Anna Maria Mancaleoni, Elise Poillot

Summary report

1. *Cases and questions at issue*

The contributions touch upon various profiles of the relationship between the Court of Justice of the European Union and national judges and tell of matters that are highly heterogeneous from the point of view of the facts of the main dispute, of the questions raised and of the interests at stake. Some of the contributions are focused on a specific case, some on a series of cases related to the same subject matter, while still others deals with a singular main theme following a more systematic, general and abstract approach. All of them epitomize the problems of 'communication' between the CJEU and national judges which were the subject of the Conference.

Professor Amato illustrates the case law of the CJEU and of the *Italian Autorità garante della concorrenza e del mercato* concerning directive 2005/29 on unfair business-to-consumer commercial practices in the internal market. This directive is based on general evaluation criteria and it also refers to extra legal notions that belong to the social and economic sciences: as the directive leaves broad discretion to national judges, the related case law provides a privileged context in order to 'measure' the alignment, or the misalignment, between the CJEU and national judges as far as the interpretation and application of the concepts on which it is based is concerned.

In her comprehensive essay, Professor Autorino presents numerous examples, taken from different phases of the history and from different

[*] Professor Elise Poillot wrote paragraph 7; Professor Anna Maria Mancaleoni wrote the other paragraphs.

geographical contexts, of *cross-judicial fertilization* (and of *legal transplants* in general) to illustrate the major contribution that national and supranational courts have given to the protection of fundamental rights, with more specific regard to dignity and in particular within the European context (CJEU and ECtHR), and in the light of the more recent enshrinement of the Charter of Fundamental Rights of the European Union.

Professor Biagioni deals with the specific and crucial problems arising from the Charter of Fundamental Rights of the European Union: its ambit of application and its effectiveness in the national legal systems. The CFREU, although having the same legal value as the EU treaties, is not comparable to the latter and its repercussions for the national legal systems are still to be defined. It is not even clear when the Charter may be relevant, i.e. when the case falls under the scope of EU law, according to Article 51 of the Charter (the Charter only applies to European Union Institutions and bodies and to the Member States «only when they are implementing Union law»).

Professor Calzolaio analyses the case law on the consequences arising from the avoidance of the preliminary reference to the CJEU as far as the liability of the State and of the judges is concerned.

The contribution of Professor Dotevall illustrates some peculiarities of the Swedish constitutional order, which are relevant also to the approach vis-à-vis European law (ECHR and EU law). Then he turns to describe the evolution of the national case law under the influence of the ECtHR with regard to the application of the *ne bis in idem* principle within the scope of tax law. It is thanks to the ECtHR that the Swedish superior courts finally changed their approach.

Professor Hartkamp focuses on the *Achmea* case, a real breakthrough in the sensitive area of bilateral investment treaties and their compatibility with EU law. The long-awaited judgement of the CJEU established that EU law precludes a provision in an international agreement concluded between Member States, under which an investor from one of those may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal. In particular, such a clause does not comply with Article 267 TFEU (and with the principle "autonomy of the EU law"), as the arbitral procedure and the review of the arbitral award are not sufficient to ensure compliance with EU law. With this judgement the CJEU took a clear stance but at the same time caused uncertainty and opened new questions (which called for subsequent clarification from the EU and national institutions).

Judge Lipari dwelled on the rich and complex Italian and CJEU case law on public procurement review procedures, in particular with specific regard to when the main claimant challenges the award of tender and the winner of the tender, in his turn, challenges the admission of the main claimant to the public procurement procedure (the so called cross-claim "incidentale escludente", as it aims at "excluding" the other party). In simplified terms, in such cases it is unclear in which order the two claims should be examined by the national judge and, in particular, whether the cross-claim takes precedence; and if this is upheld, then the judge has to dismiss the main claim for lack of legal standing (as the main claimant's "legitimate interest" would fail). The Judge illustrates that this is about reconciling the need for the protection of economic operators with the conflicting need for the timely achievement of the objectives of public interest, which could be impaired by "excessive" litigation. Italian judges have expressed different opinions in this respect and they also have called upon the CJEU to pronounce (see in particular the decisions in *Fastweb* and *Puligienica*), but the answers have not been conclusive, also due to the variety of factual circumstances in which the question arises each time.

Professor Poillot introduces and comments on the speech given at the conference by Judge Rigal; furthermore, as an expert of consumer law, she illustrates the legal framework underlying the matter. Judge Rigal tells us about his experience, from a professional and human point of view, as the judge who made the preliminary reference to the CJEU in the *Cofidis* case. The case raised the question as to whether the directive on unfair terms in consumer contracts requires the national judge to disapply the national provision which does not allow the same judge to raise the unfairness of contractual clauses of his own motion if the legal proceedings were initiated more than two years after the conclusion of the contract (*délais de forclusion*). As Professor Poillot highlights in her contribution, on this occasion the CJEU has further developed the doctrine of the 'active role of the judge' in consumer litigation, thus determining a significant change in the French legal framework, in addition to general repercussions for other Member States. This is the second judgement of a series in which the CJEU replaced the EU legislator in order to remedy the ineffectiveness of consumer protection, thus opening the door to dozens of further preliminary ruling referrals leading the CJEU to circumscribe the scope of the doctrine of the active role of the judge.

Judge Riccardi's contribution critically assesses the *Taricco* saga, in which the Italian Constitutional Court and the CJEU were confronted

with the sensible question of the limits within which EU law prevails over national law (the so called doctrine of the "controlimiti"). In the first of the judgements on *Taricco*, the Grand Chamber of the CJEU had established that Italian judges have to disapply the relevant provisions on limitation periods in the context of criminal proceedings on VAT fraud, so as not to declare time-barred crimes of fraud affecting the financial interests of the EU, when the application of these provisions, in particular, «prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union», which it is for the national court to verify. In the national follow-up to the CJEU judgment, some national courts questioned the compatibility of the CJEU solution with fundamental rights and the Italian Constitution. Then the Italian Constitutional Court reopened the question before the CJEU in order to clarify any doubts as to the scope of the previous judgement. According to the Constitutional Court, the application of the *Taricco* rule by national judges might be contrary to the fundamental principles of the domestic legal order (such as, in particular, the principle of legality, in its corollaries), which are part of the national "constitutional identity"; consequently the national judge might not be obliged to disapply the national provisions under consideration, as this would go beyond the limits of the primacy of EU law over national law. The CJEU, in answering the question, circumscribed the scope of the first *Taricco* judgement by establishing that the obligation to disapply the national provisions on limitation periods fails when it «entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed».

The contribution of Raffele Sabato, judge at the *Corte di cassazione* (civil matters) at the time of the Conference and now (at the moment of the publication of this Volume) the Italian judge at the European Court of Human Rights, focuses on another case involving the relationship between the Italian Constitutional Court and the CJEU, EU and national law. It deals with the so called "doppia pregiudizialità": namely, the situation of the national judge who faces doubts as to the compatibility of the relevant domestic provisions with directly applicable EU law and, at the same time, with the Constitution. According to the well-settled national case law, in such cases the court to be first seised is the Court of Justice, but this rule has been questioned by a decision of the Constitutional Court (n. 269/2017):

even if in *obiter*, this decision seems to state that, when the doubts of the judge are related to rights protected at once by the national Constitution and by the EU Charter of fundamental rights and the latter is applicable, the question of constitutionality (and therefore the Constitutional Court) comes first (without prejudice to the possible referral to the CJEU for a preliminary ruling on questions of validity and of interpretation of EU law).

Professor Sica provides a critical analysis of the case law on the liability of internet providers. The exceptions to the general principle of 'no liability' allowed by the EU legislation, which was introduced to catch up with US regulation, are not clearly defined and there are different interpretive approaches. Furthermore the fact that also the case law of the European Court of Human Rights follows a different approach is not of help for the harmonisation of the regulation of provider liability.

Professor Wallis – former President of the European law Institute and former member of the EU Parliament – discusses the future relationship between the UK courts and the EU – and the civil law courts – in the light of Brexit.

The contributions, even if they vary considerably, as outlined above, can be also considered transversely, with regard the various steps of the preliminary ruling procedure in which the communication between the national courts and the CJEU is articulated: the decision on whether or not to refer the case to the CJEU; the correct definition, at the national and EU level, of the legal context in which the question is placed, which is relevant for both the national judges and the CJEU; the final moment, when the national judge has to implement the ruling of the CJEU in the national legal system (without prejudice to further appeals and referrals to the CJEU and to possible legislative intervention which could be necessary to remedy non-compliance with EU law).

2. *To refer, or not to refer? This is the problem*

For obvious reasons, the generally speaking most well known cases among national jurists are often those which originate from higher or constitutional national court referrals, and, above all, those which concern fundamental questions inherent to the relations between domestic and EU law. This is so for those cases dealt with by Giuseppe Riccardi and Raffaele Sabato that take their cue from current events in Italy in which the Constitutional Court

dealt with the question of "controlimiti"/"constitutional identity" (*Taricco*) and the relationship between the referral to the Constitutional Court and to the Court of Justice in the case of "doppia pregiudizialità". In *Taricco*, in particular, the Constitutional Court sought to clarify the limits beyond which not even the Court of Justice and the primacy of EU law can go.

The case presented by Judge Rigal, however, underlined how lower judges can play a role no less incisive than that played by the Supreme Courts. Preliminary referrals to the CJEU are the purview of judges of every state and level (unlike what is provided for in some legal systems – see France and Austria, in particular – in cases where the preliminary ruling concerns the constitutionality of laws). Furthermore, many CJEU rulings that have had enormous impact on given internal legal systems find their origin in preliminary rulings by the judges in question, who, through the EU Court, bypassed their respective higher courts and determined a change of course in their own legal system, as demonstrated by the *Cofidis* case. The impacts of the case law of the Court of Justice in matters of consumer protection, even though these are not in themselves of great economic importance (beyond, possibly, to the position of the individual consumer party to the dispute) have enormous implications at a 'system' level. This is particularly evident in the case law on unfair terms and consumer credit, which, since it concerns financing in the broad sense, has a profound effect on the market behaviour of banks.

Rolf Dotevall's report also shows how national higher courts' resistance to change can sometimes be overcome with the intervention of European supranational courts. The example is, in this case, taken from the case law of the European Court of Human Rights, which pushed internal systems in the direction already taken (in vain) by the lower judges (who due to, among other things, age, are at present 'closer' to European law than their and older colleagues in the higher courts).

Etienne Rigal's contribution, moreover, is characterized by its originality: it even describes the human aspect of the case: the inner 'torment' of the judge, faced with the difficulties and risks inherent to referral, particularly in the case *de quo*, in which the referral is an attack on the position taken by the *Cour de cassation*. The sensitivity of the judge, his empathy with the position of the weak debtor with respect to the powerful banks, the struggle for justice and the consequent wait and search for a 'good' case as well as the link, so crystal clear, between law and values, are all striking. As Elise Poillot points out, the case, above all, shows the law of the European Union, often accused of laissez-faire liberalism, in this instance close to the

needs of the citizens and functional to what is, according to Judge Rigal, the primary purpose of law: to grant the weak the possibility to petition the State for the redress of their rights. In this case, the consumer has had the fortune of 'encountering' a pool of jurists at once competent and 'sensitive' (and thus capable of making up for the lawyer's ignorance of EU law): Judge Rigal, was able to avail himself of the support of a university professor expert in EU law profiles, who directed the strategy, of two colleagues that envisioned the recourse and of a Spanish colleague who proved at once industrious and 'sensitive'. Rarely, however, do such circumstances come about contemporaneously. Knowledge of EU law among judges, and especially among those of the lower courts (while higher court judges are trained to deal with the most controversial cases and are, on the whole, more equipped) was, at least until a decade ago, limited: on this point, see what emerges from the report to which Diana Wallis refers to in her contribution on the perception of European Union law among national judges.

Limited, moreover, as Ermanno Calzolaio's account illustrates, is the liability that a judge bears in cases of a negative decision on whether to refer or not, seeing as the State is liable vis-à-vis individuals for damages resulting from omission of referral for a preliminary ruling only if it is a judge of last resort, if the omitted referral adds up to a "serious and manifest" violation of the obligation of referral and if there is a causal nexus between the omitted referral and the damage suffered. These are, evidently, highly restrictive requirements, and all the more so in respect to those that pertain to the general liability of the State as derived from violations committed by a judicial organ (of which I am aware of only one case for which a State was found liable). Even more remote, furthermore, is the possibility that the judge be called to compensate for the damage (directly or as a result of recourse of the State which had to make good the damage caused to individuals) due to measures of internal law on the civil liability of judges, as national regulations tend to limit such liability.

3. *The framework of the preliminary reference: illustrating and interpreting the picture*

The exact definition of the legal framework in which a preliminary referral is placed is relevant both from the point of view of the national judge that proceeds to referral and from that of the CJEU, which is called

upon to decide on the basis of the illustration of internal law carried out by the national judge.

The choice on whether to refer becomes even more complex when dealing with subject matters in which the legal framework is indeterminate, as clarity is even lacking within both the European legislation and in the case law of the Court of Justice. Particularly illustrative on this last hypothesis is the account of Professor Biagioni, centred on the problems linked to the interpretation and application of the Charter of Fundamental Rights of the European Union: on this, the guidance that the CJEU provides on the scope and effectiveness of the Charter on which national judges can rely is limited; the approach is case-based. To establish if the CFREU is applicable, the CJEU analyses on a case-by-case basis the specific circumstances of the case at hand, rendering it difficult for national judges to find concrete guidelines. Referral, consequently, can be discouraged. In the case of the CFREU – a particular case for the peculiarity of this source of EU law – 'too many referrals': as a consequence, as Professor Biagioni explains, the CJEU tends to close such cases declaring them as inadmissible for lack of sufficient connection to EU law. The CJEU can in this way select its cases, refusing to hear those that are more sensitive from a political point of view or that present limited interest from the perspective of the EU. In such a way, the CJEU can also evade conflict with national constitutional courts, avoiding thus accusations of judicial activism and mitigating anxieties pertaining to the notion of it replacing national legal systems in the determination of the standard of protection of fundamental rights. Still – Giacomo Biagioni also observes – in the long term such a case-by-case approach may lead to a decrease in referrals, especially from lower court judges, who have no such obligation (considering the uncertainty as regards the applicability of the Charter), and a certain incoherence of interpretation and application.

At times a decision of the Court of Justice is perceived to be missing the proper domestic legal framework. Such was concretely verified in the *Taricco* affair, in which the CJEU did not comprehend the values presided over by the Italian criminal law system, only to then "take a step back", as highlighted in Judge Riccardi's account (and the initial position of the CJEU was verisimilarly spoilt – he suggests – by prejudice as regards the Italian statute of limitations). This also true with regards to the case law on review procedures: Judge Lipari notes that, apart from some reservations that can be expressed on the legitimacy of para-normative power exercised by the Court of Justice, the case-by-case approach «brings with it a defect derived from limited preliminary investigation and the lack of evaluation of

the problem as a whole, beyond the concrete case it underlies».

4. *The art of implementing the decisions of the Court of justice*

Almost all of the contributions highlight the difficulty of understanding the scope of the judgments of the Court of Justice and especially those of Carla Sieburgh, Marco Lipari and Arthur Hartkamp: here the case-by-case approach is particularly pronounced, and more than ever poorly inclined to understanding if the principle enunciated by the CJEU is separable from the specific circumstances of the concrete case or if it can be extended to a more ample generality of cases. This is the issue widely explored in the context of common law systems, which now sees itself proposed again in a more 'grave' manner in the multilevel system of the European Union, which does not present the same cultural homogeneity and commonality of language of the common law systems.

The *Achmea* ruling – of crucial content under the economic and market profile, which is that of foreign investments, which requires a strengthened level of certainty – has not clarified if the incompatibility of the EU legal system of the European Union subsists only by the Bilateral Investment Treaty being considered (or in those which contemplate arbitration clauses with analogous formulation) and if analogous solution counts with reference to all BIT's and also to the Charter of energy. The motivation, all else aside, appeared less than convincing. One can hypothesise that there was not unanimity of opinion within the CJEU, since prior another Advocate General, even if in relation to a only partially similar case, had expressed, much like the Advocate General for *Achmea*, a sense of compatibility of the BIT with European Union Law. Doubts, emphatically raised in the commentary on the ruling, were in part overcome by successive interventions on the part of the Member States and of the institutions of the European Union, which from the ruling of *Achmea* received the unavoidable spur to change the framework.

Also in *Abercrombie* we can see a divergence of opinion between the Advocate General and the CJEU: the former attributed to a national judge the task of establishing if the legitimate ends pursued by the national discipline were necessary and appropriate, while the latter directly carried out the evaluation itself; this, as – Judge and Professor Carla Sieburgh notes – omits, however, to justify the conclusion reached, limiting itself to

refer to the discretion that the Member States enjoy and without clarifying the doubts raised by the judge who ordered the referral. The ruling leaves room for doubt on how to treat cases that may be slightly different (for example when the employee is not in his or her first work experience); according to Sieburgh, it constitutes an example of unidirectional top-down communication; and an analogous approach was followed by the Court of Justice in a subsequent case, concerning a similar matter. In the following internal review the *Corte di cassazione*, in upholding the appeal of the employer, was able to limit itself to recalling the ruling of the CJEU to affirm that the principal objective of the contested law was that of granting young people a *first* chance to access the labour market, to guarantee a first experience that could then put them in a position of competitive advantage in said job market, excluding that a similar protection be provided for workers beyond their first work experience.

Equally indicative of the difficulty of establishing if the ruling of the CJEU is also valid as a precedent for similar, albeit not identical, cases is also the contribution of Judge Lipari, as related to public procurement review procedures which are particularly complex for the variety of situations that can concretely emerge (with consequent difficulties in finding a general solution that satisfies all the needs that may arise in the event of a "ricorso incidentale escludente" regardless of how the specific case is configured). Both the reports of Judges Riccardi and Lipari highlight the difficulties of transposing into internal law the specific solutions found by the CJEU due to the repercussions that arise in the domestic system of the sources of law. The problem, as outlined above, arises in particular in criminal law, but, with reference to the practice of public procurement review procedures, Judge Lipari also dwells on the relationship between written law and case law, as this involves legal certainty. In the area of public procurement, EU legislation is centred on elastic concepts and principles, while the CJEU case law, which is the prevalent source, is specific and detailed. According to the Judge, this is because at the time of adoption of the review procedures directive there was reluctance to intervene on the procedural aspects; today, however, it is very much time for the introduction of more specific written provisions, also of procedural nature. This would be preferable to relying on the principle of autonomy of the Member States, which, in its uncertainty, does not lend itself to efficient application, particularly in matters that, like this one, demand certainty.

5. *The post-Brexit common law-civil law dialogue*

Diana Wallis' account takes on the topic of dialogue between the British and European courts in the scenario created by Brexit, characterised first of all, by uncertainty. Citing the outcome of the 2008 Report *on the Role of the National Judge in the European Judicial System*, based on the more than 2,300 responses to a questionnaire given by national judges, Diana Wallis, at that time Vice President of the EU Parliament, let it be known that – at least up to a decade ago – the law of the European Union was not known, or at least applied, when required at the national level, also due to lack of expertise. Judges were somewhat aware of Union law as something of gravity to be approached with a sense of responsibility, but, at the same time, of extreme complexity and with which they would unlikely be faced; and this was the case especially for English judges, that treat foreign law as a question that must be raised in judgment by the parties and which, if these do not raise it, the judge applies English law. Diana Wallis notes that the English approach, however, was always 'internationalist' since Lord Mansfield and also due to the influence, albeit not immediately obvious, of various migratory flows.

One can here recall, incidentally, that with the entry of the United Kingdom into the European Union the idea of "gradual convergence" of common law and civil law had gained ground (a classic topic of comparison): the membership of the United Kingdom to the European Union, as involving the sharing of Community legislation and case law (the "incoming tide" of EU law, in the words of Lord Denning[1]), would have led

[1] *HP Bulmer Ltd & Anor v. J. Bollinger SA & Ors* [1974] EWCA Civ 14: «It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute»; «What a task is thus set before us! The Treaty is quite unlike any of the enactments to which we have become accustomed. The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them. They have sacrificed style and simplicity. They have foregone be brevity. They have come long and involved. In consequence, the Judges have followed suit. They interpret a statute as applying only to the circumstances covered by the very words. They give them a literal interpretation. If the words of the statute do not cover a new situation - which was not foreseen - the Judges hold that they have no power to fill the gap. To do so would be a "naked usurpation of the legislative power" (…). The gap must remain open until Parliament finds time to fill it. How different is this Treaty. It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look

to a deeper approximation. According to the antagonising thesis, instead, EU law would have acted as a «legal irritant», putting into gear a transformative process of the internal law with the outcome not being necessarily convergence[2]. Still, according to a wide breadth of study dedicated to the analysis of the 'dialogue' between the courts[3], the English judges would tend to in any case, for various reasons[4], 'converse' with the other courts of common law instead of the national courts of civil law tradition; European influence would only be felt in those areas object of European Union law, while areas in which reference to foreign law is purely optional the privileged interlocutors would be colleagues of Commonwealth jurisdictions[5].

With Brexit, the British courts, once the relationship of 'subordination' to EU law ceases, can legitimately disregard the judgments of the Court of Justice, if they believe that they do not provide the preferable interpretation of what will have become purely internal law. However, according to Diana Wallis, the efforts to improve training and European collaboration surely brought about certain effects and with successive generations, and certainly with those of the Erasmus era, European influence has penetrated, albeit in an immeasurable fashion; thus the fact is that formally receding from the European Community Act is not enough to undo decades of custom.

6. *Dialogue or monologues*

The contributions manifest both optimism and pessimism, as well as moderation, about the effectiveness of communication between the courts and, therefore, about the prospects of European integration specifically through case law. Such a profile can be framed within the context of widespread euroscepticism (even aside from Brexit), which Judge Riccardi and Professor Sica in particular refer to in their account.

in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by the Judges, or by Regulations or Directives. It is the European way».

[2] G. Teubner, *Legal irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies*, in *Modern LR*, (61) 1998, p. 11 ff.

[3] M. Bobek, *Comparative reasoning in European Supreme Courts*, Oxford, 2013.

[4] Just think, first of all, of the commonality of language and consequently of the accessibility to legal materials; then of the greater prestige attached to the other common law courts and of the greater inclination to undergo their influence, also due to the common cultural heritage: v. P. Giliker, *The influence of EU law and European human rights on English private law*, in *Int. & Comp. Law Quarterly*, 2015, p. 249 ff.

[5] Bobek, p. 75 ff.

The most marked critical tones are those of Judge Riccardi, who speaks of "monologues", rather than "dialogues" in reference to the relationship between the courts (and further, the very same category of "dialogue", as that of "multilevel protection of rights", would be pure myth). The balance of rights, notes the judge, cannot lie beyond a political dimension, which is not at the moment found in the European context; in the last analysis the Court of Justice disregards links to the domestic system of the sources of law and the division of powers itself, on which western constitutionalism is based.

Greater optimism emerges from the accounts of Judge Rigal and from Professor Dotevall, which recount events in which 'fair' outcomes on the merits resulted from the ruling of the Court of Justice and the internal legal systems were induced to change their orientation. In both cases, the 'dialogue' between the trial judges and the Court of Justice was effective, as the trial judges found in the Court of Justice an interlocutor capable of overcoming resistance to desirable change opposed to trial judges by their respective higher courts.

Also Professor Amato's account is positive: even if comparison does not always result in coherent application, one can note a gradual convergence, most of all well prone to improvement; in this context, the fact that the CJEU embraces a case-law approach, leaving ample discretional powers to national judges, is positive, as it in this way avoids jeopardising the process of harmonisation through argumentation founded on the application of the general clauses.

Professor Autorino, although highlighting the uncertainty of framework, looking worldwide and both to the past and to the future, sees favourably the protection of fundamental rights given by the dialogue among the national and supranational courts (also beyond their respective fields of competence).

On the crucial matter of public procurement review procedures, the contribution of Judge Lipari, although underlining the lack of determination of the rules and of the overall framework, notes a basic convergence of the internal and European Union systems, on consolidated values, and invites us have faith in the work of the Court of Justice. According to the Judge, in the area under consideration the dialogue is «fruitful» and «especially lively and complex»; even highlighting the uncertainty of the framework, he retains that this outcome is not inevitable: he notes how the CJEU does not always bring uncertainly, but, on the contrary, certainty (as Rigal's account demonstrates); in any case, in the matter of in the field of public procurement review procedures juridical insecurity and «risks of overly unbalanced law on the 'creative' intervention of jurisprudence» are not without remedy, but can

be corrected via legislative intervention that updates the discipline.

Lipari's contribution addresses, among other things, the problem of the communication deficit also in terms of concrete procedural methods. EU institutions should involve themselves more in procedural aspects (and to this end institute, for example, some permanent centres of dialogue with the national legal systems). Additionally, it would be auspicious to mitigate the rigidity of the procedure before the CJEU, especially if the subject of the referral is a matter of utmost importance on which the national supreme courts have already ruled; if the question is of utmost importance, an exception should also be made with respect to the rules on the conciseness of the order for reference and on the untranslatability of the acts of the main proceedings.

In (pro) positive terms is also the report by Carla Sieburgh, who, while acknowledging the difficulties of communication between the courts, invites us to not interrupt the chain of dialogue and to not hesitate to go to the Court of Justice again if doubts remain; and the report by Professor Autorino, which shows how achievements in the protection of fundamental rights have been derived from legal transplants through the case law.

Negative but at the same time open is the position of Professor Sica, who, while considering a common value system to be lacking, regards dialogue inescapable (since, above all, the solutions must necessarily converge since it is a matter of network discipline): there is « too much Europe» and «too little Europe», «Uncertainty continues to reign supreme, but the exchange between European and national case law is indispensable, even as the only path in which the thread of the legal norms enacted can be found of shared value choices, is today lost in the (not accidental) chaos that the economic governance of processes has generated».

7. *Conclusive observations*

The fundamental role of the dialogue established between the CJUE and national courts cannot be ignored. In the labyrinth of questions and cases that are referred to the Luxembourg Court, there is a red thread. Sometimes the creative process of the law can feel like walking a maze and getting lost along the way. But the CJUE knows how to unroll that thread and guide national judges out of the labyrinth. And this thread is precisely the dialogue that the Court succeeded to establish with national judges. This dialogue is the essence of what could be defined today as the European

Union legal tradition. To find the way out of the labyrinth is not easy and it takes some time, as it took some time for the Court to reconsider its first judgement in the *Taricco* case. In its second judgement, criticisms addressed to the unfortunate consequences of the first approach of the Luxembourg judges were undoubtedly taken into consideration.

Somehow, the dialogue between national judges and the CJUE resembles the Platonist interpretation of dialectic as the dialogue assumes a crucial role in the development of both national and EU law and the way they interact. It becomes the process whereby the intellect passes from sensible to intelligible – one cannot here but think of the contribution of Etienne Rigal – rising from idea to idea until it finally grasps the supreme interpretation, that of the CJUE. The dialogue between national and European judges is a process of enquiry that does away with hypotheses up to the First Principle of EU law[6], that of primacy – whose existence was, by the way, if not established at least proclaimed by the CJUE on the ground of a judgement rendered to answer a preliminary question referred to the Court of Justice. The dialogue between national judges and the CJUE slowly embraces the multiplicity of interpretation in unity of interpretations in the Union. Of course, one needs to be realistic. The judgements of the Court are not always as intelligible as one would wish, as illustrated by the contribution of Professor Hartkamp regarding the *Achmea* case, and national judges may find them difficult to implement in their national jurisdictions. But they continue to refer more and more cases to the Court, confirming their need for dialogue and the trust they put in the Luxembourg jurisdiction[7]. After all, the legal framework of the preliminary ruling is broad enough to be perceived as extremely flexible when it comes to appreciate whether or not a preliminary question should be referred to the CJUE. National judges could choose not to do it.

There are several reasons to refer a case to the Luxembourg Court. It may be a political move as it was in the case in the *Costa v ENEL* case[8] and in many others. It may be a social vision of the law of a community of judges, as demonstrated by the judiciary saga of the active role of courts with regard

[6] Plato, *Republic*, VII, 533 c-d.

[7] The yearly review of the CJUE 2019 reports 641 preliminary rulings proceedings. Available at *https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/ra_pan_2019_interieur_en_final.pdf*.

[8] On the political background that led to the *Costa v ENEL* judgement, see A. Arena, *From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL*, in *European Journal of International Law*, 2019, pp. 1017-1037, more specifically p. 1034.

to consumer protection, or it may more simply be the pragmatic need for a clarification of EU legislation. Whatever the reasons, the Court of Justice and the national judges, through the narrative of the cases referred to the Luxembourg Court by the latter, be the Court's rulings clear or unclear, wrote and will still be writing part of the story of Europe, illustrating the theory of Rudolf Jhering on the "Kampf ums Recht" at the judicial level. Both national and European judges struggle to assert the rights of EU citizens through judicial proceedings contributing to the progress of national and EU legal orders as a whole[9].

As has been observed, without the counterfactual scenario of *Costa v. ENEL* where a judgement of the Italian Constitutional Court of 24 February 1964 gave precedence to a subsequent Italian statute inconsistent with the EEC Treaty «which […] posed an existential threat to the EEC and a direct challenge to the ECJ's preliminary jurisdiction», it is very doubtful that the CJEU would have entrusted national courts with the mandate to disapply national statutes incompatible with Community law as early as in 1964. National judges make EU law and in return the CJUE makes national law. The dialogue comes full circle, like the twelve stars on the European flag.

[9] R. von Jhering, *The Struggle for Law*, translated by John J. Lalor (1915 [1872]), at 73–74: «E]ach of us, in his own place, is called upon to defend the law, to guard and enforce it in his own sphere. ... In defending his legal rights he asserts and defends the whole body of law, within the narrow space which his own legal rights occupy».