A Pan-European Dialogue among National Courts for a more integrated Europe

by Biancamaria Raganelli Biancamaria Raganelli* and Öznur Uguz**

Abstract

What about the role of the Supreme Courts as part of the judicial network in promoting a uniform interpretation and adequate enforcement of the EU legislation? What independence of judgment and liability consequences for individual supreme national Courts of a possible refusal to proceed with a referral to the Court of Justice of the European Union? Is it possible and appropriate to draw a model that encourages dialogue and discussion between national courts in evaluating whether to activate the preliminary ruling mechanism?

The position taken by the Italian Administrative Supreme Court in a recent case concerning the interpretation and application of the national legislation on the treatment of dangerous substances offers the opportunity to reflect on the functioning of the preliminary ruling procedure and the role of the so-called *pan-European dialogue* between domestic courts and the CJEU, for a broader discussion on the European integration.

A new organization model for a more effective EU judicial system could be envisaged. The national courts could work not only as a transmission link. A network of domestic Courts that act as interconnected neural centers is envisioned, contributing at guaranteeing a *European ius commune* founded upon a uniform interpretation and application of EU law.

Effective functioning of such a model is only possible through an effective pan-European dialogue that allows individual courts to transmit impulses in a hetero-directional way, horizontally as well as vertically, in order to encourage the discussion and collaboration even before the referral. This would lead to a better amalgamation of legal systems in a flexible, efficient and responsible way and would facilitate the EU's legal integration. This lays the foundation for a more connected Europe where economic barriers are diminished for a more efficient European economy offering better opportunities for growth and development.

* Biancamaria Raganelli is Professor of Public Law and Economics at the University of Rome Tor Vergata, qualified Professor of Administrative Law, coordinator of the Jean Monnet Module on European Innovative and Sustainable Law financed by the European Commission (www.eusl.it).

** Öznur Uguz is phd student at Scuola Superiore Sant'Anna, Pisa.

Table of Contents: 1. Questions and preliminary considerations 2. The nature of the preliminary reference procedure under art. 267 TFEU and its role in the integration and development of EU law. 3. The role of the pan-European dialogue among national courts in the European jurisdictional network. 4. The responsibility of Courts of last resort for failure to make a preliminary reference with reference to the CILFIT criteria and the judicial independence principle. 5. Limiting judicial responsibility to the motivation of refusal and effects in the national context. 6. National courts' decisions on reference from the perspective of the right to a fair trial and the approach of the European Court of Human Rights. 7. The interpretative doubts on the adaptation of the "Seveso Directive" to Italian law and their wider implications on the functioning of the European Union.

1. Questions and preliminary consideration.

The Italian Administrative Supreme Court *Consiglio di Stato*, with its ruling n. 2789 of 21 March 2024, intervened on the very delicate topic of the treatment of dangerous substances and the compatibility of the European regulation on the matter with the national legislation transposed from thereof[1]. The appeal, presented by a company managing environmental services for the treatment of hazardous and non-hazardous liquid waste against a warning by a regional technical committee, offered the administrative judge the opportunity to address some issues regarding the proper integration of European regulations into national law and the correct interpretation of the directives regarding the management of dangerous substances.

The case concerns a formal warning issued in 2020 by a Regional Technical Committee (C.T.R.) against an environmental services management company in relation to a hazardous and non-hazardous liquid waste treatment plant,[2] in accordance with the implementation of the national regulations transposing the EU Directive 2012/18, known as the "Seveso Directive." A working group established by C.T.R. to draw up a report on whether or not the company's establishment is subject to the so-called "Seveso Directive"[3] implemented in Italy[4] confirmed the applicability of the European regulation to the specific case. The committee had held that the company was required to submit the notification and the safety report in the particular form as per the national legislation in force transposed from the Seveso Directive,[5] which was not specified in the EU regulation itself, and a warning was issued by C.T.R. of the region following an inspection[6].

[1] Council of State, sec. IV, ord. 21 March 2024, n. 2789 – Pres. Lopilato, Est. Conforti. Appeal brought by the company Eredi Raimondo Bufarini s.r.l. – Environmental Services, *against* the Ministry of the Interior, the Ministry of ecological transition, the Regional Technical Committee of the Marche, the Coordination for the uniform application on the national territory of art. 11 of Legislative Decree no. 105/2015, in the person of the respective Ministers *pro tempore*, represented and defended by the State Attorney General *for the reform* of the sentence of the Regional Administrative Court for the Marche n. 498 of 23 June 2021, rendered between the parties.

[2] The integrated environmental authorization (A.I.A.), issued by the Province, allows the storage (operation D15) of up to 800 tonnes of hazardous waste identified with various EER codes and the treatment (operations D8-D9) of up to 200 t/d of the same waste.

[3] Directives 82/501/CEE, 96/82/CE, 2012/18/UE.

[4] Presidential Decree n. 175 of 1988, Legislative Decree no. 334 of 1999, and Legislative Decree no. 105 of 2015.

[5] Art 13 and art 15 of the same Legislative Decree No. 105/2015.

[6] The company was warned twice to submit the notification and the safety report referred to in art. 15 of Legislative Decree 105 of 2015 or to limit the use of tanks so as not to exceed the threshold limits established by the regulations in force.

The Italian Regional Administrative Court, hearing the matter, rejected the appeal at first instance[7], but the complaints were re-proposed on an appeal to the Italian Administrative Supreme Court[8]. In particular, the environmental services management company claimed that under the "Seveso Directive," the manager of a waste treatment plant should be allowed to demonstrate, through a management system, that the presence of dangerous substances in his plant never exceeds the "lower threshold" through continuous monitoring of the substances present in the plant, which was not allowed under the national legislation that implements the EU Directive. If true, this would mean that national regulations not allowing such measures would violate the EU directive, which would constitute an infringement of EU law. To clarify the issue, which required the interpretation of Article 3(12) of Directive 2012/18/EU, a preliminary referral to CJEU was made, followed by the non-definitive sentence no. 490/2022, with which *Consiglio di Stato* suspended the proceedings and raised three preliminary questions relevant in a broader context of EU law.

The *first question* concerns the role of the Supreme Courts as part of the judicial network in promoting a uniform interpretation and adequate enforcement of the EU legislation. With reference to Article 267 of TFEU, which requires national courts of last resort to refer CJEU for a preliminary ruling on a question of interpretation of EU law, the administrative court asked for clarification regarding the conditions that trigger the obligation to refer.

The *second question* pertains to the liability consequences of a possible refusal by a national supreme court to proceed with a referral. If a national judge decides not to activate the preliminary ruling mechanism, would they be subjected to, automatically or at the discretion of the party requesting the preliminary ruling, civil and disciplinary liability? Can the principle of judicial independence and the right to trial within reasonable time be invoked to avert the activation of proceedings for civil and disciplinary liability against national judges for the refusal of a preliminary reference?

The *third question* focuses on the specific case and the definition of "presence of dangerous substances" provided for under Article 3(12) of the EU Directive 2012/18. Is the national practice, which allows an operational procedure to be implemented by the manager, including the constant monitoring of the quantity of dangerous substances present within the plant to guarantee that the lower and upper thresholds are not exceeded, compatible with the EU Directive?

This recent ruling on the management of dangerous substances by the Italian Administrative Supreme Court proposes some general considerations on the relationship between the Member State courts and CJEU in the context of the preliminary reference procedure, deemed a prerequisite with respect to the assessment of the interpretative questions. The reflection starts from the origins of the European community plan dating back to the end of the Second World War and continues with highlighting the change in perspective and strategy of interaction between European countries from coexistence to cooperation, which allowed the creation of an idea of Europe through the commitment of the first six founding countries, including Italy. The court emphasized Italy's *"active and convinced participation*

[7] Tar Marche, sentence no. 498 of 23 June 2021, n.r.g. 57/2021.
[8] The Ministry of the Interior, the C.T.R. have formed their resistance of the Marche Region, the Ministry of ecological transition and the "Coordination for the uniform application on the national territory of art. 11 of Legislative Decree no. 105/2015".

in the European construction and in the original legal system it developed" through a concert of the creation of the EU institutions, the establishment of a harmonized discipline, and a progressive transfer of sovereignty by Member States in different contexts and areas. This legal system has implications not only on the political and economic level, reflected through the legislative and executive functions, but also on the jurisdictional one, reflected through the work of the national courts.

The case is significant from multiple points of view in a broader context, as it suggests some important considerations on the role of national judges in interpreting national legislation transposed from EU law and on the active role of the preliminary reference procedure under Article 267 TFEU in the convergence and legal integration of the EU. Any consideration in that regard encompasses a necessary discussion on the need to ensure a uniform interpretation and application of EU law in different Member States and the role of judges in the broader context of the so-called *pan-European dialogue* among national courts and between them and CJEU, a constructive legal collaboration between the centre and the periphery of the Community. Establishing an effective pan-European dialogue is paramount for both the development and the consistency of *European common ius* as well as for the European legal integration, which is the driving force of the EU's economic and political unification. The EU judicial system, which comprises not only the EU courts but also the national courts of Member States by virtue of the preliminary reference mechanism, has evolved to become the primary actor of the European integration process, working like the "central nervous system"[9] of the EU and conditioning the functioning of every aspect of the Union governed under EU law, including the EU single market.

The influence of courts and the effect of judicial decisions have grown far beyond the legal aspect of the Union over the years, thanks to the successful collaboration and active dialogue among the national courts and CJEU, and expanded their impact to economic activities, business decisions, and policy of the EU, becoming a driver of the EU's economic growth and development. In addition to their role in the positive integration of Europe, the courts play an important part in the EU's negative integration by fostering the removal of legal barriers to international economic exchange through the harmonization and unification of rules and standards applicable to the intra-EU trade.[10] This demonstrates the utmost importance of a well-functioning *pan-European dialogue* between the courts both at the domestic and the Union levels towards the building of a more inclusive, cohesive, and stronger EU. The new model proposed in the context of the relevant case, which confers national courts a greater autonomy as the integral components of the EU judicial network cooperating through a hetero-directional constructive dialogue, supports and contributes to this multi-dimensional system of "integration through law" and offers a new perspective of improvement for better efficiency.

[9] Alec Stone Sweet, 'European Integration and the Legal System,' (2005) Reihe Politikwissenschaft Political Science Series 101 <https://aei.pitt.edu/3006/1/pw_101.pdf> accessed 8 September 2024.
[10] Ibid.

2. The nature of the preliminary reference procedure under Article 267 TFEU and its role in the integration and development of EU law

The Italian administrative court set out to interpret the influence of the Italian national legislation on the civil liability of judges on the preliminary reference decisions of national courts[11] and refers a preliminary question to CJEU on the matter, which spurs a discussion on the nature of the preliminary ruling mechanism under Article 267 of TFEU.

As is known, the procedure under Article 267 of TFEU grants CJEU jurisdiction to give preliminary rulings, following a request from a court or tribunal of a Member State, on the interpretation of the Treaties and on the validity and interpretation of acts carried out by the institutions, bodies, offices or agencies of the Union.[13] Whether Article 267 TFEU conveys a right to or imposes an obligation on national courts to make a preliminary reference depends on the possibility of appeal against the decisions given by such courts[15]. While the provision grants discretion to lower courts on their decision to refer, it confers an absolute duty to courts of last resort to bring the matter to the CJEU when they consider such a ruling necessary to give a judgment.

The preliminary reference procedure has been intended to and plays an important role in the European legal integration and the development of a uniform body of EU law.[16] It establishes a *"special field of judicial cooperation,"* as defined in the case *Firma G Schwarze v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*,[17] that creates an official channel of dialogue between national courts and CJEU for a coherent interpretation and effective application of EU law across Member States. This mechanism of judicial cooperation not only accounts for the emergence of a *European ius commune* built through the collaboration of EU institutions and member states but also facilitates the penetration of EU law into national legal systems and promotes the harmonization between national laws of the Member States and EU legislation.

An essential contribution of the preliminary reference mechanism to the formation of a *European ius commune* is its role in the development of several fundamental legal principles, demonstrating the growing role of the EU judiciary in reinforcing European integration. The most prominent of such principles from an aspect of strengthening European integration are the doctrines of supremacy, direct effect, and state liability.

---

[11] Law no. 117/1988, art. 2, paragraph 3-bis. For similar questions raised by the Fourth Section, see orders C-597/21 of 15 December 2022, C-144/22 of 15 December 2022, C-83/21 of 22 December 2022, C-482/22 of 27 April 2023, and C-495/22 of 27 April 2023. For other cases of remission, consult Cons. State, Sec. IV, ord., 6 April 2022 n. 2545; Section IV, sentence not definitive, 14 July 2022 n. 6013; Section IV, sentence not definitive, 21 July 2022 n. 6410.

[13] Art. 267, Treaty on the Functioning of the European Union.

[15] When analysing the consequences deriving from the violation of the para. 3, art. 267 TFEU, it is necessary to distinguish the internal ones, connected to the possibility of the private individual obtaining compensation for damages, from those relating to the relations between the EU and the Member State, connected to a possible infringement proceeding pursuant to art. 258/259 TFEU. For the first question, see the Köbler ruling in more detail (C-224/01). On the second, a case of infringement proceedings initiated by the Commission against the French Republic was addressed in Decision C-416/17.

[16] Karin Leijon, 'National courts and preliminary references: supporting legal integration, protecting national autonomy or balancing conflicting demands?' (2020) *West European Politics*, *44*(3), 510–530 <https://doi.org/10.1080/01402382.2020.1738113> accessed 8 September 2024.

[17] Case 16/65 *Firma G Schwarze v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1965].

The doctrine of supremacy is the cornerstone principle laying the foundation for a uniform body of EU law for it establishes the absolute precedence of EU law over the national laws of Member States, which entails a "duty" for Member States to set aside any national norm in conflict with an applicable EU law on the matter. The principle changes the dimension of the relationship between CJEU and national courts, which was horizontal in origin based on the equality of the EU and Member State courts, to a more vertical one, elevating CJEU to a "superior" position in the judicial hierarchy giving the court the power of judicial review of national laws in a way not envisaged in the Treaties.

While the existence of the principle of supremacy was claimed to be implied in the EEC Treaty by CJEU,[18] the doctrine was officially established in the case *Costa v. Enel*, in which a preliminary ruling was requested by the Italian Constitutional Court *Giudice Conciliatore* on the interpretation of Articles 102, 93, 53, 37 of EEC Treaty.[19] In its ruling, CJEU makes an explicit declaration on the *"precedence of Community law,"* stating that varied applications of EU law that change according to different national laws of Member States would jeopardized the uniformity of Community law that is the legal foundation of the EU. In *Simmenthal* case, CJEU held that any national law that conflicted with EU law must be immediately disapplied and, widened the scope of application of the supremacy principle by precluding the subsequent adoption of any national legislation insofar as it would be incompatible with the existing EU law.[20]

The principle of supremacy is a clear reflection of CJEU's approach to EU law defined by the court in *Van Gend & Loos* case as *"a new legal order of international law" "for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subject of which comprise not only Member States but also their nationals."*[21] In *Van Gend & Loos*, CJEU established the doctrine of direct effect and extended the effect of EU law from member states to individuals, making it possible for individuals to rely on their rights stemming from EU law before their national courts under certain conditions. According to the doctrine, any discrepancy between a national norm and a directly effective provision of EU law automatically results in the inapplicability of the national law in question. With the immediate effect of enforceability and absolute precedence, direct effect provides the eligible EU provisions with, the doctrine has been a powerful tool in the development and national expansion of EU law, giving the legal integration process another dimension at the citizen level. With its overarching application of the principle of supremacy, CJEU magnified the scope of the impact of EU law on the national legal systems of Member States and pawed the way for an "integration through law".

The state liability doctrine established in *Frankovich* complements the doctrine of direct effect in its purpose of protecting the rights granted to individuals under EU law by introducing a liability scheme holding member states accountable for damages endured by individuals as a result of a Member State's infringement of EU law. The principle was developed further in *Brasserie du Pêcheur and Factortame* and three conditions were laid out for a Member State to become liable under the principle. Accordingly, the EU law breached by the State must be intended to confer rights on individuals; such

[18] John Fairhurst and Christopher Vincenzi, Law of the European Community (3rd edition), (2002) Pearson/Longman Publishers, London.
[19] Case 6/64 *Flaminio Costa v. Enel* [1964].
[20] Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA (Simmenthal 2)* [1977], para 21.
[21] Case 26/62 *Van Gen & Loos v Netherlands Inland Revenue Administration* [1963] , Grounds of Judgement 2-B.

breach must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the party.[22]

Unlike previous case law of CJEU,[23] which leaves it national laws to correct the unlawful consequences of breaches of EU law committed by member states,[24] the court in *Frankovich* and in the following case law took a direct approach and introduced practical implications for incompliance, providing a strong incentive to comply with EU law and complementing the legal integration process.

In Köbler v Austria, CJEU extended the applicability of state liability to the breaches of law resulting from the courts of last resort, in the specific case the decision of the Austrian administrative supreme court of not making a preliminary reference to the EU court, provided the conditions in *Factortame* is met.[25] The case demonstrates that failure to comply with Article 267 could result in liability also in the EU level in addition to the civil and disciplinary liability which may arise for judges of court of last resort under national laws. While, the court in *Köbler* stated that the application of state liability to judicial organs does not entail any particular risk to the judicial independence of judges as the liability incurred would be one of the state not personally of the judge,[26] a decision by the EU court confirming liability in such case would likely trigger the commencement of proceedings for individual liability of judges who committed the breach of EU law in the first place. This proves the importance of the existence of an effective dialogue between the EU court and national courts before and during a preliminary reference process.

3. The role of the pan-European dialogue among national courts in the European jurisdictional network.

The hierarchical relationship between national courts and CJEU, built through the preliminary reference procedure, does not nullify the necessity for a constructive dialogue between the courts. In fact, it is only through the so-called *pan-European dialogue* between CJEU and the judges of Europe, in particular the Supreme Courts, the constitutive components of the European jurisdictional network, that a uniform body of EU law can be developed.

In its preliminary ruling to the Italian administrative supreme court, CJEU defined and clarified the reference model outlining the relationship between European Courts and the interaction between them, as well as between "the centre" and "the periphery" of the EU's judicial system. In the organization and functioning of the European judicial function, an integrated model with mutual and hetero-directional impulse was outlined, in which the individual national courts' part of the network is recognized with a renewed interpretative centrality through the exercise of a nomophylactic function

[22] Joined Cases 46/93 and 48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany* and *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996].
[23] Case 6/60 *Humblet v Belgium* [1960]; Case 39/72 *Commission v Italy* [1973], para. 11; Case 33/76 *Rewe* [1976].
[24] Takis Tridimas, 'Liability for Breach of Community Law: Growing up and mellowing down?' (2001) CMLRev, 303.
[25] Case 224/01 *Gerhard Köbler v Republik Österreich* [2003], para 52.
[26] *Köbler*, para 42.

that contributes to ensuring a uniform interpretation and application of law in the European Union[27]. That was an alternative to the bottom-up and top-down models, with which the relationships between *the periphery* - domestic systems and national institutions - and *the centre* - EU systems and central institutions - have been traditionally articulated, as evident, for example, in the European financial architecture designed to deal with the 2007 financial crisis and its aftermath.

In this integrated model, the network between the courts has connected the centre to the peripheries and vice versa, thanks to the explication of the principle of subsidiarity, and created a common thread, allowing the interpretation of European law and the amalgamation of domestic systems. The model is a translation into practice of the monistic approach in the definition of the relationship between the EU legal system and domestic legal systems, through which a set of regulations and directives have been transformed over time into a real legal system.

Dialogue is what allows the transmission of impulses that emanate from autonomous but interconnected neurons in different directions, providing energy to the network and contributing to the formation of the Union order. It leads to a system endowed with flexibility and effectiveness, thanks to the nomophylactic function carried out by supreme courts, which provides useful interpretative guidelines to all judges who are not of last resort and ensures their diffusion throughout the Union. This system does not create rigid and immutable principles but allows their reasonable evolution, through the exercise of a rule-making activity where it is necessary to fill regulatory gaps or define issues. It is, in fact, always possible to return to issues, which have been addressed and decided, where elements and circumstances emerge as suitable for reconsidering the issue.[28] The system does not favour the creation of interpretative guidelines of general scope, ignoring the concrete problems, which gave rise to the question and are illustrated, especially in the Italian tradition, by the referring judge[29]. Such an approach is no longer the prerogative of common law systems alone but allows the adaptation of the discipline to reality in a more flexible way even in civil law countries, according to the Economic Analysis of Law approach[30].

[27] It is worth remembering that a first formulation of the obligation of uniform interpretation can be found in Case 14/83 *Von Colson* [1984]. The Italian Constitutional Court had developed a similar interpretative burden as a corollary of the effort of interpretation compliant with the Constitution (in particular, with art. 11 of the Constitution): see. Constitutional Court, sentence. n. 170 of 1984, already anticipated by rulings nos. 176 and 177 of 1981; Constitutional Court, n. 454 of 2006; n. 28 of 2010; n. 227 of 2010; n. 222 of 2011. As is known, the obligation of uniform interpretation was subsequently reiterated and extended by the Court of Justice in various cases including, ECJ, 13.11.1990, Marleasing, C-106/89; Id., 16.12.1993, Wagner Miret, C-334/92; Id., 09.26.1996, Faccini Dori, C-168/95; Id., 27.06.2000, Océano Grupo Editorial, C-240-244/98; Id., 11.07.2002, Arcaro, C-62/00; Id., 09.12.2003, Commission c. Italy, C-129/00; Id., 01.07.2004, X, C-60/02; Id., 05.10.2004, Pfeiffer, C-397/01; Id., 16.06.2005, Pupino, C- 105/03; Id., 04.07.2006, Adeneler and others, C-212/04; Id., 03.05.2007, Advocaten voor de Wereld, C-303/05; Id., 19.01.2010, Ku cu kdeveci, C-555/07; Id., 01.24.2012, Dominguez, C-282/10; Id., 05.24.2012, Amia SpA, C-97/11; Id. 04.19.2016, Rasmussen, C-441/14.

[28] Council St. sentence 6 October 2021, C-561/19, c.d. “Italian Management Consortium”.

[29] See the “Recommendations for the attention of national judges, relating to the submission of requests for preliminary rulings” of the CJEU - 2019/C 380/01, and in particular paragraph 15.

[30] The Economic Analysis of Law (EAL) in the context of public law has been defined as a prospective approach to law, which tends to research and analyze the consequences of rules in order to select and define them based on efficiency criteria. Assuming efficiency as one of the values involved in legislative choices and, therefore, one of the main objectives of each law, the use of some tools of economic theory can be of help in evaluating the ex-post effectiveness of the formulation of law and, if necessary, suggest possible corrective measures. From this perspective, common law countries are certainly advantaged, characterised by a high specificity of the rule of law and by the power of "creation of law" in the exercise of the judicial function, through which the judge "finds himself in the situation ideal for verifying, with hindsight,

Following this approach, the Italian national court was called upon to propose an interpretation and anticipate the interpretation of EU law CJEU would make in order to form a conviction that "*the other judges of last resort of the Member States and the Court would share its analysis*" according to specific interpretative criteria and considerations outlined, which would enable it to formally abstain from making a referral. The national court was to carefully carry out its interpretative role as part of the EU judicial network of which it is not only the transmission link, but also the impetus and maintenance vessel of the system.

But what are the risks that the "conviction" developed by the judge of a national court that the judges of last resort of the Member States and the CJEU would share his analysis is not reliable? The issue has significant implications not only for judges in terms of civil and disciplinary liability but also for the entire community of European citizens and economic operators for whom a non-discriminatory interpretation and application of EU law in compliance with the rule of law must be ensured. As clarified by CJEU, it is exclusively up to the national judge to evaluate the "*necessity and relevance of the referral"* and he *"must assume responsibility for the subsequent judicial decision."*[31] The EU judge, for his part, is not obliged to rule when *"the requested interpretation has no connection with the actual reality or with the object of the main proceedings, [or] if the problem is hypothetical."*[32]

It follows that, in the design of the EU justice system, the national judge is called upon to evaluate and decide primarily alone and assuming exclusive responsibility for the referral and for its decision on which CJEU is not required to rule. Thus, the interpretation of the EU judge places the responsibility for the referral on the periphery, which, in the absence of an instrument for sharing responsibility and weighing the "*profiles of necessity and relevance*" between courts, slows down or rather disincentivizes the national judge from fully carrying out his role in the network. It risks weakening the effectiveness of the integrated model of the European judicial network which, among other things, could have a deflationary effect on the flow of referrals to CJEU.

On the contrary, an amendment to the model that would allow, in case of doubt, the activation of a dialogue between courts, could actually mitigate the risk of misjudgement on the *"profiles of necessity and relevance"* and promote collaboration in interpreting an EU law provision intended to be uniformly applied in all Member States. This would result in a reduction in the risk of error in the proposed interpretation and, thereby, of civil and disciplinary responsibility for national judges. In the absence of this, it cannot be excluded that the information asymmetry between national courts and the sword of Damocles of responsibility, with the peculiarities delegated to national laws, inevitably play a role in the judgement requested from the national court on the "necessity and relevance" of a referral.

---

which incentives should have guided the parties' behaviour ex-ante". For further information on the Italian literature on EAL, among others, R. Pardolesi, Voice Analysis of Law, in Digest IV, I, Utet, Turin, 1987, p. 309; R. Cooter, U. Mattei, P.G. Monateri, R. Pardolesi, T. Ulen, The market of rules-economic analysis of civil law, Il Mulino, Bologna, 1999; P. Chiassoni , Economic Analysis of Law. The economic analysis of law in the United States, Giappichelli, Turin, 1992; A. M. Polinsky, An introduction to the economic analysis of law, in Il foro italiano, Rome, 1992; B. RAGANELLI, Project finance and public works: which incentives?, 2006; G. Napolitano, M. Abrescia, Economic analysis of public law. Theories, applications and limits, 2009.

[31] Case 144/2022, CJEU Preliminary ruling of 15 December 2022.

[32] Case 144/2022, para 58.

4. The responsibility of courts of last resort for failure to make a preliminary reference with reference to the CILFIT criteria and the judicial independence principle

When it comes to the responsibility of judges for non-referral, CJEU, despite the rigid approach of Article 267 towards the interpretation of EU law by national courts of last resort, created certain exceptions to the duty to refer, allowing supreme courts to avoid liability for a refusal of referral under certain conditions. In *Da Costa*, the EU court held that if the question raised by the national court is perfectly clear that it leaves no room for any interpretation or it is materially identical to a question previously referred to CJEU in a similar case, there is no need to bring the matter to the EU court, known as the doctrines of *acte clair* and *acte eclaire*.[34]

In *CILFIT v Ministero della Sanità,* CJEU took the criteria set out in *Da Costa* further, adding a new criterion of relevancy[35] and extending the scope of the *acte eclair* doctrine to where the point of law in question has already been dealt with in previous case law even if the questions are not strictly identical.[36] Under the new criteria, the obligation to make a preliminary reference to CJEU no longer applies if; a ruling on the question of EU law is irrelevant to the outcome of the case; the correct application of EU law in question is so obvious that leaves no scope for reasonable doubt, or the EU law provision to be interpreted had already been tackled by the EU court.

While the court in *CILFIT*, providing an escape from liability through exceptions, grants national courts more discretion as to their decision on whether to make a preliminary ruling or not, it also makes benefitting from the second exception of *acte clair* virtually impossible by subjecting its application to strict conditions, which are extremely difficult and impractical for national courts to satisfy. As such, for a national court or tribunal to avoid liability for non-referral based on *acte clair*, the court must be convinced that the matter of EU law in question is equally obvious to the courts of other member states and CJEU.

Given that European legislation is drafted in different languages, resulting in several versions that are all authentic, ensuring the clarity of an EU law provision would require it to be obvious in all such versions,[37] which means that a detailed comparison of different language versions would have to be carried out. As stressed by CJEU, in their comparison, national courts must consider that legal concepts and terminology might differ from one Member State to another and between national laws and the EU law.[38] In any event, every provision of EU law must be evaluated in its own context and the state of evolution, with reference to the EU law as a whole body.[39]

[34] Joined Cases 28-29-30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration* [1963].
[35] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982], para 10.
[36] *CILFIT*, para 14.
[37] *CILFIT*, para 18.
[38] *CILFIT*, para 19.
[39] *CILFIT*, para 20.

In Ferreira da Silva,[40] the court referred the guidance set out in CILFIT for declaring a matter *acte clair* but left a margin for a possible discrepancy between the interpretation of an EU law by different Member State courts, stating that the existence of contradictory decisions by other national courts or tribunals is *"not a conclusive factor capable of triggering the obligation."*[41] Nonetheless, the court held that where the interpretation of a particular EU law provision or a concept *"frequently gives rise to difficulties of interpretation"*[42] among different Member States, the matter must be referred to CJEU for a preliminary ruling as it creates *"a risk of divergences in judicial decisions within the European Union."*[43]

In *Commission v. French Republic,*[44] the EU court reiterated that the clarity of the case must not be assessed only with regard to the national perspective, but also taking into account all the circumstances specific to the community context. In the specific case, CJEU held that, by not referring the matter of EU law in question to the EU court and accepting the interpretation of the provisions of EU law in the cases made in *Rhodia*[45] and *Accor,*[46] which in fact did not pass the test of clarity beyond any reasonable doubt, the French administrative supreme court failed to fulfil its obligations. The case is a milestone in the EU case law in the sense that it marks the first time CJEU condemned a member state for a breach of Article 267 TFEU in the context of an infringement action.

Meeting the conditions set out in *CILFIT* means that a detailed examination should be conducted by a national court before it declares a matter *acte clair*, which would cause a long and unnecessary delay in the delivery of judgment and an increase in the financial cost of the trial. This might, consequently, deter national courts from relying on *acte clair* as an exception, resulting in a rise in the number of referrals on provisions that actually need no interpretation. In fact, in many member states, the exception of *acte clair* is applied far less frequently than the other two exceptions established in *CILFIT*.[47]

Alternatively, the fact that such rigorous standard cannot be actually achieved might propel courts to apply the criterion in a superficial manner.[48] The ambiguous wording used by CJEU in *CILFIT* to define the *acte clair* exception, which requires the interpretation of an EU law provision to be obvious beyond any reasonable doubt, would encourage the courts in that regard as it grants them discretion to determine the extent of "reasonable doubt." As such, the interpretation of "reasonable doubt" may differ among individual courts of a Member State or national courts of different Member States, depending on the level of clarity expected by the courts. In fact, the vast majority of legal systems do

[40] Case 160/14 *Ferreira da Silva* [2015].
[41] *Ferreira da Silva,* para 41.
[42] *Ferreira da Silva,* para 45.
[43] *Ferreira da Silva,* para 43.
[44] Case 416/17 *Commission v French Republic* [2018].
[45] *Rhodia*, FR:CESSR:2012:317074.20121210.
[46] *Accor*, FR:CESSR:2012:317075.20121210.
[47] Directorate-General for Library, Research and Documentation Research Note (2019) https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/ndr-cilfit_synthese_en.pdf date accessed 8 September 2024.
[48] Max Oberfeld and others, "The Preliminary Ruling Procedure: A Legal Vacuum in Union Law?" (2022) https://portal.ejtn.eu/PageFiles/20510/Team%20Germany%20II_The%20Preliminary%20Ruling%20Procedure%20-%20A%20Legal%20Vacuum%20in%20Union%20Law.pdf accessed 8 September 2024.

not have a structured test to define reasonable doubt but each case is assessed within its own context, with the concept of reasonable doubt being not even referred to in the case law of the supreme courts of some member states such as Estonia and Malta.[49] These would mean that a provision might be interpreted in a contradictory way by different national courts, which would pose a threat to the uniformity in the interpretation and application of EU law and create a risk for arbitrary and discriminatory treatment of nationals of different member states, pointing out a weak spot in the preliminary reference mechanism. As a result, the strict criteria established in *CILFIT* would have produced an opposite effect than it was intended.[50]

This has been acknowledged by Advocate General Bobek in his opinion on the case *Consorzio*.[51] In his opinion, Advocate General Bobek pointed out the *"non-ascertainable and non-reviewable"* subjectivity of the criteria established in CILFIT[52] and proposed a new set of terms based on which national courts to decide whether to make a preliminary reference to CJEU.[53] The proposal suggests the limitation of preliminary reference procedure to the questions of interpretation where there is objectively more than one possible interpretation of an EU law provision and the answer to the question cannot be inferred from the existing EU case law.[54] With these new conditions, Bobek aims to avoid contradictions in the interpretation of EU law by replacing the subjective criteria of "reasonable doubt" with a more objective lens of "divergence in interpretation." According to Bobek, however, national courts should not be expected to go through detailed research into the case of the law of other EU member states to find possible interpretative divergences[55] but rather should recognise any divergence brought expressly to their attention by the parties of the proceedings.[56]

As opposed to the *CILFIT* criteria which confines the applicability of the exception to the obligation of referral to very specific conditions and exacerbates the procedural burden on national courts, the proposal offers an approach that narrows the obligation and conveys national courts more discretion in their decision to refer. Still, the Advocate General underlines that, in the event of a decision of non-referral by a national court based on one of the new conditions laid down in the proposal, the court must provide adequate reasons for its conclusion that the matter in question does not fall within the scope of the obligation under Article 267 TFEU.[57]

In its decision, the court in *Consorzio* acknowledged some of the suggestions proposed in Bobek's opinion and made small but significant amendments to the criteria in CILFIT. In line with the Bobek's proposal, the court used the term "interpretation" rather than application in the Italian and French versions of the judgement and relatively eased the practical burden placed on national courts in *CILFIT* for eliminating any reasonable doubt, stating that *"a national court or tribunal of last instance cannot*

[49] Directorate-General for Library, Research and Documentation Research Note (n 37).
[50] Ibid.
[51] Opinion of Advocate General Bobek delivered on 23 February 2021 on the case C-800/19 *Mittelbayerischer Verlag KG v SM*.
[52] Advocate General Bobek's Opinion, para 104.
[53] Advocate General Bobek's Opinion, para 134.
[54] Ibid.
[55] Advocate General Bobek's Opinion, para 156.
[56] Advocate General Bobek's Opinion, para 157.
[57] Advocate General Bobek's Opinion, para 167.

be required to examine...each of the language versions of the provision in question."[58] Nevertheless, the court made it clear that the divergences between various language versions of the provision in question, of which the court is aware, must be born in mind.[59]

The *Consorzio* decision, which the Council of State recalled in its ruling considering it a solid exegetical parameter, is also significant from other aspects regarding the responsibility of national courts for non-referral. In the case, CJEU provided clear answers to the procedural question posed by the Italian administrative judge, attributing decisive space to the procedural autonomy of the Member States as well as to the decision-making responsibility of the national judge. The court emphasized that the system under Article 267 TFEU does not constitute a legal remedy available to the parties who are not members of the network. The system of direct cooperation between the Court and national judges, the integrated model that feeds the *pan-European dialogue* in the definition of a uniform body of EU law, *"is foreign to any initiative of the parties.*" It is in the sense that the parties "*cannot deprive national judges of their independence*" in the exercise of their power to give reasons whether or not to proceed with the referral, in particular by obliging them to submit a request for a preliminary ruling.[60] It follows that the possible responsibility of the national judge, as the national court of last resort, in deciding on the activation of the preliminary ruling, should be limited to the motivation alone and should never concern the choice itself of whether or not to refer the matter to the Court of Justice.[61]

Hence, the obligation of the national judge of last resort towards the parties on the referral to CJEU, in the motivation of the *Consorzio* sentence, appears to consist of examining the question *"independently and with all due attention"* and providing a reason for the failure to refer. A clear and all-encompassing obligation, which is capable, in the event of incompliance, to constitute a violation of the very independence of the judge.

In this context, the *acte clair* and *acte éclairé* doctrines constitute an integral and functional part of the *pan-European dialogue* - presupposition and content - as they define the effectiveness of the obligation and make it sustainable even in its practical functioning. The European judge valorizes, in the logic of "dialogue between judges", the fundamental role of the motivation provided by the national court of last resort on the choice not to refer, even in "mandatory" cases.

The strengthening of the obligation to state reasons in the event of a failure to refer, together with the indication of the horizontal comparison with the regulations and jurisprudence of other national systems, opens up new scenarios in which the technique of correct processing of the rulings of the Italian judge on related issues will have to be refined as of community importance. This could,

[58] Case 561/19 *Consorzio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* [2021], para 44.
[59] Ibid.
[60] *Consorzio*, para 53.
[61] In this sense, A.C.A., in the aforementioned meeting of 9-10 October 2023, held at *the Supreme Administrative Court of Sweden: "the possible responsibility of the judge in not activating this mechanism must be limited only to the statement of reasons and should never concern the choice itself to refer or not to the ECJ"* (see the minutes of the A.C.A. meeting of 9-10 October 2023).

eventually, pave the way for the integration between European law and national systems to be more harmonious, strengthening the already fruitful dialogue between the Courts[62].

5. Limiting judicial responsibility to the motivation of refusal and effects in the national context.

With its judgement, *Consiglio di Stato* attempts to identify an interpretative principle that makes it possible to clarify and limit the possible implications of the national legislation on the civil liability of judges, Legge n. 117/1998 and subsequent amendments, in relation to their decision on preliminary reference. With an aim to prevent any future questions relating to the national law on the civil liability of judges, the court finds the solution in European sources and in the considerations carried out by CJEU in other cases.[63]

The court recalls the importance of the role Italian courts played in the construction of the pan-European dialogue between CJEU and national courts[64] and refers to data from the Association of the Councils of State and Supreme Administrative Jurisdictions, which highlights a recent tendency by Italian courts to proceed almost automatically to referral even in cases without any interpretative doubts[65]. A ratio that is at least 3 times higher in Italy than in Germany and almost four times higher than in France and Spain.[66] Beyond the objective of ensuring a uniform application of European law, common to every Court within the system, the Italian trend appears to be encouraged by the national legislation on the civil liability of magistrates,[67] which sets the scope of liability to encompass "*the failure to comply with the obligation to refer for a preliminary ruling pursuant to art. 267, third paragraph, TFEU"*.

While the Council of State raised a preliminary question about the compatibility of the national provision with the mechanism under Article 267 TFEU[68], it was found by CJEU as "manifestly inadmissible" on the ground that there was no link between the question and the actual reality or the

[62] On this point, M. Lipari, *The obligation to refer a preliminary ruling to the CJEU, after the ruling of 6 October 2021, c-561/2019: the cilfit criteria and procedural preclusions*, juxtamm.
[63] Please refer to the literature on European and national jurisprudence on the subject of preliminary rulings. Among others, F. Ferraro, 'Court of Justice and obligation of preliminary ruling of the judge of last instance: nihil sub sole novum, GiustiziaInsiem'*;* M. Cartabia, J.H.H. Weiler, *Italy in Europe. Institutional and constitutional profiles*; T. Giovannetti, *The Europe of judges. The jurisdictional function in community integration*,; L. Cappuccio, 'The Italian judges and the preliminary ruling to the Court of Justice after the Treaty of Lisbon', in *Where is the centralized Italian system of constitutional control going*?.
[64] A.C.A. meeting - *Association of the Councils of State and Supreme Administrative Jurisdictions*, held on 9-10 October 2023, at the Supreme Administrative Court of Sweden.
[65] The data from the Association of the Councils of State and Supreme Administrative Jurisdictions shows that the cases of preliminary rulings by the Italian Council of State are not only numerically higher than those of the Supreme Administrative Courts of the other Member States but highlight, especially in recent years, the emergence of some automatisms in the referral even in specific cases in which the national legislation is not characterized by provisions of dubious compatibility with the so-called Union legislation, according to the principle of *acte clair*. The A.C.A. data on the preliminary rulings formulated by the European Supreme Administrative Courts in the decade 2012-2022 highlights 300 referrals in Italy compared to around 100 in Germany, 90 in France, 70 in Spain and much less in the other Member States.
[66] Ibid.
[67] Legge n. 117 of 1988, as amended by Legge n. 18 of 2015 on the relationship between responsibility, limits and distortions, among others Biancamaria Raganelli, *Efficacy of administrative justice and fullness of protection*, Turin, 2012.
[68] *Consiglio di Stato* non-final sentence n. 490/2022.

objective of the main proceedings.[69] CJEU held that the Italian legislation on the liability of judges falls within the procedural autonomy of national systems and it is not directly applicable to the decision on the question submitted to CJEU. Nevertheless, the question remains relevant in light of the outstanding difference between the referral rate of the EU countries, which might indicate a possible influence of the Italian national legislation on the liability of referring judges, inducing them to formulate questions with a "self-defensive" approach, particularly in cases where the parties bring about the possibility of an action for liability in the event of a failure to refer[70].

A solution to the issue might be found in the internal legislative front by way of a better definition of the regulatory provision, without necessarily exempting the courts from responsibility in the event of a manifest violation of EU law. However, a better solution would be through the activation of the newly proposed reference model, which gives a renewed centrality to the national courts as peripheral neural centres. That would require encouraging an active dialogue between national courts and building a horizontal coordination and exchange mechanism in multiple directions that allows discussion and consensus on legal interpretation with respect to a decision on referral in a specific case, which would correspond to a limitation of liability in relation to the interpretative risk assumed by national courts. Otherwise, burdening national courts with heavy responsibility conditioned by different interpretations for the sake of avoiding divergences would undermine the functionality of the European model and risk *"the transmission of impulses through the neuronal network"*, which might compromise the effectiveness of the *pan-European dialogue*. In line with that approach, the proposed path by the Council of State in the ruling n. 2789 offers an interpretation that limits the responsibility of the national courts of last resort to the motivation for the decision on referral. Accordingly, the liability within the meaning of the law no. 177/1988, as amended in 2015, would refer solely to the obligation to state reasons for the decision on referral and would not imply an automatic obligation to refer. If, in contrast, Italian law was interpreted in a way that imposes civil liability for judges of the last instance, not for the lack of motivation but for the failure of automatic referral for the sole reason that the party has proposed it, it would mean that Italian law provides for a form of liability further than permitted under EU law and, therefore, would incompatible with it. This would result in an open contradiction with what is stated in the *Consorzio* ruling and with the consolidated jurisprudence of CJEU, taking the form of an interpretation that may pose the risk of "*depriving the national judges of their independence*".

The independence of the judiciary, a constitutive element of the rule of law, should be preserved and placed before the parties' requests for preliminary rulings even in cases before the courts of last resort[71]. Hence, in the presence of an express motivation by the national judge for the non-referral or for the

[69] Case 144/22, para 58.
[70] Case 407/23 of 12 December 2023.
[71] As is known, independence, as a prerequisite for impartiality, is a right of every person and a prerogative of the judge both as an individual and as a member of a Court. The relationship between the two profiles emerges from the opinions of the Consultative Council of European Judges (CCJE), body of the Council of Europe, Opinion no. 1 (2001): «*The independence of the judiciary is a precondition of the rule of law and a fundamental guarantee of a fair trial». «The independence of judges is not a prerogative or privilege granted in their own interest, but in the interest of the rule of law and of anyone seeking and expecting justice. Independence as a condition of impartiality of judges therefore offers a guarantee of equality of citizens before the courts*", Opinion no. 10 (2007).

subsequent decision following the preliminary ruling, civil or disciplinary liability cannot arise[72]. However, this approach and argument could fuel involuntary distortions in the absence of a corresponding action at the EU level. In fact, as is known, the principle of the rule of law evokes the equal dignity of every person before the law, which translates to a right to a fair trial and the protection against any form of arbitrariness that could harm their fundamental rights. According to this principle, every citizen is entitled to invoke their rights granted under certain legal principles before independent and impartial judges and enjoy equal and non-discriminatory treatment towards public authorities.

A discriminatory effect in the interpretation and application of EU legislation is precisely what the preliminary ruling mechanism aims to avoid. A decision of a national court of last resort on the referral in the absence of any reasonable doubt could, albeit unintentionally, lead to different consequences than that of a national court of another Member State, producing involuntary discriminatory effects between European citizens of different countries. This is confirmed by what is reported in the Council decision n. 490 of 25 January 2022, point 17.1, according to which it is not possible to demonstrate with certainty that the interpretation to be given to the relevant provisions is also clearly established in the national courts of other Member States and in CJEU itself. The effect could be aggravated by the lack of a corrective mechanism that allows a potential sharing of the followed approach and a comparison between Member States in the interpretation and application of EU law.

6. National courts' decisions on reference from the perspective of the right to a fair trial and the approach of the European Court of Human Rights

Respect for the rights and freedoms of people is one of the founding values of the EU and an integral part that defines the Community's character and guides the Union in its internal and external policy. The right to an effective remedy through a fair trial before an independent and impartial court enshrined in Article 6 of the European Convention of Human Rights (ECHR) is one of the fundamental rights protected under EU law, which needs to be observed by Member State courts to the extent that they are subject to EU law. In the context of the preliminary reference procedure under Article 267 TFEU, a refusal by a national court to the party's request for a preliminary question to CJEU might trigger an infringement of the right to a fair trial in certain circumstances, particularly in connection to the general duty to give reasons for judicial decisions.

Since the preliminary reference procedure under Article 267 is *"independent of any initiative by the parties"*[73] and does not confer rights on individuals,[74] the actions CJEU can take against a national court that decides not to refer a question to CJEU and refuses to provide reasons for its decision are limited. The doctrine of procedural autonomy, which stipulates that Member States are free to set up their own procedural rules and remedies when enforcing EU law on a national level, is, possibly, also a factor confining the CJEU's competence for interfering with the domestic application of EU law by Member State courts. It follows that the European Court of Human Rights (ECtHR) can play a

[72] Only the existence or otherwise of the fulfilment of the obligation to provide reasons according to the Council of State should be considered in the identification of any liability of the judge for failure to provide reasons, for the failure to refer to the CJEU, or for revocation due to failure to (consider or justify the request for) referral to the CJEU.
[73] *Consorzio*, para 53.
[74] Advocate General Bobek's Opinion, para 115.

significant role in ensuring that parties' rights and interests are not infringed in the context of a preliminary reference, mitigating the dysfunctionality of the mechanism under Article 267 in terms of the lack of availability of corrective actions against possible breaches of individuals' rights and interests.

The general approach of ECtHR towards national courts' decision of refusal to make preliminary reference despite a request by the party to the proceedings prescribes a duty on national courts to motivate such decision with adequate reasons in line with the exceptions granted in the related case law of CJEU.[75] As expressed in *Ullens De Schooten and Rezabek v Belgium*, while this obligation is not "absolute" and can be discharged based on the exceptions established in CILFIT,[76] the right to a reasoned decision inherently serves the fundamental principles of the rule of law and the avoidance of arbitrary power, which underly the Convention and protect the rights of individuals.[77]

In *Vergauwen and Others v Belgium*, ECtHR established a set of principles to determine whether a decision of refusal to refer by a national court is in violation of the right to a fair trial under Article 6 of the Convention.[78] First and foremost, the court made it clear that Article 6 imposes on national courts against whose decisions there is no remedy an obligation to give reasons if they refuse a request for referral of a preliminary question to CJEU in light of the exceptions provided by CJEU in its case law.[79] A national court that rejected a request of preliminary reference, hence, must state the reasons why they consider the question irrelevant to the outcome of the case, or that the matter of EU law in question has already been interpreted in the previous case law of CJEU, or its application is obvious beyond any reasonable doubt.[80]

In the light of this obligation, what the court needs to do when an allegation of an infringement of Article 6 is brought before ECtHR in that context is ensuring that the contested decision of refusing the reference was duly justified by such reasons.[81] Although the court has a duty to carry out a rigorous assesment regarding the fulfilment of this obligation, it has no obligation to examine whether any errors may have been made by the national court in its interpretation or the application of the relevant law.[82] It was added in the subsequent case law of ECtHR that whether a national court complied with its duty to give reasons under Article 6 can only be determined, in view of the circumstances of the individual case, with due regard given to the objective of the duty and the proceedings as a whole.[83] ECtHR considered the obligation to state reasons to be complied where such reasons for the rejection

[75] See: *Vergauwen et autres v Belgique*, App no 4832/04 (ECtHR, 10 April 2012), *Dhahbi v Italy*, App no 17120/09 (ECtHR, 8 July 2014); *Ullens de Schooten and Rezabek v Belgium,* App no 3989/07 (ECtHR, 20 September 2011).
[76] *Ullens De Schooten and Rezabek v Belgium*, App no 3989/07 and 38353/07 (ECtHR, 20 September 2011), para 56.
[77] *Ullens De Schooten and Rezabek v Belgium,* para 54-59; *Baydar v The Netherlands* App no 55385/14 (ECtHR, 24 July 2018), para 39.
[78] *Vergauwen et autres v Belgique,* para 89, 90; *Dhahbi v Italy*, para 31; *Georgiou v Greece*, App no 57378/18 (ECtHR, 10 July 2023), para 23.
[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] *Baydar v The Netherlands*, para 40; *Harisch v Germany*, App no 50053/16 (ECtHR, 9 September 2019), para 42.

of referral can be deduced from the reasoning of the remainder of the national court's judgement[84] or from the decisions of the lower courts,[85] or considered implicit in the decision rejecting the request.[86]

The court elaborated on its approach in *Baydar v The Netherlands*, saying that while the Convention does not guarantee the right to have a case referred for a preliminary ruling, a national court's refusal to make a reference might infringe the fairness of proceedings if such refusal is arbitrary.[87] According to ECtHR, a refusal may be deemed arbitrary *"where the applicable rules allow no exception to the granting of a referral," "where the refusal is based on reasons other than those provided for by the rules,"* or *"where the refusal was not duly reasoned."* Having said that, where a request for a preliminary reference by the applicant is insufficiently substantiated, as it was in the case of *John v Germany*, a decision of refusal would not be arbitrary, thus, there would not be any infringement of Article 6.[88]

On the other hand, where a question requested for referral *"raised no fundamentally important legal issues or had no prospects of success,"* it might be acceptable under Article 6 of the Convention for a court of last resort to refrain from providing explicit reasons for its refusal.[89] Similarly, when an appeal on points of law was inadmissible that a preliminary ruling *"would have no impact on the outcome of the case,"* the national court might be released from its obligation to provide reasons under Article 6 of the Convention.[90]

In the cases of both *Baydar v The Netherlands* and *Dhahbi v Italy*, ECtHR held that, since the judgement of the Court of Cassation contained neither a reference to the reference request by the concerned party nor any reasons of why the question was not qualified for a preliminary ruling by CJEU, a breach of Article 6 occurred.[91] Similarly, in the more recent ruling of *Georgiou v Greece*, the court found a violation of Article 6 on the ground that it was not possible to infer a reason for non-referral from the court's judgement as required under the obligation to give reasons.[92] It was despite the arguments of the Greek Government that the Court of Cassation had no doubt as to the interpretation and meaning of the provisions requested to be referred since the provisions were "sufficiently clear" that a preliminary ruling neither was necessary to reach the final decision nor it would have had "any decisive influence on the outcome of the case."[93]

The case law of ECtHR appears to be constant in its application of the criteria developed by the court to assess whether a refusal of a preliminary reference request constitutes a breach of Article 6, which introduces an obligation for national courts to state reasons for their refusal. This approach of ECtHR

[84] *Krikorian v France*, App no 6459/07 (ECtHR, 26 November 2013), para 97-99; *Harisch v Germany*, App no 50053/16 (ECtHR, 11 April 2019), para 37-42; *Ogieriakhi v Ireland*, App no 57551/17 (ECtHR, 30 April 2019), para 62.
[85] *Harisch v Germany*, App no 50053/16 (ECtHR, 09 September 2019), para 37-42.
[86] *Repcevirág Szövetkezet v Hungary*, App no 70750/14 (ECtHR, 30 April 2019).
[87] *Baydar v The Netherlands*, para 39.
[88] *John v Germany*, App no 15073/03 (ECtHR, 13 February 2007).
[89] *Baydar v The Netherlands*, para 42, 46, 48; *Sanofi Pasteur v France*, App no 25137/16, (ECtHR, 13 June 2020), para 71.
[90] *Astikos Kai Paratheristikos Oikodomikos Synetairismos Axiomatikon and Karagiorgos v Greece,* App no 29382/16 and 489/17 (ECtHR, 9 May 2017), para 47; *Sanofi Pasteur v France*, para 71.
[91] *Baydar v The Netherlands*, para 25; *Dhahbi v Italy*, para 33.
[92] *Georgiou v Greece*, App no 57378/18 (ECtHR, 10 July 2023) para 25.
[93] *Georgiou v Greece,* para 21.

aligns with the interpretation proposed by the Italian Council of State that limits the responsibility of the national courts of last resort for refusing a preliminary reference to the motivation of the decision. In that respect, it highlights the essential role of an effective pan-European dialogue among national courts and CJEU for avoiding any discordance in the model that might undermine the uniform development and application of *European common ius* and the efficiency of the EU legal system, under which the rights and freedoms of the members of the European community are protected.

7. The interpretative doubts on the adaptation of the "Seveso Directive" to Italian law and their wider implications on the functioning of the European Union.

With reference to the specific case being evaluated, *Consiglio di Stato* further analyses the CJEU's response to the third question in order to evaluate and verify, according to the exegetical coordinates set out, whether, in relation to the so-called "Seveso Directive," there are remaining reasonable interpretative doubts that require a new referral to CJEU. The answer to this question is not only pertinent to the uniformity in the interpretation and application of the EU law but also has broader implications for the European community and the functioning of the entire system.

The Italian legislation referred to in Legislative Decree n. 105/2015 and annexes exclude the applicability of the Seveso regulation for establishments in which dangerous substances do not exceed the lower threshold. Where the presence of dangerous substances is between the lower and upper thresholds, the provisions for the so-called "lower tier establishments" apply whereas if the upper threshold is exceeded, the legislation is applied in full (so-called "upper threshold establishments")[94]. The definition of "*presence of dangerous substances*" contained in the Italian legislation recalls that of Directive 2012/18/EU.[95] The obligation established by the internal legislation expressly refers to the Directive and obliges the manager to transmit, with the certain methods indicated, "*a notification, drawn up according to the form shown in Annex 5*" that contains the required information.[96]

In the case in question, the interpretation and the method of application of this notification obligation were called into question. It is because the Directive's reference to "*a notification,*" could be interpreted in two different ways, more narrowly to refer to a predetermined method of communication or in a more flexible manner to mean that the manager can use any form of communication of information, making the most appropriate terminology to prevail. On the other hand, Italian legislation provides for a specific notification method drawn up in a particular form and signed in self-certification, with consequent assumption of criminal liability in the event of false statements.[97] Such

[94] See art. 3, Legislative Decree no. 105/2015.
[95] Art. 3(n), Legislative Decree no. 105/2015.
[96] In particular, the Board considers the interpretation of the obligation set out in the article to be decisive. 13, co. 1 of the internal legislation, Legislative Decree no. 105/2015, which recalls art. 7, par. 1 and 2 of Directive 2012/18/EU and obliges the manager "*to transmit, in the manner referred to in paragraph 5... a notification, drawn up according to the form shown in Annex 5*", containing the required information.
[97] The only indicated method is the notification of art. 13 drawn up according to the specific form shown in annex 5, signed in the form of self-certification (articles 46, 47 and 76 of Presidential Decree no. 445 of 2000 and, therefore, with the assumption of criminal responsibility in the event of false declarations), without admitting equivalent methods of communication (which, in fact, do not provide for criminal liability).

unduly specification of the method and failure to provide alternative modes of transmission may be considered to be in conflict with the wording of the Directive and cause interpretative doubts in the case being considered.

It could be argued that the Directive, interpreted with consideration to the principles of the Treaty on competition and freedom of establishment, would not allow the national legislator to exclude technologically more innovative and advanced forms of verification and monitoring, which are less restrictive of competition within the territory of the EU but equally effective, simpler, and less costly for businesses. The protection of competition, on the other hand, must be balanced with the need to protect the environment and safety, which is particularly critical in the sector in question. Each judge as an interpreter, to the extent of their competence, is called upon to balance the imminent interests at both the European and national levels.

On such grounds, the request for a preliminary ruling by the party for the interpretation of the provision was deemed relevant by the Italian administrative judge for the purposes of settling the dispute and a reasonable doubt was considered to exist, on the grounds of which a preliminary ruling was sought from CJEU. Depending on the CJEU's decision regarding whether Directive 2012/18 renders a national legal provision that stipulates a single method of communication of information inapplicable or not, the Council of State would assess whether the Italian administration was required to allow the company to communicate information using different methods. On that account, the legitimacy of the contested warning would be ruled on and the conformity of the Italian legislation transposed from the Directive with the EU law would be determined. The interpretation provided by CJEU through the preliminary ruling could further help to clarify the lack of a formal mechanism that favours a collaborative exchange between Courts on similar cases.

However, the Italian Administrative Supreme Court was not satisfied with the answer provided to the question on the meaning of the aforementioned provision by CJEU in the preliminary ruling. While *Consiglio di Stato*, with its statements in paragraph 17.1 of the non-definitive sentence n. 490 of 2022, excluded the possibility of any reasonable interpretative doubts regarding the interpretation of the provision on its part, it added that it was not possible to demonstrate with certainty that their interpretation would be shared by courts of other Member States and by CJEU. Following the criteria laid down by CJEU in its previous case law for exemption from the obligation to make a preliminary reference, while being aware of the absolute exceptional nature of a further referral within the same case, *Consiglio di Stato* decided to insist in its decision of a second referral to CJEU on the ground of the existence of an interpretative doubt.

Nevertheless, while CJEU did not directly provide a response to the third preliminary question, it stated that focusing only on the "*effectiveness of the system"*, the discretion of the legislator is a characteristic of the Union law, which implies a certain amount of autonomy on the part of national legislators in relation to the adaptation of the Directive. In fact, Article 7 of Directive 2012/18 on the obligation to notify merely provides that Member States should ensure that the manager is obliged to send a notification to the competent authority containing "*the information that allows the identification of the dangerous substances and the category of dangerous substances involved or which may be present*", without specifying any particular method of communication. In this way, the EU legislation appears

to allow each Member State to select the method of notification they deem the most appropriate so long as it conveys the information in the requested way. Such discretion granted to Member States, however, may give rise to differences in national legislation and different applications by courts, fueling jurisprudential divergences and, consequently, varied and potentially discriminatory treatments within the EU. This could impact "*the effectiveness of the system"* attributed to utmost importance by CJEU and should be carefully evaluated through the *pan-European dialogue* horizontally among the network of national courts and vertically with CJEU.

The interpretative contribution of CJEU, on one hand, and the judge of the Italian Administrative Supreme Court, on the other, in the specific case, made it possible to highlight some elements in the system that can be refined to make the EU legal system more effective. The Council of State built its analysis upon a broader context of legal reflections on the meaning and the role of the network between courts, which is established to protect the correct interpretation and application of the Union law towards the progressive definition and refinement of the European community. As such, in the context of the preliminary reference mechanism, if national courts are asked to develop a "conviction" that "*the other judges of last resort of the member states and the Court would share its analysis,*" it is deemed necessary to empower them with the authority to do so. That is to protect not only the national judiciary but the entire community of European citizens and economic operators, for whom a non-discriminatory interpretation and application of the Union law must be ensured.

It cannot be denied that even judges, with full respect to the independence and impartiality of their role in the context in which they carry out their functions, are to be considered exposed to the so-called theory of incentives and costs associated with it[99]. The connection between the Italian national legislation on the liability of judges and national courts' approach towards the preliminary reference mechanism, hence, remains relevant. That is because the so-called costs associated with the application of the mechanism, connected to the fear of incurring liability, are capable of affecting "*the attitude of the referring judge*" and, thus, the exercise of the function recognized to the national courts within the judicial network as the transmission, impulse, and sealing ring of the system. This is an issue capable of influencing the effectiveness of the entire system, which, therefore, would be worth clarifying at the EU level, taking the opportunity to fine-tune the system on the basis of the considerations set out.

The effectiveness and stability of the organisation and management model of the EU judicial function, supported by the exercise of the nomophylactic function of individual courts, depends on the fluidity of the flow of energy transmitted through the network in the form of a *pan-European dialogue*. A fluidity that can be involuntarily conditioned and limited by forms of distortion, which are pertaining

[99] As is known, in the economic literature, the theory of incentives arises from the union between studies on information asymmetries and those on game theory and organisation theory, as a response to the problem of conflict of objectives linked to the delegation of functions between two subjects, a delegating party (principal) and a delegate (agent), between which there is imperfect information. The basic idea is that the behaviour of individuals can be influenced through incentives and sanctions, mitigating any distortions induced by an asymmetric distribution of information in a relationship of delegation of roles and functions. In the international literature on the topic, among others, J.J. Laffont-D. Martimort, *The theory of incentives. The principal-agent model*, Princeton University Press, Princeton, 2002; G. Akerlof, 'The Market for 'Lemons': Quality Uncertainty and Market Mechanism' (1970) Quarterly Journal of Economics 84, 488. See also M. Spence, *Market Signaling: Informational Transfer in Hiring and Related Processes*, Harvard University Press, Cambridge; M. Roths-child and J. Stiglitz, 'Equilibrium in Competitive Insurance Markets' (1976) Quarterly Journal of Economics 90, 541.

to the different legal systems as the parts of the legal "patchwork" making up the threads of the *common European ius* and could invalidate the functioning of the entire system of the Union.

It is, therefore, a common European interest to enhance this dialogue and, where possible, encourage discussion through the judicial network, with a view to an increasingly wider sharing of opinions connected to the interpretation and application of *European common ius*. This would ensure better jurisdictional protection by reducing the risk of consequent responsibilities for individual courts, on one hand, and promote the mitigation of legal divergences across Europe, on the other, which could lead to social and economic distortions if not corrected.[100] A well-functioning *pan-European dialogue* between courts of the EU judicial network, in which national Supreme Courts are granted more say and autonomy in accordance with the new model suggested by the Italian Administrative Supreme court, could reinforce a stronger relationship between European national courts and promote harmonisation in the application and interpretation of the EU law across Europe. This would not only yield a more consistent legal system in both jurisdictional and legislative dimensions but also facilitate the EU's economic growth and development by serving as a catalyst for the EU's negative integration for the benefit of the European Community.

[100] Rafael La Porta and others, 'The Economic Consequences of Legal Origins,' (2008) Journal of Economic Literature 46-2, 285-322 <https://www.aeaweb.org/articles?id=10.1257/jel.46.2.285> accessed 8 September 2024.