

THE EUROPEAN 'NOMOFILACHIA' AND THE PRINCIPLE OF PROPORTIONALITY

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Abstract*

The European Court of Justice greatly contributes to the guarantees that Community law will be uniformly interpreted and applied ("nomofilachia") and the rights which individuals derive from the Community legal order will be effectively protected. This essay analyses some aspects of the European Union "nomofilachia"; the research is developed in two steps which are strictly correlated.

In the first part, it will be underlined how the uniform interpretation and the uniform application of EC law go beyond the provisions of art. 234 of the EC Treat; and are supported by new kind of relations among the Court of Justice, national courts and national administrations. In the second part of the research, it will be highlighted the impact of the general principles of the European Community legal system, moulded through the "nomofilachia" function of the Luxembourg Court, as regards the activities of national administrations. The analysis gives a particular attention to the evolutionary dynamics of the proportionality principle.

All these aspects work in a contemporary context of deep transformation of the traditional relations among law, courts, administrations and citizens.

* This essay is the joint work of both authors with Barone primary responsible for paragraph 1,2,3,4,9 and Ansaldo for paragraph 5,6,7,8.

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Introduction

The process of convergence among the administrative laws of the EU Member States and the progressive forming of a 'common administrative law' in Europe is one of the most important propulsive drives in the European Court of Justice's function of uniform interpretation of European law (*nomofilachia*). In fact, the integration among the Member States' administrative laws is realized mostly through the progressive elaboration of a series of Community law general principles by the Court of Justice. These general principles strongly affect the activity of national and European public administrations (Auby, 2009).

In the first part of the essay, it will be shown how the uniform interpretation and the uniform application of EC law go beyond the provisions of art. 234 of the EC Treaty and are supported by new relationships among the Court of Justice, national 'lower' courts and national administrations. In the second part the essay will highlight the impact of the general principles of the European Community legal system, moulded through the *nomofilachia* function of the Luxembourg Court, as regards the activities of national administrations. The analysis will pay particular attention to the evolutionary dynamics of the proportionality principle.

The two aspects of this essay are related on the basis that the identifying of original juridical instruments directed to guarantee the uniform interpretation of Community law is the *conditio sine qua non* to favour the process of mutual crossbreeding among the national administrative laws through the Community law general principles as elaborated by the Luxembourg Court.

The Court of Justice, national 'lower' courts and administrations thus become, from time to time, the main actors who guarantee the effective uniform interpretation and enforcement of Community law and even guarantee a new 'legality' of the administrative function, based on case-law principles (Marino, 2007).

1. The uniform interpretation of EC Law and the non compliance of national courts adjudicating at last instance

The uniform interpretation of Community law is, first of all, insured by the Court of Justice through the obligation to make a reference for a preliminary ruling which national courts apply in the cases before them¹. Article 234(3) of the EC Treaty has

1 Only when the national court is unable, through its interpretation to guarantee the correct application of Community law, then it can, on its own initiative, seek from the Court of Justice the interpretation of the Community law which must be applied in that particular case. This optional initiative becomes an obligation to make a reference for a preliminary ruling to the Court of Justice when the interpretative issue is before a national court of last resort. The operational mechanisms envisaged by article 234 of the EC Treaty are widely studied by scholars. See for example Capotorti, 1977, p.497; Tesauro, 2000, p.91; Kennedy, 1993, p.121; Arnall, 1993, p.129; Barnard, Sharpston, 1997, p.111. It is particularly important to read Picozza, 2004.

been identified by the Court of Justice as having the aim to avoid differences of interpretation on Community law matters².

Therefore, the uniform interpretation and application of Community law is insured through the particular force of the European Court of Justice's case-law³. The effects of the judgment delivered in pursuance of art. 234 of the EC Treaty are not limited to the single case, but they operate in any other case in which national courts face the same question of interpretation of EC law already settled by the Luxembourg Court. Moreover, these effects are even retroactive, except for the cases in which the Court of Justice decides in a different way (Chiti, 2004, pp. 576-577).

The obligation to make a reference for a preliminary ruling and the binding nature of the previous case-law of the Luxembourg Court are two aspects that contribute to create the unity of the Community legal system together with the uniform treatment of the interests protected at European level.

However, both aspects have to be analysed in the light of the non-compliance of national courts adjudicating at last resort.

As regards the obligation to make a reference for a preliminary ruling, the Court of Justice has drawn up, since the *Cilfit* judgment of 1982, some exceptions from the obligations under art. 234 (3) of the EC Treaty⁴. Nevertheless, we can say that the risks caused by the '*acte clair*' doctrine are real, mostly as regards the wide evaluation autonomy given to the national courts and are confirmed by the traditional reluctance of the national courts of last resort to respect art. 234(3) of the EC Treaty⁵. Moreover,

2 European Court of Justice, *Cilfit*, case C-283/81 (judgment of 6 October 1982), <http://eur-lex.europa.eu/it/index.htm>.

3 Although EC law scholars are divided on the correct interpretation of the effects of the European Court of Justice judgments, they agree as regards the binding effects that these judgments have for the Member States as regards their obligation to cooperate in the enforcement of the obligations coming from EC law (art. 10 of the EC Treaty): see Butler, Bieber, Pipkorn, Streil, Weiler, 1998, p.315.

4 In particular, in the *Cilfit* judgment the European Court of Justice identifies three special 'exceptions' to the obligation to make a reference for a preliminary ruling for the national courts of last resort under art. 234(3), of the EC Treaty. The first two exceptions are where the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case or where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical. The third 'exception' is when the national court of last resort has established that the correct application of Community law is so obvious to leave no scope for any reasonable doubt ('the *acte clair*' doctrine).

5 As stated by the Advocate General Antonio Tizzano in the *Opinion* delivered on 21 February 2002, case C-99/00 (*Lyckeskog*), footnote 22, <http://curia.europa.eu/>, between 1960 and 2000 references for a preliminary ruling from courts of last instance accounted for just over a quarter of the total number of references (1173 out of 4381). In Italy, the first reference for a preliminary ruling was made by a regional administrative Court (administrative court of first instance) in 1975, while the *Consiglio di Stato* (administrative court adjudicating at last instance) made its first reference for a preliminary ruling only in 1991.

this provision does not provide sanctions in cases of breach of the obligation to make a reference for a preliminary ruling.

Even as regards the European Court of Justice case law it is possible to advance reservations which are similar to those mentioned above. In particular, we will focus our attention on the hypothesis of manifest breach of the case-law of the Luxembourg Court by the national courts adjudicating at last instance. The European Community legal system does not identify sanctions in cases of manifest breach of the Court of Justice case-law. From this point of view, art. 234 of the EC Treaty envisages a 'preventive' *nomofilachia*, devoid of suitable instruments which can guarantee respect for the Court of Justice's case-law.

This possible non-compliance by the national courts of last resort enlarges the horizons of the analysis (Hofstötter, 2005). When there is a manifest breach of the Court of Justice's case-law or when there is a breach of the obligation to make a reference for a preliminary ruling, the provisions of art. 234 of the EC Treaty are supported by new relationships among the Court of Justice, national 'lower' courts and national administrations (Barone, 2008).

The European *nomofilachia* tries to create a 'network' of decision-makers whose nodes are the Court of Luxembourg, the national 'lower' courts and national administrations. Each of these nodes of the *nomofilachia* network has its own decision-making autonomy. The Community *nomofilachia* (described in the *Köbler*, *Traghetti del Mediterraneo*, *Kuhne & Heitz* and *Kempton* judgments of the European Court of Justice) starts a collaboration which is based on the liability of the Member State for breach of Community law owing to a fault attributable to a national court and on the administrative review powers of a final administrative decision which is inconsistent with EC law. It is through these two juridical instruments that we can have a new and original aspect of the adherence of Member States' legal systems to the *nomofilachia* function of the European Court of Justice.

2. National supreme courts and liability of the State for infringements of Community law

The non-contractual liability of Member States for damage caused to individuals by a breach of Community law is the first step through which the Court of Justice tries to identify suitable redress for the non-compliance of the national Courts of last resort. In the *Köbler* and *Traghetti del Mediterraneo* judgments, in particular, the Court of Justice makes the Member States liable for damage caused to individuals by a breach of Community law where that breach is attributable to a national court.

The liability of Member States for damage caused to individuals by a breach of Community law comes from an interpretation made by the European Court of Justice since the 1990s. The traditional leading-case is the *Francovich* judgment of 1991, which can be considered the ideal continuation of landmark judgments such as, *Van Gend en Loos*, *Costa*, *Simmenthal* and *Factortame*⁶.

6 On *Francovich* Judgment (European Court of Justice, case C-6 e 9/90 (judgement of 19 November 1991), <http://eur-lex.europa.eu/it/index.htm>, *ex multis*, see Barav, 1992, p. 1;

The statement of the liability caused by the exercise of 'judicial functions', even if it follows the previous case-law, is made on a different basis, which obliged the Court of Justice to face some important points of interpretation⁷. Moreover, the liability created by the exercise of 'judicial functions' is based on the elaboration of some novel elements as regards the previous judgments on the liability of the Member States for the inconsistent exercise of lawmaking and administrative functions with Community law.

At the beginning of its judgment in *Kobler*, the Court of Justice applies its previous case-law on this matter. For a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law, the Court states that there are three conditions: (1) the rule of law infringed must be intended to confer rights on individuals; (2) the breach must be sufficiently serious; and (3) there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties⁸.

However, the Court of Luxembourg highlights the need to reconsider the conditions which have led to the 'serious and manifest' infringement of the Community law. In the light of the main features of the judicial function, the liability of the State for an infringement of Community law by a decision of a national court of last resort, exists only in the 'exceptional' case where the national court has 'manifestly' infringed the applicable law⁹.

It is the national 'lower' court (which is in charge of the claim for reparation) which must evaluate the 'manifest' infringement of the Community law. This national court must take into consideration some basic factors, such as, 'the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable,

Schockweiler, 1992, p.27; Steiner, 1993; Ross, 1993, p.55. As regards the European Court of Justice case-law after the *Francovich* judgment, see v. Harlow, 2002, p.915.

7 European Court of Justice, *Köbler*, case C-224/01, (judgment of 30 September 2003), <http://eur-lex.europa.eu/it/index.htm>. About this judgment we can see the following Italian scholars: Conti, 2004, pp.26-41; Conti, 2006a, pp.127-163. As regards French scholars see Huglo, 2004, p. 34; Pingel, 2004, pp.723-728. As regards German scholars see Schulze, 2004, p. 1049. As regards English scholars, even before the *Köbler* judgment, see Toner, 1997, p. 165; Anagnostaras, 2001, p.281. See, moreover, Breuer, 2004, pp.243-254; Wattel, 2004, p.178; Simon, 2003, p.3.

The *Kobler* judgment is mostly based on the consideration of the 'main role' made by courts to safeguard the rights of the individuals deriving from Community laws. The Court of Luxembourg stresses, in that context, that «a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights» (*Köbler* judgment, par. 34).

8 *Ibidem*, par. 51

9 *Ibidem*, par. 53

by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under Article 234(3) EC. In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter'¹⁰.

As regards the issue of 'manifest' infringement, the Court of Justice identifies the two 'weak points' of the EU *nomofilachia*: the violation of art. 234(3) of the EC Treaty and the breach of the European Court of Justice's case-law. But, these two points do not completely coincide. In particular, the Court gives a remedy for the non-observance of art. 234(3) of the EC Treaty, only to cases in which the non-compliance with the reference for a preliminary ruling leads to an infringement of Community law¹¹. In this way we have, as regards the liability of a State, the double condition of the breach of a 'procedural' rule (art. 234 (3), of the EC Treaty) and also of a 'substantive' rule¹².

The Court of Justice reaffirmed the main features faced in the *Kobler* judgment in *Traghetti del Mediterraneo* one¹³, which stated the incompatibility of the Italian system with the liability of the 'State-Judge' with EU law (Barone, 2008).

3. The network between the European Court of Justice and national 'lower' courts

The *Köbler* and *Traghetti del Mediterraneo* judgments start a course which aims to fill the gaps of the non-compliance of the national courts of last resort as regards the *nomofilachia* of the European Court of Justice. The absence of sanctions in case of breach of art. 234(3) of the EC Treaty, and even the non-compliance of the Community *stare decisis*, are redressed through the liability of the State for the breach of Community law owing to a fault attributable to national courts adjudicating at last instance.

A brief reflection on the main consequences of this case-law on the Community *nomofilachia*, first of all, must consider the difference between the judgment which has caused the decision of the court of last resort (which has infringed Community law and caused the damage) and the judgment which will state the liability of the State. According to the Luxembourg Court, these two judgments have a different object and do not have necessarily the same parties; in fact, the liability of the State in case of

10Ibidem, par. 55-56.

11Ibidem, par. 122-123.

12Ferraro, 2007, p.77, sets off this peculiarity of the above mentioned judgment. We have to consider that, in this judgment, the Court of justice tries mostly to emphasize the importance of the strict evaluation of the State liability requirements, rather than to give detailed instructions as regards the reference for a preliminary ruling matter. On the contrary this matter is dealt in a deep way in the *Opinion of the Advocate General*, delivered on 8 April 2003, case C-224/01, <http://curia.europa.eu/>, par. 129.

13European Court of justice, Grand Chamber, *Traghetti del Mediterraneo*, case C-173/03 (judgment of 13 June 2006), <http://eur-lex.europa.eu/it/index.htm>. As regards this judgment see Ruffert, 2007, pp.479-486; Seegers, 2006, pp.561-565; Martín Rodríguez, 2006, pp.1017-1034. As regards the Italian scholars see Picardi, 2007, p. 283; Conti, 2006b, pp.1515-1528; Rasia, 2007, p.661.

'manifest' infringement of Community law does not imply the review of the national judgment which has caused the damage (*res judicata*). It is not by chance that the judgments in *Kobler* and *Traghetti del Mediterraneo* are derived from references for a preliminary ruling made by national courts of first instance which must deliver the judgment for the reparation of the damage caused by a breach of the Community law.

According to the *Kobler* and the *Traghetti del Mediterraneo* judgments, the national court of first instance must deliver the judgment on the request of reparation of the damage caused by a 'manifest' breach of the Community law made by a national supreme court. This judgment could even be on the interpretation and on the evaluation of the facts and of the evidences produced by the national supreme courts.

In this way we can see clearly the European *nomofilachia* network. The European case-law shows through the configuration of the liability of the State for the breach of Community law that the national 'lower' courts contribute to guaranteeing the uniform interpretation and application of Community law.

This gives some independence to the national 'lower' court because it is that court which must evaluate the 'manifest' character of the breach of Community law from the national court of last resort.¹⁴ Moreover, it will be the national 'lower' court that must point out the non-compliance by the national supreme court with the obligation to make a reference for a preliminary ruling and must evaluate at the same time the presence of a consequent (and so, 'manifest') infringement of a 'substantive' rule of Community law.

This will guarantee the effective safeguard of the citizens' rights coming from Community law, as well as contributing to ensuring the unity of the European legal system.

4. The network between Court of Justice and national Administrations

The cooperation of the European *nomofilachia* involves the Court of Justice and the Member States 'lower' courts and the national administrative bodies (public, regional and local). These are other 'nodes' of the network made by the Luxembourg Court to ensure respect for its function of uniform interpretation and application of Community law. The national public administrations enter the Community *nomofilachia* network because of their traditional powers of review of a final administrative decision¹⁵. In

¹⁴In some cases, the Court of Justice has stated almost completely the requirements of the reparation for loss. See, for example, European Court of Justice, Lindopark, case C-150/99 (judgment of 18 September 2001); Larsy, case C-118/00 (judgment of 28 June 2001), <http://curia.europa.eu/>.

¹⁵The Italian term 'autotutela decisoria' can be translated in 'power of review of a final administrative decision'. However, we are conscious of the different names used for these administrative powers (and of the different kinds of exercise of these powers) in each Member State legal system. On this matter, we have to quote Schönberg, 2000; Cassatella, 2004, pp.66-90. On the administrative powers of review as regards the uniformity features of the European legal system see Greco, 2007, pp. 933-990; Mattarella, 2007, p.1223 .

fact, the administrations' power of review of a final administrative decision can be a remedy for the non-compliance of the national courts of last resort as regards the interpretative bonds of the Community *nomofilachia*.

We speak about the hypotheses in which, after the settlement by a national supreme court of a dispute with the breach of art. 234(3) of the EC Treaty, the national administration is asked to re-examine an administrative act which has become definitive after a national judgment which is inconsistent with Community law. This administrative re-examination, in fact, can be the only instrument we have to safeguard juridical positions which are based on Community law as interpreted by the Court of Justice. This happens mostly when a judgment of the Court of Justice *ex art. 234* of the EC Treaty, arrives after the national judgment and it formulates an interpretation of EC law which contrasts with the one given by the national court of last resort (a national supreme court which did not make a reference for a preliminary ruling

In the *Kühne & Heitz* judgment, in particular, the Court of Justice states, on the basis of the principle of cooperation in pursuance of art. 10 of the EC Treaty and when there are particular conditions, the obligation for the national administration to re-examine an administrative decision which is in contrast with Community law¹⁶.

In the reference for a preliminary ruling made by the *College van Beroep voor het bedrijfsleven*, the Dutch Court asked the European Court of Justice if an administrative body is obliged to review a 'final' administrative decision in order to ensure the respect for Community law as it has been interpreted by a judgment of the Court of Justice, which has normally retroactive effect.

The Court of Justice states that the obligation to re-examine applies only under the following specific conditions: (a) when the administrative body has, under national law, the power to reopen that decision (b) that the administrative decision in question has become final as a result of a judgment of a national court of last resort; (c) that the national judgment is, in the light of a decision given by the European Court of Justice subsequent to it, based on a misinterpretation of Community law which was adopted without being referred to the Court of Justice for a preliminary ruling; (d) that the person concerned complained to the administrative body immediately after becoming aware of that decision of the European Court of Justice¹⁷.

The conditions laid down by the Community court are strictly correlated. It can be seen that the characterization of the power of review of a final administrative decision as a Community legal system instrument of real safeguard of the rights of the individuals. This kind of safeguard of the rights is the remedy to the misinterpretation of the Community law given by the national court of last resort, which has in the

16 European Court of Justice, *Kühne & Heitz*, case C-453/00 (judgement of 13 January 2004), par. 24, <http://eur-lex.europa.eu/it/index.htm>. On this judgment, we can see Caranta, 2004, pp.1154-1156; Martin Rodriguez, 2004; Ruffert, 2004, pp.619-621. In order to make a complete analysis of this subject, even as regards the judgments that we have had before the *Kühne & Heitz* judgment, see Galetta, 2005b, pp. 35-60.

17 *Kühne & Heitz* judgment, par. 26.

meantime failed to follow the obligation to request a preliminary ruling under Article 234(3) of the EC Treaty, putting at risk the uniform interpretation of the European law.

So, when there are the requirements stated by the Court of Justice, the national administrative body can affect the internal judgment which is inconsistent with Community law, and in this way it can support the *nomofilachia* function of the Court of Luxembourg.

The last conditions given in the *Kühne & Heitz* judgment are developed further by the *Kempter* judgment, in establishing the obligation to review the administrative decision which infringes the Community law¹⁸.

‘It cannot therefore be inferred from *Kühne & Heitz* that, for the purposes of the third condition established by that judgment, the parties must have raised before the national court the point of Community law in question¹⁹. [...] 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 equivalence²⁰.

So, in the circumstances stated in the *Kühne & Heitz* judgment, the national administration, in accordance with the principle of cooperation arising from Article 10 of the EC Treaty, has the obligation to open the administrative proceeding for the review of the final administrative decision in order to take account of the interpretation of the relevant provision of Community law given in the meantime by the European Court. In particular the national administration ‘will have to determine on the basis of the outcome of that review to what extent it is under an obligation to reopen, without adversely affecting the interests of third parties, the decision in question²¹. The national administrative body must take the last decision, and in order to do so, it must apply the national rules and criteria that regulate the re-examination of the administrative acts (De Pretis, 2004, p.73). In the end, where we have the circumstances that have been identified in the *Kühne & Heitz* and *Kempter* judgments, the needs of unity of the European legal system forces the public body to re-open (after the appeal of the person concerned) the administrative proceeding for the review of the final administrative decision, with the discretionary power to affect the internal judgment which is inconsistent with Community law.

In this way we can identify the role of the national administrative bodies in the Community *nomofilachia*. Thus the obligation to review the final administrative decision which is inconsistent with Community law is justified by the previous violation of art. 234(3) of the EC Treaty, committed by the national court of last

18 European Court of Justice, Grand Chamber, *Kempter*, case C-2/06 (judgment of 12 February 2008), <http://curia.europa.eu>. As regards this judgment see Ward, 2008, p.739; Cortese, 2008, p. 1517.

19 *Kempter* judgment, par. 44-45.

20 *Ibidem*, par. 60.

21 *Kühne & Heitz* judgment, par. 27.

resort. Accordingly, the national administrative bodies are (mostly) in charge of the uniform fulfillment of Community law and so they become parts of the Community *nomofilachia* network.

5. The general principles of Community law and the 'new' legality of the administrative function

In the second part of this essay, the new sanctions in case of non-compliance from national courts of last resort have important consequences for the national administrations' activities. We consider the review of administrative acts which are inconsistent with Community law (*Kuhne & Heitz* and *Kempter* judgments) and also the requirement that national administrations must respect the principles of the European Community legal system.

As regards this last aspect, the juridical contents of the principles of Community law have been moulded through the *nomofilachia* function of the European Court of Justice. This means that some case-law principles bind public administrations even in Civil Law systems such as the Italian one. In fact, Art. 1, par. 1, of the Law n. 241 of 1990, the Italian law on the administrative proceeding, states that administrative activity 'is regulated' (also) by the Community law principles.

The analysis of the impact of these principles on the national administrative activities would require a book. Nevertheless, this essay seeks to highlight some evolutionary aspects of the consequences for public administrations' activities (with a particular reference to the Italian situation) of a general principle of Community law: the principle of proportionality. In particular, by comparing the European and the Italian case-law, we will suggest that proportionality is becoming more and more a 'non-invasive' criterion, a principle of the whole administrative function, and not a principle which exclusively binds the administrative 'power'.

In this way, the problems linked to the uniform interpretation and application of Community law also concern the identification of the evolutionary aspects of the juridical contents of the principle of proportionality.

It is clear that the general principles of Community law are a point of integration between the Community legal system and the legal systems of the Member States, which contribute, simultaneously and decisively to the harmonization of the national administrative laws²².

The general principles of Community law have been identified by the Court of Justice in order to fill the gaps of the Community legal system for those cases in which the Treaty did not provide a solution²³. The Court of Justice started to identify and

22 The Community law has a direct and even an indirect influence on national administrative law. On this matter, see Cassese, 1993, p.329; Greco, 1993, p. 85., Chiti, 1996; Picozza, 1996, p. 239. Chiti, 1992, p.717; Torchia, 1997, p.845.

23 From 1957, the Court of Justice in order not to refuse justice in an administrative law matter which was not foreseen by the Treaty, spoke explicitly about the laws, the jurisprudence and the case-law of the Member States; see Court of Justice, *Dineke Algera*,

develop these principles taking them from the experiences of the Member States legal systems. As the principles have been strengthened and refined by the European Court of Justice case-law, they have been acknowledged by all the national legal systems. In this way, we have a circulation and a penetration of the general principles of EC law, as they have been stated by the Court of Justice, within the Member States legal systems, and so we have the process of the mutual hybridization between *common law* and *droit administratif* systems.

These principles, those with a Community origin and even those which belong to the national legal systems (Schwarze, 2004, p. 1224), pervade every branch of the law, and, as regards public law, have the important function to bind the sovereign power, not only when it expresses itself through legislative measures (Marino, 2007, p.139), but also when it expresses itself through administrative activity.

In particular, as regards administrative law, the Court of Justice case-law has, from time to time, identified, among others, the principles of legality of the administration, of equality, of proportionality, of legal certainty and of protection of legitimate expectations, the precautionary principle, the principles of administrative procedure under the rule of law, the principle of 'good administration'²⁴.

Both national and Community administrative bodies, tend to comply with the common standards of the *acquis communautaire*, which have serious consequences for the national administrative laws.

The way towards the integration of the Community and the national legal systems caused by the Community principles can be seen even in a field such as administrative law, in which we have greater preservation of the national peculiarities because of the political, social and cultural differences that have contributed to making the different common law and *droit administratif* systems (Massera, 2005, p.730).

As regards this matter, it is particularly important to note that the Italian legal system, in 2005 acknowledged the 'general principles of the Community legal system',

case C-7/56 e 3-7/57, in *Raccolta*, 1957, 83. Afterwards, the Court has better defined and developed the general principles of the law, and in case of necessity, it has inquired about the Member States legal systems, about their constitutional traditions, and even about the European Convention of Human Rights (see also art. 6 of the EU Treaty). The Lisbon Treaty (published the 17 December 2007, in the OJEU, 2007/C, 306, page. 1 and follows) points out the Charter of the fundamental rights of the European Union (published the 18 December 2000, in the OJEU, 2000/C, 364, page 1 and follows) in which have been codified the whole catalogue of the general principles that establish the *acquis communautaire* in the Community legal system. See, Zito, 2002, p. 425; Trimarchi Banfi, 2007, p.49.

²⁴In order to examine the general principles of the Community law, see Massera, 2007, p. 285. Schwarze, 2004a, p.1297 and Schwarze, 2004b, p.1230, highlights the role of the general principles as regards the safeguard of the '*Stato di diritto*' in the EU after the enlargement up to 25 Member States.

It has been said that the Court of Justice, far from referring to the principles which are common to the National legal systems and to the method of the critical comparison, has elaborated the general principles drawing them, from time to time, from the National legal systems. See, Gaja, 1986, p.543; Schwarze, 2004a, p.1284.

and has stated them in the new version of art. 1, par. 1, of law n. 241 of 1990²⁵. But, even before this legislative modification, scholars did not question that the national administrative action would abide by the principles of the Community legal system, not only as regards the matters in which the Community rules have direct effect, but also as regards all other matters. This is because the general principles of the law must be applicable to every matter, without any restrictions²⁶.

Moreover, as regards the Italian legal system, the reference to the Community principles is not really new: in fact the Italian law maker has expressly considered them when regulating wide sectors of the administrative function.²⁷

The most important consequence of what has been provided for by art. 1, par. 1, of the Italian law n. 241/1990, is the redefinition (and the enlargement) of the legality principle of the administrative function, now integrated by the 'principles of the Community legal system' to which the lawmaker generically refers, with a clear reference to the *nomofilachia* function of the European Court of Justice.

This shows the real crisis of the principle of legality that is, in the meanwhile, the crisis of the supremacy of the law and of the juridical positivism (Marino, 2007). In this way, even apart from the recent resistance to the European political integration process, all the Member States' legal systems confront themselves with a sole concept of legality, based on common juridical principles, such as they are identified and applied by the European case-law (Merusi, 2009, p.43).

The legality of the administrative function is, in this way, released from the mere formalistic respect of the legislative rules and finds, in the meanwhile, new criteria in principles which have a case-law origin. Moreover, these principles would be the guidelines of the administrative function in its totality. We would say that (in particular) the principles which come from the *nomofilachia* function of the European Court of Justice usually condition the work of the national administrative bodies, even when they act through unilateral provisions or through other juridical means (such as agreements, contracts). As has been already highlighted, the administrative function can be nowadays read as a discretionary 'duty' to pursue the public interest, and not as a discretionary 'power'; a 'duty' that can be accomplished through unilateral

25In consequence of the Italian law n. 15/2005, the art. 1, par. 1, of the law n. 241/1990 provides that the administrative activity pursues the aims which have been defined by the law and must follow the criteria of inexpensiveness, effectiveness, publicity and transparency and the principles of Community legal system.

26The general principles identified by the Court of justice are in force in all cases, independently from their Community relevance. See, Temple Lang, 1991, p.23. Greco, 1993, p.83 and Greco, 2008, p. 69 s. considers the influence of the so called 'induced effects' of the Community rules on the National legal systems as an important moment of integration and homogenization of the Member States administrative law.

27In order to clarify this matter, see the Italian regulations on the competition safeguard (art. 1, last paragraph, law n. 287 of 1990), on the Public authorities' contract function (art. 56, par. 2, law no. 142/1990), and even that on the reorganization of the national electric system (art. 1, par. 1, law no. 142/1990).

juridical means, administrative acts, or other means such as agreements, contracts (Marino, 2003, p. 346).

In this way, the Community principles have an impact on the basis of the Italian administrative law, as it has been developed during the last century. Concepts such as discretion, merits and legality (Ottaviano, 1947; Piras, 1972) have a new meaning in a legal system which is increasingly based on the integration of national and Community legal systems. A process of integration which is, implemented by the uniform interpretation and enforcement function of the Community law done by the Court of Justice through the new kind of 'network' cooperation with national 'lower' courts and administrative bodies.

6. Proportionality and relational dynamics between principles of national and Community law

Among the general principles of Community law, we highlight the principle of proportionality²⁸. Even if it belongs to a different part of the legal system, the principle of proportionality is mostly applied in general public law, and particularly in administrative law, as it is a limitation of 'public power'.

Indeed, the principle of proportionality, which was developed from German police law²⁹, states that the administrative action must be suitable, necessary and, proportionate in the strict sense, to pursue the public interest.

According to the three elements of the principle of proportionality, the administrative measure must be, at the same time suitable, that is, able to reach the pursued result; necessary, in the sense that the authority concerned has no other mechanism at its disposal which is less restrictive of freedom; proportionate in the strict sense, that is, able to reconcile the different interests involved in that solution which is not excessively hard for the citizen.

This principle, borrowed from the German legal system³⁰, is set among the general principles of Community law (Schwarze, 2004a, p.1219 and 2004b, p. 1279) and introduced in the primary EC law as a limit to the enforceability of the principle of subsidiarity³¹, has been applied even in the Italian legal system. Indeed, the *nomofilachia*

28 See Schwarze, 2003, p.53; Schwarze, 2006, p.677; Emilou, 1996; Ellis 1999; Philippe, 1990; Barnes *et al.*, 1998; Sandulli, 1998 and 2006; Galetta, 1998, and 2005.

29 At the beginning of the 20th century the principle of proportionality has been synthesized by F. Fleiner, as 'the police does not shoot the sparrows with the cannons', quotation from Galetta, 1998, p.14.

30 The principle of proportionality has been applied by the Court of Justice since its birth: Court of Justice, *Federation Charbonnière de Belgique*, case C-8/55, in *Raccolta*, 1955-56, p. 199; *Società Acciaierie San Michele*, case C-5-11, 13-15/62, in *Raccolta*, 1962, p.917; *Schmitz*, case C-18/63, in *Raccolta*, 1964, p.175 .

31 The principle of proportionality has been quoted in art. 5, par. 2, Treaty establishing the European Community, and has been further reaffirmed in the agreement which has been added to the Treaty of Amsterdam 'on the enforcement of the principle of subsidiarity and proportionality', and, at last, that has been confirmed by the Treaty of Lisbon.

function that the Court of Justice has on the Member States' legal systems has led the scholars and the law maker to assert the enforceability of proportionality even in the Italian legal system³².

Even considering the numerous and valuable studies by European scholars on this matter, an up to date reflection on the principle of proportionality can be developed though the analysis of some guidelines coming from Community law, European and national (Italian) case-law. In fact, the Italian administrative courts have in some cases evaluated the contents of the principle of proportionality, coming to conclusions that, although they are limited to the national legal system, can be considered in a more general perspective³³.

The principle of proportionality will be analyzed through a double reading: the relational dynamics between proportionality and other principles of national and Community law; and proportionality as a 'transversal' criterion of the administrative function.

As regards the relationship between proportionality and other general principles concerning administrative action, in national and Community law, we can make two kinds of hypotheses.. The principle of proportionality, restrains the work of the administrative body in a more convincing way than the principle of the reasonableness, and it contributes to defining the juridical contents of the precautionary principle.

For more than fifteen years the Italian courts have applied the test of proportionality which, because of its three steps³⁴, defines a wider, deeper and more efficacious control of legitimacy of the administrative function than the related concept of reasonableness.³⁵

32 Nowadays, in the Italian law we can find an indirect reference to the principle of proportionality in art. 1, par. 1, of the law n. 241/1990, as modified by the law n. 15/2005, and we find a clear quotation of this principle in art. 2 of the called Code of public contracts (legislative decree n. 163 of 2006), according to which when the administrative bodies trust public works, services and supplies they must abide themselves to the principle of proportionality.

33 As it has been said by the scholars, only during the last years has Italian jurisprudence acquired the Community principle of proportionality even if sometimes it confuses this principle with the reasonableness one. See Galetta, 2005a, p. 554.

34 The Italian administrative courts have often recognized that the verification of the proportionality of the administrative function must be done according to the so called 'theory of the three steps', which has been elaborated by the German scholars and acknowledged by the Court of justice: Cfr.: Consiglio di Stato, n. 1885/2000; TAR Lombardia, Milano, n. 6158/2000; TAR Lombardia, Brescia, n. 288/2001; TAR Lombardia, Brescia, n. 2191/2002; TAR Veneto, Venezia, n. 1836/2003; TAR Abruzzo, Pescara, n. 641/2004; TAR Puglia, Bari, n. 2405/2004; Consiglio di Stato, n. 6410/2004; TAR Abruzzo, l'Aquila, n. 661/2005; TAR Lombardia, Brescia, n. 1356/2005; TAR Puglia, Bari, n. 3783/2006; Consiglio di Stato, n. 2087/2006 cit.; TAR Lazio, Roma, n. 563/2007; Consiglio di Stato, n. 1736/2007, <http://www.giustizia-amministrativa.it>.

35 Scholars highlight a trend in which the principle of proportionality belongs to the principle of reasonableness, because of their relationship of species a genus, and for this reason, it belongs to the general standard of coherence and rationality of the administrative function,

The principle of reasonableness, which has been primarily used by the *Common Law* legal systems (Wade, Forsyth, 2000, pp.353-385), has successively been applied in different ways, even in the most important Continental European legal systems: the *rationalité* and the *erreur manifeste d'appréciation* in France, the *Zumutbarkeit* and the *Rationalität* in Germany, the *racionalidad* in Spain (Sandulli, 2000, p.961). As regards the Italian legal system, the principle of reasonableness is the direct consequence of the constitutional principles of impartiality and '*buon andamento*' of the administrative function (art. 97 of the Italian Constitution), and the principle of equality (art. 3 of the Italian Constitution).

The principle of reasonableness forces the administrative body to work according to rules of logic, coherence and suitability, thereby avoiding unjustified and irrational differences of treatment among private individuals (Casetta, 2005, p. 518; Vipiana, 1993). Such a definition highlights the ontological difference of the principle of proportionality as regards that of reasonableness and its greater intensity for the judicial control of the legality of the administrative function.

Where the principle of reasonableness acts a balance of the interests in the light of the logicity- congruity of the administrative measure, the principle of proportionality implies a more complicated and articulated evaluation which directly relates the impact upon the private individual with the pursued public interest³⁶.

Consequently, in case of judicial annulment of the administrative measure for the violation of the principle of proportionality, because of its unsuitability, or because it is not necessary or a disproportionate means to achieve the legitimate aim, the administrative body cannot reiterate it; rather, it must opt for a measure that is less intrusive for the citizen. Whereas, the violation of the reasonableness standard, with the following judicial annulment of the administrative measure which has been impugned, allows the administrative body to reiterate, with some adjustments, the same measure. So, it is clear that the proportionality test affects the exercise of the administrative power from a 'qualitative' point of view (Parisio, 2006, pp.725-729).

The principle of proportionality modulates and defines the discretion of the administrative body so that it becomes increasingly a 'duty' and less a 'power'³⁷.

that is, to the principle of '*buon andamento*' of the administrative bodies as provided for by art. 97 of the Italian Constitution, see Morbidelli, 1993, p.1026; Vipiana, 1993. Some other scholars state that the principle of proportionality is autonomous from the reasonableness one cf. Galetta, 2005a, p. 554 and 1998; Sandulli, 1998, thesis reaffirmed in 2006, p.4646.

³⁶ So, the evaluation of the interests would be articulated accordingly to the 'theory of the three steps', and in this way the provisions of the administrative body would be necessary, suitable and adequate to pursue the public interest.

³⁷ Marino, 2003, p. 346, p.362, who states that the expression 'discretionary duty', at the place of 'discretionary power', makes clearer and more evident the basis on which we construct the administrative function's permanent duty, with its permanent duty to give reasons within the final act (and so on). Ferrara, 2008, p. 47, brings back the discretionary power to the proportionality-reasonableness and highlights the immanence of this hendiadys in the 'global' legal system.

Proportionality constrains the administrative function, as well as the conduct of the administrative proceeding, and by strengthening the role and the meaning of the citizen's participation in the administrative proceeding, and through the duty to give reasons for the final administrative decision (Marino, 2003, p. 340, and 2007, p. 158).

7. Proportionality and the precautionary principle

The second aspect of the relational dynamics between proportionality and other principles of national and Community law is the relationship between proportionality and the precautionary principle.

The precautionary principle guides the action of the public authorities in cases of scientific uncertainty³⁸. According to the European Commission, in particular, the precautionary principle 'finds its application in all the cases in which a preliminary scientific objective evaluation shows that there are reasonable grounds to fear that the possible injurious effects on the environment and on the health of human beings, of animals and of plants can be incompatible with the high level of protection chosen by the Community'³⁹. As regards this aspect, European scholars have identified the 'constitutional' background of this criterion in articles 3, 6, 152, 153 and 174 of the EC Treaty⁴⁰.

In cases of scientific or technological uncertainty, which are increasingly present in contemporary 'risk society' (Beck, 1986), Community law establishes that the public choices must not be linked only to an uncertain technical or scientific parameter. This causes the emergence of an independent phase of 'management' of the environmental and health risk which is detached from the results of the phase of scientific evaluation of risk (that is anyway necessary and made in a preliminary phase). So, this kind of distinction between evaluation and management of risk can legitimate an administrative body's decision to deny the authorization to start, for example, an industrial business which presents some risks for the health of the citizens and for the environment, according to considerations which do not have a scientific feature but an historical, cultural or economical one (Marino, Barone, 2005; Barone, 2009).

38 German juridical doctrine has had a fundamental part in the study of this principle. See Darnstädt, 1983; Rengeling, 1985; Reich, 1989; Reh binder, 1988, pp.129, 1991, 269; Ladeur, 1995; Callies, 2001.

For French doctrine see: De Sadeleer, 1999; Cans, 1999, p.750; Foucher, 2002; Noiville, 2003; Gossement, 2003; Ewald, Collier, De Sadeleer, 2003. Moreover, *The Revue Europeenne de Droit Public* devoted its Vol. 15, nr. 1, 2003, to the theme *Droit Publique et risque*. As regards English doctrine see: O'Riordan, Cameron, 1994; O'Riordan, Cameron, Jordan, 2001; Fisher, 2007.

For the Italian juridical doctrine, see: Ferrara, Marino, 2003; Barone, 2006; De Leonardis, 2005; Fioritto, 2008.

39 European Commission, 2000, p. 3 of the summary.

40 European Court of First Instance, case T-74/00, T-76/00, by T-83/00 up to T-85/00, T-132/00, T-137/00 e T-141/00 (judgment of 26 November 2002), curia.europa.eu, par. 183-184.

US scholars have strongly criticized the European development of the precautionary principle, underlining the fact that it can generate a sort of 'laws of fear', creating new forms of scientific obscurantism (Sunstein, 2005). However, as the European Commission has stated, the precautionary measures must anyway respect the principle of proportionality. It is not by chance that proportionality has been identified as a 'non-invasive' criterion which guarantees the freedom of the citizen and stems the unsuitable, unnecessary and inadequate interventions of the administrative bodies (Marino, 2004, p.27).

According to Community law, the precautionary measures, in addition to being non-discriminatory and coherent with similar measures already adopted⁴¹, must produce proportionate results as regards the chosen level of protection. 'Measures based on the precautionary principle must not be disproportionate to the desired level of protection and must not aim at zero risk, something which rarely exists. [...] In some cases a total ban may not be a proportionate response to a potential risk. In other cases, it may be the only possible response to a potential risk. Risk reduction measures should include less restrictive alternatives which make it possible to achieve an equivalent level of protection, such as appropriate treatment, reduction of exposure, tightening of controls, adoption of provisional limits, recommendations for populations at risk, etc. One should also consider replacing the products or procedures concerned by safer products or procedures'⁴².

The principle of proportionality contributes to integrate the juridical contents of the principle of precaution and, more in general, can be considered as a criterion of interpretation and of comparison with other principles of national and Community law⁴³.

8. Proportionality as a 'transversal' principle of the administrative function

A further feature of the evolution of the juridical contents of the principle of proportionality can be seen in the impact that this principle has, not only as regards the exercise of the administrative activity, but also as regards the overall administrative function. We are used to saying that the principle of proportionality affects the contents of the traditional means of expression of the administrative 'power': the administrative act. At the same time, it can affect either the choice of the juridical means to pursue the

41 European Commission, 2000, pp.18-23.

42 European Commission, 2000, p.18.

43 To make further examples we could think to the relation between subsidiarity and proportionality. Art. 5 of the EC Treaty establishes that in the fields for which the Community is not the sole competent, it intervenes according to the principle of subsidiarity, only if the objectives of the foreseen action cannot be sufficiently well realized at a community level. The third paragraph of art. 5 of the EC Treaty, which is enforceable to all the Community rules, limits the action of the Community to what is necessary to reach the aims of the Treaty. See, Sico, 2001, p. 1062. De Pasquale, 2000, p.13.

public interest, administrative act or administrative agreement, or the administrative activity regulated by civil law. In fact, it is clear that the administrative body, in almost all the cases, can choose several different ways through which it can reach the aim and give substance to the public interest.

As regards the Italian legal system, the principle of proportionality will guide the administrative body since the choice of the means to apply in a particular case (Cerulli Irelli, 2003, p.236), considering that the administrative function can express itself according to the different and more flexible rules of civil law⁴⁴, and also through special agreements in substitution or integration of the administrative act, ex art. 11 of the Italian law n. 241/1990. The chosen means must be, at the same time, suitable, necessary and proportionate to secure the public interest⁴⁵.

For example, Italian scholars have highlighted that the respect for the principle of proportionality can sometimes be better guaranteed through the conclusion of agreements between administrative bodies and private individuals⁴⁶.

In particular, according to the Italian *Consiglio di Stato*, in cases of agreement between private individuals and administrative bodies it is obvious that this kind of agreement guarantees the need for adaptation between the general interest and the particular interests of the private individuals, respecting the principle of proportionality which restrains the pursuit of the general interest with the requirement of the least adverse effect for private individuals.

As regards the impact of the proportionality on the administrative bodies' contracts, it is important to refer to public procurement. In Italy this sector has recently been

44 At the end of the 1950s, Giannini, 1958, p.944, asserted that 'the Public juridical person can take care of the public interests that it has as aims through Public law instruments and even through the Private law ones. The public activity regulated by civil law [...] is administrative activity' (our translation from Italian to English).

45 Art. 11 of the Italian law n. 241/990, modified by the law n. 15/2005, allows the administrative body to sign agreements with private individuals which are substitutive or integrative of the administrative act. So, this rule allows public administrations to carry out the administrative function through consensual ways. Naturally it is out of any doubts the novelty and the importance of this rule within the Italian legal system: the unilateral instrument and the conventional one are two options, and both are, in abstract, suitable and have the same dignity, to reach the public interest.

This article identifies two models: the substitutive and the integrative agreement. The first one is an endo-proceeding agreement between the administrative body and the private individual and afterwards it becomes part of the final administrative act; on the contrary the substitutive agreement replaces entirely the administrative act.

The juridical regulation of the agreements provided for by the art. 11 of the law no. 241/1990 highlights the enforceability of the civil law principles, as they are compatible: the written form, request *ad substantiam*, and even the chance from the administrative body to withdraw unilaterally only 'if there are new public interests reasons'. See Casetta, 2005, p.543; Greco, 2003.

46 See for example, Consiglio di Stato, sez. VI, 5 January 2001, n. 25, in *Urbanistica e Appalti*, 2001, 305 et seq.

subjected to new rules (the Codice dei contratti pubblici di lavori, servizi e forniture⁴⁷), adopted to implement Community Directives 2004/17/CE and 2004/18/EC⁴⁸.

The new Italian Code highlights a renewed attention to the market, as it states that the public contracts sector is regulated by the Community principles of protecting competition, with the clear purpose to guarantee the wider participation of the economic operators (including those in other Member States). In order to entrust and to perform public contracts the administrative body must, moreover, respect the principles of transparency, non-discrimination and above all of proportionality (art. 2 of the Italian Code for public contracts).

As regards this last aspect, Italian administrative scholars have interpreted the principle of proportionality so as to safeguard the equal treatment among the enterprises interested in the public contract. In particular, this kind of contract must be interpreted as it is an economic benefit, subject to public tendering procedures, through which it guarantees, simultaneously, the expediency of the administrative body's choice competition among the private individuals and the impartiality of the administrative function.

Even in these cases, proportionality sets limits to the discretion of the administrative body. When a public administrative body prepares a call for bids, it cannot impose upon the interested enterprises conditions and clauses of participation which exceed what is necessary to satisfy the object of the service envisaged in the bids⁴⁹. Thus the administrative bodies are forbidden to include in the bids clauses of admission and participation which require unjustified technical, organizational and economic, or financial prerequisites for the enterprises, limit the competition, causing differences of treatment, and discriminate against some subjects in an unjustified way⁵⁰.

47 D.lgs. 12 April 2006, no. 163, in G.U. 2 May 2006, no. 100, suppl. ord. no. 107 subsequently modified by d.lgs. 26 January 2007, no. 6, in G.U. 31 January 2007, no. 25; d.lgs. 31 July 2007, no. 113, in G.U. 31 July 2007, n. 176, suppl. ord. no. 173; d.lgs. 11 September 2008, no. 152, in G.U. 2 October 2008, no. 231. In order to have exhaustive observations of the contracts see Massera, 2006, and Sandulli, De Nictolis, Garofoli, 2008.

48 Both Published on G.U.E. 30 April 2004, no. 134.

49 We have an Italian case-law trend according to which it is up to the discretion of the contractor to identify the requirements to take part in a contract. Even if these requirements are more intrusive than those which are foreseen by the law, the public power fits (through the specification of the requirements for the admission) the instruments and measures which are more suitable, adequate, efficient in order to pursue the public interest in a correct and effective way (ex multis Cons. Stato 10.01.2007, no. 37). We have a single ground of challenge to the public discretionary choice: when it is openly unreasonable, irrational, arbitrary, disproportionate, illogical and contradictory, and even when it is prejudicial to the competition (cfr. Cons. Stato, sez. V, 14.12.2006 no. 7460; Cons. Stato, sez. V, 13.12.2005 n. 7081; Cons. Stato, sez. IV, 22.10.2004, no. 6967) (TAR Emilia Romagna, Bologna, 11 April 2008, 1424. Moreover, see *ex multis*, TAR Lombardia, Brescia, no. 1698/2002; Consiglio di Stato, no. 9305/2003; TAR Lazio, Roma, no. 5418/2006; TAR Puglia, Bari, no. 475/2007; TAR Lazio, Roma, no. 1824/2008).

50 See, *ex multis*, TAR Liguria, Genova, no. 1238/2009; TAR Puglia, Lecce, no. 2216/2004; Consiglio di Stato, n.o 2294/2002; TAR Lombardia, Milano, no. 922/1998.

In this way proportionality affects all the means of the administrative function and so acquires 'transversal' features.

9. "Judicial globalization" and peculiarities of the European legal system

The impact of the Community case-law principles on administrative activity is a result of the *nomofilachia* function of the European Court of Justice. Such a consideration, if from one side presupposes the guarantee of the uniform interpretation of Community law, from the other side is useful to guarantee the uniform treatment of the interests which are protected by European law. This strengthens the perspective of a 'unique case-law charter' of the administrative activity, characterized by the same general principles.

The progressive emergence of this kind of 'charter' must be evaluated according to the 'clause of homogeneity' which characterizes the European legal system⁵¹. The uniform interpretation of Community law is not done exclusively through the mechanism of authoritative imposition from the top, Court of Justice, towards the bottom national 'lower' courts and administrative bodies. On the contrary, if from one side in the network of the Community *nomofilachia* the national-local nodes, 'lower' Courts and administrative bodies, have some interpretative autonomy, from the other side the general principles of Community law can be defined precisely as regards their interpretation by national jurisdictions, for example, the principle of proportionality.

The Court of Justice, national courts and administrative bodies thus become, from time to time, the main actors who guarantee the effective uniform interpretation and enforcement of Community law and even guarantee a new 'legality' of the administrative function, based on case-law principles.

This allows us to further appreciate the peculiarities of the European legal system as regards the different phenomena of the so called 'judicial globalization'⁵².

51 See Mangiameli 2005, p.541. As Chiti 2004, p. 536 states the European Union has to be read as an 'homogeneous' legal system. This interpretation is encouraged by the new article 2 of the Treaty on the European Union (amended by the Lisbon Treaty) according to which (par. 2): 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self government [...]'. The clause of homogeneity of the Community legal system, on the other hand, blends with a system which shares the competences between Union and Member States according to the principle of conferral. To have a further confirmation of the relationship European homogeneity – respect of the 'national identities', the Union intervenes, out of the field of its sole competence, applying the principles of subsidiarity and proportionality (see Barone, 2003, p.31).

52 This expression is taken from. Baudenbacher, 2003, p. 502. On this matter see the remarks of Pollicino, 2007, pp.407-440. As Ferrarese, (2002, p. 228) states, within the globalization, the judicial power is characterized by a strong tendency to 'inter-activity', that is, a new capability of the courts to establish connections, adjournments and reciprocal

In fact, the guarantee of the uniform interpretation of Community law is made through reticular processes that do not involve only the 'upper' courts (Cassese, 2009). The network of the Community *nomofilachia* works through the basic contribution of the 'lower' courts and national administrative bodies, State, regional and local. The national administrative bodies must respect in their activity some common case-law principles, and in this way they contribute to create a unitary juridical tissue in the relationship between citizens and public powers.

Moreover, the 'global juridical space', which represents the theatre of the new role of the judges '*dans la mondialisation*' (Allard and Garapon, 2006), is made by a plurality of special systems of rules among which we have contiguity but not continuity, as they do not have the 'unity' requirement (Cassese, 2007, p. 615). These basic features are different from those of the European 'homogeneous' legal system. In fact in the Community legal system the unity-homogeneity is guaranteed, and not created all over again thanks to the Community *nomofilachia* network, and the progressive emergence of general principles which bind the European and national public administrations' activity.

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postponements, establishing complicated reticular links even among different countries beyond clear hierarchies of the sources or different juridical backgrounds. On this matter, see in particular: L'Heureux-Dubé, 2001, p.2049; Slaughter, 2003, p. 191 and 2004; Shany, 2007 and 2003.

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