INSIGHT

DUAL PRELIMINARITY WITHIN THE SCOPE OF THE EU CHARTER OF FUNDAMENTAL RIGHTS IN THE LIGHT OF ORDER 182/2020 OF THE ITALIAN CONSTITUTIONAL COURT

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ABSTRACT: The *Insight* discusses order 182/2020 of 30 July 2020 of the Italian Constitutional Court against the background of the latter Court's approach to dual preliminarity inaugurated in decision 269/2017. It argues that the order confirms an expansionist trend as regards the scope of the Court's competence in cases concerning the violation of fundamental rights granted both by the Constitution and the Charter of Fundamental Rights of the European Union. At the same time, however, the order is permeated by a spirit of loyal and constructive collaboration with the Court of Justice, which emerges, notably, from the approach to the preliminary ruling procedure.

KEYWORDS: dual preliminarity – Charter of fundamental rights of the European Union – Constitutional Court – Court of Justice – preliminary ruling – direct effect.

I. INTRODUCTION

Through order 182/2020,[1] the Italian Constitutional Court (CC) recently sought guidance from the Court of Justice[2] in ascertaining the compatibility with EU law of national provisions that award childbirth and maternity allowances only to non-EU citizens holding an EU long-term residence permit.[3] According to the referring court, the Court of Cassation,

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[1] Constitutional Court, order no. 182 of 30 July 2020. The English translation is available at www.cortecostituzionale.it. The English translation of the other decisions of the CC referred to in this *Insight* can also be found in the CC's website.

[2] The request was registered as case C-350/20, *INPS*.

[3] The national provisions under scrutiny are Art. 1, para. 125, of Law no. 190 of 23 December 2014 (Stability Law 2015) and Art. 74 of Legislative Decree no. 151 of 26 March 2001 (Consolidated text of legislative provisions on the protection of and support for maternity and paternity). These provisions contain

ISSN 2499-8249
doi: 10.15166/2499-8249/405

the national provisions at issue would violate fundamental rights granted, at the same time, by the Italian Constitution and the Charter of fundamental rights of the European Union (EU Charter). Thus, order 182/2020 – the fifth request for a preliminary ruling issued by the CC – is the second one, following order 117/2019,[4] rooted in the approach to dual preliminarity that had been inaugurated by the CC in decision 269/2017.[5]

By holding the referrals admissible, the CC confirmed that, when national law entails the violation of both the Constitution and the EU Charter,[6] ordinary courts have an alternative to requesting a preliminary ruling from the Court of Justice and/or immediately disapplying national law as incompatible with directly effective EU law provisions. In fact, after order 182/2020, the scope of the CC's new competence seems wider than what had emerged from previous decisions. At the same time, however, the order is permeated by a spirit of loyal and constructive collaboration with the Court of Justice, which was absent in decision 269/2017 and in subsequent decisions where the CC refined its position. The shift in attitude emerges, notably, from the CC's approach to the preliminary ruling procedure.

This *Insight* focuses on the contribution of order 182/2020 to shaping the CC's competence on dual preliminarity inaugurated by decision 269/2017. A discussion on the role of the dialogue between the CC and the Court of Justice in enhancing social inclusion of legally resident third country nationals is, by contrast, outside the scope of this analysis.[7] Accordingly, section II briefly recapitulates the evolution of the CC's approach to dual preliminarity after decision 269/2017. Sections III and IV summarize, respectively, the legal background of the case and the content of order 182/2020. Sections V to VII then engage with the lights and shadows of the CC's reasoning, tackling three main issues, namely the approach to the scope of the new competence, the preliminary ruling procedure and the parameters for constitutional review.

a reference to Art. 9 of Legislative Decree no. 286 of 1998, *Testo unico sull'immigrazione* (Immigration Code), which in turn concerns the permit for long-term residents.

[4] Constitutional Court, order no. 117 of 10 May 2019. The case, which is registered as C-481/19, *Consob*, is currently pending before the Court of Justice.

[5] Constitutional Court, decision no. 267 of 14 December 2017.

[6] It must be stressed that the Court's approach only concerns cases within the scope of EU law, in which the Member States are bound to apply the EU Charter: see the latter's Art. 51, para. 1, and the interpretation provided by the Court of Justice, judgment 26 February 2013, case C-617/10, *Fransson*, paras 17 to 23. The essence of the case law inaugurated with *Fransson* is that the EU Charter can apply only when a rule of EU law other than the EU Charter provisions invoked is applicable to the case in the main proceedings. In turn, since decision no. 80 of 11 March 2011, the CC held that EU Charter provisions can be invoked in the context of constitutional review of national legislation only when the case in the main proceedings is governed by EU law (cf. point 5.5). More recently, the CC confirmed this position in decision no. 190 of 31 July 2020.

[7] For a discussion on the merits of the case, see S. Giubboni, *L'accesso all'assistenza sociale degli stranieri alla luce (fioca) dell'art. 34 della Carta dei diritti fondamentali dell'Unione europea (a margine di un recente rinvio pregiudiziale alla Corte costituzionale)*, in *Giurisprudenza costituzionale*, forthcoming.

II. Dual preliminarity after decision 269/2017: taking fundamental rights *differently*

Before decision 269/2017, the path that ordinary courts should follow to solve antinomies between national law and EU law depended solely on the nature of the EU law provision(s) at issue. In line with the *Simmenthal* case-law of the Court of Justice,[8] ordinary courts should immediately disapply national provisions incompatible with EU law rules with direct effect, after asking for a preliminary ruling from the Court of Justice, where necessary. By contrast, a referral to the CC was (and is) necessary when national law is in contrast with EU law provisions that lack direct effect.

After decision 269/2017, ordinary courts can opt to go to the CC when national law seemingly violates fundamental rights granted by both the Constitution and the EU Charter. As we shall see in section V below, the new competence encompasses not only the contrast between national law and an EU Charter provision with direct effect;[9] it also extends to situations in which national law breaches (*prima facie*) directly effective EU secondary law provisions that "relate" to a fundamental right granted by the EU Charter. Thus, on a request by an ordinary court, the CC will perform its review "in light of internal parameters and, potentially, European ones as well [...], in the order that is appropriate to the specific case".[10] If the scrutiny leads to a finding of unconstitutionality, the national legislation will be eliminated with *erga omnes* effects.

Decision 269/2017 raised several concerns regarding the compatibility of the new competence advocated by the CC with the established Court of Justice case law on pri-

[8] Court of Justice, judgment of 9 March 1978, case C-106/77, *Amministrazione delle finanze dello Stato v. Simmenthal*, para. 24.

[9] The Court of Justice laid down the test to establish which EU Charter provisions can be relied on to disapply contrasting national law in its judgment of 15 January 2014, case C-176/12, *Association de Médiation Sociale* (*AMS*). The Court referred to EU Charter provisions that are "sufficient in [themselves] to confer on individuals an individual right which they may invoke as such" (see, notably, paras 41-49). On that occasion, the Court acknowledged the direct effect of Art. 21, para. 1, of the EU Charter, with respect to prohibition of discrimination on grounds of age; at the same time, it held that Art. 27 of the EU Charter, on the right to information and consultation within the undertaking, lacked that quality. The Court of Justice reiterated and applied the *AMS* test in the context of cases that, like *AMS*, called in question the horizontal application of the EU Charter: see judgment of 17 April 2018, case C-414/16, *Egenberger*, paras 76-78; judgment of 6 November 2018, case C-596/16, *Bauer*, paras 87-91; judgment of 22 January 2019, case C-193/17, *Cresco Investigation*, para. 76. In these judgments, the Court acknowledged the direct effect of Art. 21, para. 1 (with respect to the prohibition of discrimination on grounds of religion), Art. 31, para. 2 (in relation to the worker's right to paid annual leave), and Art. 47 (on effective judicial protection). In the literature, see, *inter alia*, E. Frantziou, *(Most of) the Charter of Fundamental Rights is Horizontally Applicable*, in *European Constitutional Law Review*, 2019, p. 306 *et seq*. In its judgment of 29 July 2019, case C-556/17, *Torubarov*, para. 56, the Court of Justice relied on the *AMS* test in the context of a vertical case, in relation to Art. 47 of the EU Charter.

[10] Constitutional Court, decision 269/2017, cit., para. 5.2.

macy, direct effect and the preliminary ruling.[11] However, the CC introduced important adjustments in subsequent cases.[12]

First, when they consider that national law applicable to the case is in contrast with a fundamental right granted both by the Constitution and the EU Charter, ordinary courts have the *possibility*, rather than the *duty* to raise a question of constitutionality (unless in case there may be a breach of one of the "counter-limits" to the application of EU law set forth in the constitutional system).[13] Second, ordinary courts remain free to request a preliminary ruling from the Court of Justice, including after the review of constitutionality and also on the same grounds examined by the CC. Third, ordinary courts must disapply the national legislation that survived constitutional review, when the conditions for disapplication are met. Fourth, since the CC has the quality of a Member State "court or tribunal" under Art. 267 TFEU, it may well decide to submit itself a request for a preliminary ruling.

Whilst *formal compatibility* of the new judicial course with EU law is now ensured,[14] its *substantive impact* remains largely ambivalent. As is evident, it has paved the way to

[11] In English, see D. GALLO, *Challenging EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure*, in *European Law Journal*, 2019, p. 434 *et seq*.; R. DI MARCO, *The "Path Towards European Integration" of the Italian Constitutional Court: The Primacy of EU Law in the Light of the Decision No. 269/17*, in *European Papers – European Forum*, *Insight* of 14 July 2018, www.europeanpapers.eu, p. 1 *et seq*.; P. FARAGUNA, *Constitutional Rights First: The Italian Constitutional Court fine-tunes its "Europarechtsfreundlichkeit",* in *VerfassungsBlog,* 14 March 2018, verfassungsblog.de. The Italian literature is extensive; see, *inter alia*: C. AMALFITANO, *Il dialogo tra giudice comune, Corte di Giustizia e Corte costituzionale dopo l'obiter dictum della sentenza n. 269/2017*, in *Osservatorio sulle fonti*, 2019, www.osservatoriosullefonti.it; 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, www.osservatoriosullefonti.it, p. 1 *et seq.*; P. MORI, *La Corte costituzionale e la Carta dei diritti fondamentali dell'UE: dalla sentenza 269/2017 all'ordinanza 117/2019. Un rapporto in mutazione?*, in *I Post di AISDUE*, 3 September 2019, www.aisdue.eu, p. 55 *et seq*.; C. SCHEPISI, *La Corte costituzionale e il dopo Taricco. Un altro colpo al primato e all'efficacia diretta?*, in *Osservatorio europeo*, 31 dicembre 2017, www.dirittounioneeuropea.eu; L.S. ROSSI, *La sentenza 269/2017 della Corte costituzionale italiana: obiter 'creativi' (o distruttivi?) sul ruolo dei giudici italiani di fronte al diritto dell'Unione europea*, in *Federalismi.it*, 31 January 2018, www.federalismi.it; L.S. ROSSI, *Il 'triangolo giurisdizionale' e la difficile applicazione della sentenza 269/17 della Corte costituzionale italiana*, in *Federalismi.it*, 1 August 2018, www.federalismi.it.

[12] See Constitutional Court: decision no. 20 of 21 February 2019; decision no. 63 of 21 March 2019; and decision 117/2019, cit. *supra*, fn. 4. Before order 182/2020, the CC confirmed the competence established in decision 269/2017 also in decision no. 11 of 5 February 2020.

[13] Under the so-called "counter-limits" (*controlimiti*) doctrine (introduced by the CC in decision 183/1973, *Frontini*), ordinary courts must refer to the CC when the applicable EU law provision (possibly, as interpreted by the Court of Justice) are in contrast with "the fundamental principles of the constitutional order or of the inalienable rights of individuals". The activation of a counter-limit precludes the application of the EU law provision at stake, thus entailing a violation of the primacy of EU law.

[14] In its judgment of 22 June 2010, joined cases C-188/10 and C-189/10, *Melki and Abdeli*, para. 57, the Court of Justice held that Art. 267 TFEU *does not* preclude Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws "in so far as the other national courts or tribunals remain free: to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for

new dynamics of interaction between ordinary courts, the CC and the Court of Justice. In this respect, one can see the risk of a domestic approach to the application of EU law within the scope of the EU Charter.[15] At the same time, the new framework has some potential for triggering a process of mutual enrichment between European and national standards concerning fundamental rights protection.

Both scenarios are open at present and, at first sight, ordinary courts are the decisive factor. However, how the CC exercises this new competence is crucial, as we shall see.[16]

III. The main proceedings in order 182/2020

Order 182/2020 derived from ten referrals of similar content which were raised by the Court of Cassation. The main proceedings originated from the National Institute for Social Security's (INPS) refusal to grant a childbirth or maternity allowance to third country nationals holding a single work permit or a permit for family reasons. INPS grounded its position on national provisions that require non-EU citizens to have long-term resident status[17] in order to qualify for the allowances at issue. Unlike INPS, first instance and appeal courts found that the national provisions were in contrast with Art. 12 of Directive 2011/98/EU,[18] which they considered to be applicable[19] and endowed with direct effect.

Art. 12, para. 1, of the Directive awards some categories of third country nationals the right to equal treatment as the nationals of the Member State in which they reside legally with regard to, *inter alia*, the "branches of social security issues as defined in Regulation (EC) 883/2004"[20]. Art. 3, para. 1, of this latter refers to "all legislation concerning [...] maternity and equivalent paternity benefits [and] family benefits",[21] which include, in turn,

the review of constitutionality, any question which they consider necessary; to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.

[15] See *infra*, section 5.

[16] See *infra*, sections 6 and 7.

[17] This is conditional, in turn, upon possessing a valid residence permit for at least 5 years, as well as an adequate income and housing.

[18] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. This Directive was implemented in the Italian legal order by the Legislative Decree of 4 March 2014, no. 40. The latter limited itself to introduce some amendments to the Immigration Code of 1998 (see *supra*, fn. 3), but no express provision was made to transpose Art. 12 of the Directive.

[19] Note that, in the two proceedings originated from INPS' refusal to grant the maternity allowance, Directive 2011/98 was considered to be not applicable *ratione temporis*, because the relevant facts occurred prior to the expiry of the deadline for the transposition of the Directive.

[20] Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

[21] See let. b) and j), respectively, of Art. 3, para. 1, Regulation 883/2004, cit.

"all benefits in kind or in cash intended to meet family expenses".[22] As regards the personal scope of equal treatment, it must be pointed out that Directive 2011/98/EU does not apply to third-country nationals who are EU long-term residents; the latter's right to equal treatment as regards, *inter alia*, social security benefits is established by Directive 2003/109.[23] In other words, Art. 12, para. 1, of Directive 2011/98 extends the beneficiaries of equal treatment on social security issues[24] to two categories of third country nationals: those who have been admitted to a Member State for purposes other than work in accordance with Union or national law, who are allowed to work and who hold a residence permit in accordance with Regulation (EC) 1030/2002; and those who have been admitted to a Member State for the purpose of work in accordance with Union or national law.[25] Lastly, Art. 12, para. 2, of the Directive lists the derogations from the right to equal treatment that the Member States have the option of establishing.[26]

First instance and appeal courts took the view that Art. 12, para. 1, of the Directive was applicable and endowed with direct effect. INPS, by contrast, insisted on classifying the childbirth allowance as an incentive, consequently falling outside the scope of Art. 12. It also argued that, under the Directive, Member States can refuse benefits such as those at issue considering the financial resources available.

The Court of Cassation opted to trigger a constitutionality review, in order to obtain a decision with *erga omnes* effect. It explicitly justified this choice in the light of the CC's approach on dual preliminarity within the scope of the EU Charter, holding that the national provisions under review breached, at the same time, Arts 3, para. 1, and 31 of the Italian Constitution (on equality before the law and the protection of the family) and Arts 20, 21, 24, 33 and 34 of the EU Charter (on equality before the law, non-discrimination, the rights of the child, family and professional life, and social security and assistance).

[22] More precisely, "all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I". However, there is no mention of Italian allowances in Annex I.

[23] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[24] Note that the material scope of equal treatment is different: Art. 11 of Directive 2003/109 refers to "social security as defined by national law", whereas Art. 3, para. 1, Regulation 883/2004, cit., contains a selection of branches of social security.

[25] See Art. 3, para. 1, let. b) and c) of the Directive 2011/98, cit., which Art. 12, para. 1, refers to.

[26] Member States must state clearly their intention to rely on derogations: see Court of Justice, judgment 21 June 2017, C-449/16, *Martinez Silva*, para. 29.

IV. The main proceedings in order 182/2020

The CC decided to join the referrals in order to address the questions "within the broader perspective of the provisions on social benefits to foreign nationals, also in light of the directions provided under EU law".[27]

At the outset, the CC confirmed its competence to verify, on a request by the referring court, whether the national provisions challenged violate the fundamental rights granted by both the Constitution and the EU Charter. It also recalled that, being a Member State "court or tribunal" pursuant to Art. 267 TFEU, it may issue a request for a preliminary ruling and – in case, after the Court of Justice's assessment – it may declare the contested national provisions to be unconstitutional, thus removing them with *erga omnes* effect.[28]

The CC then announced its intention to request a preliminary ruling concerning the interpretation of the relevant EU law provisions. It acknowledged the existence of "an inseparable link" and a relationship of "mutual implication and fruitful supplementation" between the guarantees provided by the Constitution and those laid down by the Charter.[29] It also affirmed that "[w]ithin an area that is marked by the growing influence of EU law [one cannot but prefer] a dialogue with the Court of Justice".[30]

After noting that Directive 2011/98 "must be brought within the [scope] of Article 34 of the Charter",[31] the CC focused on the right to equal treatment in the area of social security as provided by Art. 12, para. 1, of the Directive. It found that the allowances at issue do not fall within the typical grounds of exclusion mentioned in Annex I to the Regulation,[32] nor did the Italian legislator rely expressly on the derogations provided by Art. 12 when implementing the Directive.[33]

The CC nonetheless considered that the existing case law of the Court of Justice[34] does not provide a clear answer on whether the allowances at issue qualified as "family

[27] See order 182/2020, cit., para. 2.

[28] The CC did not also repeat that ordinary courts remain free to raise themselves a preliminary ruling to the Court of Justice, including after the review of constitutionality, and that they must not apply, in the pending case, national legislation that survived that review, when the conditions for disapplication are met. However, the general tenor of the Order suggests that nothing has changed in this respect.

[29] See order 182/2020, cit., para. 3.2.

[30] Ibid. The official English translation of the indent within the square brackets ("it is inconceivable not to promote a dialogue with the Court of Justice") appears even stronger than the original Italian version ("*non si può non privilegiare il dialogo con la Corte di giustizia*").

[31] See order 182/2020, cit., para. 6.3.1. This point is discussed in depth *infra*, section 5.

[32] See *supra*, fn. 22.

[33] See *supra*, fn. 26 and the corresponding text.

[34] The Court of Justice (see, *ex multis*, judgment *Martinez Silva*, cit., paras 20-23, and the case law cited), the classification of a benefit as a social security benefit depends on its content and scope, whereas the name, method of financing and implementation are not relevant; notably, it must be granted automatically to recipients that meet objective criteria, without any individual and discretionary assessment. The Court has also clarified that the expression "to meet family expenses" in Art. 3, para. 1, of Regulation

benefits" under EU law. Notably, it found the classification of children allowance problematic, in the light of its dual purpose as a public contribution to families experiencing financial distress and as an incentive to childbirth. Therefore, it asked the Court of Justice to clarify whether the scope of Art. 34 of the EU Charter should be interpreted, according to EU secondary law, as encompassing childbirth and maternity allowances and whether, in such a case, EU law precludes national provisions such as those at issue.

V. An expanded scope for the CC's dual preliminarity competence?

Amongst the EU Charter provisions referred to by the Court of Cassation, the CC decided to focus only on Art. 34. This provision, titled "Social security and social assistance", is certainly relevant *ratione materiae* to the case at issue, in particular its second paragraph ("Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices"). However, considering the provision's formulation, one may wonder whether the preliminary question raised by the CC should have rather concerned the (more detailed) EU secondary legislation at issue, possibly interpreted in the light of Art. 34.[35]

In effect, the CC itself, after stating that Directive 2011/98 "must be brought within the [scope] of Art. 34 of the EU Charter", based its reasoning primarily on Art. 12 of the Directive, on the right to equal treatment as regards social security benefits. For the purpose of this *Insight*, the connection established by the CC between Art. 34 of the EU Charter and Directive 2011/98 deserves special attention. Basically, the CC confirmed, albeit implicitly, that its competence on dual preliminarity encompasses not only the EU Charter provisions, but also other EU law provisions concerning the protection of fundamental rights. Whilst this position is not completely new, in order 182/2020 the CC seems to further expand the scope of its review.

In decision 20/2019,[36] the CC already declared admissible a question of constitutionality concerning not only the EU Charter but also some (directly effective) provisions of a Directive. The Court argued that these latter provisions showed "a singular connection with the relevant provisions of the EU Charter, not only in the sense that they provide it with details or implement it, but also in quite the opposite sense that they constituted the «model» for those rules and, therefore, they [contribute to providing evidence of the same nature as the EU Charter's provisions], as expressed in the Explanations relating to the Charter"[37].

883/2004, cit., refers "in particular to a public contribution to a family's budget to alleviate the financial burdens involved in the maintenance of children".

[35] Cfr. the Art. 34-oriented interpretation of the principle of equal treatment between long-term residents and Member States nationals as regards social security, social assistance and social protection provided by the Court of Justice in its judgment of 24 April 2012, case C-571/10, *Kamberaj*, para. 76 *et seq*.

[36] See *supra*, fn. 12.

[37] The expression within square brackets is, in the author's view, a translation closer to the Italian original (*e perciò partecipano all'evidenza della loro stessa natura*).

As was noted, this position is a logical implication of the rationale inspiring decision 269/2017, namely the CC's desire to re-take a role on fundamental rights' adjudication within the scope of EU law.[38] From an EU law perspective, however, one can see the risk that the *possibility* of raising a question of constitutionality, rather than following the *Simmenthal* case law (preliminary ruling and/or disapplication), is *de facto* extended to antinomies between national law and *any* EU law provisions with direct effect.[39] As repeatedly clarified by the Court of Justice, the EU Charter is applicable in all situations where another legally binding provision of EU law applies.[40] Considering the breadth of the fundamental rights granted by the EU Charter, the possibility of invoking its provisions in combination with other EU law rules exists – plausibly – in the vast majority of cases within the scope of EU law.[41]

Such an outcome would go beyond the stated justification of the new judicial course on dual preliminarity provided by the CC in decision 269/2017, namely the specific characteristics of the EU Charter as an inherently constitutional source. Accordingly, a question of constitutionality *formally* falling within the scope of the CC's competence should be declared inadmissible when national legislation should be reviewed primarily against directly effective provisions of EU law other than the provisions of the EU Charter (or EU law sharing the same constitutional nature).[42]

Against this backdrop, order 182/2020 provides ambivalent indications in relation to the scope of the CC's competence on dual preliminarity. By explaining the relationship between Art. 34 of the EU Charter and Directive 2011/98, the CC confirmed that the new judicial course only concerns national legislation raising (genuinely and) primarily fundamental rights' issues. On the other hand, it seems that the CC superseded the criterion of the "singular connection" between the EU Charter and other EU law provisions identified in decision 20/2019, endorsing the (less stringent) logic of the *material overlap* between the two sources.

Arguably, the CC did not mean to extend its review to all EU law rules falling within the material scope of the EU Charter – in practice, entire fields of EU law. It seems more

[38] See D. GALLO, *Challenging EU constitutional law*, cit., p. 451.

[39] Under this scenario, the status of the EU Treaties in the Italian legal order would be (almost) equated to that of other international treaties legally binding on Italy, the only difference being the *possibility* – rather than the *duty* – to raise a question of constitutionality.

[40] See *supra*, fn. 6.

[41] Cf. R. MASTROIANNI, *Sui rapporti tra Carta e Corti: nuovi sviluppi nella ricerca di un sistema rapido ed efficace di tutela dei diritti fondamentali*, in *European Papers*, 2020, Vol. 5, No 1, www.europeanpapers.eu, p. 493 *et seq.* Consider also that the EU Charter recognizes rights "for which provision is made in the [EU] Treaties": see Art. 52, para. 2, of the EU Charter.

[42] Reference is, primarily, to the general principles of EU law concerning fundamental rights additional to those granted by the EU Charter and corresponding to fundamental rights protected by the Constitution, and to EU secondary law provisions that merely reflect a rule that may be inferred already from an EU Charter provision (see also *infra*, at the end of this section).

plausible – and acceptable, from the point of view of EU law – that the CC only wanted to encompass those EU law provisions that are more closely related to the EU Charter, as they give specific and concrete expression to the basic substantive content of the fundamental rights granted.

If this reading is correct, the expansion of the scope of the CC's competence that derives from order 182/2020 is more limited than what appears at first sight, at least in theory. In practice, the correct identification by ordinary courts of EU secondary law provisions that share the same nature as the EU Charter in the sense just explained may prove difficult and open to different interpretation.

VI. The evolving approach to the preliminary ruling procedure

The possibility of a direct dialogue between the CC and the Court of Justice was implicit in decision 269/2017. Only a few years earlier, the CC had overcome the case law in which it had taken the view that it could not be identified as a Member State "court or tribunal" for the purpose of Art. 267 TFEU.[43] The CC indeed submitted a request for preliminary ruling rooted in the new course on dual preliminarity already with order 117/2019. However, this differs from order 182/2020 in some respects.

Order 117/2019 originated from a case where the potential violation of a counter-limit[44] was at issue. The CC upheld the concern of the referring court (the Court of Cassation) and issued a preliminary ruling aimed at preventing the reliance on the counter-limits doctrine and the consequential violation of the primacy of EU law. Notably, it raised two questions: one on the interpretation of the relevant EU Charter provisions, and the other on the validity of the applicable EU secondary law rules, should it prove impossible to interpret the EU Charter in harmony with the Italian constitutional tradition. By contrast, no counter-limits issues are at stake in order 182/2020. The CC's decision to rely on the preliminary ruling procedure was in fact premised on the "growing influence" of EU law on the matter of social benefits to foreign nationals and the "inseparable link" between relevant guarantees provided by the Constitution and the EU Charter.[45] The rationale behind activating the dialogue with the Court of Justice thus differs: the CC tried to "shape" the interpretation of the Charter in order 117/2019, whereas it requested the Court of Justice to provide the correct interpretation of the relevant EU Charter provisions in order 182/2020.

[43] The CC expressed this position, for the first time, in order 536/1995, relying on the peculiar tasks entrusted on it by the Constitution. The *revirement* took place in two steps: first, in relation to *principaliter* proceedings only (order 103/2008), and later on also with respect to *incidenter* proceedings (order 207/2013). In the literature, see A. Adinolfi, *Una "rivoluzione silenziosa": il primo rinvio pregiudiziale della Corte costituzionale italiana in un procedimento incidentale di legittimità costituzionale*, in *Rivista di diritto internazionale*, 2013, p. 1249 *et seq*.

[44] See *supra*, fn. 13 and the corresponding text.

[45] Order 182/2020, cit., para. 3.2.

Moreover, a different approach to the role of the preliminary ruling in cases falling under the new course on dual preliminarity emerges. In order 117/2019, the CC only confirmed its quality as a Member State "court or tribunal" under Art. 267 TFEU. By contrast, order 182/2020 acknowledges that the Court of Justice has the ultimate authority on the correct interpretation and application of EU law, quoting Art. 19, para. 1, TEU and stressing that "[the] clarification sought from the Court of Justice is conducive to ensuring a guarantee of the uniform interpretation of rights and obligations under EU law".[46]

Looking at future cases raising dual preliminarity issues within the scope of the EU Charter, one may wonder whether ordinary courts can derive some indication from order 182/2020 regarding the choice between the old *Simmenthal*-path (i.e., disapplying national law incompatible with EU law, after asking for a preliminary ruling, where necessary) and the new one (i.e., prioritizing the referral to the Constitutional Court). As anticipated, the CC clarified that ordinary courts have the *possibility*, rather than the *duty*, to raise a question of constitutionality in case law after decision 269/2017, but did not also provide – expressly, at least – any criteria to deal with two alternative paths.[47]

The CC offered no *explicit* indications either in order 182/2020. At the same time, one *general criterion* seemingly emerges, albeit *implicitly*, from the Court's general approach to the preliminary ruling and from the consideration that, in the case at issue, "[one cannot but prefer] a dialogue with the Court of Justice, which is charged with ensuring «that in the interpretation and application of the Treaties the law is observed»".[48] By acknowledging that the Court of Justice is the *juge naturel* on questions concerning EU law, the CC seemingly suggests that ordinary courts should opt for the request for a preliminary ruling whenever the case raises doubts regarding the applicability, scope and effects of the provisions of the EU Charter (possibly, in connection with other EU law rules).[49]

If this is correct, when could – or should – the CC be involved? Some scenarios can be identified based on the case-law of the Court of Justice. The first scenario is the *Egenberger*-style situation, where the referring court was requested to ensure the observance of the relevant EU Charter provisions, endowed with (horizontal) direct effect,

[46] *Ibid*.

[47] In the aftermath of decision 269/2017, and before the important adjustments introduced later on by the CC (on which see section 2), the Court of Cassation did not always choose the same path in cases entailing the violation of fundamental rights granted both by the Constitution and by the EU Charter: for an overview, see A. COSENTINO, *La Carta di Nizza nella giurisprudenza di legittimità dopo la sentenza della Corte costituzionale n. 269/2017*, in *Osservatorio sulle fonti*, 2018, www.osservatoriosullefonti.it. More recently, an Italian appeal court (the *Corte di appello* of Neaples) opted to raise, simultaneously, a constitutionality question and a request for a preliminary ruling: the case is commented in this review by R. MASTROIANNI, *Sui rapporti tra Carte e Corti*, cit., p. 509 *et seq*.

[48] Order 182/2020, cit., para. 3.2.

[49] Stressing that the Court of Justice is the *juge naturel* on the interpretation of the EU Charter, see L.S. ROSSI, *Il 'triangolo giurisdizionale'*, cit., p. 12.

"while possibly balancing the various interests involved".[50] When hearing such cases, ordinary courts may find it appropriate to involve the CC, in order to ensure that the balance is achieved through a decision having *erga omnes* effect, for the sake of legal certainty and equal treatment.[51]

Another scenario is the *Fransson*-style situation, where Member States can determine the standard of protection of the fundamental rights at issue, provided that "the level of protection provided for by the Charter, as interpreted by the Court [of Justice], and the primacy, unity and effectiveness of EU law are not thereby compromised".[52] In such cases, there is space for involving the CC when the standard determined by the national legislator meets the first condition of the *Fransson*-test, but fails to satisfy the (more protective) constitutional standard.

Similarly, national measures adopted under a derogation provided by EU law, which comply with the Charter, can additionally be challenged against the Constitution. Unlike in the previous scenario, the second condition identified in *Fransson* (where the Court of Justice has the last say) does not apply, because the primacy, unity and effectiveness of EU law are inevitably enhanced by setting aside national derogations.

Lastly, ordinary courts should raise a question of constitutionality when, under EU law, there is (or *seems to be*) no space for accommodating more extensive protection offered by the Constitution. This option must be preferred, clearly, when the (potential) violation of a counter-limit is at stake. This may occur in *Melloni*-style cases, where the level of protection is completely determined by EU secondary law,[53] but also in *Fransson*-style cases if the national standard does not satisfy the second condition of the test. These situations call in question the possibility of interpreting the relevant EU Charter provisions in harmony with the corresponding constitutional standards. Thus, a direct interaction between the Court of Justice and the CC is the most appropriate path for exploring whether a convergence can be found, and possibly avoiding the reliance on counter-limits.[54] This dialogue should be activated by a request for preliminary ruling inspired by loyal cooperation rather than a *Taricco*-style "threatening reference".[55]

[50] *Egenberger*, cit., para. 81.

[51] Cf. C. Amalfitano, *Il dialogo tra giudice comune, Corte di Giustizia e Corte costituzionale*, cit., p. 19. According to D. Gallo, *Challenging EU constitutional law*, cit., p. 450, "if uncertainty remains in respect to the possible emergence of a conflict between EU law and constitutional standards of protection as the result of a certain interpretation of domestic law [...] the domestic court has a duty to dispel such uncertainty and, therefore, in the context of the same proceedings, refer the matter to the Constitutional Court".

[52] *Fransson*, cit., para. 29.

[53] Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni*, para. 60.

[54] Cf. G. Gaja, *Alternative ai controlimiti rispetto a norme internazionali generali e a norme dell'Unione europea*, in *Rivista di diritto internazionale*, 2018, p. 1035 *et seq*., notably p. 1050.

[55] The expression is used by D. Paris, *Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case Taricco*, in *QIL-Questions of International Law*, 31 March 2017, www.qil-qdi.org.

However, ordinary courts may opt to raise a constitutionality question also when, in a *Melloni*-style scenario, the standard of fundamental rights protection harmonised at the EU level is lower than the domestic one, even though no breach of a counter-limit is at stake. The EU harmonised standard must ensure a fair balance between the protection of the fundamental rights involved and the objectives pursued by the EU legislation at issue. One may not exclude that the latter objectives could be effectively achieved by endorsing a more protective standard than that identified by the EU legislator. The Member States' governments may indeed be willing, during the EU lawmaking process, to level down the protection of the fundamental rights involved in order to find a compromise on the proposed legislation.[56] Here comes the role of (all) national courts, in cooperation with the Court of Justice. Rather than challenging the EU harmonised standard because it does not align (or leave space) to the more protective domestic standard, national courts should contribute to ensure that the EU standard effectively offers a high level of protection, whilst not compromising the effective achievement of the objectives pursued by the EU legislator. In this scenario, ordinary courts may refer themselves a request for preliminary ruling to the Court of Justice, but they may also opt to involve the CC and invite it to activate a dialogue with the Luxembourg Court, should the CC share the concerns of the referring court.[57]

VII. The choice of the parameters for constitutional review

The CC's approach to the parameters for constitutional review in order 182/2020 deserves a few comments. As anticipated, in decision 269/2017 the CC expressed its intention to carry out the review "in light of internal parameters and, potentially, European ones as well […], in the order that is appropriate to the specific case, including for the purpose of ensuring that the rights guaranteed by the [EU Charter] are interpreted in a way consistent with constitutional traditions".[58] Even though it is unclear how the "appropriate order" between the two sets of parameters should be established, the Court's statement suggests that the national provisions under review may be declared unconstitutional against the EU Charter.[59]

So far, the CC has opted to engage with the EU Charter and the relevant Court of Justice case law in interpreting the constitutional parameters, but ultimately based its

[56] The case of asylum legislation is illustrative: see C. Favilli, *The standard of fundamental rights protection in the field of asylum: The case of the right to an effective remedy between EU law and the Italian Constitution*, in *Review of European Administrative Law*, 2019, p. 167 *et seq*.

[57] I articulated this point in N. Lazzerini, *The standard of fundamental rights protection according to the EU Charter: Which role for national standards (and courts)?*, in F. Casarosa, M. Moraru (eds), *The Practice of Judicial Interaction in the Field of Fundamental Rights - The Added Value of the Charter of Fundamental Rights of the EU*, Elgar, forthcoming.

[58] Decision 269/2017, cit., para. 5.2.

[59] *Per* Arts 11 and 117, para. 1, of the Constitution.

decision only on the latter.[60] It is uncertain whether in case 182/2020, the CC will confirm this trend or opt to declare the national provisions unconstitutional against the EU Charter. However, one can clearly see an emphasis on the substantive connection between the Constitution and the EU Charter's relevant provisions, "which [...] complement each other and operate in harmony".[61] This marks a shift from decision 269/2017, where the Court's reasoning about the different set of parameters available for constitutional review was mainly inspired by a logic of separation.

The approach to the EU parameters in order 182/2020 is also particularly welcome. The CC did not engage itself with the interpretation of Art. 34 of the EU Charter, but asked the Court of Justice to clarify its scope. As was suggested, national courts should contribute to achieving harmony between the EU Charter and the Member States' common constitutional traditions[62] by interpreting the constitutional provisions corresponding to the relevant rules of the EU Charter; the interpretation of the latter in the light of the common constitutional traditions is, by contrast, the task for the Court of Justice.[63] This type of "appropriate order" seemingly emerges from the statement made in order 182/2020 that "the questions referred for preliminary ruling [...] have implications for the constant evolution of constitutional principles, as part of a dynamic of mutual implication and fruitful supplementation".[64]

[60] See R. MASTROIANNI, *Sui rapporti tra Carte e Corti*, cit., pp. 520-522.

[61] Order 182/2020, cit., para. 3.2. On a proposal for integrating the internal and EU parameters into a third "mixed parameter", see A. CARDONE, *Dalla doppia pregiudizialità al parametro di costituzionalità: il nuovo ruolo della giustizia costituzionale accentrata nel contesto dell'integrazione europea*, in *Osservatorio sulle fonti*, 2020, www.osservatoriosullefonti.it.

[62] In decision 269/2017, the CC referred explicitly to Art. 52, para. 4, on which see section 6, *in fine*.

[63] See MASTROIANNI, *Sui rapporti tra Carte e Corti*, cit., p. 521 and fn. 70.

[64] Order 182/2020, cit., para. 3.2.