CONSTITUTIONALISING THE EUROPEAN COURT OF JUSTICE? THE ROLE OF STRUCTURAL AND PROCEDURAL REFORMS

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Abstract

In the last five years, the Court of Justice of the European Union has undergone major developments, both in procedural and structural terms. This article seeks to demonstrate that the reforms undertaken by the CJEU will safeguard the exclusive jurisdiction of the Court on the interpretation of EU law and allow it to concentrate on the most relevant references for a preliminary ruling. In doing so, they will enable the Court to better fulfil its mandate as the final arbiter of EU law while continuing to ensure an effective judicial protection. It is argued that, together, the procedural and structural reforms, seen in the light of the recent case-law, represent long-overdue but positive steps in the direction of the implementation of the Nice reform, which can contribute to the emergence of the Court of Justice as the EU Constitutional Court.

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1. Towards the (vertical) constitutionalisation of the Court of Justice: the role of the preliminary ruling procedure

In the last five years, the Court of Justice of the European Union ('CJEU') has undergone major developments, both in terms of scope of jurisdiction and structure. The Court of Justice ('CJ', or 'the Court'), in particular, is increasingly emerging – and acting – as a supranational constitutional court.

On the one hand, after the entry into force of the Treaty of Lisbon and the assimilation of the legal value of the Charter of Fundamental Rights of the EU ('CFREU') to that of the Treaties, the Court is increasingly engaged in the protection of human rights, as they result from the CFREU. This case-law relates first and foremost to acts of EU institutions, but it also extends to the Member States, when acting within the scope of EU law[1]. On the other hand, the CJ is more and more frequently seized to solve not only the horizontal conflicts of powers among the EU institutions but also the vertical conflicts of competences and powers arising between the EU and its Member states.

It is evident that the two tendencies are the two sides of the same coin, in so far as the protection of EU fundamental rights in national legal orders is ultimately aimed at ensuring the primacy of Union law and its consistent and uniform interpretation and application. Moreover, the two dimensions of the 'constitutionalisation' of the CJ are inextricably linked. The actual or potential conflicts of powers between the Union and its Member States have traditionally arisen and revolved around the issues of the level of protection of fundamental rights in the EU and national legal orders, to the extent to which those rights form part of the national constitutional identities.

The CJ jurisdiction over the horizontal conflicts of power within the EU institutional framework and the application of Union rights in national legal order is uncontested. This is also due to the settled case-law of the Court on the autonomy of the EU legal order in relation to national and international law and on the subsequent exclusive competence of the CJ to interpret and examine the

[1] See, for a review of the most relevant CJ case-law on arts 51-53 CFREU, L.S. Rossi, *'Stesso valore giuridico dei Trattati'? Rango, primato ed effetti diretti della Carta dei diritti fondamentali dell'Unione europea*, 21 Dir. Un. Eur. 329 (2016).

validity of an EU act[2]. This case-law has in fact prevented the Union from acceding to alternative judicial control mechanisms, such as the ECHR or the European and Community Patents Courts[3].

The CJ authority to judge over the vertical conflict of competences and powers is, on the other hand, much more disputed, especially by national supreme and constitutional courts. While it is widely known that ordinary judges make frequent use (and abuse) of the preliminary reference procedure provided for by art. 267 TFEU, supreme and constitutional courts have instead been traditionally reluctant to resort it and to acknowledge the CJ interpretative monopoly over EU law. Whilst some of these constitutional courts are now "behav[ing] increasingly as courts or tribunals within the meaning of Article 267 TFEU"[4], their references have been accompanied by the development of a common "narrative of constitutional reservations against EU law"[5] and sometimes loaded with ultra vires and identity review warnings.

Against this background, it is clear that the preliminary ruling procedure is destined to play a crucial role in the process of (vertical) 'constitutionalisation' of the Court.

References for preliminary ruling represent the "keystone" of the EU judicial system[6] and have gradually become the 'core business' of the CJ, both in numerical and legal terms. This has emphasised even more the 'original sin' of the EU judicial architecture: the fact that, as Weiler and Jacqué have pointed out, the same Court (the CJ) exercises "the functions of a constitutional court of the [Union] whenever it is called upon to deal with a constitutional issue" but has also to deal with other ordinary or secondary issues which in national legal orders would only exceptionally reach the highest jurisdictions[7]. Whilst the Court is a

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[2] See Opinion 2/13, EU:C:2014:2454, paras 170-176 and 181-183, Opinion 1/09, EU:C:2011:123, para 67, and Opinion 1/91, para 35.

[3] See Opinion 2/13, paras 181-183 and Opinion 1/09, paras 78-89, respectively.

[4] Opinion of Advocate General Cruz Villalón, Case C-62/14, *Gauweiler*, EU:C:2015:7, para 40.

[5] M. Claes, *The Validity and Primacy of EU Law and the 'Cooperative Relationship' between National Constitutional Courts and the Court of Justice of the European Union*, 23 MJ 151 (2016), 156.

[6] Opinion 2/13, para 176.

[7] J.P. Jacqué & J.H.H. Weiler, *On the Road to European Union - A New Judicial Architecture: An Agenda for the Intergovernmental Conference*, 27 CML Rev. 185 (1990), 190.

"victim of its own success" in its relations with lower courts[8], and shall now cope with an ever-increasing workload as a result of it, as anticipated courts of last instances have resisted its authority.

To realise its 'constitutional aspirations', the Court is therefore required to "readjust [its] jurisdiction without limiting its ability to be a final arbiter of important points of Community law"[9]. More particularly, the CJ is called to give some form of precedence to the 'constitutional adjudication' activity (*ratione materiae* or *personae*) over the 'ordinary' interpretative jurisdiction, while continuing to ensure an effective judicial protection to private parties. The Court shall moreover reinforce its cooperative relation with national supreme and constitutional courts and safeguard its exclusive jurisdiction in preliminary ruling proceedings vis-à-vis the General Court ('GC').

To achieve this twofold objective, the CJ has initiated major structural and procedural reforms. In March 2011 and again, at the invitation of the Italian Council Presidency, in October 2014, the Court has requested the legislators to revise the Statute of the Court of Justice of the European Union ('CJEU Statute'). The proposed amendments concerned to various degrees all the three existing courts composing the CJEU, but were mainly intended to increase the number of judges of the GC. Following long and difficult negotiations, the request was finally granted, by means of Regulations 2015/2422[10] and 2016/1192[11]. The two regulation have allegedly marked the "most radical transformation of the EU judicial architecture since the establishment of the General Court"[12], by doubling of the number of judges of the GC and dissolving the Civil Service Tribunal ('CST').

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[8] To quote the famous expression coined by T. Koopmans, *La procédure préjudicielle - victime de son succès?*, in F. Capotorti et al. (eds.), *Du droit international au droit de l'intégration: Liber Amicorum Pierre Pescatore* (1987).

[9] J.P. Jacqué & J.H.H. Weiler, *On the Road to European Union*, cit. at 7, 190–191.

[10] Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ L 341, 24.12.2015, pp. 14-17.

[11] Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants, OJ L 200, 26.7.2016, pp. 137–139.

[12] A. Alemanno & L. Pech, *Thinking justice outside the docket: A critical assessment of the reform of the EU's court system*, 54 CML Rev. 129 (2017), 129.

Furthermore, in November 2012, the Court has adopted its new Rules of Procedure ('RPCJ'), which are precisely intended "to ensure that the structure and content of the Rules of Procedure of the Court are adapted [..]to the increasing number of references for a preliminary ruling made by the courts and tribunals of the Member States"[13].

This article argues that both reforms will play a major positive role in strengthening the constitutional adjudication dimension of the Court's activity.

First, the structural reform of the GC will be addressed, in connection with the actual and future delimitation of the preliminary ruling jurisdiction between the latter and the CJ (§ 2). The contribution shall then investigate the procedural reforms undertaken by the Court, underlying how they contribute to strengthening the constitutional character of the preliminary ruling procedure itself (§ 3). Last, the article will single out the main internal limits to the process of 'constitutionalisation' of the Court, stemming from the principles of effective judicial protection and loyal cooperation (§ 4).

2. Structural reforms: protecting the CJ monopoly over preliminary ruling proceedings

The Treaties provides that, in principle, both the CJ and GC shall have jurisdiction over preliminary ruling proceedings.

Unlike for direct actions, the CJ has general and original jurisdiction to hear and determine questions referred for a preliminary ruling. According to art. 256(3) TFEU, the GC's jurisdiction shall instead be expressly provided for by the CJEU Statute and shall cover only "specific areas".

As is well known, to date, no such provision has been inserted in the CJEU Statute. However, the CJ itself has referred to the possibility that the doubling of the number of judges of the GC

[13] Rules of Procedure of the Court of Justice of 25 September 2012, OJ L 265, 29.9.2012, as amended on 18 June 2013 (OJ L 173, 26.6.2013, p. 65) and on 19 July 2016 (OJ L 217, 12.8.2016, p. 69).

could lead to "some competences of the Court potentially to be transferred from the Court of Justice to the General Court"[14].

The possible consequences of the 2015 reform on the division of competence in preliminary ruling proceedings among the two EU courts shall therefore be investigated. In particular, attention will be drawn to the main procedural and structural limits which arguably will impede the partial transfer of preliminary jurisdiction to the GC as a result of the reform.

2.1. Procedural obstacles on the road to shared interpretative jurisdiction

Following the entry into force of the Lisbon Treaty, the rules on the jurisdiction of the EU courts – set out in the Protocol (No 3) on the CJEU Statute– may be amended by the co-legislators pursuant to the ordinary legislative provision. The relevant Treaty norm (art. 281 TFEU) nonetheless provides that the Parliament and the Council shall act either "at the request of the Court of Justice" or after consulting the latter.

This power – along with the power to request the establishment of specialised courts attached to the GC, under art. 257 TFEU – is not attributed to the institution as a whole (the CJEU), but is the sole prerogative of the CJ.

From an administrative perspective, the Treaties and the CJEU Statute do not establish a clear hierarchical relationship between the various judicial bodies composing the CJEU. The centralization of legislative powers in the hand of the CJ and of its President can nevertheless be inferred from a literal interpretation of primary law[15], and is reflected in the established practice of the CJEU[16]. This has also been confirmed on the occasion of the 2015 reform, as is apparent from the CJ Response to the Italian Council Presidency invitation. The document underlined that, after having

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[14] CJEU, Press release No 44/15, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/cp150044en.pdf>.

[15] As is evident from art. 19 TEU, according to which "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts"; this is confirmed by the provisions of Part Six, Title I, Chapter 1, Section 5 TFEU and of the CJEU Statute, which consistently refer to the "Court of Justice" to indicate the body (CJ).

[16] Cf. A. Alemanno & L. Pech, *Thinking justice outside the docket*, cit. at 12, 167–169.

been "discussed internally", the proposal to double the number of GC judges has been "approved by the general meeting of the Court of Justice"; despite the plenary meeting of the GC "stated its preference for the establishment of a specialised trade mark court and for the status quo to be maintained as regards the CST", the CJ proceeded nonetheless with the proposal[17].

It is true that the European Parliament has secured inclusion in Regulation 2015/2422 of an obligation to draw up a report "on possible changes to the distribution of competence for preliminary rulings", "accompanied, where appropriate, by legislative requests" to the co-legislators[18]. Interestingly enough, the drafting of the report – due by the end of 2017 but yet to be published – has been entrusted to the CJ itself, and not to the whole institution, nor to an external consultant, as foreseen for the parallel report to be produced on the functioning of the GC[19].

Not only the CJ is in a position to influence the allocation of jurisdiction over preliminary ruling procedures among the various bodies composing the CJEU. It can also control what arguably constitute a relevant pre-condition for the attribution of preliminary jurisdiction to the GC, i.e. the revision of its structure and internal Rules of Procedure ('RPGC').

It is evident that the partial transfer of jurisdiction over preliminary ruling proceedings from the CJ to the GC is conditional upon the insertion, in the RPGC, of specific provisions dedicated to references for a preliminary ruling, similar to those contained in the Rules of Procedure of the CJ ('RPCJ'). According to art. 254(5) TFEU, the establishment of the Rules of Procedure of the GC shall not only require the approval of the Council, but also the "agreement" of the Court of Justice. The latter has therefore a veto right over any amendment proposed by the GC, including those potentially aimed at introducing the requisite procedural provisions on references for a preliminary ruling.

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[17] See the 'Reasoning' accompanying the 'Response to the invitation from the Italian Presidency of the Council to present new proposals in order to facilitate the task of securing agreement within the Council on the procedures for increasing the number of Judges at the General Court', <http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-05/8-en-argumentaire-270.pdf>, at 3.

[18] Art. 3(2) Regulation (EU, Euratom) 2015/2422.

[19] Ibid., art. 3(1).

Last, it could be argued that the jurisdiction to hear and determine indirect actions under art. 267 TFEU should probably be accompanied by a reform of the composition of the GC's chambers. Given the growing political relevance and sensitivity of references for preliminary ruling, they are currently largely determined by five-judge Chambers, and frequent recourse is made to the Grand Chamber[20]. The overwhelming majority (85% in the last five years) of cases heard by the GC, on the contrary, are still referred to three-judge Chambers. Although the 2015 reform should increase the possibility of recurring to five-judge Chambers[21], it is interesting to note that, the relevant criteria laid down by the Plenum of the GC in 2016 still provide otherwise[22].

2.2. Toward an internal specialisation of the General Court

The 2015 reform has led to a structural rejection of the specialised courts model[23]. Both the CJ and the co-legislators have ruled out the alternative option of establishing a new court competent for direct actions concerning intellectual property, repeatedly invoked by the GC[24]. Moreover, to facilitate an agreement within the Council, they also dissolved the sole specialized court created since the Nice Treaty – the CST.

It is to be noted, in this respect, that the CJ never called into question the role and prerogative of the CST[25]. As underlined by

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[20] CJEU, *Annual Report 2016 - Judicial Activity*, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ra_jur_2016_en_web.pdf>; in the last five years, cases heard and determined by the Grand Chamber accounted for more than 8% (8,42% in 2016), while, cases referred to five-judge Chambers represented at least the 54% of the total number of closed cases.

[21] Ibid., 212: the number of cases referred to five-judge Chambers – let alone the Grand Chamber – arose in 2016 as a reflection of the reorganization of the Court, but on average they still account for only 1,5% of the total actions determined by the GC.

[22] See Decision of the General Court, on the Criteria for assignment of cases to Chambers, 2016/C 294/04, OJ 2016, C 296/2, adopted in accordance with art. 25 RPGC.

[23] Cf. 'Reasoning', cit. at 17, 2-3 and recital (4) Regulation (EU, Euratom) 2015/2422, respectively.

[24] Draft amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto, 28 March 2011, 2011/0901 (COD), 6.

[25] Ibid., 13, the Court even proposed to attach temporary judges to the EU specialised courts, implicitly supporting their continued existence.

Alemanno and Pech, the abolition of the CST shall therefore be regarded as a *quid pro quo* for the doubling of the number of judges of the GC, aimed at limiting the costs of the reform and ending the deadlock over the nomination of two judges of the CST[26].

On the contrary, in both its initial 2011 request and 2014 response to the Italian Council presidency, the CJ took a firm stand against the possibility to resort to art. 257 TFEU to establish a new specialised court. The alternative option of increasing the number of GC judges has consistently been regarded by the CJ – and by the Commission[27] – as "clearly preferable", both for contingent reasons (the urgency of the situation, and the flexibility and reversibility of the proposed option, as compared to the establishment and dismantlement of a new body) and for more structural factors[28].

As for the latter factors, according to the CJ, the establishment of a trademark and design court would not have solved the backlog, since the majority of complex cases would have remained in the jurisdiction of the GC and the number of appeals to the latter Court would have increased[29]. Moreover, in order to ensure the uniform interpretation of EU law, any transfer of direct actions relating to trademarks to a specialised court "ought to go hand in hand with a transfer to the General Court of preliminary ruling proceedings" relating to this field[30]. In the view of the Court, this would, in turn, have posed a risk for the overall consistency of its case-law, given the interlinkages between intellectual property and other areas of EU law such as, in particular, the free movement of goods, which would have remained subject to the interpretative jurisdiction of the CJ[31]. What is more, the allocation of requests for a preliminary ruling to the GC could have caused "confusion among the Member States' courts and discourage[d] them from referring such questions, particularly in view of the procedural delays involved in the event of a review"[32].

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[26] A. Alemanno & L. Pech, *Thinking justice outside the docket*, cit. at 12, 137.

[27] See Commission Opinion of 30.9.2011 on the requests for the amendment of the Statute of the Court of Justice of the European Union, presented by the Court, COM(2011) 596, para 29.

[28] Draft amendments, cit. at 24, 7-10; see also, 'Reasoning', cit. at 17, paras 2 and 4.

[29] Draft amendments, cit. at 24, 7.

[30] Ibid., 8.

[31] Ibid., 9.

[32] Ibid., 9.

It is therefore evident that the rejection of the specialised court model can also be attributed to the CJ desire to preserve its monopoly over preliminary ruling jurisdiction.

From a strictly legal perspective, the course of action taken by the co-legislators is fully consistent with art. 257 TFEU. The latter provision empowers the Parliament and the Council to establish – and therefore to dissolve[33] – specialised courts attached to the GC, acting by means of Regulation in accordance with the ordinary legislative procedure. The 2015 reform will nonetheless require further organizational measures to cope with the challenges – above all, the increase in the volume and complexity of cases and in the number, variety and technical specificities of EU legal acts[34] – which were intended to be addressed through the establishment of specialised courts.

It could be argued, in this respect, that, rather than facilitating the attribution of jurisdiction over preliminary ruling proceedings to the GC, the structural reform has laid the foundations of a process of internal specialization within the General Court in respect of direct actions.

It was the CJ itself, in its 2011 request, to suggest this development and to invite the GC "to achieve the greater productivity sought by specialisation [..] at the level of chambers within the General Court"[35]. The opinion the Commission on the initial CJ request was even more explicit as to the necessity and opportunity to introduce a form of "subject-matter specialisation by several General Court chambers"[36]. The opinion went further, invoking an amendment to the CJEU Statute to enshrine the principle of specialisation "to guarantee permanence", thus forcing the GC's hand to "establish[h] an appropriate number of specialized chambers, and in any case at least two"[37].

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[33] See, along this line, A. Alemanno & L. Pech, *Thinking justice outside the docket*, cit. at 12, 151.

[34] See Regulation (EU, Euratom) 2015/2422, cit., recital 2.

[35] Draft amendments, cit. at 24, 7; the 'Reasoning', cit. at 17, reaffirms this point of view, by stating that, with the proposed reform, "the General Court will be able, in the interest of the proper administration of justice [..] to make certain Chambers responsible for hearing and determining cases falling within certain subject areas".

[36] Cf. Commission Opinion, cit. at 27, paras 29 and 33-36.

[37] Ibid., para 37.

Although Regulation 2015/2422 makes no reference to any form of internal specialization of the GC, the suggestions made by the Commission and the Court have been accepted by the GC (and by the Council), on the occasion of the reform of the RPGC in 2015. According to art. 25 RPGC, the General Court may now "make one or more Chambers responsible for hearing and determining cases in specific matters". To be sure the process of specialisation is still embryonic.

On the one hand, a certain tendency to an "informal occasional specialization in the attribution of cases" has been reported[38]. Moreover, cases have been grouped into four classes for the purpose of their assignment to Chambers, corresponding to the principal areas of activity of the GC[39]. On the other hand, all categories of cases are still automatically allocated to all Chambers, on the basis of an equal division of labour following separate rotas[40]. In addition, there are a number of legal obstacles which militate against such process of specialization[41], among which the present difficulties in taking technical and scientific competencies into account when appointing judges and selecting legal secretaries stands out[42].

Notwithstanding the controversies and uncertainties surrounding the process of internal specialization of the GC, it seems clear that the structural reform undertaken by the CJEU will not radically change the division of competence between the CJ and the GC, nor will it result in the attribution of jurisdiction over preliminary ruling proceedings to the latter court in specific areas. The present analysis has also demonstrated that the CJ would, in

[38] F. Dehousse, *The reform of the EU courts. The need for a management approach*, Egmont Paper 53, March 2016, <http://www.egmontinstitute.be/publication_article/reform-of-eu-courts-2/>.

[39] The Decision of the General Court, on the Criteria for assignment of cases to Chambers, cit. at 22, para 2, distinguishes in particular three categories of cases concerning competition law and trade, IP rights and civil service, and a residual category of "other cases".

[40] Ibid., para 2.

[41] See, in this respect, F. Dehousse, *The reform of the EU courts*, cit. at 38, 25–29.

[42] The reference made in Regulation (EU, Euratom) 2015/2422, cit., recital (7), to the need to take into account not only the "professional and personal suitability", the independence and the impartiality but also the "expertise" of potential candidates to the GC, is an initial step in this regard.

any case, have *de iure* or *de facto* the last word over these reforms, and could therefore protect its monopoly over art. 267 TFEU.

3. Procedural reforms: constitutionalising the preliminary ruling procedure

The widening and deepening of the Community and the establishment of the then Court of First Instance (now the GC) by the Single European Act, have led to an exponential increase, both in relative and absolute terms, of the importance of the preliminary ruling proceedings in the CJ caseload[43].

In the last five years preliminary ruling proceedings accounted for almost two thirds of the new cases (as compared to 37% in 1990), with a record high in the history of the Court in 2016 (470 new cases, representing the 67.92% of the total number of actions)[44]. This has been reflected in the number of preliminary rulings delivered by the Court, which has reached a record high of 476 cases in 2014 (two-thirds of the overall CJ case-law, a figure which remained broadly stable in 2016)[45].

The increase of both new and completed preliminary ruling proceedings has been accompanied by an "unremitting upward trend in the number of cases" brought before the CJ[46]. The strong downward trend observed in the number of direct actions has in fact been compensated not only by the references for preliminary rulings but also by the significant increase of appeals lodged against GC decisions (215 cases in 2015, the highest figure in the Court's history)[47].

Together, these two tendencies bring about some practical challenges for the 'constitutional aspirations' of the Court. How to give some form of precedence to the adjudication of conflicts of powers and competences among EU institutions and between them

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[43] See, in this respect, P. Iannuccelli, *La réforme des règles de procédure de la Court de justice*, 18 Dir. Un. Eur. 107 (2013), 108-109.

[44] CJEU, *Annual Report 2016*, cit. at 20, 88.

[45] See ibid., 91.

[46] Cf. http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-03/cp160034en.pdf.

[47] CJEU, *Annual Report 2015 – Judicial Activity*, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rapport_annuel_2015_activite_judiciaire_en_web.pdf>, at 9.

and the Member States? How to continue to ensure an effective judicial review, given the difficulties in reducing the backlog of pending cases[48]?

To be sure, these challenges are not new[49]. They are nonetheless of particular significance today that national constitutional courts are increasingly resorting to the preliminary ruling procedure and the Court is being called upon to explore the unchartered territory of high politics, through references concerning the EU migration, citizenship and economic policies.

To respond to these challenges, in November 2012 the Court of Justice has adopted its new Rules of Procedures[50]. Contrary to the previous 1974 and 1991 recasts, the new RPCJ constitutes a real innovation[51], especially in relation to the preliminary ruling procedure. It has been the CJ itself, in its revised Practice directions to parties[52], to underline that it was precisely the "increasing number of references for a preliminary ruling" which largely inspired the reform, aimed at "ensur[ing] that the structure and content of the Rules of Procedure of the Court are adapted" to this emerging trend[53].

The centrality of preliminary ruling proceedings in the CJ jurisdiction is, first of all, reflected in the very structure of the RPCJ. Whereas previously indirect actions were treated as special procedures, they now feature immediately after the common procedural provisions, in a separate and dedicated title. This is not only illustrative of the importance attributed to the art. 267 TFEU procedure, but it also signals a discontinuity in their qualification. Indeed, it could be argued that the "special function of the Court when it is called upon to give a preliminary ruling"[54] is no longer

[48] According to the CJEU, *Annual Report 2016*, cit. at 20, 87, the total number of pending cases on 31 December 2016 was 872, which is a broadly constant number as compared to December 2015 (884 pending cases) and December 2012 (886 pending cases).

[49] See, among others, J.P. Jacqué & J.H.H. Weiler, *On the Road to European Union*, cit. at 7, 187–189.

[50] Rules of Procedure of the Court of Justice, cit. at 13.

[51] See, in the same vein, P. Iannuccelli, *La réforme des règles de procédure de la Court de justice*, cit. at 43, 108.

[52] Practice directions to parties concerning cases brought before the Court, OJ L 31, 31.1.2014, 1–13.

[53] Ibid., recital 1.

[54] Ibid., para 33.

regarded as a derogation from the general rules and structure laid down by the RPCJ, but rather as a concurrent procedure.

Along with these "cosmetic" changes, the new RPCJ have brought forward significant innovations. They have strengthened the procedural tools at the CJ disposal to filter the referrals from ordinary judges (§ 3.1) while centralising to a certain extent the application of the *CILFIT* case-law concerning the derogations to the obligation to refer by courts of last instance (§ 3.2).

3.1. Enhancing the admissibility threshold for "ordinary" references preliminary rulings

The CJ has only limited discretion to decide whether to hear a case brought before it. This flows from the absence of legal tools enabling the Court to select the cases on the basis of their systemic or legal relevance, such as the *certiorari* mechanism employed by the US Supreme Court. For references for a preliminary ruling, the limited margin of appreciation in deciding on their admissibility also reflects the letter and the spirit of art. 267 TFEU.

Under art. 267(2) TFEU, any ordinary national judge "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." National courts *a quo* have therefore the "widest discretion" in determining the need for a preliminary ruling and the relevance of the questions submitted to the CJ[55]. The Court, in turn, is "in principle bound to give a ruling" on the referred questions accordingly[56].

As is well known, the "presumption of relevance"[57]enjoyed by the referred questions can only be rebutted where one of the following conditions are met: (*i*) "it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object", (*ii*) "the problem is hypothetical", or (*iii*) "the Court does not have before it the factual or legal material necessary to give a useful answer"[58].

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[55] Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13, *Mascolo*, EU:C:2014:2401, paras 47-48.

[56] Case C-571/10, *Kamberaj*, EU:C:2012:233, para 40.

[57] Case C-94/04 and 202/04, Cipolla, EU:C:2006:758, para 25.

[58] The test was first laid down in the case C-314/08, *Filipiak*, EU:C:2009:719, paras 43 and 45, and recently reaffirmed in case C-182/15, *Petruhhin*, EU:C:2016:630, para 20.

The Court has traditionally exercised some sort of self-restraint in examining whether one of these conditions were met. Only where the questions referred were manifestly falling within the latter conditions, or their relevance was disputed in the written observations submitted either by the parties or by the Member States, the Commission or the institutions which adopted the act at issue, the CJ has proceeded in this way[59].

The lenient approach adopted by the Court has already resulted in a constant increase in the workload of the Court (and in the average length of proceedings) but could also hamper the "constitutional authority" of the CJ vis-à-vis national supreme and constitutional courts. The latter, in particular, have long suffered the special relationship between the ordinary judges and the CJ. When confronted with the unremitting rise in the number of questions referred for a preliminary ruling by lower courts – and in light of the constraints posed by the CJ case-law on the parallel or prior recourse to the interlocutory procedure of review of constitutionality (see *infra*) – some courts of last instance could be tempted to perceive and treat the CJ as a competitor, rather than as a complementary forum of adjudication.

Against this background, it is easy to grasp the importance of the revised art. 94 RPCJ.

The provision lays down the (minimum) content of the request for a preliminary ruling. This include the following cumulative elements, which are aimed at assessing the relevance of the referred questions for the main action and to rule out its artificial nature: a summary of the subject-matter of the dispute and the findings of fact (art. 94(a) RPCJ); the tenor of the applicable national law and the relevant case-law (art. 94(b) RPCJ); a statement of the reasons, justifying the reference and explaining the relations between the provisions of EU law at issue and the national legislation applicable to the main proceedings (art. 94(c) RPCJ).

Before the entry into force of the new RPCJ, this minimum content was defined by the sole Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (hereinafter the 'Recommendations')[60]. The

[59] L. Daniele, *Art. 267 TFEU*, in A. Tizzano (ed.) *Trattati dell'Unione europea* (2014), 2108.

[60] CJEU, Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings, OJ C 439, 25.11.2016, p. 1, para 15.

Recommendations constitute a soft law instrument designed to provide the referring court "with all the practical information required in order for the Court to be in a position to give a useful reply"[61]. They were therefore an inadequate tool for filtering the abusive requests for a preliminary ruling.

As highlighted by some Authors, the insertion of a "minimum content" of the references for a preliminary ruling in a binding Union act, such as the RPCJ, and its formulation as a mandatory legal requirement, seems to have marked a "change of attitude by the Court in its relations with national courts"[62].

On the one hand, the new art. 94 RPCJ, which the national Courts are "bound to observe scrupulously" as a reflection of the "requirement of cooperation that is inherent in the preliminary reference mechanism"[63], has called on the national courts to show greater responsibility in making use of the art. 267 TFEU procedure. On the other hand, art. 94 RPCJ has provided the opportunity for the CJ to give a more restrictive interpretation of its previous case-law. Based on the new provision, the Court may now, on a more stable and continuous basis[64], decline its jurisdiction and dismiss the request as inadmissible[65]—in full or, at least, partially, in relation to some of the referred questions[66].

The practice seems to confirm the theory: five years after its introduction, the CJ has made extensive recourse to art. 94 RPCJ. This applies in particular to the third limb of the test under art. 94(c) RPCJ – i.e. the existence of a factor linking national and Union law.

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[61] Ibid., presentation and para 2.

[62] Cf. P. Iannuccelli, *La réforme des règles de procédure de la Court de justice*, cit. at 43, 120–121.

[63] See, among others, Case C-614/14, *Ognyanov*, EU:C:2016:514, paras 19 and 23.

[64] See, as to the previous CJ case-law declaring manifestly inadmissible requests for preliminary ruling for failure to comply with the abovementioned minimum content, K. Lenaerts, I. Maselis & K. Gutman, *EU procedural law* (2014), 75–76.

[65] Along this line P. Iannuccelli, *La réforme des règles de procédure de la Court de justice*, cit. at 43, 121 as suggested by the Recommendations to national courts and tribunals, cit. At 60, para 15, and K. Lenaerts, I. Maselis & K. Gutman, *EU procedural law*, cit. at 64, 75, according to whom, although art. 94 RPCJ "is not intended to serve as a benchmark for a stricter admissibility test [..] the Court will not refrain from declaring an order for reference inadmissible when drawn up in complete disregard of the requirements".

[66] See, among the most recent ruling, Case C-156/15, *Private Equity Insurance Group*, EU:C:2016:851, paras 60-67.

A first relevant example in this respect concerns the CJ case-law on the connecting factors between purely internal situation and EU law provisions, with a view to determining the scope of CJ interpretative jurisdiction. The wide-ranging types of cases in which requests submitted in purely domestic cases are deemed admissible remained the same[67]. After the recent *Ullens de Schooten* ruling the Court seems nonetheless inclined to verify their existence in a more accurate way, and, to this effect, to allocate the burden of proof entirely on the referring courts[68].

Another good illustration of the abovementioned restrictive trend is the case-law on the scope of the CJ jurisdiction over preliminary ruling concerning the interpretation of the Charter of Fundamental Rights. According to art. 51(1) CFREU the provisions of the Charter are addressed to the Member States "only when they are implementing EU law". The Recommendations therefore require the national courts to make "clearly and unequivocally apparent from the request for a preliminary ruling that a rule of EU law other than the Charter is applicable to the case in the main proceedings"[69]. It follows that the sole provisions of the Charter "cannot, of themselves, form the basis for such jurisdiction"[70] and that, in this case, the Court may systematically refuse to give rulings on the referred questions[71].

Admittedly, the requirements in art. 94 RPCJ are largely formal ones, the compliance with which is moreover still interpreted widely by the Court[72]. As anticipated, the new provision nonetheless signals the CJ intention to prevent the submission of inadmissible preliminary proceedings.

In so doing, the Court is not refusing the dialogue with lower courts, with a view to protecting national judicial hierarchies. Rather, the CJ appear to be aiming at avoiding exceeding its jurisdiction and giving private parties unrealistic hope about the

[67] See Case C-268/15, *Ullens de Schooten*, EU:C:2016:874, paras 50-53, as to the situations in which references (concerning the interpretation of the fundamental freedom's provisions) "confined in all respect within a single Member State" can be regarded as admissible.
[68] Ibid., paras 54-55.
[69] Recommendations to national courts and tribunals, cit. at 60, para 10.
[70] Ibid., para 10.
[71] See, among others, Case C-498/12, *Pedone*, EU:C:2013:76, paras 14-15 and case C-282/14, *Stylinart*, EU:C:2014:2486, paras 18-22.
[72] Cf., for example, Case C-265/13, *Torralbo Marcos*, EU:C:2014:187, para 38.

enforcement of the EU rights and obligations against national authorities. This ultimately reinforces the authority of the Court, which, like any other tribunal, is dependent on the responsiveness and effectiveness, as well as on the coherence of its case-law[73].

It is worth noting, in this respect, that the efforts to introduce some form of procedural filters of admissibility for 'ordinary' references have not overshadowed the continued relevance of the Court's case-law precluding any legal obstacles limiting the national courts' discretion to refer preliminary rulings to the CJ[74].

Since *Simmenthal*, the Court has repeatedly stated that the national courts are under a "duty to give full effect" to the provisions of EU law, "if necessary refusing of its own motion to apply any conflicting provision of national legislation", without "request[ing] or await[ing] the prior setting aside of such provision by legislative or other constitutional means"[75]. Any national provision or practice which may withhold from national courts the "power [..] to set aside" conflicting national legislation – even if only temporarily – is "incompatible" with "the very essence of EU law"[76].

This applies also when the provision of national law is both contrary to EU law and unconstitutional, and the national court is under an obligation to refer the matter to the constitutional court. The existence of such an obligation cannot "prevent a national court [..] from exercising the right conferred on it by Article 267 TFEU"[77], and the national courts remain therefore "free to refer to the Court

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[73] See, in the same vein, J. Komárek, *In the Court (s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure*, 32 EL Rev. 467 (2007), 490: "narrowing down the possibility of lower courts to send preliminary references reflects the philosophy of the Court of Justice's role as a veritable Supreme Court for the Union", in that it contributes to the enhance the "authoritative guidance" of the CJ, without "pulveris[ing] its authority into hundreds of (sometimes) contradictory and (often) insufficiently reasoned answers".

[74] Cf., among the most recent rulings delivered by the Court, the case C-689/13, *PFE*, EU:C:2016:199, paras 31-36; on this issue cf. also C. Lacchi, *Multilevel judicial protection in the EU and preliminary references*, 53 CML Rev. (2016), 679–707, 682–684.

[75] Cf. Case 106/77, *Simmenthal*, EU:C:1978:49, paras 21 and 24, and, more recently, case C-617/10, *Åkerberg Fransson*, EU:C:2013:105, para 45.)

[76] Case 106/77, *Simmenthal*, para 22 and case C-112/13, *A*, EU:C:2014:2195, para 37.

[77] See case C-188/10 and C-189/10, *Melki and Abdeli*, EU:C:2010:363, para 45.

for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate"[78]. According to the *Melki and Abdeli* case[79], provided that the lower courts had the possibility to disapply national law, to adopt interim measure and to submit a reference to the CJ, they could nonetheless be deemed to be obliged to await the outcome of the interlocutory procedure[80].

However, this position seems to have been somehow hardened by the Court in the recent *Kernkraftwerke Lippe-Ems* case[81]. The Court has held that, pending an interlocutory procedure of review of constitutionality in a parallel proceeding, lower courts cannot be "precluded from referring questions to the Court for a preliminary ruling" but also from "immediately applying EU law in a manner consistent with the Court's decision or case-law"[82]. This implies that not only lower courts may disregard national procedural rules imposing an obligation to stay proceedings pending the interlocutory procedure before the constitutional court[83]. In order to immediately apply EU law, they could also disapply conflicting national law, regardless of their constitutional legitimacy.

The added value of such refinement of the previous CJ case-law can be better understood in the light of the considerations made by the referring court in *Kernkraftwerke Lippe-Ems*. It is true that, if the constitutional courts were to find that the applicable national law was invalid, the interpretation of EU law would no longer be needed[84]. This notwithstanding, the constitutional courts could declare the invalidity of national law only with future effects, and

[78] Case C-112/13, *A*, para 39.
[79] Joined cases C-188/10 and C-189/10, *Melki and Abdeli*, EU:C:2010:363, paras 52-57.
[80] Along this line K. Lenaerts, I. Maselis and K. Gutman, *EU procedural law*, cit. at 64,75
[81] Case C-5/14, *Kernkraftwerke Lippe-Ems*, EU:C:2015:354, para 36; see, for a similar assessment of the case at issues, R. García & E. Ferreiro Serret, *Hardening the preliminary reference procedure in a Union in crisis: Kernkraftwerke Lippe-Ems*, 53 CML Rev. 819 (2016), 828–833.
[82] Case C-5/14, *Kernkraftwerke Lippe-Ems*, para 36.
[83] Ibid., para 37.
[84] Ibid., para 25.

if the reference could be submitted only after the interlocutory procedure, the case could not be dealt within a reasonable time[85].

The importance of the *Kernkraftwerke Lippe-Ems*case becomes even more evident at a time where some constitutional courts are trying to regain their monopoly over the resolution of conflicts between national legislation and EU law provisions which are not directly applicable nor having direct effect or concern fundamental rights protected by both the CFREU and the national constitution[86], thus overtly challenging the authority of the CJ and undermining the foundations of the *Simmenthal* case law.

In this respect, the recent CJ case-law safeguarding the national courts' discretion to refer questions to the Courtcan be regarded as the other side of the coin of the restrictive trend concerning the minimum content of the request for a preliminary ruling under art. 94 RPCJ. Indeed, both case-law are serving the same purpose: that of safeguarding the effectiveness of art. 267 TFEU proceedings, and thus the effectiveness, coherence and primacy of EU law[87].

3.2. Towards a centralised enforcement of the CILFIT case-law?

Unlike ordinary judges, the national courts "against whose decisions there is no judicial remedy under national law" are in principle obliged to refer the questions of validity and interpretation of EU law to the CJ, provided that the question is necessary to enable them to give judgment.

According to the *CILFIT* jurisprudence, the courts of last instance within the meaning of art. 267(3) TFEU are exempted from the obligation to refer only where: (*i*) the (interpretative[88]) reference is "materially identical" with or concerns the "same point of law" of a question which has already been dealt with by the Court (*acte éclairé*) or (*ii*) the "correct application of [Union] law is so obvious

[85] Ibid., para 27.

[86] See, as a recent example, Corte cost., judgment of 14 December 2017, No 269/2017, paras 5.1. and 5.2.

[87] See, as to the causal link between the effectiveness of art. 267 TFEU and that of EU law, the case C-5/14, *Kernkraftwerke Lippe-Ems*, para 36.

[88] In case C-461/03, *Gaston Schul Douane-expediteur*, EU:C:2005:742, para 19, the Court has held that "the interpretation adopted in the *Cilfit* judgment [..] cannot be extended to questions relating to the validity of Community acts".

as to leave no scope for any reasonable doubt" (*acte clair*)[89]. The applicability of the latter condition, in particular, is dependent upon the fact that the "matter [shall be] equally obvious to the Courts of the other Member States"[90]. This in turn must be assessed on the basis of a systematic interpretation of Union law and comparing its different language versions, "in the light of the specific characteristics of [EU] law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the [European Union]"[91].

The *CILFIT* test, and notably its second limb, has attracted criticism. The *acte clair* doctrine has proven both too difficult to comply to assist some national courts in limiting the request for reference by the parties to the main proceedings, and too loose and vague to prevent other supreme and constitutional Courts to improperly circumvent the obligation to refer.

To review or to clarify the CJ settled case-law, as suggested by some Authors[92], appears politically unfeasible at present. Nevertheless, the new RPCJ are now offering an indirect procedural avenue to address the first critique, by facilitating the adoption of decisions by reasoned orders on the questions that manifestly fall within the *CILFIT*criteria. As for the second criticism, if not to revise it in a more stringent way, it appears that the Court is now prepared to put the *acte clair* doctrine to work.

Under art. 99 RPCJ, the Court may "at any time" and "on a proposal from the Judge-Rapporteur and after hearing the Advocate General" decide to reply to a preliminary ruling by reasoned order, without taking further procedural steps. This applies "where a question referred [..] is identical to a question on which the Court has already ruled", "where the reply [..] may be clearly deduced from existing case-law" or "where the answer [..]

[89] Case 283/81, *CILFIT and Lanificio di Gavardo*, EU:C:1982:335, paras 13, 14, 16 and 21.
[90] Ibid., para 16.
[91] Ibid., paras 16-21.
[92] See, among others, A. Ruggeri, *Il rinvio pregiudiziale alla Corte dell'Unione: risorsa o problema? (Nota minima su una questione controversa)*, 17 Dir. Un. Eur. 95 (2012), 100 and 104 and G. Rugge, *Bundesverfassungsgericht e Corte di giustizia dell'UE: quale futuro per il dialogo sul rispetto dell'identità nazionale?*, 21 Dir. Un. Eur. 789 (2016), 808-809.

admits of no reasonable doubt", that is, when one of the *CILFIT* conditions is met[93].

The RPCJ does not prescribe the content of the reasoned order. So far, the Court has made use of this instrument as a procedural shortcut to considerably reduce the length of proceedings[94]. Art. 99 RPCJ shall therefore primarily be understood against the background of a more general trend towards the speeding up of the CJ decision-making process, which is also reflected in a number of procedural revisions easing the recourse to the expedited preliminary ruling procedure[95].

In this context, it is doubtful whether the Court can make use of art. 99 RPCJ to declare the inadmissibility of the referred questions[96], by analogy with the corresponding provision laid down in art. 181 RPCJ for manifestly inadmissible appeals. While the CJ has so far excluded this possibility[97], the recourse to reasoned orders to declare the inadmissibility of preliminary questions could nonetheless be deduced from a systematic interpretation of the Rules of Procedures. The specific provision applicable to preliminary rulings is to be read in conjunction with the relevant common procedural provision (art. 53(2) RPCJ)[98]. It follows from the latter that the fulfilment of one of the *CILFIT* conditions may in principle determine either the lack of jurisdiction of the Court or the manifest inadmissibility of the request[99].

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[93] Along this line L. Daniele, *Art. 267 TFEU*, cit. at 59, 2119.

[94] See, among the most recent, the Orders delivered in Case C-497/16, *Sokáč*, EU:C:2017:171, paras 22-24, Case C-443/16, *Rodrigo Sanz*, EU:C:2017:109, paras 24-25, Case C-28/16, *MVM*, EU:C:2017:7, paras 21-22 and Case C-511/15, *Horžić*, EU:C:2016:787, paras 24-25.

[95] Cf., in this respect, P. Iannuccelli, *La réforme des règles de procédure de la Court de justice*, cit. at 43, 109, 111, 114, 122–123.

[96] L. Daniele, *Art. 267 TFEU*, cit. at 59, 2119.

[97] See, in this regard, the Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13, *Mascolo*, EU:C:2014:2401, para 49, and, in the same vein, K. Lenaerts, I. Maselis & K. Gutman, *EU procedural law*, cit. at 64, 85.

[98] According to art 53(2) RP, a decision by reasoned order can be adopted only "where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible".

[99] The general rule (art. 53(2) RPCJ) can be deemed to be applicable since the relation of speciality between arts 99 and 53(2) RPCJ does not extend to the legal qualification of the three concurrent conditions of applicability of art 99 RPCJ, to the extent to which the latter, more specific, rule is silent on this issue; see, in this

Irrespective of that, it is clear from the foregoing that the jurisdiction over the applicability of the *CILFIT* case-law does no longer lie exclusively within national jurisdiction. Its enforcement has been partially centralised in the hand of the CJ – either for the purpose of easing its decision-making process or, should the abovementioned systematic interpretation of the new RPCJ be accepted, for dismissing the requests as inadmissible. This is all the more so taking into account that, with the entry into force of the new RPCJ, the Court is no longer subject to the obligation to inform the referring national court and hear the parties before resorting to art. 99 RPCJ, which had until then prevented the Court from ruling by reasoned order[100].

Along with some sort of indirect centralized enforcement of the *CILFIT* case-law by way of substitution for some supreme courts, the CJ has put the same case-law to work against other, more recalcitrant, courts of last instance.

For the first time in the history of the preliminary ruling, in the recent case *Ferreira da Silva e Brito*[101], the Court has found that a national supreme court had infringed its obligation to refer a question to the CJ.

As anticipated, according to the CJ settled case-law, the national courts of last instance are precluded from invoking the *acte clair* doctrine when they consider that the matter is not "equally obvious" to the other Member States courts. In *Ferreira da Silva e Brito*, instead, the CJ has valued the existence of "conflicting lines of case-law at national level"[102], that is, within the same Member State (Portugal). Although the fact that lower courts in the same Member State have given conflicting decisions "in itself [..] is not a conclusive factor capable of triggering the obligation" to refer[103], if combined with "difficulties of interpretation in the various Member States"[104] – demonstrated by the existence of references already

respect, on a more general note, the Opinion of Advocate General Mengozzi in Case C-490/10, *Parliament v Council*, EU:C:2012:209, paras 35-36.

[100] See P. Iannuccelli, *La réforme des règles de procédure de la Court de justice*, cit. at 43, 116–117.

[101] Case C-160/14, *Ferreira da Silva e Brito*, EU:C:2015:565.

[102] Ibid., para 44.

[103] Ibid., para 41.

[104] Ibid., para 43-44.

made by national courts to the CJ – it is such as to oblige the courts of last instance to make a reference to the Court[105].

In *CILFIT* the pre-condition for applying the *acte clair* exception – i.e. that the matter is equally obvious to the other Member States' courts – was based on a subjective judgment. On the contrary, in *Ferreira da Silva e Brito* the aforementioned condition is rather dependent on objective factors (i.e. the conflicting case-law at national level and the references submitted to the CJ on similar points of law), the existence of which could more easily be assessed and enforced by the ECJ[106].

It could therefore be argued that by analogy with what has been observed in relation to art. 99 RPCJ – and in line with the original rationale behind *CILFIT*[107] – the Court appears now willing to scrutinise more carefully the existence of the conditions to invoke the *acte clair* doctrine and, in exceptional cases, to consider assessing itself the respect of the 'counterlimits' to the *CILFIT* derogations[108].

The position taken by the CJ shall also be seen against the background of the recent developments in its relationship with national constitutional courts.

As is well known, the objective of establishing a continuous and structured dialogue between the CJ and national constitutional courts has until recently proved very difficult to achieve. This was due not only to a certain political resistance on the part of constitutional courts to engage in such a dialogue but also to exogenous factors, related to the specificities of the national systems of constitutional justice[109].

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[105] Ibid., para 45.

[106] A. Kornezov, *The new format of the acte clair doctrine and its consequences*, 53 CML Rev. 1317 (2016), 1320 and 1326-1327.

[107] As underlined by H. Rasmussen, *The European Court's acte clair strategy in CILFIT*, 9 EL Rev. 242 (1984), the goal pursued by the Court was "a curtailment of the spread of national interpretative judicial independence [aiming] at ensuring the advent of a larger measure of European Court judicial control over what happens in the national courts, even those of last-resort."

[108] See, for a (partially) different reading, A. Kornezov, *The new format of the acte clair doctrine and its consequences*, cit. at 106, 1325–1326 and 1328, and A. Limante, *Recent Developments in the Acte Clair Case Law of the EU Court of Justice: Towards a more Flexible Approach*, 54 JCMS 1384 (2016), 1393–1395.

[109] See, in this respect, P. Mengozzi, *A European partnership of Courts. Judicial dialogue between the EU Court of Justice and National Constitutional Courts*", 20 Dir. Un. Eur. 701 (2015), 707-709andM. Claes, *The Validity and Primacy of EU Law*, cit. at 5, 163–164.

More recently, as observed by the Advocate General Cruz Villalón in *Gauweiler*, national constitutional courts are instead "behav[ing] increasingly as courts or tribunals within the meaning of Article 267 TFEU"[110].Indeed, in the last ten years, we have witnessed a gradual but constant recourse to the preliminary ruling procedure by constitutional courts, amongst which stand out the Italian, German, French, Spanish and Polish courts[111].

The increase in the number of references has been accompanied by – and, in certain cases, has been a direct consequence of – the development of a common "narrative of constitutional reservations [..] to the absolute and unconditional primacy of EU law"[112]. Regardless of the kind of potential conflicts between EU and constitutional law and the respective type of review of constitutionality, which varies significantly across Member States[113], this narrative also encompasses a certain openness to European law, which translates into a form of loyal cooperation towards the CJ[114]. On that basis, several constitutional tribunals have requested, or committed themselves to request, a preliminary ruling from the CJ before exercising their review of constitutionality[115].

Whilst the vast majority of Member States' constitutional courts seem to have entered an era of constructive (although sometimes confrontational) dialogue with the CJ, others still refuse

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[110] Opinion of AG Cruz Villalón, Case C-62/14, *Gauweiler*, para 40.

[111] Cf. G. Rugge, *Bundesverfassungsgericht e Corte di giustizia dell'UE*, cit. at 92, 792–793 and P. Mengozzi, *A European partnership of Courts*, cit. at 109, 706–707; in this respect see also, with particular reference to the evolution of the French *Conseil d'Etat* and *Cour de cassation* case-law, R. Mehdi, *French supreme courts and European Union law: Between historical compromise and accepted loyalty*, 48 CML Rev. 439 (2011), and, with regard to the Italian Constitutional Court, S. Sciarra & G. Nicastro, *A New Conversation: Preliminary References from the Italian Constitutional Court*, 23 MJ 195 (2016), 198–202; for a general overview of the use of the preliminary ruling procedure in the various Member States cf. M. Broberg & N. Fenger, *Le renvoi préjudiciel à la Cour de justice de l'Union européenne* 53 (2013).

[112] M. Claes, *The Validity and Primacy of EU Law*, cit. at 5, 156 and 159.

[113] Ibid., 156–162.

[114] See BVerfG, Order of 14 January 2014 - 2 BvR 2728/13, para 24 and, in the same vein, Trybunal Konstytucyjny, Judgment of 16 November 2011 – SK 45/09, para 2.5

[115] Cf., among others, BVerfG, Order of 6 July 2010 - 2 BvR 2661/06, para 60, Trybunal Konstytucyjny, Judgment of 16 November 2011 – SK 45/09, para 2.6 and Corte cost., Order of 26 January 2017, n. 24/2017, paras 6-7.

to engage in such a dialogue, by avoiding making a prior reference for a preliminary ruling to the Court before declaring the inapplicability of EU law. This has been the case, in particular, of the Czech constitutional court in the *Slovak pensions* case[116], and more recently of the Danish supreme court, in the *Ajos* case[117].

Ferreira da Silva e Brito in this respect could also be seen as a response to those constitutional tribunals that, by asserting their competence without recognizing the CJ's jurisdiction, violate the principle of loyal cooperation underlying the preliminary ruling procedure.

It is true that the Court has restated in *X and van Dijk* that it is for national courts of last instance alone "to take upon themselves independently the responsibility for determining whether the case before them involves an 'acte clair'"[118], also distancing themselves from the interpretation espoused by lower courts[119]. Nonetheless, the CJ, in cooperation with a 'coalition of the willing' ordinary judges, has now the procedural means for circumventing the risks for the primacy, coherence and uniformity of EU law represented by some 'recalcitrant' supreme courts' abusive interpretation of the *CILFIT* case-law, although within the limits of the enforcement tools made available by the EU legal order[120].

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[116] Ústavni Soud, Judgment of 31 January 2012, 2012/01/31, Pl. ÚS 5/12 and Hojesteret, Judgment of 6 December 2016, 15/2014.

[117] Ústavni Soud, Judgment of 31 January 2012, 2012/01/31, Pl. ÚS 5/12 and Hojesteret, Judgment of 6 December 2016, 15/2014; these cases shall be distinguished from the so-called Solange III decision rendered by the BVerfG on the European Arrest Warrant (Order of 15 December 2015 - 2 BvR 2735/14, paras 46, 50 and 105-125), in that, while the BVerfG has refused to submit a reference to the CJ applying the *acte clair* doctrine, it has nonetheless found the relevant EU law provision compatible with the Constitution and has restated its obligation to refer the question to the CJ before exercising its (identity) review of constitutionality in cases of real conflicts of norms.

[118] Joined Cases C-72/14 and C-197/14, *X and van Dijk*, EU:C:2015:564, para 59.

[119] Case C-160/14, *Ferreira da Silva e Brito*, paras 40-42.

[120] Cf., as to the current limits to the enforcement of the obligation under art. 267(3) TFEU by means of actions for damages and infringement proceedings and the possible ways forward, A. Kornezov, *The new format of the acte clair doctrine and its consequences*, cit. at 106, 1331–1341, P. Mengozzi, *The Liability of the State for Acts of the Judiciary: from the Köbler Ruling to the Ferreira da Silva e Brito Ruling*", 21 Dir. Un. Eur. 401 (2016), L. Coutron & J.-C. Bonichot (eds.), *L'obligation de renvoi préjudiciel à la Cour de justice: Une obligation sanctionnée?* (2013) and C. Lacchi, *Multilevel judicial protection in the EU and preliminary references*, cit. at 74, 688-691

4. Concluding remarks: a reasonable balance between effective judicial protection and constitutional authority?

From the perspective of EU law, there are two potential limits to the 'constitutionalisation' of the Court of Justice by means of structural and procedural reforms. They stem from the right to an effective judicial protection enshrined in art. 47 CFREU and the principle of loyal cooperation under art. 4(3) TEU respectively, read in conjunction with art. 267 TFEU.

At first glance, the revised RPCJ and the recent CJ case-law does not appear entirely consistent with the letter and the spirit of art. 267 TFEU and with the principle of loyal cooperation, which shall underlie the judicial dialogue between the CJ and the Member States' courts[121].

The preliminary ruling procedure, as the "keystone" of the EU judicial system, is primarily "an instrument of cooperation" between the national and Union jurisdictions, which share the competence to "ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law"[122]. It follows that in contrast with direct actions, the jurisdiction of the Court under art. 267 TFEU is preliminary both under a temporal and a functional perspective, in that it precedes and is instrumental to the adoption of the national judgment[123]. The Court would therefore appear to be under an obligation to give rulings and to avoid the establishment of any form of filter to the requests for a preliminary ruling submitted by the national courts.

The CJ settled case-law has nonetheless consistently underlined that the aim pursued by art. 267 TFEU is to provide national courts "with the points of interpretation of EU law which they need in order to decide the disputes before them"[124]and to deliver "an interpretation of EU law which will be of use to the national court"[125]. The procedural reforms undertaken in the last years appear to go precisely in this direction, by preventing the

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and 704-707, who goes so far as to theorise a justiciable "right of access to preliminary references upon individuals".

[121] See, to this effect, Opinion 2/13, EU:C:2014:2454, para 176 and Case C-614/14, *Ognyanov*, EU:C:2016:514, para 16.

[122] Opinion 2/13, EU:C:2014:2454, paras 175-176.

[123] L. Daniele, *Art. 267 TFEU*, cit. at 59, 2104.

[124] Case C-42/17, *M.A.S. and M.B.*, EU:C:2017:936, para 23.

[125] Case C-614/14, *Ognyanov*, para 16.

submission of – or facilitating the adoption of a decision on – preliminary ruling proceedings which ultimately are not necessary and useful to solve the dispute in the main proceedings.

It remains to be seen to what extent the possible limitations to the references from lower courts and the concentration of the preliminary jurisdiction in the hand of the CJ are instead consistent with the right to an effective judicial protection. The answer depends very much on the content of such right in the framework of the preliminary ruling procedure.

The right to an effective judicial protection, as codified by art. 47 CFREU, comprises the "right to an effective remedy before a tribunal", and the "right to a fair and public hearing within a reasonable time". For the purpose of the preliminary ruling proceedings, the balance between these two rights differs from that established under direct actions. Indeed, as the Court has consistently held, the preliminary ruling procedure has "the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy"[126]. It follows that art. 267 TFEU procedure is not primarily aimed at ensuring an effective remedy to private parties, as is evident from its "non-adversarial nature"[127].

On a more general note, it is true that where the effectiveness of judicial protection and of EU law collide, the latter may take precedence only insofar as the "essence of the right to effective judicial protection is preserved"[128]. Nonetheless, as Safjan and Düsterhaus have demonstrated, this "essence" varies "according to the type and nature of procedures"[129], and shall be determined by the CJ itself, precisely in view of the need to uphold the primacy, uniformity and effectiveness of EU law.

In light of the foregoing, it could be argued that, particularly in the framework of interpretative preliminary ruling proceedings, the legitimate public interest in the reasonable length[130], coherence

[126] See Opinion 2/13, EU:C:2014:2454, para 176.
[127] Practice directions to parties, cit. *supra* note 69, para 33.
[128] See M. Safjan & D. Düsterhaus, *A Union of effective judicial protection: addressing a multi-level challenge through the lens of Article 47 CFREU*, 33 YEL 3 (2014), 37-38.
[129] Ibid., 38.
[130] As the CJEU, *Annual Report 2016*, cit. at 20, 14 and 81-82 have shown, the RPCJ revision has brought forward a significant reduction of the average length of preliminary ruling proceedings.

and effectiveness of these proceedings could prevail over the expectation of the private parties in the main proceedings to have the EU law provision interpreted or declared invalid by the Court[131]. To the extent to which they respond to the former interest – by entrusting the uniform and coherent interpretation of EU law to a single Court[132] and enabling that Court to concentrate on the most relevant references – the abovementioned structural and procedural reforms seem therefore in line with art. 47 CFREU.

The effects of the reforms undertaken by the CJEU on the effective judicial protection shall also be assessed in the light of its recent case-law concerning the material scope of its preliminary jurisdiction. Reference is made to the case *Rosneft*, in which the CJ has accepted jurisdiction to give a preliminary ruling on the validity of CFSP acts concerning the compliance with the so-called non-affection clause (art. 40 TEU) and the legality of restrictive measures against natural or legal persons[133]. In so doing, the CJ has defended the "scope of the general jurisdiction that Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed"[134], precisely with a view to enforcing the principle of effective judicial protection as essential to the rule of law[135]. The progressive universalisation of the CJEU jurisdiction and the restrictive interpretation of the exceptions to the obligation to refer under art. 267(3) TFEU, on the one hand, and the tendencies to reinforce the CJ's monopoly over preliminary ruling proceedings and to introduce a form of prioritisation of cases on the basis of their relevance (by the deployment of reasoned orders and as an effect of the enhancement of the admissibility threshold for 'ordinary'

[131] See in the same vein, A. Kornezov, *The new format of the acte clair doctrine and its consequences*, cit. at 106, 1340; *contra*, partially, A. Ruggeri, *Il rinvio pregiudiziale alla Corte dell'Unione: risorsa o problema?*, cit. at 92, 97–98, according to whom any form of filter to the requests for a preliminary ruling could constitute a violation of art.6 ECHR.

[132] G. Vandersanden, *La procédure préjudicielle devant la Cour de justice de l'Union européenne* (2011), 10 rightly pointed out in this regard that "une procédure préjudicielle à deux étages, plutôt que de renforcer la confiance du justiciable dans la bonne administration du droit de l'Union, risquerait de le conduire à douter de la "parole du juge" s'il devait s'avérer qu'une décision rendue devait, par l'effet du réexamen, faire l'objet d'une évaluation différente".

[133] Case C-72/15, *Rosneft*, EU:C:2017:236, para 81.

[134] Ibid., para 62.

[135] Ibid., paras 71-73.

references for preliminary rulings) should be regarded as the two sides of the same coin. Together they represent long-overdue but positive steps in the direction of the implementation of the Nice reform, which "contained a fundamental reallocation of jurisdiction in embryo as between the Union courts", aiming at attributing to the CJ the sole "examination of questions that were of essential importance for the Union legal order"[136], like a true EU Constitutional Court.

[136] In this sense K. Lenaerts, I. Maselis & K. Gutman, *EU procedural law*, cit. at 64, 38.