
# Freedom, Security & Justice: European Legal Studies

*Rivista giuridica di classe A*

2022, n. 1

EDITORIALE SCIENTIFICA
ES

Rivista quadrimestrale on line "Freedom, Security & Justice: European Legal Studies"
www.fsjeurostudies.eu
Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017

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## 2022, n. 1

**NUMERO TEMATICO**

**Il ruolo delle Corti nella costruzione dello Spazio europeo di libertà, sicurezza e giustizia**

# JUDICIAL DIALOGUE BETWEEN NATIONAL CONSTITUTIONAL JUDGES AND EU JUDGES IN THE CONTEXT OF THE SINGLE SUPERVISORY MECHANISM: OPPORTUNITY FOR A REVERSE PRELIMINARY RULING?

Ilaria Ottaviano*

SUMMARY: 1. The novelty of the Single Supervisory Mechanism in the institutional building of the EU. – 2. Exclusive jurisdiction of the CJEU in the SSM common procedures and right to an effective judicial protection. – 3. Feasibility of a reverse preliminary ruling? – 3.1. Conceivable measures at Treaties unchanged. – 3.1.1. The principle of sincere cooperation. – 3.2. Judicial protection of the national identity. – 3.3. Problematic issues of the proposal. – 4. Concluding remarks.

## 1. The novelty of the Single Supervisory Mechanism in the institutional building of the EU

The creation of the Banking Union[1] has been one of the most relevant innovations for the institutional structure of the EU, both for its institutional and procedural profiles, with an incidence capable of going beyond the borders of the banking sector and the eurozone.

**Double blind peer reviewed article.**

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[1] R. D'AMBROSIO (ed.), *Law and Practice of the Banking Union and of its governing Institutions (Cases and Materials)*, *Quaderni di Ricerca Giuridica della Consulenza Legale*, n. 88, Roma, 2020; D. BUSCH, G. FERRARINI, *European Banking Union*, Oxford, 2020; G. LO SCHIAVO (ed.), *The European Banking Union and the Role of Law*, Cheltenham, 2019; N. RUCCIA, *Caratteri, limiti e prospettive dell'Unione bancaria*, Bari, 2018; L. LIONELLO, *L'attuazione del progetto di Unione bancaria europea. Problematiche e prospettive di completamento*, in *Il diritto del commercio internazionale*, 2017 p. 651 ss.; M. MACCHIA, *Integrazione amministrativa e Unione bancaria*, Torino, 2018; ID., *L'architettura europea dell'Unione bancaria tra tecnica e politica*, in *Rivista italiana di diritto pubblico comunitario*, 2015, p. 1579 ss.; F. POLITI, *Le funzioni di vigilanza bancaria della BCE nelle dinamiche fra istituzioni europee e nei rapporti fra Unione Europea e stati membri*, in *Diritto pubblico comparato ed europeo*, 2018, p. 1035 ss.; D. SARMIENTO, *The European banking governance. The Single Supervisory Mechanism and the Union's constitutional challenge*, in *European review of public law*, 2016, p. 109 ss.; T. TRIDIMAS, *Banking Union: An unfinished story of federalization*, in *XXVII FIDE Congress*, 2016, p. 159 ss.; M.P. CHITI, V. SANTORO (eds.), *L'Unione bancaria europea*, Pisa, 2016; M. LAMANDINI, *Il diritto bancario dell'Unione europea*, in R. D'AMBROSIO (ed.), *Scritti sull'Unione Bancaria*, Quaderni di Ricerca Giuridica della Consulenza Legale n. 81, Roma, 2016; S. PUGLIESE, *L'Unione bancaria europea tra esigenze di coerenza interna e risposte alle sfide globali*, in *Il diritto dell'Unione europea*, 2014, p. 831 ss.; M. MANCINI, *Dalla vigilanza nazionale armonizzata alla Banking Union*, Quaderni di Ricerca Giuridica della Consulenza Legale, n. 73, 2013.

In fact, even if not yet fully completed, it introduces into the Union an original integrated system of supervisory authorities, composed of its own rules and original administrative systems, which inaugurate new ways of interaction between systems and in which innovative solutions are tested. Furthermore, although born in relation to the euro area, it is open to the participation of all member States of the EU and can in part also apply outside the euro area.

Its first pillar (the Single Supervisory Mechanism, SSM), in particular, concerns banking supervision, and aims at establishing a new system for monitoring compliance with and implementation of the EU prudential legislation in the matter. In the first 8 years of its activity, it has consolidated its structure and has challenged some of the traditional categories of the supranational system, showing the shortcomings still present in an institutional design still not fully completed.

Concerning the exercise of prudential supervision and its allocation between the ECB and National Competent Authorities (NCAs)[2], regulation (EU) 1024/2013 (hereinafter SSM regulation) created an integrated system, which divides the exercise of the function on the basis of the "significance" or not of the supervised credit institution. The cooperation between NCAs and the ECB is described in greater detail in the so-called framework regulation[3], adopted by the ECB on the basis of art. 6 of the SSM regulation. In general, the ECB is entrusted with the prudential supervision of "significant"[4] entities, while the NCAs are entrusted with the supervision of non-significant one[5]. However, with respect to the so-called "common procedures" (a specific categories of composite procedure between ECB and NCAs[6]), relating to the exercise of the tasks referred to in Article 4, par. 1, letters a) and c) SSM regulation[7], the exercise of the supervision is the

[2] Defined as "public authority or body officially recognised by national law, which is empowered by national law to supervise institutions as part of the supervisory system in operation in the Member State concerned": Article 4, par. 1 CRR, as recalled by Article 2, par. 1 SSMR.

[3] Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation).

[4] In general, the ECB is entrusted with the prudential supervision of "significant" institutions, identified on the basis of criteria defined in the SSM Regulation, which consider the size of the institution, its importance for the economy of the Union or any Participating Member State (Article 6, par. 4 SSRM and articles 39, par. 3, lett. B) and 56 of the framework regulation), the significance of cross-border activities (Article 6, par. 4 SSMR, and articles 39, par. 3, lett. D) and 61-64 of the framework regulation), or being one of the three most significant credit institutions of a participating Member State (Article 6, par. 4 SSRM and articles 39, par. 3, lett. E) and 65-66 of the framework regulation).

[5] Normally, smaller banks and banking groups whose consolidated assets do not exceed € 30 billion: Article 6, par. 4 SSRM and articles 39, par. 3, lett. a) and 50-55 of framework regulation. However, also with reference to the tasks attributed to the national authorities, the ECB may issue regulations, and provide general guidance or instructions, also in order to ensure the consistency of the supervision within the mechanism.

[6] On the composite procedures in the EU Banking Union see F. BRITO BASTOS, *Composite Procedures in the SSM and SRM – An Analytical Overview*, in C. ZILIOLI, K.-P. WOJCIK (eds.), *Judicial Review in the European Banking Union*, Cheltenham, 2021, p. 97 ff.; V. DI BUCCI, *Procedural and Judicial Implications of Composite Procedures in the Banking Union*, in C. ZILIOLI, K.-P. WOJCIK (eds.), *Judicial Review*, cit., p. 114 ff.

[7] Article 4, par. 1 SSMR: Tasks conferred on the ECB: "Within the framework of Article 6, the ECB shall, in accordance with paragraph 3 of this Article, be exclusively competent to carry out, for prudential

sole responsibility of the ECB, regardless of the significance or otherwise of the entity. Finally, Article 4, par. 3 SSM regulation[8] introduces one of the most innovative provisions of the entire banking supervision system[9], a "*situation largement inédite*"[10] in the EU, establishing that in the exercise of the supervisory tasks the ECB has mandate to apply all relevant EU law and also national legislation transposing EU directives or exercising options granted by EU regulations in the context of the prudential supervision.

## 2. Exclusive jurisdiction of the CJEU in the SSM common procedures and right to an effective judicial protection

In the context of one of the common procedures (the acquisition of a qualifying holding in a credit institution), the Court of Justice, upon a reference for preliminary ruling made by the Italian Consiglio di Stato, has affirmed that the exclusive jurisdiction of the Union courts to review Union acts also includes the incidental review of the national preparatory acts adopted by the NCAs in the same procedure. Reaffirming that art. 263 TFEU gives EU courts exclusive jurisdiction in reviewing the legality of acts adopted by EU institutions, the Court has established that this also applies when the EU act is adopted at the end of a composite decision-making procedure, where the EU institution issues the final decision[11], without being bound by the preparatory act of a national authority[12]. In particular the Court of Justice, recalling its previous case-law

supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States: (a) to authorise credit institutions and to withdraw authorisations of credit institutions subject to Article 14; (…); c) to assess notifications of the acquisition and disposal of qualifying holdings in credit institutions, except in the case of a bank resolution, and subject to Article 15". See G. BUONO, *Banking Authorisations and the Acquisition of Qualifying Holdings as Unitary and Composite Procedures and their Judicial Review*, in C. ZILIOLI, K.-P. WOJCIK (eds.), *Judicial Review*, cit., p. 251 ff.

[8] Article 3, par. 3 SSMR: "For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options".

[9] A. WITTE, *The Application of National Law by the ECB, Including Options and Discretions, and its Impact on the Judicial Review*, in C. ZILIOLI, K.-P. WOJCIK (eds.), *Judicial Review*, cit., p. 236 ff.; ID. *The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 89 ss., a p. 109.

[10] V. DI BUCCI, *Quelques questions concernant, le contrôle juridictionnel sur le mécanisme de surveillance unique*, in *Liber Amicorum in onore di Antonio Tizzano: De la Cour CECA à la Cour de l'Union: le long parcours de la Justice Européenne*, 2018, p. 316 ff., at p. 326.

[11] *Berlusconi and Fininvest*, par. 49. See also Opinion of Advocate General SÁNCHEZ-BORDONA, delivered on 27 June 2018, *Berlusconi and Fininvest*, case C-219/17, parr. 107-108.

[12] Court of Justice, (Grand Chamber), judgment of 19 December 2018, *Berlusconi and Fininvest*, case C-219/17.

*Sweden v Commission*[13], as further clarification of the *Borelli*[14] doctrine, remarked the necessity of a single judicial review by the EU judge, in application of the principle of sincere cooperation (art. 4, par. 3 TEU), excluding any possible coexistence between national and European judicial remedies, to avoid the risk of conflicting judgments[15].

Consequently, in bringing before the Union judge an action challenging an ECB decision issued in the context of a common procedure, it is possible to challenge incidentally also the national preparatory measures adopted by the NCA in the same procedure. Since both the ECB decision and the national preparatory measures may be based on the application on national law, questions of constitutionality of national norms may arise before the Union judge[16].

In this context, however, the exclusive jurisdiction of the EU Courts, combined with the possible presence of national legal systems with centralized constitutional control and with the absence, in some jurisdictions, of direct access to the Constitutional Court for natural and legal persons, could impinge on jurisdictional guarantees recognized by the EU and national legal systems[17]. In the Italian legal system, for example, the constitutionality control is centralized in the Constitutional Court, without there being any possibility to raise the question of constitutionality by the EU Courts.

Therefore, in the SSM unprecedented questions arise, concerning the *vulnus* of the right to an effective judicial protection, a general principle of EU law, also reaffirmed as fundamental right in Article 47 of the EU Charter of fundamental rights, recognized as

[13] Court of Justice, (Grand Chamber), judgment of 18 December 2007, *Sweden v. Commission*, case C-64/05 P, parr. 93 and 94. For a comment on the judgment, v. J.-Y. CHÉROT, *La CJCE juge que les Etats membres n'ont pas de pouvoir discrétionnaire dans l'exercice de leur compétence pour refuser la divulgation des documents qui émanent d'eux,* in *Revue des droits de la concurrence*, 2008 p. 143 ff.; P. LEINO, *Case C-64/05 P, Kingdom of Sweden v. Commission of the European Communities and Others, Judgment of the European Court of Justice (Grand Chamber) of 18 December 2007,* in *Common Market Law Review*, 2008, p. 1469 ff.

[14] Court of Justice, (Fifth Chamber), judgment of 3 December 1992, *Oleificio Borelli*, case C-97/91. On the judgment, see: F. BRITO BASTOS, *The Borelli Doctrine Revisited: Three Issues of Coherence in a Landmark Ruling for EU Administrative Justice*, in *Review of European Administrative Law*, 2015, p. 269 ff.; R. CARANTA, *Sull'impugnabilità degli atti endoprocedimentali adottati dalle autorità nazionali nelle ipotesi di coamministrazione*, in *Il Foro amministrativo*, 1994 p. 752 ff.; E. GARCÍA DE ENTERRÍA, *The Extension of the Jurisdiction of National Administrative Courts by Community Law: the Judgment of the Court of Justice in Borelli and Article 5 of the EC Treaty*, in *Yearbook of European Law*, 1994, p. 19 ff.

[15] *Berlusconi and Fininvest*, par. 50: "If national remedies against preparatory acts or proposals of Member State authorities in this type of procedure were to exist alongside the action provided for in Article 263 TFEU against the decision of the EU institution bringing the administrative procedure established by the EU legislature to an end, the risk of divergent assessments in one and the same procedure would not be ruled out and, therefore, the Court's exclusive jurisdiction to rule on the legality of that final decision could be compromised, in particular where the EU institution's decision follows the analysis and the proposal of those authorities".

[16] F. AMTENBRINK, *The application of national law by the European Central Bank: challenging European legal doctrine?, Building bridges: central banking law in an interconnected world*, ECB Legal Conference 2019, Frankfurt am Main, 2019, p. 136 ff.

[17] The same problem does not occur in case of MS legal systems which, on the contrary, allow widespread control of constitutionality and would authorize the EU Court to consider any question of constitutionality raised incidentally in the context of the supranational judgment.

having direct and horizontal effects[18]. It would also impinge on a principle (such as the centralized control of constitutionality), considered identitarian in some member States. In similar hypothesis, the clash between legal systems would be inevitable, as the national provisions on referral to the Constitutional Court are inapplicable to the Court of Justice.

The present Article addresses these questions and carries out a speculative analysis on a possible correction of similar breaches, assessing the feasibility, at Treaties unchanged, of a sort of reverse preliminary ruling, from the EU judge to the national one, valid both for the Court of Justice and the national Constitutional Courts, and the possible balancing between sincere cooperation, national identity and national and supranational autonomy.

## 3. Feasibility of a reverse preliminary ruling?

Many scholars, in recognizing the extraordinary success of the preliminary reference in achieving the current level of European integration[19], have highlighted the need to expand cooperation between Courts, underlining how the existence of a reverse preliminary ruling would give a more complete systematization to the dialogue between judges, transforming a unilateral vertical relationship (from the national Court to the supranational) into a bilateral one[20]: "The preliminary reference procedure under Article

[18] Be allowed the reference to I. OTTAVIANO, *Profili di tutela giurisdizionale nell'Unione bancaria*, Bari, 2020. In the same line, see S. ALLEGREZZA, *The enforcement dimension of the single supervisory mechanism*, 2020, p. 107 f.

[19] F. FERRARO, I. IANNONE, *Il rinvio pregiudiziale*, Torino, 2020.

[20] L. WISSINK, *Effective Legal Protection in Banking Supervision*, in *Europa Law Publishing*, 2021; C. GRABENWARTER, P.M. M. HUBER, R. KNEZ, I. ZIEMELE, *The Role of the Constitutional Courts in the European Judicial Network*, in *European Public Law*, 2021, p. 43 ff.; S. ALLEGREZZA, *The enforcement dimension of the single supervisory mechanism*, 2020; P. DERMINE, M. ELIANTONIO, *Case Note: CJEU (Grand Chamber), Judgment of 19 December 2018, C-219/17, Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza sulle Assicurazioni (IVASS)*, in *Review of European Administrative Law*, 2019, p. 137 ff., at p. 151; G. ZACCARONI, *The Good, the Bad, and the Ugly: National Constitutional Judges And The Eu Constitutional Identity*, in *Italian Journal of Public Law*, 2018, p. 421 ff.; M. MARTINI, Q. WEINZIERL, *Nationales Verfassungsrecht als Prüfungsmaßstab des EuGH?*, in *Deutsche Universität für Verwaltungswissenschaften*, 2017, p. 8, available online; V. DI BUCCI, *Quelques questions concernant*, cit., at p. 331; M. ELIANTONIO, *Judicial Review in an Integrated Administration: the Case of 'Composite Procedures'*, in *Review of European Administrative Law*, 2014, p. 65 ff.; S.A. DE LEÓN, *Composite Administrative Procedures in the European Union*, Madrid, 2017; H.C.H. HOFMANN, *Composite decision making procedures in EU administrative law*, in H.C.H. HOFMANN, A.H. TÜRK (eds.), *Legal Challenges in EU Administrative Law – Towards an Integrated Administration*, 2009 p. 158 ff.; M. POIARES MADURO, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in N. WALKER (ed), *Sovereignty in Transition*, 2003, p. 517, 522. J. Ziller highlighted this lack also with reference to the European Court of Human Rights: J. ZILLER, *L'interpretazione conforme ai principi generali e diritti fondamentali UE,* in A. BERNARDI (eds.), *L'interpretazione conforme al diritto dell'Unione europea. Profili e limiti di un vincolo problematico*, Napoli, 2015, p. 109 ff. More nuanced the position of S. Allegrezza: "It may be questioned whether it would be preferable to enhance the role of national Courts in reviewing ECB acts that apply national law, for instance trough a mechanism of reverse preliminary ruling", S. ALLEGREZZA, *The enforcement dimension of the single supervisory mechanism*, 2020, p. 107. Doubtful A. WITTE, *The application of national law by*

234 EC was probably one of the most important and influential procedural innovations which made possible European integration as we know it. This exceptional success can be used as an example of how to proceed in other than the vertical relation but needs to be updated to the current stage of integration in order to ensure judicial protection in the face of integrated procedures. Such update should include, first, expanding the relationship between courts to allow the ECJ also to refer questions to national courts as to the application of national law in composite procedures"[21].

It has also been noted that a preliminary ruling *alla rovescia*[22], *inverso*[23], *renversé*[24], appears to be an inevitable consequence of an increasingly integrated administration[25], underlining how similar mechanisms can for example be found in some federal legal systems[26].

Therefore, the very existence and strengthening of procedures, norms and mechanisms that integrate national and supranational law, as typically happens in the SSM, lead to an overall rethinking of the preliminary reference, introducing the possibility of a reverse preliminary ruling, from the Luxembourg Courts to the national one[27].

German doctrine scholars have highlighted the need for such a provision precisely with reference to the SSM[28], underlining how the decision on the constitutionality of a

*the ECB, including options and discretions, and its impact on the judicial review*, in C. ZILIOLI, K.-P. WOJCIK (eds.), *Judicial Review in the European Banking Union*, Cheltenham, 2021, p. 240.

[21] H.C.H. HOFMANN, *Composite procedures in EU Administrative Law*, 2009, p. 159.

[22] A. RUGGERI, *Dimensione europea della tutela dei diritti fondamentali*, in A. MOCCIA (ed.), *Diritti fondamentali e cittadinanza dell'Unione europea*, 2011, p. 89 ff., at p. 108, footnote 42: "la mancanza di una sorta di rinvio pregiudiziale alla rovescia –come lo si è altrove chiamato– che dal giudice dell'Unione discenda cioè ai giudici nazionali (ma, poi, a quali giudici?), fa sì che il quadro si presenti al riguardo vistosamente appannato e, dunque, estremamente mobile e fluide appaiono le relazioni fra gli organi di giustizia, sollecitate a ricercare da se" stesse le forme più adeguate, in spirito di cooperazione, per raccordarsi, al servizio dei principi di base sia dell'uno che dell'altro ordinamento".

[23] A. RANDAZZO, *I controlimiti al primato del diritto comunitario: un futuro non diverso dal presente?*, in *Forumcostituzionale.it*, p. 10, *online*: "Al fine di dare concreta e compiuta operatività al richiamato art. 4 sarebbe opportuno il ricorso ad una sorta di rinvio pregiudiziale in senso inverso (dalla Corte di giustizia alla Corte costituzionale), che tuttavia non è azionabile, in quanto non previsto dal Trattato".

[24] V. DI BUCCI, *Quelques questions concernant le contrôle juridictionnel*, cit, at p. 331.

[25] G. ZACCARONI, *The Good, the Bad, and the Ugly*, cit., 2018, p. 421 ff.; M. PREK, *Mutual judicial deference?, The delineation of the (interpretative) competence of European and national courts in the judicial review of ECB acts based on national law*, in *ECB Legal Conference 2019*, 2020, p. 129 ff.

[26] See, for example the "certification procedure" in the USA, where federal courts refer questions concerning State law to State courts: J.R. NASH, *Examining the Power of Federal Courts to Certify Questions of State Law*, in *Cornell Law Review*, 2003, p. 1673 ff.; F.C. MAYER, *Multilevel Constitutional Jurisdiction*, in A. VON BOGDANDY, J. BAST (eds.), *Principles of European Constitutional Law*, 2009, p. 423 f. S.A. DE LEÓN, *Composite Administrative Procedures in the European Union*, Madrid, 2017.

[27] M. ELIANTONIO, *Judicial review in an Integrated Administration: the Case of 'Composite Procedures'*, in *Review of European Administrative Law*, 2014, p. 65 ff.: at p. 98 the Author remarks that, in the context of a composite procedures, "the competent Court could ask a question of validity to a competent court of the legal system where the preliminary measures were issued"; S. RÖTTGER-WIRTZ, M. ELIANTONIO, *From Integration to Exclusion: EU Composite Administration and Gaps in Judicial Accountability in the Authorisation of Pharmaceuticals*, in *European Journal of Risk Regulation*, 2019, p. 393 ff.

[28] M. MARTINI, Q. WEINZIERL, *Nationales Verfassungsrecht als Prüfungsmaßstab des EuGH*, cit, at p. 8.

national law that the ECB applies should be reserved to the national Constitutional Courts, which could provide constitutional guidance to the Court of Justice.

The risks deriving from the lack of a bilateral preliminary ruling instrument has also been highlighted, in the context of a proceeding concerning the Community trade mark, by the Court of Justice itself[29]. In fact, in the Opinion relating to the *Edwin* case, Advocate General Kokott stressed that questions concerning the content and interpretation of domestic law could arise before the supranational judge, and the Court of Justice may not be able to answer. The AG highlighted how in similar circumstances: "EU law does not provide for a procedure, in the sense of a counterpart to the preliminary ruling procedure, whereby a reference may be made to national supreme courts or other national bodies to obtain a binding ruling on a specific issue of national law. Likewise, nor does EU procedural law provide in such a case that the proceedings must necessarily be stayed and the parties ordered to bring the matter before the national courts and to obtain by way of an action for declaration a ruling on the legal position. (…) Although according to the second paragraph of Article 24 of its Statute the Court may generally 'require the Member States ... to supply all information which the Court considers necessary for the proceedings', first, that provision is of no assistance where the Court is faced with the national law of a non-member country and, second, information on the substance (…) is not equivalent to a binding judicial ruling on the legal position which applies to a particular set of facts"[30].

### 3.1. Conceivable measures at Treaties unchanged

In order to turn effective a reverse preliminary ruling, some legal scholar deems necessary to modify the Treaties and the national constitutional norms[31], while other do not consider it mandatory, although recognizing the difficulties arising from such an absence[32].

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[29] Opinion of the Advocate General KOKOTT, delivered on 27 January 2011, *Edwin v. OHIM*, C-263/09 P. See also Opinion of Advocate General KOKOTT, delivered on 27 February 2014, *Commune de Millau and Société d'économie mixte d'équipement de l'Aveyron (SEMEA) v. Commission,* case C-531/12 P.

[30] Opinion of Advocate General KOKOTT, *Edwin v. OHIM*, cit., par. 49 ff**.** See A. PÉREZ VAN KAPPEL, *La posición procesal del derecho nacional en el procedimiento de casación ante el Tribunal de Justicia UE tras las sentencias Edwin (C-263/09 P) y Comisión / Gribraltar (C-106/09 P y C-107/09 P)*, in *Revista española de Derecho Europeo*, 2012, p. 125 ff.

[31] A. WITTE, *The application of national law by the ECB,* cit. Referring to the Court of Justice autonomous interpretation, he argues: "*De lege ferenda*, this has even been reinforced with demands for a reverse procedure whereby Union Court could, where needed, request an interpretation of a national provision by a national Court, but the necessary legislative change to put such a novel procedure in place cannot be expected for the foreseeable future", p. 240; M. MARTINI, Q. WEINZIERL, *Nationales Verfassungsrecht*, cit; A. RUGGERI, *Dimensione europea della tutela dei diritti fondamentali*, cit., p. 89 ff.; G. ZACCARONI, *The Good, the Bad, and the Ugly*, cit.

[32] L. WISSINK, *Effective Legal Protection in Banking Supervision*, cit., p. 309; C. GRABENWARTER, P.M. M. HUBER, R. KNEZ, I. ZIEMELE, *The Role of the Constitutional Courts in the European Judicial Network*, in *European Public Law*, 2021, p. 43 ff.; A. RUGGERI, *Dimensione europea della tutela dei diritti fondamentali e tecniche interpretative*, cit., p. 108, footnote 43.

Other Authors consider that, since the measure suggested would constitute an incidental proceeding in the context of a direct appeal to supranational judges, an amendment of Article 24 of the Statute[33] of the Court of Justice might be sufficient to obtain from the national constitutional Court the relevant information needed in the specific case[34]. Based on the provisions of Article 281 TFEU, it could take place with the legislative procedure, initiated at the request of the Court of Justice after consulting the Commission, or, reversely, on a proposal from the Commission after consulting the Court of Justice. More detailed provisions would be included in the rules of procedure of the Court of Justice and the General Court. As these are questions of law, additional measures should be provided on top of the Rules of Procedure of the Court, which already allow the Judge-Rapporteur or the Advocates General to request any information relating to the facts (article 62 Rules of procedure of the Court of Justice)[35]. In fact, although such a cross-reference is more relevant in the context of proceedings before the General Court, because normally the actions for annulment of the decisions of an EU institution applying national law (as the ECB in the SSM) are initiated by private applicants, the provision should also be extended with respect to proceedings brought before the Court of Justice, being possible an appeal against a first judgment of the General Court.

According to other Authors[36], the EU judge could directly proceed with a reference to the Constitutional Court in a system that provides for a centralized control of constitutionality[37], under the same conditions laid down by national law for referral by any other judge, based on the principle of sincere cooperation[38] between EU and national constitutional judges[39].

### 3.1.1. The principle of sincere cooperation

As well known, the principle of sincere cooperation is a direct source of obligations, which can be asserted before the EU judges, and also applies to the institutions of the Union, which must cooperate with the national authorities and bodies to ensure the full effectiveness of EU law. Originally the Treaties provided for this obligation only towards the Member States, but the last amendments made to the Treaties have innovated on the

[33] Article 24, par. 2 Statute of the Court of Justice: "The Court may also require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings".
[34] A. VON BOGDANDY, S. SCHILL, *Overcoming Absolute Primacy: Respect for National identity under the Lisbon Treaty*, in *Common Market Law Review*, 2011, p. 1417 ff., at p. 1449.
[35] In the same line see also L. WISSINK, *Effective Legal Protection in Banking Supervision*, cit., p. 309.
[36] V. DI BUCCI, *Quelques questions concernant le contrôle jurisdictionnel sur le mécanisme de surveillance unique*, cit., p. 317 ff.
[37] The supranational judge could instead directly proceed to examine the question of constitutionality in relation to the systems that provide for widespread constitutionality control, see V. DI BUCCI, *Quelques questions concernant le contrôle jurisdictionnel sur le mécanisme de surveillance unique*, cit.
[38] Article 4, par. 3 TEU: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties".
[39] V. U. VILLANI, *Istituzioni di diritto dell'Unione europea*, VI ed., 2020, p. 108 ff.

matter, incorporating the reciprocity of the duty of loyalty into primary law, especially with reference to judicial authorities[40], also in line with previous judgments of the Court of Justice[41].

Advocat General Cruz Villalon, in his Opinion on the *Gauweiler* case[42], has underlined the necessity of a "mutual loyalty"[43] between Luxembourg judges and national Constitutional Courts, in particular through the use of the preliminary ruling, which constitute the principal way to keep open the dialogue between jurisdictions, in order that it "may continue as long as the importance of the case requires"[44]. This should certainly happen where a supreme judge of a Member State, in the exercise of his or her constitutional competence, intends to raise its concern.

But the sincere cooperation between the two judges of constitutional rank, at national and supranational level, would be required even more vigorously if the national constitutional judge is unable to express his perplexities through the preliminary ruling, due to the recognized exclusive jurisdiction of the Court of Justice in the matter.

In the *Taricco*[45] case, it was the Constitutional Court, following the ruling of the Court of Justice, that raised a preliminary question to the latter, to ask for a second

[40] Order of the Court of 13 July 1990, case C-2/88 Imm, *Zwartveld and others*, par. 17 f. See also judgment of 10 February 1983, case 230/81, *Grand Duchy of Luxembourg v European Parliament*, par. 37.

[41] F. CASOLARI, *Leale cooperazione tra Stati membri e Unione europea. Studio sulla partecipazione all'Unione al tempo delle crisi*, Napoli, 2020; B. GUASTAFERRO, *Sincere Cooperation and Respect for National Identities*, in R SCHÜTZE, T. TRIDIMAS (eds.), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I*, Oxford, 2018, p. 350 ff.; M. KLAMERT, *The Principle of Loyalty in EU Law*, Oxford, 2014; J. TEMPLE LANG, *Article 10 EC — The Most Important "General Principle" of Community Law*, in U. BERNITZ AND OTHERS (eds.), *General Principles of EC Law in a Process of Development*, Alphen aan de Rijn, 2008, p. 76 ff.

[42] Opinion of Advocate General CRUZ VILLALON, delivered on 14 January 2015, case C-62/14, *Gauweiler*, par. 62-68.

[43] Opinion of Advocate General CRUZ VILLALON, *Gauweiler*, cit., par. 64. P. MORI, *Quelques réflexions sur la confiance réciproque entre les États membres: un principe essentiel de l'Union européenne,* in AA.VV. *Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino, 2018, p. 65 ff.

[44] Opinion CRUZ VILLALON, par. 63.

[45] Court of Justice, Grand Chamber, judgment of 8 September 2015, *Taricco and others.* case C-105/14. On the Taricco saga, *ex multis*, v. C. AMALFITANO, *La vicenda Taricco e il dialogo (?) tra giudici nazionali e Corte di giustizia,* in *Il diritto dell'Unione Europea*, 2018, p.153 ff.; N. LAZZERINI, *Il rapporto tra primato del diritto dell'Unione e tutela costituzionale dei diritti fondamentali nella sentenza Taricco-bis: buona la seconda?*, in *Rivista di diritto internazionale*, 2018, p. 234 ff.; E. MONTSERRAT PAPPALETTERE, *La sentenza "Taricco bis": dalla contrapposizione degli ordinamenti al bilanciamento dei princìpi attraverso il dialogo,* in *Il diritto dell'Unione Europea*, 2018, p. 203 ff.; H. LABAYLE, *Du dialogue des juges à la diplomatie judiciaire entre juridictions constitutionnelles: la saga Taricco devant la Cour de justice,* in *Revue française de droit administratif*, 2018, p. 521 ff.; M. BONELLI, *The Taricco saga and the consolidation of judicial dialogue in the European Union,* in *Maastricht Journal of European and Comparative Law*, 2018, p. 357 ff.; P. MORI, *La Corte costituzionale chiede alla Corte di giustizia di rivedere la sentenza Taricco: difesa dei controlimiti o rifiuto delle limitazioni di sovranità in materia penale?*, in *Rivista di diritto internazionale*, 2017, p. 407 ff., D. GALLO, *Controlimiti, identità nazionale e i rapporti di forza tra primato ed effetto diretto nella saga Taricco,* in *Il diritto dell'Unione Europea*, 2017, p. 249 ff., A. BERNARDI, *I controlimiti - Primato delle norme europee e difesa dei principi costituzionali*, Napoli, 2017; M. TIMMERMAN, *Balancing effective criminal sanctions with effective fundamental rights protection in cases of VAT fraud: Taricco,* in *Common Market Law Review*, 2016, p. 779 ff.; E. LUPO, *La primauté del diritto dell'UE e l'ordinamento penale nazionale (riflessioni sulla sentenza Taricco),* in *Il filo delle tutele nel dedalo d'Europa*, Napoli, 2016, p. 33 ff.; A. CIAMPI, *Il caso Taricco impone la*

preliminary ruling on Article 325 TFEU. But when such a possibility does not occur, as in the common procedures within the SSM, it is precisely in this absence the source of prejudice for individuals, as the doubt on the constitutional legitimacy of an internal rule cannot find another way for a constitutionality check[46].

Currently, the only possible way to address these issues is to bring an action before a national Court against a measure adopted by a national authority for the implementation of the decision adopted at the EU level[47]. Such a national measure, however, might not exist; e.g., within the SSM a measure for implementing the denial for the acquisition of a qualified holding does not exist in all jurisdictions of participating member States.

With regards to the capacity of the Constitutional Courts to acknowledge any referral they could receive by EU judges, the principle of sincere cooperation could also be useful to consider the referral admissible. For example, in the Italian legal system, the notions of "judge" or "judgment" could be broadly interpreted, in accordance with the Italian constitutional law n. 1 of 9 February 1948[48] and with the law n. 87 of 11 March 1953[49]. This interpretation has also found formal endorsement in the case-law of the same Constitutional Court: in the judgment n. 13 of 31 January 2019[50], the Constitutional Court, called upon to judge on the admissibility of a question of constitutional illegitimacy from the competition and market authority, reiterated that, precisely at the

*disapplicazione delle garanzie della prescrizione: un problema di rapporti fra diritto dell'UE e diritto nazionale e di tutela dei diritti fondamentali, non solo di diritto processuale internazionale*, in *Il Corriere giuridico*, 2016, p. 113 ff.; A. MAFFEO, *Le système italien de la prescription des poursuites pénales entre Charybde et Scylla, in Revue des affaires européennes*, 2015, p. 589 ff.

[46] P. BISCARI, *Review of L. WISSINK, Effective Legal Protection in Banking Supervision,* in *EULawLive*, available online: "Particularly welcome is the author's views on the need for a 'reverse preliminary ruling': a procedure where EU courts are able to consult national courts on points of national law which are relevant to an EU judicial process. Such proposals might very well help address the 'gaps' in legal protection that could arise in the context of the judicial review of administrative acts within the SSM".

[47] See Court of Justice, judgment of 21 May 1987, *Rau*, joined cases 133 to 136/85, par. 11 f.: "It must be emphasized that there is nothing in community law to prevent an action from being brought before a national court against a measure implementing a decision adopted by a community institution where the conditions laid down by national law are satisfied. when such an action is brought, if the outcome of the dispute depends on the validity of that decision the national Court may submit questions to the court of justice by way of a reference for a preliminary ruling, without there being any need to ascertain whether or not the plaintiff in the main proceedings has the possibility of challenging the decision directly before the Court. The answer to the first question must therefore be that the possibility of bringing a direct action under the second paragraph of article 173 of the EEC Treaty against a decision adopted by a community institution does not preclude the possibility of bringing an action in a national Court against a measure adopted by a national authority for the implementation of that decision on the ground that the latter decision is unlawful".

[48] Constitutional Law 9 February 1948, n. 1, *Norme sui giudizi di legittimità costituzionale e sulle garanzie di indipendenza della Corte costituzionale*, in *GURI* of 20 February 1948: "La questione di legittimità costituzionale di una legge o di un atto avente forza di legge della Repubblica rilevata d'ufficio o sollevata da una delle parti nel corso di un *giudizio* e non ritenuta dal giudice manifestamente infondata, è rimessa alla Corte costituzionale per la sua decisione".

[49] Law 11 March 1953, n. 87, *Norme sulla costituzione e sul funzionamento della Corte costituzionale,* in *GURI* of 14 March 1953, n. 62 and subsequent amendments. See also, in the German legal system, the term "*gericht*" pursuant to Article 100 of the German *Grundgesetz*, could also include the judges of the Kirchberg. V. DI BUCCI, *Quelques questions*, cit.

[50] Italian Constitutional Court, judgment of 5 December 2019, n. 13, incidental judgment of constitutional legitimacy, available online.

declared objective of allowing the widest possible access to constitutional justice and excluding the existence of areas free from constitutionality control[51], it is necessary to interpret the notions of "judge" and "judgment" "in modo elastico, avuto riguardo alle peculiari esigenze del caso concreto" in order to "*consentire il giudizio incidentale di costituzionalità pur in presenza di aspetti di volta in volta soggettivamente ed oggettivamente di difficile riconduzione a generali e predeterminati schemi concettuali*". Moreover, the Court specified that, in order to have an *a quo* judgment, it is sufficient the exercise of judicial functions for the objective application of the law by subjects placed in a *super partes*[52] position, albeit unrelated to the organization of the jurisdiction. The Court also specified that, precisely in order to allow wider conditions of access to justice, "a partire dalla sentenza n. 12 del 1971 (…) *utilizza le categorie del 'giudice' e del 'giudizio' 'ai limitati fini' e 'ai soli fini' della legittimazione a sollevare questione di legittimità costituzionale*" thus implicitly admitting that they may differ from those valid for other purposes[53].

### 3.2. Judicial protection of the national identity

The possible obstacle to a centralized control of constitutionality could also constitute a violation of national identity, protected by Article 4, par. 2 TEU[54], being impossible to fulfil the EU duty to respect national identity "without an input from national Constitutional Courts on the interpretation of the national constitutional values that are part of the values laid down in Article 2 TEU.

Therefore, a true dialogue, and not a simple one-way round, is necessary. Ideally, such dialogue would be realized through the Court of Justice making a referral to the national Court competent to render a binding decision on the interpretation of a national law[55]. Article 4 TEU would therefore require the Court of Justice to consult the national Constitutional Courts when there is a fear of a possible violation of a founding principle of a national legal system by an act of supranational institutions (as the ECB, applying a national law in the contest of its supervisory powers). This interpretation would allow Article 4, par. 2 TEU to introduce a mechanism to overcome this constitutional blindness

[51] Italian Constitutional Court, judgment of 5 December 2019, cit., point 3.1. considerations of law.
[52] The judgment also recalls judgments n. 387 of 1996, n. 226 of 1976, and n. 83 of 1966.
[53] Italian Constitutional Court, judgment of 5 December 2019, cit. Emphasis added.
[54] Article 4, par. 2 TEU: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security (…)". See L.S. ROSSI, *2, 4, 6 (TUE)… l'interpretazione dell'"Identity Clause" alla luce dei valori fondamentali dell'UE*, in AA.VV. *Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino, 2018, p. 859 ff.; A. BERNARDI (eds.) *Controlimiti. Primato delle norme europee e difesa dei principi costituzionali*, Napoli 2017.
[55] C. GRABENWARTER, P.M.M. HUBER, R. KNEZ, I. ZIEMELE, *The Role of the Constitutional Courts in the European Judicial Network,* in *European Public Law*, 2021, p. 43 ff., esp. p. 58 f.

at the EU level[56], in application of the proportionality test, used to valorize the national identity clause.

In the absence of this, some scholar would consider devolved to the Court of Justice, and not to the national courts, the "task of interpreting and preserving such national identities"[57]. On this topic it must be recalled, however, that a recent case-law of the Court of Justice, called upon to rule on similar profiles in the field of prudential supervision, seems to be oriented in this last sense. In the judgment *Crédit mutuel Arkéa v ECB*[58] the Court of Justice has clarified to consider "question of law" the one inherent to the national law applied by the ECB in the context of the SSM and interpreted by the General Court: "the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts" [and] "in the absence of decisions by the competent national courts, it is for the Court to rule on the scope of those provisions"[59]. And also Advocate general Mengozzi, in the Opinion related to the case *Evropaïki Dynamiki v ECB*[60], considered that "where national law has been 'incorporated' by an institution into its legal measure, such national law *becomes part of the legal context which the Courts of the European Union must take into account in their assessment*"[61].

However, it seems impossible to us, as also recalled by Advocate General Mischo in *Association Greenpeace France*, "to see how the Community Court, which has sole jurisdiction to declare a Community act invalid, could form an opinion as to the existence of an irregularity with respect to national law, when it has no jurisdiction to interpret or apply that law in the context of the jurisdiction conferred on it under Articles 173 of the

[56] M. CLAES, *National Identity: Trump Card or Up for Negotiations* in A. SAIZ ARNAIZ, C. ALCOBERRO LIVINA (eds.) *National Constitutional Identity and European Integration*, 2013, at p. 114.
[57] J. TEGELAAR, *The EU Courts as juges de droit national? Judicial review of composite procedures and the role of national law after Berlusconi*, in *EBI Young Researchers Virtual Workshop*, Session No. 8, available online; J.-P. JACQUÉ, *La Cour de Justice de l'Union européenne et la théorie des contre-limites*, in A. BERNARDI (eds.) *Controlimiti. Primato delle norme europee e difesa dei principi costituzionali*, Napoli, 2017, p. 3 ff.; M. CARTABIA, R. BIFULCO, A. CELOTTO, M. OLIVETTI (eds.), *Art. 11*, in *Commentario alla Costituzione*, Torino, 2006, spec. 302, as recalled by A. RUGGERI, *Trattato costituzionale, europeizzazione dei "controlimiti" e tecniche di risoluzione delle antinomie tra diritto comunitario e diritto interno (profili problematici)*, in *Forum di quaderni costituzionali*, available *online*. For a different perspective, see M. LUCIANI, *Il brusco risveglio. I controlimiti e la fine mancata della storia costituzionale*, in A. BERNARDI (eds.) *Controlimiti. Primato delle norme europee e difesa dei principi costituzionali*, Napoli, 2017, p. 63 ff.
[58] Court of Justice, judgment of 2 October 2019, *Crédit Mutuel Arkéa v. ECB*, joined cases C-152/18 P and C-153/18 P. In the legal doctrine, see D. SARMIENTO, *National Law as a Point of Law in Appeals at the Court of Justice. The case of Crédit Mutuel Arkéa/ECB, in EuLawLive blog*, ottobre 2019, available online; M. PREK, S. LEFÈVRE, *Le contentieux de la surveillance prudentielle* ***des établissements de crédit devant le tribunal de l'Union européenne,*** **in *Journal de droit européen*, 2019, p. 99 ff.**
[59] *Crédit Mutuel Arkéa c. BCE*, par. 132.
[60] Opinion of Advocate General MENGOZZI, delivered on 27 January 2011, case C-401/09P, *Evropaïki Dynamiki v. ECB*. See D. MCGOWAN, *Questions of Admissibility: A Note on Case C-401/09 P*, in *Public Procurement Law Review*, 2011, p. NA 241 ss.
[61] Opinion of Advocate General MENGOZZI, *Evropaïki Dynamiki v. ECB*, cit., par. 72. Emphasis in the original text.

EC Treaty (now, as amended, Article 230 EC) and 177 of the Treaty [currently Articles 263 and 267 TFEU]"[62].

Furthermore, even in relation to States in which there is no centralized control of constitutionality, a conformity assessment to a national fundamental Charter, made by the supranational judge solely on the basis of the allegations made by the parties, would not seem fully in line with the Treaties, in the absence of any contact with a national supreme Court.

In the *Borelli* judgment, the Court of Justice had required national courts to declare an appeal admissible even if the national procedural rules had not provided for this possibility[63]. The right to an effective judicial protection, as also guaranteed by Article 47 EU Charter of fundamental rights and recognized directly applicable, would then require an extensive interpretation of the *Borelli* ruling, appealing the EU procedural system to adapt and allow the activation of that scrutiny by the national constitutional judge. On the basis of the answer received, "the ECB has then to balance the interest of the Member State and that of the EU, in determining the legal effect of the duty to respect the national identity under Article 4(2) TEU, while also taking in due account the view expressed by the Member State's Constitutional Court on its view on how the uniform application of EU law and the Member State's identity should be balanced"[64].

Undeniably, even in the absence of a formal legitimacy to refer to the constitutional Court of the State concerned from time to time, the EU judge as of now must take into account the previous case-law of that one. However, such case-law might not exist, and the simple "take into account" appears somewhat different from a formal request for an "authentic" interpretation of the constitutional provision, which could be obtained by means of a reverse preliminary ruling.

Certainly, the hypothesis could recur in exceptional cases, resulting limited to issues of constitutionality in the systems characterized by centralized control, in a case before an EU Court in the absence of any national jurisdiction, but it still appears to be systematically relevant.

Other Authors instead consider the hypothesis of a reverse preliminary reference with a more general purpose, aimed at obtaining a specific answer to any kind of question raised by the EU judges, without aiming at a constitutional oriented interpretation of a national law, thus being possible to also refer to ordinary national judges[65].

[62] Opinion of Mr Advocate General MISCHO, delivered on 25 November 1999, case C-6/99, *Association Greenpeace France and Others v Ministère de l'Agriculture et de la Pêche and Others*, par. 98.
[63] *Oleificio Borelli*, cit.
[64] A. VON BOGDANDY, S. SCHILL, *Overcoming Absolute Primacy: Respect for National identity under the Lisbon Treaty*, in *Common Market Law Review*, 2011, p. 1417 ff., at p. 1449.
[65] V. S.A. DE LEÓN, *Composite Administrative Procedures*, cit.

### 3.3. Problematic issues in the proposal

The problematic aspects of such a reconstruction cannot be overlooked: in fact, it appears difficult, in the first place, for the EU judges to plainly accept to do what the national Constitutional Courts have refused for decades, to address the other judge in spirit of cooperation[66], especially in consideration of the "closure" manifested by some Constitutional Courts towards the rulings of the Court of Justice[67].

Even more serious is the risk of an impact on the autonomy of the EU legal system[68]: in the absence of an explicit provision for a reverse preliminary ruling, there are no formal elements that can give indications on the binding or not binding value for the Court of Justice of the judgment of a national Constitutional Court. Reasons of consistency would perhaps support the recognition of its binding value, but this would require the Court of Justice to comply with the interpretation provided by the national constitutional judge, with possible impact on the principle of EU autonomy[69].

It is also necessary to assess the consequences in terms of uniform application of EU law, in consideration of the possible relative value of the ruling of the Court of Justice

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[66] A. RUGGERI, *Trattato costituzionale, europeizzazione dei "controlimiti" e tecniche di risoluzione delle antinomie tra diritto comunitario e diritto interno (profili problematici)*, in AA. VV., *Giurisprudenza costituzionale e principi fondamentali. Alla ricerca del nucleo duro delle costituzioni, Atti del Convegno annuale del 'Gruppo di Pisa'. Capri, 3-4 giugno 2005*, Milano, 2006, p. 846 ff.

[67] See the judgment of 5 May 2020 of the second Senate of *Bundesverfassungsgericht*, BVerfG, 2 BvR 859/15, parr. 1-237. For critical comments on the ruling see L.M. POIARES MADURO, *Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court*, in *Verfassungsblog*, 6 May 2020, available *online*; J. ZILLER, *L'insoutenable pesanteur du juge constitutionnel allemand. A propos de l'arrêt de la deuxième chambre de la Cour constitutionnelle fédérale allemande du 5 mai 2020 concernant le programme PSPP de la Banque Centrale Européenne*, in *Eurojus*, 7 May 2020, available online; G. TESAURO, P. DE PASQUALE, *La BCE e la Corte di giustizia sul banco degli accusati del Tribunale costituzionale tedesco*, in *Il diritto dell'Unione europea, Osservatorio europeo*, 11 May 2020, available online; D.U. GALETTA, *Karlsruhe über alles? Il ragionamento sul principio di proporzionalità nella pronunzia del 5 maggio 2020 del BVerfG tedesco e le sue conseguenze*, in *Federalismi.it*, 13 May 2020, available online; L.F. PACE, *Il BVerG e la sentenza sul programma PSPP*, in *Federalismi.it*, 27 May 2020, available online; EDITORIAL COMMENTS: *Not mastering the Treaties: The German Federal Constitutional Court's PSPP judgment*, in *Common Market Law Review*, 2020, p. 965 ff.; S. CAFARO, *Quale Quantitative Easing e quale Unione europea dopo la sentenza del 5 maggio?*, in *Sidiblog*, 8 May 2020, available online; P. MORI, *Riflessioni sulla possibilità e sull'opportunità di aprire una procedura di infrazione nei confronti della Germania a causa della sentenza del Bundesverfassungsgericht sul PSPP*, in *Eurojus*, 13 July 2020, available online; R. ADAM, *Il controlimite dell'ultra vires e la sentenza della Corte costituzionale tedesca del 5 maggio 2020*, in *Il diritto dell'Unione europea*, 2020, p. 9 ff.; E. PERILLO, *De Karlsruhe au Kirchberg et retour: le long voyage, courageux mais prévisible, d'un tourmenté "ultra vires Urteil"*, in *Il diritto dell'Unione europea*, 2020, p. 127 ff.; M. WENDEL, *The two-faced guardian – or how one half of the German Federal Constitutional Court became a European fundamental rights court*, in *Common Market Law Review*, 2020, p. 1383 ff.; P. FARAGUNA, D. MESSINEO, *National courts Light and shadows in the Bundesverfassungsgericht's decision upholding the European Banking Union*, in *Common Market Law Review*, 2020, p. 1629 ff.; M. SIRAGUSA, C. RIZZA, *L'"insostenibile leggerezza" del sindacato giurisdizionale sulle decisioni di politica monetaria della BCE*, in *Eurojus*, 26 May 2020, available online.

[68] G. ZACCARONI, *The Good, the Bad, and The Ugly*, cit., p. 421 ff.; J.L. DA CRUZ VILAÇA, *De l'interprétation uniforme du droit de l'Union à la "sanctuarisation" du renvoi préjudiciel. Étude d'une limite matérielle à la révision des traités*, in AA.VV. *Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino, 2018, p. 247 ff.

[69] G. ZACCARONI, *The Good, the Bad, and the Ugly*, cit.

that applies the ruling of the national law judge, limited to the system with which it activated the reverse referral.

Moreover, a possible declaration of unconstitutionality by a national Constitutional Court of the national provision applied by the ECB could also impinge on the validity of EU decision[70]. In order to avoid such an indirect incidence, other scholars consider preferable to ask the Constitutional Courts for an Opinion, and not of a binding ruling[71], not able to directly affect the validity of the EU decision, in order not to breach the exclusive competence of the Court of Justice in ruling on the validity of an EU act.

But even in relation to these objections it is possible to make some observations. In the first place, the principle of EU autonomy is today confronted with some critic from legal scholars[72]. It has been noted that it could be possible for the Court of Justice to adopt a flexible approach, embracing a limited constitutional diversity, even though this might affect the uniform application of EU law, due to the not absolute value of the EU autonomy, often balanced with other principles, interests and values.

And an initial rethinking of this principle can also be seen in some case-law of the Court of Justice itself, starting from opposite departure points but converging towards its possible cracking: on the one hand, in the *M.A.S. and M.B* judgment[73] the Court of Justice seems to have accepted some limits to the primacy of EU law deriving from national constitutional law, tolerating the violation of a substantial element of the EU legal system, if justified by the need to protect a vital right, falling within the constitutional traditions of a Member State. In fact, the *Taricco* saga seems to show that there is no exclusive

[70] On the capacity of the Court of Justice to assess questions of law, be allowed the reference to I. OTTAVIANO, *Profili di tutela giurisdizionale nell'Unione bancaria*, Bari, 2020, p. 114 ss.; C. ZILIOLI, K.-P. WOJCIK (eds.), *Judicial Review in the European Banking Union*, Cheltenham, 2021; M. PREK, S. LEFÈVRE, *The EU Courts as "National" Courts*, in *Common Market Law Review*, 2017, p. 369 ff.; G. BECK, *The legal reasoning of the EU Courts*, Portland, 2012, p. 116.

[71] L. WISSINK, *Effective Legal Protection in Banking Supervision*, cit., p. 309.

[72] A. BOUVERESSE, *How autonomy can Lead to Subordination*, in *ECB Legal Conference 2019*, 2020, p. 104 ff.; A. VON BOGDANDY, S. SCHILL, *Overcoming Absolute Primacy*, cit.

[73] Court of Justice, Grand Chamber, judgment of 5 December 2017, case C-42/17, *M.A.S. e M.B.* On the judgment see P. MENGOZZI, *Corte di giustizia, Corte costituzionale, principio di cooperazione e la saga Taricco*, in *Studi sull'integrazione europea*, 2020, p. 9 ff.; M. ARANCI, *Brevi note a conclusione di una lunga vicenda: una prima lettura di Corte cost., 115/2018*, in *Eurojus*, 10 June 2018, available online; all the Articles in C. AMALFITANO (eds.), *Primato del diritto dell'Unione europea e controlimiti alla prova della "saga Taricco"*, Milano, 2018; L. DANIELE, *La sentenza "Taricco" toma davanti alla Corte di giustizia UE*, in G. CAGGIANO (eds.), *Integrazione e sovranazionalità*, p. 51 ff.; G. DI FEDERICO, *La "saga Taricco": il funzionalismo alla prova dei controlimiti (e viceversa)*, in *Federalismi.it*, 23 May 2018, available online; T. FENUCCI, *A proposito della Corte di giustizia UE e dei c.d. "controlimiti": i casi Melloni e Taricco a confronto*, in this *Review*, 2018; R. MASTROIANNI, *Da Taricco a Bolognesi, passando per la ceramica Sant'Agostino: il difficile cammino verso una nuova sistemazione del rapporto tra Carte e Corti*, in *Osservatorio sulle fonti*, 2018, available online; P. MORI, *La Corte costituzionale chiede alla Corte di giustizia di rivedere la sentenza Taricco: difesa dei controlimiti o rifiuto delle limitazioni di sovranità in materia penale?*, in *Rivista di diritto internazionale*, 2017, p. 407 ff.; M. NISTICÒ, *Taricco II: il passo indietro della Corte di giustizia e le prospettive del supposto dialogo tra le Corti*, in *Osservatorio dell'Associazione Italiana Costituzionalisti*, 17 January 2018, available online; S. POLIMENI, *Il caso Taricco e il gioco degli scacchi: l'"evoluzione" dei controlimiti attraverso il "dialogo" tra le Corti, dopo la sent. cost. n. 115/2018*, in *Osservatorio dell'Associazione Italiana Costituzionalisti*, 2 June 2018, available online; G. VITALE, *L'attesa sentenza "Taricco bis": brevi riflessioni,* in *European Papers*, 2018, p. 445 ff., available online.

primacy in the interaction between the national and European levels, confirming the core task of all constitutional judges in the EU legal system, to contribute to the dialogue between fundamental Charters and legal cultures. And a similar dialogical evolution can also be seen in relation to some hypotheses of dual preliminary, constitutional and European, in the Member States with a centralized control of constitutionality[74]. Referring to the constitutional Courts by the Court of Justice would allow the constitutional Courts of both levels to jointly reach a shared solution, remaining independent and sovereign, with judgments both binding in their respective legal orders[75]. And this could also restore the role of national Constitutional Courts, enabling the exercise of their own prerogatives in the context of legal pluralism. The reverse preliminary reference, therefore, would re-attribute to the supreme national Courts their role and hierarchy also in relation to the lower ordinary Courts[76], avoiding dysfunctional judicial dialogue (between ordinary judges and Court of Justice, leaving apart the Constitutional Courts) and possible rebellions. In fact, the absence on dialogical approach with national Constitutional Courts in cases involving issues of fundamental constitutional relevance, touching at the constitutional identity, might lead to a constitutional conflict, conducing national Constitutional Courts at opting for the national constitution instead of EU law. It partially happened, e.g., in the *obiter dictum* of the judgment 269/2017 of the Italian Constitutional Court[77] (even if then modified by the subsequent clarifications of the Consulta in 20/2019 and 117/2019): the *obiter* precisely claimed for a greater involvement of the Constitutional Court, and not leaving at ordinary national judges the setting aside of national norms incompatible with the EU law. The Italian Constitutional Court stressed the need for the Constitutional Court to have at least a "first word"[78] in framing constitutionally sensitive questions, in order to guarantee the

[74] Court of Justice, Grand Chamber, judgment of 22 June 2010, joined cases C-188/10, *Melki* and C-189/10, *Abdeli*, Court of Justice, judgment of 11 September 2014, *A. and B*, case C-112/13. On this judgment, see R. MASTROIANNI, *La Corte di giustizia ed il controllo di costituzionalità: Simmenthal revisited?*, in *Giurisprudenza costituzionale*, 2014, p. 4089 ff.

[75] C. GRABENWARTER, P.M.M. HUBER, R. KNEZ, I. ZIEMELE, *The Role of the Constitutional Courts in the European Judicial Network,* in *European Public Law*, 2021, p. 43 ff., p. 59. See also D. TEGA, *The Italian Constitutional Court in its Context: A Narrative*, in *European Constitutional Law Review*, Volume 17, Issue 3, September 2021, p. 369 ff.

[76] J. KOMAREK, *In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure*, in F. FONTANELLI, G. MARTINICO, P. CARROZZA (eds.), *Shaping Rule of Law Through Dialogue: International and Supranational Experiences*, 2009, pp. 112 ff.

[77] Judgment n. 269/2017 proposes an inversion of the order of the referrals, suggesting the anticipation of the constitutional question with respect to the preliminary ruling to the Court of Justice. This derogation would be justified on the basis of the constitutional nature of the rights enshrined in the Charter, and its impact on the role of Constitutional Courts, which are confronted by their mandate with the protection of fundamental rights. In fact, a different level of protection is possible between a national Constitution and the charters of national rights, with possible important frictions (as demonstrated for example in *Melloni* and *Taricco*). According to the Constitutional Court, the Charter is not a normal legislative act of the EU, which requires a uniform application of Union law, but a more flexible one, due, on the one hand, to the need to consider the constitutional traditions of the members States, and on the other the need to ensure the highest level of protection for individuals.

[78] N. LUPO, *The advantage of having the "first word" in the Composite European Constitution,* in *The Italian Journal Of Public Law: Constitutional adjudication in Europe between unity and pluralism, Special Issue*, 2018, n. 2, p. 158 ff.

proper functioning of composite European Constitution and the protection of national constitutional identity. That case regarded the traditional way of functioning of the preliminary reference, in the context of a national proceeding.

But the importance of this kind of judicial interaction would be even more relevant when there is not national jurisdiction and the constitutionality question arise before the EU judges.

## 4. Concluding remarks

In an interesting Article, written by various constitutional judges of different Member States, it was noted that a reverse preliminary ruling could "not only reflect more appropriately the specific structure of the European Union as an association of sovereign States and a compound of different constitutional orders. The CJEU commonly developing solutions with the constitutional courts would very likely contribute to a higher level of acceptance and the confidence in the European structures and institutions, deprive adversaries of European integration of an important argument and integration as such would gain momentum"[79].

Conversely, also at the EU level, the case-law of the Court of Justice aimed at protecting the independence and integrity of the national judiciary[80], and the *Rimšēvičs*

[79] C. GRABENWARTER, P.M. M. HUBER, R. KNEZ, I. ZIEMELE, *The Role of the Constitutional Courts in the European Judicial Network*, in *European Public Law*, 2021, p. 43 ff., esp. p. 58 f., at p. 60.

[80] Among the massive bibliography: NASCIMBENE, *La violation grave des obligations découlant du Traité UE. Les limites de l'application de l'Article 7*, in AA.VV. *Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino, 2018, p. 672 ff.; O. PORCHIA, *Le respect de l'État de droit dans les États membres: la complémentarité des initiatives politiques et le rôle de la Cour de justice*, in *Idem*, p. 769 ff.; E. CANNIZZARO, *Il ruolo della Corte di giustizia nella tutela dei valori dell'Unione europea*, in *Idem*, p. 158 ff.; R. ADAM, *Il controllo sul rispetto del diritto dell'Unione: una nuova frontiera della sussidiarietà?,* in G. CAGGIANO (eds.), *Integrazione e sovranazionalità*, Bari, 2018, p. 51 ff.; N. LAZZERINI, *Le recenti iniziative delle istituzioni europee nel contesto della crisi dello Stato di diritto in Polonia: prove di potenziamento degli "anticorpi" dei Trattati?,* in *Osservatorio sulle fonti*, 2018; C. CURTI GIALDINO, *Il Parlamento europeo attiva l'Article 7, par. 1 TUE nei confronti dell'Ungheria: quando, per tutelare lo 'Stato di diritto', si viola la regola di diritto*, in *Federalismi.it*, 18/2018; R. BARATTA, *Droits fondamentaux et "valeurs" dans le processus d'intégration européen*, in *Studi sull'integrazione europea*, 2019, p. 289 ff.; P. MORI, *L'uso della procedura di infrazione a fronte di violazioni di diritti fondamentali*, in *Il diritto dell'Unione europea*, 2018, p. 363 ff.; S. MARINAI, *Considerazioni in merito all'introduzione, "a Trattati invariati", di nuovi meccanismi per il rispetto della rule of law*, in *Studi sull'integrazione europea*, 2020, p. 69 ff.; C. IANNONE, G. ETIENNE, *La Cour de justice de l'Union européenne et le respect du principe de l'indépendance du juge national*, in *Il diritto dell'Unione europea*, 2020, p. 65 ff.; A. CIRCOLO, *Il rispetto dei valori fondanti dell'Unione e l'attivazione della procedura di controllo alla luce delle recenti vicende di Polonia e Ungheria*, in *DPCEonline*, 2019, p. 19 ff.; M. CARTA, *La recente giurisprudenza della Corte di giustizia dell'Unione europea in merito all'inadempimento agli obblighi previsti dagli articoli 2 e 19 TUE: evolutionary or revolutionary road per la tutela dello Stato di diritto nell'Unione europea?,* in *Eurojus*, 3 gennaio 2020; M. ARANCI, *La procedura d'infrazione come strumento di tutela dei valori fondamentali dell'Unione europea. Note a margine della sentenza della Corte di giustizia nella causa Commissione/Polonia*, in *Eurojus*, 13 Luglio 2019; A. ROSANÒ, *Considerazioni su due proposte relative alla tutela dello Stato di diritto nell'Unione europea,* in *Eurojus*, 12 aprile 2019; A. CIAMPI, *Can the EU Ensure Respect for the Rule of Law by its Member States? The Case of Poland*, in *Osservatorio sulle fonti*, 2018, available online; A. LIGUSTRO, *La crisi Ungheria-*

judgment[81], seem to affect the principle of autonomy between the EU and the MS legal systems. In the latter judgment, in particular, the Court of Justice did not limit itself to issuing a ruling declaring the incompatibility with EU law (and in particular with Article 14.2 ESCB Statute[82]) of the national decision to suspend Mr Rimšēvičs from the post of Governor of the Latvian Central Bank, due to ongoing criminal investigations (resulting in limitations of his mandate as a member of the Governing Council of the ECB). The Court directly annulled the national act, as the only action capable of preserving the

*UE: quali prospettive dopo la risoluzione del PE del 12 settembre?*, in *DPCE Online*, 2018; S. BARTOLE, *Hungary and Poland. The Organisation of the Judiciary between the Council of Europe and the European Union*, in *Quaderni costituzionali*, 2018, p. 295 ff.; ID., *La crisi della giustizia polacca davanti alla Corte di giustizia: il caso Celmer*, in *Quaderni costituzionali*, 2018, p. 921 ff.; A. MIGLIO, *Indipendenza del giudice, crisi dello stato di diritto e tutela giurisdizionale effettiva negli Stati membri dell'Unione europea*, in *Diritti umani e diritto internazionale*, 2018, p. 421 ff.; M. ARANCI, *La reazione dell'Unione europea alla crisi polacca*, in *Federalismi.it*, 15/2018; R. CABAZZI, *Procedura per squilibri macroeconomici e principi democratico-costituzionali degli Stati membri: un connubio conflittuale?*, in *Rivista dell'Associazione Italiana Costituzionalisti*, 26 marzo 2018, available online; G. HALMAI, *How the EU can and should cope with illiberal Member States*, in *Quaderni costituzionali*, 2018, p. 313 ff.; E. LEVITS, *L'Union européenne en tant que communauté de valeurs partagées – les conséquences juridiques des articles 2 et 7 du traité sur l'Union européenne pour les États membres*, in AA.VV. *Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino, 2018, p. 509 ff.; G. RAGONE, *La Polonia sotto accusa. Brevi note sulle circostanze che hanno indotto l'Unione Europea ad avviare la c.d. opzione nucleare*, in *Osservatorio dell'Associazione Italiana Costituzionalisti*, 19 aprile 2018, available online.

[81] Court of Justice, judgment of 26 February 2019, joined cases C-202/18, *Ilmārs Rimšēvičs v. Latvia*, e C-238/18, *ECB v. Latvia*. Competence conferred on the Court of Justice by Article 14.2, second paragraph, of the Statute of the European System of Central Banks (ESCB) and of the ECB. The Court ruled that, within the scope of the competence recognized by the Statute of the ESCB to judge the legitimacy of national decisions raising the central bank governors of Member States from their office, the removal from office of the governor of the Latvian National Bank was not based on the existence of sufficient evidence regarding the commission of serious misconduct under the same Statute. The Court therefore found that the removal of the governor without serious indications of guilt undermined the principle of independence of the ECB, enshrined in Articles 130 and 131 TFEU, and consequently annulled the national decision prohibiting Rimšēvičs from further exercising his functions. On the judgment, see, among the vast bibliography: D. SARMIENTO, *Crossing the Baltic Rubicon*, in *Verfassungsblog.de*, 4 marzo 2019, available online; P. DERMINE, M. ELIANTONIO, *Case Note: CJEU (Grand Chamber), Judgment of 19 December 2018, C-219/17, Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza sulle Assicurazioni (IVASS)*, in *Review of European Administrative Law*, 2019, p. 137 ff.; M. MACCHIA, *L'indipendenza delle banche centrali presa sul serio [Corte di Giustizia dell'Unione europea, Grande Sezione, 26 febbraio 2019, cause riunite C-202/18 e C-238/18*, in *Giornale di diritto amministrativo*, 2019, p. 774 ff.; R. SMITS, *ECJ annuls a national measure against an independent central banker*, in *Europeanlawblog*, 5 March 2019, available online; A. CIRCOLO, *Accertamento o annullamento? La prima volta della Corte sull'Article 14, par. 2 statuto SEBC e BCE: il caso Rimšēvičs,* in *I Post di AISDUE*, 6 May 2019, available online; P.-E. PIGNARRE, *Anatomie d'une première: Le contrôle de légalité d'une mesure nationale par la CJUE,* in *BlogdeDroitEuropéen*, 9 May 2019, available online; J. BAST, *Autonomy in Decline? A Commentary on Rimšēvičs and ECB v Latvia*, in *VerfassungBlog*, 13 May 2019, available online.

[82] Article 14.2 ESCB Statute: "The statutes of the national central banks shall, in particular, provide that the term of office of a Governor of a national central bank shall be no less than five years. A Governor may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. A decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application. Such proceedings shall be instituted within two months of the publication of the decision or of its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be".

independence of the ECB. In the Courts words the ESCB constitutes "a novel legal construct in EU law which brings together national institutions, namely the national central banks, and an EU institution, namely the ECB, and causes them to cooperate closely with each other, and *within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails*"[83]. But original legal constructions are not limited to the ESCB, and the Banking Union are a clear emblem of this[84]. And the Court of Justice itself, in articulating its reasoning regarding the reasons that required an annulment, appeared to go beyond the provisions of Article 14.2 ESCB Statute, which does not explicitly refer to a direct power of annulment by the Court of Justice[85].

If therefore the Court of Justice can jealously defend its monopoly in declaring a supranational act null and void[86], and directly declare a national act void in specific hypotheses characterized by "a novel legal construct", in conditions of similar originality it would not be entirely unimaginable the hypothesis of a reverse preliminary ruling, to protect many founding principles of the supranational construction, allowing the full emergence of a real pluralistic constitutional identity in the European Union, based on mutual respect and mutual accommodation.

A fundamental challenge of the European Union legal system is therefore to find new ways of dialogue and meeting between the Courts, including the guarantee of adequate judicial protection[87].

It has been well said that the integration is pursued by making reciprocal acknowledgments and concessions, avoiding that one party feels subordinate to the other and stripped of its role. The dialogue then really appears to be the best way to reach that encounter between Courts[88], without which European integration risks sudden arrests.

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[83] Court of Justice, Grand Chamber, judgment of 26 February 2019, *Ilmārs Rimšēvičs and European Central Bank (ECB) v. Republic of Latvia*, joined cases C-202/18 and C-238/18, par. 69, emphasis added.

[84] Sarmiento evokes the SSM as another possible hypothesis of "novel legal construct": D. SARMIENTO, *Crossing the Baltic Rubicon*, in *Verfassungsblog*, 4 March 2019, available *online*. Other agreements on the originality of the SSM in the sense indicated by the *Rimšēvičs* judgment can be found in P. DERMINE, M. ELIANTONIO, *Case Note: CJEU (Grand Chamber),* cit., at p. 248 f.

[85] D. SARMIENTO, *Crossing the Baltic Rubicon*, cit.

[86] *Foto-Frost*, cit.

[87] P. MORI, *Quelques réflexions sur la confiance réciproque entre les États membres: un principe essentiel de l'Union européenne,* in AA.VV. *Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino, 2018, p. 65 ff.; S. SCIARRA, *Rule of law and Mutual trust: a Short Note on Constitutionals Courts as "Institutions of Pluralism"*, in *Il diritto dell'Unione europea*, 2018, p. 431 ff.; M. CAIANIELLO, *Quel che resta del dialogo,* in C. AMALFITANO (eds.), *Primato del diritto dell'Unione europea e controlimiti alla prova della "saga Taricco"*, Milano, 2018, p. 391 ff.; B. CORTESE, *ECJ and National Constitutional Courts: A Collaborative Law Approach*, in *Il diritto dell'Unione europea*, 2018, p. 47 ff.; H.C.H. HOFMANN, *Composite Decision Making Procedures in EU Administrative Law,* in H.C.H. HOFMANN, A. H. TURK, *Legal Challenges in EU Administrative Law*, Cheltenham, Northampton, 2009, p. 136 ff., at p. 157.

[88] A. VON BOGDANDY, *Founding Principles of EU Law: A Theoretical and Doctrinal Sketch,* in *European Law Journal*, 2010, p. 95 ff.; A. ARNULL, *The Law Lords and the European Union: Swimming with the Incoming Tide,* in *European Law Review*, 2010, p. 57 ff., at p. 62; F.G. JACOBS, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice,* in *Texas International Law Journal*, 2003, p. 547 ff., at p. 548; J. KOMAREK, *In the Court(s) we trust? On the need for hierarchy and differentiation in the preliminary ruling procedure*, in *European Law Review*, 2007, p. 467 ff. V. anche T.

The introduction of a reverse preliminary ruling from the Court of Justice to the national Constitutional Courts, which gives the latter the opportunity to be consulted by the judges of Luxembourg in relation to suspected infringements of national fundamental principles, therefore appears to be a possible way, even if not the unique, and not immediate.

A possible alternative could be found in the introduction of mixed specialized judicial chambers, internal to the Court of Justice, composed of members of the Court itself and judges of the constitutional courts of the Member States concerned from time to time, similar to the proposal put forward by Sarmiento and Weiler as a possible way to address the issues concerning the relationship between legal systems, as highlighted in the judgment of 5 May 2020 of *Bundesverfassungsgericht*[89]. With specific reference to the common procedures within the SSM, the use of extrajudicial solutions was also proposed[90].

Even more, the possible *vulnus* in the subjective positions of natural and legal persons recipients of supranational decisions in the context of common procedures in the SSM, which constitutes a violation of the rule of law and the infringement of an identity value of the Union, could convince the Court of Justice to a radical swift: rethinking the principle of EU autonomy and considering itself entitled to enforce national law by means of the reverse preliminary ruling, in order to preserve the rule of law[91].

The European Union is confronted with the balance between the EU autonomy and the uniformity of EU law, on the one hand, and the respect of judicial protection and the guarantee of the rule of law, on the other, and the testing ground of a possible revolution could be started by the SSM.

At the moment, it does not appear possible to imagine the future. But the progressive transformation of the Union has concretely shown that what does not currently exist could one day be realized.

ABSTRACT: The article analyzes the consequences of the recognized exclusive jurisdiction of the Court of Justice of the European Union in some common procedures carried out within the Single Supervisory Mechanism and the limits of the incidental control of the Court of Justice on the legality of the preparatory acts adopted by the National Competent Authorities. Particular attention is paid to a speculative analysis regarding a reverse preliminary reference, from the EU judge to the national one, as a possible corrective of the breach of the right to an effective judicial protection, analyzing

TRIDIMAS, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure, in Common Market Law Review*, 2003, p. 9 ff., at p. 46 f.

[89] J.H.H. WEILER, D. SARMIENTO, *Op-Ed: The EU Judiciary After Weiss – Proposing A New Mixed Chamber of the Court of Justice. A Reply to Our Critics,* in *Eulawlive, Institutional Law Justice & Litigation*, 6 July 2020, available online.

[90] F. BRITO BASTOS, *An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Nonjusticiable National Law,* in *European Constitutional Law Review*, 2020, p. 63 ff.

[91] F. BRITO BASTOS, *An Administrative Crack,* cit.

the possible balancing between EU values, national identity and national and supranational autonomy.

KEYWORDS: Reverse Preliminary Ruling – Single Supervisory Mechanism (SSM) – Common Procedures – Effective judicial protection – Sincere cooperation.