1968; G. Grottanelli De Santi, "Atto politico e atto di governo", in *Enciclopedia Giuridica Treccani*, Vol. IV, Roma, Istituto della Enciclopedia Italiana, 1988.

⁵⁷ See, for example, *Solange I* cit: "The Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level".

7. The “why” level

A. *The 2001 Constitutional Reform*

The Italian Constitution’s new Art. 117, paragraph 1 expressly codifies the limit that supranational obligations represent for domestic law by ruling that: “*Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European union law and international obligations*”.

Soon after the reform, the interpretation of this provision divided the scholars.⁵⁸ According to some of them, Art. 117, paragraph 1 would simply codify the pre-existing situation: it would just grant a sort of *a posteriori* assent to the European primacy⁵⁹ as it was developed by the ECJ accepted across the Community.

Other scholars, instead, emphasized the importance of the constitutional *status* given to the European primacy, and asserted that Art. 117 paved the way for the acceptance of the Italian monistic thesis.⁶⁰

Such a codification would bring about the necessity of centralizing the task of controlling the relationship between EC law and national law⁶¹ or – at least – a more active role of the ICC in this respect (along with common judges, who would maintain their role as main guardians of the primacy of EC law).⁶²

The occasion of testing these theories was given in case no. 406/2005, where the ICC accepted a State claim against a regional law where Art. 117, paragraph. 1 was the only parameter of constitutionality invoked, and in case no. 129/2006.⁶³

In both cases, the Italian *Consulta* decided to appoint the Italian Constitution Art. 117, paragraph 1 as the only parameter upon which to decide the question, and refrained from using the other constitutional standard of review invoked by the plaintiff.

⁵⁸ For an overview, see R. Chieppa, “Nuove prospettive per il controllo di compatibilità comunitaria da parte della Corte costituzionale” in *Il Diritto dell’Unione Europea*, 3/2007, 493-511, 499 ff.; A. Ruggeri, “Riforma del titolo V e giudizi di “comunitarietà” delle leggi” available at <http://www.associazionedeicostituzionalisti.it/dottrina/ordinamentieuropei/ruggeri.html>.

⁵⁹ C. Pinelli, “I limiti generali alla potestà legislativa statale e regionale e i rapporti con l’ordinamento comunitario”, in *Foro italiano*, 2001, V, 194 ff.

⁶⁰ F. Paterniti, “La riforma dell’art. 117, comma 1, Cost. e le nuove prospettive nei rapporti tra ordinamento”, in *Giur. Cost.*, 2004, 2101 ss; A. Pajno, “Il rispetto dei vincoli derivanti dall’ordinamento comunitario come limite alla potestà legislativa nel nuovo Titolo V della Costituzione”, in *Le Istituzioni del federalismo*, 2003, 814-842.

⁶¹ 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, 129 ff.

⁶² A. Celotto, “Le fonti comunitarie”, in G. Corso - V. Lopilato (eds), *Il diritto amministrativo dopo le riforme costituzionali- parte generale*, Milano, 2006, 121 ff.

⁶³ ICC, judgement No. 129/2006, www.cortecostituzionale.it

In fact, the *Consulta* declared the regional laws challenged in this case unconstitutional for the first time, after many “failed attempts”⁶⁴ (see cases no. 65, 150, 161, 304, 355, 393, 428, 434, 469 of 2005⁶⁵).

Although these two decisions do not mention the intentional avoidance of preliminary ruling by the ICC, nevertheless they reflect a certain “judicial activism”, and support the view that the new explicit mention of EC law in Art. 117, paragraph 1 changed the map of the relationship between the ICC and the EC system.

B. The distinction between the direct proceedings and the indirect proceedings

The above mentioned judgments were drawn in a direct proceeding, where the ICC acts as the “true” judge of the controversy, as opposed to the indirect proceedings (“*incidenter*” proceedings), where the “true” judge of the question is the *a quo* national judge.

In the direct proceedings EC norms are “*interposed norms* [norme interposte] that can integrate the parameter for the control of consistency of the regional legislation with Art. 117, par. 1, of the Constitution” (see *sentenze* no. 129/2006; no. 406/2005; no. 166 and no. 7/2004) or, better, they “*make the parameter of Art. 117, par. 1, actually efficient*,”⁶⁶ [and this can give rise to a] *declaration of constitutional illegitimacy of the regional norms judged incompatible with EC law.*”⁶⁷

Moreover, since no form of appeal against its decisions is foreseen (Art. 137 Cost), the Constitutional Court could not avoid raising the preliminary ruling without infringing the general interest to the uniform application of EC law.

According to the Italian Constitution the legislation’s constitutional review⁶⁸ can be triggered and pursued in two different ways: the indirect proceedings and the direct proceedings.

In the *incindeter* proceedings an *a quo* judge (either ordinary or administrative) can raise the question of constitutionality (i.e. of consistency between the Italian law and the Constitution) before the Constitutional Court during a trial.

The Constitutional Court can regard the question as admissible only if it is “relevant” (i.e. significant for the solution of the case) and non-manifestly groundless.

On the contrary, direct proceedings are regulated under Art. 127 of the Italian Constitution, that reads:

⁶⁴ In these terms R. Calvano, “La Corte costituzionale ‘fa i conti’ per la prima volta con il nuovo art. 117 comma 1 Cost.,” in *Giur. Cost.*, 2005, 4417 ff.

⁶⁵ See www.cortecostituzionale.it

⁶⁶ This passage is borrowed from *judgment* No. 348/2007.

⁶⁷ ICC Order No. 103/2008.

⁶⁸ The task of reviewing the legislation, in the traditional models of centralized constitutional justice, is usually attributed to a *ad hoc* Constitutional Court.

(1) Whenever the government regards a regional law as exceeding the powers of the region, it may raise the question of its constitutionality before the constitutional court within sixty days of the publication of the law.

(2) Whenever a region regards a state law, another act of the state having the force of law, or a law of another region as infringing on its own sphere of powers, it may raise the question of its constitutionality before the constitutional court within sixty days of the publication of said law or act.⁶⁹

According to the scheme provided therein, in case of a constitutional controversy arising between the Regions and the State, the Government can appeal directly against a regional law, and a Region can appeal directly against a national law, or a law enacted by another Region.

In such cases, constitutional proceedings are conceived to resolve disputes between the State and the Regions concerning the limits of their respective powers.⁷⁰

It is well known that the direct proceedings represent another exception to the diffuse review of consistency between internal and communitarian law (i.e. the power that ordinary or administrative judges have to monitor the consistency between domestic and EC law); as argued above, the ICC had already agreed to rule on the issue of contrasts between national and EC law within this proceeding.

According to decisions no. 384/1994 and no. 94/1995,⁷¹ indeed, a centralized decision could be envisaged when a question of consistency between national and EC law was raised before the ICC via the direct proceedings (both by the Regions and by the State).

In particular, in case no. 384/1994 the ICC acknowledged that, due to the particular dynamics of the direct proceedings (where the role of the ordinary judge - who normally guarantees the respect of EC law - is irrelevant), its refusal to rule on such questions would have implied a dangerous gap in the protection of rights, and a breach of the legal certainty principle.

Therefore, it can be said that, due to the direct proceedings unique features, the residual possibility to involve the Constitutional Court is justified only because the ordinary judge, who is the natural guardian of EC law primacy at domestic level, is totally missing from the scene.

The scholars pointed out that, if the Constitutional Court were really coherent with this assumption, it should also provide for the centralization of the questions of consistency between national and EC laws in the indirect proceedings.⁷²

⁶⁹ The current wording of this article dates back from the 2001 constitutional reform.

⁷⁰ A huge difference between Regions and State exists: whilst the former can raise the constitutional question only when their sphere of competence is infringed by a State act, the State can raise the constitutional question on a regional norm grounded on any kind of constitutional 'defect'.

⁷¹ Both available at www.cortecostituzionale.it

Probably, the key to understand the rationale underlying the choice made by the ICC rests in the absence of the *a quo* judge who normally non-applies the domestic norm in conflict with the EC in the direct proceedings.

The distinction between direct and indirect proceedings was initially drawn in case no. 129/2006, where the ICC declared that - as the Court had already had the chance to clarify (see cases no. 406/2005 and no. 166/2004) - EC directives worked as interposed norms ("*norme interposte*"), and could then integrate the constitutional standard of review used in the constitutionality test over regional provisions, as regards the consistency with Art. 117, paragraph 1 of the Constitution.

Italian scholars have already stressed how there is no particular reason for confining this view to direct proceedings alone.⁷³ The conflict between national norms and EC norms can be brought about in several ways besides the direct proceedings, as confirmed in an *ordinanza* (see *Corte di Cassazione* III Criminal Section, order no. 1414/2006⁷⁴) raised to the ICC by the Italian Supreme Court.

In that case the ICC's intervention was urged by the *Corte di Cassazione* since it was impossible to non-apply the Italian norms in conflict with interpretative ECJ rulings (as we said, the ICC had placed ordinary legislation and classical EC legal sources on the same level), because those interpretative rulings were based on an EC provision lacking direct applicability.

The question was then referred back to the *Corte di Cassazione* because in the meanwhile the Italian regulation was modified,⁷⁵ and this prevented the ICC from ruling on it (indeed, in cases of *ius superveniens* the requisite of relevance - see above - could obviously be missing).

We are going to review this point at a later stage, when writing about the Constitutional Court as *a quo* judge.

C. The "good" example given by the Belgian and Austrian Constitutional Courts

As a matter of fact, it could be sound to claim that one of the most important reasons which led the *Consulta* to change its mind is the gradual acceptance of the constitutional dialogue by certain Constitutional Courts, through the use of Art. 234 ECT. Apart from a couple of

⁷² M. Cartabia - J. H. H. Weiler, *L'italia* cit, 185.

⁷³ S. M. Carbone, "Corte Costituzionale, pregiudiziale comunitaria e uniforme applicazione del diritto comunitario", in *Il Diritto dell'Unione Europea*, 3, 2007, 707-717, 711.

⁷⁴ Recalled by S. M. Carbone, see *Corte Costituzionale* cit., 711.

⁷⁵ This is normally referred to in Italy with the Latin formula *ius superveniens*, used when an amendment of the applicable regulations results in changing the terms of a preexisting legal relationship, that was born (and regulated) under the previous set of norms.

very well known cases,⁷⁶ it is interesting to notice that the case that probably persuaded these Constitutional Courts to accept the *formal* dialogue with the ECJ is the *Carlsen* case.⁷⁷

This is a bit of a paradox, because the “main player” of that case was not a Constitutional Court, but the Danish Supreme Court (in Denmark, in fact, a real Constitutional Court does not exist).

In *Carlsen* the Danish Court specified the relationship existing between counter-limits and preliminary ruling as follows.

According to the *Carlsen* doctrine, if there is a doubt about the consistency of an EC act with the Constitution, the Constitutional Court could raise the question by asking the ECJ to clarify the exact meaning of the norm. Once received the ECJ’s opinion, the Constitutional Court can decide: if it still has doubts regarding the constitutionality of the EC act, it can resort to the use of the “counter-limits”.

This precedent obviously supports the view that Constitutional Courts do have the last say, even when they accept to raise the preliminary referral, and therefore encourages Constitutional tribunals to behave in the same way, without the fear of being outclassed by the ECJ.

D. The case-law on the relationship between the ECHR and Constitution art. 117, par.1

In Order no. 103/2008 the ICC recalled the recent twin cases no. 348 and 349/2007, wherein some national provisions⁷⁸ were declared unconstitutional for being in conflict with the international obligations stated in the European Convention of Human Rights, Protocol 1, Art. 1.

These decisions are very innovative “because not only has the Italian Constitutional Court clarified, by using Art. 117, paragraph 1, the European Convention’s actual efficacy in the domestic legal system, but it has also interpreted international obligations as an interposed standard of review, on the basis of which the constitutionality of domestic law must be assessed.”⁷⁹

There is no room here to analyze these two decisions in-depth, but it is fundamental to point out the increasing openness of the constitutional jurisprudence towards external sources of law that is reflected in their text.

⁷⁶ *Cour d’Arbitrage*, 19th February 1997, No. 6/97, in <http://www.arbitrage.be/fr/common/home.html>; *VfGH*, 10 March 1999, B 2251/97, B 2594/97, in <http://www.vfgh.gv.at/cms/vfgh-site>. See also *Lietuvos Respublikos Konstitucinis Teismas*, Decision of 8 May 2007, available at www.lrkt.lt/dokumentai/2007/d070508.htm.

⁷⁷ *Højesteret*, *Carlsen v Rasmussen*, [1999] 3 CMLR 854.

⁷⁸ Namely, the provisions ruling the quantification of compensation amounts due for public purposes expropriation and for unlawful expropriation.

⁷⁹ See F. Biondi Dal Monte - F. Fontanelli, *The decisions cit.*

It is nevertheless curious to emphasize that in the above mentioned decisions the ICC had entered a long reasoning in order to underline the difference between EC law and the law of the European Convention, based on the difference of their effects on domestic law, whereas in *order* no. 103/2008 the Court seems to refer to this precedent only with the view of supporting its findings on EC law. In other words, the ICC is more interested in using the similarities between EC and conventional (international) law, rather than in drawing the attention on those passages of the decisions no. 348 and 349/2007 where the Court itself had provided a carefully distinction between them.

E. The lack of coherence of the Constitutional Court's case-law concerning its judicial - non judicial nature

As Prof. Groppi⁸⁰ pointed out, the fact that the Italian Constitutional Court did not consider itself as an *a quo* (referring) judge was hardly compatible with its own "internal" case-law.

According to a consolidated case-law, indeed, the ICC considers itself a potential *a quo* judge who can raise to itself (*sic!*) questions of consistency between ordinary statutory norms and constitutional provisions; this clear-cut judicial trend is consolidated in each area of its jurisdiction (see orders no. 22/1960, no. 225-297/1995, no. 183-197/1996, no. 42, 156, 288/2001, no. 2/1977).

In each of these cases the ICC agreed to refer to itself (thus acting as an *a quo* judge) the question of constitutionality, but it argued that a difference still existed between itself and "normal" judicial bodies (see *sentenze* no. 13/1960 and 536/1995).

It is common knowledge that the domestic notion of "*a quo* judge" is somehow different with the one pertaining to the EC order, but either of them is very broad, and allows for a wide interpretive margin.⁸¹

As for the ECJ's approach, it has been maintained that the Luxembourg Court follows a functional or "fuzzy"⁸² logic, as its choices reveal a high degree of malleability and changeability.

On this issue, the core elements of the ECJ's position – as expressed in its case-law – are summarized as follows: "*In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 TEC, which is a question governed by Community law alone, the Court takes into account a number of factors, such as whether the body is*

⁸⁰ T. Groppi, "La Corte costituzionale come giudice del rinvio ai sensi dell'art.177 del Trattato CE", in P. Ciarlo - G. Pitruzzella - R. Tarchi (eds.), "Giudici e giurisdizione nella giurisprudenza della Corte costituzionale", Torino, 1997 171 ff, 186-187.

⁸¹ As Cartabia wrote "*The ECJ, for example, considered the Council of State capable of the preliminary ruling, ECJ judgement 16 October 1997, joined cases 69 to 79/96, while the selfsame court (Council of State) is not authorised to approach the Constitutional court with questions of constitutional review of legislation.*" M. Cartabia, Taking Dialogue cit.

⁸² M. T. D'Alessio - N. Pecchioli, "Ricorso straordinario al presidente della repubblica e rinvio pregiudiziale: la logica «fuzzy» della Corte di giustizia", in *Riv. It. Dir. Pubbl. Comunitario*, 1998, 699 ff.

*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”.*⁸³

According to these criteria it can be inferred that the ICC fits the ‘tribunal or court’ Community definition; it is worth here to remember how, on the contrary, the Italian scholarship had stated that the indirect proceedings lacks a perfect *inter partes* structure,⁸⁴ and this is why they differ from the direct proceedings, and the ICC cannot be seen as playing the judge role in the indirect framework. Secondly, as the *Consulta* has repeatedly assessed, the ICC is not the actual judge deciding on the dispute of the trial before the *a quo* judge.

From this perspective, it is possible to appreciate the coherence of the Italian Constitutional Court, which raised the preliminary ruling in a direct proceedings, arguing that the judge in a dispute between a Region and the State in this context is the Court itself (both formally and substantially).

F. The external pressure coming from cases like Traghetti and Köbler

In the cases *Traghetti del Mediterraneo* and *Köbler* the ECJ carried out something that was already anticipated in the *Francovich*⁸⁵ and *Brasserie*⁸⁶ decisions. Indeed, it had pointed out that

in international law a State whose liability for breach of an international commitment is in issue will be viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. This must apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals.⁸⁷

As the ECJ specified, a typical case of manifest infringement of community law is precisely “the non compliance with the obligation to make a reference for preliminary ruling under the third paragraph of art. 234 EC.”⁸⁸

It was argued that these two judgments have to be read in the light of the ECJ’s necessity to “control” its relationship with the national judges, after some questionable decisions were taken by the latter not to raise the preliminary question. As Cartabia pointed out: “The fact

⁸³ See case C-96/04, *Standesamt Stadt Niebüll*, ECR, [2006], I-3561. See also D. Basile, “La nozione di ‘giurisdizione nazionale’ nella giurisprudenza della Corte di giustizia. Aspetti problematici e profili comparativi”, in *Foro. Amm. C.d.S.*, 2006, 696 ff.; N. Bassi, “Ancora sul rinvio pregiudiziale alla Corte di giustizia e sulla nozione di ‘giudice nazionale’: è il momento della Corte Costituzionale?”, in *Riv. It. Dir. Pubbl. Comunitario*, 2000, 155 ff.

⁸⁴ R. Romboli, *Il giudizio costituzionale incidentale come processo senza parti*, Milano, Giuffrè, 1985.

⁸⁵ *Francovich and Bonifaci / Italy*, ECR, [1991], I-5357.

⁸⁶ *Brasserie du pêcheur/Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and others* ECR [1996], I-1029.

⁸⁷ *Brasserie cit.*

⁸⁸ *Köbler cit.*

remains, however, that the Court of Justice wants to punish the high courts that do not use, when necessary, the preliminary ruling ex art. 234 ECT.”⁸⁹

Besides, it is possible to link this judicial trend with other judgements issued by the ECJ, whereby the Court recognized that “the liability of a member state under article 169 arises whatever the agency of the state whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution.”⁹⁰

Although the Constitutional Courts are not expressly “targeted” by these rulings, undoubtedly their own condition can be “touched” by these judgments. It is therefore acceptable to suggest that the Constitutional Court could have given up a portion of its interpretative sovereignty also under the pressure coming from the judgements described above.

As Cartabia sharply concluded, somehow anticipating the last events: “The evolution of State liability as exemplified in the decisions Köbler and Traghetti del Mediterraneo, should solicit an overruling by the constitutional courts, preferably before facing the unpleasant hypothesis of requests for claims for damages on the part of individuals due to the constitutional courts’ behaviour.”⁹¹

8. Final remarks

We should not overestimate the value of this *revirement*: the Court was careful in avoiding that the revolutionary component of the decision could spread and cause unexpected consequences.

This means that the use of the preliminary referral is limited, without any doubt, to the direct proceedings, and that this last adjustment intervened to confirm the traditional choice not to take avail of Art. 234 ECT: whilst this minor overruling removed an unreasonable consequence of the Court’s denial (the impossibility to obtain the ECJ’s view in the direct proceedings), the denial itself must stay, and continues to raise a barrier between the ICC and the ECJ.

If this decision has not a revolutionary impact, if taken alone, it is worth to consider it in a wider set of circumstances that could make us appreciate its peculiar value.

In fact, this decision is not the only one dealing with the sensible matter of inter-judicial dialogue, although it is one of the few ones that actually treat it from a formal (*rectius*: procedural) perspective.

⁸⁹ M. Cartabia, “Taking 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, <http://www.jeanmonnetprogram.org/papers/07/071201.html>.

⁹⁰ C-77/69, *Commission v. Belgium*, ECR, [1970], 243 ff; C-8/70, *Commission v. Italy*, ECR, [1970], 966 ff; C-100/77, *Commission v. Italy*, ECR, [1978], 887 ff.

⁹¹ M. Cartabia, Taking cit.

We can, for instance, contrast this decision with the one issued in the *Berlusconi* case,⁹² where the ICC decided to suspend a constitutionality proceeding it was handling, because a preliminary question was pending at the same time before the ECJ on the interpretation of an EC norm in relation to the same domestic provisions challenged before the ICC. The ICC preferred to prevent the possibility of issuing a decision in conflict with the ECJ, thus preferred to wait, and halted its proceeding. By doing this, the ICC re-created the mechanism of the preliminary referral to the ECJ (the stop in the proceeding, the conformity with the ECJ's interpretation), still without using the procedure set forth in Art. 234 ECT.

With the no. 103/2008 order, instead, the ICC decided to give up this unorthodox strategy, and after finally becoming aware of its 'judge' status, it could go for the institutional way, (that is, the use of Art. 234 ECT).

What is more, the ICC did not give up any of its competences, nor did it restrict its authority: by involving the ECJ; the ICC wishes to find an authoritative/technical support to strengthen its own decision, but no transfer of jurisdiction to the ECJ actually occurred.

This new strategy (the preservation of its authoritativeness and of its apical position in the interpretive hierarchy, pursued involving the competitors, rather than excluding them, can be found also in the recent decisions no. 348 and 349/2007, where the ICC acknowledged the obligation upon the ordinary judge to take into account the interpretation of the European Court of Human Rights, while applying the European Convention of Human Rights. In this case also, the ICC pledged allegiance to the interpretation of the European counterpart (the Strasbourg Court), but still kept for itself the possibility to assess the importance that this interpretation can bear in the domestic order (and to declare the unconstitutionality of the provisions of the Convention as interpreted by the Strasbourg Court).

This is why the decision commented embodies a significant change in the Court's case-law: after some informal attempts as the one described in the case of the Berlusconi's 'double preliminary',⁹³ and after having instituted a formal relationship with another European Court (the Strasbourg Court), the ICC perceived that the dialogue with the ECJ has attained a degree of ripeness that allowed for the opening of a formal channel such as the use of the preliminary referral.

In addition, the ICC will have for the first time to take into account the ECJ's ruling, and the ECJ, in turn, will be called to demonstrate that it deserves the trust showed by the ICC, and probably will behave in a careful and cooperative way. In sum, this order of referral opens a series of interesting procedural 'first times': the contribution of this decision consists in having paved a (narrow) way for a new integration scheme between national and

⁹² ICC, order No. 165/2004, www.cortecostituzionale.it

⁹³ For a wider overview of the techniques used by the ICC to open a 'hidden dialogue' with the ECJ, see G. Martinico - F. Fontanelli, "The Hidden Dialogue: When Judicial Competitors Collaborate," in *Global Jurist Advances*, 2008/3, available at <http://www.bepress.com/gj/vol8/iss3/art7>.

Community law, monitored by the ICC and ECJ, a scheme that now accompanies the traditional ordinary judge – ECJ relationship.