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LEGAL CONSEQUENCES FOR NOT REFERRING A QUESTION FOR PRELIMINARY RULING

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1. INTRODUCTION

An essential feature of European Union (hereinafter: EU and also Union) legal system is its decentralized character in the sense that it comprises the Court of Justice of the European Union (hereinafter: CJEU)[1] at the EU level and national courts of all EU Member States in their role as ordinary law courts of the EU. This feature follows from the second sentence of Article 19(1) of the Treaty on European Union (hereinafter: TEU)[2] according to which *'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'*. It follows that in this system legal protection of individuals' rights is first of all a matter for all national courts.[3] Consequently they are obliged to give full effect to the EU law and even more they are expected to know and master the entire EU law *ex officio*. Since it can easily happen, that national courts (when applying EU law) are not sure about the right interpretation or have doubts about validity of certain EU law provision, they should under such circumstances request the CJEU to give a preliminary ruling on a matter of Union law.

Such conduct of national courts is provided in Article 267of the Treaty on the Functioning of the European Union (hereinafter: TFEU).[4] Mentioned Article

[1] The institution consists of three judicial bodies: the Court of Justice (Arts. 251 to 253 TFEU), the General Court (Art. 254 TFEU) and specialized courts (Art. 257 TFEU).

[2] OJ C 326 of 26. 10. 2012.

[3] See also: Rene Barents: The Court of Justice after the Treaty of Lisbon, v: Common Market Law Review, 47 (2010), pp. 709–728, p. 715.

[4] OJ C 326 of 26. 10. 2012.

covers a reference-based preliminary ruling procedure which is the principal procedural link between the Member States' courts and the CJEU within the EU legal system. According to this provision, the CJEU has exclusive jurisdiction to give preliminary ruling on the interpretation or validity of certain EU legal measure that the referring national court seeks to apply in the main proceeding. In that case only specific point of EU law is referred to the CJEU which, in turn, rules on that point and remits the issue back to the national court, from where the reference was made, for a final decision. By clarifying such questionable 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 questions for a preliminary ruling follows directly from the TFEU and is independent of the existence of any national legal rule. This is a *sui generis* procedure based on the Treaty itself. National legal rules can supplement but cannot restrict these rules of the TFEU.[5] It follows that the national court can initiate a reference for a preliminary ruling even if its own domestic law does not regulate this possibility or its procedural framework.[6]

The significance of the mentioned procedure cannot be overestimated, since almost all the major principles established by the CJEU were decided in the context of a reference to that court for a preliminary ruling under Article 267 TFEU. The procedure accounts for over 50 % of all cases heard by the CJEU and it plays a central part in the development and enforcement of EU law.[7] Even the CJEU itself in its report[8] to the 1996 IGC was firmly of the view that *'the preliminary ruling system is the veritable cornerstone /.../ since it plays a fundamental role in ensuring that the law established by the Treaties retains its Union character with a view to guaranteeing that the EU law has the same effect in all circumstances in all of the Member States of the EU while at the same time ensuring that individuals are effectively protected by the courts.'* Thus, the principal purpose of Article 267 TFEU is to establish a generally applicable

[5] See e.g.: Case C-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 Alfandega do Porto* [1991] ECR I-3277, para. 45.

[6] See also: László Blutman: The Cartesio judgment: Empowering lower courts by the European Court of Justice, v: Pravo i Politika (ISSN 1820-7529), III (2010) 2, pp. 95–106, p. 96.

[7] See also: Josephine Steiner, Lorna Woods, Christian Twigg-Flesner: EU Law, 9th edition. OUP, Oxford 2006, p. 193.

[8] Report of the Court of Justice on certain aspects of the application of the Treaty on European Union, Luxembourg, May 1995, p. 6 and Opinion of AG Tizzano in case C-99/00 *Lyckekog* [2002] ECR I-4839, para. 69.

interpretation that goes beyond the confines of a single case; furthermore, ensure that EU law preserves its unity and is interpreted and applied in a uniform manner in all Member States; and also prevent a body of national case law not in accord with the rules of EU law from coming into existence in any Member State.[9]

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.[10] One can hardly conclude, whether this means, that in some 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, as follows more precisely later on in this paper. 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.

[9] See e.g.: Case C-107/76 *Hoffmann-La Roche* [1977] ECR 957, para. 5; Joined Cases C-35–36/82 *Morson and Jhanjan* [1982] ECR 3723, para. 8.

[10] E.g.: from Slovenia (since the entrance into EU integration on the 1. May 2004 till now) there were only four questions referred for a preliminary ruling. The first one in case *Detiček* (C-403/09) was send only in 2009, the second one in 2009 as well 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 preliminary ruling procedure and thus importantly influence on the development of EU law. Until now Slovenia in the nine 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 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 a significant impact on the Slovenian legal order. The same applies to all the other Member States.

2. REFFERING A QUESTION – THE RIGHT AND THE DUTY

In principle the question whether to make a reference falls within the exclusive jurisdiction of the national court. The court enjoys absolute discretion and may make a reference on its own motion, regardless from any interference from the litigants[11] or constraints imposed by national law.[12] In deciding whether to make a reference the national court must consider, that a decision of the CJEU on the question of EU law arising in the proceeding 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.[13] 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.[14] 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.[15]

2.1. The procedure

Article 267 TFEU provides that:[16]

'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

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[11] In Case C-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 C-44/65 *Hessische Knappschaft* [1965] ECR 965; Joined Cases C-34–135/91 *Kerafina* [1992] ECR I-5699.

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

[13] See also: Takis Tridimas: Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure, v: Common Market Law Review, 40 (2003), pp. 9–50.

[14] Case C-283/81 *CILFIT v. Ministry of Health* [1982] ECR 3415.

[15] Case C-14/86 *Pretore di Salo v. Persons Unknown* [1987] ECR 2545.

[16] The changes made to Article 234 EC via the Treaty of Lisbon and enacted in Article 267 TFEU may be viewed online at: <en.euabc.com/upload/Reader_friendly_sept_2009-net.pdf> (12. 2. 2014).

(a) the interpretation of the Treaties;

(b) the validity and interpretation of the institutions, bodies office or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

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 Court.'

2.2. Discretionary and mandatory references

Second and third paragraph of Article 267 TFEU both refer to courts and tribunals of Member States.[17] However, in seeking a preliminary ruling, whereas second paragraph provides that a court of a Member State has discretion in that it '*may request*' a ruling, third paragraph provides that in certain cases a court or tribunal '*shall bring the matter before the CJEU.*'[18]

It follows that Article 267 TFEU distinguishes between appealable and non-appealable decisions. As regards appealable decisions, courts or tribunals have an unfettered discretion in deciding to seek a preliminary ruling. To emphasise this point: it is for the lower national courts to decide whether or not to make a reference; to decide the legal issue(s) for reference; and to decide at what stage in the proceeding to make the reference. That an appeal is pending before an appellate court is no bar for making a reference; neither is a national court precluded from making a reference when the CJEU has already ruled on a similar question from another court.[19] Such courts will only have the obligation to refer, if they contemplate declaring an EU act invalid.[20] In this situation, the

[17] Whether a particular body qualifies as a court or tribunal having the authority to request a preliminary ruling is a matter of Union law. The CJEU in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, for the first time in the Case C-61/65 *Vaassen* [1966] ECR 261 and later on in Case C-54/96 *Dorsch Consult* [1997] ECR I-0496, laid down five criteria via which a court or tribunal might be identified. Those criteria are: statutory origin; permanence; *inter partes* procedure; compulsory jurisdiction; and the application of rules of law.

[18] See also: Gwyn Tovey: Preliminary Rulings under Article 267 TFEU [ex.Art.234 EC/Art.177 EEC], available at: <www.topnotes.org/EU-4-1-PrelimRJan2011.pdf> (15. 2. 2014), p. 6.

[19] Joined Cases C-28-30/62 *Da Costa en Schaake NV* [1963] ECR 31.

[20] See e.g.: Case C-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; Case C-461/03 *Gaston Schul* [2005] ECR I-10513.

obligation to refer cannot be mitigated not even by the *acte clair* 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 the above, 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.[21] This seemingly indicates that a reference must be made by a national court when there is no further possible judicial remedy under national law against the decisions of that very court; when in a case pending before that court any question relating to the interpretation of the Treaty and/or the interpretation or validity of an act of an EU Institution is raised; and a decision on that very question is necessary to enable the national court of the last instance to give the final judgment.[22]

In most Member States, the direct competence of the national judge to request a preliminary ruling from the CJEU has its reflection in the national procedural law. But even in the absence of any such express provision in national law, the 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 national legal rule. National legal rules can supplement but cannot restrict these rules of the TFEU.[23] Therefore the national court can initiate a reference for a preliminary ruling even if its own domestic law does not regulate this possibility[24] or its procedural framework.[25]

[21] See also: Niels Fenger, Morten P. Broberg: Finding Light in the Darkness: On the Actual Application of the acte clair Doctrine, v: Yearbook of European Law, 30 (2011) 1, pp. 180–212, p. 181.

[22] See also: G. Tovey, op. cit., p. 10.

[23] See e.g.: Case C-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.

[24] 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).

[25] See also: L. Blutman, op. cit., p. 96.

2.3. The actual consequences of submitting a request for a preliminary ruling

The first consequence of sending a question for a preliminary ruling is that a reference calls for the national proceedings to be stayed until the CJEU has given its ruling.[26] The national court may, however, take protective measures or suspend the application of a national measure, particularly in a reference on determination of validity. The national court may furthermore issue other orders as far as the position of the parties is concerned, typically a preliminary order or an injunction.[27] But any such measure taken, should not affect the final outcome of the main dispute.

Secondly the judgement of the CJEU binds the national court that made the reference and all the other national courts that will later on have to deal with the same case.[28] What is more, in all subsequent cases at the national level, where the same point of EU law arises before the same or other national courts, those courts may either follow the already existing judgement or make a fresh reference.[29] These are the only two options national courts have, since they cannot on their own motion accept contradictory solution or different interpretation of EU law in similar cases. In this regard it should be pointed out as well, that in giving a ruling on interpretation, it may happen that the CJEU (depending on the questions raised by the national court) gives a general indication of the meaning of the provision at issue, or more precise and specific interpretation.[30] In the latter case, national courts are even more limited in giving the final judgement in the main procedure pending before them and also in all the other similar cases.

However the preliminary ruling should not be considered only as an obstacle or a burden for national courts, but as a useful help as well. It is to say, that the judgement of the CJEU can be regarded as an important guidance and firm insurance that at least the interpretation of EU law provision in the case at hand is correct and lawful, thus importantly reducing the doubts and uncertainty of national judge, who has to decide in the main proceeding.

[26] Court of Justice: Information note on references from national courts for a preliminary ruling, OJ 2009/C 297/01, para. 25.

[27] See also: Michal Bobek: Learning to Talk: Preliminary rulings, The Courts of the New Member States and The Court of Justice, v: Common Market Law Review, 45 (2008) 6, pp. 1611–1643, p. 1624.

[28] Especially in the event of an appellate procedure, if a lower court sent a question for a preliminary ruling or in a case of other procedures.

[29] Joined Cases C-28–30/62 *Da Costa* [1963] ECR 31.

[30] See e.g.: Case C-36/74 *Walrave & Koch v. Union Cycliste Internationale* [1974] ECR 1405; Case C-32/75 *Cristini v. CNCF* [1975] ECR 1085.

2.4. Control of admissibility

The starting point remains that it is for the national court to determine the need for a preliminary reference and the questions to be referred.[31] In that sense, there is a presumption of relevance attached to the questions referred by national courts for a preliminary ruling, which may be rebutted only in exceptional cases. In principle, the CJEU is therefore bound to give a ruling, unless it cannot provide an adequate answer due to the questions submitted by the national courts.[32]

It follows that the CJEU may decline jurisdiction in the following cases:

- where the referring court has failed to define adequately the legal and factual background to the dispute;[33]
- where the question referred is general or of a hypothetical nature;[34]
- where the issues of EU law on which the referring court seeks guidance bear no relation to the actual nature of the case or the subject-matter of the main action;[35] or
- where the question does not fall within the scope of EU law.[36]

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[31] See e.g.: Case C-415/93 *Bosman* [1995] ECR I-4921, para. 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, para. 38; Case C-153/00 *Der Weduwe* [2002] ECR I-11319, para. 31; Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, para. 40.

[32] See also: Xavier Groussot: Spirit Are You There? Reinforced Judicial Dialogue and the Preliminary Ruling Procedure, v: Eric Stein Working Paper, 4 (2008), p. 14.

[33] See e.g.: Joined Cases C-320–322/90 *Telemarsicabruzzo SpA v. Circostel* [1993] ECR I-393; Joined Cases C-128-137/97 *Testa and Modesti* [1998] ECR I-2181; Case C-9/98 *Agostini* [1998] ECR I-4261; Case C-116/96 *REV Reiseburo Binder GmbH* [1998] ECR I-1889; Joined Cases C-28–29/98 *Charreire and Hirtsmann v. Directeur des Services Fiscaux de la Mossele* [1999] ECR I-1963; Case C-325/98 *Anssens v. Directeur des Services Fiscaux du Nord* [1999] ECR I-2969; Case C-422/98 *Colonia Versicherung and Others v. Belgian State* [1999] ECR I-1279; Case C-116/00 *Laguillaumie* [2000] ECR I-4979.

[34] See e.g.: Case C-83/91 *Meilicke* [1992] ECR I-4871; Joined Cases C-320–322/90 *Telemarsicabruzzo* [1993] ECR I-00393; Case C-157/92 *Banchero* [1993] ECR I-01085.

[35] See e.g.: Case C-343/90 *Lourenco Dias* [1992] ECR I-4673; Case C-104/79 *Foglia v. Novello* [1980] ECR 745; Case C-244/80 *Foglia v. Novello* [1981] ECR 3045; Case C-153/00 *Paul der Weduwe* [2002] ECR I-11319; Case C-318/00 *Bacardi Martini SAS v. Newcastle United Football Company Ltd* [2003] ECR-00905.

[36] See e.g.: Case C-328/04 *Attila Vajnai* [2005] ECR I-8577; Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-01683, para. 33; Case C-127/08 *Metok* [2008] ECR I-6241, para. 77. In *Metock* the CJEU stated that it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by EU law and which are confined in all relevant respects within a single Member State.

In fact the case law does not distinguish clearly between the second and the third category mentioned above, but it is nevertheless evident, that the hypothetical nature of the questions referred includes the cases where the proceedings are contrived.[37] By contrast, the CJEU firmly follows its stance that it will not examine whether the referring court lacks jurisdiction according to the procedural rules of national law. Nor will it investigate whether the factual findings of the referring court are correct.[38] To say it differently, the duty assigned to the CJEU by Article 267 TFEU is not that of delivering advisory opinions on general or hypothetical questions, but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply on questions of interpretations which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the CJEU to give its views on certain problems of EU law which do not correspond to an objective requirement inherent in the resolution of a dispute.[39]

3. EXCEPTIONS – WHEN THERE IS NO DUTY TO REFFER

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 is not so strict in interpretation of mentioned provision. In the well-known CILFIT judgment[40] and many cases that followed, the CJEU emphasized, that there are certain conditions exempting the court of last instance of the obligation to make a preliminary reference on the interpretation of EU law. The case-law of the CJEU specifies three different situations.

Firstly, the national court is deprived of the obligation to refer a question, 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.[41] Thus the national court is vested discretion in decision whether or not to make a preliminary reference. This exception protects the CJEU from overwhelming flood of unnecessary cases and inhibits unreasonable lengthening of the proceeding before the national court.[42]

[37] See e.g.: Case C-244/80 *Foglia v. Novello* [1981] ECR 3045, para 18; Case C-343/90 *Lourenco Dias* [1992] ECR I-04673, para 17.

[38] See e.g.: Case C-435/97 *World Wildlife Fund v. Autonome Provinz Bozen* [1999] ECR I-5613, para. 32; Case C-379/98 *Preussen Elektra* [2001] ECR I-2099, para 40.

[39] See also: G. Tovey, op. cit., p. 6.

[40] Case C-283/81 *CILFIT* [1982] ECR 3415.

[41] Ibidem, para. 12.

[42] See also: Marketa Navratilova: The Preliminary Ruling before The Constitutional Courts, Ústavní soud, Česká Republika, available at: <www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/navratilova.pdf > (16. 2. 2014), p. 2.

The second exception is presented by a doctrine known in the francophone legal world as *acte éclairé* – that is 'explained'. This 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.[43] The *acte éclairé* doctrine in practice means, that the final decision of 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.

The third exception for not submitting a request for a preliminary ruling is called *acte clair*, i. e. "clear" and 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.[44] For an *acte clair* to exist the conditions are very strict, since a subjective conviction of a national court is not sufficient; 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.[45] It follows that the *acte clair* doctrine 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.[46]

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[43] Case C-283/81 *CILFIT* [1982] ECR 3415, para. 13, 14.

[44] Ibidem, para. 16.

[45] See also: M. Navratilova, op. cit., p. 2.

[46] See also: Frans Vaistendael: Consequences of the Acte Clair doctrine for the National courts and temporal effects of an ECJ decision, K.U.Leuven, I.B.F.D. Amsterdam, available at: <www.ideff.pt/xms/files/Iniciativas/Conf_17_18Set_2007/-vd4-FRANSVANISTENDAELPANEL4.pdf> (14. 2. 2014), p. 3.

One can conclude that the conditions attached to all those exceptions and especially to the *acte clair* doctrine are very strict, especially for the purpose of circumscribing the scope of the exceptions – and also to interpret all those exceptions restrictively in order to avoid abuses. However whilst this should mean that a national court of last instance would be able to rely on those exceptions only in rare cases, in practice it seems that especially the *acte clair* doctrine has gained widespread application, far exceeding what is dictated by the strict criteria, thus indicating, that national courts 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 follows from the above stressed, that at the end of the day the national judge is still the final arbiter on the question whether he will submit a request or not, despite the fact that under certain circumstances he is under obligation to do so. One could say this whole system is built on trust and the bona fide exercise by the national judges of their decision making power. When national judges would refuse to submit requests which are clearly necessary to resolve questions of EU law, this would be tantamount to a *mala fide* exercise of their powers, seriously undermining the legal foundations of the EU[47] and violating 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 for a preliminary ruling. 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 a 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 Rights[48] (hereinafter: ECHR).[49]

[47] Ibidem, p. 2.

[48] 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.

[49] See also: N. Fenger, M. P. Broberg, op. cit., pp. 205–210.

To say it differently, there are two possible remedies on the national level. Firstly, there is a remedy 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 be subject to a review by a national Constitutional Court. The second remedy on the national level may consist in separate procedure before national court for breach of EU law, relying on the principle of state liability, as elaborated by the CJEU in the Francovich[50] and Brasserie du Pêcheur/Factortame III cases[51] and later on also in Köbler case,[52] where the prospect of liability in damages for failure of a national Supreme court to comply with the EU law was established. The only conceivable remedy on the Union level is the procedure for infringement based on Article 258 TFEU brought by the European Commission (hereinafter: Commission). The possible remedy on the international level is an application to the European Court of Human Rights in Strasbourg (hereinafter: ECtHR).

4.1. Review by a national Constitutional Court and consequently invalidity of the national ruling or duty to reopen a case at a national level

Although constitutions of the EU Member States do not explicitly guarantee the right to have a question submitted to the CJEU for a preliminary ruling, this right forms a constituent part of the right to a fair trial or the right to a lawful judge or a statutory judge,[53] which is guaranteed at a constitutional level in all of the countries of EU integration.[54] A remedy based on the principle of the

[50] Joined Cases C-6-9/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5357. On state liability see generally: Paul Craig, Grainne de Búrca: EU Law: Text, Cases and Materials, Fifth edition. Oxford University Press, Oxford 2011.

[51] Cases 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.

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

[53] The violation of the obligation to make a preliminary reference can be constructed as a disrespect towards **the right to lawful judge**, furthermore **the right of access to the court** as an element of **the right to fair trial** or equally more generally as a disrespect towards **the right to judicial protection** whose one of the components is the right to lawful judge. This approach is based on an idea that the right to judicial protection contains i.e. a guarantee that a national court shall make use of the interpretation provided by the competent judicial body (the CJEU). The failure to engage the CJEU does not represent a correctly provided judicial protection; in this case the question of the lawful judge is secondary (See also: M. Navratilova, op. cit., p. 5).

[54] See also: Regina Valutytė: Legal consequences for the infringement of the obligation to make a reference for a preliminary ruling under constitutional law, v: Jurisprudence, Mykolas Romeris University, Department of International and European Union Law, 19 (2012) 3, pp. 1171–1186, p. 1182.

lawful judge was first fashioned by the German Federal Constitutional Court in Solange II. Judgement.[55] According to the decision, the CJEU is a sovereign judicial body that renders final judgements independently. Since the CJEU enjoys a judicial monopoly in the decision-making regarding the interpretation and the validity of EU law in the preliminary ruling, it represents a lawful judge in this sphere. 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.[56]

However 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. This means that there is an additional way of challenging final decisions of ordinary courts of last instance, if the individual believes her or his fundamental human rights have been violated. 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 a fair trial, and it is ready to consider the CJEU to be, in proceedings before last instance courts, a lawful judge of its own.[57]

According to just stressed it may follow from national law of each Member State that the setting aside of the obligation to make a reference under Article 267(3) TFEU can in itself lead to the judgment or order in question being invalid, since the Constitutional Court may annulled such rulings of the courts acting as courts of last instance, where the latter decline to make a preliminary reference. That would be a case, if a refusal of such court may amount to an infringement of the specific Member State's constitutional principle laid down in the national Constitution or other Basic law, that no one may be deprived of the protection of the courts established by law. The examination of the Constitutional Court is limited to whether the application of Article 267 TEFU of the court of last instance was manifestly unjustifiable, and in particular whether that court has totally violated its obligation to refer.[58] It follows that a mere procedural defect is not sufficient; the basis for the violation of the right to a

[55] Judgement available at: <www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=572> (14. 2. 2014).

[56] On the 21st of November 2013 such an explanation was reached also by the Constitutional Court of the Republic of 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.

[57] See also: M. Bobek (2008), op. cit., p. 18.

[58] See also: N. Fenger, M. P. Broberg, op. cit., p. 206.

fair trial (a lawful judge or a statutory judge) in all jurisdictions is an arbitrary[59] infringement attributable to a national court.[60]

In this respect it is necessary to emphasize that in contrast EU law itself does not contain a principle, according to which a breach of the obligation to refer, laid down in Article 267(3) TFEU, must lead to the invalidity of the decision of the national court. This is so regardless of the fact that Article 267 TFEU has direct effect on national legal systems. In fact, the CJEU has recognized the importance of the principle of *res judicata*[61] in the legal systems of both the EU and its Member States. Even more, the CJEU emphasized, that in order to ensure the stability of the law together with stability of legal relations on the one hand and the sound administration of justice on the other hand, it is important that judicial decisions are definitive and can no longer be called into question after all rights of appeal have been exhausted or after the expiry of the time limits.[62] Therefore EU law does not require a national court to misapply domestic rules of procedure conferring finality on a decision, even if to do so would enable the national court to remedy an infringement of EU law.[63] This principle applies both to situations where the infringement consists of a national ruling that is contrary to EU law with regard to substance and to infringements of a procedural nature, such as an omission to respect Article 267(3) TFEU.

In the absence of EU rules it is thus accepted, that all the issues about reopening the case are regulated solely by national law. Not even does the EU law impose any time limits on how late a party can ask for reopening of the national proceedings. Consequently, the matter must be settled in accordance with the principle of procedural autonomy, which means that Member States remain free to set reasonable time limits for seeking remedies in a manner consistent with the EU principles of effectiveness and equivalence.[64]

4.2. Claims for damages at the national level

The second remedy on the national level may consist in separate procedures before national courts for breach of EU law, relying on the principle of state

[59] The *Kloppenburg* judgement provides an explanation of the notion 'arbitrary and non justifiable'. See judgement C-70/83 *Kloppenburg* [1984] ECR 1075.

[60] See also: R. Valutytė (19(3), 2012), op. cit., p. 1182.

[61] The principle of *res judicata* means that a matter adjudicated is held to be true and a new case of the same subject-matter, legal basis and parties cannot be opened again.

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

[63] See e.g.: case C-126/97 *Eco Swiss* [1999] ECR I-3055; Case C-234/04 *Kapferer* [2006] ECR I-2585.

[64] See also: N. Fenger, M. P. Broberg, op. cit., pp. 206–207.

liability. The principle of state liability for breaches of EU law was first introduced by the CJEU in the Francovich-case, as pointed out above. The meaning of the principle is that when three criteria, further elaborated on in Brasserie du pêcheur / Factortame III are fulfilled, an individual can claim damages for breach of EU law before national courts. In short the three criteria are, firstly, that the rule of law infringed must be intended to confer rights on individuals. Secondly, the breach must be sufficiently serious. Finally, there must be a direct causal link between the breach of the obligation of the State and the damage sustained by the injured parties.[65] The CJEU based its reasoning on the principle of loyalty[66] and on the Union's own liability under Article 340 TFEU[67] (ex. 288 TEC).[68] Drawing on international law the CJEU therefore already in 1996 stated, that state liability could not depend on which body of the State the breach is attributed to, indicating that also actions by the judiciary are covered.[69]

This was indisputably confirmed in 2003, when in the Köbler-case the CJEU, after much speculation in the doctrine, finally explicitly pronounced its opinion on liability for breaches by the judiciary. The CJEU, sitting in full session, repeated its position out-lined in Brasserie du Pêcheur/ Factortame that based on international law, a State is to be seen as a unity and thus responsible also for the conduct of its judiciary.[70] In this respect the CJEU also added that the role of the judiciary is especially important in order to ensure the effectiveness of rights derived by individuals from EU law and from this follows, according to the CJEU, that individuals must have a possibility of obtaining redress in the case of damage caused by national courts.[71] However regarding the conditions governing State liability for the actions of courts of last instance, the CJEU first stated that they are the same as the ones found in Brasserie du pêcheur / Factortame III for other State bodies, but nevertheless continued, commenting on the second condition, that state liability in the context of the court of last instance *'can be incurred only in the exceptional case where the court manifestly*

[65] Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, para. 51.

[66] Joined Cases C-6–9/90 *Francovich* [1991] ECR I-5357, para. 36.

[67] The relevant provision of Article 340 TFEU reads as follow: *'In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'*

[68] Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, paras. 28–29 and 47.

[69] Ibidem, paras. 28–29 and 34.

[70] Case C-224/01 *Köbler v. Austria* [2003] ECR I-10239, para. 32.

[71] Ibidem, paras. 33–36.

infringed the applicable law.' The factors to take into account when determining this are the same factors as outlined in earlier cases in regards to other State organs, including the degree of clarity and precision of the rule infringed; whether the infringement was intentional and excusable or not and the position taken by an EU institution. However, the CJEU made one important addition in stating that of importance is also *the 'non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC'* (now Article 267 TFEU).[72]

In June 2006 the approach on liability for breaches by the judiciary was additionally confirmed and specified by Traghetti del Mediterraneo[73] where the CJEU took the opportunity to specify some of the principles that were established by Köbler.[74] The CJEU highlighted that, having regard to the specific nature of the judicial function and to the legitimate requirements of legal certainty, state liability in cases concerning the infringement of EU law by courts adjudicating at last instance is not unlimited and can be incurred only in exceptional cases where there has been a manifest infringement of the applicable law.[75] However, the CJEU also clearly emphasized that neither the principle of the independence 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.

For the above-mentioned reasons the CJEU finally ruled, that EU law precludes national legislation, which excludes state liability in a general manner for damage caused to individuals by an infringement of EU law attributable to a court adjudicating at last instance by reason of the fact, that the infringement in question resulted from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court.[76] Correspondingly, the CJEU decided that EU law also precludes national legislation which limited such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of

[72] Ibidem, para. 55. See also: C-46/93 and C-48/93 *Brasserie du Pêcheur*, para. 56, where the same factors are listed, except for the fact, that the discretion of the body in breach is not mentioned in *Köbler*.

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

[74] See also: Xavier Groussot, Timo Minssen: Res judicata in the ECJ Case law: Balancing Legal Certainty with Legality?, v: European Constitutional Law Review, 3 (2007), pp. 385–417, p. 393.

[75] Case C-173/03 *Traghetti del Mediterraneo* [2006] ECR I-5177, paras. 34, 35.

[76] Ibidem, paras. 46, 47 and 50.

the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out already in Köbler case.[77]

According to all stressed 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 be relevant in assessing whether the Member State in question must pay damages for any loss that has been suffered due to the judgment. It may, however, be quite a delicate task for a lower national court to assess whether a superior court has incurred liability due to a sufficiently serious infringement of EU law. Moreover, a problem of incapacity can arise, if the matter is to be brought before the court of last instance that is held to have committed the infringement. In practice it will probably be a rare occurrence that a judgment of a national court will justify an award of compensation under EU law also according to the fact, that the condition that the breach of EU law must be regarded as manifest and sufficiently serious, is extremely strict and hard to be fulfilled or proven.

Thus a Member State will really only be held liable under the CJEU's Köbler ruling in exceptional cases, i.e. in a case of bad faith of national judicial body,[78] meaning that the *'Köbler liability'* is definitely no surrogate for the preliminary reference procedure. Nevertheless it cannot be underestimated that the possible scope for national courts to interpret EU law is more limited post-Köbler, when the risk of a liability claim has been established, even if the cautious application has not yet created a *de facto* hierarchy in European judicial system.

4.3. Infringement proceedings under Article 258 TFEU

As follows it is incumbent on the Member States to ensure that their national courts fulfil the obligation to make references under Article 267 TFEU. If they fail to do this, the Commission can initiate infringement proceedings[79] under Article 258 TFEU,[80] as happened for the first time in 2004, when the Com-

[77] See also: X. Groussot, T. Minssen; op. cit., p. 398.

[78] See also: N. Fenger, M. P. Broberg, op. cit., p. 208.

[79] Due to the limited space, this procedure cannot be explained in further details in this paper, however numerous academics have analyzed mentioned issue, therefore it can be found in their contributions. See e.g.: Paul Craig, Grainne de Búrca: EU Law: Text, Cases and Materials, Fifth edition. Oxford University Press, Oxford 2011.

[80] Article 258 TFEU reads as follows: *'If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.'*

mission issued a letter of formal notice to Sweden for breach of Article 267 TFEU.[81] This proceeding is the only conceivable remedy on the Union level and can be invoked, since the Commission has the power to start a procedure against a Member State before the CJEU for infringement of EU law, caused by any organ of that Member State. The highest courts of a Member State are indeed considered to be organs of the State, therefore infringement proceedings against a Member States 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.[82]

The infringement procedure can be initiated, since the Commission (when fulfilling its task as Guardian of the Treaty) is responsible for ensuring that EU law is correctly applied in all Member States. Consequently, where a Member State fails to comply with the EU law, the Commission has powers of its own to try to bring the infringement to an end and, where necessary, may refer the case to the CJEU.[83] The Commission takes whatever action it deems appropriate in response to either a complaint or indications of infringements which it detects itself.[84]

It follows that when national courts from specific Member State do not respect their obligation under EU law and refer questions for preliminary ruling, when they should, the Commission can start infringement procedure against that Member State before the CJEU. If the CJEU finds that there indeed was a breach or that there is inconsistency between national legislation and provisions of EU law, it may impose a lump sum or penalty payment on the Member State concerned. Imposed fine is the revenue of the European Union. The individual can benefit indirectly from such proceedings, as they can help him to prove, that there indeed was a breach of Article 267(3) TFEU. That is extremely

[81] In 2004 the Commission issued a letter of formal notice to Sweden for breach of Article 267 TFEU. According to the Commission, the Swedish authorities should have adopted rules to ensure that the Swedish courts of last instance made references for preliminary rulings in connection with decisions on whether a right of appeal should be granted. Next, the Commission argued that reasons should be given for the refusal of the court of last instance to grant leave to appeal, so as to make it possible to assess whether the requirements of Article 267(3) TFEU were fulfilled. (See also: N. Fenger, M. P. Broberg, op. cit., p. 209).

[82] 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.

[83] See also: Infringements of EU law, available at: <ec.europa.eu/eu_law/infringements/infringements_en.htm> (15. 2. 2014).

[84] The infringement procedure can be initiated *ex officio*, following a proposal from a Member State or from a person reporting the infringement, be it a legal or a natural person.

important, if individual at the same time or later on, starts also his own separate procedure against the same Member State before its national courts for breach of EU law and (relying on the principle of state liability) claims damages for any loss that has been suffered due to the judgment, as explained in the previous section.

However, in this respect it should be emphasized that upon receipt of a complaint (from individual or any other affected legal subject) concerning the infringement of EU law by a Member State, the Commission has a wide discretion to decide whether or not to initiate a proceeding and how to proceed with an alleged case of infringement. This means that the Commission is under no obligation to start infringement proceedings.[85] What is more, the Commission is actually very reluctant to start such procedures, especially since it is seen as an attempt to weaken the independency of the highest national courts and thus negatively affecting the independence of the judiciary as whole.[86] Hence, it is very well possible that, despite the mistake committed by a national highest court, no infringement proceedings will be started and no action for European institution's failure to act (on the basis of Article 265 TFEU) against the Commission could successfully be initiated.[87]

4.4. Breach of Article 6 of the European Convention of Human Rights

Whether the national court's failure to make a preliminary reference may constitute also a breach of international human rights law, especially Article 6 of the ECHR,[88] where the principle of fair trial is settled, has arisen on several occasions and provoked the discussion,[89] but for now remains without tangi-

[85] See Case C-247/87 *Star Fruit v. Commission* [1989] ECR 291, para. 11.

[86] See also: F. Vaistendael, op. cit., p. 2.

[87] See also: Mariolina Eliantonio, Chris Backes: Taking constitutionalization one step too far? The need for revision of the Rheinmühlen case law in the light of the AG opinion and the ECJE's ruling in Elchinov, v: Maastricht Faculty of Law Working Paper, 9 (2010), available at: <ssrn.com/abstract=1722631> (13. 2. 2014), p. 9.

[88] See also: Regina Valutytė: State Liability for the Infringement of the Obligation to Refer for a Preliminary Ruling Under the European Convention on Human Rights, v: Jurisprudence, Mykolas Romeris University, Department of International and European Union Law, 19 (2012) 1, pp. 7–21.

[89] 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. See: Opinion of Advocate General Léger in Case C-224/01 *Köbler*, para. 147. See also: N. Fenger, M. P. Broberg, op. cit. and R. Valutytė (19 (2012) 1), op. cit., p. 9.

ble consequences in practice, considering the fact, that the ECtHR has not yet found any Member State liable for such a breach.

Nevertheless in case Coëme,[90] the ECtHR was asked to consider whether the Belgian Court of Cassation had committed an infringement of Article 6 of the ECHR when it refused to make a preliminary reference to the Belgian Administrative Jurisdiction and Procedure Court on certain issues relating to the main proceedings. The ECtHR first observed 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. This was so even where a particular field of law may be interpreted only by a court designated by statute and where the legislation concerned requires other courts to refer to that court, without reservation, all questions relating to that field. The ECtHR 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 Convention, in particular where such refusal appears arbitrary'*.[91] Arguably, the reasoning in the ECtHRs' ruling in Coeme was applied also to a national court's failure to make preliminary references to the CJEU.[92] 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.[93]

However two main obstacles may appear. Firstly in a relation to the notion, that the refusal to make a preliminary reference must be arbitrarily, since there is no clear guidance on how exactly this condition should be interpreted, but it is more than evident, that the refusal will be considered as arbitrarily only in exceptional cases.[94] I.e. the analysis of the ECtHR's decisions on admissibility, related to the implementation of the obligation to make a reference for a

[90] Case *Coeme and others v. Belgium* (Applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96), Decision of 22 June 2000, para. 114, available at: <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59194> (15. 2. 2014).

[91] See also: N. Fenger, M. P. Broberg, op. cit., p. 210.

[92] See e.g.: Case *Canela Santiago v. Spain* (Application No 60350/00), Decision of 4 October 2001, where the ECtHR indirectly confirmed, that the refusal to refer a case to the CJEU for a preliminary ruling could infringe the fairness of proceedings within the meaning of Article 6 ECHR, if it appeared to be arbitrary.

[93] See also: N. Fenger, M. P. Broberg, op. cit., p. 210.

[94] In Case *Canela Santiago v. Spain*, the ECtHR held that the Spanish Supreme Court's failure to make a preliminary reference to the CJEU did not constitute an infringement of Article 6 of the ECHR **because** the Supreme Court **had set out its reasons** for not making a preliminary reference. Accordingly, the refusal to make a preliminary reference could not be regarded as arbitrary.

preliminary ruling to the CJEU, shows, that the motivation of the decisions of national courts of last instance not to refer is not limited. Thus the national courts can employ any duly justified reason.[95] Secondly, since some applications to the Strasbourg court concerning alleged violations of the duty to make a preliminary reference under 267(3) TFEU, claiming violations of Articles 6 (1) (fair trial), 13 (the right to an effective remedy) and 14 (the prohibition of discrimination) of the ECHR, have failed at the admissibility stage, it may be considered that the ECtHR is well aware of the sensitivity of enforcing the obligation to refer for the relationship between national courts and the CJEU and it will, therefore, continue to dismiss applications to review alleged breaches of the duty to refer under Article 267(3) TFEU.

5. CONCLUSION

The preliminary ruling procedure established under Article 267 TFEU was described by D. Anderson as *'both the most fundamental and the most intriguing part of the evolving 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'*.[96] As a main tool in uniform application of the EU law, therefore should remain a constant dialogue and an expression of interplay between the CJEU and national judges. But for this to be able to happen, it is firstly a task for 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 refer, therefore should not be abused in order to facilitate the procedure before national courts and enable them to avoid their obligations under EU law, but should instead be treated with high responsibility. Should the national courts of last instance overlook this aspect and circumvent 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 the EU law.

[95] See also: R. Valutytė (19(1) 2012), op. cit., p. 18.

[96] See also: David Anderson: References to the European Court. Sweet and Maxwell, London 1995, p. ix.

To prevent such unpleasant consequences some legal remedies, discussed in this paper, have been established and are provided. However an extensive investigation of those remedies yields the conclusion, that the legal protection of individuals against possible breaches of Article 267 TFEU is probably quite far from ideal. Such practice is unsatisfactory and requires reforms. Nevertheless it should not be underestimated, that sanctions (despite their deficiencies) are provided and that certain procedures already now can be invoked. Without them legal certainty and uniform interpretation and application of EU law throughout the Union would be even harder to achieve. Therefore the instruments of liability for judicial acts (Köbler), infringement proceedings for judicial acts (Commission v. Italy) and the possibility to ask the national Constitutional Courts for a review of cases which are already decided in the final instance or possibility to question the conduct of national court before ECtHR, can nevertheless strengthen the principles of primacy and effectiveness of EU law, even if they should not be seen as an alternative or an adequate substitute for preliminary ruling procedures.

To conclude, it is undoubtedly that under such provided legal remedies the CJEU now has a greater control over Supreme courts than ever before and that a national judge is no more immune from causing liability of the State – either in relation to individuals or the EU in infringement proceedings, as was highlighted in many cases and judgements mentioned above. Although viability of the principles set in these judgments and all the conditions laid down for a specific legal remedy may be seriously questioned, the power of those established remedies lies outside actual cases where they could be successfully invoked – it lies already in their dissuasive effects. Beneficiaries may use them to warn national judges not to disregard EU law and it seems that CJEU judges themselves never let slip an opportunity to remind their national counterparts of these judgments, of course, in an atmosphere of sincere cooperation and mutual understanding. Already because of that, national courts should endeavour to fully comply with their obligations under EU law and in particular with those arising from Article 267 TFEU and especially recognise more and more that they are also – even in the first place – European law courts and in this regard take over responsibility that comes with that. In the context of such a Europeanized attitude towards their assignment to 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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PRAVNE POSLEDICE KRŠITVE DOLŽNOSTI PREDLOŽITI SODIŠČU EU VPRAŠANJE V PREDHODNO ODLOČANJE

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Pristop države k Evropski uniji (EU) ima tako za državo samo kot za njene državljane izredno pomembne institucionalne in normativne učinke, saj s podpisom in ratifikacijo pristopne pogodbe nacionalni pravni red države članice avtomatično postane dopolnjen z avtonomnim,[1] primarnim,[2] neposredno uporabnim[3] in neposredno učinkovitim[4] pravnim redom EU, ki je vir pravic in

[1] Avtonomnost pomeni, da pravo EU nastaja, velja, se razlaga in uporablja izključno v skladu s svojimi lastnimi pravili, neodvisno od kateregakoli nacionalnega ali mednarodnega pravnega sistema oziroma pravnih redov posameznih držav članic.

[2] Primarnost pomeni, da pravila, sprejeta na ravni EU, prevladajo nad pravili, vsebovanimi v pravnih redih držav članic. V primeru neskladja med pravilom prava EU in pravilom nacionalnega prava torej prevlada prvo.

[3] Neposredna uporabnost pomeni, da se pravila EU v državah članicah uporabljajo neposredno, to je brez posredovanja zakonodajnih ali kakšnih drugih organov; ni torej potreben vmesni akt, ki bi jih šele pretvoril v pravna pravila notranjih pravnih redov. Z vstopom posamezne države v evropsko integracijo pravo EU postane del njenega nacionalnega pravnega reda in ga morajo vsi nacionalni organi spoštovati in vsa sodišča poznati.

[4] Neposredna učinkovitost pomeni, da se posameznik lahko pred državnimi organi in sodišči zoper državo (vertikalni neposredni učinek) ali v določenih primerih nasproti posamezniku (horizontalni neposredni učinek – v tem primeru pravo EU posameznikom ne določa le pravic, pač pa jim nalaga tudi obveznosti) sklicuje neposredno na posamezno določbo iz določenega akta prava EU, ki je neposredno uporaben. Pogoj pa je, da je ta določba dovolj jasna, nepogojna in samoizvršilna (angl. *self-executing*), torej da gre za pravno popolno normo (angl. *legally complete norm*). Vse norme niso sposobne neposredno učinkovati, odločanje o tem, katere so, pa je v izključni pristojnosti Sodišča ES.

obveznosti tako za državo članico in EU kot tudi za posameznike (torej fizične in pravne osebe zasebnega ter javnega prava).[5]

Prav neposredna uporabnost prava EU v nacionalnem pravu in s tem povezano odločanje po pravu EU v upravnih in sodnih postopkih v državah članicah pomeni, da se varstvo prava EU prvenstveno zagotavlja pred nacionalnimi sodišči, ki morajo pravo EU v skladu z načelom *iuria novit curia* poznati in uporabljati *ex officio*. Glede na decentralizirano naravo pravnega reda EU so namreč vsa nacionalna sodišča držav članic hkrati redna 'evropska' sodišča v zadevah prava EU in morajo kot taka zagotoviti učinkovito pravno varstvo pravic posameznikov.

Ker pri tem obstaja možnost, da bi zaradi različnih pravnih tradicij, specifične terminologije, različne pravne zavesti in razlik v pravnih sistemih prišlo do neenotnega tolmačenja in posledično različne uporabe prava EU na območju evropske integracije, in ker je na drugi strani (tudi zaradi načela pravne varnosti in zaupanja v pravo) ključno, da je pravni red EU v vseh osemindvajsetih državah članicah prav, poenoteno interpretiran in predvsem uporabljan, je v okviru pravosodnega sistema EU pristojnost za avtonomno interpretacijo prava EU in odločanje o njegovi veljavnosti podeljena izključno Sodišču EU[6] s sedežem v Luksemburgu. Le-to namreč, na podlagi člena 19(3)(b)[7] Pogodbe o Evropski uniji (PEU)[8] in člena 267[9] Pogodbe o delovanju Evropske unije

[5] Že leta 1963 je Sodišče EU v svoji znameniti sodbi *Van Gend en Los* (C-26/62) poudarilo, da pomeni Skupnost nov pravni red mednarodnega prava, v korist katerega so države članice omejile, čeprav na omejenih področjih, svoje suverene pravice in katerega subjekti so ne le države članice, ampak tudi njihovi državljani.

[6] Člen 19(1) PEU določa, da »*Sodišče Evropske unije*« sestavljajo »*Sodišče*« (ki se je pred uveljavitvijo Lizbonske pogodbe imenovalo Sodišče Evropskih skupnosti), »*Splošno sodišče*« (predhodno imenovano Sodišče prve stopnje Evropskih skupnosti) in »*specializirana sodišča*«. Ker je sicer predvideno, da bi lahko, v določenih primerih, predvidenih s Statutom Sodišča EU, postopke predhodnega odločanja vodilo tudi *Splošno sodišče*, vendar do navedenih opredelitev v Statutu ni prišlo, in ker zato v praksi dejansko vse postopke predhodnega odločanja vodi *Sodišče*, v nadaljevanju prispevka zaradi lažjega razumevanja namesto zgolj imena *Sodišče* uporabljam kratico *Sodišče EU*. Gola navedba *Sodišče* (pa čeprav je to uradno ime) se mi namreč zdi presplošna in bi lahko otežila razumevanje obravnavane tematike, saj se tudi nacionalni organi, ki so dolžni sprožati postopke predhodnega odločanja, imenujejo »*sodišča*« ali »*tribunali*«. S kratico *Sodišče EU* torej nimam v mislih skupnega imena za *Sodišče, Splošno sodišče in specializirana sodišča*, pač pa samo *Sodišče*, ki edino tudi dejansko vodi postopke predhodnega odločanja iz člena 267 PDEU.

[7] Člen 19(3)(b) PEU določa, da skladno z določbami Pogodb Sodišče EU na predlog nacionalnih sodišč predhodno odloča o vprašanjih glede razlage prava EU ali veljavnosti aktov, ki so jih sprejele institucije EU.

[8] UL EU, C 115 z dne 9. maja 2008, str. 13.

[9] Člen 267 PDEU določa: »Sodišče Evropske unije je pristojno za predhodno odločanje o vprašanjih glede:

(a) razlage Pogodb;

(b) veljavnosti in razlage aktov institucij, organov, uradov ali agencij Unije.

(PDEU),[10] odloča o predhodnih vprašanjih glede razlage prava EU in glede veljavnosti aktov institucij, organov, uradov ali agencij Unije.[11]

Pomembnosti obravnavanega postopka ne gre spregledati, saj je bila večina temeljnih načel evropskega prava, skupaj z drugimi pomembnimi razlagami prava EU, določena ravno v okviru predhodnega odločanja, prav tako omenjeni postopek predstavlja več kot 50 odstotkov vseh primerov, ki potekajo pred Sodiščem EU. Kljub temu praksa kaže, da so nekatera nacionalna sodišča pogosto še vedno zadržana pri pošiljanju vprašanj. Pri tem bi se morala zlasti tista nacionalna sodišča, za katera obstaja dolžnost predložiti vprašanje v predhodno odločanje, zavedati, da lahko nespoštovanje te dolžnosti v večini primerov pomeni kršitev prava EU, ki ima lahko neugodne pravne posledice za državo članico.

Člen 267 PDEU namreč jasno določa, da **lahko** katerokoli nacionalno sodišče države članice, pred katerim se pojavi dvom o veljavnosti ali razlagi prava EU (od katerega je odvisna končna odločitev v glavni stvari), predloži vprašanje v odločanje Sodišču EU. Kadar pa se takšno vprašanje postavi v postopku, ki teče pred sodiščem države članice, zoper odločitev katerega po nacionalnem pravu ni pravnega sredstva, je to sodišče **dolžno** predložiti zadevo Sodišču EU v predhodno odločanje.[12] Iz navedenega sledi, da člen 267 PDEU sam izrecno ločuje med sodnimi odločbami, zoper katere so dovoljena pravna sredstva, in tistimi, zoper katera pravna sredstva, s katerimi bi se lahko naknadno ponov-

Kadar se takšno vprašanje postavi kateremu koli sodišču države članice in če to sodišče meni, da je treba glede vprašanja sprejeti odločitev, ki mu bo omogočila izreči sodbo, lahko to vprašanje predloži v odločanje Sodišču.

Kadar je takšno vprašanje postavljeno v postopku, ki teče pred sodiščem države članice, zoper odločitev katerega po nacionalnem pravu ni pravnega sredstva, je to sodišče dolžno predložiti zadevo Sodišču.

Kadar je takšno vprašanje postavljeno v postopku, ki teče pred sodiščem države članice glede osebe, ki ji je odvzeta prostost, Sodišče odloča v najkrajšem možnem roku.

[10] UL EU, C 115 z dne 9. maja 2008, stran 47.

[11] Sodišče EU, Pojasnilo o predlogih nacionalnih sodišč za začetek postopka predhodnega odločanja, Informacije institucij in organov Evropske unije, UL EU, L C 297/1 z dne 5. decembra 2009.

[12] To pomeni, da imajo hierarhično nižja sodišča, katerih odločbe (*meritum*) je mogoče izpodbijati s pravnimi sredstvi pred hierarhično višjim sodiščem, fakultativno opcijo oziroma diskrecijsko pravico, da po svoji odločitvi posredujejo vprašanje v predhodno odločanje, ali pa brez predložitve vprašanja Sodišču EU (na podlagi lastne interpretacije prava EU) odločijo o glavni stvari. Vendar to velja le **v primeru dvoma o razlagi** oziroma pravilni interpretaciji prava EU. Iz sodne prakse Sodišča EU namreč izhaja, da je nasprotno **v primeru dvoma o veljavnosti** sekundarnega prava EU vsako nacionalno sodišče (ne glede na njegovo mesto v hierarhiji sodniškega odločanja) zavezano predložiti akt sekundarnega prava v odločanje o veljavnosti Sodišču EU. Nobeno nacionalno sodišče v primeru dvoma namreč ne more samo določenega akta prava EU razglasiti za neveljavnega.

no 'meritorno' odločalo o glavni stvari, niso dovoljena. V primeru slednjih so nacionalna sodišča pred sprejemom končne sodne odločbe obligatorno dolžna prekiniti nacionalni postopek in vprašanje glede razlage ali veljavnosti prava EU (če se v postopku pojavi) predložiti Sodišču EU, saj je le tako mogoče zagotoviti učinkovito varstvo pravic posameznikov ter (po prejetem odgovoru oziroma razlagi s strani Sodišča EU) sprejeti pravilno, legalno in legitimno končno odločitev v glavni stvari.

Pravkar navedena določba je v omejevanju diskrecijske pravice nacionalnih sodišč, ki v konkretnem primeru sodijo na zadnji stopnji, povsem nepogojna in jasna, zato njeno nespoštovanje nedvomno pomeni kršitev prava EU kot takega in člena 267 PDEU bolj specifično. Tako ne bo zgolj v primeru, ko bodo izpolnjene vse predpostavke in okoliščine, ki jih je v svoji sodni praksi (zlasti v znani sodbi *CILFIT*[13] in številnih zadevah, ki so sledile) samo Sodišče EU določilo kot mogoče izjeme, ko vprašanja vendarle niti hierarhično najvišjim sodiščem ni treba postaviti.[14] Vendar pri tem ne gre spregledati, da so te izjeme (ki so v glavnem prispevku podrobneje pojasnjene) opredeljene dokaj ozko ter strogo in bi jih nacionalna sodišča – ob doslednem upoštevanju vseh napotkov, podanih s strani Sodišča EU – dejansko lahko uporabila zgolj v izjemnih primerih, zagotovo pa ne tako pogosto, kot se to v praksi dogaja trenutno, ko zelo razširjena uporaba omenjenih izjem daleč presega tisto, kar narekujejo njihova stroga merila.

Čeprav iz do zdaj pojasnjenega izhaja, da je ravno postopek predhodnega odločanja ključni dejavnik za ustrezno pravno varstvo in ne nazadnje razvoj prava EU in da na drugi strani prav tukaj obstajajo možnosti za številne nedoslednosti, pa samo pravo EU posebnih sankcij zaradi nespoštovanja člena 267 PDEU s strani nacionalnih sodišč izrecno ne določa. Kljub temu lahko za državo članico (tako na podlagi že vzpostavljene sodne prakse kot na podlagi posredne uporabe drugih določb ustanovitvenih pogodb) na treh različnih ravneh – tj. na nacionalni ravni, na ravni Unije in na mednarodni ravni – za-

[13] Zadeva C-283/81 *CILFIT* [1982] ECR 3415.

[14] Te izrecno opredeljene izjeme so, če pravno vprašanje ni pomembno za meritorno odločbo in zato v takem postopku ni objektivne potrebe po odgovoru s strani Sodišča EU. Nadalje, če že obstaja sodna praksa Sodišča EU, ki obravnava identično pravno vprašanje, oziroma če je postavljeno vprašanje enako kot v že obravnavanih primerih – v tem primeru mora nacionalno sodišče uporabiti razlago, ki jo je Sodišče EU že podalo (fr. *acte eclaire*). Nacionalnemu sodišču pa vprašanja ni treba postaviti tudi, če je pravilna uporaba prava EU tako očitna, da (upoštevaje značilnosti in specifičnosti prava EU) ne dopušča nobenega prostora za dvom glede pravilnosti interpretacije, kar pomeni, da mora biti nacionalno sodišče prepričano, da bodo tudi vsa druga nacionalna sodišča držav članic in Sodišče EU prišla do popolnoma enake interpretacije (fr. *acte claire*). (Zadeva C-283/81 *CILFIT* [1982], točki 16 in 17.)

radi kršitve člena 267 PDEU s strani njenih nacionalnih sodišč pride do neugodnih pravnih posledic. Te so zlasti:

- razveljavitev nacionalne sodne odločbe s strani nacionalnega ustavnega sodišča;
- odškodninski zahtevek zoper državo članico na nacionalni ravni;
- postopek zoper državo članico za ugotavljanje kršitve po členu 258 PDEU na ravni Unije; in
- postopek pred Evropskim sodiščem za človekove pravice zaradi kršitve 6. člena Evropske konvencije o varstvu človekovih pravic in temeljnih svoboščin.

Navedeno pomeni, da na nacionalni ravni obstajata dva postopka, ki se lahko sprožita v primeru kršitev s strani nacionalnih sodišč. Prvi postopek temelji na načelu 'zakonitega sodnika', ki v bistvu pomeni, da je arbitrarna zavrnitev nacionalnega sodišča na zadnji stopnji, da bi sprožilo postopek predhodnega odločanja, lahko na podlagi ustavne pritožbe predmet pregleda s strani nacionalnega ustavnega sodišča, ki lahko v končni fazi sodbo (ki se ne da več izpodbijati z rednimi ali izrednimi pravnimi sredstvi) tudi razveljavi in zadevo celo vrne v ponovno sojenje. Drugo sredstvo na nacionalni ravni zaradi kršitve prava EU s strani nacionalnih sodišč se lahko uveljavlja v novem – ločenem – postopku pred nacionalnim sodiščem in se pri tem opira na načelo odškodninske odgovornosti države, kot ga je Sodišče EU potrdilo v znanih sodbah *Francovich*[15] in *Brasserie du Pêcheur / Factortame III*[16] ter pozneje tudi v zadevi *Köbler*,[17] v kateri je bilo prvič izrecno poudarjeno, da se lahko odškodninska odgovornost države uveljavlja tudi zaradi kršitve prava EU, storjene s strani njenega Vrhovnega sodišča. Edino pravno sredstvo, ki se zaradi nespoštovanja člena 267 PDEU lahko uveljavlja na ravni Unije, je postopek zaradi kršitve, ki temelji na členu 258 PDEU in ki ga zoper specifično državo članico[18] lahko – kot varuh ustanovitvenih pogodb – sproži Evropska komisija. Pravno sredstvo na mednarodni ravni bi v primeru nepredložitve vprašanja v predhodno odločanje lahko bila tožba zoper državo članico pred Evropskim sodiščem za človekove pravice v Strasbourgu, zaradi kršitve 6. člena Evropske konvencije o

[15] Združena zadeva C-6-9/90 *Francovich* [1991] ECR I-5357.

[16] Zadevi C-46/93 in C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029.

[17] Zadeva C-224/01 *Köbler v. Austria* [2003] ECR I-10239, par. 32.

[18] Da je država članica zaradi kršitve s strani njenega nacionalnega sodišča lahko odgovorna po členu 258 PDEU, je nesporno, saj je nacionalno sodišče del državne sodne oblasti, povsem drugo vprašanje pa je realnost pričakovanja, da bo do postopka tudi zares prišlo, saj po do zdaj razpoložljivih podatkih poseben postopek na podlagi člena 258 PDEU, zato ker nacionalno sodišče ne bi sprožilo postopka predhodnega odločanja, še ni bil sprožen. Kar pa ne pomeni, da v primeru očitnih kršitev tudi ne bo.

varstvu človekovih pravic in temeljnih svoboščin, kjer je določena pravica do poštenega sojenja. Vsi omenjeni postopki in njihove glavne prednosti, slabosti ter zlasti omejitve so v glavnem prispevku podrobneje pojasnjeni.

Če bi se torej izkazalo, da nacionalna sodišča svojih obveznosti po postavitvi predhodnega vprašanja ne spoštujejo (kar bi dejansko lahko pomenilo resno ogrozitev pravnih temeljev in primarnih načel prava EU, zlasti načela učinkovitega varstva pravic in zaupanja v pravo), bi bilo takšno njihovo ravnanje s prej predstavljenimi pravnimi posledicami mogoče tudi ustrezno sankcionirati in vsaj delno korigirati. Tega vidika nacionalna sodišča pri sprejemanju ustreznih procesnih in meritornih sklepov ne smejo spregledati. Ravno tako pa – kot subjekti s poslanstvom sprejemati pravilne in zlasti zakonite sodne odločbe – ne bi smeli spregledati, da se s predstavljenimi pravnimi sredstvi načelo primarnosti in učinkovitosti prava EU sicer lahko vsaj delno okrepi, vendar teh postopkov vseeno ne moremo obravnavati kot alternativo postopku predhodnega odločanja. Zgolj ta je namreč tisti, ki dejansko omogoča dosledno izpeljavo koncepta neposrednega učinka in prevlade prava EU nad nacionalnim pravom, ter z nadnacionalno sodno instanco, ki ima pristojnost za celotno ozemlje EU, in s poenoteno interpretacijo prava EU vodi tudi do njegove poenotene uporabe.

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TURIČNIK, Edita: Pravne posledice kršitve dolžnosti predložiti Sodišču EU vprašanje v predhodno odločanje

Pravnik, Ljubljana 2014, let. 69 (131) št. 9-10

Glede na decentraliziran značaj pravnega reda EU, so vsa nacionalna sodišča držav članic EU hkrati redna sodišča v zadevah prava EU in morajo kot taka zagotoviti učinkovito pravno varstvo pravic posameznikov, ki za slednje izhajajo iz prava EU. Z namenom, da se tudi v postopkih pred nacionalnimi sodišči zagotovi poenotena uporaba prava EU in zlasti, da se prepreči morebitna različna razlaga določb prava EU, je v členu 276 PDEU določen postopek za predhodno odločanje. Na podlagi omenjenega člena nacionalna sodišča lahko (in v določenih primerih morajo) Sodišču EU predložiti vprašanje v predhodno odločanje ter v njem zaprositi za razlago pomena ali odločitev o veljavnosti pravne norme EU, saj je Sodišče EU izključno pristojno, da o tem odloča. V predmetnem prispevku je najprej na kratko pojasnjeno, kdaj obstaja pravica in kdaj dolžnost nacionalnih sodišč, da postavijo vprašanje za predhodno odločanje in katere so izjeme od te dolžnosti. Glavna tema prispevka pa je osredotočena na možna pravna sredstva, ki lahko sledijo, če nacionalna sodišča ne spoštujejo svoje obveznosti iz člena 267 PDEU. Avtorica zaključi z ugotovitvijo, da obravnavana pravna sredstva sicer lahko okrepijo načelo primarnosti in učinkovitosti prava EU, vendar jih vseeno ne bi smeli obravnavati kot alternativo postopku predhodnega odločanja.

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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 the 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 first shortly examines, when national courts have the right and when the duty to refer question to the CJEU and which are exceptions to this obligation, but the main topic of the paper is focused on the possible legal consequences which may follow, if national courts do not fulfil their obligations under Article 267 TFEU. The author concludes, that those possible remedies are indeed able to strengthen the principles of primacy and effectiveness of EU law; notwithstanding, they should not be considered as an alternative for preliminary ruling proceedings.