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1. INTRODUCTION

As it is well known, having recognized the principle of the supremacy of community law within the Italian legal system, the ICC (the Italian constitutional court), starting back in 1984, established that the primacy of EU sources of law with direct effect has to be guaranteed directly by the ordinary or administrative judge. More specifically, if a possible

conflict between an internal and a EU provision cannot be solved by means of interpretation, the judge has to apply the EU norm and not apply the national one (the s.c. non-application, or *disapplicazione* in Italian): this general rule applies to internal provisions of both primary level (ICC judgment no. 170/1984) and constitutional level (ICC judgment no. 399/1987). The only exception to the principle of supremacy of community law and direct application of its sources of law can be identified in the possible violation of either fundamental rights or supreme principles of Italian constitutional system, i.e. the s.c. "counter-limits" to European integration, always considered intangible.[1] In

[1] Quite understandably, the doctrinal reflections on this issue are endless: for a first general reading on the EU sources of law and for their relationship with the Italian legal order see Tosato G. L., *I regolamenti delle Comunità europee*, Giuffrè, Milano, 1965, p. 965; Conforti B., *Diritto comunitario e diritti degli Stati membri*, in Riv. dir. int. priv. proc., 1966, p. 5 ss.; Monaco R., *Diritto delle Comunità europee e diritto interno*, Giuffrè, Milano, 1967; more recently, within the numerous studies, you can read, for example, Gaja G., *Fonti comunitarie*, Dig. Disc. Pubbl., VI, (1991), p. 433 ss.; Guzzetta G., *Costituzione e regolamenti comunitari*, Giuffrè, Milano, 1994; Rossi L.S., *Rapporti fra norme comunitarie e norme interne*, in Dig. Disc. pubbl.,Torino, XII, 1997, p. 367 ss.; Pizzorusso A., *L'attuazione degli obblighi comunitari: percorsi, contenuti e aspetti problematici di una riforma del quadro normativo*, in Foro it. 1999, V, p. 225ss.; D'Atena A., *L'anomalo assetto delle fonti comunitarie*, Dir. Un. Eur., 2002, p. 591 ss.; Celotto A., *L'efficacia delle fonti comunitarie nell'ordinamento italiano. Normativa, prassi, giurisprudenza*, Utet, Torino, 2003; Cartabia/Gennusa, *Le fonti europee e il diritto italiano*, Giappichelli, Torino, 2009.

For a theoretical framing of the "*Community path of the ICC*" – as prof. Barile named it in a seminal article published in Giur. Cost., 1973, p. 2406 ss. – regarding the difficult application of the EU sources of law read, for example, Sorrentino F., *Corte costituzionale e Corte di giustizia delle Comunità europee*, I, Milano, 1970; Condorelli L., *Il caso Simmenthal e il primato del diritto comunitario: due corti a confronto*, in Giur. Cost., 1978, p. 669 ss.; Tizzano A., *La Corte costituzionale e il diritto comunitario: vent'anni dopo*, in Foro Ital. 1984, I, c. 2062; Donati F., *Diritto comunitario e sindacato di costituzionalità*, Giuffrè, Milano, 1994; Sorrentino F., *Profili costituzionali dell'integrazione comunitaria*, Giappichelli, Torino, 1994; Cartabia M., *Principi inviolabili ed integrazione comunitaria*, Giuffrè, Milano, 1995; for a comprehensive outlook on the evolution of this issue see AA.VV., *Diritto comunitario e diritto interno*, Atti del seminario svoltosi in Roma, Palazzo della Consulta, 20 April 2007, Giuffrè, Milano, 2008; Cassese S., *Ordine giuridico europeo e ordine nazionale*, Report, 20 November 2009, in www.cortecostituzionale.it.

short, we could affirm that the ICC accepts the supremacy of EU law but under condition (doctrine of counter-limits), thus adhering to the dualist doctrine according to which "the two legal orders, Community and State, are at the same time distinct and coordinated" (ICC judgment no. 170/1984)

If this happens in matters of "indirect review" (the s.c. incidenter proceeding) of legislation – namely the case in which the judge refers to the ICC a question of constitutional legitimacy of a statute, as an incident to an ordinary legal proceeding – the case of "direct review" (the s.c. principaliter proceeding) of legislation, occuring when the controversy arises between regions and state is different: according to this latter procedure, the state government or the region can appeal against the state or the regional law to the ICC. As a matter of fact, in this case there is not a judge able to apply the EU act and not apply the conflicting internal law since the appeal is direct: accordingly, the ICC stated that the supremacy of the EU order could here be better safeguarded through its declaration of unconstitutionality of the conflicting internal law. Thus, starting from the Ninety's (judgments ICC 384/1994 and 94/1995), the constitutional judge decides matters of constitutionality having as object a conflict between a regional or state law and a community act with direct effect, when the questions arise within conflicts between regional and state law.[2]

The s.c. "*disapplicazione*" led to a profound change - whose importance was perceived only later and thanks to a rather agressive ECJ case law –, within the Italian legal system. This change was particularly far-reaching considering two different perspectives: on one hand, it questioned the proper role of the ordinary judge, since according the Constitution

[2] For a theoretical overview of this stage of constitutional case law see Amoroso G., *La giurisprudenza costituzionale nell'anno 1995 in tema di rapporto tra ordinamento comunitario e ordinamento nazionale: verso "la quarta fase"?* Foro it. 1996,V,73; Barone G., *La Corte costituzionale ritorna sui rapporti tra diritto comunitario e diritto interno*, Foro it. 1995,I, 2050; Groppi T., *Le norme comunitarie quale parametro nel giudizio (preventivo) di legittimità costituzionale delle delibere legislative regionali*, Le Regioni 1995,923; Ruggeri A., *Le leggi regionali contrarie a norme comunitarie autoapplicative al bivio tra "non applicazione" e "incostituzionalità" (a margine di Corte Cost. n.384/94)*, Le Regioni, 1995,469.

"judges are exclusively subjected to the law" (art. 101, para. 2) – on the contrary, in this occasion, they are exceptionally allowed not to apply it; on the other hand, – in the fields of EU competence – this choice ends up breaking the general rule of a centralized review of constitutionality (art. 134), with the ICC as the only body endowed with the power to strike down statutes in conflict with the constitution.

This innovative system based on the supremacy of EU law – recognized by the court by means of an imperative interpretation of art. 11 It. Const. – was further acknowledged through the 2001 constitutional amendment, according to which the "obligations deriving from the Community system" (art. 117, 1° c., Cost.) over the domestic legislative power are for the first time formally included in the constitutional charter.[3]

The potential outcomes implied in this system – we dare to say – are not yet totally known and the judgments of the year 2010 in this field (even if not pivotal) while confirming in many aspects the theoretical framework previously depicted, hold important rationalizing elements, thus contributing to shed light on a system not totally stabilized to-date.[4] Furthermore, a 2010 case-law leitmotiv, maybe even more persistent than before, is the call

[3] On this issue see exemplarily, Sorrentino F., *Nuovi profili costituzionali dei rapporti tra diritto interno e diritto internazionale e comunitario*, in Dir. Pubbl. Comp. Europ., 2002, p. 1335 ss.; Conforti B., *Sulle recenti modifiche della Costituzione italiana in tema di rispetto degli obblighi internazionali e comunitari*, in Foro it., 2002, V, 229 ss.; Luciani M., *Le nuove competenze legislative delle regioni a statuto ordinario*, in ww.associazionedeicostituzionalisti.it; Cannizzaro E., *La riforma federalista della Costituzione e gli obblighi internazionali*, in Riv. dir. int., 2001, p. 921 ss.; D'Atena A., *La nuova disciplina costituzionale dei rapporti internazionali e con l'unione europea*, in Rass. parl., 2002, p. 913 ss.

[4] The judgments more suited to shed light on the already fully ongoing rationalizing process of the relationship between domestic and EU orders will be discussed in this report, while the CC judgments nr. 112, 127, 178, 180, 266, 288, 340, 345; and the order nr. 174 will not be analyzed, as considered of less relevance under this perspective.

for the internal judges to interpret – as long as it is possible – the internal provision in compliance with the EU law (the s.c. *consistent interpretation*).

2. RETURN TRIP: THE FIRST EXAMPLE OF DIALOGUE BETWEEN THE IT. CONSTITUTIONAL COURT AND THE EUROPEAN COURT OF JUSTICE IN THE CONTROVERSIES BETWEEN STATE AND REGIONS ON THE CONSTITUTIONALITY OF A LAW

ICC Judgment nr. 216 marks the conclusion of the well known *querelle* on the s.c. "luxury taxes" fixed by Sardinia Region: in that occasion the Government appealed the ICC against the choice expressed by one of its region to tax some luxury products (regional law no. 4/2006) – namely, second houses owned (and those used for tourism), ships and airplanes, arguing that they were in conflict with many constitutional provisions as well as some provisions of the EC Treaty. The ICC declared the tax on second houses owned unconstitutional on the basis of the Italian constitution (ICC order nr. 102/2008) and referred, for the first time in the ICC history, the question involving taxes on ships and airplanes to the ECJ according to art. 234 (now 267) EC Treaty.

In fact, the Sardinian law maker opted to tax only ships and airplanes which are not owned by residents in Sardinia: this legislative choice involved not only doubts of constitutionality from an internal point of view, but required to verify the consistency of this provision with art. 49 and art. 87 EC Treaty, i.e. the respect of the fundamental freedom of services and of the EC prohibition of non-authorized State-aid distorting competition. Accordingly, the

ICC suspended the proceeding and referred the question regarding art. 49 and art. 87 of the EC Treaty to the ECJ (ord. n. 103/2008[5]).

Without any hesitation, the ICC's decision to use the preliminary reference procedure has been labeled by the doctrine as pivotal, to an extent that starting from this moment they fixed the beginning of a new phase in the ICC "community path". But this is not all: it is also pivotal if we consider the fact that not only it never used it before but also that, in the past, the constitutional judge always excluded to be endowed with the features required by the EC Treaty in order to be fit to refer a question to the ECJ.

5 This first referral to the ECJ by the ICC has been widely studied by the legal scholar: see, among others, Daniele L., *Corte costituzionale e pregiudiziale comunitaria: alcune questioni aperte*, I quaderni europei, Online Working Paper 2009/n. 16, December 2009. For a comparative point of view on this issue see Passaglia P. (ed.), *Corti costituzionali e rinvio pregiudiziale alla Corte di giustizia*, Internal Seminar of the ICC, April 2010, in www.cortecostituzionale.it. For further analisys see also Perlingieri P., *Leale collaborazione tra Corte costituzionale e Corti europee*, Napoli, 2008; Guarino G. C., *Costituzione italiana e integrazione europea: aiuti di Stato, distrazione amministrativa e costi impropri per le imprese*, in *Riv. coop. giur. internaz.*, 2009, p. 13 ss.; Bartole S., *Pregiudiziale comunitaria ed "integrazione" di ordinamenti*, Le Regioni, 2008, p. 808; Sorrentino F., *Svolta della Corte sul rinvio pregiudiziale: le decisioni 102 e 103 del 2008*, Giur. Cost, 2008, p. 1288; Cartabia M., *La Corte costituzionale e la Corte di giustizia: atto primo*, Giur. Cost, 2008, p. 1312, Antonini L., *La sent. n. 102 del 2008: una tappa importante per l'autonomia impositiva regionale*, Giur. Cost., 2008, 2646; Cannizzaro E., *La Corte costituzionale come giudice nazionale ai sensi dell'art. 234 del Trattato CE: l'ordinanza n. 103 del 2008*, in RDI, 2008, p. 7689; Celotto A., *Crolla un altro baluardo*, in www.Giustamm.it, Di Seri C., *Un'ulteriore tappa del cammino comunitario: la Corte costituzionale rinvia una questione di "comunitarietà" alla Corte di giustizia*, in www.Giustamm.it; Pesole L., *La Corte costituzionale ricorre per la prima volta al rinvio pregiudiziale. Spunti di riflessione sull'ordinanza nr. 103 del 2008*, in www.federalismi.it; Gennusa M. E., *Il primo rinvio pregiudiziale da Palazzo della Consulta: la Corte costituzionale come «giudice europeo»*, Quad. Cost., 2008, p. 612 ss.; Zicchittu P., *Il primo rinvio pregiudiziale da Palazzo della Consulta:verso il superamento della teoria dualista?*, Quad. Cost., 2008, p. 615 ss.

Not so long ago, in fact, the Court seemed to have definitively settled this issue, stating without hesitation that the ICC cannot be considered a "national jurisdiction" in a technical sense, as art. 267 EC Treaty requires in order to be able to use the preliminary reference procedure: too many differences and too many peculiarities characterize the ICC when compared to the judges, ordinary or special as they may be, as the ICC affirmed definitively in order no. 536/1995. For this reason order no. 103/2008 can really be considered, from a certain point of view, revolutionary: to justify this assertion it suffices to read the ICC order when in states – in marked contrast with the above-mentioned statement – that, even if the constitutional court is the supreme institution of constitutional guarantee of the internal legal system, it still can be defined as national jurisdiction in the sense of art. 234 (now 267) EC Treaty. More specifically, order nr. 103/2008 affirms that the ICC represents a national jurisdiction of last resort, endowed with the consequent legitimacy to use the preliminary reference procedure.

To downsize the significance of this outstanding ICC *revirement* and to put it into perspective, we should recall that the referral was issued within a conflict between regions and state, i.e. a ICC direct review (art. 127 It. Const.): as we already explained, in this type of controversies the ICC happens to be the only judge reviewing the case and, accordingly, able to refer the case to the ECJ. Even though the use of preliminary reference procedures appears to be limited to this particular field, the ICC introduces a truly significant change and opens the way for a direct dialogue with the supranational counterpart.

Considering more in-depth the details of the dialogue as it actually developed in this first case, it emerges that its contents are not particularly surprising: the ICC scantily refers the case to the ECJ, this latter answers with judgment C-168/2009 (17 November 2009) – declaring, as a matter of fact, that the Sardinia law is actually inconsistent with art. 49 and 87 EC Treaty and leaving the application of this statement to the domestic judge – and the ICC judgment no. 216/2010 simply applies it to the case, declaring the unconstitutionality of the regional law as much as it concerns the luxury tax on ships and airplanes owned by non-residents.

On the contrary, when the ICC review is indirect (incidenter proceeding), the previous framework does not incur any change: the preliminary reference procedure has to be promoted by the ordinary or administrative judge. If need be the judge can – in the meantime – refer the question to the Constitutional Court too – the s.c. system of "double preliminarity" (*doppia pregiudiziale*) – and the ICC has the last say in deciding the issue.[6]

3. INDIRECT DIALOGE TESTS

Notwithstanding our previous analysis of the first example of direct dialogue between ICC and ECJ, with judgment 216/2010, we already experienced many attempts of dialogue between the two courts in an "indirect" way – at a distance we could say – each time the constitutional judge has to rule on cases concerning issues on which the ECJ had already had the occasion to decide, even if dealing with other States or with similar but not identical situations. In all these occasions the ICC proved to be aware of the ECJ case-law and faced it, ending up often to use part of it, even if remaining within the borders of a wholly domestic issue. Hence, our wordings "dialogue tests", or dialogue "at a distance", or "indirect dialogue", are aimed at simply pointing out the reference to ECJ case-law within

[6] According to the system of "double preliminarity", the judge has to refer the case first to the ECJ and only afterwards, if it is necessary, to the ICC. A famous application of this procedure can be seen in ICC order no. 165/2004 (*Berlusconi* case), in which the ICC suspended the constitutional review of that case as soon as it discovered that a preliminary question was already pending before the ECJ on the same issue. The decision to wait for the ECJ judgment was taken in order to prevent the possibility of issuing a judgment in conflict with ECJ one. A peculiar application of this procedure can be seen in the case *Mariano*, in which the tribunal of Milan referred on the very same day the question separately to the ICC and to the ECJ: the ECJ answered with order C-217/08, *Mariano v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro* (17 march 2009,) declaring not to have the competence on this matter and just some days after the issuing of this order, the ICC solved the case just applying the internal law (ICC, judgment nr. 86, 27 March 2009). For further reference see.: Rovagnati A., *Nuove scelte giurisprudenziali in tema di doppia pregiudizialità (comunitaria e costituzionale)?*, Quad. Cost., 2009, p. 717 ss.

the arguments used by the ICC. In 2010, judgment 138 and 325 are the most relevant examples of this kind of dialogue.

Judgment nr. 138/2010 concerns a possible discrimination of non-married couples (more precisely, same-sex couples) and involves questions of constitutionality about some provisions of the Italian civil code on marriage reserving this institute only to hetero-sex couples: even if this case regards, first and foremost, a sensitive issue regarding the institute of marriage and the principle of equality, the question touches on the relationship between national and supranational level of government, as stressed by the claimants when they rely on the evolution of this institute at supranational level.

Four claims against a possible discrimination of non-married couples (more precisely, same-sex couples) have been raised before the Constitutional Court questioning the traditional reading of art. 29 Cost. and relying on a combined reading of art. 2, 3, and 29 it Const. together with art. 117 of It. Const., according to which "legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European Union law and international obligations". And it is only the possible violation of this latter that will be analyzed in the present report.[7]

The reference to EU and international obligations in this reasoning serves rather as reinforcement of this new constitutional reading than as an isolated ground. Its use is really diversified and never systematic, as we already noticed in the German constitutional court case. In fact, the EU Charter of Fundamental Rights, the Universal Declaration of Human Rights, the European Charter of Human Rights, various interventions of supranational institution (even a proposal for a EP resolution of 1983), some judgments or legislative acts of other EU countries are all used to "support" such thesis without being necessarily grounded nor relevant. We would be tempted to identify in this case another example of the

[7] For further in-depth examination see reports in "Human Rights".

well known "cherry picking" judicial attitude when confronted with the use of "foreign law" in constitutional adjudication.

The answer provided by the Constitutional Court on 15th of April 2010 is very plain and at the same time out of the ordinary: specifically with reference to the aspect of supranational obligations in this field, which we are particularly interested in, the Italian constitutional judge observes – thus re-organizing the aforementioned referral orders – that the relevant provisions for the judgment are art. 12 ECHR and art. 9 of the European Charter of Fundamental Rights. The constitutional court is well aware that, in the course of the trial, the Lisbon Treaty entered into force thus conferring to the Charter of Fundamental Rights a new *status*, namely the same force of the Treaty; still, this point is not relevant for the case at stake since art. 9 of the Charter of Fundamental Rights (as well as art. 12 ECHR) in the recognizing the fundamental right to marry refers expressly to the "national laws governing the exercise of this right". *Ad adiuvandum*, the ICC recalls also the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union – as it is well known, even if they are not legally binding still they are recognized as an interpretative tool – regarding art. 9 clarify that "this Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex." Therefore, according to the reading of this provision, the regulation of this field is a domestic competence.

Accordingly, the arguments of the claimants relying on the supranational evolution in this field are rejected, since the competence on marriage and family appears to be still strictly in the hand of the domestic law-maker. One cannot not underline, though, that even if this reading is from a certain point of view irreprehensible, this point is becoming more and more a crucial point, a truly sensitive issue, given the complexity of the ECJ case-law on this topic that renders uncertain the future possible developments.

The second example of indirect dialogue with the ECJ in 2010 is represented by judgment no. 325, characterized by a lengthy and detailed analysis of the EU legal framework in the field at stake, from which the ICC infers a lack of contrast between said framework and the Italian provisions object of the review.

More precisely, the object of the question of constitutionality in this case – within a direct review procedure (or principaliter proceeding) – is the delicate issue of the different ways

to award local public services. The questions of constitutionality – raised, separately, both by the State and the Regions – involve more constitutional provisions, within which also art. 117, c. 1, Const.: this – as in the previous case – will be the only aspect analyzed of this broad decision.[8]

The interesting aspect of this case is represented by the special position taken by the ICC: facing – on one side – different regional appeals against the state law arguing a clear violation of the EU legal system as well as the European Charter of Local Self-Government and – on the other side – the State's arguments supporting that the very same legislation is just the "set verses" ("a rime obbligate" in Italian) legislation applicable in order to comply with the EU obligations, the constitutional judge decides to proceed directly with the interpretation of the supranational and international legal framework. The ICC does it thoroughly, citing ECJ judgments, the Commission's communications and anything that can be useful to clarify not just a very complex but also crucial issue in order to ensure the respect of competition within EU territory.

Limiting, as already said, our analysis to the point of a possible violation of EU law through art. 1, c. 23 bis, l.d. no. 112/2008, the ICC infers that EU rules constitute just "a mandatory *minimum* for the member States law-makers" (para. 8.1, conclusion on points of law): therefore, according to the ICC judgment, it is not foreclosed to a member state to choose a more restrictive discipline than the mandatory minimum prescribed by the EU. Actually, this possibility is a constitutive part of that "margin of appreciation" the lawmaker can dispose with regard to the mandatory minimum margins established by the EU system in the field of the safeguard of competition. The domestic legislative discretionality – within the limits set by the EU order – is definitively reaffirmed by the constitutional judge, but only after an intense "dialogue" with the EU order, its legislation and its case-law.

[8] For further in-depth examination see the report by Aldo Sandulli in this area.

Indeed, this topic is really disputed, and maybe also for this reason the ICC felt the need to intervene in such a precise way.

In both the cases analyzed above, it appears evident, though, that the ICC is trying to carve out an autonomous space of dialogue, interacting with the EU counterparts as the "main actor"

4. THE CONFLICT BETWEEN INTERNAL LAW AND A NON-SELF-EXECUTING COMMUNITY ACT: THE COURT REGAIN HIS ROLE

ICC judgment nr. 28/2010 distinguishes itself as it is the first case in which the Court uses the reformed art. 117, c. 1 Const. – always in conjunction with art. 11 Const. – in a direct review (incidentaliter proceeding) and it is also the first case in which the Court declares a law unconstitutional on the ground of being in conflict with a community act without direct effect.

We cannot properly defined this – i.e. the fact that in such a case the constitutional judge is the competent body to intervene in order to guarantee the respect of the EU law – as a novelty in terms of relationship between internal and EU sources of law, since the landmark judgment no. 170/1984 the ICC reserved to itself the possibility to declare unconstitutional a law in the case that there is not a EU act directly applicable by the ordinary or administrative judge instead of the conflicting internal law. And this is exactly the case at stake. In this sense, thus, judgment no. 28 could be seen as a simple, concrete application of a possibility already foreseen in the past.

Considering the case more in-depth, though, the analysis of this judgment is less clear than it appears at a first reading: examining its content at length, it appears that a very delicate problem of temporal sequence of Italian criminal laws was involved. The first criminal law implementing a EU directive (the s.c. "Ronchi decree", l.d. no. 22/97) was stricter but in

compliance of EU law, the second one (l.d. no. 152/2006) was milder but with a possible conflict with the EU law.

Since the illegal disposing of waste is recognized both by the EU directive and the Italian law as an alleged criminal offence, leading to the corresponding criminal liability, the critical item turns out to be the interpretation of the waste status. More precisely, when a substance is not defined as waste but as by-product (as it happens in this case), the problem of criminal liability is no longer existing. In this case, as a matter of fact, the first Italian implementation of the EU directive qualified – as well as the EU directive itself – pyrite ashes as waste, the following amendment of the internal provision – in conflict with the EU directive – re-listed it defining it a by-product, thus exempting it from much stricter and burdensome obligations foreseen for wastes.

The Constitutional Court is thus asked to solve the case, also bearing in mind that the 2006 legislation is alleged to be in contrast with a EU non-self executing directive, since it is foreclosed to a EU act to make the decision more burdensome – without the intermediation of an implementing domestic law – for the criminal liability of a defendant.

Indeed, the directive could be arguably recognized as - if not endowed with direct effect in the technical sense - at least endowed with the effect to preclude judges to apply the internal conflicting provision, with the ensuing application of the domestic law previously in force (and actually applying when the crimes occurred).

The Court firmly clarifies, in this occasion, the right procedure to follow: the non self-executing directives cannot lead to the non-application of the internal conflicting provision. In accordance with the primacy of community law, though, these latter cannot be applied either: accordingly, the only viable way is to strike them down through the constitutional review: In this sense, it is important to recall that judgment no. 28 very clearly defines the EU provisions as binding and prevailing over the internal laws thanks to art. 11 and 117, para. 1, It. Const.

In sum, it is possible to grasp in the reasoning of the Court that, together with the a very classical (and steady) reading of the primacy of community law – even in a sensitive field

as criminal law and even if the community law is not self-executing –, another equally classical reading of the non-application of the internal provision in conflict with non self-executing directive is thus reaffirmed: to be honest, we could say that the judge can surely "disapply" the conflicting law but only passing through a declaration of unconstitutionality…with the corresponding "supremacy" of the Constitutional Court in this field.

A doubt inevitably emerges, though: if this is a first concrete example of a question already clarified by the ICC in 1984, we are not completely positive that the European integration has not further moved forward in this quarter of a century, thus rendering this ICC judgment – even if irrefutable from the point of view of our sources of law system – not totally consistent with the more recent ECJ case-law.[9] In such a case, i.e. a case in which it was possible to restore the law previously in force and consistent with the EU diktat just not-applying the conflicting provision – and where clearly, it was not possible to provide a consistent interpretation –, the primacy of community law principle could perhaps be better served by this last option instead of proceeding with a constitutional review procedure, that due to its very nature simply "slows down" what should be the direct and swift application of community law. We should bear in mind, though, that we are dealing with a criminal law case and in this field even the ECJ case-law is not always very coherent:[10] therefore, at least, the credit of clarifying the internal legal frame on this issue must be given to judgment no. 28.

Judgment no. 227/2010 seems to be in line with this theoretical framework confirmed by the ICC in judgment no.28, regarding (once again) the constitutionality of the Italian law implementing the European arrest warrant discipline when it establishes that an Italian

[9] See, for example, on this issue, the well known ECJ judgment, 11 November 2004, case C-457/02, *Niselli*.

[10] You can refer, on this point, to the ECJ judgment, 3 May 2005, Joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi et al.*

judge could legitimately refuse to extradite an Italian citizen while provided that the same judge could not refuse to extradite a citizen from any other European country.[11]

Letting aside the numerous relevant aspects of this proceeding and focusing on the analysis of the ICC position in framing the relationship between internal and supranational order and the possible conflicts between their sources of law, it has to be pointed out that the EU discipline was a framework decision – i.e., an act by definition not self-executing – and with the principle of non discrimination according to nationality to which, on the contrary, the attribute of direct effect is granted. Nonetheless, the Court deems perfectly coherent to proceed with the constitutional review procedure instead of the non-application of the conflicting law.

The Court observes, as a matter of fact, that the principle of non discrimination is not always, by itself, a sufficient condition in order to not apply the conflicting internal provision. The principle of non discrimination, indeed, as one can infer also by the ECJ case-law, even if theoretically endowed with direct effect, is not always to be recognized as self-executing to an extent that the internal law is always in contrast with it. If, on one hand, the difficulty of leaving the direct applications of principles in the hands of the ordinary judge is rather evident (and, first and foremost, the principle of non discrimination which would imply for the ordinary judge a very complex analysis of different legislative sources of law, typical competence of the constitutional judge), on the other hand, the position of the European Court of Justice on this issue is at the same time simple and straightforward, just calling for the application of community law and the acknowledgment of its primacy[12].

[11] The ICC solves the case declaring that the Italian provision is unconstitutional when it does not state that the judges can refuse to extradite citizens of any European country legally and effectively residing in Italy (namely, he adopted a s.c. "*additive judgments*") and the other questions of constitutionality involving the parameters of art. 3 and 27 It. Const. were absorbed.

[12] Even if in a totally different field but, notwithstanding, exemplary of a certain position of the ECJ, see ECJ judgment, 19 January 2010, case C-555/07, *Kücükdveci*, in which the European judge reaffirms the obligation to

Certainly, as in the above-mentioned case – cited at the conclusion of this judgment – the object of the question concern a criminal law circumstance, hence another reason for the prudent choice of the constitutional judge. To sweeten the pill the Court is expressly recalling the ECJ case-law both as identification tools of the *ratio* underlying the framework decision and as evaluating tools of the proportionality of the exception. But, after all – the constitutional judge seems to be telling us that – the intervention of the Constitutional Court is also needed to implement the EU diktat.

5. WHICH PARAMETER?THE CONCURRENCE OF ART. 117 AND ART. 11 IT. CONST.

In order to complete the present analysis, it is important to observe that in 2010 the Court in different occasions faced the question regarding the appropriate parameter according to which the judge can refer a case to the Constitutional Court, when the object of the constitutional review concerns a conflict between domestic laws and community law. It is also urged to start addressing the possible use of the European Charter of Fundamental Law as parameter of the constitutional review.

First of all, the already mentioned judgment no. 227/2010 regarding the European arrest warrant appears to be relevant in this regard: in this case the ordinary judge referred the question to the Court relying only to art. 117, para 1, It. Const. The Constitutional Court makes haste to integrate the parameters adding art. 11 It. Const., traditionally used for conflict between domestic and community sources of law. According to the ICC, this "integrative" faculty is perfectly admissible if the referral order, even omitting the indication of part of the parameters, clearly refers to them. The clear reference would be implied in the fact that the referral judge is *de-facto* applying the principles governing the

disapply the internal law also if in contrast with the principles foreseen n the European Charter of Fundamental Rights (in this case, the principle of equality) and if with horizontal effects.

relationship between internal and EU orders, established in art. 11 It. Const. Furthermore, the Court underlines that while art. 117 It. Const. is filling the gap regarding the fact that the conventional obligations (as the European Convention for Human Rights) were not provided for by the Italian constitution, art 11 It. Const. represents the safe foundation for the relationship between internal and community orders. Hence, the limitations of sovereignty that permit to acknowledge the primacy of the EU legal order. This specification is meaningful because it points out to another difference between the direct constitutional review and the indirect one: while in the first one art. 117 Const. can have autonomous relevance also in reference to the application of community law, in the second one the same article can have only an ancillary position, since art. 11 remains the fundamental parameter, and art. 11 can be invoked[13]only together with art. 117.

Always referring to the European arrest warrant, we can recall also the ICC order no. 374/2010: in this case the question is referred to ICC directly using as parameter art. 20 of the European Charter of Fundamental Rights (in conjunction with art. 3 It. Const.), without any possible intermediation of art. 11 or art. 117 It. Const. Strangely enough, the Court does not even mention this fact, just deciding the case with an order of inadmissibility on the grounds of the lack of relevance in the referral proceeding. But one can be sure that in the future the Constitutional court will address this issue – namely the legal effects of the European Charter of Fundamental Law and the its role as a possible parameter in the constitutional review –, considering that this latter is one of the unsolved dilemmas of this last stage of the European integration.

[13] As well clarified also in judgment no. 216/2010, "community law serves as interposed provisions fit to integrate the parameter for the control of the consistency of regional legislation with art. 117, para. 1, It. Const."