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**Tracking Judicial Dialogue –  
The Scope for Preliminary Rulings from the Italian Constitutional Court**

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# **Tracking Judicial Dialogue –**

## **The Scope for Preliminary Rulings from the Italian Constitutional Court**

Marco Dani\*

### *Abstract*

In cases 102-103/2008 for the first time the Italian Constitutional Court has referred a question to the Court of Justice under the article 234 EC procedure. The article analyses this decision in light of previous contrary case law and argues that, insofar as supremacy will be construed according to the *Simmenthal* doctrine, the scope for preliminary ruling from that Constitutional Court will be rather narrow, as mainly limited to *principaliter* proceedings.

Such a conclusion brings about an important theoretical implication. Constitutional Courts such as the Italian one will face difficulties in interacting directly with the Court of Justice and, notably, in conveying at supranational level the authentic versions of national constitutional traditions. Conversely, ordinary courts seem in a better position to play a similar role. As a consequence, if we want the Court of Justice to modify its *octroyée* methodology of construing common constitutional traditions, we have to place all our stakes on a judicial dialogue based on ordinary courts as the privileged interface between the EU and national constitutional environments.

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## *1. The Italian Constitutional Court as Interlocutor: a New Approach to Judicial Dialogue?*

Recent developments in Italian constitutional adjudication show clear signs of a new approach to judicial dialogue. In the last two years the Italian Constitutional Court, notoriously a rather recalcitrant player in the European judicial arena, has delivered a number of decisions revealing a more open and cooperative attitude towards the European Court of Human Rights and the European Court of Justice. In 2007, a couple of landmark judgements clarified the status of the European Convention on Human Rights in the domestic constitutional setting.<sup>1</sup> The Court not only declared that ECHR principles can be employed as benchmarks for review of internal legislation<sup>2</sup> but, critically, specified that in their enforcement the interpretation by the Court of Strasbourg must be adequately taken into account.<sup>3</sup> As to the Court of Justice, this year and for the first time the Constitutional Court, in handling a case concerning a number of fiscal measures adopted by the Region of Sardinia<sup>4</sup> in the field of tourism, has sent a preliminary reference to obtain an authoritative interpretation of certain articles of the EC Treaty relevant to the decision of the case at hand.<sup>5</sup>

In both these circumstances the Constitutional Court has appeared amenable to those invitations, even recently advocated in scholarly debate,<sup>6</sup> to take judicial dialogue seriously and overcome its isolation. In subscribing to a much more open position, the Court has also appeared to promote an approach that from both a European and domestic standpoint may seem quite unusual. As to Europe, the current state of judicial relationships is for many reasons far from the

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<sup>1</sup> Cases 348-349/2007, in *Giurisprudenza Costituzionale* (hereinafter GC), 2007, respectively at p. 3475 and p. 3535. The same doctrine has been later applied also in case 39/2008, 27 February 2008, not yet reported (all the pronouncements by the Italian Constitutional Court can be read at this website: <[www.giurcost.org](http://www.giurcost.org)>).

<sup>2</sup> See paragraphs 4.4 and 4.5 of case 348/2007. The Constitutional Court has inferred such a doctrine from article 117 (1) of the Italian Constitution, which stipulates that “Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from Community law and international obligations”.

<sup>3</sup> See paragraphs 4.6 and 4.7 of case 348/2007, where the Court specifies that the interpretations by the Court of Strasbourg can be considered insofar as they are compatible with domestic constitutional norms.

<sup>4</sup> According to article 119 of the Italian Constitution, regions have financial autonomy with respect to revenues and expenditures. Sardinia, as one of the five regions enjoying special forms and conditions of autonomy (article 116), is endowed with specific forms of financial autonomy as provided by article 8 of its Statute.

<sup>5</sup> Cases 102-103/2008, 15 April 2008, not yet reported. The text of the judgements is available at <[www.giurcost.org](http://www.giurcost.org)>.

<sup>6</sup> 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>, pp. 35-38.

comfortable image of dialogue. Not only do many national Constitutional and Supreme Courts seem reluctant to dismiss certain belligerent tones when it comes to EU issues,<sup>7</sup> but also the Court of Justice does not seem entirely convinced by the perspective of abandoning its unilateral style of adjudication and establishing genuine and open relationships with its national interlocutors.<sup>8</sup> In such a context, the initial move towards dialogue clearly expressed by the Italian Constitutional Court comes out as tangible proof of EU loyalty which, particularly after the debacle of the Constitutional Treaty, could not easily be taken for granted.

The new approach of the Italian Constitutional Court is even more striking when compared to its past decisions. To be sure, the results of recent constitutional adjudication are far from revolutionary or ground-breaking insofar as in legal terms they do little more than revise some of the most questionable constructions endorsed in previous judgements. Moreover, the solutions devised by the Constitutional Court can neither be regarded as manifestations of a sudden move towards judicial activism, being these pronouncements nothing more than a coherent application of a constitutional amendment adopted in 2001<sup>9</sup> or the acknowledgement of longstanding doctrines by the Court of Justice. Nonetheless, it seems that the general attitude pervading Italian constitutional adjudication is undergoing significant change. Hitherto, the Italian Constitutional Court could be classified as one of the critical interlocutors of the Court of Justice since some of the most important constitutive doctrines of the Community legal framework were framed precisely in response to the positions emerging from Italian constitutional adjudication.<sup>10</sup> Over the years, the Constitutional Court has gradually accommodated the domestic constitutional setting with the constitutional *acquis* as shaped by the Court of Justice<sup>11</sup> and in certain occasions

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<sup>7</sup> Eloquent in this regard are some of the most recent pronouncements by Constitutional Courts of the new member states. See W. Sadurski, "Solange, chapter 3": *Constitutional Courts in Central Europe – Democracy – European Union*, EUI Working Papers Law No. 2006/40.

<sup>8</sup> The need to turn to a more discursive, analytic and conversational style has been argued by J. H. H. Weiler, *Epilogue: The Judicial Après Nice*, in G. de Burca and J. H. H. Weiler (eds.), *The European Court of Justice*, Oxford University Press, 2001, p. 225.

<sup>9</sup> The new version of article 117 Cost. quoted in note 2 is the result of a constitutional amendment introduced by constitutional statute 3/2001. Previously, the only constitutional basis for European integration was an evolutionary interpretation of article 11 of the Constitution allowing for "the limitations of sovereignty necessary to create an order that ensures peace and justice among Nations ...."

<sup>10</sup> Particularly the leading cases on the supremacy doctrine are both responses to previous more restrictive pronouncements by the Italian Constitutional Court. See Case 6/64, *Costa v. Enel* [1964] ECR 585 and Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629.

<sup>11</sup> For a complete survey on the Constitutional Court case law on EU membership see M. Cartabia, J. H. H. Weiler, *L'Italia in Europa – Profili istituzionali e costituzionali*, Bologna, il Mulino, 2000, pp. 163-198.

it has even reconsidered its previous decisions in light of the results of later supranational adjudication.<sup>12</sup> Yet, loyalty to the Court of Justice has not been the only ingredient in its case law on EU membership. The affirmation of state sovereignty and, critically, the defence of its role as ultimate custodian of national constitutional values have also enriched a blend where more controversial solutions such as an Italian version of the *Solange* doctrine, namely the so-called “counter-limits” doctrine,<sup>13</sup> have been developed. In sum, a certain attitude to frank and outspoken dialogue with the Court of Justice is by no means something new in the tradition of Italian constitutional adjudication. If there is a change of approach, this relates to the patterns according to which judicial dialogue is conceived of. Whereas in the past the Constitutional Court entertained indirect and sometimes conflicting relationships with the Court of Justice, the recent decision to use article 234 EC might mark the beginning of a new phase in which the Constitutional Court abandons its rebellious approach and turns to direct cooperation and constructive engagement.

The decision to refer a preliminary ruling to the Court of Justice in Italy comes at a time in which academic support for EU constitutional *acquis*, at least in the version filtered by the Constitutional Court, is largely uncontested. Nowadays scholarly debate is still prevalently centred on the most appropriate theoretical accounts for the mutual relationships between the EU and domestic constitutional orders.<sup>14</sup> Within a similar framework, previous refusals by the Constitutional Court to refer questions to the Court of Justice have been explained as the procedural flipside of the “counter-limits” doctrine and, therefore, as a clear strategy of self-isolation associated with the idea of preserving its role of *superiore non recognoscens* in the definition and enforcement of the supreme constitutional values.<sup>15</sup> The latter position has not gone unchallenged in both legal and theoretical terms. The sharpest analyses<sup>16</sup> not only have found legally flawed the arguments proffered by the Constitutional Court in declining to refer,

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<sup>12</sup> Consider for instance the *Pasta* saga where the adoption of a ruling by the Court of Justice (Case 90/86, *Criminal proceedings against Giorgio Zoni* [1988] ECR I-4285) modified a consolidated position of the Constitutional Court (compare case 20/1980, in *GC*, 1980, p. 171 and case 443/1997, in *GC*, 1997, p. 3904).

<sup>13</sup> The counter-limits doctrine was first developed in *Frontini* (Case 183/73, in *GC*, 1973, p. 2401) and subsequently reaffirmed in *Granital* (Case 170/84, in *GC*, 1984, p. 1098) and *Fragd* (Case 232/89, in *GC*, 1989, p. 1001).

<sup>14</sup> A synthesis of the main positions emerging from the debate is offered in S. Bartole, *Interpretazioni e trasformazioni della Costituzione Repubblicana*, Bologna, il Mulino, 2004, pp. 298-311.

<sup>15</sup> J. H. H. Weiler, *supra* at note 8, pp. 220-221; M. Cartabia, *supra* at note 6, pp. 27-30.

<sup>16</sup> A thorough discussion of the previous position by the Constitutional Court is provided in M. Cartabia, *supra* at note 6, pp. 25-40.

but have also questioned at a more theoretical level that very strategy as reinforcing rather than constraining the unilateral approach permeating EU constitutional adjudication. It was acutely pointed out that in failing to refer under preliminary ruling procedures, the Constitutional Court rather than limiting EU cultural homologation, was losing an important chance to establish a serious dialogue with the Court of Justice and, therefore, of representing officially the Italian voice on the fundamental rights issues increasingly handled in the supranational judicial circuit.

Now that a reference has been made it would seem that the conditions for a more structured relationship between the Constitutional Court and the Court of Justice have been established. But although the outcome of that case may be welcomed as a further step towards a full internalisation of EU orthodoxy in the domestic legal order, its broader implications raise a number of questions which require careful consideration. Notably, before reaching the conclusion that the Constitutional Court has embraced article 234 EC (and 35 EU) as privileged channels for judicial cooperation with the Court of Justice, an analysis of its latest pronouncements in light of current EU judicial architecture may be useful if we are to assess what may be the real scope for preliminary rulings from the Italian Constitutional Court and, arguably, other Constitutional Courts designed on the same model.

This article seeks to provide such a comprehensive investigation by touching upon both its legal and theoretical dimensions. Firstly, a retrospective illustration of previous case law on non-preliminary ruling will be proffered (section 2). Then, the decision containing the reference will be analysed by highlighting the factors on which the concrete possibility of a preliminary ruling from the Italian Constitutional Court depend (section 3). Finally, the broader implications of the case at hand will be assessed by discussing both the scope for preliminary ruling from the Constitutional Court as resulting from the current EU judicial configuration and the implied risks of cultural homologation and judicial exit associated with the most recent outcomes of fundamental rights adjudication in the EU sphere (section 4).

## *2. The Italian Constitutional Court as a non-referring Court*

At least apparently, the opportunity to raise questions to the Court of Justice had already surfaced several times before the Constitutional Court eventually decided to refer in cases 102-103/2008. The purpose of this section is not to develop a complete report on all the judgements

where the Constitutional Court has denied preliminary ruling. What may be useful here is a short survey on some paradigm cases that could shed some light on the context where the recent decision to refer has intervened.

To our knowledge, the first case where the Constitutional Court denied a reference under article 234 EC is *De Rossi*,<sup>17</sup> an order dating from the pre-*Simmenthal* era and, namely, from a period where Italian constitutional law did not recognise domestic courts the power to set aside national legislation contrasting with prior Community law.<sup>18</sup> In that occasion, the Constitutional Court was asked to review a decree establishing a temporary price freeze on beef and other products of wide consumption. Requested to apply the decree, the Pretore of Rome deemed this measure to fall within a policy area completely pre-empted by the EC regulation on the common organization of the market of beef. Hence, following the contemporary constitutional wisdom, the Pretore had referred the question to the Constitutional Court, at the time the only judicial body entitled to review national legislation contrasting with prior Community law in light of article 11 of the Italian Constitution.<sup>19</sup> Before the Constitutional Court, the State Government had submitted a different interpretation of the decree whereby it could coexist with the Community regulation. Confronted with these two alternative solutions, the Court was in the typical position for a judge to use article 234 in order to obtain an authoritative interpretation of the regulation and, indirectly, an assessment on the legality of the decree. Yet, the Constitutional Court opted for a different solution: it acknowledged that the case was not ripe for a decision but, rather than referring to the Court of Justice, it decided to dismiss the question and asked the Pretore to do so in its place. Considered in the constitutional environment of the time, it was quite an extravagant solution since, arguably, after having received a ruling from Luxembourg, the Pretore could have found himself under obligation to refer the question again to the Constitutional Court to have a possible violation of article 11 ascertained and the decree annulled.

Whereas in *De Rossi* the Constitutional Court endorsed a solution inconsistent with its pre-*Simmenthal* approach to Community law, in *Industrie Buitoni Perugina*<sup>20</sup> the refusal to refer has

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<sup>17</sup> Case 206/1976, in *GC*, 1976, p. 1299.

<sup>18</sup> This was the position taken by the Constitutional Court in *ICIC* (Case 232/1975, in *GC*, 1975, p. 2211).

<sup>19</sup> See *supra* at note 9.

<sup>20</sup> Case 144/90, in *GC*, 1990, p. 812. A similar solution had been already adopted in Case 132/90, in *GC*, 1990, p. 746.

a totally different meaning and can easily be interpreted as the correct answer to a misplaced question submitted by the ordinary court. The case dealt with the contrast between an EC regulation and a domestic statute on the documents needed to file an application for the reimbursement of sums paid for the possession of high quantities of sugar. The tribunal considered that not only the requirements imposed by domestic legislation diverged from those of the regulation, but also that the former could be found in violation of articles 3 and 24 of the Italian Constitution.<sup>21</sup> As a consequence, the judge decided to refer to the Constitutional Court to have the whole matter decided. Nevertheless, the Constitutional Court was not no longer in a position to hear the case. At that time, it had already accepted the *Simmenthal* doctrine whereby it is only for ordinary courts to enforce directly applicable Community law and, if necessary, to set aside inconsistent national law.<sup>22</sup> Coherently with this new approach, the Court declined the reference to the Court of Justice and dismissed the case. It could have been up to the tribunal to ask for a preliminary ruling, and only at a later stage domestic legislation, if still applicable to the case, could have been reviewed by the Constitutional Court in light of domestic constitutional principles.

A rather similar solution seems to be behind *Industria Dolciaria Giampaoli*,<sup>23</sup> a case concerning the conflict between domestic legislation and an EC directive. Contrary to the content of the latter, a domestic piece of delegated legislation stipulated the application of the registration fee to the issue of bonds. Instead of referring the case to the Court of Justice, the Tax Court asked the Constitutional Court to review the measure in light of both article 76 of the Constitution (*delega legislativa*) and the relevant legislative delegation aiming to implement the EC directive. The answer given by the Court is only partially in line with the Community doctrine of direct effect and the demarcation of its jurisdiction as resulting from its relevant case law.<sup>24</sup> Of course, the Court confirms that the legal status of regulations may be extended to directly effective directives and that, as a result, in similar circumstances ordinary judges are permitted to bypass domestic constitutional adjudication and assess, in cooperation with the

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<sup>21</sup> Article 3 establishes the principle of equality, while article 24 the right to take judicial actions and the right to defence.

<sup>22</sup> See *Simmenthal*, paragraphs 21-22. The Constitutional Court acknowledged this version of the supremacy doctrine in the already mentioned *Granital* case.

<sup>23</sup> Case 168/1991, in *GC*, 1991, p. 1409.

<sup>24</sup> The direct effect of directives was first recognised by the Italian Constitutional Court in Case 182/76, in *GC*, 1976, p. 1138.

Court of Justice, whether internal legislation is applicable to the case at hand. But, quite surprisingly, the conclusion reached by the Constitutional Court goes beyond the solution formulated in *Industrie Buitoni Perugina*. True, in both cases the questions have been dismissed as inadmissible. But in *Industria Dolciaria Giampaoli* the Court does not simply refer the case back to the domestic court which could have triggered the preliminary ruling procedure on the issue of direct effect and interpretation of the directive. Quite at the opposite, the Court overstretches its jurisdiction with a dubious application of the *acte clair* doctrine<sup>25</sup> and decides directly the case by declaring the direct effect of the directive and its prevalence over conflicting domestic law whose review, as a consequence, will result as no longer relevant for the solution of the case at hand.

Before arriving at such a questionable conclusion, in *Industria Dolciaria Giampaoli* the Constitutional Court had affirmed in an *obiter dictum* its capacity of referring a question to the Court of Justice via article 234.<sup>26</sup> Nevertheless, a similar position would have been rapidly reversed in *Messaggero Servizi*.<sup>27</sup> The facts of the case echo very much those of *Industria Dolciaria Giampaoli*. Also here a Tax Court faces the conflict between different amounts in the taxation on the increase of capital established respectively by an EC directive and domestic legislation. Without any reference to the Court of Justice, the Tax Court finds the directive as lacking the requirements for direct effect. Hence, as in *Industria Dolciaria Giampaoli*, it calls into question the Constitutional Court and asks to review domestic legislation in light of the directive and article 76 of the Constitution. The Court dismisses the case by stating that it could not proceed to the scrutiny without an interpretation of the directive by the Court of Justice.<sup>28</sup> But in justifying such a solution, the Court adds also that, because of its peculiar function and position in the Italian judicial system, it did not qualify as a “court or tribunal” for the purposes of article 234 and, therefore, it was prevented from referring the question to Luxembourg. Consequently, the case was referred back in order to have the question submitted to the Court of Justice by the Tax Court.

Finally, there is a last case in which the Constitutional Court neglected a preliminary ruling and, unintentionally, created the conditions for a possible conflict with a later ruling by the Court

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<sup>25</sup> Case 283/81, *CILFIT and Lanificio di Gavardo Spa v. Ministero della Sanità* [1982] ECR 3415.

<sup>26</sup> *Industria Dolciaria Giampaoli*, paragraph 6.

<sup>27</sup> Case 536/95, in *GC*, 1995, p. 4459.

<sup>28</sup> The same solution was adopted also in case 319/96, in *GC*, 1996, p. 2618, and case 108/98, in *GC*, 1998, p. 923.

of Justice. The case is *Pupino*, a very well known judgement in which the Court of Justice, by extending the doctrine of indirect effect to third pillar framework decisions, started a strategy of partial de-fragmentation of the EU legal order. Before reaching Luxembourg, *Pupino* was referred to the Italian Constitutional Court.<sup>29</sup> Even at this earlier juncture, the ordinary court asked the Constitutional Court to extend the so called “special inquiry procedure”, originally established by the code of criminal procedure for the testimony of young children only in the narrow field of sexual crimes, to a broader range of offences where the vulnerability of this particular category of witnesses and the need to prevent the loss of evidence would have justified the same kind of legal protection. In support of this position, the ordinary judge not only advocated respect for human dignity and the principle of reasonableness, but it submitted to the attention of the Constitutional Court a framework decision requiring the member states to ensure that particularly vulnerable victims benefited from a specific treatment during the proceedings. The request from the ordinary court received a negative answer. The Constitutional Court found that since the application of the special inquiry procedure for the testimony of young children in sexual crimes was a *lex specialis*, it could not be judicially applied to other crimes. Furthermore, the Court observed that in sexual crimes more than in other circumstances the need to protect children justified a specific treatment and that in proceeding for other crimes the protection of this category of victims could be ensured through alternative legal devices such as non public hearings and assisted examination. As to the EU aspects of the case, let alone preliminary ruling, the reasoning of the Court did not even mention the contents of the framework decision.

At this point, the judge decided to submit to the Court of Justice the same question arguing for some effect of the framework decision. The latter, by adapting the doctrine of indirect effect of directives to framework decisions, prepared the ground for a broader application of the special inquiry procedure to the testimony of young children.<sup>30</sup> Here, it is not crucial to go into all the details and constitutional implications of the case. What is more important for our purposes is to observe how the divergent solutions proffered respectively by the Constitutional Court and the Court of Justice left the referring court in quite a difficult position. On the one hand the national judge was empowered by the Court of Justice to interpret national law according to the framework decision and, at least in principle, to broaden the scope of application of the special

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<sup>29</sup> Case 529/2002, in GC, 2002, p. 4346.

<sup>30</sup> Case 105/03, *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285.

inquiry procedure.<sup>31</sup> On the other hand, the qualified version of the indirect effect doctrine put forward in *Pupino* appears in the case at stake as preventing the enforcement of the very regulatory solution sought by the national court and envisaged by the Court of Justice. In the words of the latter, “the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision”.<sup>32</sup> In our case, the Constitutional Court found that the narrower application of the special inquiry procedure could be justified on constitutional grounds. Of course, it did not go so far as to say that an interpretation such as that apparently endorsed by the Court of Justice would be necessarily unconstitutional. Yet, it is not entirely clear if by adopting that kind of solution the national judge would incur precisely in the *contra legem* interpretation of national law excluded by the Court of Justice. A similar uncertainty could have probably been avoided had the Constitutional Court referred the case to the Court of Justice, a wise solution that the former apparently did not even consider. However, after the ruling by the Court of Justice, it seems that now even for framework decisions room for preliminary references from the Constitutional Court is rather limited, since indirect effect doctrine also entails a judicial circuit centred mainly on the relationship between ordinary courts and the Court of Justice and where domestic bodies of specialised constitutional adjudication are often bypassed.

As a result, lack of preliminary ruling from the Constitutional Court to the Court of Justice appears to depend upon a single main variable, namely the configuration of the relationships between Community and domestic legal orders. The solutions adopted in the cases at hand are strictly entwined with the various interpretations of the supremacy doctrine that the Constitutional Court has devised over the years. But while in *De Rossi* the missed reference is not consequential with a framework in which the Constitutional Court has the monopoly on the power to set aside domestic rules conflicting with prior Community law, such a solution becomes coherent with the post-*Simmenthal* doctrines whereby ordinary courts are entitled to enforce directly applicable Community law without any need to involve the Constitutional Court. In most of the cases reported, therefore, the lack of preliminary ruling, far from reflecting

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<sup>31</sup> *Pupino*, paragraph 56.

<sup>32</sup> *Pupino*, paragraph 47.

theoretical or political defiance vis-à-vis the Court of Justice, is a correct reaction to misplaced references of Community questions to the wrong judicial site. In this regard, *Industria Buitoni Perugina* is the clearest example.<sup>33</sup> Despite the acceptance in the domestic legal order of the *Simmenthal* doctrine, ordinary courts sometimes seek interpretation of a regulation or a directive (and scrutiny of the allegedly conflicting domestic legislation) by referring to the Constitutional Court rather than to the Court of Justice. As a result, what might appear to be lack of cooperation by the former, on a closer analysis is nothing more than the correct application of *Simmenthal* and its progeny, a comprehensive doctrine which structurally excludes Constitutional Courts from the official dialogue established via preliminary ruling between the Court of Justice and ordinary courts.

Such considerations are not intended to relieve completely the Constitutional Court of its responsibilities. As mentioned, *De Rossi* and, arguably, *Pupino* are cases where references to the Court of Justice would have been the most appropriate solution.<sup>34</sup> In *Messaggero Servizi*, the arguments by which the Constitutional Court dismisses preliminary ruling are remarkably weak and probably theoretically biased. As correctly pointed out,<sup>35</sup> it is difficult to contradict the fact that the Constitutional Court performs at least a *sui generis* judicial function. Furthermore, in denying its role as a court, the Constitutional Court inevitably ends up misinterpreting the article 234 notion of “court and tribunal” which, at least for Community law purposes, can easily include organs of constitutional adjudication. Let alone the detail that, at least for domestic purposes, the Court does not hesitate to wear the dresses of a referring court.<sup>36</sup>

All things considered, therefore, criticism against the lack of reference can be targeted more at the flaws in its legal reasoning than at implicit theoretical or political considerations such as the Constitutional Court defending its role of ultimate custodian of national constitutional values and sovereignty. To be sure, the Constitutional Court is on the frontline in affirming that national constitutional identity must be safeguarded even against EU law. Nevertheless, in most of the

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<sup>33</sup> But similar considerations may be repeated for *Industria Dolciaria Giampaoli* and *Messaggero Servizi* where ordinary courts do not seem to have properly applied the doctrines of direct and indirect effect of directives.

<sup>34</sup> As seen above, the solution opted for in *Industria Dolciaria Giampaoli* might also be criticised, but on different grounds. Here, the Constitutional Court does not leave to the Court of Justice the question on the direct effect of directives and, in doing so, it seems to disregard the exclusive jurisdiction of the latter in this respect.

<sup>35</sup> M. Cartabia, *supra* at note 6, pp. 25-27.

<sup>36</sup> This phenomenon occurs in certain cases where in deciding a question the Court uses *incidenter* proceedings before itself for the review of legislation relevant for the solution of the case at stake.

cases reported the lack of preliminary rulings can be explained in simple legal terms without the need to speculate on more ambitious theoretical scenarios. If national constitutional patriotism and self-empowerment had any role in the decisions of the Constitutional Court of not to refer, this was just in one case and only at a cosmetic level. But behind that language lies a veritable constitutional issue, namely the isolation of the Constitutional Court as resulting from both its position in the domestic judicial architecture and its commitment to respect the EU constitutional *acquis* as grown in the shadow of *Simmenthal*. This latter is a purely legal combination which, at least until cases 102-103/2008, had seemed to preclude any chance of direct judicial dialogue with the Court of Justice.

### 3. *The Italian Constitutional Court as referring court: cases 102-103/2008*

Hitherto analysis has shown that since circuits associated with preliminary ruling reflect the configuration given to the relationships between EU and domestic legal orders, the Constitutional Court ends up with being excluded from direct judicial dialogues arising from EU litigation. Nevertheless, the framework according to which the relationships between supranational and domestic legal orders are organised is not the only variable on which preliminary ruling from the Constitutional Court depends. Mode of access to the latter can be identified as a further element worthy of the utmost consideration in our attempt to track judicial dialogue.

In all cases investigated in section 2, the Constitutional Court's involvement in EU issues was sought in the context of *incidenter* proceedings, i.e. proceedings where the Court is called into question by an ordinary judge to rule incidentally on the compatibility with the constitution of domestic legislation relevant to the decision of the case at hand.<sup>37</sup> In previous analysis, however, mode of access did not seem to play any significant role in the decision by the Constitutional Court not to refer. By contrast, in cases 102-103/2008 this element comes out as a further crucial variable that may open the door to references to the Court of Justice.

Cases 102-103/2008 originate from a *principaliter* proceeding, i.e. an action brought before the Constitutional Court either by the State or by Regional governments to have the legislative

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<sup>37</sup> The discipline of *incidenter* proceedings is provided in article 1 of the constitutional statute n. 1/1948 and articles 23-30 of statute 87/1953.

acts of the other reviewed in light of constitutional sources.<sup>38</sup> Although as a rule complaints focus on the breach of constitutional rules on the distribution of legislative powers, in certain cases legislation is challenged lamenting a specific violation of the Constitution such as the breach of Community rules.<sup>39</sup> This is arguably the last category of cases where the Constitutional Court is still entitled to review national legislation in light of EU sources.<sup>40</sup> But although the Court has been requested to decide on similar actions in quite a significant number of cases,<sup>41</sup> only in 2008 has it held preliminary ruling to be a useful instrument in discharging its judicial tasks.

In the case at issue, State government challenged a number of fiscal measures contained in the reform of the policy for tourism enacted by the Region of Sardinia. The relevant regional legislation included taxes on capital gains accruing from the transfer of holiday homes, fees on the landing of aircrafts and mooring of sports boats and a visitor's tax.<sup>42</sup> Although questions have been raised to the Court of Justice only for the measure relating to the landing of aircrafts and mooring of sports boats, the treatment of all these measures seems relevant in capturing the real character of the new cooperative attitude of the Constitutional Court. State government, indeed, besides submitting complaints based on purely domestic constitutional law arguments, claimed the violation of several Treaty articles ranging from the prohibition of discriminations on the ground of nationality (article 12 EC) to the freedom to provide services (article 49) and the general prohibition of state aids (article 87). The Constitutional Court, through a rather brisk application of the *acte clair* doctrine, hold that most of these questions were unfounded. Only where the solution to the Community law questions appeared too uncertain, did the Court turn to

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<sup>38</sup> The discipline of *principaliter* proceedings is enshrined in article 127 of the Constitution, article 2 of the constitutional statute n. 1/1948 and articles 31-34 of statute 87/1953.

<sup>39</sup> According to domestic constitutional case law, for the purposes of *principaliter* proceedings, the infringement of Community norms constitutes a violation of articles 11 (integration clause) and 117 (primacy of Community law over domestic law) of the Constitution.

<sup>40</sup> See V. Onida, "Armonia tra diversi" e problemi aperti. *La giurisprudenza costituzionale sui rapporti tra ordinamento interno e ordinamento comunitario*, in *Quaderni Costituzionali*, 2002, XXII, 3, pp. 553-554.

<sup>41</sup> See, *inter alia*, case 384/1994, in *GC*, 1994, p. 3449; case 94/1995, in *GC*, 1995, p. 788; case 482/1995, in *GC*, 1995, p. 4093; case 7/2004, in *GC*, 2004, p. 167; case 406/2005, in *GC*, p. 4429; case 129/2006, in *GC*, 2006, p. 1198.

<sup>42</sup> State Government challenged a broader number of measures contained in the regional legislation on tourism. The focus here is only on those measures where questions of Community law have emerged.

preliminary ruling. Both choices may be indicative of the nature of the *revirement* undertaken by these decisions.<sup>43</sup>

To be sure, *acte clair* is by no means a new source of inspiration in Italian constitutional adjudication. As noted, until the judgment under review, the Constitutional Court had always decided autonomously about EU issues emerging from the cases submitted to its scrutiny via *principaliter* proceedings.<sup>44</sup> Although it had never openly asserted – and case 102/2008 makes no exception in this regard – in this line of pronouncements the Court has always acted on the assumption that in the cases at issue “the correct application of Community law … [is] so obvious as to leave no scope for any reasonable doubt as to the manner in which the question [is] to be resolved”.<sup>45</sup> Consequently, no reference to the Court of Justice was made and the correct application of Community law rested with its willingness and legal ability in EU-related aspects. The Court of Justice, for its part, has increasingly been sympathetic towards choices of this nature. Gone are the days when the Court was eager to attract questions from national courts. Nowadays, when workload and docket-control are rightly perceived as major concerns for the management of the EU judiciary, decentralisation through *acte clair* or sector delegation to national courts are broadly accepted strategies,<sup>46</sup> even though their flipside is likely to result in a lower or less informed application of Community law.

Such a trade-off comes out quite clearly in the section of case 102/2008 relating to the visitor’s tax.<sup>47</sup> The regional measure at issue provides that non residents in the municipalities of Sardinia who stay there between mid June and mid September are charged with a levy whose revenues are intended for policies for sustainable tourism. State Government challenged the tax as violating, *inter alia*, article 12 EC (discrimination of EU citizens not residing in Sardinia) and article 49 EC (obstacle to the movement of recipients of tourist services).<sup>48</sup> Arguably, both the questions could have been referred to the Court of Justice, especially if we consider the quantity (paucity) and quality of the arguments developed by the Constitutional Court to dismiss them.

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<sup>43</sup> Case 102/2008 contains the decision on all the complaints brought by State government against the regional legislation on tourism. Case 103/2008 contains the reference to the Court of Justice on the issue of taxation of the landing of aircrafts and mooring of sports crafts.

<sup>44</sup> See cases quoted at note 41.

<sup>45</sup> CILFIT, paragraph 16.

<sup>46</sup> An enlargement of the *acte clair* doctrine has been argued for by H. Rasmussen, *Remedying the Crumbling EC Judicial System*, in *Common Market Law Review*, 2000, 37, 5, pp. 1107-1110.

<sup>47</sup> Case 102/08, paragraph 9.1.3.

<sup>48</sup> Case 102/08, paragraph 4.4.

The Court, indeed, observes that the issue of visitor's tax is not covered by any Community legislative measure and that, in the absence of harmonisation, in many member states similar schemes of taxation are being applied. On this basis, a violation of article 12 is rapidly excluded by pointing out elements that, to the eyes of the Court, justify residents in Sardinia being treated differently from other EU citizens who spend only limited time there on holidays. Whereas the latter take advantage of public regional and local services, not to mention the cultural and environmental heritage of the island, without any obligation to contribute to them, residents bear all the costs related to those services and the maintenance of the environment.<sup>49</sup> As a consequence, a heavier fiscal burden on tourists appears to the Court to be a pecuniary measure that is compatible not only with domestic constitutional principles but also with article 12 EC. It would be interesting to speculate here on what might have been the ruling of the Court of Justice on this very issue. Yet, rather than delving into free movement disquisitions, our criticism of this section of the judgement remains at a more superficial level and points to the scant reasoning offered by the Court in support of its conclusion. Let alone that no position is taken on the possible objections to its argument on justification, namely the fact that also non residents, by paying for tourist services, may be seen, at least indirectly, as financing local services and the maintenance of the island, and that protection of the cultural and environmental heritage could be pursued through measures with a lesser impact on non residents. What is particularly disappointing in the Court reasoning is that no effort is made in identifying the Community position on this kind of conflicts and not even a single precedent by the Court of Justice is quoted. True, *acte clair* applies precisely in circumstances where no prior decisions by the Court of Justice exist. But could the Constitutional Court affirm light-heartedly as it seems to do that its solution to this question is "equally obvious to the court of other Member States and to the Court of Justice"?<sup>50</sup> We sincerely doubt this and the very fact that many member states apply similar schemes of taxation and that, at least to our knowledge, the Court of Justice has never had the chance to decide on this issue suggest the appropriateness of an article 234 reference.<sup>51</sup>

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<sup>49</sup> Case 102/08, paragraph 9.1.2.

<sup>50</sup> *CILFIT*, paragraph 16.

<sup>51</sup> It seems that a reference on this point would have been in line also with the guidelines suggested by AG Jacobs as to the appropriateness of an article 234 reference in its Opinion in Case 338/95, *Wiener S.I. GmbH v. Hauptzollamt Emmerich* [1997] ECR I-6495. According to the AG "a reference will be most appropriate where the question is one of general importance and where the ruling is likely to promote the uniform application of the law throughout the European Union. A reference will be least appropriate where there is an established body of case-law which could

Scrutiny under article 49 EC is even more striking. Again, the Constitutional Court does not draw any inspiration from previous pronouncements by the Court of Justice and, as a result, it ends up with a reading of article 49 which sheds a dim light on its conception of the law of free movement and justifies some scepticism on the substantive outcomes of a strategy of decentralisation of the application of Community law via *acte clair* doctrine.<sup>52</sup>

At least since *Säger*<sup>53</sup> the Court of Justice has embraced an access to market interpretation of article 49. As a result, the prohibition herein enshrined catches not only discriminatory but also indistinctly applicable restrictions hindering cross-border provision of services. Such interpretation has subsequently become settled case law<sup>54</sup> and, more importantly, it has been extended to fiscal restrictions such as those introduced with the visitor's tax.<sup>55</sup> In its pronouncement, by contrast, the Constitutional Court appears to be stuck in an exclusively discrimination-based reading of article 49. This seems to be the approach underlying a rather obscure passage in which the Court states that the visitor's tax does not affect tourists in a discriminatory or disproportionate way and that, therefore, their freedom to travel to another member state to receive a service is not impaired. Both the solution and the reasoning seem unconvincing. Firstly, a glance at the case law of the Court of Justice would have shown that when it comes to services, discrimination is not the main issue. In *De Coster*,<sup>56</sup> for instance, the Court of Justice found that the article 49 prohibition is triggered precisely when a fiscal measure has a dissuasive impact on the recipients of services,<sup>57</sup> arguably a principle which could have led the Constitutional Court to a different assessment of the visitor's tax. Secondly, the ruling at issue is surprising even if we accept a discrimination-based framework for the freedom to

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readily be transposed to the facts of the instant case; or where the question turns on a narrow point considered in the light of a very specific set of facts and the ruling is unlikely to have any application beyond the instant case" (paragraph 20).

<sup>52</sup> A. Arnall, *The Use and Abuse of Article 177 EEC*, in *Modern Law Review*, 1989, 52, p. 626.

<sup>53</sup> Case 76/90, *Säger v. Dennemeyer* [1991] ECR I-4221, paragraph 12.

<sup>54</sup> See Case 384/93, *Alpine Investments v. Minister van Financiën* [1995] ECRI-1141, paragraph 35, or Case 165/98, *Mazzoleni v. ISA* [2001] ECR I-2189, paragraphs 22-23. The same rationale informs also articles 16 and 19 of Directive 2006/123/EC, on services on the internal market, in *OJ*, 27.12.2006, L 376/36.

<sup>55</sup> Case 17/00, *François De Coster v. Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I-9445, paragraph 29; Case 134/03, *Viacom Outdoor Srl v. Giotto Immobilier SARL*, Judgement 17 February 2005, paragraph 35.

<sup>56</sup> See *supra* note 55.

<sup>57</sup> *De Coster*, paragraph 33.

provide services, as the measure in question deliberately discriminates between tourists and residents and, therefore, does constitute a *prima facie* violation of article 49.

Justifications for such a violation on policy grounds could certainly have been sought, whether that finding follows a discrimination or an obstacle-based reading of article 49. But even in this regard the standards of review guiding the Constitutional Court and the Court of Justice are likely to differ. There is a short passage in the reasoning of the Constitutional Court that may be evocative of some sort of justification. The Court observes that the visitor's tax, rather than hindering the provision of services, is instrumental to it insofar as it pursues the objective "of rendering sustainable the flux of non resident tourists".<sup>58</sup> Even in this regard, however, it seems that the approach of the Constitutional Court is in stark contrast with the standards normally employed by the Court of Justice. As seen, the former does little more than recognise the policy arguments defended by the regional government. A deferent position that, arguably, is difficult to reconcile with the relevant case law of the Court of Justice whose scrutiny on reasonableness is much stricter as often entailing assessments on both the necessity and proportionality of the measure.<sup>59</sup>

Application of *acte clair*, therefore, reveals remarkable flaws also as to the way the Constitutional Court carries out its review on justification. Particularly its adoption of the standards of review usually employed in domestic issues appears inconsistent with the caveat of the Court of Justice of placing Community law in its specific context and interpreting it in light of its objectives.<sup>60</sup>

A more faithful application of *acte clair* can be found in the section of case 102/2008 dealing with the taxation of capital gains accruing from the transfer of holiday homes. Such a measure was not challenged by the State on Community law grounds although only persons and firms non fiscally domiciled in Sardinia were subjected to it. Strictly speaking, *acte clair* plays a minor role in this regard in that the measure at hand has been declared unconstitutional for the violation of a number of domestic constitutional norms.<sup>61</sup> Nonetheless, after this domestic law finding, the decision contains a Community law section dealing with free movement of capitals introduced

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<sup>58</sup> Case 102/2008, paragraph 9.1.2 (translation by the author).

<sup>59</sup> The ruling in *De Coster* is a clear example also in this regard. See paragraph 38 and the application of the least restrictive measure test.

<sup>60</sup> *CILFIT*, paragraph 20.

<sup>61</sup> Namely, Article 8 of the Sardinian Statute, articles 3 and 53 of the Constitution.

on its own motion by the Court.<sup>62</sup> According to a decision by the Court of Justice on a similar case,<sup>63</sup> taxation on capital gains such as that at issue breaches article 56 EC. To be sure, on this point it is not entirely correct to state that the Court has applied *acte clair* (or *éclairé*) as far as the Community argument is offered just *ad colorandum* a solution achieved through other legal means. Nonetheless, the approach followed in this passage appears procedurally more accurate and substantively more plausible than that experimented on the visitor's tax.

As announced, the first reference to the Court of Justice by the Constitutional Court concerns fiscal measures associated with the landing of aircrafts and mooring of sports boats in Sardinia from June to September. The Constitutional Court has held that such measures – the former imposing a fee on aircrafts exercising business aviation in the context of general aviation, the latter applying a levy on the mooring of sports boats owned by firms not fiscally domiciled in Sardinia – can be questioned under article 49 and 87 EC<sup>64</sup> as they impose a heavier burden on services providers not domiciled in Sardinia and, conversely, favour through tax exemptions those domiciled there. If little doubt can be cast on the existence of discrimination and, therefore, on a *prima facie* violation of those regulatory principles, the Constitutional Court seems to have more trouble deciding whether a legitimate justification may be found for them. On these bases, preliminary ruling to the Court of Justice appears to be the easiest solution: why not pass the 'hot potato' over the jurisdiction that over the years has matured a stronger expertise on this kind of questions?

Inevitably, the adoption of such a 'wait and see' approach has obliged the Constitutional Court to revisit its earlier arguments on the impossibility to refer questions under article 234. In this regard, the Court draws clear coordinates that may be helpful in defining the scope for its preliminary rulings in the shadow of *Simmenthal*. Two typical situations for direct judicial dialogue with the Court of Justice are identified. The first occurs when ordinary courts are requested to apply regional legislation – but the principle can easily be translated to all domestic norms – and find on their way a conflicting piece of Community law fulfilling the requirements for direct effect. This is the standard *Simmenthal* situation where the ordinary court is expected to enforce Community law and, in case of doubts on its interpretation, refer to the Court of

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<sup>62</sup> Case 102/2008, paragraph 6.7.

<sup>63</sup> Case 443/06, *Erika Waltraud Ilse Hollmann v. Fazenda Pública*, Judgment 11 October 2007.

<sup>64</sup> The violation of articles 3 and 81 EC was also argued but the Court decided not to refer on those grounds.

Justice. The Constitutional Court restates the point and draws two important consequences from it: a) if the ordinary court refers a question on the conformity between domestic and EU law to the Constitutional Court prior to a ruling by the Court of Justice on the matter, the question is destined to be dismissed by the former as non pertinent; b) after the ruling by the Court of Justice and only if domestic law is still applicable, the Constitutional Court can be called into question to review the latter in light of domestic constitutional law.

The second typical situation occurs before the Constitutional Court in cases of *principaliter* proceedings. As in the case at stake, the Court may be asked to enforce Community law as a benchmark of review for regional legislation according to article 117(1) of the Italian Constitution, establishing the primacy of Community obligations over national (state and regions) legislation. In *principaliter* proceedings, the Court notes, its role is at the same time that of a judge of first and last resort and, in this capacity, it is entitled to refer questions under article 234, paragraph 3. Only at this point and notwithstanding its “peculiar position” of organ of constitutional adjudication, the Court implicitly reverses its previous argument of *Messaggero Servizi* and admits that the notion of “court” must be inferred from the Community context. A short excursus on the relevant case law on articles 49 and 87 follows and, finally, the questions are referred to the Court of Justice.

But while on the notion of court the Constitutional Court is back on the right track, there is a final point where its approach still seems to err from Community orthodoxy. In the passage on its role in *principaliter* proceedings, it holds that in the case of conflict between Community obligations and domestic legislation it has a duty to annul the latter with an *erga omnes* declaration of unconstitutionality. Such an outcome, though conceptually in line with the rationale of domestic judicial review of legislation, may not fit perfectly with the correct enforcement of certain Treaty principles such as those invoked in the case at hand. In contemporary Community wisdom, free movement principles target eminently cross-border situations leaving purely internal situations unaffected.<sup>65</sup> If the Constitutional Court were to adopt *erga omnes* ruling, the legislation under review would be completely phased out even in respect to purely internal situations. In the case at hand, for instance, if the Court of Justice establishes that taxation on sports boats owned by firms non domiciled in Sardinia infringes

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<sup>65</sup> The *Pasta* saga (see cases quoted above at note 12) is a clear example of free movement provisions impacting only on cross-border situations where the Constitutional Court has been requested to rule on the compatibility of the resulting reverse discrimination with the domestic constitution.

article 49, in theory only firms not domiciled in Italy could profit from its ruling. Conversely, were the Constitutional Court to annul the measure, even Italian firms not domiciled in Sardinia would be exempted from taxation. To be sure, it might be argued that the Constitutional Court has put forward an easy solution also for dismantling reverse discriminations. Moreover, it could be argued that the Court is implicitly endorsing the position already experimented in certain more recent pronouncements by the Court of Justice where also purely internal situations have been included in the scope of free movement principles.<sup>66</sup> Yet, if these were really the objectives that the Court intended to pursue – and not simply the result of the automatic application of a non refined version of the supremacy doctrine – it should have expressed them overtly. Reverse discrimination is an issue where national courts are important interlocutors of the Court of Justice as they are often requested to face the complaints by the domestic collateral victims of the application of free movement principles. Their opinion in this regard, therefore, could be particularly interesting as it might contribute to a debate that at the moment is taking place essentially at supranational level. The Constitutional Court, for instance, could have taken position on the fact that in certain circumstances reverse discriminations may have a restraining effect on race to the bottom<sup>67</sup> or it could have discussed the consequences in terms of growth of Community competences of cancelling the requirement of a cross-border element in the application of Treaty principles. By contrast, if the Constitutional Court had not intended to take position on this issue, in future pronouncements it will have to specify whether the effects of its *erga omnes* decisions enforcing Community principles extend to purely internal situations or, more cautiously, are limited to only intra-Community situations.

#### 4. In the Shadow of Simmenthal: Conveying Constitutional Traditions via Ordinary Courts

Previous analysis has shown why mode of access to the Constitutional Court, combined with the current configuration of the relationships between Community and domestic legal orders, can

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<sup>66</sup> A reconsideration of the settled case law on this regard has started with *Pistre* (Cases 321, 322, 323, 324/94, *Criminal proceedings against Jacques Pistre and others* [1997] ECRI-2343) where article 28 EC is applied to purely internal situations. A similar trend is highlighted also in the most recent analysis of the case law on services, see V. Hatzopoulos and T. U. Do, *The case law of the ECJ concerning the free provision of services: 2000-2005*, in *Common Market Law Review*, 2006, 43, 4, pp. 943-946.

<sup>67</sup> C. Bernard and S. Deakin, *Market Access and Regulatory Competition*, in C. Barnard, J. Scott (eds.), *The Law of the Single European Market – Unpacking the Premises*, Oxford, Hart Publishing, 2002, p. 203.

be regarded as a decisive factor in determining the possibility for a preliminary ruling from that judicial site. The two typical situations highlighted in the reasoning of case 102/2008 are revealing of how narrow the scope is for direct judicial dialogue via preliminary ruling between the Italian Constitutional Court and the Court of Justice. Only in occasion of *principaliter* actions the former seems in a position to refer via article 234.<sup>68</sup> By contrast, the framework depicted in the same ruling shows how difficult it may be for the Constitutional Court to refer when involved *incidenter* as either it will have to dismiss a misplaced Community question that should be more properly lodged in Luxembourg or decide on a domestic question after a pronouncement by the Court of Justice on a preliminary Community issue.<sup>69</sup>

Obviously, abandoning the reluctant arguments such as those put forward in *Messaggero Servizi* is welcome and the use of the preliminary reference by the Constitutional Court in its capacity as arbiter in the centre-periphery conflicts may improve the quality of this category of judgements. In particular the deficits underlined in the *acte clair* section of case 102/2008 testify to how important a close dialogue with the Court of Justice may be for a proper solution to this kind of controversies. Even after this judgement, however, the Constitutional Court finds itself in quite an isolated position in respect to EU judicial dialogue. In the shadow of *Simmenthal*, the latter appears to unfold mainly around the circuits connecting ordinary judges and the Court of Justice. Thus, apart from *principaliter* cases, the Constitutional Court is almost completely excluded from litigation on EU issues. True, it could be argued that it still has a role to play in enforcing counter-limits and in cases involving the review of domestic legislation in light of Community law not satisfying the requirements for direct effect.<sup>70</sup> Yet, both cases appear either marginal or troublesome. As for the latter, it might be contended that ordinary courts, before going to the Constitutional Court, have nonetheless strong incentives to interrogate the Court of Justice. When confronted with whatever piece of Community law, ordinary courts will refer to the Court of Justice in order to get a ruling on the direct effect or, critically, indirect effect of the relevant EU measure. Only if both the hypotheses are excluded, arguably quite a rare circumstance, would there be room for a further reference to the Constitutional Court in order to

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<sup>68</sup> The same applies also to the particular category of *principaliter* proceedings concerning non legislative acts (*confitti di attribuzione*).

<sup>69</sup> In the latter case, the Constitutional Court could be alternatively requested to review still applicable domestic law in light of the Constitution or to assess whether prevailing Community law is compatible with the fundamental principles of the Italian constitutional system (counterlimits doctrine).

<sup>70</sup> M. Cartabia, J. H. H. Weiler, *supra* at note 11, pp. 191-194.

have domestic legislation reviewed in light of Community law under article 117(1) of the Italian Constitution. As to counter-limits, suffice it here to observe that in more than thirty years of adjudication since *Frontini* the Constitutional Court has decided a handful of cases in this regard, probably a rather slim record for building a credible theory on judicial dialogue and playing an influential role vis-à-vis the Court of Justice.

The narrow scope for preliminary ruling from the Constitutional Court does not amount to a complete obstacle to its relationship with the Court of Justice. Firstly, as mentioned previously, the Italian Constitutional Court and the Court of Justice have already experienced a significant and mutually enriching practice of informal communication mediated by ordinary courts. Secondly, the absence of formal channels for judicial dialogue does not impede the circulation of extra-systemic parameters, a form of indirect dialogue which increasingly marks the current practice of constitutional adjudication.<sup>71</sup>

Nevertheless, if our interpretation on the scope of preliminary ruling is correct, the cases under review contain an important implication that those interested in a balanced and pluralist evolution of European constitutionalism should take into greater account. It has been convincingly argued that in the relationships between states and EU constitutional adjudication both cultural homologation by the most influential national constitutional voices and sterile battles of defence entrenched behind the counter-limits doctrine or the rhetoric of national sovereignty should be avoided.<sup>72</sup> On the one hand, cultural homologation associated particularly with certain pronouncements by the Court of Justice in the field of thorny ethics-related issues is feared as excessively curtailing the autonomy of national constitutional traditions.<sup>73</sup> On the other hand, counter-limits doctrine and principled judicial exit by national Constitutional or Supreme Courts are equally concerning due to their potential for disintegration.

In order to prevent similar phenomena, only apparently opposite but in reality mutually reinforcing, preliminary ruling by Constitutional Courts has been addressed as the most immediate procedural device for channelling communication between national and supranational constitutional adjudication on fundamental rights issues. Constitutional Courts have been invited

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<sup>71</sup> On this regard see A. Lollini, *Legal Argumentation Based on Foreign Law. An Example From Case Law of the South African Constitutional Court*, in *Utrecht Law Review*, III, I, 2007, pp. 60-74.

<sup>72</sup> M. Cartabia, *supra* at note 6, p. 38.

<sup>73</sup> M. Cartabia, *supra* at note 6, p. 20 quotes cases such as *K. B.* (Case 117/01, *K.B. v. National Health Service Pensions Agency, Secretary State for Health* [2004] ECR I-541) and *Richards* (Case 423/04, *Sarah Margaret Richards v. Secretary of State for Work and Pensions* [2006] ECR I-3585).

to use article 234 and to voice in the supranational judicial arena their specific constitutional approaches.<sup>74</sup> Their influence, according to the author of the proposal, would enrich the quality of the ruling by the Court of Justice with authentic insights that would mitigate both the risks of cultural homologation and principled judicial exit.

At least in theory, a similar solution may sound certainly attractive since the Court of Justice, in the absence of any credible constraint, appears sometimes to construe common constitutional traditions in a rather *octroyée* fashion. Constitutional doctrines and solutions are picked here and there without following clear guidelines and, critically, without establishing a direct dialogue with both the constitutional sites from where those doctrines are drawn and those where they are to be transplanted. By contrast, the idea of establishing a systematic procedural connection with the sites where national constitutional traditions are mainly cultivated could integrate a first step in the right direction of a more balanced and horizontal judicial dialogue. Yet, a similar proposal, if confronted with the framework emerging from case 102/2008, suffers a clear deficit of workability.<sup>75</sup> The very field of fundamental rights protection is eloquent in this regard. In all the canonical situations where fundamental rights are enforced at EU level – namely review of Community acts,<sup>76</sup> review of national measures implementing Community law<sup>77</sup> and, if still included in the jurisdiction of the Court of Justice, *ERT*-like situations<sup>78</sup> – Constitutional Courts such as the Italian one will meet with difficulties in intervening directly in the EU judicial dialogue. In all these cases, indeed, ordinary courts are first of all expected to refer to the Court of Justice either to have a Community measures reviewed in light of fundamental rights or to obtain an interpretation of Community sources prior to the review of relevant national measures. The Constitutional Court, conversely, is almost completely bypassed as it can only be involved

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<sup>74</sup> M. Cartabia, *supra* at note 6, p. 37.

<sup>75</sup> At a certain point in her piece, Cartabia senses this problem with her theory as at p. 41 she states “Doctrines like direct and indirect effect could easily be reshaped so as to involve the supreme and constitutional courts, instead of banning them”. Yet, the point is not developed further and, therefore, it is difficult to guess how the author thinks direct and indirect effect could be revised in order to allow the involvement of Constitutional Courts.

<sup>76</sup> Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

<sup>77</sup> Case 5/88, *Wachauf v. Germany* [1989] ECR 2609. I would consider cases resulting from the application of the policy-absorption doctrine such as *K. B.* as falling under this category.

<sup>78</sup> Case 260/89, *ERT v. Dimotiki (DEP)* [1991] ECR I-2925. It must be observed that the Charter of Nice, in defining its scope for application (article 51), appears to cut off this latter category of cases (although, surprisingly, *ERT* is quoted in the Explanations by the Praesidium of the Convention at the moment of defining when the Charter applies to acts of the member states).

subsequently and for the limited purpose of enforcing counter-limits or domestic constitutional principles.

As a result, do we have to simply accept the marginalisation of national constitutional traditions and their gradual pre-emption by the EU version of fundamental rights protection? Are we to conclude that the fate of national constitutional traditions rests in the lap of the Court of Justice? My opinion is that such an outcome is by no means inevitable, even though we should realistically acknowledge that, at least in the short period, cultural homologation and principled judicial exits continue to be concrete dangers. Nevertheless, the consequences of the clear demarcation of the scope for preliminary ruling by the Constitutional Court traced in cases 102-103/2008 can be more positively evaluated even in respect to the issue of representation of national constitutional traditions in the EU sphere. As long as the EU judicial architecture will maintain its current post-*Simmenthal* structure, the task of conveying constitutional traditions to Luxembourg cannot but rest with ordinary courts. Hitherto, the latter have developed a great deal of expertise in using article 234 and interacting with the Court of Justice. The next challenge for them, at least in cases involving fundamental rights aspects, will be to frame their references with the language and the wisdom of their constitutional tradition as continuously developed by Constitutional Courts in deciding non Community law questions. On a closer look, even this function cannot be regarded as something completely new in the context of preliminary ruling. Indeed, solutions to controversies in this area are often decided in the framework of balancing and proportionality. As noted, in this kind of litigation ordinary courts are already expected to play a tremendously important role associated with the proceduralisation of the principle of proportionality, namely hearing the interested parties and conveying to the Court of Justice their arguments to be later compared for the solution of the case.<sup>79</sup> No surprise that most of the time these arguments will already be shaped according to the language and the spirit of the national constitutional tradition involved in the case.

Only if ordinary courts will accurately perform this interface role will they have a chance to preserve national constitutional traditions from marginalisation and EU constitutionalism from cultural homologation. In the current context, therefore, the function of ordinary courts as decentralised terminals in EU adjudication is fraught with further constitutional implications of

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<sup>79</sup> W. Van Gerven, *The Effect of Proportionality on the Actions of Member States of the European Community: National View points from Continental Europe*, in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe*, Oxford-Portland Oregon, Hart Publishing, 1999, p. 63.

which they should rapidly become aware if they want to face threats that, at the moment, could be detrimental to the quality and the scope of both supranational and national constitutional adjudication.