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**IMPLEMENTING EUROPEAN LAW PRINCIPLES IN THE
FRAMEWORK OF TRANSFORMATIONS OF THE
RELATIONSHIPS BETWEEN NATIONAL LEGAL SYSTEMS
AND EU LAW. REFLECTIONS ON THE RULING OF THE
ITALIAN CONSTITUTIONAL COURT No. 181/2024**

ABSTRACT

The Paper aims to analyze the issue of implementing European law principles within the national legal systems, as a phenomenon related to the expansion of the fields of European action. This expansive trend produces a transformation of the coordinates within which the dialogue between the European and national legal systems is placed, in particular with regard to the impact of the Charter of Fundamental Rights of the EU (directly applicable and therefore cause of expansion of the area of possible conflicts with domestic law), the growing protection of the fundamental rights of European citizens, and the tendency to formalize European Law Principles in primary European law with their express provision in the treaties and with the attribution to them, to many of them, of a constitutional value.

In this context the judgement of the Italian constitutional Court n. 181/2024 fits in. The paper will move from its reasoning in order to show the interaction between all this issues, that are not lying on the ground of the dialogue between legislators (European and national) and judges, but highlight the need to refer the implementing dimension of European law principles to the dialogue between administration and national (common) judges. According to the ruling's reasoning, the inadequacy of the disapplication tool in order to effectively defend the primacy of European law would arise, among others, precisely in the cases where public administration continues to apply uncertain and controversial provisions. On the other hand, the judgement deals with one of the general principles, namely the non-discrimination principle, which appears as a paradigmatic field of analyses of issues such as those here mentioned.

KEYWORDS: eu law implementing processes - national public administrations - plurality of actors - transformation - non-discrimination principle.

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1. The plurality of actors involved in implementing EU law principles

There are many perspectives of analysis to address the issue of the application of the principles of European law in national administrative law. Among these, the one adopted in this essay, mostly focuses on the interaction within that process between different and several actors, additional than administrations. The perspective herewith proposed also stresses – as it will be underlined – the value and the effects of transforming factors on the said implementing process.

On a general point of view, this approach might appear to be a somewhat different perspective from the most usually proposed with regard to the implementation of EU law principles, looking at the latter as an hermeneutic operation which refers the process at issue essentially to a matter for national administrations, if not confined to the activity of national administrative authorities.

Nevertheless on a closer inspection, attention paid to a plurality of actors involved in the implementing dynamic is fully coherent with the purpose – which underlines the subject of reflection to which we are called¹ – to exhibit national administrative legal systems as a field of application of European law principles.

In this perspective, on one hand, it is worth noting that the administrative activity itself cannot be reduced to a mere execution of legal provisions, and in this sense the idea that powers conferred to public bodies are exhausted in a pure law-execution must be considered definitively outdated. The same idea of the incompleteness of the normative level², that needs to be completed through the administrative procedure, and therefore through a job which is partly a creative one³, militates in this direction. These are all outcomes that the so-called “Result-based Administration” helps to corroborate, in particular by paying attention to the result as an essential reference in the exercise of administrative activity, as an element that is placed within legality, so that the legality itself is not only compliance with the regulatory provisions but also a tool to assess the consistency with the objective

1 This Paper develops the reflection carried out in the context of the Conference “Implementing European Law Principles in National Administrative Law”, that took place at the University of Rijeka, Faculty of Law, on 17 and 18 February 2025.

2 On the incompleteness of the legal provisions (conferring administrative powers) see A. FALZEA, *Teoria generale del diritto*, Milano, 1999; M. SPASIANO, *Spunti di riflessione in ordine al rapporto tra organizzazione pubblica e principio di legalità: la regola del caso*, in *Dir. Amm.*, 2000, 131 ss.

3 On this aspect it is worth mentioning the position taken by G. BERTI, *La responsabilità pubblica (Costituzione e amministrazione)*, Padova, 1994, 371: “Administration is not execution of laws, as well as it is not economic freedom. It cannot accept orders given by the law-maker, but neither can it impose on the market rules that it does not accept and make its own. In reality, the administration receives regulatory impulses from one or the other of the spheres just mentioned, and it is its prerogative to derive from the comparison between the directive of the legislator and the market convention, which constitutes precisely its own code”.

whose pursuit legitimizes the power of the authority⁴. In line with the approach that is being considered, it is clear that the implementation of the principles emphasizes, even more than the implementation of the rules, this creative rather than executive role of public administration. Actually, within principles' implementation the public administration contributes to creating the rule of the concrete case⁵, in accordance with the idea of the growing complexity of the context in which public bodies are called to exercise active administrative functions⁶. Convergent with the value exhibited by legal principles in the governance of complexity, appears the role played by them within the whole modern administrative law and the system which binds EU Law and Member States' legal systems, since they appear – thanks to their indeterminacy – to be able to bring back to a system the complex and disordered set of sources characterizing the law of our time, and to allow administrative law to be reconstructed beyond the boundaries of state law⁷.

⁴ On the polisemic notion of “Result-based Administration”, see the wide analysis of M. SPASIANO, *Funzione amministrativa e legalità di risultato*, Napoli, 2003; and most recently M. SPASIANO, *Dall'amministrazione di risultato al principio di risultato del Codice dei contratti pubblici: una storia da scrivere*, in *Federalismi.it*, 2024, 206 ss.; M. SPASIANO, *La codificazione dei principi del Codice dei contratti pubblici e, in particolare, del risultato, alla prova del correttivo*, in *Federalismi.it*, 2025, 10, p. 191 ss.; M. TRIMARCHI, *Il risultato dell'amministrazione: un quadro d'insieme*, in *Dir. Amm.*, 3/2025, 803 ss.. On the subject see also A. POLICE, *Amministrazione “di risultati” e processo amministrativo*, in M. Immordino, A. Police (cured by), *Principio di legalità e amministrazione di risultati*, Torino, 2004, 102 ss.; A. ROMANO TASSONE, *Amministrazione “di risultato” e provvedimento amministrativo*, in M. Immordino, A. Police (cured by), *Principio di legalità e amministrazione di risultati*, Torino, 2004, 11 ss.; L. IANNOTTA, *Previsione e realizzazione del risultato nella pubblica amministrazione: dagli interessi ai beni*, in *Dir. amm.*, 1999, 64. On the case-law that refers to the mentioned deviation from the goal (result), instead of a mere formal legality, as a parameter of judicial assessment, see TAR Campania, Napoli, Section V, 17.5.2019 n. 2616; Section VII, 28.7.2014 n. 4339; TAR Lombardia, Milano, Section III, 8.6.2011 n. 1428. The “Result-based Administration” as a canon is at the core of the Ruling of Italian constitutional Court n. 32 of 2024, which rejected the complaints of constitutional illegitimacy raised against the law which temporarily limited the administrative responsibility of public officials before the Corte dei conti, by revealing the contradictions that concern, on the one hand, the need for efficiency in the administration, and, on the other hand, the complications that derive from too many rules and the complexity of the job of the public administrator in modern “society of risk”. For a comment on the judgement see F. CINTIOLI, *La sentenza della Corte costituzionale n. 132 del 2024*, in *Federalismi.it*, 2024.

⁵ On this point see again M. SPASIANO, *Dall'amministrazione di risultato al principio di risultato del Codice dei contratti pubblici: una storia da scrivere*, cited.

⁶ A. ZITO, *La funzione amministrativa nella riflessione giuridica: una nozione meramente descrittiva o connotativa?*, in *Ceridap*, 2/2024, 228 ss.

⁷ A deep analysis of the value exhibited by principles in the framework of EU administrative law is carried out by D. DE PRETIS, *I principi nel diritto amministrativo dell'Unione europea*, in M. Malo, B. Marchetti, D. De Pretis (cured by), *Pensare il diritto pubblico: liber amicorum per Giandomenico Falcon*, Trento, 2015, 123-152, who, on this point, refers to Schmidt-Aßmann's position (expressed in *Verwaltungsrechtliche Dogmatik. Ein Zwischenbilanz zu Entwicklung, Reform und zukünftigen Aufgaben*, Tübingen, 2013) about the aptitude of principles in the Community context to go beyond the merely programmatic dimension that characterizes them at national level and to act as real legal norms. On the topic see also G. Della Cananea, C. Franchini (cured by), *I principi dell'amministrazione europea*, Torino, 2017; C. FRANCHINI, *I principi applicabili*

On the other hand, the implementation clearly appears as a task, as a role, that involves many more actors than national administrations: namely national courts, and among them, not only “common judges”⁸, but of course, even constitutional courts⁹, and law-makers¹⁰, as I will try to clarify later on.

1.1. The fundamental role played by Courts

In this perspective the choice to draw the subject for analysis around the themes of the role played by national jurisdictions; administrative disputes or the functions performed by national high administrative courts, easily shows that the debate about the EU principles implementation involves the jurisprudential dimension as a fundamental factor of the application of such principles¹¹. In this sense it is worth pointing out that the opening provision laid down by the Italian Code of Administrative Process, within the scope of a rule dedicated to the “effectiveness”¹², provides that “Administrative jurisdiction ensures full and effective protection in accordance with the principles of the Constitution and European law”. Therefore, the principles clearly represent the perimeter within which the role of guaranteeing normative consistency carried out by the judges is called upon to take place.

ai procedimenti amministrativi europei, in *Riv. it., dir. pubbl. com.*, 5/2003, 1038 ss.; T. TRIDIMAS, *The General Principles of EU Law*, Oxford, 2006; J. SCHWARZE, *I principi dello stato di diritto per l'azione amministrativa nella “vecchia” e “nuova” Unione europea*, in *Riv. it. dir. pubbl. com.*, 2004, 1279 ss.. On the issue, in order to underline the influence of the European Law on the structuring process of administrative law principles see A. MASSERA, *I principi generali dell'azione amministrativa tra ordinamento nazionale e ordinamento comunitario*, in *Dir. amm.*, 2005, 730; G. POLI, *I principi nel diritto amministrativo. Tracce di un cambiamento in corso*, Napoli, 2023.

⁸ Just in order to mention one of the main problems arising within the implementation processes in national laws of rules and principles imported from supranational legal contexts, reference can be made to the debate about the consistency of jurisprudential interpretation and about the role of national common judges in fighting normative inconsistencies: see among others, G. MARTINICO, *The Importance of Consistent Interpretation in National Constitutional Contexts. Old Wine in New Bottles?*, in *Perspectives on Federalism*, 4, No. 2, 2012, 269-293.

⁹ About the role of constitutional Courts, see, among others: E. LAMARQUE, *Interpreting Statutes In Conformity With The Constitution: The Role Of The Constitutional Court And Ordinary Judges*, in *Italian Journal of Public Law*, October 2010, Vol. 2, No. 1, at <http://www.ijpl.eu/>; G. BETLEM, *The Doctrine of Consistent Interpretation – Managing Legal Uncertainty*, in *Oxford Journal of Legal Studies*, Vol. 22, No. 3 (2002), 398; o O. CHESSA, *Drittwirkung e interpretazione: brevi osservazioni su un caso emblematico*, in *Il giudizio sulle leggi e la sua “diffusione”*, E. Malfatti, R. Romboli, E. Rossi (cured by), Torino, 2002, 420 ss.

¹⁰ The matter at issue however poses a problem of regulation and rule-making. See on this point, S. CASSESE, E. D'ALTERIO, *Introduction: the development of Global Administrative Law*, in *Research Handbook on Global Administrative Law*, Cheltenham, 2016, 1-21; according to them: “in the global perspective, the concept of publicness is also subject to change, because it is influenced by the State in connection with global regulators. The State remains the protagonist, but new actors play the part of deuteragonist (or vice versa)”.

¹¹ On the role of national common judges in implementing EU law principles, see among others M. D'ALBERTI, *Principi del diritto europeo e giurisprudenza amministrativa*, in G. Pellegrino e A. Sterpa (cured by), *Giustizia amministrativa e crisi economica*, Roma, 2014, 277 ss.

¹² Article 1 of the Code of Administrative Process is entitled “Effectiveness”.

A further reason for the significant protagonism of judges in principles implementation process is even intuitive: protection of rights at national level is entrusted to the national judge, so the principles of European law end up finding application even in matters mainly and typically national¹³.

Another aspect concerning the role of judges in the implementation process consists in the fact that national case-law becomes a tool of application and contextual definition of European administrative law, in accordance with a dynamic described as follows. The application and the construction of the principles of European law performed by national judges, has been revealed to be also a phase of construction of European administrative law, which is in turn an osmotic process between different national legal systems (specifically a reconstruction of the solutions adopted in national – Member States' – legal systems on the basis of a selection), in short corresponding to a transition from national legal systems to the European legal order (bottom-up) and their subsequent return from the latter system to the national legal orders (top-down), although they cannot be described as automatisms¹⁴. In the framework of this osmotic dynamic – back and forth – the European Court of Justice carries out, as it is well known, a creative work, but its contribution is then integrated with the one provided by national judges. More specifically, the Court incorporates into European Law as European principles, principles found in national law on the basis of a selection, which usually takes place on recurring principles in national legal systems. Nevertheless, beyond this quantitative recurrence, there are cases in which the selection can also identify values appearing useful for the purposes of European Law but conflicting with general principles common in the Member States¹⁵ or developed, for example, only within a particular legal system.

At this point, and moving back to the plurality of actors involved in the principles' implementation, as process not concerning only public administrations, neither only judicial authorities, it has to be bear in mind that the definition of administrative law itself (even in a mere domestic horizon) implies reference to rules conferring powers on public administrations, and therefore to the

13 In this perspective two reasons have been outlined (D. DE PRETIS, *I principi nel diritto amministrativo dell'Unione europea*, cited): the one referred in the text, namely the entrustment of judicial protection of rights to national judges, and a first one, related to the need to avoid discrimination whenever the application of European law results in more favourable legal treatment than the one reserved for the same situation by national law. The Author adds that "the coincidence between the national level of the European jurisdiction and the national jurisdiction explains why European principles end up imposing themselves even in exclusively national matters". On the matter see also G. FALCON, *Separazione e coordinamento tra giurisdizioni europee e giurisdizioni nazionali nella tutela avverso gli atti lesivi di situazioni soggettive europee*, in *Riv. it. dir. pubbl. com.*, 2004, 1153 ss.

14 D. DE PRETIS, *I principi nel diritto amministrativo dell'Unione europea*, cited, 139-140.

15 This is the case paradigmatically represented in the well known Kobler Ruling (ECJ, Cause C-224/01, 30.9.2003) where the liability of States for damage caused by the exercise of judicial powers contrary to European law was affirmed despite the limitation of liability for judicial activity recognized in all legal systems of Member States.

law-maker as an additional actor, and to the dialogue between national laws and European law with a specific regard to the principles of the latter. More options at this point arise within a range of hypothesis from conformity to conflict between European Union law (and its principles) and national administrative laws. That national administrative law is a natural framework for the application of these principles of European Law is clear by the “return” of the principles of European law to national legal systems. The “descending” process, being not an automatic entry of the european principle into national legal orders, often involves an expansion of the principle beyond the areas pertaining to European law, so that principles’ implementation becomes constant even in cases of mere domestic law¹⁶. Therefore implementing european law principles in national administrative law also becomes the issue of solutions put in place in national legal systems to ensure the compatibility of domestic administrative rights with the principles of european law, or to overcome the conflict between them; ranging those solutions from: the duty to disapply national law conflicting with EU law and the duty to interpret national law in conformity with EU law, with the possibility for preliminary ruling when necessary¹⁷; a limited use of constitutional legitimacy proceedings before the constitutional court – in accordance with the balance established by Granital ruling¹⁸, that is – limited to: hypotheses in which a conflict between national provisions and european rules not directly applicable/self-executing arises, and Articles 11 and 117 of italian Constitution represent the scrutiny parameter; cases in which a conflict between european provisions and fundamental principles of the italian Constitution arises, and there is therefore the possibility of activating the so called “conunter-limitis”. As well known, a further room for the proceedings of constitutional legitimacy has been opened in cases of “dual preliminaryity” – *id est* in cases of disputes that may give rise to questions of constitutional illegitimacy and, simultaneously, to questions of consistency with european Law¹⁹ – when

16 G. FALCON, *Separazione e coordinamento tra giurisdizioni europee e giurisdizioni nazionali nella tutela avverso gli atti lesivi di situazioni soggettive europee*, cited.

17 On the “European Path”, see R. MASTROIANNI, *Sui rapporti tra Carte e Corti: nuovi sviluppi nella ricerca di un sistema rapido ed efficace di tutela dei diritti fondamentali*, in EP, 2020, 493 ss., where the Auhor refers to that path the solution (of conflicts between national and european legal provisions) provided by the Granital Ruling, in accordance to which, whereas the European rules at issue have direct effect and the conflict cannot be resolved by way of interpretation, national judge has to proceed with the disapplication of national rules, whatever their rank in the national legal system and without prejudice of the so called “counter-limits”. The expression “domestic path”, on the other side, refers to the intervention of constitutional Court in the framework of constitutional legitimacy proceedings of a national provision conflicting with articles 11 and 117 of italian Constitution, so that, in the event of ascertainment of the conflict, the internal rule is removed from the legal system with effects *erga omnes*.

18 C. cost. 8.6.1984 n. 170 commented by A. TIZZANO, *La Corte costituzionale e il diritto comunitario ... vent'anni dopo*, in *Foro it.*, 1984, I, 2062 ss.

19 See, for the textual passages here repoted, the well known ruling of constitutional Court n. 269 of 2017. On the so called “Dual Preliminaryity” established by the Italian constitutional Court in its judgement No. 269/2017, the literature is boundless. See, among others, G. Tesauro – P. DE PASQUALE, *La doppia pregiudizialità*, in C. Iannone – F. Ferraro (cured by), *Il*

the question involves (as parameter of scrutiny) the Charter of Fundamental Rights and the fundamental rights protected by national constitutional provisions²⁰. In those cases the national judge must refer the matter to the constitutional Court, but he can also, at any time, raise the questione before the European Court of Justice, so that the primacy of European law is saved. As widely known, the subsequent case-law has corrected the sharpness of the said position, admitting that there is a room for a choice by the common judge between the so called domestic and european path only when the issue of consistency is referable to the Charter of Fundamental Rights or to acts of European Law related to the said Chart, while for other issues the model applicable is the one provided by Granital case²¹. As it appears clear, a complication within the implementation process (as based on the dialogue between the two paths) is of course represented by the Charter of Fundamental Rights of the EU. The latter has in fact enlarged the area of possible conflicts with the national legal orders and laws, not only thanks to its direct applicability, but also by mean of the fact itself that it has allowed the european jurisdictions to deal with fundamental rights, which are right at the heart of national constitutions²². Thus, cases of

rinvio pregiudiziale, Torino, 2024, 341 ss.; G. SCACCIA, *Giudici comuni e diritto dell'Unione europea nella sentenza della Corte costituzionale n. 269 del 2017*, in *Giur. cost.*, 2017, 6, 2948; A. RUGGERI, *Svolta della Consulta sulle questioni di diritto eurounitario assiologicamente pregnanti, attratte nell'orbita del sindacato accentrato di costituzionalità, pur se riguardanti norme dell'Unione self-executing (a margine di Corte cost., n. 269 del 2017)*, in *Riv. Dir. comparati*, 2017, 3, 234 ss.; G. REPETTO, *Concorso di questioni pregiudiziali (costituzionale e comunitaria), tutela dei diritti fondamentali e sindacato di costituzionalità*, in *Giur. cost.*, 6, 2017, 2955-2965; C. CARUSO, F. MEDICO, A. MORRONE, *Granital revisited? L'integrazione europea attraverso il diritto giurisprudenziale*, Bologna, 2020; R. ROMBOLI, *Corte di giustizia e giudici nazionali: il rinvio pregiudiziale come strumento di dialogo*, in *Rivista AIC*, 1, 2014, 1-34; R. BIN, *È scoppiata la terza "guerra tra le Corti"? A proposito del controllo esercitato dalla Corte di Cassazione sui limiti della giurisdizione*, in *Federalismi.it*, 2020; G. MARTINICO, *La doppia pregiudizialità nel diritto comparato*, in *Dir. pubbl.*, 2022, 3, 757-774; L. LORENZONI, *The Doctrine of dual Preliminarity in the case-law of italian administrative Courts*, in *Italian Journal of public Law*, 2023, 41-68.

20 See M. CARTABIA, *Convergenze e divergenze nell'interpretazione delle clausole finali della carta dei diritti fondamentali dell'Unione Europea*, in *Rivista AIC*, n. 4, 2017, pp. 1-17, and M. CARTABIA, *L'ora dei diritti fondamentali nell'Unione Europea*, in M. Cartabia (cured by), *I diritti in azione: universalità e pluralismo dei diritti fondamentali nelle Corti europee*, Bologna, Il Mulino, 2007, 13-66; A. BARBERA, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di giustizia*, in *Rivista AIC*, n. 4, 2017, 1-27.

21 For a summary of the solution embraced by the subsequent jurisprudence and represented by the concurrence of remedies, "more suited to the needs imposed by the european Law" see R. MASTROIANNI, *La sentenza della Corte costituzionale n. 181 del 2024 in tema di rapporti tra ordinamenti, ovvero la scomparsa dell'articolo 11 della Costituzione*, in *Quad. Aisdue*, 1/2025, 1-29. On the subject at issue see also F. FERRARO, *Giudice nazionale, centro di gravità e doppia pregiudiziale*, in AA.VV., *Annali AISDUE*, Napoli, 2021, 511 ss.). See also P. GAMBATESA, *Reversing or Updating Granital? La nuova "regola 181" nell'ambito dei rapporti interordinamentali (in margine a Corte costituzionale, sentenza n. 181 del 2024)*, in *Osservatorio cost.*, 2025, 30, 152 ss.

22 On these profiles see P. DE PASQUALE, O. PALLOTTA, *In tempi di sovranismo la Consulta difende il primato del diritto dell'Unione europea (e l'autonomia dei giudici)*, in *EuroJus*, 4/2024, 172-185.

intertwining between competences of the two jurisdictions can often occur as well as cases of non-application of domestic rules on the basis of disparate and divergent interpretations of the content of fundamental rights recognised by the Charter of Nice, with undeniable repercussions on the domestic constitutional order²³.

Actually through the involvement of national legislator and national laws as interpreters of the overall implementing process of European law principles, involvement of further actors arises: administrations applying national law (in particular provisions conferring powers) and which are obliged to apply self-executing provisions; common national courts on which the same obligation is incumbent; even constitutional courts, as is the case at issue in a recent ruling adopted by the Italian constitutional Court, and in its subsequent case-law.

2. The facts at issue in the Judgement no. 181/2024 and the role of non-discrimination principle

The ruling issued last Novembre by the Italian constitutional Court in fact shows how all these several level of relevance of implementing process (of European Law principles) are intertwined. This intertwining confirms, on one hand, the premise from which this study moved, that is the plurality of actors involved at the same time in the said process: national law-maker, public administration, national (very often administrative) common Courts, constitutional Courts. On the other hand, in order to solve the matter at issue in the judgement before the Italian constitutional Court, a peculiar principle of European Law appears decisive, that is the non-discrimination principle²⁴. This is a para-

23 R. MASTROIANNI, *Sui rapporti tra Carte e Corti: nuovi sviluppi nella ricerca di un sistema rapido ed efficace di tutela dei diritti fondamentali*, cited. See again also P. DE PASQUALE, O. PALLOTTA, *In tempi di sovranismo la Consulta difende il primato del diritto dell'Unione europea (e l'autonomia dei giudici)*, cited.

24 Just as in this ruling, in other decisions of the strand at issue the question of the principle of non-discrimination has been raised. See constitutional Court. Ruling No. 15/2024, about the discriminatory consequences on the basis of nationality produced by regional legislation which made the allocation of a contribution for the purchase of a home as a primary residence subject to the requirement of the absence of property in the national territory or abroad: A. RUGGERI, *Ancora in tema di tecniche di risoluzione delle antinomie tra norme interne e norme sovranazionali self-executing (a prima lettura di Corte cost. n. 15 del 2024)*, in *Consulta online*, 2024, 305 ss.; L.S. ROSSI, *Il nuovo corso della Corte costituzionale italiana sui rapporti con l'ordinamento dell'Unione europea: è davvero una questione di "tono"?*, in *Federalismi.it*, 2025, 14; O. SCARCELLO, *Un altro passo nel processo di riaccostamento del sindacato di costituzionalità eurounitario. Nota a Corte cost., sentenza n. 15 del 2024*, in *Osservat. cost.*, 2/2024, 280 ss. See also constitutional Court., Ruling No. 1/2025, in which the question referred to the Court concerned the requirement of ten-year residence in order to access contributions relating to public housing, regulated in such a way as to violate the principle of equal treatment between long-term residents and national citizens: on it see again L.S. ROSSI, *Il nuovo corso della Corte costituzionale italiana sui rapporti con l'ordinamento dell'Unione europea ... cited*. See also constitutional Court, Order No. 21/2025 cit., by which the Constitutional Court suspended the proceedings to put a preliminary question of interpretation to the Court of Justice regarding the compliance of some provisions of the 2023 Budget Law with the EU Reg. 2022/1854, for having the domestic legislation extended the set of recipients of the "solidarity contribution", with respect to the one identified by the

digmatic principle, since it appears as a typical area of intertwining issues, such as those above mentioned. First of all, the exemplary value of non-discrimination expresses the reason itself underlying the above mentioned phenomenon, that is the expansion and the relevance of European law principles even in mere domestic affairs, since it is necessary to avoid discriminations by preventing a more favorable treatment produced by an European law principle than the one provided by national provision for the same situation²⁵. On the other hand, a significant part of administrative activities consists in managing selective procedures and therefore competitive comparisons (for instance public tender), which brings out the issue of respect for the principle of equal treatment and non-discrimination, and therefore appears as a natural reason to focus on them. In the case of the judgement at issue the administrative judge has in fact recognized a conflict between the national discipline on which an internal competition for the qualification of police inspector had been based and the European prohibition of discrimination on the basis of gender in workplace²⁶.

The issue subject of the constitutional Judgement No. 181/2024 has arisen from a dispute before the Italian High administrative Court²⁷. The appeal had been filed by some assistants of the Penitentiary Police Corps against the

European law: s. L.S. ROSSI, *cited*; P. GAMBATESA, *Reversing or Updating granital? La nuova "regola 181" ... cited*. Also constitutional Court Ruling No. 31/2025, resolves a proposed conflict between the Italian legislation on citizenship income, in particular in the provision of the requirement of ten-year residence for the purposes of receiving the benefit, and the principles of European law of equal treatment and non-discrimination on grounds of nationality: on it see L.S. ROSSI, *op. cit.*; P. GAMBATESA, *op. cit.*; e C. AMALFITANO, *"Tono costituzionale": formalmente conciliante, sostanzialmente preoccupante. Brevi riflessioni a partire dalla sentenza costituzionale n. 31/2025*, in *Riv. del contenzioso eur.*, 2025, 1, 1 ss.

25 D. DE PRETIS, *I principi nel diritto amministrativo dell'Unione europea*, cited above, 144.

26 The non-compliance with the non-discrimination principle was in the judgement referred to: the Directive 76/207/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, which was subsequently replaced by Directive 54/2006/EC; the Directive 2000/78/EC; the Charter of Fundamental Rights (Articles 21 and 23) and the Treaty on the Functioning of the European Union (Article 3, par. 2, and Article 8).

27 To be more precise, the role of the High Administrative Court has been played in the framework of a procedure called "Extraordinary Appeal to the Head of State". While adopting the opinion, provided for by Presidential Decree No. 1199 of 24 November 1971, by Order No. 1449 of 8 November 2023, the Council of State, I Section, ascertained a conflict between the national law applicable to the public selection at issue and the European provisions. It is worth mentioning that the debate on the administrative or judicial nature of the remedy at issue has been strengthened by the legislative amendment (by means of Law No. 69/2009) of the Articles 13 and 14, D.P.R. No. 1199/1971 cited, in particular by foreseeing the possibility for the Council of State to raise questions of constitutional legitimacy before the constitutional Court. On the procedure, see among others, F.G. SCOCA, *Osservazioni sulla natura giuridica del ricorso straordinario al Capo dello Stato*, in *Giur. it.*, 2013, p. 11; S. BATTINI, *Aggiornamento sul ricorso straordinario al Capo dello Stato: l'ircocervo esiste*, in *Giorn. Dir. Amm.*, 12, 2014, 1177-1188; M. CARRATO, *Il ricorso straordinario al Capo dello Stato: uno strumento alternativo alla giurisdizione. Dalla Corte costituzionale all'adunanza plenaria n. 11/2024*, in *Federalismi.it*, 14/2025; A. CARBONE, *Il ricorso straordinario al Presidente della Repubblica come rimedio giustiziale alternativo alla giurisdizione*, in *Diritto Processuale amministrativo*, 1, 2015.; G. MARTINI, *Il ricorso straordinario al Capo dello Stato dopo la riforma introdotta con la legge n. 69/2009*, in *Giust. amm.*, 2010, 689-716.

approval of the final ranking of an internal competition for several (hundreds) posts in the bodies of the penitentiary police, for the male role of inspectors, and against the prerequisite acts. The administrative acts were considered to be in violation of the law, specifically for breach of the principle of non-discrimination on the basis of gender, both with regard to EU law provisions and with regard to national law provisions²⁸. At present case, the Council of State, even if had expressly recognized self-executing provisions²⁹, did not choose the european path, by setting-aside the national conflicting rule or carrying out a conforming interpretation of it. The national provisions at issue³⁰ were disputed for allowing administrations to adopt discriminatory measures on the basis of gender (in that case, notice and final ranking), distinguishing the Italian Law the posts to be put up for competition in the position of inspector of the penitentiary police corps, within the organic endowment of the bodies, according to the gender.

The national provisions have been challenged by the administrative judge within the referral order, cause of an alleged breach of the Italian Constitution under Article 3 – by means of which it would seem conflict with the principle of equality and to be devoid of any reasonable justification – and under Article 117, first paragraph, indicating as interposed parameters, Directives 2000/78/EC and 76/207/EC establishing a general framework for equal treatment in employment and occupation and Articles 21 and 23 of the Charter of Fundamental Rights of the EU, relating to the principles of non-discrimination and equal treatment between men and women.

2.1. The “Constitutional Tone”, the relationship between European and national legal systems and the role of public bodies

Faced self-executing european provisions, the italian constitutional Court, in order to justify its own competence, while safeguarding the principle of primacy of EU law, observes that “it is necessary that the question posed by the referring judge exhibits a ‘constitutional tone’, due to the link with interests or principles of constitutional importance”. In this sense, the constitutional tone would appear as a filter of admissibility of the questions raised to the Constitutional Court, a basis for choosing and preferring the internal rather than

²⁸ In particular the national provisions at issue were Articles 3, 51 and 57 of the italian Constitution.

²⁹ On the subject the literature is boundless. See P. PESCATORE, *The Doctrine of ‘Direct Effect’: An Infant Disease of Community Law*, in ELR, 1983, p. 155; R. MASTROIANNI, *Le norme comunitarie non direttamente efficaci costituiscono parametro di costituzionalità delle leggi interne?*, in *Giur. cost.*, 2006, p. 3503 e ss.; R. MASTROIANNI, *Conflitti tra norme interne e norme comunitarie non dotate di efficacia diretta: il ruolo della Corte costituzionale*, in *Diritto dell’U.E.*, 3/2007, 585 ss.; R. MASTROIANNI, *Efficacia “orizzontale” del principio di eguaglianza e mancata attuazione orizzontale delle direttive comunitarie*, in *Diritti, lavori, mercati*, 2006, 442 ss.; A. PACE, *La sentenza Granital, ventitré anni dopo*, in *Studi sull’integrazione europea*, 2007, 451 ss.

³⁰ The national discipline was laid down by a Legislative Decree no. 95/2017 (art. 44, paragraphs 7 to 11).

the European path. Some perplexities have been raised on this point, as will be said in more detail later on³¹. But in general those perplexities are due to an envisaged marginalization of the “european path”, by means of an alleged encouragement of access to the proceedings of constitutional legitimacy. Nevertheless, it is worth mentioning that the “constitutional tone”, can act as a deflationary tool³² instead of an incentive to the access to the constitutional Court, not being an unknown processual tool, but having been borrowed from the scientific debate on the conditions of admissibility in the framework of conflicts of attribution between the powers of the State or between the State and the regions.

In the exhibition of the “constitutional tone”, the principle of equal treatment between men and women has a decisive influence, since the principles of non-discrimination and equal treatment between men and women, as the Court expressly recognizes, “invests fundamental principles in the constitutional design”, and “with those principles interacts in the review that this Court is called to carry out in the light of Article 3 of the Constitution, in a perspective of effectiveness and integration of remedies/guarantees”³³.

The perspective is therefore the integrated contribution of judicial remedies, which involve the national administrative judge and the constitutional Court, both “committed to implementing European Union law in the Italian legal system, each one with its own instruments and each one within the scope of their respective competences”³⁴. In a context of concurrence of remedies, in which the choice is therefore left to the common national judge (in this case the administrative one), according to the Court opinion there are, however, reasons to prefer the judgment before the Constitutional court over other paths. On this point, the Courts states that “The dialogue with this Court, activated in order to issue ruling *erga omnes*, shows to be very appropriate, whenever the law (national) at issue gives a too wide room for interpretation; or whenever public administration goes further to apply the disputed law or the interpretative issues are likely to have a systemic impact, and to produce their effects beyond the concrete case; or whenever it is

31 Critical concerns have been raised by R. MASTROIANNI, *La sentenza della Corte costituzionale n. 181 del 2024 in tema di rapporti tra ordinamenti, ovvero la scomparsa dell'articolo 11 della Costituzione*, cited; F. FERRARO, *La Consulta si affida al “tono costituzionale” per estendere il suo controllo (anche) sulle norme dell'Unione provviste di effetto diretto*, in *EJ*, 4, 2024, 160 ss.; A. RUGGERI, *La doppia pregiudizialità torna ancora una volta alla Consulta, in attesa di successive messe a punto (a prima lettura di Corte cost. n. 181 del 2024)*, in *Consulta on line*, III, 2024.

32 As P. DE PASQUALE, O. PALLOTTA, *In tempi di sovranismo la Consulta difende il primato del diritto dell'Unione europea (e l'autonomia dei giudici)*, cited, conveniently do, by recalling the formula used by C. MEZZANOTTE, *Le nozioni di «potere» e di «conflitto» nella giurisprudenza della Corte Costituzionale*, in *Giur. Cost.*, 1979, 110 ss., in particular 113, in order to show that the “constitutional tone” has been already used, in the past, in the framework of a “restrictive approach” to the eligibility cases of conflict to raise before the constitutional Court (Rulings No. 10/2017 and 129/2019 cited in the Paper).

33 So the Ruling No. 181/2024 cited, par. 6.3.

34 See, on it, constitutional Court, Ruling No. 149/2022, par. 2.2.2. cited in the Ruling No. 181/2024, and also Ruling No. 15/2024, No. 20/2019, par. 2.3.

necessary to carry out a balance between principles of constitutional nature”.

Thus, in this reasoning, the administrative action in the light of national administrative law appears relevant. As well known, among operators obliged to apply self-executing EU law provisions, to set-aside national provisions conflicting with the former, there are for sure public administrations, besides judges. Nevertheless, a going on use and application (by public bodies) of national rules conflicting with EU law can also occur, due to the “lack of awareness of the aforementioned conflict or due to an interpretation that deny the conflict existence”³⁵. And these interpretative processes are left every day to public administrations, who are called to apply – in the creative manner above mentioned – national administrative law³⁶. This last outcome (in terms of variety of outcomes of this interpretive operation and inability to unequivocally identify the hypotheses of conflict) is so true that the administrative judge, by raising the question before the Constitutional Court, pointed out that in other judgments (on analogous issues) any conflict with the constitutional and EU law principles has been denied³⁷. Besides this, doubts about the direct effectiveness of the EU law applicable could arise: here it’s clear that the “internal or national” path, meaning the raising of the constitutional legitimacy question, allows to eliminate all uncertainty. And in this perspective the Italian constitutional Court goes so far to admit that the question of constitutional legitimacy can be declared well-founded, in the presence of a conflict between domestic law and european law, regardless of the direct effect/self-executing nature of the European provisions at issue. Within the scope of this reasoning, a decisive argument seems to be the legal certainty³⁸: for the benefit of legal certainty it is proper to choose, among several remedies provided and available (and aimed to ensure uniform application of EU law), the removal from the national legal system of the rule conflicting with the principles of EU law, through a constitutional illegitimacy ruling, which is a tool provided with binding effects towards everyone. And those effects will bind not only all national courts, but also all public administrations. In conclusion the constitutional Court refers to a strengthening of the EU law primacy through constitutional guarantees, “in a relationship of mutual enrichment”³⁹.

³⁵ In these terms in the Ruling No. 181/2024 cited (par. 6.5.), the benefits of an appeal to the constitutional Court are outlined.

³⁶ About the obligation of disapplication incumbent upon public bodies, as well as on the judge, in the context of the reflections conducted downstream of the Ruling of the costituzional Court No. 15/2024, see O. SCARCELLO, *Un altro passo nel processo di riaccentramento del sindacato di costituzionalità eurounitario*, ...cited and A. RUGGERI, *Ancora in tema di tecniche di risoluzione delle antinomie tra norme interne e norme sovranazionali self-executing* ...cit.

³⁷ See in these terms the par. 6.6. of the Ruling No. 181/2024 cited.

³⁸ On a more general level of reflection, about the legal certainty P. GROSSI, *Sulla odierna incertezza del diritto*, in *Annuario Aipda* 2014, Napoli, 2015, 1 ss.

³⁹ See the final part of par. 6.5. in Ruling No. 181/2024 cited. With regard to the need to give priority to legal certainty in the solution of problems, see M. LUCIANI, *Ogni cosa al suo posto*, Milano, 2023.

As it is easy to see, all these statements of the Court relate to the profile of the method.

As regards the substantial profiles, the constitutional Court finds the illegitimacy question well-founded, because there is a conflict with Article 3 of the Constitution (which lays down the equality principle), and with a fundamental principle of EU law according to Article 2, and Article 3, para. 2 TFEU, as well as “according to the case-law of the Court of Justice”. In particular, Directive 2006/54/EC detailed this principle by providing (Article 14) that “any direct or indirect discrimination on grounds of sex in the public or private sectors, including bodies governed by public law, shall be prohibited as regards: a) the conditions of access to employment and occupation... as well as promotion”. The disputed Italian law discriminated against access to the role, but such discrimination against women, has been deemed not pursuing “a legitimate objective, linked to the need to preserve the functionality and efficiency of the Penitentiary Police Corps” and therefore conflicting “with the canon of proportionality, precisely because of the breadth of the gap it generates”. The relevance of the proportionality principle⁴⁰, is fully clear. In addition, the recognized unequal treatment generates “distorting effects that affect the efficiency of the administration itself”⁴¹. On this specific point, it is possible to notice a convergence between a principle of European law and a fundamental internal principle, that of efficiency of administrative action.

The same method scheme is reproduced by the Court in other Rulings, for instance Rulings No. 1 of 2025 and No. 7 of 2025⁴², respectively relating to: a case of a regional law⁴³, assumed conflicting with the principle of non-discrimination between holders of long-term residence permits and Italian citizens in access to public housing and other social benefits; and a case of

40 On the principle at issue see A. SANDULLI, *La proporzionalità dell'azione amministrativa*, Padova, 1998, 315 ss.; D.U. GALETTA, *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo*, Milano, 1998; F. TRIMARCHI BANFI, *Canone di proporzione e test di proporzionalità nel diritto amministrativo*, in *Dir. proc. amm.*, 2016, 361 ss.; S. COGNETTI, *Principio di proporzionalità. Profili di teoria generale e di analisi sistematica*, Torino, 2011; V. FANTI, *Dimensioni della proporzionalità. Profili ricostruttivi tra attività e processo amministrativo*, Torino, 2012; S. DE NITTO, *La proporzionalità nel diritto amministrativo*, Torino, 2023.

41 See par. 17 of the Ruling No. 181/2024. Some remarks about the effects on the principle of good performance of the Italian regulation of penitentiary system on the basis of the Ruling at issue are made by A. PITINO, *La sentenza n. 181/2024 e l'affermazione del principio di non discriminazione e pari opportunità tra le donne e gli uomini nell'accesso al ruolo di ispettore della Polizia penitenziaria (con qualche osservazione sull'ambigua rilevanza del genere come “requisito attitudinale” nell'accesso al lavoro)*, in *Le costituzionaliste*, 2025, 4 ss.

42 See also constitutional Court Ruling No. 210/2024; No. 31/2025 and Order No. 21/2025.

43 More precisely the law has been adopted by the Autonomous Province of Trento, 7.11.2005 No. 15. The referring Judge (Court of Cassation, Italian highest Court) has challenged the requirement of ten-year residence on Italian territory, which is provided by the law for as a condition both for access to public housing and for the payment of the supplementary contribution to the rent. See constitutional Court, Ruling 8.1.2025, No. 1.

national discipline, challenged for a violation of the European law principle of proportionality in criminal punishment, for having foreseen the sanction of mandatory confiscation of good instrumental to crime, whether direct or by equivalent means⁴⁴, even in this case by considering the referral judicial order admissible even though the challenged provision could have been set aside in the main proceedings by directly applying the Charter of Fundamental Rights.

3. Critical issues raised by the Ruling and the impact of Transformations

A first concern has been raised by the Doctrine relating to the use by the constitutional court of the “legal certainty” argument, and its effect on the discretion of national judge in managing a conflict between national provisions and EU law. The “national path” would in fact frequently no longer appear only an option compared to the “European” one (setting-aside the national conflicting provision by directly applying the European law and, in some cases, raising preliminary Ruling) but the only feasible one. This would happen for instance in all hypotheses where the arising problem of consistency between national law (administrative and not only) and European law, involves a wide range of interested parties, or leads to repeated/several applications of the provision, and even leads to divergent outcomes within the provision application. Namely the concern is that almost always “conflict between national and European rules should be brought to the attention of the Constitutional Court, thus limiting the use of European path and the immediate protection of subjective legal situations that only this path fully and properly protects”⁴⁵. Almost always, since there are many cases in which the EU law and principles invoked in national judicial disputes have a general scope and a systemic impact, like for instance in the very crowded disputes relating to the compatibility of the national law with the European provisions on bathing concessions.

A further critical issue is represented by a delay in obtaining the good of life for those entitled: excepted cases of precautionary measures, the entitled persons must wait for the end of the centralized judgment before the constitutional court, and the subsequent resumption of the case before the common national judge (in this case administrative court), being the good of life, in this case, represented by the annulment of the challenged administrative acts. Therefore, the hope expressed by this critical part of the doctrine is that, as well as following the issuance of Ruling No. 269/2017 by the constitutional Court, the ordinary national judges will go ahead to enhance their role as the main guarantor of the direct and immediate effectiveness of European provisions for

⁴⁴ Constitutional Court, Ruling 5.2.2025 No. 7. For subsequent cases in which the “constitutional tone” has been recognized, see constitutional Court, Order No. 21/2025, with which the question has been referred for Preliminary Ruling to the European Court of Justice; and Ruling No. 31/2025.

⁴⁵ In this terms R. MASTROIANNI, *La sentenza della Corte costituzionale n. 181 del 2024 in tema di rapporti tra ordinamenti, ovvero la scomparsa dell'articolo 11 della Costituzione*, cited.

the full protection of subjective legal positions.

Within this dialogue of national administrations with their national law influenced by the European law principles, and within the dialogue between national courts (at different levels) and European courts, it is true that very significant transformations occur and that they involve the priorities taken on by the different actors as well.

Priorities at the time “of Granital” were certainly different as the actual ones: in matters involving European law, centrality had to be guaranteed to the European Court of Justice and to the common judge, being the latter understood as a bulwark of the “functioning of a system based on the full and simultaneous application of European rules in all Member States”⁴⁶. Now, however, the priorities have changed, and therefore the problem of recovering a central position of the top national courts in Europe is at the center of the debate; of course this does not necessarily mean marginalizing the role of the common judge. However, it means acknowledging that the gradual substantial extension of the EU's competences, hoped for because it is healthy for the process of European integration and for the process of protection of fundamental rights, erodes state competences, or at least extends them to sectors wider than those in which the Communities operated in the 80s.

Thus, if the needs for integration of the legal systems have been changed, there is reasonably room for a redefinition of the role of high national courts (among those of the constitutional courts), since this role had been assigned to them, in the perspective of a greater involvement, within an outdated context. It means adapting the relations between legal systems by means of living law⁴⁷.

4. Confusion of roles and crossing the boundaries between powers

The afore mentioned transformations are actually also a mirror of a confusion of roles of the different various actors involved in processes, of a crossing-over of their different roles, that create tensions on the implementing of European principles.

In this sense the Italian case of bathing concessions is highly paradigmatic. As well known, at issue there has been a conflict of the extension of bathing concessions – based on national law – with the European law and with the principles of equal treatment and freedom of establishment of economic activities (provided for by Article 49 TFEU) as well as with the provisions of the so called Services Directive.

Here, in addition to the confusion of roles, several themes are intertwined. On one side, it is worth mentioning the significant extension of administrative activity to strategic areas, and of the consequent litigation arising from

⁴⁶ See again R. MASTROIANNI, *La sentenza della Corte costituzionale n. 181 del 2024 in tema di rapporti tra ordinamenti, ovvero la scomparsa dell'articolo 11 della Costituzione*, cited.

⁴⁷ This is the shareable opinion of P. DE PASQUALE, O. PALLOTTA, *In tempi di sovranismo la Consulta difende il primato del diritto dell'Unione europea (e l'autonomia dei giudici)*, cited, 185.

that activity (for instance the judicial proceedings on economic matters) which has moved into the hands of the administrative judge.

On another side, the relationship between high courts, in particular between the Court of Cassation and the Council of State, is also subjected to stress. The relationship between each other is traditionally managed by Article 111, last paragraph of the Italian Constitution, which controls the pre-eminence of the Cassation over the Council of State, by limiting the appeal of high administrative court decisions before the Court of Cassation according due to “reasons inherent in jurisdiction”⁴⁸.

In this context the Court of Cassation has been trying to gain ground through an extensive interpretation of the concept of excess of judicial power, in order to counteract and balance the extension of the area of administrative jurisdiction, expanded – as mentioned above – as a result of the expansion of economic litigation (judicial proceedings on economic matters). Within the described scenario of friction between Court of Cassation and Council of State, the Italian constitutional Court has also tried to curb this expensive interpretative approach, by confining the power of judicial control exercised by the Supreme Court according the Italian Constitution, within very precise limits⁴⁹.

Now, the said attempt (to extensively interpret the concept of excess of judicial power) carried out by the Court of Cassation also relied on European law⁵⁰.

The “Randstad” case is highly significant in this perspective, since the Court of Cassation has put forward the idea that the failure of the High Administrative Court (Council of State) by applying an European provision would give rise to an excess of judicial power⁵¹. Actually, the case of the “Anti-euro-

48 On the subject the literature is very wide. See, among others, F. AULETTA, *Il ricorso in Cassazione per i soli motivi inerenti alla giurisdizione – Significato e valore attuali dell'art. 111, comma 8, Cost.*, in *Dir. proc. amm.*, 4/2024, 793 ss.; A. PANZAROLA, *Il controllo della Corte di Cassazione sui limiti della giurisdizione del giudice amministrativo*, in *Riv. Trim. dir. e proc. civ.*, 2018, 587 ss.; H. SIMONETTI, *Questioni di giurisdizione e diritto dell'Unione europea*, in www.giustizia-amministrativa.it, 2024; R. VILLATA, *Sui “motivi inerenti alla giurisdizione”*, in *Riv. dir. proc.*, 2015, 632 ss.

49 This outcome has been produced by constitutional Court, Ruling No. 6 of 2018, on which see A. TRAVI, *Un intervento della Corte costituzionale sulla concezione “funzionale” delle questioni di giurisdizione accolta dalla Corte di cassazione*, in *Dir. proc. amm.*, 2018, 1111 ss.; P. TOMAIUOLI, *L’“altolà” della Corte costituzionale alla giurisdizione dinamica (a margine della sentenza n. 6 del 2018)*, in *Consultaonline*, 2018.

50 More in general, for the opinion according to which the influence of European Law intertwines with the issue of the “questions of jurisdiction”, and therefore of the Appeal to the Court of Cassation, before and after the issuance of the Italian Code of Administrative Process, see H. SIMONETTI, *Questioni di giurisdizione e diritto dell'Unione europea*, cited, who underlines that “Public services, compensation for damages, public contracts, fundamental rights are the elective sectors of these ‘intersections’”. See also G. GRECO, *L'eccesso di potere giurisdizionale del giudice amministrativo*, in *Riv.it.dir.pubbl.com.*, 2023, 275.

51 See ECJ 21.12.2021 cause C-497/20. The Court of Cassation (order 18.9.2020 No. 19598) had recognized a judicial error, made by the Council of State (Ruling No. 5606/2019), by means of a breach of European Law on public contracts’ sector. The Council of State had rejected the appeal of an exclusion (in a public tender procedure) for the award of a public

pean” Ruling can occur both cause of a judicial failure to refer to the European Court of Justice (preliminary Ruling), and cause of a denial of judicial protection. On the Randstad case, the Court of Justice replied that a national provision, such as the Italian one, which prevents from challenging before the Court of Cassation the consistency with the European law of a judgment of the Council of State, does not breaches European law from the point of view of an effective and equivalent protection with respect to the subjective positions guaranteed by national law⁵².

In the case of bathing concessions then, the Court of Cassation returns to apply the scheme at issue. In particular, by Ruling No. 32559 of 2023, the United Sections of Supreme Court has annulled the Ruling issued by High administrative court in Plenary Session (No. 18 of 2021) about the extension of state-owned maritime concessions, considering that a denial of jurisdiction had occurred⁵³, since the administrative judge had rejected the intervention in the judicial proceedings of collective stakeholders, without having concretely assessed their subjective legal positions. However, in doing so, the Court of Cassation has removed a decision, issued by the administrative Court, that had ascertained the breach of European provision by the Italian legislation and had affirmed the duty to set-aside such a legislation. In fact in the Ruling No. 18/2021 of the Plenary Meeting, the Council of State had recognized a violation, by the Italian Law on awarding concessions of coast areas to companies in the absence of transparency, of the European law principle of equal treatment and freedom of establishment of economic activities. In this sense, the mission – that the Court of Cassation had taken on by means of the said extensive approach – to prevent and overcome breaches of EU law appears, in the case at issue, seems not fulfilled⁵⁴.

contract, allegedly in breach of EU law, and the Ruling had been appealed before the Court of Cassation, pursuant to art. 362, paragraph 1, of the Code of Civil Procedure, for reasons relating to jurisdiction, believing that the failure of the supreme administrative court by applying an European rule gives rise to an excess of judicial power.

52 See ECJ 21.12.2021, cited. On the Ruling see M. VERRENGIA, *Il caso Randstad Italia tra profili procedurali e sostanziali: la Corte di giustizia si pronuncia sui limiti del sindacato della Cassazione sulle decisioni del Consiglio di Stato e sulla tutelabilità dell'interesse strumentale secondo il diritto dell'Unione*, in *Dir. proc. amm.*, 2023, 131 ss.; P. BIAVATI, *Brevi osservazioni sul caso Randstad Italia*, in *Questionegiustizia.it*, 2022; P. IANNUCELLI, *La sentenza Randstad, ovvero la Corte di giustizia si accontenta (apparentemente) di fare l'arbitro in casa sua*, in *aisdue.eu*, 2022; N. CANZIAN, *Il caso Randstad: la violazione del diritto dell'Unione da parte del Consiglio di Stato non incide sul riparto di giurisdizione*, in *Quad. reg.*, 2/2022, 378-381. On the theme of the autonomy of processual Law of Member States, see D.U. GALETTA, *L'autonomia procedurale degli Stati membri dell'Unione europea: Paradise Lost?*, Torino, 2009; C. CONSOLO, *Il flessibile rapporto dei diritti processuali civili nazionali rispetto al primato integratore del diritto comunitario (integrato dalla Cedu a sua volta)*, in *Corti europee e giudici nazionali*, Bologna, 2011, 189 ss.

53 See F. PATRONI GRIFFI, *Eccesso o rifiuto di giurisdizione e sindacato della Corte di cassazione ex articolo 111 della Costituzione*, in *corteconti.it*, 2017; F. LIGUORI, *La funzione nomofilattica nell'età dell'incertezza*, in *Dir. e processo amm.*, 2/2017, 587 ss.

54 On this point see again H. SIMONETTI, *Questioni di giurisdizione e diritto dell'Unione europea*, cited.

In any case, and on a more general point of view, the disapplication of national provisions becomes a tool used several times by the Italian administrative judge to frustrate the attempts of the Italian legislator to adopt national provisions conflicting with European law principles, and in particular, as far as it concerns the case at issue, the tendency of the Italian regulation to extend the bathing concessions' lasting⁵⁵. Thus, disapplication of national rules (carried out in judicial proceedings) appears as a mean useful to impose, even artificially, compliance with self-executing European law provisions and, therefore, a way for the judge to replace the law-maker (not complying with EU principles)⁵⁶. Within this replacement of legislator by the judge it is also recognizable a "political" use of the judicial decision, in order to extend for a time-limit in the future the effects of measures recognized as invalid by the decision itself (issued by the Plenary Meeting of the Council of State) that ensures their continuation, by invoking the judicial need to replace for failures of the legislator⁵⁷. Then, not only a replacement of an actor to another and an invasion of powers occur, but even a very unscrupulous use of legal theoretical categories, as it appears, for instance, the recourse to the modulation of the effects of the annul-

55 As recalled by the Council of State in Plenary Meeting No. 18/2021 cited, (since the the analogous Ruling No. 17/2021 of the Plenary Meeting had not been annulled) there had been several laws having extended concessions' lasting. One of the most recent laws was Law No. 145 of 2018, providing that the state concessions already issued had a duration of fifteen years from the entry into force of the law. On the basis of Law No. 145/2018 some administrative acts – at issue in the Ruling – had been adopted. As far as concern the effects of the Ruling, the Plenary Meeting had stated that the latter would have been produced from 31 December 2023. After the Ruling No. 18/2021 cited, the Law No. 118/2022 has been adopted in order to implement the extension provided by Ruling No. 18/2021 cited and to lay down principles for competitive procedures for the assignment of bathing concessions. On the subject see P. OTRANTO, *Proroga ex lege delle concessioni balneari e autotutela*, in *Diritto e soc.*, 3/2021, 583-620; R. ROLLI, D. SAMMARRO, *L'obbligo di "disapplicazione" alla luce delle sentenze n. 17 e n. 18 del 2021 del Consiglio di Stato (Adunanza Plenaria)*, in *Diritto e soc.*, 3/2021, 489 ss.; B. CARAVITA DI TORITTO, G. CARLOMAGNO, *La proroga ex lege delle concessioni demaniali marittime. Tra tutela della concorrenza ed economia sociale di mercato. Una prospettiva di riforma*, in *Diritto e soc.*, 3/2021, 621 ss.; M. GOLA, *La concessione di beni demaniali: verifica della sua attualità e influenza dell'ordinamento euro-unitario per la sua interpretazione*, in *Ceridap*, 4/2024, 165 ss.; A. De SIANO, *Stravaganze giurisprudenziali a proposito dell'atto amministrativo (a margine di Adunanza Plenaria, 9 novembre 2021, nn. 17 e 18)*, in *Dir. proc. amm.*, 4/2022, 823 ss.

56 The Plenary Meeting of the Council of State by Judgements No. 17 and 18 of 2021 cited ruled that concessions' extension *ex lege* was breaching principle of freedom of establishment (Article 49 TFEU) and Article 12 of Services Directive (Dir. 2006/123/EC) which requires public tenders at European level for the issue and renewal of concessions.

57 On the issue see M.A. SANDULLI, *Introduzione al numero speciale sulle "concessioni balneari" alla luce delle sentenze nn. 17 e 18 dell'Adunanza plenaria*, in *Diritto e soc.*, 3/2021, pp. 353 ss. The Author underlines that "We therefore face rulings that, on the one hand, while reiterate that administrative acts contrary to EU law are simply voidable, immediately after ... clearly state that the extensions ordered by the entire administrations through the reference to the laws of 2018 and 2020 would not be an expression of an administrative power, but merely recognizatory acts, which, given the contrast of the aforementioned laws with EU rules with direct effect, must even be considered *tamquam non esset*. On the other side, in view of the complexity of the consequences of such a statement, provide that the effects of the decisions must be postponed for two years".

ment decision in absence of its prerequisites⁵⁸, or even the use of the concept of “recognizatory acts” or “reconnaissance measure”, with regard to the extension (of concessions) ordered by means of administrative measures, since merely reproductive of national provisions conflicting with self-executing European provisions.

Thus, the invasion of powers becomes an ordinary pattern to which the actors react: the law-maker by issuing, in consideration of the described judicial trend, subsequent laws laying down further conditions for bathing concessions extension, also in order to prevent public administrations from disapplying the law; public bodies, by issuing administrative measures extending active bathing concessions⁵⁹; and finally, again, the administrative judge, by using the notion of reconnaissance acts, in order to neutralize the effects of the extension measures (issued by municipalities) and thus to ensure the implementation of European law principles.

On this latter profile it is worth underlying that, on a closer inspection, behind the said legislative trend (to extend the concessions’ lasting) itself there is a further example of the invasion of the field of one power by another, namely the so called “administration by Law”⁶⁰, cases in which the legislator concretely disposes in place of the administration. In the light of this observation, even the reference to the reconnaissance acts appears out of scope. In theory, it should imply the exercise by public administration of a bounded activity (consisting in the ascertainment of the legal prerequisites at the end of which the enabling effect is produced), not the meaning intended by the Plenary Meeting in Ruling No. 18/2021, namely measures to be considered non-existent, since reproductive of laws capable themselves to produce the extending effects (since, as said, they administer by law) and moreover conflicting with European self-executing provisions.

The cases analyzed allow to observe and confirm that common national judges, and in a special way, administrative courts, play a fundamental role as protagonists of the dialogue between internal and supranational courts and, through this dialogue, appear protagonists within the relationship between diffe-

⁵⁸ On this point see, again, the critical analysis of M.A. SANDULLI, *Introduzione al numero speciale sulle “concessioni balneari” alla luce delle sentenze nn. 17 e 18 dell’Adunanza plenaria*, cited, and B. ACCETTURA, *Studio sui presupposti processuali. Evoluzione e prospettive*, in *Ambienteditto.it*, 2/2024, 1 ss.

⁵⁹ On the basis of mentioned Law No. 118/2022.

⁶⁰ The literature on the “administration by law” is very wide. On the subject see: S. SPUNTARELLI, *Il Parlamento amministratore*, in *Riv. trim. dir. pubbl.*, 1/2023, 262 ss.; L. CASINI, *Il governo legislatore*, *ivi*, 149 ss.; and before S. SPUNTARELLI, *L’amministrazione per legge*, Milano, 2007; A. MOLITERNI, *Discrezionalità amministrativa e separazione dei poteri*, *ivi*, 393 ss.; F. LIGUORI, *Lo spazio della pubblica amministrazione. Vecchi territori e nuove frontiere. Una introduzione*, in *Ceridap*, 1/2024, 58 ss.; L.R. PERFETTI, *Legge-provvedimento, emergenza e giurisdizione*, in *Dir. proc. amm.*, 2019, 1024 ss.; G. ARCONZO, *Contributo allo studio sulla funzione legislativa provvedimentale*, Milano, 2013; F. CORTESE, *Sulla riserva preferenziale di procedimento come strumento di garanzia*, in *Le Regioni*, 2018, 759-765.

rent legal systems and the rights' enforcement dimension. The relationship between different courts, between supreme national Courts⁶¹ and supranational Courts (the European Court of Justice)⁶² becomes the framework in which is inscribed the implementing of european law principles. In the described scenario, sometimes, as it is easy to see for instance in the Randstad case, implementing European law principles raises a question of implementing legal provisions by national judges more than by national public bodies, being national administrative law (in that case the national regulation of public tender) only an external anchor of european law principles (in that case the principle of loyal cooperation, the principle of effectiveness of judicial protection, principles governing the division of competences between the EU and the Member States, principles relating to the raise of preliminary Ruling⁶³) to be applied in order to assess the compliance with them of processual internal provisions⁶⁴.

In addition to this as the bathing concessions affair clearly shows, administrative courts, having acknowledged a legislative invasion of the area of competence of the public administration, by trying to fix it, end up invading the area of public administration as well.

The dynamics here summarized are indicative of a confusion of roles as well as of attempts, not always linear, to neutralize dysfunctional fields' invasion, which sometimes end up give raise to even more serious dysfunctions. In the said climate of significant transformations, even the need to implement European law principles can become a justification for confusing the respective areas of competence of legislators, administrations, judges.

61 On this issue in fact H. SIMONETTI, *Questioni di giurisdizione e diritto dell'Unione europea*, cited, observes "the administrative judge once had only the Supreme Court (Court of Cassation) above him and only with regard to questions of jurisdiction understood in the classic sense. Instead, for some decades he has also and first of all had the Court of Justice above him, which in many cases 'has the last word' on the events of its judgment".

62 H. SIMONETTI, *Questioni di giurisdizione e diritto dell'Unione europea*, cited: "The relationship that would have been created, in this scenario, between the Court of Justice and the national supreme Courts is debated, whether it is one of hierarchy or equiordination, and whether it is better framed in a monist or pluralist logic". In particular a question arises whether the High Administrative Court (Council of State) is a Court of last instance, pursuant to Article 111 of Italian Constitution, in order to establish who has the duty to refer a question for preliminary Ruling.

63 See Court of Cassation, Order No. 19598 cited.

64 In the case at issue, preventing a judicial remedy, the appeal to the Court of Cassation, cause of "lack of judicial power", in order to challenge Council of State's decisions implementing national practices braching European case-law in fields regulated by european law.