Ermanno Calzolaio

The avoidance of the duty of courts of final instance to submit a preliminary reference to the CJEU: comparative remarks

1. *The problem*

The dialogue between national judges and the Court of Justice of the European Union pivots around the preliminary reference procedure, through which the CJEU has laid down, over the past decades, the basic institutional principles of EU law. This procedure presupposes the cooperation of national courts. Any court or tribunal of a Member State may request the CJEU to solve questions of interpretation of the Treaties and of EU law in general, but the national courts against whose decisions there is no judicial remedy are obliged to bring the matter before the Court (article 267, paragraph 3 TFEU, in continuity with article 234 TEC and, before, with article 177 TEEC).

Since the *Cilfit*[1] case, the CJEU has clarified that the duty to raise a preliminary question does not arise each time that a question of interpretation needs to be solved. The national judges should assess if the issue is relevant for the solution of the case and if there is uncertainty concerning the correct interpretation of EU law. This is not the case if the CJEU has already settled the issue at stake in previous judgments and if the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (*acte éclairé* and *acte clair* doctrines).

In the decision whether (or not) to submit a preliminary question, the national courts have a wide margin of discretionary power, recognised by the CJEU itself. This discretionary assessment has to be carried out in the

[1] CJEU, 6 October 1982, *Cilfit*, C-283/81, in *Rep.*, 1982, p. 3415.

light of the specific characteristics of EU Law, the particular difficulties which its interpretation gives rise to and the risk of diverging judicial decisions within the Member States.

The flexibility acknowledged by the CJEU to national judges is even more evident in recent decisions. In particular, in the *Van Dick* and *Ferreira de Silva* cases of 2015, settled the same day, the Court clarified that:

> «In itself, the fact that other national courts or tribunals have given contradictory decisions is not a conclusive factor capable of triggering the obligation set out in the third paragraph of Article 267 TFEU. A court or tribunal adjudicating at last instance may take the view that, although the lower courts have interpreted a provision of EU law in a particular way, the interpretation that it proposes to give of that provision, which is different from the interpretation espoused by the lower courts, is so obvious that there is no reasonable doubt»[2].

Such a discretionary power has grey zones, therefore it is possible to avoid the duty to refer the matter to the CJEU. This can happen, for example, when the judge considers that the CJEU has already settled the issue in a previous judgment, whereas such a conclusion is questionable. Alternatively, when the judge simply fails to refer without adequate reasons or even without stating any reason altogether.

In the present contribution we will move, first of all, from the case law of the European Court of Human Rights, which had the opportunity to address our issue under the head of the violation of the right to a fair trial (§ 2). Then, we will address some remarks about the adequacy of the recourse to the leverage of tortious liability for breach of EU law, which the CJEU seems to have relied on in recent cases as a counterbalance to the increased flexibility recognised to national judges (§ 3). Against this background, we will consider the Italian experience and in particular the position of the Court of Cassation rejecting any possibility to appeal the decisions of the Council of State (*Consiglio di Stato*) failing to refer to the CJEU, in contrast with the German approach (§ 4). Finally, we will draw some conclusions,

[2] CJEU, 9 September 2015, C-160/14, *Ferreira de Silva e Brito e a. v Estado português* (v. especially n. 41 ff.) and C-72 - 197/14, *X e Van Dijk c Staatssecretaris van Financiën*, in curia.europa.eu. According to the Court, the duty to refer arises when there are difficulties of interpretation or a risk of divergencies between judicial decisions within the European Union. For a comment, see L. Coutron, *Assouplissement de l'obligation de renvoi préjudiciel vs. affermissement de la responsabilité judiciaire de l'Etat: à la recherche d'un équilibre*, in *Rev. Trim. Dr. Eur.*, 2016, p. 407.

focusing on the need for a shift in perspective, in order to protect the right of European citizens to a correct interpretation of the applicable EU norms by the CJEU (§ 5).

2. *The breach of the duty to refer as a violation of the right to a fair trial*

In the judgment *Dhahbi v Italy*, delivered in 2014, the European Court of Human Rights dealt with a case of alleged violation of the right to a fair trial, protected by Article 6 of the European Convention of Human Rigths, through the breach of the duty to refer to the CJEU[3].

The case concerned the request of a Tunisian national, working in Italy on the basis of a lawful residence and job permit. He was hired by a company and insured with the Italian Social Security Agency (INPS). His family consisted of his wife and four under-age children. He applied for the family allowance payable under an Italian statute of 1998, claiming that although he was not an Italian citizen, as required under that statute, he was entitled to the allowance under the EuroMediterranean Agreement ratified by Italy in 1997. Following the rejection of his application in 2002, Mr Dhahbi lodged an appeal. He sought to have a preliminary question referred to the CJEU concerning whether, according to the Euro-Mediterranean Agreement, a Tunisian worker could lawfully be refused the family allowance payable under the Italian legislation. His appeal was dismissed in 2004, whereupon he appealed as a matter of law and reiterated his request to have a preliminary question referred to the CJEU. The Court of Cassation dismissed his appeal in 2008.

Relying on Article 6 (right to a fair trial), Mr Dhahbi alleged that the Court of Cassation has ignored his request to have a preliminary question referred to the CJEU. The Court allowed the request, because from the perspective of Article 6, national courts of last instance are obliged to state reasons, based on the applicable law and the exceptions laid down in CJEU case law, for their refusal to refer a preliminary question on the interpretation of EU law. They should clearly state why, in their opinion, the question was not relevant, or state that the provision has already been interpreted by the CJEU, or that the correct application of EU law was so obvious as to leave no scope for reasonable doubt. As a result, Italy was held

[3] ECtHR, 8 April 2014, *Dhahbi v Italy*; see also ECtHR, 8 September 2015, *Wind Telecomunicazioni S.p.a. v Italia*. In https://hudoc.echr.coe.int.

liable to pay to the applicant an amount comparable to the sum requested, which he had previously been denied.

As one can see, under the European Convention system the problem of the avoidance of the duty to refer is relevant in the only case when a court of last instance refuses to submit a preliminary reference without stating reasons. This confirms that the problem exists but, at the same time, that there is no effective solution. On the one side, this is due to the fact that no remedy is available if the court gives reasons that are not well founded. On the other side, another reason may be that it is not sure whether the remedy of compensation for damages is adequate, as we will now try to analyse more in detail.

3. *The State's liability for breach of EU Law: an adequate remedy?*

As a counterbalance to the increased flexibility recognised to national judges in deciding whether to submit a preliminary reference, the CJEU recalls the rule laid down since the *Köbler* case (2003), according to which Member States are liable for breach of EU law in the exercise of the judicial function[4].

It is worth remembering that since the *Francovich* case (1991 for the first time) the Court considered that it is a principle of Community law, inherent in the system of the treaties, that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

In the *Brasserie du Pêcheur-Factortame* case (1996), the Court set forth the conditions in which liability can arise: (i) the infringed rule of law must have been intended to confer rights on individuals; (ii) the breach should be manifest and serious; (iii) there must be a direct causal link between the breach of the obligation resting on the State and the damage suffered[5].

In the *Köbler* (2003) and *Traghetti del Mediterraneo* (2006) cases, the CJEU extended the rule of liability also when the breach of EU law is related to the exercise of the judicial function. Moving from the principle

[4] Cfr. G.V. Guiot, *La responsabilité des juridictions suprêmes dans le renvoi préjudiciel: with great(er) power, (at last) comes great responsibility*, in *Cahiers Dr. Eur.*, 2016, p. 575.

[5] CJEU, 19 November 1991, C-6/90 - C-9/90, *Francovich v Italy* in *Rep.*, 1991, I-5357; Id. 5 March 1996, C-46/93 - C-48/93, *Brasserie du Pêcheur-Factortame*, in *Rep.*, 1996, I-1131. For further references, see E. Calzolaio, *L'illecito dello Stato tra diritto comunitario e diritto interno. Una prospettiva comparatistica*, Milano, 2004.

laid down in the *Simmenthal* case[6], the Court considered that the need to guarantee effective judicial protection of the rights conferred by EU law to the individuals implies that the Member State is also liable for infringements attributable to a national court adjudicating at last instance when interpreting provisions of EU law.

> The «interpretation of provisions of law forms part of the very essence of judicial activity since, whatever the sphere of activity considered, a court faced with divergent or conflicting arguments must normally interpret the relevant legal rules – of national and/or Community law – in order to resolve the dispute brought before it».

For this reason,

> «to exclude all State liability in such circumstances on the ground that the infringement of Community law arises from an interpretation of provisions of law made by a court would be tantamount to rendering meaningless the principle laid down by the Court in the *Köbler* judgment. That remark is even more apposite in the case of courts adjudicating at last instance, which are responsible, at national level, for ensuring that rules of law are given a uniform interpretation»[7].

The concrete application of this rule to cases of avoidance of the duty to submit a preliminary reference is not easy, as the CJEU considers that:

> «State liability can be incurred only in the exceptional case where the national court adjudicating at last instance has manifestly infringed the applicable law. In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it, which include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make

[6] «Every national court must, in a case within its jurisdiction, apply community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the community rule» (CJEU, 9 March 1978, *Amministrazione finanziaria v Simmenthal*, C-106/77, in *Rep.*, 1978, I-629, no. 21).

[7] CJEU, 13 June 2006, *Traghetti del Mediterraneo v Italy*, C-173/0, in *Rep.,* 2006, I-5157, no. 34 and 36.

> a reference for a preliminary ruling under the third paragraph of Article 234 EC (*Köbler*, paragraphs 53 to 55)»[8].

Despite the difficulty in ascertaining a «sufficiently serious» violation of EU law, in a recent case the Court has found that the French *Conseil d'Etat* was wrong in refusing to refer[9]. The case concerned a complex tax issue on the distribution of dividends. In short, according to French legislation the redistribution of profits already taxed is, by means of the advance payment, subject to tax, although it grants that double taxation be eliminated in the event that redistributed profits had been initially taxed in respect of a resident subsidiary. By contrast, under the same legislation the redistribution of profits originating initially from a non-resident subsubsidiary is subject to tax even if those profits were previously taxed in the Member State in which that subsubsidiary is established, without allowing the latter taxation to be taken into account for the purposes of eliminating the economic double taxation arising from the French legislation.

A similar issue was settled by a CJEU judgment concerning the legislation of the United Kingdom[10], but the French *Conseil d'Etat* considered that this case was not relevant because the French legislation was different. The Court found that:

> «it was for the Conseil d'État (Council of State), as a court or tribunal against whose decisions there is no judicial remedy under national law, to request a preliminary ruling from the Court of Justice on the basis of the third paragraph of Article 267 TFEU in order to avert the risk of an incorrect interpretation of EU law (see, to that effect, judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraph 44). Consequently, since the Conseil d'État (Council of State) failed to make a reference to the Court, in accordance with the procedure provided for in the third paragraph of Article 267 TFEU, in order to determine whether it was necessary to refuse to take into account, for the purpose of calculating the reimbursement of the advance payment made by a resident company in respect of the distribution of dividends paid by a non-resident company via a non-resident subsidiary, the tax incurred by that second company on the profits underlying those dividends, even though its interpretation of the provisions of EU law in the judgments of 10 December 2012, *Rhodia* and of 10

[8] *Ibidem*, no. 32.
[9] CJEU, 4 October 2018, *Commission v French Republic*, C-416/17, in www.curia.europa.eu.
[10] CJEU, 13 November 2012, *Test Claimants in the FII Group Litigation*, in www.curia.europa.eu.

> December 2012, *Accor* was not so obvious as to leave no scope for doubt, the fourth complaint must be upheld»[11].

This recent case sheds new light, because up to now the doctrine of liability of Member States for infringements of EU law in the exercise of the judicial function had never been applied to a situation of breach of the duty to refer and so this remedy had remained dead letter. On the contrary, the unequivocal decision of the Court can be read as a clear warning for all courts of last instance to be very careful in considering if the questions raised before them need to be assessed by the CJEU. At the same time, it is worth remarking that the Court still has a cautious approach. For instance, in a more recent case it has rejected the argument raised by the Commission according to which the decision of Belgium not to lodge an appeal before the Belgian Court of Cassation deprived it of the opportunity to submit a preliminary reference to the CJEU[12].

Anyway, beyond the strict approach adopted by the Court, it is the effectiveness of the remedy in this kind of cases that is called into question, for two main reasons. On the one side, if the principle of liability for the infringement of EU law by the judiciary is inherent to the Treatises, there is no general rule concerning the concrete application of the remedy. This means that the States have broad discretion as to the choice of remedies. For instance, in the above-mentioned case concerning France it shall be the *Conseil d'Etat* itself to determine how to give effectiveness to the ruling handed down by the CJEU against the State, which seems rather odd[13].

On the other side, a more general remark questions the adequacy of the recourse to the doctrine of State liability for breach of EU law. In fact, compensation for damages is an indirect remedy, which fails to tackle the underlying problem of the impossibility for the CJEU to rule on the correct interpretation of EU law. In other words, there is no remedy capable of ensuring that the CJEU perform its role of interpreter of EU law. If a court of last instance breaches its duty to refer, the only possibility is to claim damages. Beyond its concrete availability, this remedy, as such, will never enable the CJEU to express its judgment on the issue at stake.

[11] CJEU, 4 October 2018, *Commission v French Republic*, no. 113 f. Our emphasis.
[12] CJEU, 30 January 2019, *Belgium v Commission*, C-587/17, in www.curia.europa.eu.
[13] For further details, see P.-A. Cazau, *Une première: la sanction d'un manquement juridictionnel par la Cour de Justice*, in *Rec. Dalloz*, 2019, p. 240.

4. *The Italian experience*

In Italy the problem of breach of the duty to refer has been dealt with by the Court of Cassation in some cases concerning appeals against judgements of the Council of State (*Consiglio di Stato*). According to Italian law, the Council of State is a court adjudicating at last instance, against which no appeal is allowed before the Court of cassation, unless for issues of «jurisdictional competence» (Article 111, paragraph 8, Constitution, Article 110 Italian code of administrative procedure and Article 362, paragraph 1, Italian code of civil procedure).

The guiding principle in order to ascertain if a case is within the judge's jurisdictional competence lies on the traditional distinction between external and internal boundaries. The external boundaries concern the delimitation of the perimeter within which the judge can decide. The crossing of these boundaries entails a misuse of the jurisdictional power. This can occur either when there is an invasion of the field of jurisdictional competence of another judge (for example, if the administrative judge decides a case falling within the jurisdictional competence of the ordinary judge), or of a public administration (for example, if it intervenes within the discretionary power of the public body), or of the legislative power. In all these cases, the Court of cassation has the power to quash the judgments issued by the Council of State. On the contrary, the appeal will be considered inadmissible in case of breach of the internal boundaries of the judicial activity, that is to say when the judge violates the law or the procedure (*errores in iudicando* or *in procedendo*)[14].

In the light of these principles, the Court of cassation regularly refuses to hear appeals against the judgments of the Council of State rejecting applications to submit preliminary references to the CJEU[15]. The Court considers that the CJEU is not the judge of the case and that the jurisdictional function exclusively rests with national judges[16].

In more recent decisions, a kind of afterthought appears to have emerged, which conceives the notion of "jurisdictional competence" more broadly, that is in a way that is not limited to the simple division of competences between different judges. According to the Court of Cassation, internal boundaries are "crossed" when the judge radically distorts the

[14] See F. Dinelli, G. Palazzesi, *La tendenza all'estensione del sindacato per motivi di giurisdizione: una 'innovativa conferma'*, in *Giur. It.*, 2015, p. 942.
[15] Cass., sez. un., 4 February 2014, n. 2403, in www.iusexplorer.it. More recently, Cass., sez. un., 29 February 2016, n. 3915, in *Foro Amm.*, 2016, p. 556 and Id., 8 July 2016, n. 14042, in www.iusexplorer.it.
[16] Cass., SS.UU., 14 December 2016, n. 25629, in *Foro it.*, 2017, c. 580.

applicable norms, especially when an access to a jurisdictional remedy is denied, contrary to the EU law as interpreted by the CJEU[17].

Notwithstanding this opening, the Court continues to reject every appeal concerning cases of not referral, always on the ground that the decision to refer lies exclusively within the competence of national judges.

This trend of reasoning is not convincing. It neglects to consider that national judges are obliged to apply EU law and to protect rights conferred by it, even to the point of setting aside the internal norm which is in contrast with the EU one. This means that a "European judge" is not only the one sitting in Luxembourg, but on the contrary every national judge, called to use all the tools afforded by domestic law in a flexible way, in order to guarantee the respect of EU Law[18].

From a comparative point of view, it is worth considering the different approach adopted in Germany. Article 101 of the Fundamental Law provides that «no one may be removed from the jurisdiction of his lawful judge». Relying on this rule, the German Constitutional Court considers that the CJEU is the «lawful judge» in the field of interpretation of EU law. Consequently, if a judgment, even one of a final court, fails to refer for a preliminary ruling, this can be considered a violation of the Constitution, if the reasons are manifestly undefendable (*unhaltbar*)[19]. The Constitutional Court does not aim to protect against mistakes in interpretation, but rather to avoid arbitrary decisions. This can happen, for instance, if the judgment does not consider the possibility of submitting a preliminary reference, or if it deviates from a clear interpretation already adopted by the CJEU without stating reasons appropriately[20].

Of course, the Italian and German legal systems differ. For example, unlike Italian law, Article 93 of the German Fundamental Law allows everyone to file an application for review to the Constitutional Court, on the grounds of an alleged violation of a fundamental right by a public authority (if the ordinary means of recourse have been exhausted). Thus, the Constitutional Court can annul every judgment violating fundamental

[17] Cass., SS.UU., 29 December 2017, n. 31226, in www.iusexplorer.it.

[18] This principle, laid down in the case *Simmenthal* above mentioned, has been specifically applied by the Court to the preliminary reference proceeding (CJEU, 11 September 2014, *A v B and others*, C-112/13, in *Giur. Cost.*, 2014, 5, p. 4088).

[19] BVerG, 2 BvR, 2661/06, 6 July 2010, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/07/rs20100706_2bvr266106.html, n. 90. A similar approach has been adopted by the Czech Constitutional Court; cfr. R. Valutyté, *Legal Consequences for the Infringement of the Obligation to Make a Reference for a Preliminary Ruling under Constitutional Law*, in *Jurisprudencija*, 2012, p. 1171.

[20] Cfr. R. Valutyté, p. 1171.

rights of the individual.

Nonetheless, and despite the difference between the Italian and the German legal systems, the German example shows that it is possible to interpret domestic law in such a way as to avoid that, because of the national judges' reluctance, the right of European citizens to have the preliminary ruling procedure activated remains without protection[21].

5. *A change of perspective*

All the above having been said, it is now possible to highlight that the breach of the duty to refer to the CJEU for a preliminary ruling creates a deep wound to the effectiveness of the EU law, because it prejudices the right of the European citizen to have a correct interpretation of the applicable norms by the CJEU.

Against the relevance of this issue, we noticed that neither the possibility to evoke the violation of the right to a fair trial (art. 6 ECHR), nor the leverage of the Member States' liability for damages for breach of EU law seem to be effective remedies. Not only is it difficult to fulfil the very strict conditions in which liability can arise, but the recourse itself to damages demonstrates that if a national judge fails to refer to the CJEU in no way is it possible to solicit the correct interpretation of EU law.

A change of perspective is called for. All the possible tools available according to the internal legal systems should be mobilised with the aim of protecting the effectiveness of EU law. In this sense, a useful paradigm for this change of perspective comes from the category of "European citizenship".

Without entering into detail, it is still worth noting that the Treaty of Lisbon has opened a new phase of the European legal integration, putting a new subjectivity of the European citizen at the centre of the EU architecture. The CJEU has highlighted the importance of this category regarding the citizenship of the Union as a status intended to be the «fundamental status of the citizens of the Member States»[22]. In this sense, European citi-

[21] In other Member States as well the situation is similar to the Italian one. Cfr. S. Platon, *La pratique du Conseil d'Etat en matière de questions préjudicielles à la Cour de justice de l'Union européenne*, in *AJDA*, 2015, p. 260; D. Szymczac, *Convention européenne des droits de l'homme et questions préjudicielles*, *ivi*, p. 268. For a complete account, cfr. F. Ferraro, *The Consequences of the Breach of the Duty to make Reference to CJEU for a Preliminary Ruling*, in *Dir. Un. Eur.*, 2015, p. 589.

[22] Cfr. L. Moccia, *Legal comparison and European law: or the paradigm shift from a*

zenship is a paradigm that no jurist can fail to consider in order to give new impetus to the process of European integration and try to overcome the boundaries, sometimes too narrow, of the traditional categories[23].

The preliminary reference procedure is the instrument that enabled the CJEU not only to orient the national judges with a view to harmonizing the domestic legal systems, but also to protect European citizens' rights. Already in the case *Van Gend and Loos* (1963) the Court asserted that the task assigned to it with the preliminary ruling mechanism «confirms that the states have acknowledged that community law has an authority which can be invoked by their nationals before those courts and tribunals». As a consequence, the subjects of the European legal system «comprise not only Member States but also their nationals», whose rights «become part of legal heritage»[24].

In this sense, the change of perspective evoked above builds on the acknowledgment that the unjust refusal (or the refusal lacking statement of adequate reasons) to submit a preliminary ruling to the CJEU cannot be considered as a simple breach of EU law. On the contrary, it affects the right of European citizens to a correct interpretation of the applicable norms by the Court of Justice or, at least, to an adequate motivation of the refusal.

Vis à vis phenomena revealing the deep transformation of the sources of law and of legal categories there should be no room for a defence of an assumed, and anachronistic, exclusivity of the jurisdictional function by national judges, which proves to be no longer adequate in a context where the boundaries of each national legal system become blurred in favour of a space of convergence at the European level.

6. *Addendum*

During the publication of the conference proceedings, a very important judgment by the Italian Court of cassation was issued precisely on the topic covered by the present contribution (Cass. Civ., sez. un., 18 September 2020, n. 19598). It marks a radical change of perspective, as

territorial to a spatial viewpoint, in the prospect of an open and cohesive society based on European citizenship as model of plural and inclusive citizenship, in *La cittadinanza europea*, 2017, especially at p. 37 f.

[23] Cfr. L. Moccia, *Diritto comunitario e diritto europeo*, 2013, p. 41, now in Id., *Comparazione giuridica e prospettive di studio del diritto*, Padova, 2016, p. 63 ff., at p. 69.

[24] CJEU, 5 February 1963, C-26/62, *Van Gend en Loos*, in *Rep.*, 1963, p. 3.

it considers that the avoidance of the duty of the Italian Concil of State to submit a preliminary reference to the CJEU exceeds the limits of its jurisdictional competence, adopting the main arguments raised in the present contribution against the previous view[25].

[25] For further details, see E. Calzolaio, *La violazione del diritto dell'Unione Europea come* "motivo di giurisdizione", in *Foro it.*, 2020 (forthcoming).