

Anna Maria Mancaleoni

*“National Judges and the case law of the Court of Justice
of the European Union”: Introduction*

The impact of EU law on Member States’ legal systems materialises decisively by means of principles and rules established by the EU Court of Justice. It is common knowledge that even the source of the fundamental principles concerning the relationship between EU and Member States is the case law of the CJEU: just think of the principle of primacy, which is one of the main pillars of the relationship between the EU and the Member States and which was not enshrined in the most recent amendments to the Treaties; simply think of the principle of sincere cooperation (or loyalty), which, unlike primacy, is provided by the EU Treaty (Article 4), but has been enriched with corollaries by the CJEU, so that it has taken on strategic value, by compelling national judges to become promoters of EU law. Nevertheless, the application of these principles – which very often are actual operational rules – is delegated by the CJEU directly to national judges.

Therefore, the good performance of the multilateral system originating from the interaction between the legal system of the EU and the single Member States, implies a synergy between the Court of Justice and the international courts: on the one hand, the CJEU has the opportunity to give its opinion only by following the preliminary ruling reference made by national judges; on the other hand, national judges are charged with the task of faithfully implementing the decision of the Court of Justice into the internal legal system.

With this premise, the contributions collected in this Volume – which are the proceedings of the Conference held in Cagliari the 1st of June 2018 – aims to deal with the problems relating to ‘communication’ between *all* national courts (be they on the merits, supreme, constitutional) and the Court of Justice of the European Union. To this purpose, the same judges, as protagonists of this process of communication, are called to speak: they are invited to illustrate, moving from their direct experience, the possible difficulties experienced in the communication with the EU Court. The awareness of such difficulties can be the key to overcoming them, to enhance

the quality of communication and to reach a better integration between the EU and national legal systems via the case law. The voice of professors specialised in European law is also heard; the dialogue between practice and academia is fruitful and beneficial for both.

The idea of organising a Conference on the ‘dialogue’ between the Court of Justice and national courts matured after my involvement in a research project, coordinated by Professor Arthur Hartkamp, concerning the effectiveness of EU law in horizontal relationships. Each participant in the research had to collect data on the impact of EU law with specific regard to those areas in which these horizontal effects have proved more significant (non-discrimination, fundamental freedoms, competition, directives in general, general principles, *ex officio* application of the EU law). Each participant, in addition to reconstructing the general EU legal framework related to the area of his/her competence, had to provide the other participants, dealing with other areas, with the relevant data from his/her national legal system. As the principle of effectiveness of EU law and its sub-principles and rules have been defined by the CJEU, at first we had to look at the relevant decisions of the latter and then at their implementation by the national judges who made the references and, possibly, by other national judges dealing with the same question.

This approach gives a greater awareness of the interaction between courts in its entirety. National lawyers’ interest is more often focussed merely on the decision of the CJEU and the final actual outcome of the main dispute is not likewise known, but for the lawyers of the Member State from which the reference originated (also because national courts’ decisions are not translated in all the Member States’ languages, unlike the decisions of CJEU, which are also easily accessible to any member of the public through the CJEU’s website). The fact of focusing on the outcome of the case before the national judge – the decision implementing that given by the CJEU – highlights, in particular, the possible ‘distance’ between what the CJEU says in abstract and what the national judge does in the actual case. There can be different scenarios.

In some cases the decision of the CJEU is decisive also with regards to the dispute pending before the national judge, who does not have any margin of discretion in implementing the decision. In other instances the decision merely provides the national judge with general and abstract guidelines to be applied to the case.

The Court of Justice after all does not have jurisdiction on the merits of the main proceedings, but only on the interpretation of EU law. In

particular, even if it renders a decision in which it substantially states the incompatibility of the national law with EU law, the outcome of the dispute, as far as the question raised before the Court of Justice is concerned, is not automatic. The final result depends on possible variables, which are not predictable and sometimes even known or cognizable through the record of the proceedings (such as, for example, the “margin of manoeuvre” given by that national legal system as to the interpretation and application of the national legislative provisions by judges, in general and with specific regard to EU law; the personal attitude of the judge toward the law and the actual case; the context, in its broadest meaning, surrounding the case).

It has to be taken into consideration also the fact that the Court of Justice only answers to that very question referred by the national judge; at the most it can rephrase the question, but it does not have to consider the case from any other possible angle. And not only is its answer conditioned by the specific question raised but it is also based on the information on the case and on the national framework provided by the national judge him/herself; therefore the knowledge of the national context from the CJEU is only partial and indirect.

Furthermore, as the Court of Justice analyses the referred question on the basis of the presentation of the legal framework by the referring judge, it is fundamental that this framework corresponds to the real picture. If not, the decision can be flawed from the start, with repercussions that go beyond the main proceedings, as the CJEU decision is binding on all national courts dealing with the same question.

However it can be difficult to establish whether the decision of the CJEU is strictly conditioned by the specific circumstances of the case or if it can be considered as an application of a more general principle, therefore with a broader scope. In fact very often the decisions of the CJEU do not disclose clearly the ratio decidendi and all the controversial questions underlining the case. It can be more exhaustive and useful, in this perspective, to look at possible clues which can be found in the Opinions of the Advocates general, but these are not always, entirely or partly, followed by the CJEU. This is what happens also in cases with the greatest impact, as some of the contributions in this Volume show.

The above mentioned research project in which I took part is representative of these ‘communication’ difficulties. As far as the horizontal effects of EU law are concerned, it is impossible to extrapolate from the CJEU decisions principles and rules coherent and applicable with regard to all the EU sources (provisions of the Treaties, directives, general principles, EUCFR).

Even within the CJEU opinions may differ, as can be seen when looking at the positions taken by some Advocates general. Therefore national judges are uncertain about the solution to adopt in similar, but distinguishable, cases.

Furthermore, depending on the legal system, national judges, in general or in relation to the specific case, can have a different personal attitude toward EU case law, even regardless of the different leeway given to them, and incline toward a given solution rather than another.

Therefore, problems and difficulties of communication in the broad sense can be encountered between the CJEU and the national judges, in both directions (bottom-up, and top-down). These drawbacks are sometimes unavoidable, as inherent to the multilevel structure of the EU legal system and in the different positions of the protagonists. Sometimes the same problems and difficulties do not depend on a mere 'communication deficit', but on the lack of shared notions and values. This is one of the reasons why the CJEU sometimes prefers to rely on general principles and flexible criteria, to be defined by national judges, even if the result is not satisfactory in terms of certainty and coherence.

In articulating the subject matter of the conference, and the corresponding proceedings collected in this volume into different sessions, a logical and chronological order was followed. The starting point is the preliminary ruling reference, which is the pillar of the relationship between the CJEU and national judges. We moved from the position of the judges who have to make the difficult decision on whether or not to refer the case to the CJEU ("To refer or not to refer? This is the problem"). Once this decision is made, the national judge has to provide the Court of justice with the national framework ("To paint the picture"). Then the Court of Justice has to interpret the national framework ("To interpret the framework") and render the decision. The ball comes back to the national judge, who has to transpose the interpretation of the CJEU into internal law ("The art of implementing the decisions of the Court of justice").

The majority of the contributors are specialized in private law as this is also my area of research and teaching, but one of them is professor of international law and two are judges from the civil and the administrative Italian supreme courts. EU law is pervasive and implies a multi-disciplinary approach; the problems of communication between courts are however transversal and shared by the judiciary as a whole regardless of the subject. Furthermore, at the time of the Conference there were some important questions pending, raised by the Italian Constitutional Court, with regard to the relationship between EU law and the national legal systems. For all these reasons I con-

sidered more than appropriate the involvement in the discussion of representatives from different areas.

After this brief introduction to the subject matter, I would like to thank everyone for their sagacity, collaboration and practical help in this initiative.

A very big thank you to all the speakers, who have prioritised taking part in the Conference to other important engagements and for having contributed with the texts published in this Volume. As well as thanking him for taking part in the Conference, my best wishes go to Raffaele Sabato, who has become the Italian judge of the European Court of Human Rights.

A thank you to the Italian Association of comparative law and to its President Professor Vincenzo Zeno-Zencovich for his support in many matters, not just scientific; thank you Professor Aldo Berlinguer for your availability, encouragement and backing. A thank you to Professor Elise Poillot for her precious scientific help.

My special thanks goes to the President of the Court of Appeal Gemma Cucca, who has allowed us to hold the conference in the courtroom of the Court of Appeal, the most appropriate of locations; to the Dean Professor Del Zompo, University of Cagliari and to the Law Department, to the Director Professor Fabio Botta and to all the technical and administrative staff who have, as always, been of precious help and support.

A special thank you to the Lawyers' Association, its President Aldo Luchi and to Giovanni Dore, who is in charge of the vocational training in supranational law matters. I would also like to thank the School for magistrates and its representatives, judges Giorgio Latti and Giovanni La Rocca; also a thank you to the Presidency of the Consiglio regionale of Sardinia and to the Fondazione di Sardegna, for their financial contribution. A thank you to all those present at the Conference, colleagues, lawyers, magistrates, PhD research students. A hello to my students from my courses in Cagliari and Sassari, where I was a substitute lecturer this year, who could come to the Conference thanks to the Law Department of Sassari.

Finally, my best wishes to the President of the Constitutional Court Giuseppe Tesauro who could not attend the conference due to sudden health problems. A thank you to Professor Gianmario Demuro, Professor of Constitutional law at the University of Cagliari. A few months before the Conference I had asked him if he could present a report but at the time he told me he couldn't guarantee his attendance due to a series of previous engagements, but he promised he would come if in Cagliari. Luckily he was here and wonderfully chaired the morning's session of the Conference in place of Professor Tesauro.