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National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom

Morten Broberg*

According to Article 267 of the Treaty on the Functioning of the European Union (TFEU), Member State courts may – and sometimes must – refer questions on the interpretation or validity of EU legal measures to the Court of Justice of the European Union for a binding preliminary ruling. But what are the consequences if a Member State court fails to make a preliminary reference in a situation where it was legally obliged to do so? The article shows that such failure may constitute an infringement of the right to a fair trial as laid down in Article 6(1) of the European Convention of Human Rights. It may also form the basis for a claim for damages under EU law. Moreover, it may instigate the European Commission to institute infringement proceedings against the Member State in question. Finally, in some situations, a failure to make a preliminary reference may affect the validity of the Member State court's judgment, and there may also be a requirement on Member State administrative authorities to reopen the case file if, after the ruling by the Member State court, it becomes apparent that this court erred with regards to EU law.

1 INTRODUCTION

On 8 April 2014, the European Court of Human Rights rendered its ruling in *Dhahbi v. Italy*.[1] The case concerned the question whether a national court of one of the EU Member States could be held to have infringed Article 6 of the European Convention on Human Rights on the right to a fair trial if the national court declined to make a preliminary reference to the Court of Justice of the European Union without giving proper reasons for this. In the *Dhahbi* case, The European Court of Human Rights ruled that there had been such violation.

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1 European Court of Human Rights, judgment of 8 Apr. 2014, *Dhahbi v. Italy,* Application No. 17120/09, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-142504.

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Taking the ruling in the *Dhahbi* case as point of departure, this article provides an overview of the legal consequences that *may* flow from a national court of one of the Member States failing to make a preliminary reference. The topic is first examined from the perspective of the European Convention of Human Rights (section 2). Next, the possibility of claiming damages under EU law is examined (section 3). The possibility of the European Commission instituting infringement proceedings against a Member State if courts of that State fail to refer is also considered (section 4). Thereupon, the article examines the possibility of the national ruling being rendered invalid, a duty for Member State administrative authorities to reopen the case, and whether there may be a duty on a court of last instance to re-refer (section 5). Finally, the article seeks to provide the full picture by tying the different knots together.

2 FAILURE TO REFER AND ARTICLE 6 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

The question of whether a national court's failure to make a preliminary reference constitutes a breach of Article 6 of the European Convention of Human Rights has arisen on several occasions; both with regards to references from Member State courts to the Court of Justice of the European Union and with regards to some of the national jurisdictions where the lower (national) courts can (or must) submit certain questions to superior (national) courts. Thus, in *Coëme*, the European Court of Human Rights was asked to consider whether the Belgian Court of Cassation had committed an infringement of Article 6 of the European Convention on Human Rights 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 European Court of Human Rights first observed that the European Convention on Human Rights 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. Moreover, it observed that there was no absolute right to have a preliminary question referred to a court. 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 European Court of Human Rights added, however, that 'it is not completely impossible that, in certain circumstances, refusal by a domestic court trying a case at final instance [to make a preliminary reference] might infringe the principle of

fair trial, as set forth in Article 6 §1 of the Convention, in particular where such refusal appears arbitrary'.[2]

The reasoning in the European Court of Human Rights' ruling in *Coëme* also applies to a national court's failure to make preliminary references to the Court of Justice of the European Union.[3] Thus, in *Canela Santiago v. Spain*, the European Court of Human Rights held that the Spanish Supreme Court's failure to make a preliminary reference to the Court of Justice did not constitute an infringement of Article 6 of the European Convention of Human Rights because the Supreme Court had set out its reasons for not making a preliminary reference so that the refusal to make a preliminary reference could not be regarded as arbitrary.[4] And in *Ullens de Schooten and Rezabek,* the European Court of Human Rights held that Article 6(1) of the European Convention on Human Rights imposes an obligation on the national courts to give reasons for any decision refusing to refer a question, particularly where the applicable law permits such a refusal only on an exceptional basis. The European Court of Human Rights went on to observe that with regards to 'national courts against whose decisions there is no remedy under national law, which refuse to refer to the Court of Justice [of the European Union] a preliminary question on the interpretation of [EU] law that has been raised before them, are obliged to give reasons for their refusal in the light of the exceptions provided for in the case law of the Court of Justice [of the European Union]'.[5] Indeed, in the *Ullens de Schooten and Rezabek* ruling, the European Court of Human Rights went on to observe:

> that the [European Court of Human Rights] does not rule out the possibility that, where a preliminary reference mechanism exists, refusal by a domestic court to grant a request for such a referral may, in certain circumstances, infringe the fairness of proceedings – *even if that court is not ruling in the last instance* . . . The same is true where the refusal proves arbitrary …, that is to say where there has been a refusal even though the applicable rules allow no exception to the principle of preliminary reference or no alternative thereto,

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2 *Coëme and others v Belgium* ECHR 2000-VII, para. 114, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59194. See also the two unreported decisions to which the European Court of Human Rights refers in para. 114 in *Coëme,* as well as *Wynen and Centre Hospitalier Interrégional Edith-Cavell v Belgium* ECHR 2002-VIII, paras 41–3, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60725 and *Ernst and others v. Belgium*, Application No. 33400/96, decision of 15 Jul. 2003, paras 74–6, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-65779.

3 *John v. Germany*, decision on admissibility of 13 Feb. 2007 (No. 15073/03), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79763.

4 *Canela Santiago v. Spain*, Application No. 60350/00, decision of 4 Oct. 2001, available at http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-43054. See also M. Breuer, *State Liability for Judicial Wrongs*, 29 Eur. L. Rev. 243, 251 (2004); and H. Schermers & D. Waelbroeck, *Judicial Protection in the European Union* (2001), 272.

5 *Ullens de Schooten and Rezabek v. Belgium,* Application Nos 3989/07 and 38353/07, decision of 20 Sep. 2011, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108382.

> where the refusal is based on reasons other than those provided for by the rules, and where the refusal has not been duly reasoned in accordance with those rules.[6]

It followed from the rulings in *Canela Santiago v. Spain* and *Ullens de Schooten and Rezabek* that the European Court of Human Rights considered that a national court's refusal to make a preliminary reference to the Court of Justice of the European Union *could* be viewed as arbitrary and therefore constitute an infringement of Article 6(1) of the European Convention on Human Rights if the national court did not accompany its refusal by adequate reasons. This was particularly relevant for Member State courts of last instance since these courts are under an obligation to make a preliminary reference to the Court of Justice to the European Union where the case before the Member State court raises a question of interpretation of EU law and where the answer to this question is not obvious (i.e., the question is not one of *acte clair* or *acte éclairé*).[7]

In the *Dhahbi* case, the question of a Member State court refusing to make a preliminary reference to the Court of Justice of the European Union and the right to a fair trial came to a fore. The case concerned Mr Bouraoui Dhahbi; at the material time, a Tunisian national who had entered Italy on a lawful residence and work permit. In 2001, he applied for a family allowance, explaining that even though he did not hold Italian nationality, as required by the relevant Italian legislation, he was entitled to the allowance under the association agreement between the European Union and Tunisia; known as the Euro-Mediterranean Agreement. The Italian district court hearing the case rejected Mr Dhahbi's application and so he lodged an appeal. As part of this appeal, he requested, amongst other things, that the Italian Court of Appeal requested a preliminary ruling from the Court of Justice of the European Union on whether, under the Euro-Mediterranean Agreement, the Italian authorities had been justified in refusing his request for a family allowance. The Court of Appeal dismissed Mr Dhahbi's appeal leading him to lodge an appeal on points of law before the Italian Court of Cassation, reiterating his request for a preliminary ruling to be sought from the Court of Justice of the European Union. Also, this appeal was dismissed without the Court of Cassation making any reference to Mr Dhahbi's request for a preliminary ruling – and not even a reference to the case law of the Court of Justice of the European Union.[8]

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6 *Ibid.* para. 59 (emphasis added).

7 If the case before the Member State court gives rise to a question on the validity of an EU legal act and if the Member State court considers rendering the EU legal act invalid, the court is under an obligation of making a preliminary reference irrespective of whether the Member State court rules in the last instance or not, cf. Case 314/85, *Foto-Frost,* [1987] ECR 4199.

8 See para. 33 of the *Dhahbi* judgment.

In March 2009, Mr Dhahbi lodged an application against the Italian Republic with the European Court of Human Rights, which rendered its judgment in April 2014. In its assessment of the case, the European Court of Human Rights first referred to its previous case law and the principles laid down therein regarding preliminary references.[9] With particular regard to Article 267(3) of the Treaty on the Functioning of the European Union (TFEU), it followed from this case law:

> that national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the [Court of Justice of the European Union] on a question raised before them concerning the interpretation of European Union law, are required to give reasons for such refusal in the light of the exceptions provided for by the case law of the [Court of Justice of the European Union]. They must therefore indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the [Court of Justice of the European Union], or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.[10]

Since no appeal had been possible against the ruling by the Italian Court of Cassation, this court had been 'under a duty to give reasons for its refusal to request a preliminary ruling, in the light of the exceptions provided for by the case law of the [Court of Justice of the European Union]'.[11] The European Court of Human Rights therefore went on to examine the Court of Cassation's judgment, but:

> found no reference to the applicant's request for a preliminary ruling to be sought or to the reasons why the court considered that the question raised did not warrant referral to the [Court of Justice of the European Union]. It is therefore not clear from the reasoning of the impugned judgment whether that question was considered not to be relevant or to relate to a provision which was clear or had already been interpreted by the [Court of Justice of the European Union], or whether it was simply ignored . . . The [European Court of Human Rights] observes in this connection that the reasoning of the Court of Cassation contains no reference to the case law of the [Court of Justice of the European Union].[12]

This finding was sufficient for the European Court of Human Rights to conclude that there had been a violation of Article 6(1) of the European Convention of Human Rights.[13] The European Court of Human Rights also

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9 The European Court of Human Rights particularly referred to its decision of 10 Apr. 2012 in *Vergauwen and Others v. Belgium* (dec.), No. 4832/04, paras 89–90, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110889.

10 Paragraph 31 of the *Dhahbi* judgment.

11 Paragraph 32 of the *Dhahbi* judgment.

12 Paragraph 33 of the *Dhahbi* judgment.

13 Paragraph 34 of the *Dhahbi* judgment. Art. 6 of the European Convention on Human Rights only applies to civil rights and obligations as well as criminal charges (in a broad sense). This means that the provision does not apply to all areas of EU law. However, Art. 47 of the Charter of Fundamental

found that the Italian State had violated Article 14 of the European Convention of Human Rights taken in conjunction with Article 8 and on this basis awarded damages to Mr Dhahbi.

It thus follows that whilst the European Convention on Human Rights does not guarantee, as such, a right to have questions referred to the Court of Justice for a preliminary ruling under Article 267 TFEU, refusal to make a preliminary reference without providing adequate justification for this refusal can constitute a breach of Article 6 of the Convention.[14] According to the ruling in the *Dhahbi* case, this is particularly likely to be the situation where a court of last instance refuses to make a preliminary reference without adequately addressing the applicant's valid arguments in favour of making a reference. Arguably, the same will be the situation where a national court of last instance (within the meaning of Article 267 TFEU) makes a reference to the European Court of Justice, but this reference is appealed to a higher court which either overturns the entire reference or excludes one or more of the questions in the reference.[15] However, the fact that a court of last instance does not set out its reasons for refusing to make a preliminary reference to the Court of Justice of the European Union does not necessarily mean that there will be an infringement of Article 6 of the European Convention of Human Rights. In particular, the European Court of Human Rights has previously held that refusal to make a preliminary reference without giving reasons does not constitute an infringement of Article 6 of the European Convention of Human Rights if the applicant's request for a preliminary reference is insufficiently substantiated, and if the matter raises no fundamentally important issue.[16]

The European Court of Human Rights' ruling in *Dhahbi* expressly refers to the fact that the Italian Court of Cassation was a court of last instance so that it had been 'under a duty to give reasons for its refusal to request a preliminary

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Rights of the European Union establishes a right to a fair trial which, in reality, reproduces Art. 6 of the Convention, but which applies to all areas of EU law. Since Art. 47 of the Charter must be interpreted in accordance with Art. 6 of the Convention, it appears fair to presume that the obligation to provide reasons applies to all parts of EU law.

[14] See in this regard also *Herma v. Germany*, Application No. 54193/07, decision on admissibility of 8 Dec. 2009, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96483. The European Court of Human Rights referred to Art. 267 TFEU in general – and not to Art. 267(3) TFEU which concerns Member State courts of last instance. Thus, this seems to be in line with the ruling in *Ullens de Schooten and Rezabek v. Belgium,* quoted above, where the European Court of Human Rights ruled that refusal by a domestic court to grant a request for a preliminary reference may, in certain circumstances, infringe the fairness of proceedings – *even if that court is not ruling in the last instance.*

[15] It is important to observe that such overturning of a national court's decision to make a preliminary reference by a superior national court may in itself contravene EU law. See further Morten Broberg & Niels Fenger, *Preliminary References to the European Court of Justice*, 327–336 (2nd edn, Oxford University Press 2014).

[16] *John v. Germany*, Decision on admissibility of 13 Feb. 2007 (No. 15073/03).

ruling, in the light of the exceptions provided for by the case law of the [Court of Justice of the European Union]'. As observed above, in *Ullens de Schooten and Rezabek* the European Court of Human Rights ruled that also courts that are not courts of last instance may infringe Article 6(1) of the European Convention of Human Rights if they refuse to make a preliminary reference to the Court of Justice of the European Union.[17] It is, however, unclear when a lower Member State court may infringe Article 6 of the European Convention of Human Rights by not making a preliminary reference. Perhaps one such situation may be where a lower Member State court is under an obligation to make a preliminary reference, but declines to do so.[18]

3 DAMAGES FOR FAILURE TO REFER

The European Union is based on mutually loyal cooperation. This also applies to the cooperation between the national courts of the Member States and the Court of Justice of the European Union on the basis of Article 267 TFEU. The TFEU does not specify any sanction for a national court's failure to comply with the obligation to make a reference for a preliminary ruling.

Refraining from making references cannot in itself lead to a duty to pay damages under EU law. For instance, it does not make much sense to argue that a national court shall be held liable for not making a preliminary reference if, in a dispute as to whether national law contravenes EU law, the national court found that there was such contravention.[19] Nevertheless, where it later 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.[20] 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 (bias) can arise if the matter is to be brought before the court of last instance that is held to have committed the

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17 See in this regard Case E-18/11 *Irish Bank Resolution Corporation* [2012] EFTA Court Report, 592, para. 64. The EFTA Court expressly refers to the European Court of Human Rights' ruling in *Ullens de Schooten and Rezabek*.

18 This may particularly be the situation where a Member State court renders an EU legal act invalid without first making a preliminary reference.

19 See similarly *Negassi, R (on the application of) v Secretary of State for the Home Department* [2011] EWHC 386 (Admin), para. 20.

20 See C-224/01 *Köbler* [2003] ECR I-10239; and Case C-173/03 *Traghetti del Mediterraneo* [2006] ECR I-5177. See also the ruling by the French *Conseil d'État* of 18 Jun. 2008 in Case No. 295831, *Gestas*, and the ruling by the Austrian *Verfassungsgerichtshof* (Constitutional Court) of 13 Oct. 2004 in case A5/04, reported in *22e Rapport sur le contrôle de l'application du droit communautaire*, COM(2005)570, Annex VI, 16.

infringement. Thus, it may have been a delicate matter for the Swedish Supreme Court when before this court a party argued that the Supreme Court had committed a significant procedural error, as it had not made a reference for a preliminary ruling before deciding a case. The Supreme Court denied that it had been under an obligation to make such a reference in the actual case.[21]

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.[22] Thus, according to (then) Advocate General Jacobs, a Member State will really only be held liable under the Court of Justice's *Köbler* ruling in a case of bad faith.[23] On that basis, it has been suggested that in order to avoid such liability the national courts in their reasoning should consider explaining why they consider a preliminary reference to be superfluous.[24] Nevertheless, in (at least) one situation a claimant has been awarded compensation on the basis that a national court of last instance had failed to make a preliminary reference; namely in the Swedish *Flexlink* case where the Swedish Chancellor of Justice[25] accepted to pay damages, *inter alia* on the basis that the Swedish Administrative Supreme Court had failed to make a preliminary reference.[26] The Swedish *Flexlink* case may, however, be the exception to prove the rule that in practice the *Köbler* ruling has led to practically no awards of damages.[27]

A Member State may not introduce laws that limit (not to mention exclude) State liability regarding a Member State court's failure to make preliminary references to such extent that it amounts to imposing requirements that are stricter than those laid down by the Court of Justice with regard to State liability for

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21 See K.J. Dhunér, 'Sweden', IBA Legal Practice Division Antitrust Newsletter, 18 (2005), 27.

22 See the Order of 19 Jun. 2013 by the Austrian Verfassungsgerichtshof (Constitutional Court) in cases A 2/2013-6, A 3/2013-4. available at http://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_20130619_13A00002_00/JFT_20130619_13A00002_00.pdf (summarised in *Reflets* no 3, 2013 at 17–18), the judgment by the UK Court of Appeal (Civil Division) *Cooper v. HM Attorney General* [2010] EWCA Civ 464 (05 May 2010) available at *http://www.bailii.org/ew/cases/EWCA/Civ/2010/464.html* and *Re Accountants Aptitude Tests* (Case III ZR 294/03) [2006] 2 *CMLR* 55, where a claim for compensation for failure to make a preliminary reference was rejected by the German *Bundesgerichtshof* (Federal Supreme Court).

23 R. Crowe, *Colloquium Report—The Preliminary Reference Procedure: Reflections based on Practical Experiences of the Highest National Courts in Administrative Matters*, ERA Forum 435, 444 (2004).

24 C. Naômé, *Le Renvoi préjudiciel en droit européen* (2nd edn, 2010), 49.

25 The Swedish Chancellor of Justice is a government appointee who supervises courts and administrative organs.

26 Decision by the Swedish Chancelor of Justice of 6 Apr. 2009 in case 2409-08-40, available at http://www.jk.se/Beslut/Skadestandsarenden/2409-08-40.aspx. For comments on this decision, see Frida-Louise Göransson, *Rapport suédois* in *L'obligation de renvoi préjudiciel à la Cour de justice: une obligation sanctionnée?,* (Laurent Coutron (ed.), Larcier, Brussels 2014), 479–496 at 495.

27 Michal Bobek, *Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts*, in *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice,* 216 (Maurice Adams, Henri de Waele, Johan Meeusen & Gert Straetmans (eds), Hart Publishing 2013), observes that (at the time of his writing the text), to his knowledge, 'not a single decision in any of the Member States . . . would have . . . awarded damages following the *Köbler* guidance.'

breaches of EU law.[28] Moreover, the fact that EU law provides private parties with the possibility of seeking damages in case of a Member State court's failure to make a preliminary reference does not mean that a private party must (also) exhaust this possibility before applying to the European Court of Human Rights for infringement of Article 6(1) of the European Convention of Human Rights.[29]

4 INFRINGEMENT PROCEEDINGS FOR FAILURE TO REFER

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 under Article 258 TFEU.[30] In some instances, the Commission has initiated infringement proceedings against Member States for failure to duly comply with their Treaty obligations where, prior to the Commission's initiation of proceedings, the matter has been before a court of last instance without this court making a preliminary reference.[31] However, given that the duty to refer is often set aside by the national courts, the Commission's practice may be qualified as reluctant.[32]

In one case the Commission has, however, addressed the issue directly. Thus, in 2004 it issued a letter of formal notice to Sweden for breach of Article 267 TFEU.[33] 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

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28 Case C-379/10, *Commission v. Italy*, Judgment of 24 Nov. 2011. It is likely that the matter will also be dealt with in the forthcoming judgment in Case C-160/4, *João Filipe Ferreira da Silva e Brito and Others v. Estado português*.

29 This the European Court of Human Right made clear in its judgment of 8 Apr. 2014, *Dhahbi v. Italy,* Application no. 17120/09, at paras 23–25.

30 That the Commission (or other Member States) could institute infringement proceedings in cases where national courts of a Member State failed to refer has been clear from an early point in time. For instance, Jean de Richemont, *L'intégration du droit communautaire dans l'ordre juridique interne – Article 177 du Traité de Rome,* Librairie du Journal des Notaires et des Avocats, Paris 1975 points to this possibility, but simultaneously observes that it is 'quelque peu hypothétique …' that this will occur.

31 This is the situation concerning Italy, Case C-129/00 *Commission v. Italy* [2003] ECR I-14637, and it is also the situation concerning the Netherlands with regard to a decision by the *Hoge Raad* of 11 Jul. 2003 in *X te Z (Duitsland) tegen Staatssecretaris van Financiën*, AB Rechtspraak Bestuursrecht 2003, No 457, reported in 21e *Rapport sur le contrôle de l'application du droit communautaire*, COM(2004) 839, Annex VI, I-24–I-25. As for the Commission's infringement action, see its press release of 9 Feb. 2004, IP/04/178. In these instances, the Commission limited itself to criticizing the results which the national courts arrived at regarding the substance of the cases, whereas the fact that the courts did not refer in accordance with Art. 267(3) TFEU was not criticized.

32 See for example the case summary in *Reflets* no. 1, 2002, 17 regarding the Portuguese ruling by *Supremo Tribunal Administrativo,* arrêt du 14.10.99, nº 31355, Antologia de Acórdãos do Supremo Tribunal Administrativo e do Tribunal Central Administrativo, Ano III – nº 1, Setembro – Dezembro 1999, 13.

33 The Commission's reasoned opinion has been made available to the public under the Swedish rules on access to documents. See Commission docket No. 2003/2161, C(2004) 3899 of 13 Oct. 2004.

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. The latter argument – that a last instance court's refusal to make a preliminary reference must be duly substantiated – appears to have much in common with the position taken by the European Court of Human Rights.[34] On the basis of the Commission's letter of formal notice, the Swedish Parliament adopted a 'Law on certain provisions on preliminary rulings from the Court of Justice'.[35] As a consequence of this law, if one party argues that, in order to decide a case, it is necessary to clarify the circumstances in which the Court of Justice of the European Union has powers to make a preliminary ruling, in its judgment a Swedish court must now give reasons why it has not made a reference for such preliminary ruling if its judgment cannot be appealed against.[36] As will thus be apparent, the Swedish case first of all turned on last instance courts providing *adequate grounds* for not making a preliminary reference when encouraged to do so rather than on their *refusal* (as such) to make a preliminary reference.

5 FAILURE TO REFER, VALIDITY OF NATIONAL JUDGMENTS, OBLIGATION TO REOPEN THE CASE FILE, AND OBLIGATION TO RE-REFER

It may follow from national law 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 under national law. This, for example, is the case in Germany, where the *Bundesverfassungsgericht* has on several occasions annulled rulings of lower courts where the latter declined to make a preliminary reference when acting as courts of last instance. According to the *Bundesverfassungsgericht*, such refusal may amount to an infringement of the German constitutional principle laid down in the *Grundgesetz* (the Basic Law) that no one may be

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34 See s. 2 above.

35 Lag med vissa bestämmelser om förhandsavgörande från EG-domstolen, SFS 2006: 502.

36 M. Schmauch, *Lack of Preliminary Rulings as an Infringement of Article 234 EC?*, 11 Eur. L. Reptr, 445–54 (2005); and U. Bernitz, *The Duty of Supreme Courts to Refer Cases to the CJ: The Commission's Action Against Sweden*, in *Swedish Studies in European Law*, I, 37, 45–6 (N. Wahl & P. Cramér eds, 2 vols, 2006). In some Member States, a somewhat similar duty to give reasons for refusal to refer has been established by constitutional courts as is examined in Section 5 below. See for example the German *Bundesverfassungsgericht* (Federal Constitutional Court) which has required reasons to be given where a lower court has declined to make a preliminary reference in order to enable the *Bundesverfassungsgericht* to adequately acquaint itself with the lower court's reasons for declining to make such a reference so that the *Bundesverfassungsgericht* can review the lower court's refusal to make a preliminary reference; see *Bundesverfassungsgericht*, Order of 9 Jan. 2001, 1 BvR 1036/99, reported in the Nineteenth Annual Report on Monitoring the Application of Community Law COM(2002) 324, Annex VI, 39–41.

deprived of the protection of the courts established by law.[37] The examination by the *Bundesverfassungsgericht* is limited to whether the application of Article 267 TFEU of the lower German court was manifestly unjustifiable, and in particular, whether that court had totally violated its obligation to refer.[38] Moreover, in order for there to be such infringement, it must be clear that the case before the German court gives rise to a question of the interpretation of EU law as opposed to a question of its application to the particular factual situation facing the court.[39]

Similar approaches have been taken by the constitutional courts in the Czech Republic (*Ústavní soud*[40]), in Slovakia (*Ustavný súd*[41]), in Austria (*Verfassungsgerichtshof*[42]), in Slovenia (*Ustavno sodišče Republike Slovenije*[43]) and in Spain (*Tribunal Constitucional*[44]).[45]

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 a direct effect on national legal systems. Indeed, the Court of Justice has recognized the importance of the principle of res judicata in the legal systems of both the EU and its Member States. Thus, it has held that, in order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions are definitive and can no longer be called into question after all rights of appeal have been exhausted

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37 Bundesverfassungsgericht, order of 9 Jan. 2001, 1 BvR 1036/99, reported in Nineteenth Annual Report on Monitoring the Application of Community Law, COM(2002) 324, Annex VI, 39–41; *Bundesverfassungsgericht*, ruling of 29 Jul. 2004, 2 BvR 2248/03 (2004) *Deutsches Verwaltungsblatt* JG 119 1411, reported in 23e *Rapport sur le contrôle de l'application du droit communautaire*, COM(2006) 416, Annex VI, I-5; and *Bundesverfassungsgericht*, Order of 30 Aug. 2010, 1BvR 1631/08.

38 Order of the *Bundesverfassungsgericht* of 30 Jan. 2002, 1 BvR 1542/00 (2002) *Neue Juristische Wochenschrift*, Heft 20, 1486, reported in Twentieth Annual Report on Monitoring the Application of Community Law, COM(2003) 669, Annex VI, 6–7.

39 F. Mayer, *Multilevel Constitutional Jurisdiction*, in *Principles of European Constitutional Law*, 399, 406 (2nd edn, A. von Bogdandy & J. Bast eds, 2010) with further references.

40 Ústavní soud, Judgment of 8 Jan. 2009, II. ÚS 1009/08.

41 Ústavný súd Slovenskej republiky, Order of 3 Jul. 2008, IV. ÚS 206/08-50, http://www.concourt.sk/rozhod.do?urlpage=dokument&id_spisu=214397.

42 *Verfassungsgerichthof*, 30 Sep. 2003, B 614/01, *Europäische Zeitung für Wirtschaftsrecht* JG 15 (2004), 222, reported in *21e Rapport sur le contrôle de l'application du droit communautaire*, COM(2004) 839, Annex VI, I-7–I-8.

43 *Ustavno sodišče Republike Slovenije,* décision du 21.11.13, Up-1056/11, summarized in *Reflets* no. 1, 2014, 42–43.

44 Cf. Daniel Sarmiento, *Reinforcing the (domestic) Constitutional Protection of Primacy of EU Law*, 875–892 at 882 CML Rev. (2013) with reference to, in particular, Judgment 78/2010 of the Full Court (Official Gazette of 18 Nov. 2010).

45 Constrast with the decision of the Dutch *Raad van State, afdeling bestuursrechtspraak*, 16 Nov. 2005, X, (2006) AB Rechtspraak Bestuursrecht AFL 14 124; and of the Dutch *Centrale Raad van Beroep*, 17 Nov. 2006, *X/Raad van Bestuur van de Sociale Verzekeringsbank* (2007) *AB Rechtspraak Bestuursrecht* AFL 8 57, according to which breach by a Dutch court of the obligation to refer a preliminary question under Art. 267 TFEU does not, according to Dutch law, constitute a reason to revise a decision that has become final. The same view has been taken in Danish law.

or after the expiry of the time limits.[46] Therefore, EU law does not require a national court to abstain from applying 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.[47] 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 two respects the Court of Justice has, however, qualified that finding. First, the principle of res judicata plays a less prominent role when a national judgment is at odds with a decision of an EU institution that has become final. In this situation, not only must the finality of the national court's decision be protected, but also must that of the EU decision. Indeed, it is one thing for a national court to make an incorrect decision, but quite another for it to render a decision that encroaches on the sole competence of an EU institution.[48]

Second, in certain situations EU law imposes on an administrative body an obligation to review a final administrative decision even though that decision has been upheld by a court of last instance. There is no general obligation for the administrative body to make such a review. However, where the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance, and where, in the light of a subsequent decision given by the Court of Justice, it becomes clear that this judgment is based on a misinterpretation of EU law which was adopted without first obtaining a preliminary ruling from the Court of Justice under Article 267(3) TFEU, the national administrative body responsible for the case is obliged to exercise its discretion to the extent possible under national law in order to reopen the administrative decision, notwithstanding that the decision has received judicial confirmation.[49] The Court of Justice thus accepts that the matter is regulated by national law and that it will be compatible with EU law that the administrative decision is considered final where national law prevents the administration from reopening the case. In this respect, EU law does not impose any time limit on how late a party can ask for a 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

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46 Case C-224/01 *Köbler* [2003] ECR I-10239.

47 Case C-126/97 *Eco Swiss* [1999] ECR I-3055; and Case C-234/04 *Kapferer* [2006] ECR I-2585. See also B.H. ter Kuile, *To Refer or Not to Refer* in *Institutional Dynamics of European Integration*, 381, 384 (D. Curtin & T. Heukels eds, 1994).

48 Case C-119/05 *Lucchini* [2007] ECR I-6199. See further A Biondi, 'Case Note', *CML Rev*, 45 (2008), 1459.

49 Case C-453/00 *Kühne & Heitz* [2004] ECR I-837.

seeking remedies, in a manner consistent with the EU principles of effectiveness and equivalence.[50]

The obligation for the relevant administrative body to reopen the case is not dependent on whether the parties to the main proceedings relied on EU law before the national court. This is because Article 267 TFEU institutes direct cooperation between the Court of Justice of the European Union and the Member State courts by means of a procedure, which is independent of any initiative by the parties. Indeed, the obligation to reopen the case arises even if the Member State court did not consider the EU law issue at all, as long as, under the relevant national procedural rules, the Member State court may raise of its own motion a plea alleging infringement of EU provisions.[51]

Finally, it may also be considered whether a national court is under an obligation to make a second reference for a preliminary ruling to the Court of Justice if the Member State court has already made one reference, but has received an answer which does not take into account all relevant matters. The UK Supreme Court was faced with this situation in *Aimia Coalition Loyalty*.[52] One party argued that the Supreme Court was obliged under EU law to make a further reference if it found the ruling of the Court of Justice of the European Union on the first reference to be incomplete or unsatisfactory. In the actual case, the Supreme Court rejected the call for a new preliminary reference noting that in its judgment, following receipt of the preliminary ruling, it had not questioned the Court of Justice of the European Union's ruling on any question of EU law. Rather, it had proceeded on the basis of a more comprehensive account of the facts than the Court of Justice had been afforded. Since, in the opinion of the UK Supreme Court, no new question of EU law arose, any further reference was not necessary. This, it is submitted, must be correct in law.

6 TYING THE KNOTS TOGETHER

As will be apparent from the above, where a Member State court fails to make a preliminary reference even though it is under an obligation to do so, traditionally it has been very unlikely that any legal consequences will flow from this. Thus, whilst the Court of Justice has held that such failure may form the basis for compensation, the present author is only aware of one single situation where such damages have actually been paid to a private party. Likewise, the Commission (and,

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[50] Case C-2/06 *Kempter* [2008] ECR I-411 and the comment on the case by N. Fenger, *Review of Final Administrative Decisions Contrary to EU Law*, 5 Eur. L. Rptr. 150, 155–156 (2008).

[51] Case C-2/06 *Kempter* [2008] ECR I-411.

[52] *Her Majesty's Revenue and Customs (Appellant) v. Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited) (Respondent)* (No. 2) [2013] UKSC 42. Note that the reference was originally made by the House of Lords.

in principle also, the Member States) may bring up the matter via infringement proceedings, but in practice the Commission has shown very considerable restraint in prosecuting Member States on this basis.

In contrast, first of all the fact that several of the Member States' constitutional courts have required their inferior, national courts to duly observe the obligation to make preliminary references when they rule as last instance courts, arguably, is important for the enforcement of this obligation. Moreover, it is possible that another important compliance incentive has been created through the European Court of Human Rights' 2014-ruling in the *Dhahbi* case. The fact that, following this ruling, a court of last instance may be held to be in breach of Article 6(1) of the European Convention of Human Rights, if the national last instance court fails to make a preliminary reference without giving sufficient grounds, may form an important impetus towards better compliance.

Author Guide

[A] Aim of the Journal

European Public Law is a forum for the discussion of issues in the development of public law. The journal traces the public law of the Member States as it is shaped by the law of the European Union as well as by the Council of Europe's European Convention on Human Rights.

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