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PRELIMINARY REFERENCES FROM THE ITALIAN
CONSTITUTIONAL COURT TO THE COURT OF JUSTICE OF
THE EUROPEAN UNION***

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‘SPEECH ACTS’ AND JUDICIAL CONVERSATIONS. PRELIMINARY REFERENCES FROM THE ITALIAN CONSTITUTIONAL COURT TO THE COURT OF JUSTICE OF THE EUROPEAN UNION ECONOMIC-GRADE CONSTITUTIONALISM?

Silvana Sciarra and Giuseppe Nicastro*

Abstract

The first part of the paper refers briefly to the *Gauweiler* judgment with the intention to underline how ‘speech acts’ may acquire the status of sources. Under exceptional circumstances, such as the ones originated by the crisis, they end up shaping both institutional and academic discussions. It was, after all, a ‘speech act’ to provoke the first German preliminary reference to the Court of Justice of the European Union (CJEU). The second part of the paper offers a brief historical picture of the complex and at times controversial conversation established between the Italian Constitutional Court and the CJEU. The first two preliminary references sent from Rome to Luxembourg suggest that it is worth comparing the attitudes of constitutional courts in search of their own style, when it comes to balancing national and EU competences. Article 11 of the Italian Constitution is brought forward as an interesting compromise, a way of balancing competences, whenever limits to sovereignty may be perceived as dangerous ones, unless a scope, common to other states, is to be reached. The Italian Constitutional Court shows awareness of its own national identity and, at the same time, seems capable to approach the CJEU in a cooperative manner.

Keywords: *Gauweiler*, Italian Constitutional Court, preliminary reference, *Mascolo*

1. Communication through ‘speech acts’

The *Gauweiler* judgment,¹ delivered by the CJEU in response to the first preliminary reference

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requested by the German Constitutional Court (*Bundesverfassungsgericht*; FCC) raises many questions of theoretical and practical relevance.

Some of the issues deserve a few initial – and brief for reasons of space – remarks. The intention is to portray, later on in this paper, the initiative taken recently by the Italian Constitutional Court (*Corte Costituzionale* ICC) in opening a conversation with the CJEU. We shall frame the two recent preliminary references in an historical perspective, proving that Constitutional Courts are capable to look ahead and grow as institutions, in response to supranational challenges.

In the background of the *Gauweiler* decision one can easily detect a strategy in media communication, brilliantly represented in the AG's opinion, especially in the opening paragraphs.

The press conference, the occasion in which the announcement was made, could be described as a 'speech act', directed to an undefined and potentially immense audience of receivers, although mainly addressed to 'markets' and to national governments. Hence, it implied much more than a simple declaration of intents.

The minutes of the 340th meeting of the Governing Council of the ECB, held on 5 and 6 September 2012, are quoted in the CJEU's judgment as the source, which then originated the press release. The latter is also quoted extensively by the CJEU, including passages in which the 'precautionary' nature of the measure is explained as a condition for 'future cases of EFSF and ESM macroeconomic adjustment programmes'. Conditionality also applies to Member States undergoing macroeconomic adjustment programs and then rehabilitated in the bond market. These passages are straightforward in suggesting that the ECB's communicative strategy was successful and deserved institutional support from the Court.

Article 10(4), Protocol n.4 On the Statute of the European System of Central Banks and the European Central Bank indicates that proceedings of the Governing Council's meetings 'shall be confidential' and that it is for the Governing Council to decide whether to make 'the outcome of its deliberations public'. Hence, the publication on the ECB's website would be a step forward in transparency and would confirm the recognition of the proceedings as sources of documentation, potentially relevant in the course of litigation or in establishing institutional responsibilities. However, this is a sign of the times we live in, and we should be prepared to observe the rapid transformation of communication techniques into legal sources, as such deserving to be taken into account by interpreters.

¹ CJUE, judgment 16 June 2015, Case C- 62/14, *Gauweiler and Others v. Deutscher Bundestag*.

This presumption of relevance is strengthened by the fact that both the minutes and the draft act were submitted to the CJEU and evaluated. The AG argued in favour of the press release as a reviewable act, whereas the Court has introduced a new precedent, whereby there can be an indirect review of EU acts, similarly to what happens in indirect reviews of national law in preliminary references.² Furthermore, the CJEU seems to expand the objectives related to price stability in a way that includes economic policies, thus implying – although not openly – that a subject matter assigned to the coordination among Member states could slowly be attracted within EU competence.³

The informality of the sources in the case related to OMT is very different from other means of communication adopted by the ECB in the past, for example when it addressed ‘letters’ to national governments, with the request to keep them confidential. In the end, national newspapers scooped these documents and published their contents to stem public debate.⁴ Informality, in this case, provoked unexpected consequences and introduced a new element of reflection on the ECB’s communicative strategy.

In all other cases, albeit in different ways, the ECB delivers as a communicator and uses ‘speech acts’ in a convincing way, with a view to reaching a vast and articulate audience. Because of their impact on such different receivers, strategies in communication should not jeopardise ECB’s independence, but rather serve the purpose to expand its own institutional standing.

In *Gauweiler* the CJEU confirms that the ECB acted within its own competences and that the highly technical nature of its choices, combined with the assessment of risks, may limit judicial review.⁵ The ‘speech act’ was a successful communication, inasmuch as the announcement made in the press release was deemed to be in compliance with macroeconomic programmes.

Another initial point deserves to be considered. When discussing OMT, economists were asked to contribute with their own expertise in setting the scene and in preparing what would have then become a communication addressed to the media. Despite differences in the evaluation of the

² D. Sarmiento, *The Luxembourg “double look”: a comparative study of the advocate general’s opinion and the judgment in the OMT case*, in F. Fabbrini (ed.), *supra* n. 1, p. 50. See CJUE, judgement 16 June 2015, Case C-62/14, *Gauweiler and Others v. Deutscher Bundestag*, para. 30-31.

³ R. Cisotta, *Financial stability and the reconstruction of the EU legal order in the aftermath of the crisis*, ECB Legal Conference, From Monetary Union to Banking Union, on the way to capital Markets Union. New Opportunities for European Integration, December 2015, p.294-295 with references to passages in *Gauweiler*.

⁴ Letters were sent, for example, to the Spanish and the Italian Governments, urging for specific reforms. See the country reports by M.L. Rodriguez and A. Lo Faro in C. Kilpatrick, B. De Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges*, EUI Department of Law Research Paper No. 2014/05.

⁵ CJUE, judgement 16 June 2015, Case C-62/14, *Gauweiler and Others v. Deutscher Bundestag*, para. 68. On this specific point, see C. Zilioli, *The ECB’s powers and institutional role in the financial crisis A Confirmation from the Court of justice of the European Union*, in F. Fabbrini (ed.), *supra* n. 1, p. 173.

measure to be adopted, all such expert witnesses added to the centrality of the issue at stake. It is now impossible to deny that the ECB has exercised its power in a new fashion, in anticipation of potential critique that could have been raised.

As much as this strategic communication may appear innovative, one cannot ignore that experts' opinions, supplied as a form of support to what would have become – and indeed could still become – a legal act, creates a sense of collective responsibility, in view of maintaining the independence of the institution which should finally deliberate on the matter.

The acknowledgment that a not yet formally enacted act can become relevant in legal scrutiny represents the apex of previous discussions on several measures drafted and adopted under the pressure of an unprecedented economic and financial crisis. That state of emergency produced, over the years, departures from a traditional and consolidated European legal method and presented new challenges in balancing rights with monetary and economic policy priorities. To take one example, there is uneasiness in legal scholarship, when it comes to evaluating the nature of memoranda of understanding and locating their place among EU sources.

Because of all these reasons – and many more having to do with the close interconnection of sources – we argue that the discussion raised by the *Gauweiler* judgment offers an opportunity to reconsider the metaphor of 'dialogue', so often used when preliminary references are at stake. The AG Cruz Villalón suggests this in his opinion, when he emphasises, not without a touch of irony, the quotations made by the FCC to its own case law, in the text of the reference sent to the CJEU.⁶ Rather than engaging in a dialogue, the German Court intends to clarify the consistency of its own arguments. It is interesting to underline this point as a sign of continuity in that Court's case law and as a way to confirm its original approach.

However, the rhetorical device chosen by the FCC may suggest that dialogues between courts are now, under more critical circumstances, less intuitive. There may be cases in which, talking to each other implies a strategy, or even a negotiation, which is expected to become a follow up of the conversation.

Earlier on in his Opinion the AG points to the 'intensification' of the EU legal order as an explanation of the changing attitude of constitutional courts in Member States, better prepared than in the past to behave as EU courts or tribunals, following Article 267 TFEU.⁷ However, the

⁶ CJUE, judgment 16 June 2015, Case C- 62/14, *Gauweiler and Others v. Deutscher Bundestag*. Opinion of AG Cruz Villalón, para 48.

⁷ *Ibid.* para. 40.

reference in the *Gauweiler* case is depicted, in between the lines of the AG's Opinion, as a peculiar one, a strenuous defence of German constitutional identity, albeit within the framework of sincere cooperation.

It is worth noting that although the case did not concern Article 4 (2) TEU, the CJEU, looking at the balance to be established with national identities, is assertive on the binding and authoritative nature of its own rulings. This is a way to confirm the 'irreversibility' of the monetary union and the ECB's crucial role in preserving it.⁸

Taking a closer look at the approach chosen by FCC, it is not so much the nature of legal sources or even the hierarchy among the same to be considered central for the Court. The key point remains the definition of competences, more arduous now than before, because of the increasing interconnections of legal orders, kept together by a single currency.

One could argue that the style adopted by the FCC seeks to set a new precedent, but it may not necessarily be followed by other referring courts. For this reason and for the peculiarities of the subject matter to be dealt with, the German reference serves the purpose of signalling differences with the attitude shown by the ICC, to which we shall now turn.

2. New conversations: the Italian Constitutional Court's preliminary references

The relationship between the ICC and the Court of Justice has been developing slowly over several decades. It is, at a closer look, an intense relationship, based on mutual respect. The ICC started fully operating in 1956, not long before the Treaty of Rome was signed, and it delivered the judgment in *Costa v. E.N.E.L.* in February 1964, not long after the common market began operating.⁹ On the ground of the very special role played by Article 11 of the Italian Constitution,¹⁰ the ICC was reluctant to accept limits to its own competence, and ruled that the application of

⁸ Michael. A. Wilkinson, *The Euro is irreversible! Or is it?: On OMT, Austerity and the Threat of "Grexit"*, German Law Journal, 2015, 4, p. 1050-1051.

⁹ ICC, judgment No. 14, 24 February 1964.

¹⁰ According to which «Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy shall promote and encourage international organisations furthering such ends» (the English translation of the Italian Constitution can be found on the website of the Presidency of the Republic http://www.quirinale.it/qrnw/statico/costituzione/pdf/costituzione_inglese.pdf). All quotations in this paper are taken from this English version. References to art. 11 in comparison with the Irish case, are in P. Charleton and A. Cox, *Accepting the Judgements of the Court of Justice of the EU as Authoritative The Supreme Court of Ireland, the European Stability Mechanism and the Importance of Legal Certainty*, in F. Fabbrini (ed.), *supra* n. 1, p. 207.

European law was subject to the rule of *lex posterior derogat legi priori*. The defence of competences was considered strictly connected to the exercise of state sovereignty.

Article 11 of the Italian Constitution had originally been conceived as a constitutional justification for Italy's adhesion to the United Nations. As a result, it took a while for this provision to develop into a strong link to the Treaty of Rome and a tool to facilitate compliance with European law. The position of the ICC *vis-à-vis* European law was understandably hesitant in *Costa v. E.N.E.L.* and yet it provoked a reaction.

The answer from the Court of Justice, which arrived in July 1964,¹¹ was straightforward and clarified the binding nature of European law and the limits to be set to state sovereignty.¹² As a result of the decision of the Court of Justice that European law is supreme over conflicting national law, the referring court in Milan, where litigation proceedings were initiated, had to intervene again and enforce the Court of Justice ruling, despite the fact that the ICC did not rule unconstitutional the Italian law in question in the case.¹³

If we move ahead in the history of judicial conversations between Rome and Luxembourg, we find that the description of two distinct and autonomous legal orders, albeit subject to coordination, offered in *Granital*,¹⁴ sounds like a tale of the past. However, that decision, coming after the Court of Justice's 1978 ruling in *Simmenthal*,¹⁵ shows the willingness of the ICC to recognize that EU law is directly enforceable by national judges, who should disregard previous or subsequent laws, when they come into conflict with European law.

The slow and yet intense process started by the ICC, with a view to encouraging all necessary institutional changes, is confirmed by the enactment in 2001 of a constitutional revision act by the Italian Parliament. With the clear scope to clarifying legislative competences between the state and the regions, the 2001 reform introduced in the new Article 117 of the Italian Constitution the principle that limits to national and regional legislatures are set by the Constitution, as well as by EU law.

The early resilience shown by the ICC, in coming to terms with a supranational legal order and in fully complying with it, can be, at least partially, explained by taking into account the strong and

¹¹ CJEU, judgment 15 July 1964, Case C-6/64, *Flaminio Costa v. E.N.E.L.*

¹² The 'anniversary' of Case C-6/64 *Flaminio Costa v. E.N.E.L.* 50 years later, is discussed by B. Nascimbene (ed.), *Costa/Enel: Corte Costituzionale e Corte di giustizia a confronto, cinquant'anni dopo*, Milano, Giuffrè, 2015.

¹³ Giudice conciliatore di Milano, 4 May 1966, reproduced in *ibid.*, p. 173 et seq.

¹⁴ ICC, judgment No. 170, 5 June 1984. An English translation of this leading case is in A. Oppenheimer (ed.), *The relationship between European Community law and National Law: the Cases*, Cambridge CUP, 1994, p. 643.

¹⁵ CJEU, judgment 9 March 1978, Case C-106/1977, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*.

pervasive role of legal culture, which emphasized and expanded the interpretation of fundamental values – including social values – deeply rooted in the Italian Constitution. The theory of counter-limits should be contextualized and referred to such traditional grounds. That theory could possibly be subject to reconsideration, in the light of changing equilibriums within the EU and because of new, more controversial inter-institutional balances.

The protection of national identities and of fundamental rights enshrined in constitutional traditions cannot rest on defensive attitudes. It should foster, under exceptional circumstances, a pro-active role of institutions, including courts. This intuition is suggested, for example, by the disputed enforcement of memoranda of understanding in bailout countries, during the most dramatic phases of the crisis and by the many challenges filed with international organizations, other than the EU.¹⁶ The current discussion on austerity measures, affecting weak and marginal citizens,¹⁷ should be confronted with the equally delicate balance of powers discussed in the *Gauweiler* case. The two fields are separate and so are the underlying legal implications. However, we witness in both cases the urgency to expand some institutional powers and to force the EU legal order into new tasks and new dimensions. The legal nature of sources, well beyond legal formalism, becomes very relevant whenever the protection of fundamental rights is at stake

In a comparative perspective, we can throw new light on Article 11 of the Italian Constitution and value its impact even in current discussions. It offers now, as it did in the past, a tool for mediating conflicting competences: limits to sovereignty are acceptable, as long as a scope, common to other states, is to be reached.¹⁸

This approach can be confronted with Federico Fabbrini's notion of equality among Member States of the EU, presented as a provocative answer to the unsettled debates originated by the *Gauweiler* decision.¹⁹ Equality, in his words, could be interpreted as complementary to the notion of solidarity,

¹⁶ A. Fisher Lescano, *Human Rights in Times of Austerity Policy. The EU institutions and the conclusion of Memoranda of Understanding*, ZERP, Bremen, 17 February 2014, a study published under the auspices of Austrian unions, ETUI and ETUC. See also M.-C. Escande Varniol, S. Laulom, E. Mazuyer, *Quel droit social dans une Europe en crise?*, Brussels, Larcier, 2012; C. Kilpatrick, B. De Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, EU Department of Law Research, Paper No. 2014/05; K. Tuori, K. Tuori, *The Eurozone Crisis. A Constitutional Analysis*, Cambridge, CUP 2014.

¹⁷ Z. Darvas and O. Tschekassin, *Poor and under pressure: the social impact of Europe's fiscal consolidation*, Bruegel Policy contribution 2015/4, March 2015.

¹⁸ The position taken by the Italian government in the *Gauweiler* case, arguing for the binding force of EU sources, can also be explained in the light of this constitutional tradition. See, P. Charleton and A. Cox, *Accepting the Judgments of the EU Court of Justice as Authoritative: the Supreme Court of Ireland, the European stability Mechanism and the Importance of legal Certainty*, *supra* n. 9. An example of disagreement is offered by the Czech Constitutional Court. See Z. Kühn, *Ultra Vires Review and the Demise of Constitutional Pluralism. The Czecho-Slovak Pension Saga, and the Dangers of State Court's Defiance of EU Law*, in F. Fabbrini (ed.), *supra* n. 1, p. 185.

¹⁹ F. Fabbrini, *After the OMT Case: The Supremacy of EU law as the Guarantee of the Equality of the Member States*, in German Law Journal, 2015, 4, p. 1003 ff.

which runs through the TFEU, when it comes to protecting financial stability, a condition to grant political steadiness, particularly within the Euro area.²⁰

Let us now return to the new conversation started by the ICC in 2008, when it requested, for the first time, a preliminary reference ruling from the Court of Justice.

The possibility to use such a procedure was at first acknowledged by the ICC in decision No. 168 of 1991,²¹ in which the ICC spoke about «the power [*facoltà*] to raise itself a preliminary reference for interpretation in the sense of article 177» EEC.²²

Only four years later however this precedent was overruled²³ when the ICC affirmed that because of the substantial difference between its role and powers, unprecedented in the Italian legal system, and the role and powers that historically characterize common judges, it could not be considered as a national judicial institutions in the sense then indicated by *ex* Article 177 EC (now Article 267 TFEU).²⁴

The path followed afterwards by the ICC in trying to establish a conversation with the Court of Justice consisted of two steps.

In 2008,²⁵ the ICC sent a preliminary reference in the context of direct proceedings (*giudizio in via principale*), in which either the government or a regional authority can request the constitutional review of the respective laws within a term of 60 days after publication. In this particular case, the government had challenged a Sardinian regional law, which introduced a regional tax on tourist stopovers by aircraft and recreational crafts, applicable to natural and legal persons resident outside the region, with reference to Article 117(1)²⁶ of the Constitution, due to a breach of Articles 49 (free provision of services) and 87 (prohibition on state aid) of the then EC Treaty (now Articles 56 and 107 TFEU).

²⁰ Along these lines, see the analysis developed by R. Cisotta, *Disciplina fiscale, stabilità finanziaria e solidarietà nell'Unione europea ai tempi della crisi. Alcuni spunti ricostruttivi*, *Diritto Unione Europea*, 1/2015, p. 53 ff.

²¹ ICC, judgment No. 168, 8 April 1991.

²² Our translation.

²³ ICC, order No. 536, 15 December 1995.

²⁴ It has been noted the «lack of coherence» between the fact that the ICC did not consider itself to be a referring judge and the fact that the same Court, according to its own consolidated case-law, had always considered itself as an *a quo* (referring) judge with regard to the possibility to raise before itself questions of constitutionality concerning national legislation. See F. Fontanelli and G. Martinico, “Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice”, 16 *European Law Journal* 2010, p. 359-360.

²⁵ ICC, order No. 103, 13 February 2008. Comments on the decision and on its historical background in L.S. Rossi, “Recent Pro-European trends of the Italian Constitutional Court”, 46 *Common Market Law Review* 2009, p. 319 et seq.

²⁶ According to which «Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU-legislation and international obligations».

In a *revirement* with regard to its 1995 declaration of incompetence to raise a preliminary reference to the Court of Justice, the ICC stated that «regarding the existence of the conditions necessary in order for this court to make a preliminary reference to the European Court of Justice on the interpretation of Community law, it should be pointed out that, albeit in its particular role as supreme constitutional guarantor of the national legal order, the Constitutional Court amounts to a national court within the meaning of Article 234(3) of the EC Treaty and, in particular, a court of first and last instance (since – pursuant to Article 137(3) of the Constitution – its decisions are not subject to appeal): therefore, in constitutionality proceedings in which the court is seized directly, it has the right to make a preliminary reference to the European Court of Justice».

The Court added that, «in contrast to those concerning an incidental appeal», in direct proceedings it «has the sole right to pass judgment on the dispute» so that, «were it not possible to make a preliminary reference in accordance with Article 234 of the EC Treaty in constitutionality proceedings where the court has been seized directly, the general interest in the uniform application of Community law, as interpreted by the Court of Justice of the European Communities, would be harmed».²⁷

The second step, in order to engage in a more complex conversation with the Court of Justice, was taken by the ICC in 2013,²⁸ when the preliminary reference was raised in *incidenter* proceedings (*giudizio in via incidentale*). In such circumstances, a judge refers to the ICC a question regarding the constitutionality of the law, after having considered that the provisions to be applied to the case he is handling are likely to be in conflict with the Italian Constitution. In this specific case the ICC examined a reference from two district courts, concerning employment legislation, which permitted teachers to be appointed under successive fixed-term contracts, without setting a limit on the total duration of the appointments or the number of renewals, and with no provision for the payment of damages in the event of abuse. The referring courts, with reference to the principle contained in Article 117(1) of the Italian Constitution, asserted that the above-mentioned legislation was in conflict with clause 5(1) of the Framework Agreement on fixed-term work annexed to Council Directive 1999/70/EC²⁹.

The ICC deemed it necessary to refer a preliminary ruling to the Court of Justice on the interpretation of clause 5(1), stating that «by the aforementioned order n. 103 of 2008, this Court

²⁷ The English translation of orders No. 103 of 2008 and No. 207 of 2013 (quoted hereafter) can be found on the ICC Website, http://www.cortecostituzionale.it/ActionPagina_1260.do.

²⁸ ICC, order No. 207, 3 July 2013.

²⁹ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, [1999] OJ L 175/43.

referred a question for a preliminary ruling within proceedings in which it had been seized directly; it must be concluded that this Court also has the status of a “national court” within the meaning of Article 267(3) of the Treaty on the Functioning of the European Union within proceedings in which it has been seized on an interlocutory basis».

With the 2013 reference, the ICC has therefore clearly recognized its own competence to seek a preliminary ruling not only in direct proceedings but also in *incidenter* ones. This step is of manifestly great importance, considering that in *incidenter* proceedings the Court fully plays its role as a judge of fundamental rights, whereas in direct proceedings disputes are between the state and the regions.

For a better understanding of the significance of this order for reference to the Court of Justice, it must be considered that the ICC case-law in which the assumed violation of EU law is a prerequisite of the alleged contrast with the Italian Constitution (particularly, with Articles 11 and 117(1)), is based on the mechanism of “double preliminary”. In all such cases, in the absence of univocal case-law of the Court of Justice, the ICC asks ordinary judges to raise the question of constitutionality only after having raised the question of interpretation of EU law before the Court of Justice. The ICC considers that a correct interpretation of EU law, to be acquired through a preliminary reference, is an indispensable requirement to integrate two prerequisites for admissibility of the question of constitutionality, namely *rilevanza* (the requisite to apply the norm) and *non manifesta infondatezza* (the existence of a doubt concerning the constitutionality).

The interesting point to investigate is why, in issuing order No. 207 of 2013, the constitutional judges chose not to return the question of constitutionality to the two referring district courts. The latter in fact could have been asked to refer directly to the Court of Justice the question of conformity of national employment legislation on fixed-term work with clause 5(1) of the Framework Agreement annexed to Council Directive 1999/70/EC.

One possible answer to the question is the following. The two referring courts had offered extensive arguments illustrating the lack of interpretative doubts, in terms of the existence of a contrast between EU secondary law and national law, since clause 5(1) of the Framework Agreement was, in their view, an *acte clair*.

The ICC, on its part, knew that whereas the referring courts and, more generally, lower ordinary judges, were convinced of the contrast between Italian law and the principles of the EU Framework

Agreement, the Italian Supreme Court (*Corte di Cassazione*) had an opposite opinion.³⁰ These two opposing certainties turned into a doubt for the ICC about the correct interpretation of clause 5(1) of the Framework Agreement.

Whatever the underlying intuitions of the ICC might have been, the point to be stressed is the cooperative attitude inspiring the ICC's reference, in bringing forward 'general reasons', when it comes to interpreting a EU source. One could argue that, unlike in the reference made by the FCC in the *Gauweiler* case, here the issues at stake are grounded in a framework directive, that is to say in secondary legislation shaped by the social partners and then transposed into a binding legal act.³¹ Articles in such directives reflect the style of the negotiators signatories to the Framework Agreement and are, because of this, less precise in their formulation, and subject to different interpretations, when transposed by national legislatures. Hence, the ICC's reference dealt with an issue carrying implications substantially different from the ones under the lenses of the FCC.

Furthermore, fixed term contracts have been at the core of the Court of justice's case law in crucial decisions dealing with the public sector. The Court had to comply with the principle of equal treatment between private and public sector workers and make sure that no abuse was made in recourse to such flexible contracts of employment. However, it could not ignore that national legislatures should retain their discretion, when seeking the resources necessary for expanding permanent employment.

The response to the ICC order for reference arrived in November 2014. In its preliminary ruling,³² the CJEU held that clause 5(1) of the Framework Agreement on fixed-term work must be interpreted as precluding a national legislation, such as that under constitutional scrutiny in the proceedings before the ICC, which, pending the completion of competitive selection procedures for the recruitment of tenured staff, authorizes the renewal of fixed-term employment contracts to fill posts of teachers that are vacant and unfilled, without stating a definite period for the completion of those procedures and while excluding any possibility, for those teachers, of obtaining compensation for any damage suffered on account of such a renewal.

³⁰ Italian Court of Cassation, judgment No. 10127 of 2012.

³¹ The history of the negotiations leading to the signature of the Framework agreement on fixed-term work in March 1999, then followed in June 1999 by the adoption of the Directive implementing the agreement, is in C. Vigneau et al., *Fixed-term work in the EU. A European Agreement against Discrimination and Abuse*, Stockholm, National Institute for Working Life 1999.

³² CJEU, judgment 26 November 2014, Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13, *Raffaella Mascolo and others v. Ministero dell'Istruzione, dell'Università e della Ricerca*.

After the clear statement of the Court of Justice, indicating that the Italian law was not complying with EU law, it is now for the ICC to decide on the constitutionality of it, with reference to Article 117(1) of the Italian Constitution, read in conjunction with clause 5 of the Framework Agreement. The case will be heard at the public hearing scheduled for 17 May 2016.

Meanwhile the legislature has intervened in compliance with the Court of Justice's ruling, showing that, pursuant to the margin of appreciation it enjoys, its powers are closely connected with the availability of resources. Hence, the obligation to take into account the ruling and apply it has been incorporated in a wider reform of the school system.³³

The case in *Mascolo* opens up new horizons in Italian scholarship, in contemplation of a 'full dialogue' between the ICC (together with other Member State's constitutional courts) and the Court of Justice. This could be a way to echo the Italian (and other Member State's) voices in Luxembourg, with regard to fundamental rights and help defining EU's obligations to respect the constitutional identity of Member States provided for in Article 4(2) TEU.³⁴

3. Concluding remarks: different conversations for different subject matters

The preliminary references sent to the Court of Justice by the ICC in 2013 and by the FCC in 2014 differ deeply.

This has to do in particular with the subject matter concerned in the two references. The FCC raised the question of whether an act of an institution of the Union, such as the OMT program of the ECB, could be covered by the powers of that institution as defined by EU primary law. The ICC sought to ascertain whether national legislation complied with EU secondary law. On the one hand, there is a question as to the competence of the Union, on the other hand the compatibility of national legislation with a directive is at stake.

The difference, as to the concerned subject matter, probably explains the different attitude shown by the two courts. By engaging in a new conversation with the Court of Justice, both of them have chosen to take an opportunity and make their voices heard in Luxembourg. Each of them with its own style pursues the objective to enforce the constitution and define competences.

³³ Law 13 July 2015, No. 107.

³⁴ See O. Pollicino, *From Partial to full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court*, 10 *European Constitutional Law Review* 2014 p. 143 et seq.

In this respect, however, the attitude shown by the FCC can appear more assertive than the one shown by the ICC. The majority of the Second Senate of the FCC expressed serious doubts about compliance of the OMT program with the provisions of the TFEU, in which the ECB's powers are identified. Moreover, in its final statement the FCC affirms that «the identity review is not to be assessed according to Union law but exclusively according to German constitutional law», thus reserving to itself the right to have the last word.³⁵

We argued in this paper that the definition of competences and the reluctance to abandon state sovereignty were the reasons that made the ICC hesitant, if not confrontational with the Court of Justice, in the early days. That old style, however, has now developed into something new, which might provoke the adoption of a new language and show the good sides of changes in inter-institutional communications. From this point of view, the ICC offers a model of cooperative approach in the use of the preliminary reference procedure that other national supreme and constitutional courts may consider.

³⁵ FCC Case No. 2 BvR 2728/13 para. 103.

