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INTERNATIONAL COOPERATION IN CIVIL MATTERS

**Primauté of Community Law and principle of domestic “*res judicata*”.
Relationships and *de jure condendo* perspectives.**

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PRIMAUTÉ OF COMMUNITY LAW AND PRINCIPLE OF DOMESTIC “RES JUDICATA”. RELATIONSHIPS AND *DE JURE CONDENDO* PERSPECTIVES.

CHAPTER 1. THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE VALUE OF “RES JUDICATA”

Section 1. Court of Justice: value of rulings and uniform application of law. This paper aims to analyze the relationship between the inviolability of domestic *res judicata* and the principle of Supremacy of Community Law, making reference to the Court of Justice of the European Union (hereinafter also referred to as “EJC”) decisions as authentic source of law.

The relationship between national judgement and Community Law is a very broad topic that involves both civil and penal subjects, the latter carried on by ECHR in obedience to the fundamental rights guaranteed by European Court of Human Rights.

Due to the wideness of this subject and considering the career we are competing for, we reckoned convenient focusing just on those civil aspects pointed out to the Court of Justice.

Going straight to the heart of the matter, it is important to underline that the principle of legal certainty is one of the cornerstones of Community legal system and its importance is, indeed, more than once stated in the Community Case of Law.

This principle is performed in Court of Justice decisions, which allow a uniform interpretation of Community Law by any of the Member States, thus guaranteeing legal certainty to the whole System.

Being absorbed by the normative tissue of every single Member State, such decisions allow to conform the jurisprudence and legal system of each of them.

Due to the power of Court of Justice decisions of guaranteeing uniform application of law, a general revision of the regulatory scheme of civil law appears to be necessary.

Indeed, our legal system do not contain any mechanism allowing a decision to call into question the whole normative system, by creating a binding precedent that, if not observed, exposes a state member to responsibilities. Due to compactness, uniformity and certainty of law and of its interpretation, Community legal system has become closer to Common law, gaining a more centralizing and ruling power above all other Member States.

In fact, according to the principle of supremacy of Community law, which is acknowledged by all Member States, Courte of Justice decisions have binding effects both on the referring judge and on the domestic ones who are required to pronounce a judgement in the main process.

Court of Justice decisions act as judicial precedents with “persuasive” effectiveness, thus bringing “additional legal rules in the community legal system”, also in other processes than the one leading

to the preliminary ruling, regulated under article 19 of TUE (Treaty on the European Union) and article 267 of TFUE (Treaty on the Functioning of the European Union).

The binding effect of these decisions is immediate within the litigation in which they have been pronounced and they allow a “creative effectiveness of law”, in future judgements related to analogous matters.

Supremacy and primacy of community law also imply primacy of interpretation of the rules of such system, which must be consistent with the one given by the Court of Justice. Every Member State is, thus, compelled to conform with it; if not, the State will be held responsible of any violation of the rights of even a single citizen. Internal regulations of every national system expand, with the consequent loss of their own legislative supremacy, in favor of superior institutions. Community law and the interpretation that the Court of Justice suggests for it, in fact, enter the internal law system of every single State member, widening their normative system and, sometimes, totally unhinging it.

This “new aspect” has repercussions on all the institutions of every single State: on the legislative power, who is no more allowed to issue rules of law conflicting with Community law, but, at the same time, shall transpose all Community rules of law which are not directly applicable by the single Member State.

It also affects the judge, who has to consider a wider normative system for his decisions, giving priority to the application of community rules and having to raise a prejudicial question to the Court of Justice every time he reckons an internal law to be in contrast with the Community law system. Finally, also any record issued by the administrative apparatus has to conform to the Community law system.

This new normative scenario, binding and of immediate application in any Member State, implies for the latter a new effort. The certainty of Community system and the binding nature of its rules and interpretation, have effects on our system, causing important systematic issues, for coming into conflict with institution and principles which had been considered intangible until that moment. As an example, let us think about bringing into question an administrative act, even when the time-limit is expired, thus disapplying article 2909 of Italian Civil Code (¹), making the *res judicata* non effective.

Section 2. The judgement and its role. *Res judicata* and non contested acts have always had the aim of guaranteeing legal certainty, therefore remaining untouchable over the times.

¹ According to which, assessment made in the final judgement does state in all respects of the parties, their heirs and successors by “*inter vivos*” acts.

In particular, if we analyze both the concept of judgement and article 2909 of Italian Civil Code, which regulates its effects, this one has always had an essential value within the legal system, for its immutability and its binding nature. In fact, being a judgement the terminal aspect of a trial process, it sets out the rules to be used with the parties involved in the specific case submitted to the court.

The judgement, as it is considered, therefore gives stability and certainty to the judicial finding and prevent the judge from reviewing a matter for which a decision has already been issued.

That's better known as "the principle of *ne bis in idem*".

In fact, the judge's task is to check whether another Court has already ruled on his dispute and if the *res judicata* is already formed. In this case, the judge will not deliver his opinion on that issue, and must comply with it, if it has the same impact on proceedings lead to his attention. The *res judicata* and its expansive force, as the constraint between the parties and the judges, is the emblem of the legal certainty that every legal system should pursue.

The idea of an approved rule that can no longer be questioned, but definitely applied the concrete rule to a particular legal relationship, acknowledging or definitely disavowing a legal right to one of the parties, gives rules coherence and stability.

If our legal culture has always been handing such dogmas, these are nowadays in potential crisis because of the effectiveness of Community legal system.

Section 3. *Jus superveniens* and legal certainty. Some recent judgements of the Court of Justice, that will be better explained in the second chapter of this paper, in fact, have put in crisis the concept of domestic *res judicata*, refusing article 2909 of the Italian Civil Code and putting in question the authority and effectiveness of *res judicata* contrary to Community law. Disregarding article 2909 of our Civil Code, in fact, the Court of Justice layed down the judicial decision of its peculiar character of immutability.

Intervening as a supervision on the *res judicata*, the Court judgement runs its effects.

In fact, such judgements have a retroactive effect on the whole European Union territory, forcing the individual national courts to comply with them, or to put the issue again at the Court of Justice, if they wish to depart.

But the EJC judgements fit into the law-system framework of the Member States, modifying it.

The *res judicata* is different from that framework, as the final judicial determination "releases" the legal relevance of the case deducted by the abstract rule

After the *res judicata* the situation deducted in judgement will not find its own discipline in the abstract rule any more but in the sentence: the *res judicata*, therefore, will become the *lex specialis* which the parties will refer to regulate their legal relationships.

Just because the abstract rule isn't raised any more in this case, the *res judicata* couldn't be scratched by a judicial decision having the force of retroactive rule that order "now for the past".

If this reasoning, in general, has its logic, the same doesn't seem to be shared by the EJC.

But some details are needed. And in fact, on an hand the Court, in a few judgements, seems to believe that the retroactive effect of its rulings carry on *vis expansiva* on *res judicata*, running over its effects. But, on the other hand, Court of Justice judgements look more like the result of compromise on the factual case, than of an actual will to change legal institutions of secular States.

The Court has repeatedly reaffirmed the importance of legal certainty, and its intention not to undermine the concept of *res judicata*, as that Community law requires certainty, in order to be implemented.

Though, the principle of legal certainty, which necessarily passes through domestic law to reach the community one, clashes and must be reconciled with other principles expressed by the Court of Justice: the effectiveness of Community law and the exclusive competence of the UE institutions.

These principles, in fact, demanded a proper and immediate application, just to ensure the uniform application and interpretation of Community law, which is so important to EJC.

When compared with these principles, legal certainty seems to play a minor role and to be undermined by a comparison between the different interests at stake, that privileges the uniformity and the reserve of competence, with resulting harm for the individuals, who can no longer trust in the value of the *res judicata* at the end of their dispute.

We can read for example the Advocate General's conclusions in the *Olimpiclub* case, who argues that the rules giving finality to the judicial or administrative decisions contribute to legal certainty, as a fundamental principle of Community law; but this principle is not absolute, since it must be balanced with the principles of "State of law", of the primacy of Community law and its effectiveness. If, therefore, national rules which give finality of decisions, prevent the application of these principles, national courts are required not to apply them, trying to find, instead, a correct balance between legal certainty and legal community.

Besides, we cannot emphasize that also in our domestic law there are some cases in wich the *res judicata* is run over a comparison of different interests.

Such "crisis" of *res judicata* occurred many times, when the values introduced by the rule of law occurring are so important to override the parties' confidence in the ruling outcome' intangibility.

Even in our domestic Courts' s opinion - and in particular, according to the Constitutional Court - therefore, legal certainty is a constitutional value that should be compared and balanced against other values, also occurred. The review of the *res judicata* and its " crisis", therefore, have roots in our legal system, so we cannot be surprised that the case law is moving, also in this direction.

Surely we are far from certainty: the case law still has not provided adequate tools to understand when you have an immutable decision, and when the same may be revised.

In fact, analyzing the various judgements of the Court, it appears, as the same rather provide general rules - of general application – moves from the concrete case, comparing the different interests and deciding accordingly.

The European Union Court of Justice, therefore, behaves more like an administrative body than as a Court, comparing different interests and prioritizing the main interest in that concrete case, free from any legal rule or any trial certainty.

This circumstance allows us to review also the function of the judge, who is expected no more to be someone who applies the law to the abstract case, but rather as one who compares the different interests and values at stake. The Court seems to be aware of this, and in fact, always stresses the need to ensure legal certainty, but don't want scratched his powers and authority.

If our domestic Courts were used to review the *res judicata*, they did that only if it would be allowed by a reference framework, such as our Constitution.

Today, in the light of the Court of Justice judgements, it is not yet clear which is the framework which enables a review of the *res judicata*, as the excessive vagueness of terms such as effectiveness and legality of Community law.

We cannot certainly speak of “crisis” of *res judicata*, given the value that legal certainty assumes for the Community legal, but of a review of the limits of the *res judicata*, in the light of a supra-national legislation, whose rules and effects must still be discovered.

In this perspective, the final decision is not as much relevant as a constitutional value in itself, but as a certainty and stability means for the individual right to get a stable and durable ruling-decision, which ensures that “good life” claimed through the process ⁽²⁾.

CHAPTER 2. THE CASE-LAW OF THE EJC.

Aim of this chapter is to briefly report the following decisions made by the ECJ on the balance between the essential requirements of legal certainty granted by domestic *res judicata* or finality of administrative decisions and the need for ensuring the full operation of Community Law.

Section 1. Judgement of 30. 9. 2003 — Case C-224/01 (Köbler)

The main proceedings: The question was raised in proceedings between Mr. Köbler and the Republic of Austria, concerning the reparation of the loss the former allegedly suffered as a result

² CHIOVENDA G., *Ist. Dir. Processuale Privato Civ.*, Napoli, 1935, I, p. 102. The *res judicata* as inherent to the social aspect of the dispute settlement, being a preminent interest of parties rather than the State's: see CAPONI R., *Corti europee e giudicati nazionali* (“European Courts and domestic *res judicata*”), p. 77 and following.

of the non –payment to him of the special length-of-service increment for university professor. Mr. Köbler’s original claim was based on the ground that not taking into account the periods of service in universities in Member States other than Austria amounted to indirect discrimination unjustified under Community law. The action for damages he brought against the Republic of Austria was due to the fact that the Verwaltungsgerichtshof dismissed Mr Köbler’s application, after withdrawing its request for a preliminary ruling, notwithstanding the “*superveniens*” judgement of the ECJ - contemplating a similar case decided in Germany- had resolved the subject-matter of the question submitted for the preliminary ruling in favour of Mr Köbler. Mr Köbler maintained that the judgement of the Verwaltungsgerichtshof infringed directly applicable provisions of Community law, as interpreted by those judgements. In the Republic of Austria’s view, the decision of a court adjudicating at last instance such as the Verwaltungsgerichtshof could not found an obligation to afford reparation as against the State.

Question to the Court for a preliminary ruling: Taking the view that in the case before it the interpretation of Community law was not free from doubt and that such interpretation was necessary in order for it to give its decision, the Landesgericht für Zivilrechtssachen Wien decided to stay proceedings and to refer the following question to the ECJ for a preliminary ruling: *“Is the case-law of the Court of Justice to the effect that it is immaterial as regards State liability for a breach of Community law which institution of a Member State is responsible for that breach (see Joined Cases C-46/93 and C-48/93 Brasserie du pêcheur and Factortame [1996] ECR I-1029) also applicable when the conduct of an institution purportedly contrary to Community law is a decision of a supreme court of a Member State, such as, as in this case, the Verwaltungsgerichtshof?”*

The ECJ’s ruling: In answer to the questions referred to it, the ECJ has ruled: *“ The principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.”*

Section 2. Judgement of 13. 1. 2004 — Case C-453/00 (Kühne & Heitz) and judgement of 12. 2. 2008 - case C-2/06 (Kempeter KG).

The main proceedings in Case C-453/00 (Kühne & Heitz): The question was raised in proceedings between Kühne & Heitz NV ('Kühne & Heitz') and the Productschap voor Pluimvee en Eieren ('the Productschap') concerning the payment of export refunds. On the basis of the declarations lodged with the Netherlands customs authorities by Kühne & Heitz, the Productschap granted export refunds under the subheading by the latter. Having carried out checks, the Productschap reclassified the goods. Following that reclassification, it demanded reimbursement. Its objection to that claim for reimbursement having been rejected, Kühne & Heitz lodged an appeal against that decision to reject. The domestic court dismissed the appeal. During those proceedings, Kühne & Heitz did not request that a question be referred to the Court for a preliminary ruling. That judgement, in the light of a decision given by the ECJ subsequent to it (Case C-151/93 -Voogd Vleesimport en –export, 1994), turned out to be based on a misinterpretation of Community law. Subsequently, Kühne & Heitz requested from the Productschap payment of the refunds. The Productschap rejected those requests and, ruling on the complaint submitted to it, upheld its earlier decision to reject. Kühne & Heitz then brought an action against that latter decision, which is the subject of the main proceedings.

Question to the Court for a preliminary ruling: Being uncertain whether the finality of an administrative decision must be disregarded in a case such as that which has been brought before it in which, first, Kühne & Heitz has exhausted the legal remedies available to it, second, its interpretation of Community law has proved to be contrary to a judgement given subsequently by the Court and, third, the person concerned complained to the administrative body immediately after becoming aware of that judgement of the ECJ, the domestic Court of Appeal decided to stay the proceedings and refer the following question to the ECJ for a preliminary ruling: *“Under Community law, in particular under the principle of Community solidarity contained in Article 10 EC, and in the circumstances described in the grounds of this decision, is an administrative body required to reopen a decision which has become final in order to ensure the full operation of Community law, as it is to be interpreted in the light of a subsequent preliminary ruling?”*

The ECJ's ruling: In answer to the questions referred to it, the ECJ has ruled: *“(…) Legal certainty is one of a number of general principles recognised by Community law. Finality of an administrative decision, which is acquired upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies, contributes to such legal certainty and it follows that Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way. However, the*

principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where

— under national law, it has the power to reopen that decision;

— the administrative decision in question has become final as a result of a judgement of a national court ruling at final instance;

— that judgement is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC; and

— the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.”

In Case C-2/06 (Kempeter KG) the ECJ’s ruling has furthermore specified that Community law does not impose any limit in time for making an application for review of an administrative decision that has become final. The Member States nevertheless remain free to set reasonable time-limits for seeking remedies, in a manner consistent with the Community principles of effectiveness and equivalence.

Section 3. Judgement of 13.6.2006 Case C-173/03 (Traghetti del Mediterraneo)

The main proceedings: Traghetti del Mediterraneo SpA, a maritime transport firm in liquidation ('TDM'), brought against the Repubblica italiana an action for compensation for the damage suffered as a result of an incorrect interpretation by the Corte Suprema di Cassazione (Italian Supreme Court of Cassation) of the Community rules on competition and State aid and, in particular, because of that court's refusal to accede to its request that the relevant questions of interpretation of Community law be referred to the Court of Justice.

Question to the Court for a preliminary ruling: Since it was unsure whether it was possible to extend to the judiciary the principles laid down by the ECJ concerning infringements of Community law committed in the exercise of legislative activity (inter alia, in Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357 and Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029), the domestic court decided to stay the proceedings and to refer the following questions to the ECJ for a preliminary ruling: “(1) *Is a Member State liable on the basis of non-contractual liability to individual citizens for errors by its own courts in the application of Community law or the failure to apply it correctly and in particular the failure by a court of last instance to discharge the obligation to make a reference to the Court of Justice under the third paragraph of Article 234 EC?* (2) *Where a Member State is deemed liable for the errors*

by its own courts in the application of Community law and in particular for failure by a court of last instance to make a reference to the Court of Justice under the third paragraph h of Article 234 EC, is affirmation of that liability impeded in a manner incompatible with the principles of Community law by national legislation on State liability for judicial errors which:

— precludes liability in relation to the interpretation of provisions of law and assessment of facts and of the evidence adduced in the course of the exercise of judicial functions,

— limits State liability solely to cases of intentional fault and serious misconduct on the part of the court?”

The ECJ's ruling: In answer to the questions referred to it, the ECJ has ruled: “*Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court. Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the judgement in Case C-224/01 Köbler [2003] ECR I-10239.*

Section 4. Judgement of 18. 7. 2008 — Case C-119/05 (Lucchini SpA)

The main proceedings: This reference was made in proceedings brought by Lucchini SpA ('Lucchini'), a company incorporated under Italian law, against the decision of the Ministry for Industry, Trade and Crafts ('MICA') ordering the recovery of State aid. In particular, the Commission, by way of Decision 90/555/ECSC, stated that the capital injection granted to Lucchini on November 1988, on a provisional basis was incompatible with the common market. Prior to the adoption of Decision 90/555, as the aid had not been disbursed to it, Lucchini had brought proceedings against the competent authorities before a domestic Court on 1989 to establish its right to the payment of all of the aid initially claimed. By judgement subsequent to Decision 90/555, the domestic Court held that Lucchini was entitled to the aid in question and ordered the competent authorities to pay the amounts claimed. That judgement was based entirely on Law No 183/1976. The parties before the domestic Court did not refer to the Decision 90/555 and nor did that Court referred to any of those provisions of its own motion. The Court of Appeal confirmed the judgement of the Court of first instance and it became finale since the competent authorities did not lodge an appeal in cassation. According to that determination, Lucchini was granted aid in the form of capital injection and interest rate subsidy. By a subsequent note to the Italian authorities, the

Commission observed that, notwithstanding Decision 90/555: '*... following a judgement of the [Corte d'appello di Roma] of 6 May 1994, which, in disregard of the most fundamental principles of Community law, found that [Lucchini] was entitled to aid which had already been declared incompatible by the Commission, in April 1996 the [competent] authorities, deeming it inappropriate to lodge an appeal in cassation, granted that aid, which is incompatible with the common market*'. On September 1996 MICA adopted Decree No 20357 revoking Decree No 17975 of 8 March 1996 and ordered Lucchini to repay the sum granted. On November 1996 Lucchini challenged Decree No 20357 before the Regional Administrative Court. That court granted Lucchini's application by judgement of April 1999, finding that the public authorities' powers to revoke their own invalid acts on the ground that they were unlawful or contain substantive errors were limited in the present case by the finding in a final judgement of the Court of Appeal that there was a right to be granted aid. On November 1999, the Avvocatura Generale dello Stato, acting on behalf of MICA, lodged an appeal with the Consiglio di Stato relying on a plea that the immediately applicable Community law, namely, *inter alia* Decision 90/555, should take precedence over a final judgement of the Court of Appeal.

The Consiglio di Stato found that there was a conflict between that judgement and Decision 90/555. According to the Consiglio di Stato, it was clear that the competent authorities could and should have relied in time on the existence of Decision 90/555 in the proceedings before the Court of Appeal, in the course of which, *inter alia*, the legality of the decision not to disburse the aid, on the ground that the grant of aid had been made subject to approval by the Commission, was in issue. Accordingly, since the competent authorities abstained from challenging the judgement of the Court of Appeal, there was no doubt that that judgement acquired the authority of *res judicata* and that that authority extended to the question whether the aid was compatible with Community law, at least in so far as Community decisions taken prior to the delivery of the judgement were concerned. The fact that the judgement was final could therefore, in principle, also be relied on against Decision 90/555, which was adopted before the proceedings were concluded.

Question to the Court for a preliminary ruling: In those circumstances, the Consiglio di Stato decided to stay the proceedings and to refer to the Court the following preliminary ruling: '*(1) In the light of the principle of the primacy of immediately applicable Community law, in the form in this case of [the third code], Decision [90/555] ... and [Note] No 5259 ... , requiring the recovery of aid — which all formed the basis for the recovery measure challenged in the present proceedings (namely, Decree No 20357 ...) — is it legally possible and compulsory for the national administrative authority to recover aid from a private recipient even though a final civil judgement has been delivered confirming the unconditional obligation to pay the aid in question?*

(2) Or, in view of the generally accepted principle that decisions on the recovery of aid are governed by Community law but the implementation thereof and the associated recovery procedure, in the absence of Community provisions on the matter, is governed by national law (regarding which principle, see the judgement of the Court of Justice in Joined Cases 205/82 to 215/82 *Deutsche Milchkontor [and Others] v Germany* [1983] ECR 2663), is the recovery procedure rendered legally impossible by virtue of a specific judicial decision that has become *res judicata* (Article 2909 of the [Italian] Civil Code), thereby being conclusive as between the private individual and the administration, and requires the administration to comply with it?

The ECJ's ruling: In answer to the questions referred to it, the ECJ has ruled: *Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Codice Civile (Civil Code), which seeks to lay down the principle of res judicata in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission of the European Communities which has become final.*

Section 5. Judgement of 3.9.2009 — Case C-2/08 (Olimpiclub)

The main proceedings: Olimpiclub, a limited liability company the objects of which were to construct and manage sporting facilities, owned a sports complex located on land owned by the Italian State. On 27 December 1985, it concluded with the Associazione Polisportiva Olimpiclub ('the Associazione') – a non-profit-making association, most of the founding members of which also hold shares in Olimpiclub – a contract under which the Associazione had the use of all the facilities of that sports complex ('the contratto di comodato'). In return, the Associazione was, first, to pay the State fee (the sum payable for the grant of the use of land) to the Italian State; secondly, to repay standard costs in the amount of ITL 5 million per year; and, thirdly, to transfer to Olimpiclub its entire gross income, consisting of the total amount of the annual fees paid by its members. In 1992, following investigations into the contratto di comodato, the Finance Administration reached the conclusion that the parties to the contract had, in reality, by means of an act which on the face of it was lawful, intended solely to circumvent the legislation in order to obtain a tax advantage. Thus, Olimpiclub had transferred to a non profit making association all the administrative and management burdens of the sports complex in question, while collecting the income produced by that association in the form of the fees paid by its members, which on that basis was not liable to VAT. Since the Finance Administration therefore considered that the contratto di comodato could not be relied upon against it, it apportioned to Olimpiclub the entire gross income produced by the Associazione for the years under investigation and, accordingly, by means of four adjustment notices, corrected the VAT returns submitted by Olimpiclub for the tax

years 1988 to 1991. In the legal proceedings subsequent to the challenging of those adjustment notices, Olimpclub relied on the existence of two judgements of an Italian Court which had acquired the force of *res judicata* and concerned VAT adjustment notices issued as part of the same tax inspection of Olimpclub, but relating to other tax years. Even though they related to different tax periods, the approach adopted would have been binding in the main proceedings pursuant to Article 2909 of the Italian Civil Code, which lays down the principle of *res judicata*. According to a judicial revirement, the principle of the discreteness of final judgements was discarded and the prevalent thesis was that it would be possible, where the findings in a judgement delivered in one dispute related to issues similar to those arising in another dispute, for the reasoning of that judgement to be properly relied on in the other dispute, even though the judgement in question was concerning a different tax period.

Question to the Court for a preliminary ruling: Taking the view that this approach could compromise the primacy of provisions of Community law and, in particular, preclude the national court from examining the main proceedings in the light of the Community legislation and the case-law of the ECJ in relation to VAT, in particular Case C-255/02 Halifax and Others [2006] ECR I-1609, and possibly from determining the existence of an abuse of rights, the Italian court decided to stay the proceedings and to refer to the ECJ the following preliminary ruling: '*Does Community law preclude the application of a provision of national law, such as Article 2909 of the Italian Civil Code, laying down the principle of res judicata, where the application of that provision would lead to a result incompatible with Community law, thereby thwarting its application, even in areas other than State aid (in relation to which, see ... Lucchini ...) and, in particular, in matters relating to VAT and with respect to the abuse of rights in order to obtain undue tax savings, in particular in the light also of the rules of national law – as interpreted in the case-law of the [Corte suprema di cassazione] – according to which, in tax disputes, where a final judgement drawn up by another court in a case on the same subject contains a finding on a fundamental issue common to other cases, it has binding authority as regards that issue, even if it was drawn up in relation to a different tax period?*'

The ECJ's ruling: In answer to the questions referred to it, the ECJ has ruled: *Community law precludes the application, in circumstances such as those of the case before the referring court, of a provision of national law, such as Article 2909 of the Italian Civil Code, in a dispute concerning value added tax and relating to a tax year for which no final judicial decision has yet been delivered, to the extent that it would prevent the national court seised of that dispute from taking into consideration the rules of Community law concerning abusive practice in the field of value added tax.*

Section 6. To conclude with: Judgements of 6.10.2009 (Asturcom)

To conclude with, in Case C 40/08 (Asturcom) the ECJ had the chance to examine the question object of the present work also in case an arbitration award had been involved, stating that a national court or tribunal hearing an action for enforcement of an arbitration award which has become final and was made in contrast to the Community Law on consumers contracts “*is required, where it has available to it the legal and factual elements necessary for that task, to assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, in so far as, under national rules of procedure, it can carry out such an assessment in similar actions of a domestic nature. If that is the case, it is for that court or tribunal to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause.*”

All the reported Case-Law of the ECJ reveal a clear attitude of the ECJ towards the balancing between both principles of legal certainty and full operation of the Community Law, as it is going to be pointed out in the following chapter.

CHAPTER 3. CONCLUSIONS: TOWARD THE AFFIRMATION OF AN “EURO-UNIFIED” LAW.

Section 1. Premises. Does the authority of the EJC lay down the principle of domestic *res judicata*? The special features of the Lucchini judgement. Our aim is trying to read in a “*de iure condendo*” perspective the current open problems concerning the relationships between Community law and domestic *res iudicata*. Undoubtedly, the focus of the debate is understanding whether the authority of EJC lay down the principle of domestic *res judicata* in a relative, rather than absolute way. If the second approach were to prevail, the so-called “frailty” of *res judicata* would involve all the community matters and fields, becoming a general principle of the community law.

But, as an absolute approach to the problem would certainly lead to a crisis of *res judicata*, we must underline that the EJC position about the legal certainty and *res judicata* is clear and well-established over the years. The European judges steadily recognized the importance that the principle of *res judicata* constitutes both in the Community legal order and in national legal systems; it also stressed the need that judgements becoming final after the exhaustion of all judicial available remedies or after the expiry of the appeals deadlines may no longer be called in question, so as to ensure both stability of law and legal relations, and a good administration of justice ⁽³⁾.

³ See judgement EJC 1.6.1999 in Case C-126/97 Eco Swiss, who first ruled the inviolability of national *res judicata* if the assessment of a Community law infringement would be mined by the *res judicata* itself, concerning an interim arbitration became final, but contrary to Community law. More recently, also judgement March 16, 2006, in Case C-234/04 Kapferer reiterated that Community law does not require national courts to disapply domestic procedural rules

Moreover, the EJC recognized the inviolability of domestic *res judicata* even if it were found to rest on a misinterpretation of Community law. Consistent with these assumptions, it showed that: a) Community law does not require a national court to disapply the procedural rules conferring authority of *res judicata* to a decision, even if it would remedy a breach of Community law by that decision; b) review of a final judgement is only allowed where it is the domestic law to provide in its procedural system a review mechanism of cases in the event of conflict with EU law – mechanism currently not imposed by the “principle of sincere cooperation” (see article 4 of TUE). Furthermore, the Court has emphasized that, in accordance with the effectiveness and equivalence principles, within the Community system the principle of procedural autonomy of Member States applies, under which the arrangements for establishing and implementation of *res judicata* depend exclusively on the domestic law itself⁽⁴⁾.

Finally, the importance that *res judicata* has both in Community and in the Member States legal systems recalls article 6 of TUE, according to which “*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union. (...) Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.*”

Now, the strength of *res judicata* - intended as intimately inherent to the social function of jurisdiction, responding to the interest of private parties who trust in the “*lex specialis*” settled in a final judgement, as already underlined in chapter 1 – is certainly an outstanding value that falls within the constitutional traditions common to the Member States of the European Union, in spite of the different ways in which it can be implemented.

This importance is also reinforced by the recent European Union accession to the Convention of Human rights and by the amendments of art. 6 TUE, under which the Charter of Fundamental Rights of the European Union shall have the same legal value as the Treaties.

Both the historical overview of the main EJC cases on the topics (see chapter 2) and the above considerations on the value of *res judicata* in the EJC case, lead to rule out the idea that the

in order to review or lay down a final judgement, if it breaches Community law (see additionally, *ex multis*, EJC 3.9.2009, Case C-2/08, *Olimpiclub*, C.G. 30.9.2003, in Case C-224/01, *Köbler*).

⁴ See, specially, judgement EJC 16.12.1976, in Case C-33/76, *Rewe*: « *In the present state of community law, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favorable than those relating to similar actions of a domestic nature*», within the only limit of effectiveness and equivalence principles, under which the protection of community rights may not be less favorable than that provided to similar rights derived from national rules (equivalence), or be structured so that in practice it is impossible or excessively difficult exercising rights conferred by supra-national law (effectiveness).

authority of EU law lay down in an “absolute” way the principle of domestic *res judicata*, in the perspective of an “euro-unified” law.

First, we must underline how distinctive is the case brought before the Court in the Lucchini judgement, which focused on solving not a contrast between *res judicata* and a community abstract rule, but a conflict with the effects of a previous, concrete European Commission act on a State aid. Only in appearance, in Lucchini the *primauté* of Community law seems to go through the complete sacrifice of *res judicata*. In fact, the correct key to understand this judgement is given by the particular deduced case, where the *res judicata* had a dangerous role in the relations between domestic and Community law, due to the risk of triggering a real conflict of powers between the national courts and EU institutions.

More specifically, the case called in question a matter “reserved” to the duties of European Community institutions (state aid), thus the domestic judgement did not merely affect the relations between the aid beneficiary and Member State (regulated under national law), but also affected the exclusive competence of the European Commission to assess the eligibility itself for a controversial state aid measure (⁵).

The overview of some significant Court judgements – already examined in the second chapter – helps us defining and properly solving the problem of the “apparent” conflict between the interpretative role of EJC and the final domestic judgements; moreover, it confirms the need for an approach “case by case” to the issue.

So, in the Köbler case the Court did not sacrifice the *res judicata*, which is still alive although conflicting with Community law, but affirmed the possibility of claiming damages, alleging the State liability. Here we must recall the basic premise, that domestic *res judicata* is to be considered in a dual role, as both “assessment” and “command” (i.e. the compulsory rule that parties must follow after the ultimate decision of a court). If this is true, then the EJC in Köbler appears to restrict the essence of *res judicata* (and its subsequent protection) only to the “command”, when the prescriptive content is a source of undue and refundable damage. Though, it does not affect the “assessment” value of *res judicata*, so that the Köbler case is considered a kind of banner of “community resistance” of final judgements.

In the Kühne & Heitz case, the Court established for the private party more favorable effects than those achieved with a previous administrative judgement, settled against a public body. It follows that the failure of *res judicata* – although ultimately due to an infringement of Community law – in

⁵ See CAPONI R., *Corti europee e giudicati nazionali*: the private party against which the European Commission takes an unfavorable decision should actually have the burden of bringing a case before the Court of Justice. If he, on the contrary, tried the way of “ordinary” justice before the national court and obtained a ruling favorable to himself, but conflicting with Community law, he could not then complain about the EJC decision annulling the State aid which was unlawfully granted. Indeed, the “failure” of domestic *res judicata* shall be imputed to himself.

fact does the best interests of citizens. So, the Court implicitly assessed that protecting the legitimate expectation and the *res judicata* resistance does not apply in non-peer relationships between private and public sector: thus confirms that *res judicata* is to be intended not only as instrumental to an abstract “reason of state”, but mainly as giving certainty to parties who look for justice through the final resolution of a case.

In the *Olimpiclub* case, the Court found incorrect a previous interpretation of Community law, basing a national court decision and, in balancing the principle of legal certainty with that of effectiveness, made the second prevail. Nevertheless, this did not mean putting in “crisis” the *res judicata*, but only reformulating its objective limits, in the name of the so-called “effet utile”: hence, the interpretative EJC judgement given in the preliminary ruling acts retrospectively as *ius superveniens*, whose effects are comparable to those of an interpretative rule ⁽⁶⁾.

It is also remarkable that EJC, while affirming that the “*primauté*” principle lays down the “external” force of *res iudicata*, took care to highlight the differences between *Asturcom* and *Olimpiclub* cases and “the highly specific situation” of *Lucchini* judgement, where “*the matters at issue were principles governing the division of powers between the Member States and the Community in the area of State aid*”.

Therefore, in the *Olimpiclub* case the Court does not seem to accept the approach of the Italian Supreme Court ⁽⁷⁾, according to which the principle of *res judicata* should have a different weight in the balance of values, depending on whether the case focuses on community rules conferring available rights (whose application is up to the party who asserts them), or on mandatory community rules, placing specific obligations for the Member States. Both in *Lucchini* and in *Olimpiclub*, in fact, mandatory rules for the Member States are undoubtedly called in question, those regarding the compatibility of a State aid measure, and those aimed to VAT incoming (community tax by definition).

However, a real failure of *res judicata* is established only in the *Lucchini* case, in order to solve a conflict of powers between institutions, while in *Olimpiclub* case the failure is “apparent”, aiming

⁶ It follows that national courts can no longer apply to tax cases the so-called principle of “judgements fragmentations”, under which each tax period retains its independence from the other, implying between taxpayer and tax authorities a legal relationship different from those relating to previous and later ones. Such a principle would actually prevent an effective contrast to abuse/ tax avoidance in the field of value added tax, which is of community interest by definition (see also Italian Supreme Court V sez., n. 25320/2010 and n. 18907/2011, transposing the EJC approach to the matter).

⁷ See the considerations of Italian Supreme Court who raised the question before EJC, according to which *Lucchini* case seems to follow a general trend in the European Court of Justice aimed to “relativize” the value of domestic *res judicata*, so as to distinguish between Community law disputes on available rights – for which the procedural means provided by national legal systems operate, pursuant to effectiveness and equivalence principles – and disputes concerning mandatory rules for Member States, directly involving the community *primauté*, which leads to a sacrifice of the *res judicata* resistance.

just to resize (and not compress *tout court*) the *res judicata* “limits” to the purpose of the correct enforcement of community law.

The EJC judgements themselves tell us, then, that we cannot talk about “crisis” of *res judicata*, whereas it is correct talking about a “reformulation” of the *res judicata* essence, as follows:

- a) The *res judicata* is not enforceable between the parties only if this results in a breach of a Community Institution competence (Lucchini case: violation of an exclusive competence of the European Commission, which was covered by domestic *res judicata*),
- b) If the previous case is not in question, but legal certainty shall yield compared to the “effet utile”, a mere question of proper interpretation –according to community law – of domestic procedural rules emerges, remodeling the objective limits of the *res judicata* (Olimpiclub case: “external” *res judicata* precluding the application of community rules aimed to contrast tax avoidance, even with regard to tax years different from the disputed matter).

Moreover, it is hard to understand why the *res judicata* should be less protected in front of the EJC judgements than when the domestic rule founding the decision is declared unconstitutional by the national Constitutional Courts (see, for instance, the Italian and German systems).

Such an harsh solution does not seem to be imposed by the EJC itself, having to consider the possible “failure” of *res judicata* properly not as a real “crisis” but as an exception to confirm the rule of *res judicata* inviolability (⁸): this is a core principle of all Member States law-right, as such it is borrowed by the Community law pursuant the aforementioned article 6 of TUE.

Lastly, interpreting in an absolute” way the possible failure of *res judicata* would undermine the well-known theory of counter-limits, developed by the Constitutional Courts of several Member States.

Section 2. Solutions *de jure condendo* to a “real” conflict between domestic *res judicata* and the EJC settlements. While waiting for further EJC judgements on the matter, if we assume that the Court “hardens” its approach and impose a disapplication of national procedural rules (as important

⁸ See CAPONI R., cit., about the outstanding exceptions to the *res judicata* resistance in Italian legal system, p. 81 and following: a) cases provided by law in the regulation of extraordinary appeal. See on the point *DI SERI C., Primauté del diritto comunitario e principio della res judicata nazionale: un difficile equilibrio*, in *Giurisprudenza Italiana*, 2009, who mentions procedural instruments like Italian “*revocazione straordinaria*”, the “*action in restitution*” (German “*Restitutionsklage*”, Belgian and Luxembourg *reque`te civile*), the “*reopening of case*” (*peru`jitas e wznowienie postepowania in the Hungarian and Polish legal system*), the “*revision*” (the Dutch “*herroeping*”), the “*case resumption*” (*obnova konania e obnova ri`zeni`in Slovak and Czech law*), the “*action for revocation*” (Austrian, Spanish, Estonian, Finnish, French, Greek, Italian, Portuguese, Slovenian and Swedish law rights); b) the burial, the following effects occurring retroactive: b1) values introduced by legal rules of law occurring are so worthy as to prevail on the trust of parties on the *res judicata* inviolability (for instance, recognizing inviolable human rights which were denied under a previous regime); b2) the *res judicata* concerns a relationship between a private party and a preminent public body and operates under a retroactive effect which introduces more favorable effects to the private than those achieved with the previous ruling; b3) the *res judicata* gives before a declaration of unconstitutionality, if that strikes just the rule of law founding the *res iudicata*, not in itself, but because of circumstances (unconstitutional) that made the legal relationship exhaust.

as article 2909 of Italian civil code in the Lucchini case), we must ask in practical terms which tools can be invoked to make up the contrast between domestic *res judicata* and Community law resulting by a “*superveniens*” preliminary interpretation by the EJC.

First, we may suppose that the well-known theories about the constitutional counter-limits should be called in question. We also may believe that overcoming the principle of *res judicata* by a subsequent EJC judgement of the Court does not require, necessarily, the disapplication of national procedural rules but must be the result of a delicate balancing, established by a Constitutional Court judgement. We could then expect two different kinds of judgements.

The case pending in the National court may involve a rule evaluated by a supervening EJC interpretative ruling, where the private party wants to take advantage of a favorable domestic *res judicata*, but contrary to community law (⁹). Alternatively, the question of constitutionality could be raised in a case involving an unfavorable domestic *res iudicata*, when the private party would benefit by invoking the *ius superveniens* set by the EJC ruling (¹⁰).

Quid iuris if the Court imposed to set aside a provision like article 2909 of Italian civil code? The national court could now fear that the decision of a court affect a fundamental principle of Community law. Nevertheless, he could not refuse the binding interpretation of the Court and will have to raise before the Constitutional Court the further question of whether setting aside the domestic procedural provision is contrary to the fundamental principles of constitutional order.

The Constitutional Court could then recognize a contrast and the national court should rightly circumvent the EJC ruling commitment: the subsequent illegality of domestic *res judicata* may be considered therefore subject to infringement proceedings before the Court of Justice.

Thus, the legal certainty is formally respected and the principles of equivalence and effectiveness would be safe, together with the *primauté* of Community law, thanks to substantial instruments like claim for damages or other re-establishing remedies.

On the other hand, if the Constitutional Court should not find any contrast with the supreme principles of constitutional order, the national court will blindly follow the instructions of the Court of Justice.

⁹ In Italy it would be involved a violation of articles 24 and 113 of Constitution, by the law of enforcement of the European Union Treaty, where it allows the principle of full effectiveness of Community law passing through the disapplication of art. 2909 Italian civil code, so as to lay down the *res judicata* resistance.

¹⁰ In this case, to remain in the Italian law system, article 395 of civil procedure code (concerning an extraordinary remedy, challenged against final judgements) may be denounced as unconstitutional for violating Italian Constitution article 117, coma 1, as it does not includes – among the extraordinary case of revocation, the contrast between domestic *res judicata* and Community one; or, again, the unconstitutionality of the national rule of law, as interpreted by domestic courts, due to the contrast with the “bond deriving from the community law system” (that is, the supervening interpretative EJC judgement).

Anyway, since the EJC case of law entails the “authentic interpretation” and – as the above considerations – a kind of *ius superveniens*, all the limits drawn for it would be called in question, aiming to protect the *res judicata* and the judiciary functional independence.

In Italy, the Constitutional Court admitted the failure of *res judicata* in balancing opposite interests, whose constitutional role is prevailing. Such a balancing should be done with respect to the authentic interpretation by the Court of Justice, the Constitutional Court having to consider whether the certainty of legal relationships, the fullness and effectiveness of judicial protection should prevail (i.e. the *res iudicata*, as imperative act of the judge) or the *primauté* principle, which similarly bases on the Constitution⁽¹¹⁾.

Such an assessment will undoubtedly be done in a practical way, considering the interests involved in each case and the underlying object of conflicting decisions, so as it is impossible to forecast which term of comparison is bound to prevail.

Section 3. Conclusions. Toward a real “integration” between legal systems. Ultimately, the cases dealt with and solved by the EJC did not show significant differences from the exceptional ones which may break with the *res judicata* resistance in the domestic law (see note 8).

In the light of EJC case-law, the domestic *res judicata* is not revealed as weak and generally “failing” but just as consciously redefined in accordance with supranational law, i.e. the overall contest which the living law has to move in.

Our analysis also confirms once again the need both of a “monistic” vision of the relationships between community system and domestic ones, and of strengthening the dialogue between the Courts (Court of Justice and Constitutional Courts of Member States).

A mature evolution would thus be possible of the concept of “legal certainty”, which has to be measured not only with domestic constitutional orders, but with an “euro-unified law right”, harmoniously integrated with the Member States ones. This would result not in a legal system overpowering the others, but in a joint and harmonic affirmation, as well as in a coordinated vision of procedural and substantive rules of all the European legal systems.

When researching and defining the balance point between legal certainty and *primauté* of Community law, Constitutional Courts will undoubtedly play the role of “border-institution” which is their own⁽¹²⁾.

Though, considering that the Courts are the only gateway to approach a constitutional ruling, this will trigger a greater “circulation” of Community law in the national systems and a virtuous cycle for the ordinary courts, called upon to be sensitive and skillful in knowing and approaching to

¹¹ Compare, in the Italian Constitution, articles 24 and 111 concerning jurisdiction and article 117 concerning the Community law supremacy.

¹² See DI SERI C., *Primauté del diritto comunitario e principio della res iudicata nazionale (...)*, in *Giur. It.*, 2009.

Community law, with a view of real integration between the legal systems: in short, to think in terms of “euro-unified” law ⁽¹³⁾. This would further strengthen the principle of effectiveness, which is basic for the community law integration process ⁽¹⁴⁾.

In conclusion, we can say that the role required today from a domestic Court in a supra-national context - as already considered in the previous paragraph and in chapter 1, par. 3 - no longer is that of a mere "applicator" of the law, but also that of an expert of "euro-unified law", who is able to balance the interests at stake on a “case by case” basis.

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¹³ Compare the recent amendment to Article 2, law n. 117/1988 on civil liability of judges in the Italian system, which includes the breach of Community law in the cases of "gross negligence", as well as identifies as a "serious violation of the law" the "clear breach of the law and the law", stating to that end that the break/omission of proceedings regulated under art. 267 TFUE must be taken into account.

¹⁴ As the rights and obligations arising from Community law sources flow through the channels provided by institutional and procedural internal systems, national courts are required under Article 4 TUE (ex 10 TCE) – as well as legislative and administrative powers - to take all the proper, general or specific measures to ensure fulfillment of obligations under Community law. As confirmed in judgement Köbler, the national court is the first and real filter to protect the effectiveness and supremacy of Community law, working in applying supra-national rules to factual cases.