



ARTICLES

IT TAKES TWO TO TANGO:

THE PRELIMINARY REFERENCE DANCE BETWEEN THE COURT OF JUSTICE OF THE EUROPEAN UNION AND NATIONAL COURTS

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WHEN TWO PRELIMINARY QUESTIONS RESULT IN ONE AND HALF ANSWERS: A “CONSTITUTIONAL TRAGEDY” IN FOUR ACTS

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ABSTRACT: As is well known, in order for the preliminary reference procedure to function properly, national courts must have both the cognitive and the political ability to engage in a judicial dialogue with the Court of Justice. The Court of Justice itself must be able to – at least sufficiently – understand the factual background and the legal issues (and possibly the broader legal and political background) of the question posed. In this *Article*, we discuss a case study, which shows that a number of procedural variables – often outside the control of the referring court – can come in the way of a fully functional preliminary reference mechanism. The *Article* examines two preliminary questions (from Italy and the Netherlands), by focusing specifically on the reasoning of both national referring courts, and the answers given to both courts by the Court of Justice, in order to assess whether and to which extent the Italian court has grounds to consider that its questions have not been properly answered. Ultimately, the contribution will attempt at teasing out, from this case study, a number of challenges posed to the correct functioning of the preliminary ruling procedure.

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I. INTRODUCTION

The preliminary reference procedure, enshrined in Art. 267 TFEU, has, since *Van Gend en Loos*,¹ been considered by doctrine and the Court itself the keystone of the judicial architecture of the EU.² With the use of the preliminary reference procedure, the Court of Justice has been able to steer the process of European integration, and deliver seminal judgments which have shaped the EU legal system politically and economically.³

The procedure is, however, a delicate object, in that the mechanism only works under certain conditions, entailing the participation of both national courts and the Court of Justice. As Krommendijk put it, “it takes two to tango”.⁴ National courts must be able and willing to dance, in that they should have both the cognitive and the political ability to engage in a judicial dialogue with the Court of Justice by sending preliminary questions. The Court itself must understand the steps of the dance the domestic courts are willing to initiate, in that it should be able to – at least sufficiently – understand the factual background and the legal issues (and possibly the broader legal and political background) of the question posed.

While for a long time these claims have remained largely unsubstantiated, increasingly more research points to the fact that there is evidence to show that the tango, while being danced, is not delivering a cohesive and well-functioning performance. Indeed, earlier research did indicate that judges are often unwilling to refer⁵ or that the quality of the references is often still below the acceptable levels, thereby impairing the Court of Justice’s understanding of the problem posed by the national court.⁶ Furthermore, it has

¹ Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos v. Administratie der Belastingen*.

² J. KROMMENDIJK, *The Preliminary Reference Dance Between the CJEU and the Dutch Courts in the Field of Migration*, in *European Journal of Legal Studies*, 2018, p. 103.

³ Most recently, see A. DYEVE, M. GLAVINA, A. ATANASOVA, *Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System*, in *Journal of European Public Policy*, 2020, p. 912 et seq., and the literature cited therein.

⁴ J. KROMMENDIJK, *The Preliminary Reference Dance Between the CJEU and the Dutch Courts in the Field of Migration*, cit., p. 101.

⁵ M. BOBEK, *Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice Through the Eyes of National Courts*, in M. ADAMS, H. DE WAELE, J. MEEUSEN, G. STRAETMANS (eds), *Judging Europe’s Judges: The Legitimacy of the European Court of Justice Examined*, Oxford: Hart, 2013, p. 212 et seq.

⁶ S. PRECHAL, *Communication Within the Preliminary Ruling Procedure. Responsibilities of the National Courts*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 755 et seq.

been argued that, because of the vague nature of the rulings of the Court of Justice, national courts do not know how to adequately implement the reply received by the Court.⁷

Within this debate, we are particularly interested in the “receiving end” of the spectrum in the judicial interaction between national courts and the Court of Justice, thereby contributing to three open strands of research on the functioning of the preliminary question. First, we contribute to the research which has focused on how national courts react to answers to preliminary questions, a topic on which, as has been aptly observed,⁸ little is known, especially in comparison with the growing empirical literature on the motives to (not) refer.⁹ In particular, we discuss in this *Article* a case study, which shows that a number of procedural variables – often outside the control of the referring court – can come in the way of a fully functional preliminary reference mechanism, thereby adding to the complexity of the system. Because of these variables, a “short circuit” is often produced in the channel of communication between national courts and the Court of Justice. Second, we feed into the research which has shown that, when preliminary questions posed by the national courts concern fundamental and politically sensitive constitutional values, the short circuit might ultimately undermine the very trust in the procedure by the national courts¹⁰ which might prefer, where available, to use the Constitutional Court as privileged interlocutor. Furthermore, because of the constitutional and politically sensitive subject matter of the litigation, this case study feeds into the more general debate on the “rebellious” attitude of national courts *vis-à-vis* the Court of Justice when certain core values are at stake.¹¹ Third, we look into the “micro-physics” of some problematic aspects of the daily workings of the preliminary reference procedure, thereby complementing earlier contributions that have primarily

⁷ E. SHARPSTON, *Making the Court of Justice of the European Union More Productive*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 763 *et seq.*; M. DE WERD, *Dynamics at Play in the EU Preliminary Ruling Procedure*, in *Maastricht Journal of European and Comparative Law*, 2015, p. 152.

⁸ M. BOBEK, *Of Feasibility and Silent Elephants*, *cit.*, p.197.

⁹ See e.g. S.A. NYIKOS, *The Preliminary Reference Process. National Court Implementation, Changing Opportunity Structures and Litigant Desistment*, in *European Union Politics*, 2003, p. 397 *et seq.*; S.A. NYIKOS, *Strategic Interaction Among Courts Within the Preliminary Reference Process – Stage 1: National Court Preemptive Opinions*, in *European Journal of Political Research*, 2006, p. 527 *et seq.*; M. WIND, D.S. MARTINSEN, G.P. ROTGER, *The Uneven Legal Push for Europe: Questioning Variation when National Courts Go to Europe*, in *European Union Politics*, 2009, p. 63 *et seq.* On the implementation of Court of Justice’s judgments see in this Special Section: J. KROMMENDIJK, *Irish Courts and the European Court of Justice: Explaining the Surprising Move from an Island Mentality to Enthusiastic Engagement*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 825 *et seq.*; as well as L. SQUINTANI, S. KALISVAART, *Environmental Democracy And Judicial Cooperation In Environmental Matters: Mapping National Courts Behaviour in Follow-up Cases*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 931 *et seq.*

¹⁰ This point has been specifically investigated by J. MAYORAL, *In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe*, in *Journal of Common Market Studies*, 2017, p. 551 *et seq.*

¹¹ See O. GARNER, *The Borders of European Integration on Trial in the Member States: Dansk Industri, Milner and Taricco*, in *European Journal of Legal Studies*, 2017, p. 1 *et seq.*

focused on high-profile cases referred by constitutional courts.¹² In this light, the aim of this *Article* is to critically discuss two sets of preliminary questions,¹³ and their national antecedents and follow-ups, concerning asylum procedures in Italy and the Netherlands, and to tease out a number of possible implications for the functioning of the preliminary ruling procedure.¹⁴ The selected sample is interesting in the context of a discussion of the possible shortcomings of the preliminary reference procedure, because an Italian and a Dutch court, autonomously from each other, and approximately around the same time, sent two preliminary questions to the Court of Justice concerning Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.¹⁵ This sequence of events, as will be shown below, irrelevant as it may look, has triggered a chain reaction that ultimately led to a useless and possibly even – for the referring Italian court – frustrating answer by the Court of Justice. The *Article* examines the reasoning of both national referring courts, and the answers given to both courts by the Court of Justice, in order to assess, specifically, whether and to which extent the Italian court has grounds to consider that its questions have not been properly answered. These points will also be considered in light of the potential consequences of a preliminary question, namely the duty to set aside national legislation and to interpret it, as far as possible, in conformity with EU law. Ultimately, the contribution will attempt at teasing out, from this case study, a number of challenges posed to the correct functioning of the preliminary ruling procedure.

¹² See. A. DYEURE, *European Integration and National Courts: Defending Sovereignty under Institutional Courts?*, in *European Constitutional Law Review*, 2013, p. 139 *et seq.*; M. BOBEK, *Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Ruling Procedure*, in *European Constitutional Law Review*, 2014, p. 54 *et seq.*; O. POLLICINO, *From Partial to Full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court*, in *European Constitutional Law Review*, 2014, p. 143 *et seq.*; A. TORRES PEREZ, *Melloni in Three Acts: From Dialogue to Monologue*, in *European Constitutional Law Review*, 2014, p. 308 *et seq.*; B. GUASTAFERRO, *The Unexpectedly Talkative “Dumb Son”: the Italian Constitutional Court’s Dialogue with the European Court of Justice in Protecting Temporary Workers’ Rights in the Public Education Sector*, in *European Constitutional Law Review*, 2017, p. 493 *et seq.*; U. SADL, S. MAIR, *Mutual Disempowerment: Case C-441/14 Dansk Industri*, in *European Constitutional Law Review*, 2017, p. 347 *et seq.*

¹³ Court of Justice: judgment of 26 September 2018, case C-180/17, *Staatssecretaris van Veiligheid en Justitie (suspensory effect of appeal)*; order of 27 September 2018, case C-422/18 PPU, *FR*.

¹⁴ These two cases have been discussed in a contribution by a Dutch and Italian judge. See A. PAHLADISINGH, A. SCALERA, *Tension Between the Obligation to Return for Illegal Third Country Nationals and an Effective Remedy in Appeal in the Light of the Case Law of the Court of Justice EU*, in *Journal Vreemdelingenrecht*, 2018, p. 31 *et seq.*

¹⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

II. HOW THE STORY UNFOLDED: THE FOUR ACTS OF THE “CONSTITUTIONAL TRAGEDY”

As mentioned in the introduction, the case study analysed in this *Article* revolves around two sets of preliminary questions, which concerned the same legal instrument and partly the same legal point, *i.e.* the absence of automatic suspensory effect of review procedures in asylum matters and its compliance with the principle of equivalence and effective judicial protection. The questions were, however, partly different in their argumentations, and were referred to different legislative frameworks. In the following, the series of acts that lead to the epilogue of the story will be detailed, while paying particular attention to the differences in the ways in which the two preliminary questions were phrased.

II.1. ACT 1: THE REFERRING ORDER OF THE DUTCH COUNCIL OF STATE

On 27 March 2017, the Dutch Council of State decided to refer to the Court of Justice a preliminary question on whether EU law prohibits that the Dutch applicable legislation did not foresee a system of automatic suspensory effect of a challenged ruling when an appeal against a first instance ruling is brought before the Council of State in asylum matters.¹⁶ The case concerned a Russian asylum seeker, who had asked for international protection. After the Dutch authorities rejected his application, a claim was brought to a first instance court (Rechtbank), who upheld the authorities' decision. Subsequently, an appeal against this ruling was brought before the Council of State, and, in that context, the request was made to suspend the challenged decision. According to the referring court, this legal setup might entail a possible violation of the Charter, and in particular Art. 47 on the right to an effective remedy. The question of the Dutch judge is, therefore, centred on the compatibility of the Dutch legislation exclusively with Art. 47 of the Charter. Specifically – and this point is worth mentioning in light of the subsequent Italian ruling – in the referring order, the Dutch court did refer to the fact that in some cases Dutch law knows of a system of automatic suspensory effect, but did not ask a question concerning the compatibility of the Dutch legislation with the principle of equivalence.

II.2. ACT 2: THE REFERRING ORDER OF THE TRIBUNAL OF MILAN

On 9 May 2018, before the Court of Justice delivered its ruling on the Dutch referral, an Italian court asked the Court of Justice a similar – yet not identical – question to that referred by the Dutch court.¹⁷ The facts at stake were very similar to the ones the Dutch

¹⁶ Dutch Council of State, judgment of 29 March 2017, no. 20169659/3/V2.

¹⁷ Tribunal of Milano, decision of 9 May 2018, no. 44718/2017, available at: www.questionegiustizia.it. See on this ruling, A. ADINOLFI, *Diritto dell'Ue e soggiorno del richiedente protezione internazionale in attesa dell'esito del ricorso in Cassazione: qualche osservazione a margine dell'ordinanza di rinvio pregiudiziale del Tribunale di Milano (n. 44718/2017)*, in *Questione Giustizia*, 29 June 2018, www.questionegiustizia.it.

judge was faced with, as the claim concerned an asylum seeker whose request for international protection has been rejected by the authorities and by the first instance court (the Tribunal of Milan). The applicant subsequently brought an appeal before the Italian Supreme Court (Corte di Cassazione) and, in accordance with the applicable Italian legislation, a request to the tribunal itself to suspend the execution of its ruling. The Italian referring court had two main questions for the Court of Justice, which it referred to the Court through an urgent preliminary ruling procedure pursuant to Art. 107 of the Rules of Procedure of the Court of Justice. The first question of the Italian judge is very much dubbing what the Dutch court had been pondering and concerned the compatibility with EU law of the Italian applicable legislation which did not foresee a system of automatic suspensory effect when an appeal against a first instance ruling is brought before the Court of Cassation. In the opinion of the Italian court, the lack of an automatic suspensive effect of the appeal before the Supreme Court makes it difficult, if not impossible, to grant an effective right of defence to asylum seekers, because the person, whose presence in the territory is illegal pending the appeal, can be subject to a return measure and cannot, therefore, participate to the proceedings.

The second question was, however, entirely peculiar to the Italian system and concerned the conditions for obtaining interim relief (upon request). In particular, the Italian court had doubts on the fact that, in order to obtain interim relief in asylum cases, an applicant had to prove the existence of “serious doubts” concerning the lawfulness of the first instance ruling, and on the circumstance that it is the same court which issued the first instance ruling to rule on the existence of these “serious doubts”.

While the referring order of the Dutch court revolved around the compatibility of Dutch legislation with Art. 47 of the Charter, the Italian judge brought forward not only the right to an effective remedy (which the judge specified into the right of defence), but also the right to an impartial judge under the Charter and the ECHR. Importantly, a very significant part of the referring order concerned the compatibility of Italian legislation with the principle of equivalence. To explain and ground this point, the Italian court identified, as required by the Court of Justice case law,¹⁸ a “similar claim”, which the court saw in the “ordinary” claim in cassation – *ricorso in cassazione*.¹⁹ In such cases, the only requirement to obtain interim relief to suspend a ruling which is subject to a claim in cassation is the existence of a situation of urgency and threat of irreparable damage to the individual's legal sphere. The requirement of existence of serious doubts on the lawfulness of the contested ruling does not need to be met. Arguably, according to the Italian court, this different regime is not based on any objective reasons other than combatting abuses of the

¹⁸ See Court of Justice: judgment of 1 December 1998, case C-326/96, *Levez v. Jennings Ltd*; judgment of 17 March 2016, case C-161/15, *Bensada Benallal*; judgment of 30 June 2016, case C-200/14, *Câmpean*.

¹⁹ Art. 373 of the Italian Code of Civil Procedure.

right to asylum, with the consequent application of special rules that are less favourable to the applicant than those generally provided by the Italian legal system.

Finally, and this is yet another peculiarity of the Italian referral *vis-à-vis* the Dutch one, the Italian court asked explicitly whether it is possible to interpret the applicable Italian legislation in asylum matters in light of EU law and therefore allowing national courts to grant interim relief by assessing the requirement of urgency and threat of irreparable damage and not the existence of serious doubts concerning the lawfulness of the first instance ruling.

II.3. ACT 3: THE REPLY TO THE DUTCH REFERRAL

On 26 September 2018, the Court of Justice delivered its ruling on the Dutch case.²⁰ The answer of the Court of Justice to the Dutch referral tackled the points raised by the national court (albeit perhaps failing to provide the answer the referring judge had hoped for).²¹ By relying on earlier and well-established case law, the Court concluded that EU law (including both EU secondary law and the Charter) does not require either a second instance of judicial review system of automatic suspensory effect or, *a fortiori*, the existence, as such, of interim relief proceedings. Despite the fact that this was not explicitly part of the questions posed by the Dutch judge, the Court of Justice felt the need to add that, if there are interim relief proceedings foreseen to transpose the relevant EU legislation, the law must respect the well-known principles of equivalence and effectiveness, the respect of which is for the national court to check.

II.4. ACT 4: THE REPLY TO THE ITALIAN REFERRAL

The day after delivering its ruling on the Dutch case, the Court of Justice answered the questions posed by the Italian judge.²² Importantly, the Court chose to answer the Italian question through an order, applying Art. 99 of the Rules of Procedure of the Court of Justice and reasoning, in essence, that the answer to the Italian question, could be “clearly deduced from existing case-law”.²³ Having taken that road, in the rest of the ruling the Court did not do much else than essentially referring to the reasoning employed in the answer to the Dutch question to reach the very same conclusion with respect to the Italian legislation.

As a consequence, the Italian questions were answered only in part, namely only with respect to the lack of automatic suspensory effect in appeal proceedings. Indeed, the Court ignored completely the specifics of the Italian legislation, in particular with re-

²⁰ *Staatssecretaris van Veiligheid en Justitie*, cit.

²¹ The referring order is indeed very much suggesting that the Dutch judge considered Dutch legislation in violation of Art. 47 of the Charter by not providing a system of automatic suspensory effect.

²² *FR*, cit.

²³ This is the formulation used in Art. 99, which provides for the situations in which a reasoned order can be used by the Court. This point will be dealt with more in depth in section III.

gard to the point concerning the conditions for obtaining interim relief, and therefore did not tackle at all the points of the Italian court concerning the right of defence and right to an impartial judge.²⁴

Even in the assessment of the compliance with the principle of equivalence, the Court is very brief, despite the fact that the Italian court had clearly brought arguments in support of its position and given all elements to make the assessment on the violation of the principle by the Italian legislation. It can be speculated that perhaps the Court of Justice did not want to take responsibility for making the assessment and left the “hot potato” in hands of the Italian court. However, it should be noted that, in other – also recent – cases, the Court of Justice did not shy away from assessing the principle of equivalence itself.²⁵ Finally, the Court was completely silent on the question of whether consistent interpretation of Italian legislation concerning the conditions for obtaining interim relief was possible, a question which had explicitly been asked by the national court.

III. THE LESSON LEARNT FOR THE PRELIMINARY RULING PROCEDURE

This case study lends itself to a number of reflections on the risks surrounding the functioning of the preliminary reference procedure. This *Article* does not have the ambition to empirically test how often these risks occur in practice (and how damaging they are for a fully functional interaction between national courts and the Court of Justice). However, it does provide a reflection on the concrete existence of these risks and how they influenced the outcome of the Italian case discussed above, as well as subsequent related cases. Below we present these reflections.

III.1. THE “PROCEDURAL X FACTORS”: AN URGENT PRELIMINARY QUESTION, ANSWERED THROUGH A REASONED ORDER, AND A LIMITED ROLE FOR THE NATIONAL COURT

A first feature of the series of events presented above, which might have contributed to triggering the “short circuit” in the communication channel between the referring Italian court and the Court of Justice, was the use made by the Italian court of the system of urgent preliminary ruling. This procedure was created in application of the requirement, contained in Art. 267, para. 4, TEFU, on the basis of which, if a question “is raised

²⁴ See on this point the *Article* by A. Wallerman Ghavanini in this Special Section: A. WALLERMAN GHAVANINI *Power Talk: Effects of Inter-Court Disagreement on Legal Reasoning in the Preliminary Reference Procedure*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 887 *et seq.*

²⁵ Court of Justice, judgment of 24 October 2018, case C-234/17, *XC and Others* [GC].

in a case pending before a court or tribunal of a Member State with regard to a person in custody, the CJEU shall act with the minimum delay".²⁶

Given that the procedure is activated when certain conditions of urgency occur, the aim of the procedure is to significantly shorten the ordinary length of wait to receive a preliminary ruling from the Court.²⁷ Concretely, and according to the latest statistics available, this means that urgent rulings are delivered, on average, within 3.1 months from the reference.²⁸ Considering that the referral of the Italian court was registered at the Court on 28 June 2018, and in light of the judicial vacation period of the Court from mid-July to end of August,²⁹ the Court of Justice must have viewed the prior submission of the Dutch referral as a good opportunity to rule first on the Dutch case and then, immediately, on the Italian case, by referring *per relationem* to the earlier judgment. As discussed above, the outcome of this approach of the Court is that the reasoning developed by the Italian court, which was partially different from that in the Dutch case, in particular regarding the respect of the principle of equivalence, was not the object of a specific consideration.

While this point could hardly have been foreseen by the Italian referring court, it does cast some shadows on the functioning of the urgent preliminary ruling mechanism as a functional mechanisms to protect EU fundamental rights.³⁰ Indeed, it has been argued that the procedure can be used to "test the extent to which the EU is a mature legal order with regard to the protection of EU fundamental rights".³¹ If the urgent preliminary ruling is to be seen as instrument to unequivocally protect vulnerable individuals when there is a serious threat of their EU fundamental rights being violated, the conclusion in our case study cannot but be that the instrument (or rather, the use that has been made of it) failed the applicant in the main proceedings. This is because the answer provided by the Court of Justice did not shed any light at all onto an extremely problematic aspect (from a fundamental right perspective) of the Italian judicial proceedings in asylum cases, namely that the request for interim relief is conditional upon the acknowledgment, by the same court who issued the contested ruling, of the fact that its own ruling is doubtful from a legal point of view.

²⁶ S. BARTOLINI, *The Urgent Preliminary Ruling Procedure: Ten Years On*, in *European Public Law*, 2018, p. 214.

²⁷ The average duration of proceedings for references for preliminary ruling in recent years has been 15 months in 2014, 15.3 in 2015, 15 in 2016, 15.7 in 2017, 16 in 2018. CJEU, *Judicial Activity - Annual Report 2018, 2019*, curia.europa.eu, p. 134.

²⁸ *Ibid.*

²⁹ See curia.europa.eu for the years 2019/2020 and 2020/2021.

³⁰ These are discussed by Bartolini and the doctrine referred to therein. S. BARTOLINI, *The Urgent Preliminary Ruling Procedure*, cit., p. 214. See also Sharpston who argues that speediness often goes to the detriment of quality. E. SHARPSTON, *Making the Court of Justice of the European Union More Productive*, cit., p. 765 *et seq.*

³¹ S. BARTOLINI, *The Urgent Preliminary Ruling Procedure*, cit., p. 215.

A second key circumstance, which seems to have generated the “constitutional tragedy” we sketched above, was the fact that the Court made use of Art. 99 of its Rules of Procedure and answered the Italian question by reasoned order and in essence by reference to its earlier answer in the Dutch case. According to this provision,

“[W]here a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge- Rapporteur and after hearing the Advocate General, decide to rule by reasoned order”.

Art. 99 of the Rules of Procedure codifies to some extent the *acte claire* doctrine established through the *CILFIT* ruling.³² The provision was introduced in 1991 and simplified in 2012 and was indeed aimed at responding to the increasing workload created by repetitive questions.³³ Indeed, speedy and quicker answers have been at the core of much of the reforms of the Court of Justice,³⁴ and the possibility to issue “reasoned orders” instead of rulings certainly can be regarded as a mechanism to speed up the preliminary reference procedure before the Court.

However, much like the *CILFIT* ruling, this provision brings along a number of risks. Indeed, *CILFIT* has been subject to much criticism and has been regarded as being liable to endanger the coherent and uniform application of EU law, by dissuading national courts from asking preliminary questions in cases in which these questions ought to have been asked.³⁵ To some extent, one could argue that Art. 99 is, in a rather specular

³² Court of Justice, judgment of 6 October 1982, case 283/81, *CILFIT v. Ministero della Sanità*.

³³ M. JACOB, *Precedents and Case-Based Reasoning in the European Court of Justice*, Cambridge: Cambridge University Press, 2014, p. 258.

³⁴ See for example the increasing practice of joining cases. According to the 2018 Annual Report, “[w]hile the number of cases closed in 2018 is significantly higher than in 2017, the number of decisions delivered by the Court [Court of Justice] in 2018 is fairly close to the number of decisions delivered in 2017. This factor is mainly due to the similarity between cases brought before the Court. Having received a large number of requests for preliminary ruling in 2017 [...] the Court, in the interests of procedural economy and efficiency, joined most of these cases for the purposes of the written and oral phase of the procedure and the judgment, thereby reducing the overall number of decisions delivered”. CJEU, *Judicial Activity – Annual Report 2018*, cit., p. 117.

³⁵ P. CRAIG, *The Classics of EU Law Revisited: CILFIT and Foto-Frost*, in L.M. POIARES, L. AZOULAI (eds), *The Past and the Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford: Hart, 2010, pp. 185-191. See also N. FENGER, M. BROBERG, *Finding Light in the Darkness: On the Actual Application of the Acte Clair Doctrine*, in *Yearbook of European Law*, 2011, p. 180 *et seq.* For example, it has been argued that “the judgment in *CILFIT* has three outstanding features: rigour, subjectivity and confusion”. A. KORNEZOV, *The New Format of the Acte Clair Doctrine and Its Consequences*, in *Common Market Law Review*, 2016, p. 1319 *et seq.*

fashion, “encouraging” the Court of Justice to regard preliminary questions as “identical” or as having been previously answered in earlier case law.

In the context of Art. 99 of the Rules of Procedure, Bobek has indeed suggested that “it is open to argument whether the Court has always used this procedural tool exclusively for questions that can be ‘clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt’”.³⁶ This point has not been subject to much scholarly debate, and has never been tested empirically. Without ambition of completeness, it can be noted, from a search in the Curia database, that the Court of Justice is generally very brief in its choice to opt for the use of Art. 99 and answer by reasoned order, and hardly motivates this choice.³⁷ The same conclusion can be reached with respect to the case at hand, where the Court simply stated that Art. 99 could find application in this case and went on to replicate the answer to the Dutch case, which, as mentioned above, in fact only partly tackled the doubts raised by the Italian referring judge.

The use of Art. 99 by the Court certainly ought to be the subject matter of further research, which would shed light on the possible “misuse” by the Court of this procedural tool, to the detriment of the functioning of the preliminary reference mechanism.³⁸

Linked to this conclusion, a second key point which could be made with respect to the use of the reasoned order concerns a more general observation on the role of national judges in the preliminary ruling mechanisms. Indeed, both de Werd³⁹ and Prechal⁴⁰ note that the mechanism of interaction between the Court of Justice and national courts is currently insufficiently geared to repair possible misunderstandings between the European and national judiciaries. They both observe that this is because there is no provision in the Statute or the Rules of Procedure to ensure that the national referring judge is heard in the procedure. Of course this point cannot be tested, but it can be argued that, specifically with respect to the use of Art. 99, it would seem sensible to provide for an opportunity for the referring court to be heard (a possibility which the provision currently affords only to the Advocate General). It can be speculated that, in the case at hand, if the Italian referring court had been given the opportunity to be heard, the possible additional explanation on the peculiarities of the Italian situation *vis-à-vis* the Dutch one might have decreased the risk of the occurrence of the “constitutional tragedy”.

³⁶ M. BOBEK, *Talking Now? Preliminary Rulings in and from the New Member States*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 786.

³⁷ See recently Court of Justice: judgment of 5 September 2019, case C-801/18, *Caisse pour l'avenir des enfants*; judgment of 20 June 2019, case C-424/18, *Italy Emergenza and Associazione Volontaria di Pubblica Assistenza “Croce Verde”*; judgment of 14 February 2019, case C-54/18, *Cooperativa Animazione Valdocco*.

³⁸ Kornezov, in the context of the *CILFIT* ruling, quotes a number of studies which range “from deliberate abuses through negligence to genuine mistakes”. See A. KORNEZOV, *The New Format of the Acte Clair Doctrine and Its Consequences*, cit., p. 1322.

³⁹ M. DE WERD, *Dynamics at Play in the EU Preliminary Ruling Procedure*, cit., p. 152.

⁴⁰ S. PRECHAL, *Communication Within the Preliminary Ruling Procedure*, cit., p. 756 et seq.

III.2. THE “USEFULNESS” OF THE RULING

As mentioned in the introduction, and aptly noted by Krommendijk, there is little systematic empirical evidence about how preliminary rulings are “received” at the national level, with earlier research pointing at rather contradictory results.⁴¹

Nyikos conceptualised the possible attitudes of national courts with the notions of “implementation”, which includes situations in which a national court abides by the Court of Justice’s ruling, or “evasion”, or “non-implementation”.⁴² According to her, “[a] national court can “evade” the ruling by adopting procedural measures to bypass an ECJ decision. [...] The two main methods of evasion are to refer a case again or to reinterpret the facts of the case such that the ECJ ruling does not apply”.⁴³ As we show below, these categories seem to assume that the Court of Justice has delivered a “useful” ruling for the national court, which is not always the case.

Indeed, having carried out empirical research on national courts’ perceptions of the preliminary ruling (with a special focus on migration cases), Krommendijk points out to the fact that the focus of the national courts is on whether the ruling of the Court of Justice is “useful” for them to solve the case.⁴⁴ In particular, he reports that, according to the interviewed judges, many judgments – significantly in migration cases – lack an unambiguous answer and only include criteria for assessments. Instead the interviewed judges in the Netherlands prefer “clear-cut” guidance.⁴⁵ A similar point is made by Sharpston, who argues that, because of the need to reduce the time being devoted to each case and the aim to achieve a quicker resolution of the cases, the Court might resort to shortcuts in the reasoning and deletion of more controversial passages. However, in order to replace that reasoning, more time is needed to reason and reach consensus, which is inconsistent with the attempt to reduce the time spent on the resolution of each case.⁴⁶ This may, in her opinion, lead to judgments handed over that are unclear or ambiguous. Her conclusion is that often “the national court is left with a muddled mess”.⁴⁷

These findings very much resonate with ours: the Court of Justice did not provide “operational” guidance to the national court and instead referred it to the well-known principle of equivalence, without testing it or providing any benchmark for the national court.⁴⁸ In

⁴¹ J. KROMMENDIJK, *The Preliminary Reference Dance Between the CJEU and the Dutch Courts in the Field of Migration*, cit., p. 112 *et seq.*

⁴² S.A. NYIKOS, *The Preliminary Reference Process*, cit., p. 397.

⁴³ *Ibid.*, p. 399.

⁴⁴ A. KORNEZOV, *The New Format of the Acte Clair Doctrine and Its Consequences*, cit., p. 142.

⁴⁵ *Ibid.*, p. 145.

⁴⁶ E. SHARPSTON, *Making the Court of Justice of the European Union More Productive*, cit., p. 765 *et seq.*

⁴⁷ *Ibid.*, p. 766.

⁴⁸ A different question, which is not explored in this *Article*, is the relationships between the principles of equivalence, effectiveness and effective judicial protection and norms of secondary EU law of procedural nature and specifically the question of whether and to which extent these principles remain ap-

the case at stake, “usefulness” of the ruling was therefore not ensured, since the reply does not guide the Italian court at all, and does not tell it anything it did not know beforehand.

To follow with Sharpston’s concerns, she argues that, because of the “muddled mess” they are faced with, national courts may either ignore or circumvent the decision of the Court of Justice or make new references anew in the attempt to get clarity.⁴⁹

This is exactly what has happened after the ruling has been handed over. In particular concerning the principle of equivalence, the national court had extensively provided reasons as to why the principle of equivalence seemed to have been violated, and why functionally equivalent claims were treated differently. Nevertheless, the Court of Justice did not provide any answer to the national court on this and remitted to the national court the evaluation on the point of equivalence. This brought as a consequence the weakening of the argument of the national court: the “silence” or at least reticence of the part of the Court of Justice, despite the depth of the arguments brought forward by the national court was interpreted in subsequent rulings as meaning that the arguments of the national court were not that strong after all.

Indeed, in several other proceedings, national courts ended up interpreting the provisions at stake very differently. Even within the referring court (the Milan Tribunal), several following rulings reaching different conclusions have been adopted. In applying the reasoned order of the Court of Justice in the proceedings during which the preliminary question was asked, the tribunal adopted a literal (and thus restrictive) interpretation of the “serious grounds” requirements, without any further analysis of the principle of equivalence.⁵⁰

In a subsequent ruling, however, the same tribunal adopted a different interpretation of the contested provision, and, in implicit application of the principle of equivalence, interpreted extensively the notion of “serious grounds” in a way which would be coherent with the general framework of interim relief set out in Art. 373 of the Italian Civil Procedure Code.⁵¹ According to the tribunal, the “serious grounds” requirement must be regarded as being fulfilled whenever the claim in appeal brings forward flaws in the first instance ruling which are “abstractly within the scope of the jurisdiction of the Court of Cassation”. In other words, in this ruling, the tribunal considered that the “serious grounds” which need to exist for the first instance ruling to be provisionally suspended do not need to concretely relate to the merits of the claim (which have as such already been ruled on by the first instance court, the same court finding itself ruling on the appeal proceedings). The “serious grounds”, according to this extensive interpretation, merely need to be grounds which in abstract the Court of Cassation is competent to examine when ruling on the interim relief proceedings. However, what is noteworthy is that, even when using such

plicable also in presence of EU secondary procedural rules. This question is explored in a special issue of the *Review of European Administrative Law* by M. Eliantonio and E. Muir (2019).

⁴⁹ E. SHARPSTON, *Making the Court of Justice of the European Union More Productive*, cit., p. 765 *et seq.*

⁵⁰ Tribunal of Milano, judgment of 7 November 2018, no. 44718-1/2017.

⁵¹ Tribunal of Milano, judgment of 16 November 2018, no. 7765/2018.

intensive interpretation, the tribunal does not make any reference to the principle of equivalence, as instead the Court of Justice had suggested.

Indeed, no other court made reference to the question of equivalence, which was instead the main argument brought forward by the referring court to criticize the Italian legislation from the perspective of EU law. Also those Italian courts which, similarly to the Milan court mentioned above, adopted an extensive interpretation of the “serious grounds” requirements, reached that conclusion by arguing that, “in order to fulfil the requirement of the existence of ‘serious doubts’ concerning the lawfulness of the first instance ruling, the mere existence of an admissible claim and of non-manifestly ungrounded reasons to bring it” had to be considered sufficient, thereby significantly lowering the threshold to obtain interim protection.⁵² Interestingly, the same courts held that the question of whether there is a threat of serious and irreparable damage to the legal situation of the applicant (in particular whether he or she, once repatriated, might not be able to return to Italy) need to be considered in the assessment of the existence of serious doubt on the lawfulness of the first instance ruling.⁵³

Instead, other courts have continued to adopt a literal interpretation of the notion of “serious grounds”, giving it a fully different meaning than that of “grave and irreparable threat” which is applicable in the ordinary interim relief proceedings before the Court of Cassation. In those rulings, the main argument used by the courts relies on the point made by the Court of Justice that neither EU law nor the European Convention on Human Rights require a second degree of proceedings or the automatic suspensory effect of the first instance ruling.⁵⁴ In conclusion, it seems quite clear that, at least with respect to our case study, the “hands-off” attitude of the Court of Justice did not contribute to “responsabilise” national courts, but, much in line with Krommendijk’s findings, seemed to have delivered a “useless” ruling, which was unanimously and unequivocally ignored by the referring courts and other courts subsequently faced with the same legal problem and the same legislative framework.

Can one therefore conclude that the “relation of trust” between national courts and the Court of Justice has been endangered? From a mere observation of the attitude of the referring court and the rest of the Italian courts rulings on the same matter, and the conspicuous absence of the order of the Court of Justice in them, or of any reference of assessment of the principle of equivalence, one might be tempted to conclude that the national courts felt “abandoned” by the Court. This conclusion resonates very much with Mayoral’s findings on the “trust” of national courts in the context of the preliminary reference procedure.⁵⁵ Indeed, he points out, in the context of a broad investigation in-

⁵² Tribunal of Bologna, judgment of 25 November 2019, no. 18051/2019.

⁵³ *Ibid.* See also Tribunal of Firenze, judgment of 20 November 2019, no. 2019/15398.

⁵⁴ Tribunal of Trieste, judgment of 7 August 2018, no. 495/2018; Tribunal of Napoli, judgment of 8 July 2019.

⁵⁵ J. MAYORAL, *In the CJEU Judges Trust*, cit., p. 557.

volving judges of several Member States, that “national judges trust more in the CJEU when they believe its rulings are clear”.⁵⁶

Furthermore, as the diverging interpretations reached by the national courts show, it seems that this “hands-off” approach of the Court undermined the uniform application of EU law. This conclusion confirms to some extent earlier doubts expressed on the suitability (for the purposes of ensuring a uniform application of EU law) of broadly formulated principles, to be tested by national courts, as “outer limits”⁵⁷ of national procedural autonomy.⁵⁸

As the next section shows, the winner in this situation might be the Constitutional Court.

III.3. THE CONSTITUTIONAL IMPLICATIONS: WHEN A PRELIMINARY RULING TOUCHES A “SOFT SPOT”

While often concerning “high profile cases”,⁵⁹ it is well known that opposition and mistrust towards the Court of Justice is more likely to arise with respect to matters which are politically sensitive. Bobek has in this respect spoken about “uncooperative courts”.⁶⁰

The Court of Justice might have been unaware of the political context in which the Italian preliminary question may be placed, or it might more likely have been acutely aware of this context (and consciously made a decision not to interfere with Italian politics), but the sensitive nature of asylum legislation in Italy can hardly be overstated. Indeed, the applicable provisions to asylum procedures were modified in Italy in 2017.⁶¹ Under the previous regime, the suspensory effect of an appeal was automatic and lasted until the final judgment ending the entire judicial procedure, which could include three instances. With the 2017 reform, the Italian legislator removed the system of automatic suspensory effect and provided that a separate application for suspension of the effects of the challenged measure may be lodged before the same court who pronounced the challenged judgment, if serious doubts on the lawfulness of the first instance ruling exist.⁶² The question sent by the Italian court should, therefore, very much be seen as an attempt at not rendering interim relief in asylum proceedings anything

⁵⁶ *Ibid.*, p. 562.

⁵⁷ This phrase is used by S. PRECHAL, R. WIDDERSHOVEN, *Redefining the Relationship Between “Rewe Effectiveness” and Effective Judicial Protection*, in *Review of European Administrative Law*, 2011, p. 31.

⁵⁸ See e.g. the conclusion drawn by F. GRASHOF, *National Procedural Autonomy Revisited: Consequences of Differences in National Administrative Litigation Rules for the Enforcement of European Union Environmental Law: The Case of the EIA Directive*, Groningen: Europa Law Publishing, 2016.

⁵⁹ J. KROMMENDIJK, *The Preliminary Reference Dance Between the CJEU and the Dutch Courts in the Field of Migration*, cit., p. 104.

⁶⁰ M. BOBEK, *Landtová, Holubec and the Problem of an Uncooperative Court*, cit., p. 54.

⁶¹ Law Decree no. 13 of 17 February 2017 was adopted, then transposed into Law no. 46 of 13 April 2017.

⁶² Art. 35bis, para. 13, of Legislative Decree no. 25/2008, introduced by Law Decree no. 13/2017.

more than empty procedural shells.⁶³ The Court of Justice seemed to ignore or be unaware of the sensitivity of the issues underlying the preliminary ruling, leaving the national court “alone” in the application of the principle of equivalence and in the consequent non-application of the national law considered to be in contrast with the same.

This approach of the Court of Justice is all the more criticisable because of the constitutional protection afforded by the Italian Constitution to the right to asylum. Asylum is indeed a typical case of multilevel protection of fundamental rights in the European legal space, where multiple sources are relevant to the shaping of the same right. The Charter contains some provisions specifically relating to the protection of asylum seekers, notably Art. 18 (right to asylum), Art. 19 (protection against return), and Art. 4 (prohibition of torture and inhuman or degrading treatment or punishment). However, this right is also protected under Art. 10, para. 3, of the Italian Constitution, which is formulated in very broad terms⁶⁴ and may be directly activated.⁶⁵ Secondary legislation can introduce limits and conditions to the right of asylum guaranteed by the Constitution, but cannot affect the existence of a right of asylum in Italy, as directly recognized by the Constitution.⁶⁶

The Italian court thus had, abstractly, the option⁶⁷ of both referring a preliminary question to the Court of Justice and of referring a question of constitutionality to the Constitutional Court pursuant to Art. 134 of the Constitution. As such, a referral to the Constitutional Court has the procedural advantage of the *erga omnes* effects of the ruling, leading to the abrogation of the law declared unconstitutional.⁶⁸ A preliminary ruling, instead, leads only to an *inter partes* effect, to the extent that the national conflicting

⁶³ This matter has been at the centre of a heated doctrinal debate in Italy at the time of the procedural reforms discussed in this *Article*. See G. IMPAGNATELLO, *La provvisoria esecuzione e l'inibitoria nel processo civile*, Milano: Giuffrè, 2008, p. 371; F. DEL ROSSO, *L'istituzione delle sezioni specializzate in materia di immigrazione e il nuovo rito per il riconoscimento della protezione internazionale*, in *Il giusto processo civile*, 2017, p. 939; F. CAPOTORTI, *Il ruolo del giudice nazionale dell'asilo tra effettività dei ricorsi e autonomia procedurale degli Stati membri: il punto sulla sospensiva*, in *Questione Giustizia*, 27 November 2018, www.questionegiustizia.it; F. DEL ROSSO, L. PISONI, *Garanzie e principio di effettività del processo nella tutela del richiedente asilo*, in *Questione Giustizia*, 6 March 2019, www.questionegiustizia.it; L. PISONI, *L'istanza cautelare nel procedimento per Cassazione in materia di protezione internazionale: un giudice che si morde la coda*, in *Questione Giustizia*, 6 March 2019, www.questionegiustizia.it.

⁶⁴ “A third-country national, who is prevented in his own country from exercising the democratic freedom and rights guaranteed by the Italian Constitution, has the right to seek asylum in the territory of the Republic, according to the conditions established by law” (Art. 10, para. 3, of the Italian Constitution, available at www.cortecostituzionale.it).

⁶⁵ Italian Supreme Court: judgment 26 May 1997, no. 4674; judgment of 17 December 1999, no. 907.

⁶⁶ M. BENVENUTI, *La forma dell'acqua. Il diritto di asilo costituzionale tra attuazione, applicazione e attualità*, in *Questione Giustizia*, 2018, p. 15 *et seq.*

⁶⁷ Indeed, lower courts have the possibility and not the duty to refer preliminary questions to the Court of Justice pursuant to Art. 267 TFEU.

⁶⁸ G. MARTINICO, *Multiple Loyalties and Dual Preliminarity: The Pains of Being a Judge in a Multilevel Legal Order*, in *International Journal of Constitutional Law*, 2012, p. 871 *et seq.*

provision will have to be set aside for the concerned national proceedings.⁶⁹ The limited “external” effects of the preliminary ruling of the Court of Justice in the case at stake are exacerbated by the vague answer of the Court, which, as discussed above, did not frame any principled statement which could be used by other national courts faced with the same legal question.⁷⁰

Furthermore, as is well known, according to the Court of Justice, national courts should have the choice of seizing the Constitutional Court instead of the Court, but this possibility should not jeopardise their freedom to seize also the Court whenever they deem this fit.⁷¹ For a moment, it seemed, however, that the Italian Constitutional Court wanted to somehow control this freedom. Indeed, the Constitutional Court stated in its ruling no. 269 of 2017,⁷² that when a question concerns potentially the violation of both national and European fundamental rights, national courts must first seize the Constitutional Court and only thereafter the Court of Justice, when the case raises “other questions” of possible incompatibility with EU law than those referred to the Constitutional Court. This ruling should be seen in the context of the “*Taricco saga*”,⁷³ one of the notable examples of a constitutional court engaging in a judicial dialogue with the Court of Justice,⁷⁴ and of the attempts of the Italian Constitutional Court to re-affirm a greater role for the mechanism of constitutionality review.⁷⁵

⁶⁹ Court of Justice, judgment of 9 March 1978, case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*.

⁷⁰ And, one might add, also by the State concerned who should amend a national provision which turns out to be in violation of EU law as a consequence of a preliminary ruling.

⁷¹ Court of Justice, judgment of 22 June 2010, joined cases C-188/10 and C-189/10, *Melki & Abdeli* [GC].

⁷² See on this ruling, which has sparked a heated academic debate, R. DI MARCO, *The “Path Towards European Integration” of the Italian Constitutional Court: The Primacy of EU Law in the Light of the Judgment No. 269/17*, in *European Papers*, 2018, Vol. 3, No 2, www.europeanpapers.eu p. 843 *et seq.*; L.S. ROSSI, *La sentenza 269/2017 della Corte costituzionale italiana: obiter ‘creativi’ (o distruttivi?) sul ruolo dei giudici italiani di fronte al diritto dell’Unione europea*, in *Federalismi*, 31 January 2018, available at www.federalismi.it, p. 1 *et seq.*; D. GALLO, *Efficacia diretta del diritto UE, procedimento pregiudiziale e Corte costituzionale: una lettura congiunta delle sentenze n. 269/2017 e 115/2018*, in *Rivista AIC*, 2019, p. 160 *et seq.*

⁷³ See M. BONELLI, *The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union: CJEU, C-105/14 Ivo Taricco and Others, ECLI:EU:C:2015:555; and C-42/17 M.A.S., M.B., ECLI:EU:C:2017:936 Italian Constitutional Court, Order no. 24/2017*, in *Maastricht Journal of European Law*, 2018, p. 357 *et seq.* See also G. PICCIRILLI, *The “Taricco Saga”: the Italian Constitutional Court continues its European Journey: Italian Constitutional Court, Order of 23 November 2016 no. 24/2017; Judgment of 10 April 2018 no. 115/2018 ECJ 8 September 2015, Case C-105/14, Ivo Taricco and Others; 5 December 2017, Case C-42/17, M.A.S. and M.B.*, in *European Constitutional Law Review*, 2018, p. 814 *et seq.*

⁷⁴ On this point see M. CLAES, *Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure*, in *German Law Journal*, 2015, p. 1331 *et seq.*

⁷⁵ G. MARTINICO, *Multiple Loyalties and Dual Preliminarity*, *cit.*, p. 871.

In subsequent rulings, and after a rich doctrinal debate,⁷⁶ and a ruling of the Italian Court of Cassation departing from the position of the Constitutional Court,⁷⁷ the latter has further refined its position. It concluded in favour of the possibility for lower courts to use the preliminary question mechanism (or the tool of disapplication of national law in violation of EU law) also with respect to the same provision on which the Constitutional Court has previously been seized,⁷⁸ thereby putting itself fully in line with the Court of Justice's position.

Consequently, as of today, there is no doubt on the possibility for lower courts to use the preliminary question mechanism, in whichever moment of the proceedings, on whichever ground, both before or after seizing the Constitutional Court. Furthermore, should the Constitutional Court be seized first, nothing prevents this court from itself sending a preliminary question to the Court of Justice and "join the conversation".⁷⁹ The Constitutional Court then can, after receiving the answer of the Court of Justice, declare the unconstitutionality of the contested provision, removing the latter from the legal system with *erga omnes* effects.⁸⁰

An important step of what Italian constitutional scholars have dubbed the "European journey" (*cammino comunitario*) of the Constitutional Court has thereby been crystallized, inaugurating a new "trialectic" phase in the relationships between lower courts, Court of Justice and Constitutional Court, the latter decisively trying to not lose the centre stage of the multi-level protection of fundamental rights in Europe.⁸¹ For the purposes of this analysis, this new dynamic goes to show that, while it does take two to tango, this specific tango variant might well be masterfully danced also with a third actor on the scene. In light of these developments, it is all the more "brave" for the Italian court to have side-

⁷⁶ C. CARUSO, *La Corte costituzionale riprende "il cammino comunitario": invito alla discussione sulla sentenza n. 269 del 2017*, in *Forum di Quaderni Costituzionali*, 18 December 2017, www.forumcostituzionale.it; A. COSENTINO, *La Carta di Nizza nella giurisprudenza di legittimità dopo la sentenza della Corte costituzionale n. 269 del 2017*, in *Osservatorio sulle fonti*, 2018, www.osservatoriosullefonti.it; M. MASSA, *Dopo la «precisazione».* *Sviluppi di Corte cost. n. 269/2017*, in *Osservatorio sulle fonti*, 2019, www.osservatoriosullefonti.it; D. TEGA, *Tra incidente di costituzionalità e rinvio pregiudiziale: lavori in corso*, in *Quaderni costituzionali*, 2019, p. 615 *et seq.*; A. TIZZANO, *Sui rapporti tra giurisdizioni in Europa*, in *Il diritto dell'Unione europea*, 2019, p. 9. *et seq.*

⁷⁷ Italian Supreme Court, judgment of 17 May 2018, no. 12108.

⁷⁸ Italian Constitutional Court: judgment of 21 March 2019, no. 63; judgment of 21 February 2019, no. 20; judgment of 10 May 2019, no. 112, and order of 10 May 2019, no. 117. These rulings and their implications have been analysed in G. MARTINICO, G. REPETTO, *Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath*, in *European Constitutional Law Review*, 2019, p. 731 *et seq.*

⁷⁹ See M. BONELLI, *The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union*, *cit.*, p. 369.

⁸⁰ A. RUGGERI, *La Consulta rimette a punto i rapporti tra diritto eurounitario e diritto interno*, in *Consulta on line*, 25 February 2019, www.giurcost.org, p. 117.

⁸¹ F. MEDICO, *I rapporti tra ordinamento costituzionale ed europeo dopo la sentenza n. 20 del 2019: verso un doppio custode del patrimonio costituzionale europeo?*, in *Il diritto dell'Unione Europea*, 2019, p. 87 *et seq.*

stepped the “constitutional route” and framed the question under EU law only. It is also all the more “disappointing” for the Italian court to have received an answer from the Court of Justice which the referring court cannot “directly” apply, and which does not provide clear and unequivocal answers.

At the same time, the national courts are “under the pain” of having to manage a situation of “double loyalty”,⁸² and, when determining which court to seize first, they would not be wrong in keeping considerations of “effectiveness” into account. And indeed, in the follow-up rulings, while the reference to EU law, the principle of equivalence and the reasoned order of the Court of Justice disappeared, reference to fundamental rights protected by the Italian Constitution, especially Art. 24 on the right of defence, Art. 111 on the right to a fair trial and Art. 3 on the equality principle, have appeared. It is therefore not hard to imagine that the referring Italian court, or any other Italian court seized of a question concerning asylum protection, might be more inclined to ask a question of constitutionality rather than a preliminary question, unless there would be questions which specifically require to take the road to Luxembourg instead of that to Rome.⁸³

The practice emerging in the aftermath of the reasoned order of the Court of Justice shows that the Constitution has been evoked, but the road to Rome has not been taken. Courts have instead made their own autonomous assessment, much to the detriment to the principle of legal certainty and possibly also of equality.

V. CONCLUSION

The importance of the preliminary ruling mechanism in the process of European integration can hardly be overestimated. However, the complex dynamics between national courts and the Court of Justice is influenced by a number of factors which might impair its correct functioning. Krommendijk, in his extensive empirical investigation on national judges in migration cases, concluded that, overall, the preliminary ruling system seems to be working well and in accordance with the envisioned aim.⁸⁴ The results of this *Article* tell us a different story. How much should one case weigh over a trend which shows the opposite? Our results do not aim at reaching overarching conclusions on the success of the preliminary reference procedure, but at showing that several factors might come in the way of a functioning system. While it is true that often dysfunctionalities come to the fore

⁸² G. MARTINICO, *Multiple Loyalties and Dual Preliminarity*, cit., p. 872.

⁸³ F. CAPOTORTI, *Il ruolo del giudice nazionale dell'asilo tra effettività dei ricorsi e autonomia procedurale degli Stati membri*, cit.

⁸⁴ J. KROMMENDIJK, *The Preliminary Reference Dance Between the CJEU and the Dutch Courts in the Field of Migration*, cit., p. 153.

of (academic) light more than the cases in which the mechanism functions correctly,⁸⁵ it is nevertheless important to consider these risks so as to see how they can be mitigated.

By taking the case study of two preliminary questions, asked by the courts of different Member States, on an overlapping, yet not identical problem, we have shown above that a number of “procedural x factors” might come in the way of a smooth interaction between national courts and the Court of Justice. Indeed, the combined use of the urgent preliminary reference procedure on the part of the Italian referring court and a reasoned order by the Court of Justice produced an answer, which only partially answered the questions of the referring court and completely omitted to consider the specificities of the Italian legislative framework *vis-à-vis* the Dutch one.

Furthermore, also with respect to the question which has been answered by the Court, the ruling only provides vague standards and lacks any form of operational guidance for the national referring court. Despite the fact that, at an abstract level, the national court had all the powers to apply the ruling, in practice this could prove difficult, not least also because of the media exposure of certain topics, such as migration and asylum. And indeed, the aftermath of the ruling shows that national courts have ignored the ruling of the Court of Justice and adopted divergent interpretation of the contested provisions.

Finally, the *Article* has shown that such – for the national courts – disappointing results might weigh quite strongly in the delicate balancing exercise of managing the double loyalty which national courts owe to the Court of Justice and their national constitutional courts.

While some factors might have been outside the control of both the referring court and the Court of Justice, the “constitutional tragedy” we have sketched in this *Article* goes to show that the Court of Justice ought to take its own form of loyalty to national courts seriously, if it does not want to put the trust of national courts at risk.

⁸⁵ This is a point made by M. DE WERD, *Dynamics at Play in the EU Preliminary Ruling Procedure*, cit., p. 156.