


A Pan-European Dialogue Among National Courts for a More Integrated Europe

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1. Introduction, object, and background

What about the role of Courts across Europe in the process of European Integration ?

- The process of European Integration from the Second World War: transition phases, crises, arrests, and setbacks vs accelerations and leaps forward.
- **Example 1:** The 2007-2008 financial crisis: a new regulatory and institutional framework - from a *bottom-up* model of regulatory harmonization to a *top-down* model with new institutions empowered of rule-making/enforcement powers. The role of EU courts.
- **Example 2:** The Covid-19 pandemic and resulting economic crisis: new borders and frontiers between States and regions - limitation of fundamental rights/freedoms - restriction of the internal market freedoms. The role of EU courts.
- The CJEU preliminary reference mechanism and the network with national courts.


Does it work properly? How to implement it for a better dialogue among Courts across Europe and a better EU integration in the interpretation and enforcement of EU law?



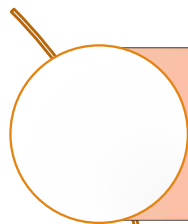
2. Aim and Methodology

- The paper investigates the EU judicial network and the *dialogue* among national Supreme Courts and between them and CJEU to explore how it could be reshaped/updated to ensure a more integrated Europe and a uniformly applied EU law in the interest of EU individuals (citizens and economic operators) as well as Institutions.

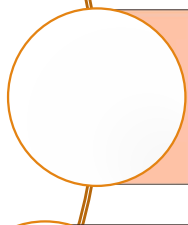
 - In the paper we discuss:
 - 1) the CJEU and the ECHR case law on the preliminary ruling mechanism
 - 2) the EAL international literature on independence of judges, liability and accountability
 - 3) distortions resulting in the model in force (es. Italian national law on liability of judges) and related inefficiencies at EU level and domestic level

 - We suggest a review of the EU judicial network model in a way fostering the interaction between national courts on EU law interpretation before resorting to CJEU, in order to reduce distortions; ensure a better EU application/enforcement of rules and principles; foster the harmonisation of the judge liability regulation and consequently promote a better European integration.
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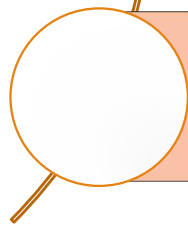
➤ A review of the **EU judicial network model** raises some preliminary questions:



What is the role of national Supreme Courts in the promotion of a uniform interpretation and adequate enforcement of EU law?



What degree of independence of judgment do Supreme Court judges have on decisions of preliminary reference to CJEU in light of the risk of liability for a possible refusal of referral?



How an efficient pan-European dialogue between courts could help in promoting the uniform interpretation and application of EU law without compromising judicial independence?




3. The Italian Supreme Administrative Court case *Consiglio di Stato*, IV, 2789/2024


- The recent ruling of *Consiglio di Stato*, sec. IV, n. 2789 of 21 March 2024 offers the opportunity to answer these questions from a broader perspective.
- The case concerns the interpretation and application of the national legislation on the treatment of dangerous substances transposing the EU Directive 2012/18 (Seveso Directive). A question of interpretation of Article 3(12) of the Directive led to a preliminary reference to CJEU.

➤ In its preliminary reference, *Consiglio di Stato* requested clarification regarding:


- conditions that trigger the obligation to refer,




- liability consequences of a possible refusal of referral for national Supreme Court judges,




- compatibility of national law on the treatment of dangerous substances with the EU Seveso Directive.



4. The nature and functioning of the preliminary reference procedure under Article 267 TFEU

- In its preliminary ruling, CJEU clarified the relationship between national courts and CJEU and outlined an integrated hetero-directional model that operates via the exercise of a *nomophylactic* function by national courts.
 - The EU judicial network model places CJEU at the centre, which acts as the pivot of the model and operates as a connecting agent between EU law and national laws of Member States through the preliminary reference mechanism under Article 267 of TFEU.
 - Preliminary reference mechanism under Article 267 of TFEU has an essential role in the functioning of this model as it establishes a channel of dialogue for the interpretation and application of EU law in Member States.
 - The national courts, *the periphery*, are linked to the centre through the preliminary reference mechanism and act as the peripheral neural centres that transmit impulses to CJEU and obtain feedback (impulses by the periphery to the center and reverse).
 - This mechanism not only facilitates the uniform interpretation and application of EU law but also contributes to the evolution of a *common European ius*.
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5. The renewed role of national Supreme Courts in the EU judicial network

- In its preliminary ruling, CJEU emphasized the importance of a *pan-European dialogue* between courts for the functioning of this mechanism and recognised to national courts a renewed interpretative centrality in the EU judicial system.
 - The EU court clarified that it is exclusively up to the national judge to evaluate the «*necessity and relevance of the referral*» and they «*must assume responsibility for the subsequent judicial decision.*»
 - Accordingly, to abstain from the referral, national courts are required to interpret the questions of EU law in a way the other national courts of last resort and CJEU would agree unless one of the exemptions to obligation to refer under the *CILFIT* case applies.
 - This system places the responsibility for the referral on *the periphery*, which, in the absence of an effective mechanism for discussion and sharing of responsibility, may result in distortions in the uniform application of EU law as well as an increased risk of civil and disciplinary liability for national judges.
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6. The judge responsibility for failure to make a preliminary reference under Article 267 TFEU

- The potential consequences for national Supreme Courts if they choose not to make a preliminary reference to CJEU on a question of EU law are:
 1. Action for damages under state liability (*Köbler v. Austria*, C-224/01)
 2. Infringement procedure (*European Commission v. French Republic*, C-416/17)
 3. Violation of the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR)
 4. Civil liability for judges under Italian law


7. Exceptions to the obligation to refer: *CILFIT* criteria

➤ Under the criteria established in *CILFIT v Ministero della Sanità*, national Supreme Courts do not have the obligation to make a preliminary reference to CJEU if;

- a ruling on the question of EU law would be irrelevant to the outcome of the case; or

- the correct application of EU law in question is so obvious that leaves no scope for reasonable doubt (*acte clair*); or

- the EU law provision had already been tackled by CJEU (*acte éclair*).

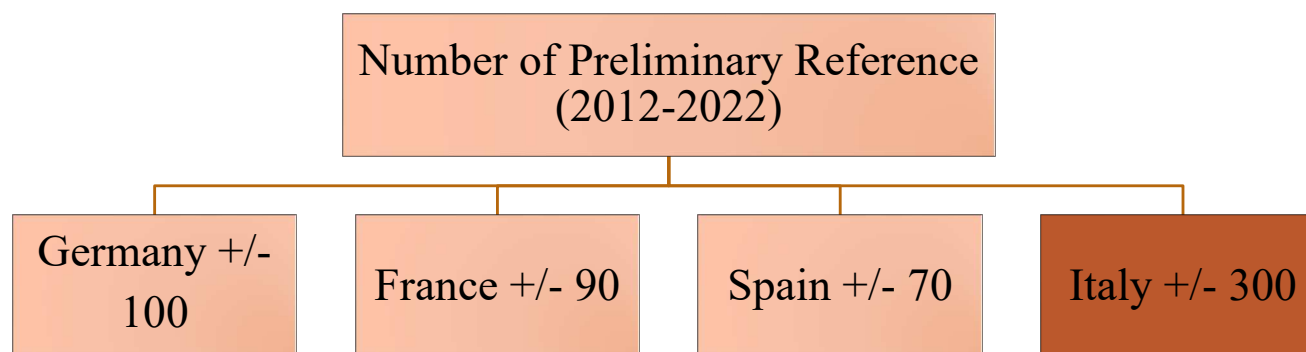
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- While the court in *CILFIT* provides an escape from liability for non-referral, it also makes benefitting from the second exception of *acte clair* virtually impossible by subjecting its application to strict conditions.
 - For a national court or 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, which requires a detailed comparison of different language versions of the EU law provision on the matter.
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8. Limitation to judicial responsibility for failure to refer: *Conorzio* ruling

- In *Conorzio*, CJEU limited the responsibility of courts of last resort to the provision of motivation for refusal to refer, granting national courts more autonomy in their decisions.
 - In the recent case concerning the management of dangerous substances, Consiglio di Stato made a similar attempt and tried to identify an interpretative principle that makes it possible to limit the possible implications of the national legislation on the civil liability of judges on national courts' decision on preliminary reference.

9. Does the Italian national law on liability of judges influence the referral? Possible distortions

- Data from the *Association of the Councils of State and Supreme Administrative Jurisdictions* highlights a recent tendency by Italian courts to almost automatically proceed to referral even in cases without any interpretative doubts.
- The number of preliminary referrals made to CJEU by Italian courts is at least three times higher than that of Germany and almost four times higher than those of France and Spain.





A distortion compromising the principle of judicial independence and effectiveness of the EU judicial system

- The trend appears to be encouraged by the national legislation on the civil liability of magistrates, 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.»*
- The potential implications in terms of liability appear to induce referring judges to a make preliminary reference with a *self-defensive approach*, compromising the principle of judicial independence and effectiveness of the EU judicial system with an artificial increase in preliminary references: this imply inefficiencies at EU and national level.
- EAL literature on judge independence versus liability and accountability: Where should we stand?

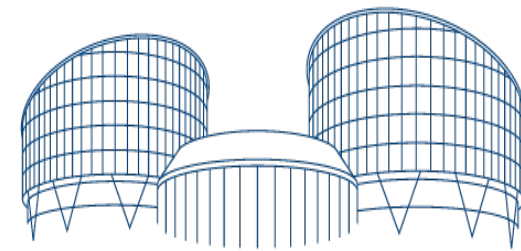
Reducing the distortion through a limit to the liability of judges ?

➤ Pros and Cons

- In the case n. 2789/2024, Consiglio di Stato proposes an interpretation that limits the responsibility of the national courts of last resort to the motivation of the decision on referral in order to promote independence of judgment in judicial decisions, free from any influence.

10. Refusal to refer from an aspect of the right to a fair trial under Article 6 ECHR

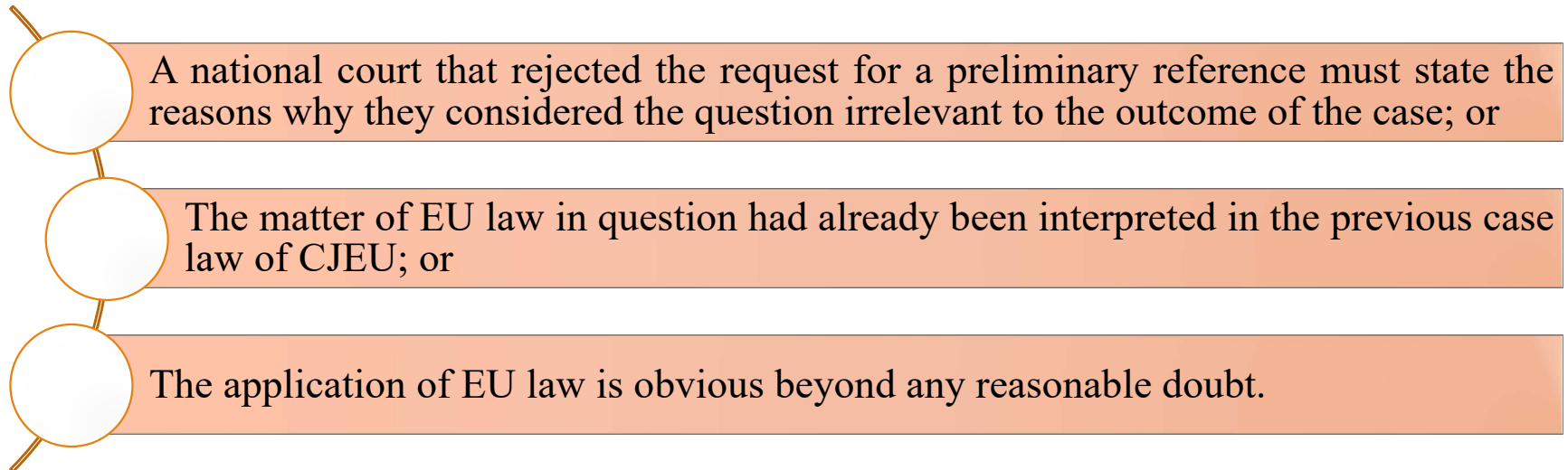
- A refusal by a national court to a party's request for a preliminary reference to CJEU may trigger an infringement of the right to a fair trial in certain circumstances, particularly in connection with the general duty to give reasons for judicial decisions.
- The general approach of ECtHR on national courts' decisions of refusal to refer despite a request by a party to the proceedings imposes a duty on national courts to motivate such decisions with adequate reasons in line with the exceptions granted in the related case law of CJEU.




EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

When a decision of refusal to refer by a national court is in violation of the right to a fair trial under Art. 6 of the ECHR?

- 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.
- For a refusal of preliminary reference to not constitute a breach of Article 6 of ECHR:



11. Final Remarks: updating the model for implementing the dialogue and favouring a more integrated Europe

- To reduce distortions within Europe with respect to the interpretation and application of EU law, and prevent the increase/inflation of preliminary references to CJEU, an update on the EU judicial network model is needed, considering the definition of EU rules on liability of judges.
 - A uniform regulation/position in Europe on the civil liability of judges is needed as to ensure the uniform and equal treatment among European judges who are part of the same judicial network, called to interpret and apply the same rules.
 - The preliminary ruling mechanism operates well in connecting *the periphery* to *the centre of the model* (vertical perspective), involving all National Courts in a joint network with the CJEU. We should implement the dialogue among national Supreme Courts, expanding the interaction to a horizontal perspective under the CJEU supervision.
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- A well-functioning pan-European dialogue among courts of the EU judicial network could reinforce a stronger relationship between EU national courts and promote harmonisation in the application and interpretation of the EU law across Europe, favouring the process of European integration.
 - 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.
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Thank you for your attention.

