

PRELIMINARY REFERENCE PROCEDURE – THE RIGHT, THE DUTY AND EXCEPTIONS

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ABSTRACT

According to decentralized character of the EU legal system, national courts are the ordinary courts in matters of EU law and should as such guarantee effective legal protection of individual's rights deriving from EU law. To ensure uniform application of EU law provisions and especially to prevent possible divergent interpretations, a preliminary ruling procedure was created, found in Article 267 TFEU. On the basis of mentioned Article national courts may, and sometimes must, refer a question to the CJEU and ask for clarification of the meaning or review of the validity of an act of EU law which is of relevance to the case upon which national courts need to adjudicate, since the CJEU has an exclusive monopoly of interpretation on questions of EU law. This Paper deals with a question, when national courts have the right and when the duty to refer questions to the CJEU and which are the exceptions to this obligation. Possible legal consequences, that may follow if national courts do not fulfil their obligations, are discussed in short as well.

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1. INTRODUCTION

Article 19 of the Treaty on European Union (hereinafter: TEU)¹ provides that the function of the Court of Justice of the European Union (hereinafter: CJEU) is to *'ensure that in the interpretation and application of the Treaties the law is observed.'* Given that the CJEU has ultimate authority in deciding on all questions of European Union (hereinafter: EU, also Union) law, means that it must have jurisdiction to determine points of EU law even when they arise in proceedings brought before national courts. Yet this power is only available to be exercised if national courts of the EU Member States refer the issues about the validity or interpretation of the EU law in question to the CJEU and if the possibility to refer a question as such is there for the national courts to exercise. For this purpose a unique preliminary reference mechanism was created, settled in Article 267 of the Treaty on the Functioning of the European Union (hereinafter: TFEU).²

According to mentioned Article in a preliminary ruling procedure the national court makes a decision to request an explanation from the CJEU on matters of EU law arisen in the national proceeding. By clarifying such legal matters the CJEU may ensure uniform application of the EU law throughout the Member States and offer useful guidance to the referring courts in particular cases on correct interpretation of EU law. The right and in some cases the duty of national courts to refer a question for a preliminary ruling follows directly from the TFEU and is independent of the existence of any national procedural rule, since this is a *sui generis* procedure based on the Treaty itself. National legal rules can supplement but cannot restrict these rules of the TFEU.³ It thus follows that the national court can initiate a reference for a preliminary ruling even if its own domestic law does not regulate this issue or its procedural framework.⁴

However and irrespective of the foregoing the practice has shown that national courts are often reluctant to send questions for preliminary ruling to the CJEU. This can be deducted from statistics and comparison of a total number of references from various Member States. Lately the debates were focused especially on the fact, that low number of references is a feature particularly of the new Member States.⁵ One can hardly conclude whether this means, that in some

¹ OJ C 326 of 26. 10. 2012.

² OJ C 326 of 26. 10. 2012.

³ See e.g.: Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA (II) [1978] ECR 0629, paras. 20-22.; Case C-348/89 Mecanarte - Metalurgica da Lagoa Lda v Chefe do Serviço da Conferencia Final da Alfândega do Porto [1991] ECR I-3277, para. 45.

⁴ See also: Blutman L.; The Cartesio judgment: Empowering lower courts by the European Court of Justice; Pravo i Politika (ISSN 1820-7529); Vol. III., 2010/2.; pp. 95-106; page 96.

⁵ E.g.: From Republic Slovenia (since the entrance into EU integration on the 1. May 2004 and until now) there were only four questions referred for a preliminary ruling. The first one in

new Member States EU law is not applied at all, or whether the national courts in new Member States master EU law in such a way, that no assistance of the CJEU is required. But when the latter is not the case, national courts of specific Member State that are under obligation to start a reference procedure should be aware, that not referring a question for a preliminary ruling constitutes a breach of EU law, which may result in different unfavourable consequences for that Member State. That would not be the case only when the specific circumstances would be given, that are by the CJEU itself determined as the only justifiable exceptions for not referring a question. Those mentioned exceptions for not referring a question, however, are not as easy to use and as clear as one could expect. In fact it is rather difficult to fulfil all the conditions in practice as is explained later on in this paper.

2. REFERRING A QUESTION – A RIGHT AND A DUTY

In principle, the question whether to make a reference falls within the exclusive jurisdiction of the national court. It enjoys absolute discretion and may make a reference on its own motion, regardless from any interference from the litigants⁶ or constraints imposed by national law.⁷ In deciding whether to make

case *Detiček* (C-403/09) was sent only in 2009, the second one also in 2009 in case C-536/09 *Omejc*, the third one in the case C-603/10 *Pelati* in 2010 and the fourth one in 2011 in case C-541/11 *Grilc*. Only four questions are placing Slovenia among the least active Member States together with Cyprus and Malta, as regards participation in European judicial dialogue. At this point it is also necessary to emphasize another aspect, i.e. the right of all Member States to intervene in a preliminary ruling procedure and thus importantly influence on the development of EU law. Until now Slovenia in almost ten years of membership in the EU intervened in approximately 27 preliminary ruling proceedings. Although this figure at first glance may seem encouraging, it should be noted however, that each year there are approximately 400 proposals for a preliminary ruling procedure all together. Therefore it would be desirable to hear the voice of Slovenia on several occasions. This would not only increase the visibility of Slovenia in the European institutions, but would also be an opportunity for its influence on the development of EU law, which is not created only in the EU's legislative bodies, but with the case law of the CJEU as well. More interventions in preliminary ruling procedures would therefore be in the interest of Slovenia itself, especially in matters that may have significant impact on the Slovenian legal order. The same applies to all other Member States.

⁶ In Case 126/80 *Salonia v. Poidomani and Giglio* [1981] ECR 1563, para. 7, it was held that a national court must be free to make a reference on its own motion even contrary to the wishes of the parties. Also, the national court alone has power to determine the questions to be referred, the parties to the main action being unable to change their content or scope. See also: Case 44/65 *Hessische Knappschaft* [1965] ECR 965; Joined Cases C-34–135/91 *Kerafina* [1992] ECR I-5699.

⁷ The CJEU has emphasized that the discretion of the national court to make a reference cannot be compromised by rules of national law, for example a rule that the referring court is

a reference national court must consider that a decision of the CJEU on the question of EU law arising in the proceedings before it ‘*is necessary to give judgement*’. This, in general, means that the result of the case must depend upon the decision of the CJEU, but it is accepted that necessity exists even when the decision is only potentially conclusive.⁸ A reference is not necessary if the answer to the question, regardless of what it may be, can in no way affect the outcome of the case.⁹ The decision at what stage in the proceeding a question should be referred to the CJEU for a preliminary ruling is dictated by considerations of procedural economy and efficiency to be weighed only by the national court and not by the CJEU.¹⁰

2.1. DISCRETIONARY AND MANDATORY REFERENCES

Article 267 TFEU provides that the CJEU shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies offices or agencies of the Union; where such a question is raised before any court or tribunal of a Member State and if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment. However, where any such question is raised in a case pending before a court of 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 CJEU.

It follows, that Article 267 TFEU distinguishes between appealable and non-appealable decisions. As regards appealable decisions, the provision in its second paragraph (Article 267(2) TFEU) vests in the national courts and tribunals the right—but not the duty—to make preliminary references on questions of validity or interpretation of EU law. Such courts will only have the obligation to refer, if they contemplate declaring an EU act invalid.¹¹ In that situation, the obligation to refer cannot be mitigated not even by the *acte clair*

bound by the decisions of a superior court. See e.g.: Case 166/73 Rheinmuhlen v. Einfuhr- und Vorratsstelle Getreide [1974] ECR 33, paras. 3–4; Case 146/73 Rheinmuhlen- Dusseldorf v. Einfuhrund Vorratsstelle Getreide [1974] ECR 139.

⁸ See also: Tridimas T.; Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure; Common Market Law Review 40 (2003); pp. 9 – 50.

⁹ Case 283/81 CILFIT v Ministry of Health [1982] ECR 3415.

¹⁰ Case 14/86 Pretore di Salo v Persons Unknown [1987] ECR 2545.

¹¹ See e.g.: Case 314/85 Foto-Frost [1987] ECR 4199; Case C-344/04 IATA [2006] ECR I-403; Case C-119/05 Lucchini [2007] ECR I-6199; and Case C-461/03 Gaston Schul [2005] ECR I-10513.

or *acte éclairé* principles explained further on in this paper, since a national court cannot declare an EU act invalid, even if similar provisions in another, comparable legal act, have already been declared invalid by the CJEU.

In contrast to just explained, where a question of EU law ‘*is raised in a case pending before a national court or tribunal*’ whose decision is non-appealable, that national court or tribunal ‘*shall bring the matter*’ before the CJEU. According to its wording, Article 267(3) TFEU imposes on all Member State courts of last instance an unconditional obligation to refer a question for preliminary ruling, when that court is not sure about the right interpretation or validity of certain EU law provision.¹² This seemingly indicates that there is *no discretion* when there is no further possible judicial remedy under national law; however, a court of last instance is not under any obligation to refer a preliminary question on the interpretation of EU law, if the answer to the question is not relevant to the ultimate outcome of the main action. Moreover, a court of last instance can refrain from making a reference, if, on the basis of national law, it arrives at a result that makes otherwise relevant EU law provision obsolete for the resolution of the dispute. This situation may arise where national procedural rules are stating, that the matter that gives rise to a problem in EU law cannot be judged, for example, where a claim under EU law is being brought after the expiry of the period of limitation laid down in national procedural law.¹³

In most Member States, the direct competence of a national judge to request a preliminary ruling from the CJEU has its reflection in the national procedural law. This principle of *national procedural autonomy* nevertheless has some restriction.¹⁴ But even in the absence of any such explicit provision in national law, a national court would still be entitled to make a preliminary reference under direct application of Article 267 TFEU, since the right and in some cases the duty of national courts to refer questions for a preliminary ruling follows directly from the TFEU and is independent of the existence of any

¹² See also: Fenger N., Broberg M.; Finding Light in the Darkness: On the Actual Application of the *acte clair* Doctrine; Yearbook of European Law (2011); Volume 30, Issue 1; pp. 180–212; page 181.

¹³ Ibidem, page 183.

¹⁴ Such as the principle of equivalence (national procedural rules designed to ensure the protection of the rights which individuals acquire under Union law should not be less favourable than those governing similar domestic situations) and the principle of effectiveness (those rules should not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order). See Case 33/76 Rewe-Zentralfinanz eG [1976] ECR 1989, para. 5; since then repeated in dozens of cases, e.g. Case 45/76 Comet [1976] ECR 2043, para. 13; Case C-128/93 Fisscher [1994] ECR I-4583, para. 39; Case C-410/92 Johnson [1994] ECR I-5483, para. 21; Case C-78/98 Preston [2000] ECR I-3201, para. 31.

national legal rule. Therefore the national court can initiate a reference for a preliminary ruling even if its own domestic law does not regulate this option or its procedural framework,¹⁵ since the absence of domestic legal regulation does not impede preliminary references.¹⁶

3. EXCEPTIONS – WHEN THERE IS NO DUTY TO REFER

Although Article 267(3) of the TFEU clearly specifies that national courts acting as a final resort are obliged to exercise the reference for a preliminary ruling, the CJEU in its practice developed some exceptions to this obligation and stressed that national courts of last instance nevertheless have some discretion.

In the well-known CILFIT judgment (and many cases that followed) the CJEU emphasized, that a court or tribunal, against whose decisions there is no judicial remedy under national law, is required, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the CJEU, unless it has established that the question raised is (i) irrelevant or (ii) that the provision of EU law in question has already been interpreted by the CJEU (*acte éclairé*) or (iii) that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (*acte clair*).¹⁷

3.1. QUESTION RAISED IS IRRELEVANT TO FINAL JUDGMENT

The national court of last instance is deprived of the obligation to refer a question for a preliminary ruling, if that question is not relevant, that is to say, if the answer to that question can in no way affect the outcome of the main proceeding.¹⁸ Thus the national court is vested discretion in decision whether or not to make a preliminary reference.

Such an exception established by the CJEU in the CILFIT case is not a great surprise, considering the fact, that also Article 267 TFEU itself imposes the obligation to submit a question for a preliminary ruling only, if national court considers that a decision on that question is necessary to enable it to give judgment. Therefore according to the wording of the mentioned Article, there is no

¹⁵ The domestic law of several Member States does not contain separate procedural legal provisions about referring for a preliminary ruling (with the exception of, for example, Scotland, England and Wales, Austria).

¹⁶ See also: Blutman L., 2010, supra n. 4, page 96.

¹⁷ Case 283/81 CILFIT v Ministry of Health [1982] ECR 3415, paras. 10, 13, 14, 16, 21.

¹⁸ Ibidem, para 12.

obligation to refer a question, when the guidance of the CJEU is not indispensable for the national judge to reach his final decision in the main proceeding.

The most positive outcome of this exception is that it protects the CJEU from overwhelming flood of unnecessary cases and it furthermore inhibits unreasonable lengthening of the proceeding before the national court. In this respect one should not forget that in the absence of this exception there could be a danger, that in practice the parties would otherwise try to intentionally abuse a preliminary ruling as an instrument how to defer the final decision of the national court, even if the national court in this regard is not obliged to take into account all the proposals made by the parties of the case, but should instead always start reference procedure on its own motion.¹⁹

3.2. QUESTION HAS ALREADY BEEN INTERPRETED BY THE CJEU (ACTE ÉCLAIRÉ DOCTRINE)

The second valid justification for not submitting a preliminary question to the CJEU is represented by a doctrine known in the francophone legal world as *acte éclairé* - that is 'explained'. The CJEU stated already in 1962 in *Da Costa* case²⁰ that '*an interpretation under Article 177 (now 267 TFEU) already given by the CJEU may deprive the obligation of its purpose and thus empty it of its substance*'. In the literature and the CJEU jargon this is often referred to as '*settled case law*'. Mentioned situation exists, where previous decisions of the CJEU have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions and even if there is not complete congruity between the previous question and the question at issue, provided that the legal situation can nevertheless be held to have been unambiguously clarified through the ruling of the CJEU in the earlier case.²¹

The *acte éclairé* doctrine in practice means, that the decision of the national court is based on the effect of precedent under specific circumstances and not on the national court's own original interpretation of the EU law. Because this exception to the obligation of the national courts to submit a request for

¹⁹ See also: Navratilova M.; *The Preliminary Ruling before The Constitutional Courts; Ústavní soud, Česká republika*; available at: <www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/navratilova.pdf> (12.2.2014); page 2.

²⁰ *Joined Cases 28/62-30/62 Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v. Netherlands Inland Revenue Administration* [1963] ECR 31. See also: *Case 66/80 ICC* [1981] ECR 1191; *Case C-337/95 Parfums Christian Dior* [1997] ECR I-6013; *Case C-421/06 Fratelli Martini* [2007] ECR I-152; and *Case C-260/07 Pedro IV Servicios* [2009] ECR I-2437.

²¹ *Case 283/81 CILFIT*, para 13, 14.

a preliminary ruling to the CJEU is based on precedent, the national court is always at liberty to nevertheless make such a request, even when there has been settled case law, especially when it is of the opinion that the conditions of the case sub-judice are slightly different from earlier precedents and also when it would like to receive some additional guidance, or even when it may want the CJEU to change its earlier case law. When national court on the other hand takes its final decision within the framework of the earlier settled case law, there is of course no reason to submit a request for a preliminary ruling. In this situation there is always a risk, however, that the national court does not make the correct decision and may err in its interpretation of settled case law.²²

3.3. CORRECT APPLICATION OF EU LAW IS OBVIOUS (ACTE CLAIR DOCTRINE)

The third exception for not submitting a request for a preliminary ruling is the *acte clair* doctrine, which is applicable, if the correct application of the EU law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.²³ For an *acte clair* to exist, the conditions are very strict, since a subjective conviction of a national court of last instance is not sufficient. I.e. a national court must be convinced that the matter is equally obvious to all the other courts, not only in the same Member State but in all Member States of the EU and to the CJEU as well. Therefore, when interpreting EU law, a national court against whose decision there is no appeal, must take into consideration the specific characteristics of the EU law. It means to compare different language versions of EU legal acts, since EU legislation is drafted in several official languages and all the different language versions are equally authentic. Moreover national court must be aware of possible divergences in the meaning of legal concepts and used terminology in EU law and in the law of the various Member States and furthermore consider the context and the objectives of EU law itself.²⁴ To say it differently, the existence of *acte clair* must be assessed with taking into account the peculiar features of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Union. Furthermore every provision of EU law must be placed in its context and interpreted in the light of provisions of EU law as a whole, regard being had to the objectives thereof

²² See also: Vaistendael F.; Consequences of the *Acte Clair* doctrine for the National courts and temporal effects of an ECJ decision; K.U.Leuven; 2007; I.B.F.D. Amsterdam; page 3.

²³ Case 283/81 CILFIT, para. 16.

²⁴ See also: Navratilova M., *supra* n. 19, page 2.

and to its state of evolution at the date on which the provision in question is to be applied.²⁵

The important aspect of the *acte clair* doctrine is, that it is not based on precedent by the CJEU. It is rather based on the inexorable logic of the EU law and the conviction of the national court, that the CJEU and other national courts could not under any circumstance come to a different interpretation and application of EU law in question. Precisely because the national court is absolutely convinced about the correctness of its judgment under Union law, there is no need to submit the questions to the CJEU. If national court would have any doubts on the application of EU law, it would need the guidance of the CJEU and would be obliged to submit the case to the latter.²⁶ It should be noted, however, that even were a national court of last instance considers an EU law provision as *clair*, it is not prevented from making a preliminary ruling.²⁷ Further, the fact that another national court has made a preliminary ruling regarding the interpretation of the same provision of EU law, does not in itself exclude the existence of *acte clair* for another national court that is faced with the same legal question.

3.4. OPEN QUESTIONS OF ACTE CLAIRE DOCTRINE

As pointed out above, the CJEU accepted that in principle a national court of last instance may refrain from making a reference for a preliminary ruling where the legal position is unambiguous, whilst it simultaneously laid down a number of conditions that are unusually difficult to satisfy in practice. It follows that even though at first the interpretation of some EU legal act may appear obvious, it may nevertheless prove to be much less so on closer scrutiny, especially when taking into consideration meticulous guidelines given by the CJEU.

Already the condition, that the matter is equally clear to all the other courts raises some open questions, since it will be rather difficult for the court of last instance to consider the provision as ‘*acte clair*’, especially if the judges at lower stages supported a diverging interpretation. Besides if the final decision must be reached in a Chamber of more judges and already among the judges, who are to decide the actual case, there is disagreement about the correct abstract interpretation of the relevant EU law provision, then it seems rather difficult to maintain convincingly that all the other national courts in the EU

²⁵ See also: Tridimas T., 2003, *supra* n. 8, page 43.

²⁶ See also: Vaistendael F., *supra* n. 22, page 3.

²⁷ See Joined Cases C-428/06-434/06 *UGT-Rioja* [2008] ECR-I-6747, para. 43.

will agree with the majority of judges in a Chamber and that no one will reach the same interpretation as the dissenting member of the national court.

However, the bar is set even higher when the national court must also be convinced not only that other national courts will arrive to the same interpretation of EU law provision, but also that they will consider the outcome to be '*obvious*'. As Advocate General Stix-Hackl argued, ultimately the national court can only rely on its own judgment. In contrast, it cannot realistically engage in imagining the workings of the minds of other judges whom it has never met and actually convince itself about the minds of these other persons.²⁸ Not to mention the fact, that the very existence of some diverged decisions by other national courts, where their interpretation of a given EU rule conflicts with the interpretation that the national court at stage considers to be correct, will in most instances in itself deprive the very court from concluding, that no other court would come to a conclusion which differs from the one favoured by the court, that is dealing with the same provision in the main proceeding.²⁹

It follows that the criterion, that the national court invoking *acte clair* must be convinced about how other judges will view the interpretative issue at stake, is close to impossible to fulfil and is undoubtedly much stricter requirement, than the need solely for the national judge alone to feel certain about the correct interpretation of the rule in question.³⁰

It is apparent that the conditions for application of *acte clair* rule are unrealizable for a national judge, since the CJEU forces a national court to use the same methodology as is used by the CJEU itself and also by all the other national courts. On the one hand, it is comprehensible since the standard of the EU law interpretation must be uniform. On the other hand, a national judge usually does not speak fluently several official languages of the EU, so as to be able to compare different language versions. Therefore it is unrealistic to expect from the court of last instance to be able to undertake a qualified review of the meaning of any given EU act in all official language versions, even though in many cases that involve interpretation of EU law, a comparison between different language versions would be relevant. What is more, a national judge equally does not dispose of vast administrative and translation body ready to prepare an analysis of the relevant case-law, the same as it is in the case of the CJEU. Moreover the duty to find information about the case-law

²⁸ The Opinion of Advocate General Stix-Hackl in Case C-495/03 *Intermodal Transports BV* [2005] ECR I-8151, para. 94.

²⁹ See also: Fenger N., Broberg M., 2011, *supra* n. 12, page 181.

³⁰ *Ibidem*, page 187.

of other Member States is illusory. One could conclude, that the way how a national court should proceed when fulfilling all the conditions for *acte clair* doctrine, is so burdensome that simply making a preliminary reference could often be regarded as an easier way to proceed, than trying to resolve a question of interpretation of EU law independently.³¹

In addition of the complexity of the strict criteria and the burdensome process itself, through which a national court should check the fulfilment of the conditions, there are several additional issues worth mentioning. Firstly it should not be overestimated, that in the case of *acte claire* doctrine the CJEU has not ruled on the issue at question yet. This entails a risk of different national courts, including Supreme Courts, coming to mutually conflicting conclusions. Furthermore, a suspicion may occur, whether the right to refrain from making a reference was abused by national courts, that wish to exclude the CJEU when they are about to decide certain cases.³²

Secondly, the very fact that the CJEU has a tendency to develop its case-law in a dynamic fashion and that it retains the right to overrule previous case-law, makes it close to impossible to be absolutely certain about the correct interpretation of certain EU law provision, even where the situation would otherwise seem to be one of *acte éclairé*.³³

Last but not least, a special regard should be given also to the relationship between *acte claire* doctrine and temporal effect of the final judgment. The link between the mentioned two is in the fact, that when the interpretation of a question of EU law is totally clear in the sense of an *acte clair* and national provisions are maintained in violation of the EU treaty provisions, there can be no excuse for a Member State to claim limitations in the temporal effect of a national decision. Indeed *acte clair* in this situation means that the whole framework of EU law dictates a solution for which there cannot be the slightest doubt. A decision by a national judge based on *acte clair* therefore should necessarily have the effect *ex tunc* as far as the interpretation of the EU law and its application in the national legal order is concerned, taking into account that also the judgment of the CJEU under preliminary ruling procedure has the effect from the day, when a specific provision (that was subject to interpretation) entered into force and that the interpretation of the CJEU becomes a part of that interpreted provision.³⁴

³¹ See also: Navratilova M., *supra* n. 19, page 3.

³² See also: Fenger N., Broberg M., 2011, *supra* n. 12, page 186.

³³ *Ibidem*, page 181.

³⁴ See also: Vaistendael F., *supra* n. 22, page 9.

To summarise, it is apparent that in *CILFIT* the CJEU acknowledged the application of this doctrine, but simultaneously attached some very strict conditions to it, especially for circumscribing the scope of the doctrine and also to interpret the *acte clair* doctrine restrictively in order to avoid abuses. Whilst this should mean that a national court of last instance would only be able to rely on the *acte clair* doctrine in rare cases, in reality it seems that the doctrine has gained widespread application, far exceeding what is dictated by the strict criteria. I.e. the approach in subsequent case law of the national courts has been more pragmatic, taking into account, *inter alia*, considerations such as the importance of the case to the parties; the issue of delay at the national stage that can be a consequence of referring a question for a preliminary ruling; and the costs associated with the making of a reference.³⁵ It follows that the *acte clair* doctrine has attained considerable importance in practice, since the national courts of last instance apply a significantly more relaxed interpretation thereof, thus indicating, that they have overlooked the fact, that this actually violates EU law as such and their obligations under Article 267 TFEU more precisely.

4. LEGAL CONSEQUENCES FOR THE INFRINGEMENT OF THE OBLIGATION TO MAKE A REFERENCE FOR A PRELIMINARY RULING

It is undoubtedly that the failure by a court or tribunal of last instance to make a reference for a preliminary ruling, when it's under obligation to do so, constitutes a breach of Article 267 TFEU. It should be highlighted, however, that the TFEU does not explicitly specify any direct sanctions for a national court's failure to comply with the obligation to make a reference. Nevertheless on three different levels, i.e. national, Union and international and under specific conditions for each of them, four types of possible consequences all together may be identified in such situation. They are as follows:

- invalidity of the national ruling or duty to reopen the case at a national level;
- claims for damages at the national level;
- infringement proceedings at the Union level; and
- breach of Article 6 of the European Convention of Human Rights³⁶ (hereinafter: ECHR).

³⁵ See also: Broberg M.; *Acte clair revisited: Adapting the acte clair criteria to the demands of the times* (2008); *Common Market Law Review* 4; Issue 5; pp. 1383–1397; page 1384.

³⁶ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, with Protocol Nos. 1, 4, 6, 7, 12 and 13, 2003.

To say it differently, there are two possible remedies on the national level. First remedy is based on the principle of the *'lawful judge'* which basically means, that the arbitrary refusal of a national court of last instance to make a reference to the CJEU may, on the basis of an individual constitutional complaint, be subject to review by the national Constitutional Court. The lawful judge approach may work, provided that three conditions are satisfied. Firstly, there is a separate and concentrated review of constitutionality, i.e. constitutional jurisdiction. Secondly, that this jurisdiction allows for the review of last instance judicial decisions before the constitutional court in the form of constitutional complaint lodged by an individual. And thirdly, that the system knows the right to a lawful judge or has inferred it from more general rights, such as the right to fair trial, and it is ready to consider the CJEU to be, in proceedings before last instance courts, a lawful judge of its own.³⁷ The reasoning is following: If there is an obligation of the CJEU to participate in certain proceedings and the national court concerned omits this obligation by failure to bring the case before the CJEU, a violation of the right to lawful judge is present.³⁸

The second remedy on the national level may consist in separate proceedings before national courts for breach of EU law, relying on the principle of state liability, as elaborated by the CJEU in the Francovich³⁹ and Brasserie du Pêcheur/Factortame III cases⁴⁰ and later on also in Köbler case,⁴¹ where the prospect of liability in damages for failure of a national Supreme court to comply with the EU law was established. However, in the latter case the CJEU added that state liability in the context of the court of last instance *'can be incurred only in the exceptional case where the court manifestly infringed the applicable law.'* Later on in June 2006 the CJEU took the opportunity to specify some of the principles that were established by Köbler and in case Traghetti del Mediterraneo⁴² highlighted also, that neither the principle of the inden-

³⁷ See also: Bobek M.; Learning to Talk: Preliminary rulings, The Courts of the New Member States and The Court of Justice; Common Market Law Review (2008); Volume 45, Issue 6; pp 1611–1643; page 1629.

³⁸ On the 21.st of November 2013 such an explanation was reached also by the Constitutional Court of Republic Slovenia in Decision Up-1056/11-15, where the Constitutional Court set aside the judgement of Supreme court and returned the case to the same court for reconsideration.

³⁹ Joint cases C-6 and 9/90 Francovich and Bonifaci v. Italy [1991] ECR I-5357. (On state liability see generally: Craig P. and De Búrca G.; EU Law: Text, Cases and Materials; Fifth edition; 2011; Oxford University Press).

⁴⁰ C-46/93 and C-48/93 Brasserie du Pêcheur SA v Germany, and R v. Secretary of State for Transport, ex parte Factortame Ltd and others [1996] ECR I-1029.

⁴¹ Case C-224/01 Köbler v Austria [2003] ECR I-10239.

⁴² Case C-173/03 Traghetti del Mediterraneo SpA v. Repubblica italiana [2006] ECR I-5177.

dence of the judiciary nor that of *res judicata*, can justify general exclusion of any state liability for an infringement of EU law attributable to such a national court.⁴³ It follows that refraining from making references cannot itself lead to a duty to pay damages under EU law, however, when it turns out that a decision of a court of last instance was taken in violation of Article 267(3) TFEU, this may nevertheless be relevant in assessing whether the Member State in question must pay damages for any loss that has been suffered due to the judgment, under the condition, that the breach of EU law was manifest and sufficiently serious.⁴⁴

The only conceivable remedy at the Union level is the procedure for infringement based on Article 258 TFEU brought by the European Commission (hereinafter: Commission). It can be invoked, since the Commission has the power to start the procedure against a Member State before the CJEU for infringement of EU law by the organs of that Member State.⁴⁵ The highest courts of a Member State are indeed considered to be State organs, therefore infringement procedure against a Member State can be used also for breaches of EU law caused by national judicial decisions, as was stated in the CJEU's judgement in case *Commission v. Italy*.⁴⁶ On the basis of mentioned procedure the Commission for the first time in 2004 issued a letter of formal notice to Sweden for breach of Article 267 TFEU. However, it should be emphasized that the Commission is very reluctant to start such procedures, especially since it is seen as an attempt to weaken the independency of the highest national courts.⁴⁷

The possible remedy on the international level is an application to the European Court of Human Rights in Strasbourg (hereinafter: ECtHR), claiming breach of Article 6 of the ECHR, where the principle of fair trial is stated. However, this remedy for now remains without tangible consequences in practice, considering the fact, that the ECtHR has not yet found any Member State liable for such a breach. The question has nevertheless arisen on several occasions

⁴³ See also: Chalmers D., Davies G., Monti G.; *European Union Law, cases and materials*; second edition; 2010; Cambridge University Press; page 301-312.

⁴⁴ See also: Groussot X., Minssen T.; *Res judicata in the ECJ Case law: Balancing Legal Certainty with Legality?*; *European Constitutional Law Review* (2007); Issue 3; pp 385-417; page 393.

⁴⁵ See also: Craig P. and De Búrca G., 2011, *supra* n. 39; Chalmers D., Davies G., Monti G., 2010, *supra* n. 43, page 329.

⁴⁶ See: Case C-129/00 *Commission v. Italy* [2003] ECR I-14637. However, the *Commission v. Italy* case is concerned with systematic and recurring breaches of EU law by the national judiciary and not exclusively with circumventing the obligation to make a preliminary reference.

⁴⁷ See also: Vaistendael F., *supra* n. 22, page 2.

and provoked the discussion.⁴⁸ As a consequence the ECtHR in invoked cases emphasized, that the ECHR does not as such guarantee any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling, but added, however, that *'it is not completely impossible that, in certain circumstances, refusal by a domestic court trying a case at final instance might infringe the principle of fair trial, as set forth in Article 6(1) of the ECHR, in particular where such refusal appears arbitrary'*.⁴⁹ It thus follows that it cannot be completely ruled out, that a failure to make a preliminary reference under Article 267 TFEU could infringe the fairness of proceedings and therefore constitute a breach of Article 6 of the ECHR.⁵⁰

5. CONCLUSION

With the enlargement of the EU and growth of the number of national courts within the EU integration already posing great challenges for the functioning of the EU court system in general and more specifically, for the Article 267 TFEU procedure, the need to ensure legal unity and a uniform interpretation of EU law has grown and not shrank. Such situation does not provide legal certainty and makes legal unity within the Union impossible, if all national courts (being the ordinary law courts of the EU at the same time) are not aware of their role in the European judicial structure. The instruments of State liability for judicial acts (Köbler) or infringement proceedings for judicial acts (Commission v. Italy) provided at the Union level and also the possibility to ask the national Constitutional Courts or even the ECtHR for a review of cases which are already decided in the final instance, are undoubtedly possible tools and remedies able to strengthen the principles of primacy and effectiveness of EU law, but they nevertheless cannot be considered as an alternative for preliminary ruling proceeding.

The latter established under Article 267 TFEU and described by D. Anderson as *'both the most fundamental and the most intriguing part of the evolving*

⁴⁸ In his opinion in Köbler case, Advocate General Léger argued for the first time that the breach of Article 267 TFEU may give rise to liability of a state for infringement of the ECHR but did not analyse thoroughly the conditions of such liability, limiting himself solely to mentioning of several examples (Opinion of Advocate General Léger in Case C-224/01 Köbler, para. 147).

⁴⁹ The case of Coëme and others v. Belgium ECHR 2000-VII, para. 114; available at: <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59194#{"itemid":["001-59194"]} > (12.2.2014); Canela Santiago v Spain (Application No. 60350/00) Decision of 4 October 2001; John v Germany [2007] 45 EHRR SE4 ECtHR.

⁵⁰ See also: Fenger N., Broberg M., 2011, supra n. 12, page 210.

judicial architecture of Europe, since it *'uniquely, appoints the European Court in Luxembourg as meeting-place between the legal order of the Union and those of its Member States'*⁵¹ therefore should remain a constant dialogue and expression of interplay between the CJEU and national judges. But for this to be able to happen, it is firstly the task of national courts, especially those, against whose decision there is no appellate procedure and which are under obligation to make a reference, whenever they have doubts about validity or the right interpretation of EU law provisions.

The CILFIT case, which marked an important stage in the evolution of the relationship between the CJEU and national courts by introducing some exceptions when there is no obligation to start a preliminary reference, therefore should not be misused in order to facilitate the procedure before national courts and enable them to avoid their obligations under EU law. In contrary, the CILFIT case promoted the process of federalization of the judicial system of the EU and is an important indication of maturity in the development of the EU legal order, demanding to be treated with high responsibility.

Should the national courts of last instance overlook this aspect and abuse the purposes established by the CJEU that would have the effect of jeopardizing the uniform application and interpretation of EU law throughout the European integration and furthermore deprive individuals of the effective judicial protection of their rights deriving from EU law. Moreover it could undermine the unity of the case law at the European level and even more, prevent further development of the EU law itself, since it cannot be underestimated, that some major fundamental principles (which had significant consequences for further development of the Union legal system) and also a process towards the constitutionalization of the Treaties were all set in motion through the preliminary reference procedure. Therefore the national courts of lower and even more last instance (while respecting the established case law and conditions specified therein) should, would and could with referring questions to the CJEU indicate clearly, that they consider the jurisprudence of the CJEU within the framework of the preliminary reference procedure as valuable and helpful for them and not as an obstacle in the main procedure they are dealing with. While at the same time paying respect to the work of the CJEU, they would also confirm their awareness, that effective legal protection of individuals is essential for development of EU legal order.

To conclude national courts should recognize more and more that they are also – even in the first place – European law courts and in this regard take over

⁵¹ See also: Anderson D.; *References to the European Court*; Sweet and Maxwell; London 1995; page ix.

responsibilities that come with that. Only in the context of such a Europeanized attitude towards their assignment to the effective legal protection, the EU law will become a pre-eminent point of reference for them and an instrument helping them to contribute to the progressive realization of living supranational legal order in Europe.

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