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Reference for preliminary ruling and remedies correlated for infringements of EU Law in recent case law of the CJEU. A procedural 'institutionalization' of comparative analysis?

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Summary

Abstract

The evolution of the case law shows in various jurisdictions, that foreign law has become an increasingly ancillary tool to traditional techniques for interpretation and dispute-settlement, at least as a good practice.
With an emphasis on two recent cases decided by the Court of Justice of the European Union (CJEU), the present paper aims to investigate about links between comparing method and the judicial cooperation system at outset of a uniform interpretation as well as implementation of EU law.

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1. Background

The evolution of the case law shows in various jurisdictions, that foreign law has become an increasingly ancillary tool to traditional techniques for interpretation and dispute-settlement, at least as a good practice[1].

With an emphasis on two recent cases decided by the Court of Justice of the European Union (CJEU), the present paper aims to investigate about links between comparing method and the judicial cooperation system at outset of a uniform interpretation as well as implementation of EU law.

The focus is on two sides of the same coin.

On the one side, with regard to reference for preliminary ruling under Article 267 (3) of the TFEU[2]- in accordance with wich "*where any such* (question requesting ai interpretation or assesment of valuidity) *is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the court*"-, the point is to understand if and to what extent the case law of CJEU may have contributed to 'institutionalize' comparative techniques before national supreme Courts[3]. The

* Paper given at the Conference "*COMPARATIVE LAW IN THE PRACTICE OF EUROPEAN SUPRANATIONAL COURTS. A PEOPLE'S HISTORY OF LIVING IN MULTILAYER LEGAL SYSTEMS*", 16 & 17 June 2022, University of Luxembourg

[1] M. D'Antona, *L'Europa sociale e il diritto: il contributo del metodo comparato*, Working Paper, Centre for the study of europea labour law, 94, 2012, 1 ss., in http://csdle.lex.unict.it; M. Andenas, D. Fairgrieve, *The comparative law method and the Court of Justice of the European Union. Interlocking legal Orders revisited*, Oxford, 2016; S. Lefèvre, M. Prek, *The EU Courts as "national" courts: National law in the EU judicial process*, in Common Market Law Review V.54, Issue 2, 2017, 369 ss.; G. Alpa, *Comparazione e diritto straniero nella giurisprudenza della Corte di Giustizia dell'Unione europea*, in Contratto e impresa 4-5, 2016, 879 ss.

[2] The system set up by Article 267 TFEU establishes between the Court of Justice and national courts or tribunals direct cooperation as part of which the latter are closely involved in the correct application and uniform interpretation of EU law and also in the protection of individual rights conferred by it. It should be recalled that the preliminary ruling procedure provided for in Article 267 TFEU, has the object of securing uniform interpretation of EU law, there by serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see CJUE of 6 March 2018, *Achmea*, C-284/16, in e-curia, para. 37).

[3] For the national law perspective see for instance, M. A. Sandulli, "*Rinvio pregiudiziale e giustizia amministrativa: i più recenti sviluppi*, in Giustiziainsieme, 20 October 2022, 1 ss.; F. Ferraro, *Corte di giustizia e obbligo di rinvio pregiudiziale del giudice di ultima istanza: nihil sub sole novum*, in GiustiziaInsieme, 2021, a ss.; M. Lipari, *L'obbligo di rinvio pregiudiziale alla CGUE, dopo la sentenza 6 ottobre 2021, c-561/2019: i criteri cilfit e le preclusioni processuali*, in Giustamm.,12, 2021, 1 ss.; G. Tulumello, *Sui presupposti dell'obbligatorietà del rinvio pregiudiziale per i giudici nazionali di ultima istanza: segnali (convergenti) di un'esigenza di ripensamento della giurisprudenza Cilfit*, in giustizia-amministrativa.it, 28 September 2021, 1 ss.; G. Zampetti, *Rinvio pregiudiziale di interpretazione obbligatorio e giudice amministrativo: natura giuridica, portata dell'obbligo ex art. 267, par. 3, Tfue e conseguenze della sua mancata osservanza (riflessioni a partire da Cons. Stato, sez. VI, n. 1244 del 5 marzo 2012 e Corte giust., C-136/12, del 18 luglio 2013)*, in Oss. AIC, 2014, 1 ss.; M. P. Chiti, *Il rinvio pregiudiziale e l'intreccio tra diritto processuale nazionale ed europeo: come custodire i custodi dagli abusi del diritto di difesa?*, in Riv. it. di dir.pubb.com, 5, 2012, 745 ss.; N. Pignatielli , *L'obbligatorietà del rinvio pregiudiziale tra primato del diritto comunitario e autonomia processuale degli Stati*, 367 ss. in Pol. dir., 2012, 83 ss .; M. Cartabia , *La Corte costituzionale italiana e il rinvio pregiudiziale alla Corte di giustizia europea*, in N. Zanon (a cura di), Le Corti dell'integrazione europea e la Corte costituzionale italiana, Napoli, 2006, 99 ss..

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suspicion falls back to the fact that comparative analysis, being already a good practice, has been elevated as a toolkit for supreme courts to assess the conditions on which reference for preliminary ruling is compulsory under Article 267 (3) TFEU to secure uniform interpretation of EU law.

On the other side, with respect to remedies against rulings of national higher courts reacting to the case law of the CJEU and refusing to make a reference for preliminary ruling in contrast with Article 267 (3) TFEU, the point is to understand if and to what extent comparative methodology may help assessing existence of an effective judicial remedy in national jurisdictions.

In this framework, this paper focuses on the dialogue between Supreme Courts and the CJEU in the realm of administrative law, where European sector-specific regulation exists. After all, administrative law constitutes the branch of the legal system with the more connections to State sovereignty, and which generates major problems in terms of harmonization, inner peculiarities compared to the rest of the norms, 'jealousy' in national courts and misunderstandings in supranational ones.

Paragraph 2 will devote attention to a case still pending before the CJEU in the field of telecom regulation, i.e. *Fastweb and others v. Autorità per le Garanzie nelle Comunicazioni* (case C-468/20). This is the first case after the ruling delivered in *Consorzio Italian Management, Catania Multiservizi SpA v. RFI SpA*[4], where the Court clarified the exceptions to the duty to refer a preliminary ruling under Article 267 (3) TFEU, almost forty years after the *Cilfit* case law[5]. The pending case *Fastweb* is of interest as it spurs reflection on the role of comparative analysis vis-à-vis the so-called 'Acte clair' doctrine, according to which last instance Court may avoid reference for preliminary ruling if a correct application of EU law is so obvious as to leave no scope to any reasonable doubt.

Paragraph 3 will draw some preliminary conclusions. In this respect, the *Fastweb* case highlights potentials of use of comparative law by the Courts of last instance in the interpretation and application of EU law, in order to overcome the "Acte clair" doctrine as a rhetorical figure that excludes any chance of different interpretations.

Paragraphs 4 and 5 will eventually polarize on *Randstad Italia SpA v. Umana SpA and others*[6]. Arising from a conflict between Italian judicial bodies (i.e. *Corte Costituzionale, Corte di Cassazione, Consiglio di Stato*), this is a ruling with a quite different focus. In the judgment concerned, the CJEU assessed if and to what extent the idea of an

[4] CJUE, 6th October 2021, case C-561/1, *Consorzio Italian Management, Catania Multiservizi SpA v. RFI SpA,* in e-curia.

[5] *Id.*, 6th October 1982, case C-238/8, *Cilfit v. Ministero della Sanità* (283/81 Rec. 1982, p.3415). According to the Cilfit case law a national court or tribunal against whose decisions there is no judicial remedy under national law cannot be relieved of that obligation unless it has established that the question raised is irrelevant or that the EU law provision in question has already been interpreted by the Court or that the correct interpretation of EU law is so obvious as to leave no scopefor any reasonable doubt (para. 21).

[6] *Id.*, 21 December 2021, case C-497/20, *Randstad Italia SpA v. Umana SpA and others,* in e-curia.

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effective remedy under EU law is consistent with the absence of appealing mechanisms against decisions of national Supreme Courts disregarding the obligation to refer a preliminary ruling. The point is to understand, indeed, if and to what extent, by serving as an additional instrument to assess the existence of an effective remedy for the protection of EU law-related rights, a major consideration of comparative analysis could have led to a different outcome in CJEU ruling.

2. Forty years after Cilfit. A focus on Fastweb and others v. Autorità per le Garanzie nelle Comunicazioni (case C-468/20).

Cilfit case law (6th October 1982, case C-283/81)[7] may have listed the exceptions to the duty to refer a preliminary ruling under Article 267 (3) TFEU. More particularly, it held that a court or tribunal against whose decisions there is no judicial remedy under national law is obliged, where a question of EU law is raised before it, to refer a question to the Court of Justice for a preliminary ruling, unless it has established: i. that the question raised is irrelevant; or ii. that the provision of EU law in question has already been interpreted by the court; or iii. that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (point

With regard to the third exception (which is the so called "Acte clair" exception")[8], it has to be noted that this key ruling in the history of European case law has left space to misunderstandings between national courts and CJEU in subsequent decades, also leading to an infringement procedure against France[9].

The point of greater contrast lays in the so-called 'Acte clair' doctrine[10]. After all, it is in *Cilfit* (para.16) that the CJEU excluded the duty to refer a preliminary ruling when *'the correct application of Community law appears so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it*

[7] See T. Millet, *European Court of Justice adopts doctrine of acte clair,* in NLJ, 1983, 443; D. Edward *Cilfit and Foto-Frost in their historical and procedure context*, in L. Azoulai, L.M. Poiares Maduro, The past and Future of EU law. The classics of EU Law reviseted on the 50th Anniversary of the Rome treaty, Hart publishing, 2010. For the national law perspective, see N. Catalano, *La pericolosa teoria dell'atto chiaro*, in Giust. Civile, 1983, 1 ss.

[8] N. Fengerand, M. Broberg, '*Finding Light in the Darkness: On the Actual Application of the Acte Clair Doctrine*'. Yearbook of European Law, 2011, Vol. 30, No. 1, 180 ss.; Broberg, M. (2008) '*Acte Clair Revisited: Adapting the Acte Clair Criteria to the Demands of the Times*', in Common Market Law Review, Vol. 45, 1383 ss. A. Limante, *Recent Developments in the Acte Clair Case Law of the EU Court of Justice: Towards a more Flexible Approach,* in JCMS 2016 V. 54. N. 6, 1384 ss.

[9] CJUE 4th October 2018, case C-416/17, *Commission v. France*, in e-curia.

[10] For a comparative perspecitive see the national reports to the 18th Colloquium of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union in Helsinki, 20 and 21 May 2002, on the subject *'The Preliminary Reference to the Court of Justice of the European Communities'* in http://www.aca-europe.eu/index.php/en/colloques-top-en/240-18th-colloquium-in-helsinki-from-20-to-21-may-2002 and the Research Note No 19/004 of May 2019 compiled by the Directorate-General for Library, Research and Documentation of the Court of Justice concerning the *"Application of the Cilfit case-law by national courts or tribunals against whose decisions there is no judicial remedy under national law"*, in https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/ndr-cilfit_synthese_en.pdf).

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comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice.'

In the last forty years, *Cilfit* has been confirmed - acritically at times - on various occasions[11].

For instance, in *Association France Nature Environnement* case law (para.48), the CJUE confirms that '*the national court ruling at last instance must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied may the national court refrain from submitting that question to the Court of Justice and take upon itself the responsibility for resolving it*'[12]. The unresolved knots have remained there, however.

What is more, Cilfit has never received universal acclaim and implementation both in opinions of Advocates General and in national case law.

Considering *Wiener* case law[13], Advocate General Jacobs underlined that, *'if the CILFIT judgment were applied strictly, then every question of Community law, including all questions of tariff classification, would have to be referred by all courts of last instance'*[14]. (para. 58).

In *Intermodal Transports*[15], Advocate General Stix-Hackl deemed that demanding national courts to assess the meaning of EU provisions in every official language *'would place a practically intolerable burden on the national courts'*, with a consequence: Cilfit criteria were in his opinion useless as *'a type of instruction manual on decision-making for national courts of last instance which is to be rigidly adhered to'*[16] (para. 99). Likewise, in *Gaston Schul*[17], Advocate General Ruiz-Jarabo advocated for a revolution of *Cilfit*, observing that *'the proposed test was unviable at the time it was formulated, but, in the reality of 2005, it seems preposterous'*[18] (para. 52). In *X e van Dijk* also, Advocate General Nils Wahl contested that *'coming across a 'true' acte clair situation would, at best, seem just as likely as encountering a unicorn'*[19] (para. 62).

Meanwhile, while invoking them as a precedent, national jurisdictions have increasingly disregarded and misinterpreted at times *Cilfit* criteria. To this end, a Research Note of 2019 shows extensively how, only in a limited number of Member

[11] CJUE, 15 September 2005, *Intermodal Transports*, case C-495/03, para. 33 and Id., 4 October 2018, *Commission v. France (Advance payment)*, case C-416/17, para.110.

[12] *Id.*, 28 July 2016, case C-379/15 *Association France Nature Environnement,* in e-curia.

[13] *Id.*, 20 November 1997, Case C–338/95 *Wiener v Hauptzollamt Emmerich*, in e-curia.

[14] Opinion of Mr Advocate General Jacobs delivered on the 10th July 1997, case C-338/95, *cit.*in e-curia.

[15] CJUE, 15th September 2005, case C-495/03, *Intermodal Transports v. Staatssecretaris van Financiën*

[16] Opinion of Mr Advocate General Stix-Hackl delivered on the 12th July 2005, case C-495/03, *cit.*

[17] CJUE, 6 December 2005, Case C-461/03, *Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit,* in e-curia.

[18] Opinion of Mr Advocate General Ruiz-Jarabo delivered on 30th June 2005, case C-461/03, *cit.,* in e-curia.

[19] Opinion of Mr. Nils Wahl delivered on the 13th May 2015, cases C-72/14 e C-197/14, in e-curia.

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States, case-law established by the courts of the other Member States is examined with a view to confirming or ruling out the existence of any reasonable doubts to the interpretation of EU law. Again, considering French case law[20], the obligation to make a reference for preliminary ruling does not rely on *Cilfit* criteria strictly, but rather on a subjective 'hard task' in interpreting EU law[21].

In 2021, in the above mentioned *Consorzio Italian Managment, Catania Multiservizi SpA v. RFI SpA* case law, the Court in Luxembourg was called upon again to assess if national supreme courts may avoid reference for preliminary ruling by relying on the inexistence of diverging opinions among tribunals of other Member States. In his statement pending the trial, Advocate General Bobek[22] recommends a revolution of *Cilfit* criteria for an economic reason, above all. In his view, a full-fledged comparative analysis is simply unattainable as a standard for national courts. This *'at least for mortal national judges not possessing the qualities, time, and resources of Dworkin's Judge Hercules (comparing (all) language version; interpreting each provision of EU law in the light of EU law as a whole, while having a perfect knowledge of its state of evolution at the date on which that provision is interpreted) '* (para. 104). As a result, Advocate General suggests lower standards in establishing if a reasonable doubt in interpretation of EU law occurs. A situation only happening when, first, a *'case raises a general issue of interpretation of EU law, which may, second, be reasonably interpreted in more than one possible way and, third, the way in which the EU law at issue is to be interpreted cannot be inferred from the existing case-law of the Court of Justice.'* (para. 134).

By his ruling on 6th October 2021 *(Consorzio Italian Managment, Catania Multiservizi SpA v. RFI SpA)*, CJEU does not uphold any revolution of *Ciflit*. Quite the opposite.

As a matter of fact, the Court stresses again that *'it is only where, with the help of the interpretation criteria set out in paragraphs 40 to 46 above, a national court or tribunal of last instance concludes that there is no circumstance capable of giving rise to any reasonable doubt as to the correct interpretation of EU law that that national court or tribunal may refrain from referring to the Court a question concerning the interpretation of EU law and take upon itself the responsibility for resolving it* (para. 47). *That being said, the mere fact that a provision of EU law may be interpreted in another way or several other ways, in so far as none of them seem sufficiently plausible to the national court or tribunal concerned, in particular with regard to the context and the purpose of that provision as well as the system of rules of which it forms part, is not sufficient for the view to be taken that there is a reasonable*

[20] See Conseil d'État,, 1e/6e SSR, 26th February 2014, No 354603 in https://www.legifrance.gouv.fr/ceta/id/CETATEXT000028663284.

[21] See Research Note No 19/004 of May 2019, cit.

[22] Opinion of Mr Advocate General Bobek delivered on 15th April 2021, case C-561/19 *Consorzio Italian Managment, Catania Multiservizi SpA v. RFI SpA.* See G. Martinico, L. Pierdominici, *Rivedere CILFIT? Riflessioni giuscomparatistiche sulle conclusioni dell'avvocato generale Bobek nella causa Consorzio Italian Management,* in Giustiziainsieme, 17 June 2021, 1 ss.

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doubt as to the correct interpretation of that provision. (para 48). In addition the CJEU pointed out that *"Nonetheless, where the national court or tribunal of last instance is made aware of the existence of diverging lines of case-law – among the courts of a Member State or between the courts of different Member States – concerning the interpretation of a provision of EU law applicable to the dispute in the main proceedings, that court or tribunal must be particularly vigilant in its assessment of whether or not there is any reasonable doubt as to the correct interpretation of the provision of EU law at issue and have regard, inter alia, to the objective pursued by the preliminary ruling procedure which is to secure uniform interpretation of EU law.'* (para. 49).

Next paragraph will reflect more extensively on the relevance of the decision in *Consorzio Italian Management, Catania Multiservizi SpA v. RFI SpA* vis-à-vis *Cilfit*.

Currently, it has to be noted that this ruling had an impact on another case pending before the Court of Justice, i.e. *Fastweb and others v. Autorità per le Garanzie nelle Comunicazioni* (case C-468/20).

This case originates from a dispute in the field of telecom regulation. Under the pressure of various user associations, *Autorità per le Garanzie nelle Comunicazioni* (Agcom) happening to be the National Regulation Authority decided not only to provide an online free application to contrast and compare offers of different operators, but to forbid any offer and billing option which was not on a monthly basis or multiple months-basis in fixed-telecom market. As a result, almost every telecom operator in Italy proposing offers on 28 days-basis had to reshape their user plans according to the new regulatory landscape. Needless to say that operators quashed the decision of the NRA on appeal before national administrative Courts, also claiming infringements of Directives No 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC, on a common regulatory framework for electronic communications networks and services, alongside the violation of the freedom of establishment and the freedom to provide services set forth in Articles 49 and 56 of the TFEU, respectively.

By Order No 5588 of 24th September 2020, the Consiglio di Stato[23] made four references for preliminary ruling. For what is of interest, three questions referred concerned substantive law. More precisely, the CJEU had to ascertain if and to what extent a time-frame of at least 30 days for offers in fixed-telecom market was admissible as a regulatory measure under sector-specific Directives, in terms of proportionality, in terms of equal treatment and non-discrimination with providers operating only in mobile-telecom market.

As a preliminary issue, however, the Court was also asked to assess if a *'correct interpretation of Article 267 TFEU requires the national court, against whose decisions there is no judicial remedy under national law, to make a reference for a preliminary ruling on a*

[23] Consiglio di Stato, Sez. VI, 24 September 2020, Ord. n.5588, in www.giustizia-amministrativa.it.

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question of interpretation of the relevant EU law in the main proceedings, even where there is no doubt as to the interpretation of the relevant EU provision (…) but it is not possible to establish in detail, from a subjective point of view, with regard to the conduct of other courts, that the interpretation of the referring court is the same as the one likely to be given by the courts of the other Member States and by the Court of Justice, to which the same question is referred.'

In this regard, by recalling para. 16 of *Cilfit* according to which diverging opinions in the supreme courts of the other Member States are a crucial element in grounding a reasonable doubt in the interpretation of EU law, the Consiglio di Stato suggested a strict reading of European case law. First, the Consiglio di Stato held that assessment of reasonable doubt was a subjective proceedings in scope. Second, in view of the referring Court State Council, an assessment covering case law throughout multiple European jurisdictions was a too hard task. As a result, national higher Courts should have not considered any residual chance that a foreign tribunal in another Member State could have achieved a different outcome in terms of interpretation.

Following the ruling in *Consorzio Italian Management, Catania Multiservizi SpA v. RFI SpA*, the CJEU demanded the national Court to reconsider his reference for preliminary ruling in the light of the new indications emerged.

By Order No 7839 of 23rd November 2021, the Consiglio di Stato[24] opined that a diverging approach among National Regulation Authorities also could reveal EU law-relevant disproportion in specific regulatory regimes. Italian justices suggested in particular that, in the *Report on Transparency of Tariff Information*, the European Regulators Group (ERG) only confirmed interactive guides and not even standardized offers as a proportionate tool. The Consiglio di Stato also valued the production in the national judgment of proof regarding the fact that the other NRAs have not adopted measures similar to those under appeal.

At the end, the referring Court held that above-mentioned different application practices in electronic communications, a sector subject to European regulatory framework, could lead to a divergent application of the same regulatory parameters (par. 49); for that reason, the Consiglio di Stato decided to maintain the preliminary ruling[25].

An answer from the CJEU is yet to come.

[24] *Id*., Sez. VI, 23rd November 2021, Order No 7839, *ivi.*

[25] For a different perspecitve, see Id., Sez. IV, 6 April 2022, in www.giustizia-amministrativa.it. Here the Consiglio di Stato held that principles laid down by the CJUE *in Consorzio Italian Management* case law are not able to overcome the limits of the Acte Clari doctrine. For this reason the Consiglio di Stato asked to CJUE to clarify again the condition under a national judge of last instance may not refer a preliminary ruling to the Court of Justice when the correct application of EU law is so obvious as to leave no scope for any reasonable doubt: a decision of the CJUE is yet to come.

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3. Preliminary remarks. Reference for preliminary ruling under Article 267 (3) TFEU as an 'institutionalization' of comparative analysis in judicial opinion.

"Continuity and change", is an expression which describe evolutionary process between *Cilfit* case law and *Consorzio Italia Management* case law, whose findings have been extended to diverging opinions among National Regulation Authorities by the Consiglio di Stato in the *Fastweb* case.

In *Cilfit* the CJEU force national supreme Courts to open their eyes beyond the realm of domestic law and to use comparative analysis as a way to assess the conditions at the outset of reference for preliminary ruling[26].

Advocate General Bobek in his opinion delivered in *Consorzio Italia Management* is crystal-clear in demanding both a revolution of *Cilfit* and the end of comparative analysis as a way to assess the conditions at the outset of reference for preliminary ruling. Yet, final ruling of the CJEU does not uphold the requests of the Advocate General, at least in full. On one side, the CJEU defends comparative analysis of national case law as an institutionalized tool enabling reference for preliminary ruling not to be dependent on the whim nor on the discretion of any given judge. On the other side, the Court fully acknowledges costs associated with imposition of comparative analysis on national courts, notably in domestic judicial systems with huge workloads and not so many professional clerks like in common law environments.

This is the reason why *Consorzio Italia Management* does not only say that national supreme courts shall take into account the case law in other Member States, but that a reasonable doubt as to the interpretation of EU law can be excluded only in so far as higher tribunals are *'made aware'* of diverging interpretations in other legal systems. *'Made aware'* is a key expression for understanding the new approach of the CJEU towards the 'Acte clair' doctrine. In the light of the worries expressed by Advocate General Bobek, for scope of compulsory reference for preliminary ruling, it is undeniable that the CJEU made herself the question: Shall National Supreme Courts have knowledge of single case law in other Member States on their own motion or only in so far as the parties submit evidence to this end? The Court in Luxembourg seems to have selected the second option.

In this contest, *Fastweb* case is the first application of the methodology and tests developed by the CJEU in *Consorzio Italia Management.* In fact, the Consiglio di Stato was made aware of defensive activities about diverging interpretations in other legal systems. Therefore, the different application practices of NRAs was used to implement the correct interpretation and application of the EU law. As a result, the Consiglio di Stato concluded to maintain preliminary reference in the light of the different interpretations, including from an operational perspective.

[26] See the reflections delivered by G. Martinico, L. Pierdominici, *op. cit.*.

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To understand why this development is so significant, it has to be noted that the Acte clair doctrine, developed in the French system[27] marked by a strong administrative influence, points out a problem of general theory of law: it has, in fact, a strong connection with the well known brocardo '*in claris non fit interpretatio*'.
According to the Acte Claire doctrine if the law is clear, the Judge must apply it without interpretation. In this legal system, Acte clair doctrine avoids risk of new form of law interpretation, due to the prevalence of parliamentary law.
In different way, German tradition[28] held the full freedom of the interpretive process, functional to the elaboration and arrangement of law: this interpretive model found fertile ground for development in a system that, unlike France, was divided into several legal systems each with its own Courts and laws.
Nowadays, Acte clair doctrine has been used by *Conseil d'État* for a different purpose. In fact, as the Advocate Gen. Bobek held in *Consorzio Italia Mangement* case, it has been used "*in cases involving the interpretation of treaties. While it was in principle for the Minister for Foreign Affairs alone to interpret the treaties (the national courts being merely entrusted with applying that interpretation to the case), the French courts relied on that theory to strengthen judicial interpretive powers to the detriment of those of the executive. From 1964, the Conseil d'État (Council of State, France) began to apply the theory, in the context of the duty to refer, in order to qualify the latter to its own benefit*" (para. 95).
In other words, Conseil d'État has used the Acte clair doctrine in order to exclude the need for interpretation by a very third party (Ministry of Foreign Affairs or CJEU), to retain power to establish the meaning of the supranational rule.
Even though the adoption by the CJEU of the above mentioned doctrine since the CILFIT judgment, has occurred for entirely different purposes, it has been used by National Courts only to maintain spaces of decisional autonomy.
Finally, in this respect, *Fastweb* case highlights potential of essential and alternative use of comparative law in order to overcome acte clair teaching as a rhetorical tool that excludes without any exceptions all interpretative possibilities.
In this regard, the absence of interpretative divergences in different legal systems becomes symptomatic of a clear (and correct) interpretation of the EU law; conversely, the existence of interpretative divergences becomes symptomatic of the need for a central intervention (by the CJEU) to guarantee the correct and uniform interpretation of the EU law.
Concluding, the same comparative methodology that is imposed on the Courts of last instance should also inspire CJEU's "central" interpretation, to avoid the risk of a given interpretation of the EU law not being applied in practice by the national

[27] Claire M. Grmanin, *Approaches to statutory interpretation and legislative history in France*, 13 Duke J. Comp. & Int'l L. 195 (2003), available at http://scholarship.law.ufl.edu/facultypub/158.
[28] The reference is to the so called "Begriffsjurisprudenz": the main representatives were B. Windscheid, C.F. von Gerber, R. von Jehring, O. Mayer, A. Merkel, A. Thon, E. Zitelmann, E.R. Bierling, K. Bergbohm, K. Binding.

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courts. Such a risk emerges clearly in *Randstad Italia SpA v. Umana SpA and other* (Case C-497/20), to which the second part of the paper is dedicated to.

4. Twenty years after Köbler. A focus on Randstad Italia SpA v. Umana SpA and others (case C-497/20).

Gerhard Köbler v. Republik Österreich[29] paved the way as leading case law to compensation for infringements of EU law by national courts. More accurately, according to the CJEU, *'Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.'* (para.59).

The main question referred in the above mentioned *Randstad Italia SpA v. Umana SpA and others* (case C-497/20)[30] makes a step forward.

Whereas, *Köbler* focuses on compensation as a minimum standard protection for individuals having experienced an infringement of their own rights under EU law, the question in *Randstad Italia SpA* is if something more like extraordinary appealing mechanisms may be required as an effective judicial remedy. By Order No 19598/2020, the Corte di Cassazione - Sezioni Unite asks the CJEU above all *'whether a Member State is obliged to provide a further right of appeal where an appellate court has itself misinterpreted or misapplied EU law.'* The invoked parameter is the obligation to ensure an effective judicial remedy under Article 1 of Directive 89/665EEC[31]. More accurately, emphasis is placed on the need for national courts to grant an adequate judicial review in public procurement-related disputes where, in the context of an

[29] CJUE, 30th September 2003, case C-224/01, *Gerhard Köbler v. Republik Österreich*, in e-curia.

[30] For the national law perspective, see inter alia M. Magri, *Individuazione dell'interesse legittimo e accertamento della legittimazione ad agire nel processo amministrativo, dopo il "caso Randstad"*, in Giustiziainsieme, 2022; F. Francario, *Il pasticciaccio parte terza. Prime considerazioni su Corte di Giustizia UE, 21 dicembre2021 C-497/20, Randstad Italia spa,* in Fderalismi, 2022; *Id*. *Quel pasticciaccio brutto di piazza Cavour, piazza del Quirinale e piazza Capodiferro*, ivi, 2020; *Id, Quel pasticciaccio della questione di giurisdizione. Parte seconda: conclusioni di un convegno di studi*, in Federalismi, 2020.

[31] Directive 89/665EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts

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action for annulment of decision awarding a public contract, successful tenderer brings a counterclaim against unsuccessful tenderer.

From a procedural law standpoint, this was and still is a delicate issue originated in a sensitive framework. On the one side with an CJEU persuaded that, as two tenderers after a procurement procedure bring actions, each one seeking the exclusion of the other, each one of those tenderers has an interest in obtaining a particular contract[32]. On the other side with Consiglio di Stato sharing a completely different view by giving priority to the interest of the successful tenderer over that of the unsuccessful bidder. Again with Italian Constitutional Court (Ruling No. 6/2018)[33] denying the chance of any appeal against decisions of the Council of State having a different opinion compared to CJEU, a situation which may amount to a blatant violation of EU Law. Finally with Corte di Cassazione having doubts as to the extent of its jurisdiction as an appeal against the rulings of Consiglio di Stato not complying with EU law, that is question referred in *Randstad Italia SpA.* To put it in other words, with request for a preliminary ruling in extant case, the CJEU was called upon - perhaps implicitly - to arbitrate a conflict between the three Italian supreme courts.

For what is of interest, the Grand Chamber of the CJEU by his ruling on the 21st December 2021, underlined inconsistencies of Italian administrative case law with European acquis; however the CJUE holds that a lack of appealing mechanisms against judgments of the highest court in a Member State's administrative order does not infringe the requirements of effective judicial protection under EU law.

After all, in Court's judgment, '*EU law does not have the effect of requiring Member States to establish remedies other than those established by national law, unless it is apparent from the overall scheme of the national legal system in question that no legal remedy exists that would make it possible to ensure, even indirectly, respect for the rights that individuals derive from EU law, or the sole means of obtaining access to a court is effectively for individuals to break the law*' (para.62).

According to the CJEU, a violation of EU law before supreme courts may occur and requires a remedy, but the principle of effective judicial protection does not require domestic legal systems to provide nationals with remedies additional to infringement procedures or compensation for missed reference for preliminary ruling[34].

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[32] CJUE, 4th July 2013, case C 100/12, *Fastweb* and Id. 5th April 2016, case C 689/13, PFE, in e-curia.

[33] Corte Costituzionale, Ruling No. 6/2018in Foro Amm. (Il) 2018, 5, 749. See A. Travi, U*n intervento della Corte costituzionale sulla concezione 'funzionale' delle questioni di giurisdizione accolta dalla Corte di cassazione,* in Dir. Proc. Amm., 2018, 3, 1111 ss.; A. Police, F. Chirico, *I soli motivi inerenti la giurisdizione nella giurisprudenza della Corte Costituzionale*, in il Processo, 2019, 1,113 ss.

[34] In the same direction, see, inter alia, judgments of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, in e-curia.

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5. Final remarks. Can comparative analysis serve as an 'institutionalized' tool also for ascertaining the existence of an effective remedy against decisions of national supreme courts infringing EU law?

Ranstad Italia SpA is a conservative ruling. Perhaps for a good reason. Yet, far from being innovative or creative, notably compared to *Consorzio Italia Management*.

In their opinions in the cases examined, Advocates General Bobek and Hogan[35] pur reflection on the existence of an effective judicial remedy against decision of national supreme courts violating - or even worse ignoring - EU law, including the obligation to raise a reference for preliminary ruling. After all, infringement procedures under Article 258 of the TFEU are a remedy in the hands of the European Commission (not even for the individual concerned) and may give rise to compensation for the benefit of the European budget (not even for the individual concerned). Likewise, claiming compensation for violation of EU law is an action whose scope is providing only a replacement for the utility lost, and whose final decision may lay in those same domestic courts liable.

EU law has not provided for specific remedies to be available in national courts in case of infringements of EU law. The CJEU has no opportunity to develop such remedies since it cannot itself adjudicate on complaints by individuals that rights under EU law have been violated. In this framework, legal traditions of the Member States are varying[36].

According to the German Constitutional Court, supreme courts not complying with their duty to refer a question for preliminary ruling infringe on the individual right not to be removed from the jurisdiction of the lawful judge set forth in Article 101 (1) (1) of the Grundgesetz[37]. As a result, as Solange II[38] ruling admits, individuals have a right to appeal directly before the Constitutional Court in the event that the BGH fails in complying with the duties under Article 267 (3) of the TFEU.

The Spanish Constitutional Court[39] stated that missed reference for a preliminary ruling may alter the right to effective judicial protection enshrined in Article 24 of the Constitution. Spanish Tribunal Constitutional also allows a direct claim for individuals.

Similar procedures concerning the judicial review of the duty to refer under article 267 (3) TFEU exist also, for instance, in France. The Cour de cassation pointed out

[35] See opinion of Mr. Advocate General Hogan delivered on 9 September 2021, Case C-497/20, *Randstad Italia SpA v Umana SpA, and others,* in e-curia.

[36] C. Lacchi, *Review by constitutional courts of the obligation og national courts of last instance to refer a preliminary question of the EU*, German Law Journal , Vol.16 , Special issue – Preliminary References to the Court of Justice of The European Union by Constitutional Courts , December 2015 1663 ss.

[37] BVerfG, Order of 9th May 2018 – 2 BvR 37/18.

[38] CJUE 5 March 1986 Case 69/85 *Wünsche Handelsgesellschaft* in e-curia.

[39] Tribunal Constitucional (Constitutional Court), 19 April 2004, STC 58/2004

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that the omission to refer might constitute a denial of justice (Oc. 26, 2011, Case no. 1002).

As noted before, the situation is different in Italy. By Ruling No 6/2018, Corte Costituzionale denies that Article 111 (8) of the Constitution covers an individual right to appeal a decision of supreme administrative courts before the Corte di Cassazione, also in the event of failure in submitting a reference for preliminary ruling to the CJEU.

The above mentioned remedies developed in some Member State certainly are an additional protection compared to the minimum standard under EU law, i.e. infringement procedure or action for damages. Conversely, in the Italian legal system individuals will benefit only of standard judicial protection and nothing more in the end.

In *Ranstad Italia SpA*, the CJEU does nothing to change the situation. Albeit the opinions of Advocates General Bobek and Hogan suggested for a revolution, the search for an effective judicial remedy dies on the altar of procedural autonomy of the Member States

In *Consorzio Italia Management* judgment the Court in Luxembourg preserves somehow comparative analysis as an institutionalized tool for national supreme courts to assess if doubts as to the interpretation of EU law exist. *Ranstad Italia SpA* case law declines instead a similar institutionalization process for comparative analysis to evaluate the equivalence of effective judicial remedies across the legal traditions of every Member States. Perhaps, for two main reasons.

First, even if other kind of primary remedies may exist in various domestic jurisdictions, allowing appealing mechanisms against final decisions of supreme courts means overcoming the basic principle of *res iudicata*, yet a shared tradition among Member States for sure.

Second, by excluding appealing mechanisms against the findings of a national Constitutional Court, the CJEU avoids implicitly any risk of discussions as to the primacy of EU law over national Constitutions, in the light of the doctrine of counter-limits, above all.

To put it otherwise, assessing the approach in *Consorzio Italia Management* (and subsequent case law) vis-à-vis *Randstad Italia SpA*, the CJEU stands in favor of comparative analysis but with circumspection. The Court rules in favor of comparison in *Cilfit* and *Consorzio Italia Management*, to impose a new standard of evidence about foreign law on the parties concerned. Conversely, the Court denies any relevance to comparison in assessing the equivalence of judicial remedies in *Randstad Italia SpA*. Considering that, persistent absence of remedies for the breach of article 267(3) TFEU risks depowering EU legal system not only with regard of CJEU's interpretative monopoly, which is functional to ensure the correct and

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uniform interpretation of EU law; but also with regard to the effective application of EU law[40].

[40] The CJUE recently was called upon again to clarify if the principle of effectiveness have the effect of requiring Member States to establish remedies other than those established by national law. By the judgment 7 July 2022, Case C-261/21, *F. Hoffmann-La Roche Ltd and others v. Autorità Garante della Concorrenza e del Mercato*, in e-acuria, the Court confirmed its settled case law and clarifed that *"Article 19(1) TEU does not require Member States to allow individuals to seek revision of a judicial decision given at last instance on the ground that, according to those individuals, that decision disregards the interpretation of EU law provided by the Court in response to a request for a preliminary ruling that had been made in the same case.* (par.51)". The CJUE also noted that *"individuals who, due to a decision of a court adjudicating at last instance, may have suffered damage as a result of an infringement of rights which are conferred on them by EU law, may hold that Member State liable, provided that the conditions relating to the sufficiently serious nature of the breach and to the existence of a direct causal link between that breach and the loss or damage sustained by those individuals are satisfied*" (par.58). After this judgment, the Consiglio di Stato, by Order N. 8436, 3rd October 2022, in www.giustizia-amministrativa.it referred to the Adunanza Plenaria del Consiglio di Stato the question concernig remedies for infringments of EU Law, showing how relevant and urgent, also from a national law perspective, is to establish an effective remedy against decisions of national supreme courts infringing EU law. In this regard, see M. A. Sandulli, *op.cit.*.

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