Special Issue – Preliminary References to the CJEU
Part Five

Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question to the Court of Justice of the EU

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A. Introduction

The Constitutional Courts of a number of Member States exert a constitutional review on the obligation of national courts of last instance to make a reference for a preliminary ruling to the Court of Justice of the European Union (CJEU).

Pursuant to Article 267(3) TFEU, national courts of last instance, namely courts or tribunals against whose decisions there is no judicial remedy under national law, are required to refer to the CJEU for a preliminary question related to the interpretation of the Treaties or the validity and interpretation of acts of European Union (EU) institutions.[1] The CJEU specified the exceptions to this obligation in *CILFIT*.[2] Indeed, national courts of last instance have a crucial role according to the devolution to national judges of the task of ensuring, in collaboration with the CJEU, the full application of EU law in all Member States and the judicial protection of individuals' rights under EU law.[3] With preliminary references as the keystone of the EU judicial system, the cooperation of national judges with the CJEU forms part of the EU constitutional structure in accordance with Article 19(1) TEU.[4]

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[1] The CJEU specified in that regard that courts whose decisions may be reviewed by the Constitutional Court, within the limits of an examination of a potential infringement of the rights and freedoms guaranteed by the national constitution or by an international agreement, are courts of last instance within the meaning of Article 267(3) TFEU. Case C–416/10, Križan and Others, para. 72 (Jan. 15, 2013), http://curia.europa.eu/ and Opinion of Advocate General Kokott at para. 58, Case C–416/10, Križan and Others (Apr. 12, 2012), http://curia.europa.eu/. Moreover, it is worth pointing out that the obligation set out in Art. 267(3) TFEU applies also to Constitutional Courts. The article, however, does not focus on the role of Constitutional Courts as courts of last instance. For the sake of clarity, the references in the case law to ex Arts. 234(3) EC and 177(3) EEC are replaced by Art. 267(3) TFEU.

[2] Case C–283/81, CILFIT v. Ministero della Sanità, 1982 E.C.R. 03415. See also Joined Cases C–28–30/62, Da Costa en Schaake NV and Others v. Administratie der Belastingen, 1963 E.C.R. 00061.

[3] Opinion 1/09, 2011 E.C.R. I–01137, paras 66-68 and 83-86.

[4] Opinion 2/13, para. 165 and paras. 174–76 (Dec. 18, 2014), http://curia.europa.eu/.

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Since individuals do not have remedies under EU law to obtain a preliminary ruling from the CJEU against the national court's refusal to make a preliminary reference, the responsibility of judges of last instance is enhanced by the case law of the CJEU concerning the financial liability of Member States for judicial acts. Accordingly, in *Köbler*, the CJEU ruled that Member States are obliged to make good damage caused to individuals by infringements of EU law for which they are responsible, including where the alleged infringement stems from a decision not to refer of a court of last instance.[5] This was then confirmed in *Traghetti del Mediterraneo, Commission v. Italy* and recently in *Ferreira da Silva,* where the CJEU found for the first time that the national court failed to comply with its obligation under Article 267(3) TFEU.[6] Although the potential effect of the principle enshrined in this case law cannot be overlooked, the requirements in order to engage the judicial liability of Member States might confine its value.[7] Individuals may also file a complaint before the European Court of Human Rights (ECtHR) for a violation of Article 6(1) of the European Convention on Human Rights (ECHR) due to the national court's refusal to refer to the CJEU. The latter recognizes that the refusal might violate the right to a fair trial and, in two judgments of April 2014 and July 2015 respectively, it determined the existence of an infringement.[8]

Taking this backdrop into account, this article focuses on the case law of the Member States where individuals are entitled to introduce a constitutional complaint before the Constitutional Court for a violation of the constitution and to challenge the decision of a court of last instance not to refer to the CJEU.[9] In this regard, the Constitutional Courts of

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[5] Case C–224/01, Gerhard Köbler v. Republik Österreich, 2003 E.C.R. I–10239. In this regard, it should be pointed out that the judicial liability is not linked to the decision not to refer but to the damages produced by that decision.

[6] Case C–173/03, Traghetti del Mediterraneo, 2006 E.C.R. I–05177; Case C–379/10, Commission v. Italy, 2011 E.C.R. I–00180; Case C–160/14, Ferreira da Silva e Brito (Sept. 9, 2015), http://curia.europa.eu/. *See also* Opinion of Advocate General Léger, Case C–173/03, Traghetti del Mediterraneo (Oct. 11, 2005), 2006 E.C.R. I–05177; Opinion of Advocate General Bot at para. 98, Case C–2/06, Kempter (Apr. 24, 2007), 2008 E.C.R. I–00411.

[7] Laurent Coutron, *L'irénisme des cours européennes*, in L'OBLIGATION DE RENVOI PREJUDICIEL A LA COUR DE JUSTICE. UNE OBLIGATION SANCTIONNEE? 13, 46–53 (Laurent Coutron & Jean-Claude Bonichot eds., 2014).

[8] Dhahbi v. Italy, App. No. 17120/09 (Apr. 8, 2014), http://hudoc.echr.coe.int/; Schipani and others v. Italy, Appl. No. 38369/09, (July 21, 2015), http://hudoc.echr.coe.int/. *See* Ullens de Schooten and Rezabek v. Belgium, App. Nos. 3989/07 and 38353/07 (Sept. 20, 2011), http://hudoc.echr.coe.int/; John v. Germany, App. No. 15073/03 (Feb. 13, 2007), http://hudoc.echr.coe.int/.

[9] It is also worth mentioning that similar procedures concerning the judicial review of the duty to refer under Article 267(3) TFEU exist, for instance, in France. The supreme administrative court (*Cour de Cassation*) pointed out that the omission to refer might constitute a denial of justice (French *Cour de cassation*, Oct. 26, 2011, Case No. 1002). Moreover, in Sweden, national legislation reinforces the obligation to refer in that a reasoned decision is compulsory (*see* Lag (2006:502) med vissa bestämmelser om förhandsavgörande från Europeiska unionens domstol, 24 May 2006). These cases, nonetheless, are beyond the scope of this article since they are not based on constitutional complaints for the infringement of constitutional rights. It is also appropriate to point out that the

Germany, Austria,[10] Spain, the Czech Republic, and, more recently, Slovenia, have elaborated a constitutional guarantee which reinforces the duty to refer under Article 267(3) TFEU against arbitrary refusals.[11] Moreover, the Slovak Constitutional Court also recognizes that the refusal to refer of a court of last instance could breach the Constitution. Thus far, however, it has not determined the existence of a violation.

On what basis do these Constitutional Courts justify the exercise of their judicial review over this matter?[12] They have developed a judicial construction, by linking a constitutional right to the preliminary reference procedure.[13] Accordingly, they consider themselves competent to examine whether a national court of last instance violates the obligation to make a preliminary reference to the CJEU. The rights that come into play are linked to the right to effective judicial protection, which includes, *inter alia*, the right to a lawful judge, the right of access to justice, the right to effective remedies, the right to a fair trial, and the right of defense.[14] Emphasis will be given to the legal reasoning of the Constitutional Courts in question, with the purpose being of looking at the connection that has been developed between these rights and preliminary references.

The *conditio sine qua non* for this practice is that, in the Member States under analysis, when other legal remedies are exhausted, individuals may file a complaint, under certain circumstances, before those Constitutional Courts, for a breach of the rights set out in the

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analysis of the case law of the Constitutional Courts in question focuses on the aspects of the judgments that are relevant to the judicial review of the obligation to refer. Moreover, the article does not take into account the follow-up to the decisions of the Constitutional Courts before the concerned national courts.

[10] The review by the Austrian Constitutional Court is confined to administrative decisions and this excludes the judgments of administrative or ordinary courts. However, it exerts its review on decisions of administrative bodies that may be regarded as court of last instance within the meaning of Article 267(3) TFEU. See, *infra*, section B.I.

[11] The word "arbitrary" is used by these courts in order to define a refusal to refer to the CJEU which is based on reasons other than the criteria established by law.

[12] Certainly, one may argue that Constitutional Courts do not enjoy jurisdiction to solve a conflict which arises between EU and national law. Constitutional Courts, in fact, have the power to decide in proceedings involving the protection of fundamental constitutional rights and to review the compliance of domestic law and, prior to their ratification, of the Treaties with the Constitution. However, they do not have jurisdiction to assess the compliance of the decisions of domestic courts of last instance with the duty provided for in Article 267(3) TFEU.

[13] Jirí Malenovský, *Le renvoi préjudiciel perçu par trois Cours "souveraines"*, 200, 6, J. DROIT EUROPEEN 214, 217, (2013); *see also Colloque de l'Association des Conseils d'Etats et des juridictions administratives suprêmes de l'Union européenne*, 20–21 May 2002, Helsinki, http://www.aca-europe.eu/images/media_kit/colloquia/2002/gen_report_fr.pdf.

[14] Adelina Adinolfi, *The "procedural autonomy" of Member States and the constraints stemming from the ECJ's case law: Is judicial activism still necessary?*, *in* THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES 282, 296 (H.W. Micklitz & Bruno de Witte eds., 2012).

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Constitution.[15] In fact, although the rights of access to justice and to a lawful judge are fundamental rights common to all Member States,[16] procedural rules prevent individuals from submitting a direct action before the Constitutional Courts for the infringements of constitutional rights. This seems to be the main reason for the lack of a similar practice in the other Member States.

Within the limits of the case law of the CJEU, the decision to refer a preliminary question depends entirely on the national judges' assessment as to whether a reference is necessary to resolve the dispute brought before them.[17] Overall, the decision or the refusal to refer depends on the appreciation of national judges insofar as it should not be influenced by the request of the parties to the main proceedings.[18] Moreover, the judgments of national supreme courts, including Constitutional Courts, cannot prevent national judges from referring to the CJEU. This is so even where there is a national constitutional rule which obliges them to follow the judgment of the higher court.[19] In this perspective, when assessing the compliance of the decisions of national courts with Article

[15] This possibility also exists before the Hungarian Constitutional Court. Although a constitutional complaint against a national court's refusal to refer to the CJEU was filed, the Constitutional Court dismissed it according to domestic procedural provisions. Therefore, it did not assess whether the complaint's right to a fair trial under Article XXVIII of the Fundamental Law of Hungary was violated. *See* Alkotmánybíróság [Hungarian Constitutional Court], May 19, 2014, Case No 3165/2014. Georgina Naszladi, *The Hungarian Constitutional Court's Judgment Concerning the Preliminary Ruling Procedure—Comments on a Rejection Order*, PÉCS J. INT'L & EUR. L. 37–43 (2015), available at http://epa.oszk.hu/02600/02691/00002/pdf/EPA02691_pjiel_2015_1_037-043.pdf.

[16] *See* Opinion of Advocate General Ruiz-Jarabo Colomer at para. 29, Case C– 14/08, Roda Golf (Mar. 5, 2009), 2009 E.C.R. I–05439 ("Access to justice is a fundamental pillar of western legal culture. 'To no one will we sell, to no one will we deny or delay right or justice' proclaimed the Magna Carta in 1215, expressing an axiom which has remained in force in Europe to the extent that it features in the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and the case law of the Court. Therefore, the right to effective legal protection is one of the general principles of Community law, in accordance with which access to justice is organised."). Daniel Sarmiento, *National Voice and European loyalty. Member States Autonomy, European Remedies and Constitutional Pluralism in EU Law*, in THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES 340 (H.W. Micklitz & Bruno de Witte eds., 2012).

[17] Heikki Kanninen, *La marge de manœuvre de la juridiction suprême national pour procéder à un renvoi préjudiciel à la Cour de justice des Communautés européennes*, *in* UNE COMMUNAUTE DE DROIT 611, 620 (Ninon Colneric ed., 2003).

[18] Joined Cases 28–30/62, Da Costa; Case C–364/92, SAT Fluggesellschaft v. Eurocontrol, 1994 E.C.R. I–00043, paras. 8–9; Case 40/70, Sirena v. Eda, 1979 E.C.R. I–03169; Case C–402/98, ATB and Others, 2000 I–05501, para. 29; Case C–2/06, Kempter, 2008 E.C.R. I–00411, para. 41. Arjen Meij, *The Rules of the Game. Party Autonomy in the EU Courts*, *in* DE REGELS EN HET SPEL. OPSTELLEN OVER RECHT, FILOSOFIE, LITERATUUR EN GESCHIEDENIS AANGEBODEN AAN TOM EIJSBOUTS 261, 273 (Jan-Herman Reestman, Annette Schrauwen, Manet Van Montfrans & Jan Jans eds., 2011); Jean-Claude Bonichot, *Le rôle des parties au principal dans le traitement des questions préjudicielles*, 227–28, GAZETTE DU PALAIS 16 (2013).

[19] *See, e.g.*, Case C–166/73, Rheinmühlen, 1974 E.C.R. I–00033; Case C–188/10 and C–189/10, Melki and Abdeli, 2010 E.C.R. I–05667; Case C–210/06, CARTESIO Oktató és Szolgáltató bt., 2008 E.C.R. I–09641; *Križan and Others*, Case C–416/10; Case C–112/13, A v. B and Others, (Sept. 11, 2014), http://curia.europa.eu/.

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267(3) TFEU, these Constitutional Courts play an unconventional role. In these circumstances, a number of questions arise: Is it consistent with the role of national judges under EU law that Constitutional Courts invoke their competence, under the national constitution, to review a decision of a national court of last instance not to refer to the CJEU? In doing so, can Constitutional Courts establish and follow their own criteria, where those criteria diverge to a certain extent from the case law of the CJEU? Should those criteria related to the obligation to refer apply also to them, or do Constitutional Courts perceive their role as the ultimate supervisor of the implementation of EU law by domestic courts in the national legal order?

In analyzing the case law of the abovementioned Constitutional Courts, the article will firstly focus on the judicial construction according to which a national constitutional right might be violated by the decision of a national judge of last instance not to refer (B). In the subsequent section, the criteria, which those Constitutional Courts have developed and under which a constitutional right might be breached by the refusal to refer, will be explored (C). The article further discusses the implications that this case law might have on the relations between these Constitutional Courts and the CJEU. Moreover, one might ask whether this case law is compatible with the case law of the CJEU related to *CILFIT* and *Köbler* and to the margin of discretion of national judges as regards the decision to refer and the procedural autonomy of Member States (D).

B. The Infringement of the Constitution Due to the Refusal to Refer

Before examining the judicial construction of the concerned Constitutional Courts, it is important to recall the functioning of the obligation to submit preliminary references under EU law and the division of competences between the CJEU and national courts.

The CJEU has jurisdiction to give preliminary ruling on the interpretation and validity of EU law. As regards preliminary references on interpretation, national courts of last instance must ask the CJEU for a preliminary ruling, unless, on the one hand, the interpretation of EU law is so obvious as to leave no scope for any reasonable doubt concerning the manner in which the question raised is to be resolved (*acte clair*) and, on the other hand, a question is materially identical to a question of interpretation raised before another court and the CJEU has already given a preliminary ruling on that matter (*acte éclairé*). Moreover, a domestic court is not obliged to refer when the question is not relevant for deciding the main proceeding.[20] Concerning preliminary references on validity, conversely, the CJEU has the sole jurisdiction to declare an EU act void or invalid, and if a question concerning the validity of an EU act arises before a national judge, the latter is obliged to refer to the CJEU.[21]

[20] *CILFIT,* Case C–283/81; *Da Costa,* Joined Cases 28–30/62.

[21] Case C–314/85, Foto-Frost v. Hauptzollamt Lübeck-Ost, 1987 E.C.R. I–04199.

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It is in the light of the foregoing that the legal reasoning of the Constitutional Courts will be analyzed.

Scrutinizing the case law of the Constitutional Courts in question concerning the breach of the constitution as a result of an arbitrary refusal of national courts of last instance to make a reference under Article 267(3) TFEU, two approaches might be identified as regards the judicial construction linking the preliminary reference procedure to a constitutional right.[22] However, as will be shown in the next section (C), although some of these Constitutional Courts refer to the infringement of the same right and follow a similar reasoning, the criteria developed in order to assess an arbitrary refusal may diverge.

Both approaches assume that the CJEU is the competent court to rule on the validity and interpretation of EU law in line with the EU Treaties (i.e., the TEU and TFEU) insofar as Member States have transferred part of their State sovereignty to the EU.[23] Moreover, they both take into account that the purpose of the preliminary reference procedure is to establish a uniform case law and prevent courts of last instance from possibly interpreting EU law differently and creating national case law that is inconsistent with EU law.

The first approach is based on the right to a lawful judge. The legal reasoning elaborated by the Federal Constitutional Court of Germany, followed by the Austrian, Slovak, and Czech Constitutional Courts, seeks to identify the competent court to settle the dispute. It focuses on the division of competences between the CJEU and national courts, according to which, under certain circumstances, national judges of last instance have no jurisdiction to decide in a proceeding where a question concerning the interpretation or the validity of EU law is raised in a case pending before them. Article 267(3) TFEU implies that the CJEU is the lawful judge established by the EU Treaties, to which Member States are bound. It follows that where national courts of last instance resolve a dispute without referring to the CJEU, their decision might violate the right to a lawful judge (I).

As to the second approach, one may note that the Spanish and the Slovenian Constitutional Courts draw attention to the right to judicial protection with a particular focus on the right to a fair trial, which includes procedural guarantees. More specifically, the jurisdiction of the CJEU is linked to the right to defense of the parties, according to the

[22] These two approaches diverge in their starting point concerning the assessment of whether the refusal to refer of a domestic court of last instance infringes a constitutional right. However, they both reach the same outcome: under certain circumstances, the (arbitrary) refusal to refer to the CJEU may violate the constitutional right under consideration.

[23] For a comment on the approaches of a number of Constitutional Courts as regards their relationship with the CJEU after the Treaty of Lisbon. *See* Kristine Kruma, *Constitutional Courts and the Lisbon Treaty: The future on mutual trust*, *in* THE AREA OF FREEDOM, SECURITY AND JUSTICE TEN YEARS ON. SUCCESSES AND FUTURE CHALLENGES UNDER THE STOCKHOLM PROGRAMME, CEPS 38, 48 (Guild, Carrera & Eggenschwiler eds., 2010).

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protection of legitimate expectations and the respect of the sources of law. Hence, when a national judge of last instance decides a case without making a reference to the CJEU, even though a question concerning the interpretation or the validity of EU law is raised, it might deprive individuals of access to justice and thereby undermine the correct application of the sources of law as well as the right to defense, in line with the right to judicial protection (II).

I. The CJEU as the Lawful Judge

The German Federal Constitutional Court (*Bundesverfassungsgericht*) was the first constitutional court of a Member State to recognize the CJEU as the lawful judge.[24] It has been followed by the Austrian, the Czech, and the Slovak Constitutional Courts. It is in that order that I will explore the case law of these Constitutional Courts.

The German Federal Constitutional Court examines, among other things, any complaint a citizen files against a decision of a court of last instance, which might have violated a fundamental right or a right equivalent to a fundamental right, enshrined in the Basic Law (*Grundgesetz*, i.e., the German Constitution).[25] Under Article 101, section 1, sentence 2, Basic Law no one may be removed from the jurisdiction of the lawful judge. This provision is interpreted as including the jurisdiction of the CJEU in the framework of the preliminary reference procedure.[26] Therefore, the Federal Constitutional Court stresses that the constitutional right to the lawful judge might be violated by the refusal of a national court of last instance to refer to the CJEU. Consequently, individuals may challenge such a

[24] This Constitutional Court has developed extensive case law concerning its relationship with the CJEU. In this context, the role of the preliminary reference procedure to the CJEU is particularly interesting. *See, e.g.*, Asterios Pliakos & Georgios Anagnostaras, *Who is the Ultimate Arbiter? The Battle over Judicial Supremacy in EU law*, 36 ELR, 109–23 (2011); Gertrude Luebbe-Wolff, *Who has the last word? National and Transnational Courts—Conflict and Cooperation*, 30 Y.B. EUR. L. (2011); Mattias Kumm, *Who is the final arbiter of Constitutionality in Europe?: Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice*, 36 COMMON MKT. L. REV. 351, 386 (1999). For a critical view as regards the reasoning of the German Federal Constitutional Court inasmuch as it considers that the CJEU is to be seen as a lawful judge, see Meij, *supra* note 18, at 265. Meij stresses that, since the preliminary reference procedure constitutes an incident in the proceeding before the national court and it is for the latter to decide the dispute, it is questionable whether one may distinguish two lawful judges in one case.

[25] *See* Art. 93, § 1, sentence 4 bis, Basic Law; Arts. 13, sentence 8 bis, and 90, § 1, *Bundersverfassungsgerichtsgesetz* (the Federal Law concerning the procedural rules before the Constitutional Court). Renate Jaeger and Siegfried Broß, *The relations between the Constitutional courts and the other national courts, including the interference in this area of the action of the European Court. Report of the Constitutional Court of the Federal Republic of Germany,* Conference of European Constitutional Courts XII[th] Congress (Warsaw 16–17 May 1999), http://www.confcoconsteu.org/reports/rep-xii/Duitsland-EN.pdf; Hans G. Rupp, *Judicial Review in the Federal Republic of Germany*, Vol. 9, n. 1, THE AMERICAN JOURNAL OF COMPARATIVE LAW, 29–30 (1960).

[26] Malte Beyer-Katzenberger, *Judicial activism and judicial restraint at the Bundesverfassungsgericht: Was the* Mangold *judgement of the European Court of Justice an ultra vires act?*, 11(4), ERA-FORUM 517, 521 (2011).

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decision, pursuant to Article 90 of the Federal Constitutional Court Act (*Bundesverfassungsgerichts-Gesetz, BVerfGG*), which states that any person who claims that one of his basic rights or one of his rights under Article[s] [...] 101, [...] of the Basic Law has been violated by a public authority may lodge a constitutional complaint with the Federal Constitutional Court.[27]

Confirming the orientation taken in *Vielleicht* regarding the importance of the preliminary reference procedure for the collaboration between national courts and the CJEU,[28] in *Solange II* the Federal Constitutional Court stated, for the first time, that the CJEU is the lawful judge within the meaning of Article 101, section 1, sentence 2, Basic Law.[29] That is to say that the CJEU enjoys the judicial monopoly to rule on EU law matters in the framework of preliminary references. Thus, the national court of last instance's failure to refer to the CJEU may violate the constitutional right to the lawful judge.[30]

The Federal Constitutional Court based its reasoning on the following considerations. The first crucial step in the acceptance of the jurisdiction of the CJEU was the recognition that, on the one hand, the protection of fundamental rights in the EU legal order is ensured at a substantially similar level to the level required under the Basic Law in the German legal order and, on the other hand, the CJEU is able to ensure the legal standard required in a due process and the essential content of fundamental rights.[31] In the second place, the

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[27] According to Article 92 of the Federal Constitutional Act, the reasons for the complaint shall specify the right which is claimed to have been violated, and the act or omission of the organ or authority by which the complainant claims to have been harmed. In other words, an individual, who believes that an ordinary court has violated its duty to refer to the CJEU under Article 267(3) TFEU, can challenge such a decision before the Federal Constitutional Court, by claiming a violation of the constitutional right to a lawful judge within the limits of Article 101, section 1, sentence 2 of the Basic Law.

[28] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], July 25, 1979, *Steinike & Weinlig ('Vielleicht')*, Case No. 2 BvL 6/77.

[29] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Oct. 22, 1986, *Solange II*, Case No. 2 BvR 197/83; Ranier Arnold, *Review by constitutional courts of proceedings before ordinary courts applying community law: The experience of the Federal Constitutional Court of Germany*, Venice Commission, Report CCS 2006/05, 2–4 (2005), *available at* http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU%282006%29026-e; *see also* E R. Lanier, Solange, *Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge*, 11 B. C. INT'L & COMP. L. REV. 20 (1988); Jochen Abraham Frowein, Solange II. *Constitutional complaint Firma W.*, 25 COMMON MKT. L. REV. 201–06 (1988).

[30] *See, e.g.*, Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Jan. 9, 2001, NJW, Case No. BvR 1036/99. In particular, the Federal Constitutional Court stated that the right to a lawful judge was violated as the national court of last instance interpreted EU legislation in contrast to EU fundamental rights. Consequently, the refusal to refer violated the protection of the fundamental rights of individuals, which the CJEU would have taken into account in its preliminary ruling. It is interesting to note that as far as fundamental rights are concerned, the constitutional review seems to limit, more than when other interests are involved, the margin of discretion of the court of last instance when deciding whether or not to refer.

[31] Lanier, *supra* note 29, at 26; BVERFG, Case No. 2 BvR 197/83.

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Federal Republic of Germany, having ratified the EU treaties, conferred on the CJEU the jurisdiction to rule when EU law is involved directly or by the implementation of secondary EU legislation in its national system.[32] Besides, in line with the purpose of the preliminary reference procedure, only the CJEU will guarantee that the objectives of the EU Treaties of integration, legal security, as well as uniform application and interpretation of EU law, are protected. Moreover, the duty to refer of a national judge of last instance shall be ensured as a consequence of the obligations arising out of the EU Treaties.[33]

The same year of its accession to the EU, the Austrian Constitutional Court (*Verfassungsgerichtshof*) delivered a judgment in which it recognized the CJEU as the lawful judge within the meaning of Article 83(2) of the *B-VG* (i.e., the Austrian Constitution).[34] It also held that a violation of the obligation of national courts of last instance to refer to the CJEU might violate the right to the lawful judge. In doing so, it applied its settled case law concerning the right to the lawful judge within the meaning of Article 83(2) of the Austrian Constitution.[35]

Under Article 144(1) of the Austrian Constitution, individuals may bring an action before the Austrian Constitutional Court concerning a violation of constitutional rights. It should be clarified, however, that the judicial review by the Austrian Constitutional Court is confined to administrative decisions. Therefore, the judgments of ordinary courts or administrative courts are excluded.[36] In these circumstances, the Austrian Constitutional

[32] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], May 31, 1990, Case No. 2 BvR 89/159, para. 131.

[33] BVERFG, Case No. 2 BvR 197/83.

[34] Verfassungsgerichtshof [VFGH] [Austrian Constitutional Court], Dec. 11, 1995, Case No. VfSlg. 14.390; Regina Valutyté, *Legal Consequences for the infringement of the obligation to make a reference for a preliminary ruling under constitutional law*, 19 MYKOLO ROMERIO UNIVERSITETAS 1171, 1174 (2012); Tanja Marktler, *The European Court of Justice as Lawful Judge, Austrian Constitutional Court Judgment from December 11th, 1995 VfSlg. 14.390*, 2 VIENNA ONLINE J. INT'L CONST. L. 294 (2008), *available at* http://heinonline.org/HOL/LandingPage?handle=hein.journals/vioincl2&div=37&id=&page. It is noteworthy that in the judgment VfSlg U 466/11 (VfGH, March 2012, Case No. VfSlg U 466/11) the Austrian Constitutional Court held, in essence, that its constitutional review applies to the provisions of the Charter of Fundamental Rights of the European Union (Charter). Concerning the effect of this judgment on the duty of national courts to refer a preliminary question to the CJEU, a national court submitted a reference to the CJEU. The latter delivered its ruling in September 2014. *Cf. A* v. *B and Others,* Case C–112/13. See, *infra* section D.II.

[35] This court gives a broad interpretation to this right, including public authority, in order to preserve the division of competences at both judiciary and administrative level. Alexander Pelzl, *Rapport autrichien*, *in* L'OBLIGATION DE RENVOI PREJUDICIEL A LA COUR DE JUSTICE. UNE OBLIGATION SANCTIONNEE?, 83, 90 (Laurent Coutron & Jean-Claude Bonichot eds., 2014).

[36] *Id.* at 83, 91–92.

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Court determined that administrative bodies might also be considered courts of last instance within the meaning of the case law of the CJEU and, thereby, be obliged to refer.[37]

The Czech Constitutional Court was reluctant, at first, to exercise judicial review over conflicts between EU law and national law, including on the violation of the obligation of national courts of last instance to make a reference for a preliminary ruling to the CJEU.[38]

This attitude changed in a judgment of 2009.[39] In *Pfizer*, the Constitutional Court of the Czech Republic received a constitutional complaint against, *inter alia*, the decision of the Supreme Administrative Court (a court of last instance), asserting a violation of the right to a fair trial under Article 36(1) of the Czech Charter of Fundamental Rights and Freedoms (the Czech Charter) and the complainant's right to a lawful judge, which is guaranteed by Article 38(1) of the Czech Charter, due to the refusal to refer a question to the CJEU.[40] The Czech Constitutional Court clarified the reason of its intervention. More specifically, it pointed out that, in principle, it is within the competence of an ordinary court to interpret EU law in line with the principle of primacy and by making use of the preliminary reference procedure, since the scope of its review concerns the protection of constitutionality and individual rights. However, it argued that the failure of a court of last instance to refer may, in certain circumstances, violate the constitutional right to a lawful judge. In this context, the Constitutional Court can assess whether a domestic court of last instance, in applying EU law, fails, in an arbitrary way, to ask the CJEU for a preliminary ruling.[41] The Czech Constitutional Court skipped the examination of whether the refusal to refer could have violated the right to fair trial, notwithstanding the dissenting opinion of one of the judges of the case who observed that particular focus should be placed on the right to a fair trial, instead of on the right to a lawful judge.[42] It determined that the failure to make a

[37] VfGH, Case No. VfSlg. 14.390.

[38] Tomáš Dumbrovský, *Constitutional Pluralism and Judicial Cooperation in the EU after the Eastern Enlargements: A Case Study of the Czech and Slovak Courts*, *in* CONSTITUTIONAL EVOLUTION IN CENTRAL AND EASTERN EUROPE. EXPANSION AND INTEGRATION IN THE EU 89, 100 (Kyriaki Topidi & Alexander H.E. Morawa eds., 2010); Valutyté, *supra* note 34, at 1177–78.

[39] Ústavní soud [ÚS] [Constitutional Court of the Czech Republic], Jan. 8, 2009, *Pfizer,* Case No. II. ÚS 1009/08, *English version available at* http://www.usoud.cz/en/decisions.

[40] In the Czech legal order, the Charter is a constitutional act, which focuses on the protection of human and civil rights, while the Constitution concerns state sovereignty, territorial integrity, and the institutions. Both are constitutional acts of equivalent hierarchical level.

[41] ÚS Case No. 1009/08 at para. 21; Markéta Navratilova, *The preliminary ruling before the Constitutional Courts* 2012, http://www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/navratilova.pdf.

[42] *See* Dissenting Opinion of Judge Dagmar Lastovecká; Malenovský, *supra* note 13, at 219; David Petrlík, *Rapport tchèque*, in L'OBLIGATION DE RENVOI PRÉJUDICIEL À LA COUR DE JUSTICE. UNE OBLIGATION SANCTIONNÉE? 409, 416 (Laurent Coutron & Jean-Claude Bonichot eds., 2014).

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reference to the CJEU entailed a violation of Article 38(1) of the Czech Charter. Accordingly, it recognized the CJEU as the lawful judge.[43]

The reasoning of the Czech Constitutional Court is structured as follows. Article 38(1) of the Czech Charter states that no one can be removed from the jurisdiction of the statutory court established by law (i.e., the court enlisted to decide a matter according to procedural rules in order to ensure the principle of fixed assignment). Further, due to the accession of the Czech Republic to the EU, national courts of last instance became obliged to refer to the CJEU for a preliminary ruling. Under this procedural obligation, the CJEU is the only court which enjoys the jurisdiction to rule and, consequently, it is considered the lawful court. Moreover, the role of the CJEU as a lawful judge aims at ensuring the uniform interpretation of EU law for individuals, as well as the foreseeability of the law in line with the principle of a law-based state. This line of case law was confirmed in another judgment two years later.[44]

It is interesting to note that in *Pfizer* there is nothing but a vague reference to the relevant practice of the Federal Constitutional Court of Germany.[45] Nevertheless, it is clear that the Constitutional Court of the Czech Republic was widely inspired by the case law of its German counterpart and this has been explicitly confirmed in the judgment of 2011.[46] In this regard, scholars have argued that the *Pfizer* judgment of the Czech Constitutional Court was rather influenced by a previous judgment of the Slovak Constitutional Court, which was delivered a few months before.[47]

As to the latter, in *Commercial Agent*, the Slovak Constitutional Court received a constitutional complaint concerning an infringement of the right to a lawful judge, as laid down in Article 48(1) of the Slovak Constitution, in that the Regional Court of Bratislava did not refer a question for a preliminary ruling to the CJEU. The Slovak Constitutional Court stated that a refusal to refer might violate the right to a lawful judge. It pointed out that this right includes that each dispute is settled by a court, relying on a correct legal basis. Thus, since the accession of the Slovak Republic to the EU, the interpretation of EU law

[43] In the English translation of the judgment there is the word "statutory" instead of "lawful." However, the meaning does not differ.

[44] ÚS, Nov. 29, 2011, Case No. II. ÚS 1658/1, http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Aktualne_prilohy/2012_01_03.pdf.

[45] ÚS 1009/08 at paras. 20, 22. The Czech Constitutional Court referred to the practice of the German Federal Constitutional Court "for the sake of comparison and information".

[46] II ÚS 1658/11 at para 18.

[47] Ústavný súd Slovenskej republiky [Constitutional Court of the Slovak Republic], July 3, 2008, Case No. IV. ÚS 206/08-50, *available at* http://www.concourt.sk/rozhod.do?urlpage=dokument&id_spisu=214397. Dumbrovský, *supra* note 38, at 101.

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given by the CJEU through the preliminary reference procedure is also part of the national proceeding, according to Article 109 section 1(c) of the Slovak Code of Civil Procedure. However, it dismissed the complaint as inadmissible due to the fact that the claimant should have filed an extraordinary appeal to the Supreme Court, and the possibility to file a claim before the latter prevents the exercise of the jurisdiction of the Constitutional Court.[48]

II. The Breach of the Right to Judicial Protection Due to the Refusal of National Courts of Last Instance to Refer to the CJEU

Even though the Spanish and the Slovenian Constitutional Courts also recognize that the failure to refer to the CJEU might lead to a breach of a constitutional right, their reasoning is based on different grounds, since these courts do not consider the CJEU to be the lawful judge.

The Spanish Constitutional Court (*Tribunal Constitucional*) finds that the failure of national judges of last instance to comply with the obligation under Article 267(3) TFEU might infringe the right to effective judicial protection, enshrined in Article 24 of the Spanish Constitution. In this regard, one may point out that, in the Spanish legal system, the constitutional review of the duty under Article 267(3) TFEU deals with the protection of the right to effective judicial protection, rather than with the division of competences between courts, which is ensured by the right to the lawful judge.[49] In other words, the existence of an obligation to refer to the CJEU under Article 267(3) TFEU does not imply that the national judge of last instance is not the lawful judge in the main proceeding any more. The denial, however, prevents access to the CJEU and it might undermine the right to defense, since it could lead, in certain circumstances, to the misapplication of the sources of law, affecting the right to effective judicial protection. [50]

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[48] *See* Articles 237g of the Slovak Code of Civil Procedure and Article 127, 1f, of the Constitution; *see also Informations rapides sur les développements juridiques présentant un intérêt communautaire* N° 2/2009, http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-07/fr_2009_reflets2.pdf.

[49] Cristina Izquierdo Sans, *Cuestión prejudicial y artículo 24 de la constitución española*, 23 REVISTA GENERAL DE DERECHO EUROPEO 18 (2011).

[50] This reasoning is inspired by the constitutional complaint brought for a violation of Article 24 of the Constitution due to the fact that a national judge does not raise a constitutional issue before the Constitutional Court. In fact, when an ordinary court decides by its own authority to set aside a national law as unconstitutional, its ruling undermines the sources of law and leads to a violation of the right to effective judicial protection. Ricardo Alonso García, *Spanish Constitutional Court. Judgment 58/2004, of 19 April 2004. Tax on the use of gambling machines. "Recurso de amparo" (individual appeal for constitutional protection) and EC preliminary ruling. Failure to request an EC preliminary ruling considered as a violation of the fundamental right to effective judicial protection*, 42 COMMON MKT. L. REV. 535, 538, 2005; Valutyté, *supra* note 34, at 1181; Daniel Sarmiento, *Rapport espagnol*, *in* L'OBLIGATION DE RENVOI PRÉJUDICIEL À LA COUR DE JUSTICE. UNE OBLIGATION SANCTIONNÉE? 165, 168 (Laurent Coutron & Jean-Claude Bonichot eds., 2014).

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Since the accession of Spain to the EU, the Spanish literature has embarked on a vibrant debate concerning the question of whether the refusal to make a reference to the CJEU may be challenged by an appeal filed by individuals against judicial decisions of last instance for a violation of a fundamental right of constitutional relevance (*recurso de amparo*).[51] In this respect, particular attention was given to the connection between the failure to refer under Article 267(3) TFEU and Article 24 of the Spanish Constitution. The first paragraph of Article 24 of the Spanish Constitution ensures the right to effective judicial protection, while the second paragraph refers to the right to a fair trial, which includes the right to a lawful judge and the right to defense. Scholars were divided on the identification of the right under Article 24 of the Spanish Constitution, which could be violated by the refusal of a national court of last instance to make a reference for a preliminary ruling.[52] Moreover, a number of scholars stressed that the Constitutional Court did not have jurisdiction to review the obligation of national courts of last instance to make a reference for a preliminary ruling to the CJEU and that, thereby, a constitutional complaint could not be admissible. The Spanish Constitutional Court seemed to have followed that view at first, by stating its incompetence to review any issue related to the interpretation of EU law.[53]

Subsequently, it started to point out the existence of a link between the protection of the constitutional rights laid down in Article 24 of the Spanish Constitution and the preliminary reference procedure to the CJEU. In particular, it underlined the crucial role of preliminary references in ensuring the protection of the fundamental rights of individuals. Indeed, it held that the preliminary reference procedure is a means of defense for the parties to the national proceeding.[54] However, it specified that ordinary courts of last instance have exclusive competence concerning the decision to make a reference for a preliminary ruling to the CJEU in the context of the positive assessment of compatibility of Spanish legislation with EU law.[55] Against this background, it stated that the parties to the proceedings could challenge the decision not to refer of a national court of last instance before the Constitutional Court in order to protect their fundamental rights.[56] However, a

[51] Ricardo Alonso García & José Maria Baño León, *El recurso de amparo frente a la negativa a plantear cuestión prejudicial ante el Tribunal de Justicia de la CE*, 29 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 193 (1990).

[52] In particular, Izquierdo Sans, *supra* note 49, at 2.

[53] Tribunal Constitucional [TC] [Spanish Constitutional Court], Dec. 1993, Case No. STC 372/1993 of December 1993; Valutyté, *supra* note 34, at 1180.

[54] *See* Tribunal Constitucional [TC] [Spanish Constitutional Court], Cases No. STC 180/1993; STC 201/1996; STC 203/1996.

[55] Tribunal Constitucional [TC] [Spanish Constitutional Court], Cases No. STC 111/1993.

[56] *Id*.

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constitutional complaint was admissible not against the refusal to refer to the CJEU, but against arbitrariness or clear unreasonableness or due to obvious error in the grounds of the decision,[57] or the arbitrary or clearly unreasonable or patently erroneous reasons in the selection of the applicable rule,[58] in spite of any connection with the obligation to ask the CJEU for a preliminary ruling.

The turning point in the constitutional case law is identified in a judgment of 2004. Differently from before, the national judge of last instance decided to disapply a national legislative provision as contrary to EU law and refused to ask the CJEU for a preliminary ruling. In that context, for the first time, the Constitutional Court regarded as well founded a constitutional complaint challenging the refusal of an ordinary court of last instance to make a preliminary reference to the CJEU for a violation of Article 24 of the Spanish Constitution.[59] In this regard, it should be underlined that the Spanish Constitutional Court focused on whether the Spanish court had decided within the limits of the CJEU's case law, in particular *Da Costa* and *CILFIT*.[60] It stressed that, prior to disapplying a domestic provision as contrary to EU law, national courts are obliged to ask the CJEU for a preliminary ruling. This is crucial where they propose an interpretation that leads to a different decision from the case law of other domestic judicial bodies. In fact, the Spanish Constitutional Court pointed out that other national courts had already stated that there was no contradiction between national legislation and EU law on that matter. Moreover, a judgment of the CJEU had confirmed those opinions.[61] In this perspective, the failure to initiate a preliminary reference procedure before the CJEU infringed the right to effective judicial protection under Article 24(1) of the Constitution.[62]

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[57] Tribunal Constitucional [TC] [Spanish Constitutional Court], Feb. 11, 2002, Case No. STC 35/2002.

[58] Tribunal Constitucional [TC] [Spanish Constitutional Court], Case No. STC 180/1993. In this judgment the Spanish Constitutional Court stressed that national judges are not obliged to provide explanations concerning an issue raised by the parties. It should be observed that in judgment 35/2002, the Constitutional Court pointed out that the decision to ask or not for a ruling on constitutionality should be sufficiently explained. The Constitutional Court kept applying this practice, e.g., Tribunal Constitucional [TC] [Spanish Constitutional Court], Nov. 29, 1999, Case No. STC 214/1999; March 27, 2006, Case No. STC 96/2006; May 4, 2009, Case No. STC 105/2009; and June 3, 2013, Case No. STC 127/2013.

[59] Tribunal Constitucional [TC] [Spanish Constitutional Court], April 19, 2004, Case No. STC 58/2004. This is also due to the fact that in 2004 the Spanish Constitutional Court delivered Opinion 1/2004 on the constitutionality of the Treaty establishing a constitution for Europe in which it began to recognize the status of EU law. Daniel Sarmiento, *Reinforcing the (domestic) constitutional protection of primacy of EU law: Tribunal Constitucional*, 50 COMMON MKT. L. REV. 875, 881 (2013). Laurence Burgorgue-Larsen, *La déclaration du 13 décembre 2004 (DTC n°1/2004): «un* Solage II *à l'espagnole»*, 18 CAHIERS DU CONSEIL CONSTITUTIONNEL 154, 161 (2005).

[60] Tribunal Constitucional [TC] [Spanish Constitutional Court], Case No. STC 58/2004; *CILFIT,* Case C–283/81 and *Da Costa,* Joined Cases 28–30/62.

[61] Joined Cases C–370-372/95, Careda and Others v. Administración General del Estado, 1997 E.C.R. I–03721.

[62] In the Spanish constitutional literature, various scholars have pointed out the similarity between preliminary references on constitutionality to the Constitutional Court and preliminary references to the CJEU. In this regard,

In a recent decision of November 2013, the Slovenian Constitutional Court also recognized that the refusal to refer to the CJEU, under Article 267(3) TFEU, may violate the right to judicial protection within the meaning of Article 23(1) of the Slovenian Constitution.[63] The Slovenian Constitutional Court based its judgment on the fact that, by joining the EU, Slovenia transferred the exercise of part of its sovereign rights to the EU. By consequence, under Article 23(1) of the Constitution the right to judicial protection of an individual, who is party to the national proceedings, refers also to the duty of a court to submit the case to the CJEU on the basis of Article 267 TFEU.[64] It is interesting to observe that Article 23 of the Slovenian Constitution alludes to the right to judicial protection, including the rights of access to justice and to a lawful judge. More specifically, the first paragraph refers to the right of access to justice, within the meaning of an independent, impartial court constituted by law. The second paragraph concerns the right to a lawful judge. Prior to this judgment, which explicitly referred to the first paragraph of Article 23 of the Slovenian Constitution, scholars were divided on whether non-compliance with the duty to refer provided for in Article 267(3) TFEU could violate the right of access to justice or the right to a lawful judge.[65]

C. Assessing the Obligation for National Courts of Last Instance under Article 267(3) TFEU: The Criteria Elaborated by Constitutional Courts

Under which circumstances can a refusal of a national court of last instance violate a constitutional right? In the Member States examined, the Constitutional Courts have

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in order to explain the practice developed by this Constitutional Court concerning the *recurso de amparo* for a breach of Article 24 of the Constitution due to the refusal to refer under Article 267(3) TFEU, it is worth exploring briefly the case law regarding the constitutional complaint for a breach of Article 24 of the Constitution due to the decision of a national judge of last instance, which has a duty to refer a preliminary question to the Constitutional Court. One may distinguish two hypotheses. On the one hand, when national courts make a negative assessment of constitutionality and do not apply a national law due to its unconstitutionality, the Constitutional Court stressed that there is an obligation to ask the Constitutional Court to rule on that matter. In other words, the failure to request a preliminary ruling on constitutionality produces an "abuse of authority", notwithstanding a reasoned decision of the relevant ordinary court. On the other hand, the positive assessment of constitutionality falls within the "exclusive and non-reviewable" margin of appreciation of national judges, even if the parties to the proceeding raise arguments of unconstitutionality of the relevant legislative provisions. García, *supra* note 50, at 535–39; *see, e.g.*, Tribunal Constitucional [TC] [Spanish Constitutional Court], Case No. STC 173/2002; Tribunal Constitucional [TC] [Spanish Constitutional Court], Case No. STC 151/1991.

[63] Ustavno sodišče Republike Slovenije [Constitutional Court of Slovenia], Nov. 21, 2013, Case No. Up-1056/11, *available at* http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/17AF41EB27FD758DC1257CA500364679.

[64] *Id.* at para 9.

[65] Verica Trstenjak & Katja Plaustajner, *Slovenian Report*, *in* L'OBLIGATION DE RENVOI PREJUDICIEL A LA COUR DE JUSTICE. UNE OBLIGATION SANCTIONNEE?, 460, 476–77 (Laurent Coutron & Jean-Claude Bonichot eds., 2014).

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elaborated a number of additional, albeit complementary, criteria to the requirements set out in the case law of the CJEU. These criteria determine the extent of the obligation of courts of last instance to ask for a preliminary reference. They affect the margin of discretion of national judges of last instance under Article 267(3) TFEU and the scope of review of these Constitutional Courts accordingly.

Although all these Constitutional Courts argue that a violation of the constitutional right to either a lawful judge or judicial protection is due to an *arbitrary* decision not to refer, the interpretation of the notion of arbitrariness diverges. In analyzing the case law, one may identify, in essence, three main approaches that these Constitutional Courts have adopted in order to determine the existence of an arbitrary failure to refer to the CJEU. First, the German and the Austrian Constitutional Courts examine whether a refusal to refer is arbitrary in relation to the assessment that the national judge made as to its duty under Article 267(3) TFEU (I). Second, the Czech and the Slovenian Constitutional Courts refer to the statement of reasons for the refusal to refer under Article 267(3) TFEU (II). Third, the Spanish Constitutional Court looks at whether the national court of last instance appears to have doubts concerning EU law (III).

I. Arbitrary Decisions As Regards the Assessment of the Duty under Article 267(3) TFEU

The Constitutional Courts of Germany and Austria examine whether national courts of last instance (or administrative bodies which may be seen as equivalent to national courts of last instance, as far as Austria is concerned) comply with their duty under Article 267(3) TFEU. However, as has been argued, it is not clear whether the review by these courts follows the criteria established by national constitutional law or by EU law.[66]

The Federal Constitutional Court of Germany has indicated the scope of its review concerning the obligation of ordinary courts of last instance to make a reference for a preliminary ruling and the hypothesis where Article 101, section 1, sentence 2, Basic Law might be violated by the decision not to refer.[67]

As for the scope of its review, the German Federal Constitutional Court clarified that it does not engage in a detailed review concerning a decision not to refer for a preliminary ruling to the CJEU.[68] It pointed out that it does not consider itself a "supreme court of review for submission." In fact, it focuses on whether the right to a lawful judge is violated

[66] Arnold, *supra* note 29.

[67] MONICA CLAES, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION 426–32 (2006); Valutyté, *supra* note 34.

[68] Felix Arndt, *The German Federal Constitutional Court At the Intersection of National and European Law: Two recent Decisions*, 2 GERMAN L. J. (2001).

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rather than on the refusal to make a reference.[69] Thus, it is not that any refusal to refer constitutes a violation of the constitutional right to a lawful judge within the meaning of Article 101, section 1, sentence 2, Basic Law.[70] The latter is breached by an arbitrary refusal to refer insofar as a court of last instance disregards its obligation under Article 267(3) TFEU in an indefensible manner[71] and its decision appears "manifestly untenable."[72] According to the German Federal Constitutional Court, it is possible to identify three cases where this happens.[73] First, the refusal to refer is manifestly untenable when a court of last instance deciding on the merits does not at all consider making a submission despite the fact that EU law is involved and although it has doubts regarding the relevant interpretation of the issue concerned (fundamental disregard of the obligation to make a submission). Second, the domestic court deliberately deviates from the case law of the CJEU (deliberate deviation without making a submission). Third, the right to a lawful judge is violated when the court of last instance decides without making a reference, even though the case law of the CJEU is not yet available with regard to the relevant EU law issue or existing case law has not yet exhaustively answered the question or there is the possibility of further development of the CJEU's case law. This is the case if possible counterviews are to be clearly preferred over the opinion put forward by that court (incompleteness of the case law of the CJEU).[74]

Moreover, it is interesting to highlight the existence of a contradictory interpretation between the two panels of the Federal Constitutional Court, namely the first Senate and the second Senate.[75] In order to illustrate the diverging reasoning of the two panels, it is

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[69] *Id.*; Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Case No 2 BvR 2661/06 at para. 90; *see also* Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Nov. 9, 1987, Case No. 2 BvR 808/82; Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], May 6, 2008, Case No. 2 BvR 2419/06. A different view is held in an order of the third chamber of the First Senate. *See* Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Feb. 25, 2010, Case No. 1 BvR 230/09; Laurent Dechâtre, *Karlsruhe et le contrôle ultra vires : une «source de miel» pour adoucir la très acidulée décision Lisbonne*, 4 REVUE DES AFFAIRES EUROPÉENNES 861, 867 (2009–2010); Valutyté, *supra* note 34, at1174.

[70] For the first time, in a decision of 8 April 1987, see Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], April 8, 1987, Case No. 2 BvR 687/85; Arnold, *supra* note 29.

[71] BVERFG, Case No. 2 BvR 687/85; Valutyté, (note 34), 1774.

[72] 29 BVERFGE 198 (207); BVerfG, Case No. 2 *BvR* 687/85 at para. 62.

[73] 82 BVerfGE 159.

[74] *Id.*

[75] The Federal Constitutional Court consists of two Senates, each of which comprises eight judges and appoints several chambers. Which of the two Senates is competent to decide is stated in Articles 13 and 14 of the Federal Constitutional Court Act. Concerning the contradictory interpretation in the two Senates, see Matthias Mahlmann, *The Politics of Constitutional Identity and its Legal Frame—the Ultra Vires Decision of the German Federal Constitutional Court* 11 GERMAN L. J. 1407, 1413 (2010); Malenovský, *supra* note 13, at 214, 224.

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worth remembering the decision of the second Senate of 6 July 2010, in the *Honeywell* case, and the judgment of the first Senate of 30 August 2010.[76] In *Honeywell*, the second Senate of the Federal Constitutional Court held that Article 101, section 1, sentence 2, Basic Law was not violated. It rejected the constitutional complaint as unfounded in that the national court of last instance applied the content of the *Mangold* ruling of the CJEU in a justifiable way. By focusing on the outcome of the decision rather than on the obligation under Article 267(3) TFEU, it concluded that, in those circumstances, the refusal to refer fell within the margin of discretion of the national court of last instance.[77] In a judgment delivered a few months later, the first Senate of the German Federal Constitutional Court stated that the challenged judgment of the national court of last instance failed to discuss the duty to refer the matter to the CJEU under Article 267(3) TFEU and, therefore, violated the complainant's right to a lawful judge within the meaning of Article 101, section 1, sentence 2, Basic Law. Moreover, the German Federal Constitutional Court underlined that the reasoning of the national court of last instance did not demonstrate that the latter sufficiently took EU law into account, nor that it actually considered the possibility of making a reference to the CJEU or the application of one of the exceptions to Article 267(3) TFEU.[78]

One may argue, in this regard, that the first Senate of the Federal Constitutional Court is inspired by *CILFIT* and the duty under Article 267(3) TFEU is directly linked to the fundamental right to a lawful judge.[79] Accordingly, the margin of appreciation of national judges of last instance is delimited by the compatibility with the "*acte claire*" and "*acte éclairé*" theories. The assessment of a violation of Article 101, section 1, sentence 2, Basic Law requires the assessment of whether national courts comply with the obligation to refer under Article 267(3) TFEU, which is monitored by the Federal Constitutional Court.[80]

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[76] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], July 6, 2010, Honeywell, Case No. 2 BvR 2661/06. The case originated in a constitutional complaint challenging the decision of the Federal Labor Court which applied the principles laid down in *Mangold* by the CJEU (C–144/04, Werner Mangold v. Rüdiger elm, 2005 E.C.R. I–09981). The complaint considered, on the one hand, the judgment *ultra vires* and, on the other one, the decision of the Federal labor court taken in violation of the protection of legitimate expectations. Matthias Mahlmann, *supra* note 75. As regards the judgment of the first Senate, see Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], August 30, 2010, Case No. 1 BvR 1631/08.

[77] *Id*. at para. 92; Anja Wiesbrock, *The implication of* Mangold *for domestic legal system: The* Honeywell *case*, 18 MAASTRICHT J. EUR. & COMP. L. 201–15 (2011).

[78] BVERFG, Case No. 1 BvR 1631/08.

[79] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Feb, 25, 2010, Case No. 1 BvR 230/09; Case No. 1 BvR 1036/99; Case No. 1 BvR 1631/08. When applying the constitutional review concerning the obligation to ask for a preliminary reference to the CJEU, the German Federal Constitutional Court considered, on the one hand, if the national courts took into account EU law and the preliminary reference procedure, and on the other hand, the attitude of the courts of other Member States deciding on the same issue. Mahlmann, *supra* note 75, at 1413; Valutyté, *supra* note 34, at 1176.

[80] BVERFG, Case No. 1 BvR 230/09, Malenovský, *supra* note 13, at 218.

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More specifically, the first Senate stresses that, when reviewing whether a violation of Article 101, section 1, sentence 2, Basic Law has occurred, the decisive factor is the assessment of how the court of last instance treated the obligation to refer under Article 267(3) TFEU, rather than the justifiability of its interpretation of the relevant substantive EU law provisions.[81]

As to the second Senate, its case law is mostly inspired by *Köbler* in that it points out that Article 267(3) TFEU does not constitute an autonomous legal basis in order to assess the obligation to refer.[82] Therefore, national courts of last instance retain the same discretion in the assessment and evaluation, which corresponds to that which they have in handling a provision of the German legal system. The Federal Constitutional Court only acts as a guardian over adherence to the boundaries of this margin. According to this analysis, insofar as the outcome of the judgment is justifiable, the refusal to make a reference appears to be comprehensible and is not manifestly untenable. Therefore, it does not infringe Article 101, section 1, sentence 2, Basic Law. The latter is violated where the national court of last instance, in deciding the case without having asked the CJEU for a preliminary ruling, did not answer the question which is material to the ruling in a manner that is at least justifiable.[83] That is to say that no possible counterviews to the relevant question of EU law are to be clearly preferred over the opinion put forward by the court.[84]

Contrary to the Federal Constitutional Court of Germany, the Austrian Constitutional Court points out that any refusal to make a reference to the CJEU under Article 267(3) TFEU violates the constitutional right to a lawful judge under Article 83 (2) B-VG, even where there is no evidence of a serious failure to refer.[85]

Particular attention should be drawn to the assessment of the Austrian Constitutional Court concerning the obligation to refer under Article 267(3) TFEU. At first sight, its interpretation does not create any problem. Indeed, this Constitutional Court takes into account whether the relevance of a preliminary question in order to reach a decision and the applicability of the *acte clair* and the *acte éclairé* doctrines have been examined. However, it seems that the Austrian Constitutional Court fails to interpret these two concepts, by unifying and combining them in a single notion.[86] More specifically, while

[81] BVERFG, Case No. 1 BvR 1631/08.

[82] Malenovský, *supra* note 13, at 218; Beyer-Katzenberger, *supra* note 26, at 517, 521.

[83] BVERFG, Case No. 1 BvR 481/01.

[84] Valutyté, *supra* note 34, at 1177; 1 *BvR* 481/01 at paras. 21–22; 82 BVerfGE 159 (194).

[85] Peter Thalmann, *Failure to refer a preliminary question to the CJEU and the right to a lawful judge*, Vol. 7 – 1, 79 ICL JOURNAL 81, 84 (2013); VFGH, Sept. 30, 2003, Case No. VfSlg 16.988/2003.

[86] VFGH, Case No. VfSlg 14.390/1995.

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referring to the *acte clair* doctrine, the Austrian Constitutional Court applies the *acte éclairé* concept. It assesses whether the failure to refer is not justified by the presence of settled case law of the CJEU. It nonetheless skips to examine whether there is an obvious interpretation of EU law which leaves no scope for any reasonable doubts.[87]

II. Arbitrary Decisions as Regards the Lack of Reasoning

When assessing whether the failure to refer to the CJEU of national courts of last instance infringes the Constitution, the Czech and the Slovenian Constitutional Courts focus on whether national judges gave reasons for their refusal.

The Czech Constitutional Court stresses that a court of last instance acts in an arbitrary manner concerning the refusal to refer a preliminary question to the CJEU where it does not "duly substantiate" its failure to refer.[88] More specifically, national courts of last instance are to provide a statement of reasons, which shows that they did not omit to deal with the issue of whether or not to refer, on the one hand, and with the applicability of the exceptions elaborated in the CJEU's case law, on the other.[89] Accordingly, the bare consideration that there are no doubts regarding the interpretation of a given issue is not sufficient, above all when the solution of the court has been contested by the parties to the proceedings. In *Pfizer*, for instance, the Constitutional Court acknowledged a violation of the obligation to make a reference under Article 267(3) TFEU since the ordinary court of last instance, by considering the interpretation of EU law to be obvious, did not consider the argument of the complainant which had suggested a different interpretation of the relevant legislative provisions under EU law and had underlined that the proposed solution was also followed by the courts of other Member States (notably, the Swedish courts).[90]

In this context, one may argue that the Czech Constitutional Court elaborated additional criteria to the requirements established under EU law.[91] Indeed, it analyzes whether the

[87] Pelzl, *supra* note 35, at 92.

[88] In order to define an arbitrary conduct, the Constitutional Court pointed out, firstly, that a decision taken in an arbitrary manner is incompatible with Article 1(1) of the Constitution of the Czech Republic (principle of the law-based state) and, then, that this notion should be interpreted, in the light of Article 2(3) of the Constitution (principle of enumerated powers) in conjunction with Art. 4(4) of the Charter (principle of judicial protection), as meaning that state powers shall be exercised within the limits that preserve the essence and significance of the rights and freedoms. ÚS, Case No. 1009/08 at para. 21.

[89] *Id.* at para. 22. Moreover, in the judgment of November 2011 II. ÚS 1658/11, para. 18, the Czech Constitutional Court referred also to the abovementioned three hypotheses elaborated by the German Federal Constitutional Court in order to determine if a refusal is arbitrary, namely in the cases of a fundamental disregard of the obligation to make a submission, a deliberate deviation without making a submission, and the incompleteness of the case law of the CJEU.

[90] *Id*. at para. 28.

[91] Valutyté, *supra* note 34, at 1178.

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refusal to refer provides duly substantiated reasons by showing a deep scrutiny of the CJEU's case law as well as of the possibility to apply the *CILFIT* criteria. It follows that a "formal referral" to the latter is not sufficient.[92] Moreover, it should be pointed out that, according to the reasoning of this Constitutional Court, the parties to the proceedings play an active role in order to influence the decision of the national court of last instance and initiate a preliminary reference procedure. It is also worth bearing in mind that, in *Pfizer*, the Constitutional Court criticized the practice of Czech courts, which were unwilling to address preliminary questions to the CJEU.[93] In this regard, one may assume that this also had an impact on the decision of the Constitutional Court in that it ruled that the right to a lawful judge requires national judges to give duly substantiated reasons where they refuse to refer under Article 267(3) TFEU and to take into consideration whether the parties have raised an issue concerning EU law.[94]

Similarly to the Czech Constitutional Court, the Slovenian Constitutional Court stresses that, in order to assess whether the right to judicial protection is ensured, within the meaning of Article 23(1) of the Constitution and in the light of the separation of jurisdiction as laid down in Article 267(3) TFEU, national courts of last instance should adopt a sufficiently clear position in relation to the questions related to EU law. More specifically, they have to give reasons and explain why they decided not to ask the CJEU for a preliminary ruling. That reasoning is to include a reference to the motion of the parties to submit a preliminary question to the CJEU and to *CILFIT*. The Slovenian Constitutional Court further points out that the reasoning of national courts of last instance must be adequate to enable the Constitutional Court to determine whether the conditions setting out the duty under Article 267(3) TFEU have been respected. Moreover, it is interesting to note that the Slovenian Constitutional Court, in requiring that the refusals to refer to the CJEU are appropriately substantiated, refers also to the case law of the ECtHR concerning the violation of Article 6(1) ECHR due to an arbitrary refusal to refer.

It is worth observing that the Czech and the Slovenian Constitutional Courts have adopted a higher requirement concerning the obligation to give reasons when deciding not to refer to the CJEU under Article 267(3) TFEU than the one established by the ECtHR. The latter holds that Article 6(1) ECHR obliges national courts of last instance to state reasons for the

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[92] Václav Stehlík & Robert Zbíral, *EU procedural rules and Czech Constitutional order: the case of preliminary ruling procedure*, VIII[th] World Congress of the International Association of Constitutional Law, Mexico 6–10 December 2010 (section 18: Constitutional Implication of regional integration); Valutyte, *supra* note 34, at 1180.

[93] ÚS Case No. 1009/08 at para. 29; Jan Komárek, *Preliminary references in the Czech Republic*, 50th Anniversary London-Leiden Conference on European Law, 25 June 2011, http://www.biicl.org/files/5751_komerek_25-06-11_biicl.pdf.

[94] In this regard, it is interesting to point out that after *Pfizer*, national courts of last instance have referred to the CJEU more frequently. Moreover, when they refuse to refer they give reasons by making references to *CILFIT*. Petrlík, *supra* note 42, at 431; *see also* ÚS, Case No. 1658/11 at para. 18.

refusal to refer, according to *CILFIT*, when a party to the proceedings made a substantiated request in this sense.[95] However, it accepts that national courts refer to *CILFIT* by mentioning that it comes into play, since its task is not to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law.[96]

III. Arbitrary Decisions as Regards the Existence of Doubts

In order to determine whether a refusal to refer under Article 267(3) TFEU is arbitrary, the Spanish Constitutional Court focuses on whether there exist doubts as regards the decision not to refer of a national court of last instance. The existence of doubts is not to be examined with regards to the subjective opinion of a judge concerning the interpretation of EU law.[97] In fact, the national judge enjoys a wide margin of appreciation concerning the statement of grounds and the merit of the case, since the review by this Constitutional Court is limited to the consideration of the existence of doubts.[98]

The existence of doubts, in the Spanish Constitutional Court's view as held in the judgment of 2004, may be deduced by the presence of a negative assessment of the compatibility of a provision of national law with EU law.[99] In such cases, the national judge cannot decline to apply a national provision without a prior confirmation of the CJEU through a preliminary ruling. The Spanish Constitutional Court also emphasizes that an interpretative doubt exists where the decision of the national judge departs from settled case law at national or EU level and implies the disapplication of a national law.[100] In these cases, there is an obligation to refer within the limits of the *acte clair* and *acte éclairé* doctrines.

This judgment was followed by another judgment of 2006.[101] However, the reasoning of the Spanish Constitutional Court was partially different. The Spanish Constitutional Court recognized an infringement of the right to effective judicial protection due to the decision

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[95] *Dhahbi v. Italy*, App. No. 17120/09, at paras. 31–33; *Vergauwen and others* v. *Belgium*, App. No. 4832/04 (April 10, 2012), http://hudoc.echr.coe.int/, paras. 87–92; *John v. Germany*, App. No. 15073/03.

[96] *Ullens De Schooten and Rezabek v. Belgium*, App. Nos. 3989/07 and 38353/07 at paras. 61–66.

[97] Valutyté, *supra* note 34, at 1180.

[98] Tribunal Constitucional [TC] [Spanish Constitutional Court], Feb. 11, 2013, Case No. STC 27/2013.

[99] Tribunal Constitucional [TC] [Spanish Constitutional Court], Case No. STC 58/2004.

[100] *Id.*

[101] STC 194/2006; Víctor Manuel Sánchez Blázquez, *STC 194/2006, de 19 de junio: vulneración del derecho al proceso debido e indefensión de la Comunidad Autónoma de Canarias por inaplicación en una Sentencia del Tribunal Superior de Justicia de Canarias de un precepto de la Ley reguladora del IGIC de contenido idéntico a otro de la Ley del IVA declarado contrario a la Sexta Directiva por el Tribunal de Justicia de las Comunidades Europeas*, http://www.ief.es/documentos/recursos/publicaciones/jurisprudencia_constitucional/2006_STC194_Sanchez.pdf

of the national judge of last instance that set aside domestic legal provisions which were deemed to be in contrast with EU law. It stressed that that national judge was obliged to make a reference to the CJEU for a preliminary ruling before disapplying the national provision.[102] To this end, the Spanish Constitutional Court referred to its case law concerning the obligation to refer to the Constitutional Court before setting aside a national provision due to a conflict with the Constitution.[103] Such an interpretation was nevertheless problematic in relation to the ruling of the CJEU in *Kücükdeveci*.[104] According to the latter, a national court cannot be obliged to make a preliminary reference to the CJEU for the sole purpose of disapplying a provision of national law.[105]

On that account, the Spanish Constitutional Court, in a judgment of 2010, clarified the previous interpretation of the cases in which the refusal to refer under Article 267(3) TFEU might infringe Article 24 of the Constitution.[106] Announcing a correction of its judgment of 2006, the Spanish Constitutional Court pointed out that questions of constitutionality and preliminary references to the CJEU are two different procedures that reflect distinct objectives and do not imply the same requirements. It further argued that the exceptions to the obligation to refer to the CJEU are established in its case law. Where the *acte clair* and *acte éclairé* hypotheses do not apply and the interpretation of EU law serves to settle the dispute before the national judge of last instance, a reference to the CJEU for a preliminary ruling is necessary where the national court of last instance has doubts. This is particularly so, according to the Spanish Constitutional Court, when a national legislative provision, deemed to conflict with EU law, must be set aside. In those cases, should the national judge of last instance decide without referring to the CJEU, Article 24 of the Constitution may be breached.

In subsequent case law, the Spanish Constitutional Court ruled on constitutional complaints related to the case in which the national court of last instance considers that there is no contradiction between EU law and national law. Thus, the question of whether a provision of national law shall be set aside is not raised. In that case, according to the

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[102] Ricardo Alonso García, *Cuestión prejudicial europea y tutela judicial efectiva*, IDEIR working paper 8 (2011) http://www.ucm.es/data/cont/docs/595-2013-11-07-cuesti%C3%B3n%20prejudicial%20europea.pdf.

[103] *See*, *supra* note 50. Unlike the judgment of April 2004, in fact, the Spanish Constitutional Court did not refer to the assessment of whether there was a violation of the right to effective judicial protection under Article 24 of the Constitution or whether the CJEU's case law as regards the applicability of the *CILFIT* criteria could apply.

[104] Case C–555/07, Kücükdeveci, 2010 E.C.R. I–00365, paras. 52-56. See also Sarmiento, *Rapport espagnol*, *supra* note 50, at 169.

[105] *Kücükdeveci*, Case C–555/07 at para. 54.

[106] Tribunal Constitucional [TC] [Spanish Constitutional Court], Case No. STC 78/2010; Juana Morcillo Moreno, *El planteamiento de la cuestión prejudicial comunitaria a la luz de la jurisprudencia europea y constitucional : ¿Facultad o deber ?*, 185 REVISTA DE ADMINISTRACIÓN PÚBLICA 227–62 (2011).

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Spanish Constitutional Court, where the national judge of last instance points out that there are no doubts, the refusal to refer cannot breach Article 24 of the Constitution, in relation to the *acte clair* doctrine.[107] In fact, the Spanish Constitutional Court does not consider its task to be that of determining whether EU law is correctly interpreted by national judges.[108] However, the refusal to refer to the CJEU violates the constitutional right to effective judicial protection where a national judge of last instance applies the national provision of law despite the fact that there is a previous judgment of the CJEU declaring that provision to be incompatible with EU law.[109]

In those circumstances, scholars argue that the Spanish Constitutional Court reviews the application of EU law in cases dealing with the defense of its prerogatives (i.e. setting aside national laws that do not comply with the constitution) or the prerogatives of the CJEU (i.e. hearing a preliminary reference).[110]

D. The Obligation to Refer Under Article 267(3) TFEU from the Perspective of the CJEU and of the Constitutional Courts: Some Implications

The case law of these Constitutional Courts illustrates that individuals may bring, in certain Member States, a direct action against the refusal to refer to the CJEU of a national judge of last instance for the protection of constitutional rights. In exercising the constitutional review, the Constitutional Courts under analysis contribute to ensuring that national courts of last instance do not overlook EU law. In this regard, it could be argued that these courts have elaborated an additional guarantee for individuals. Moreover, the role of the CJEU is reinforced by the practice of the aforementioned Constitutional Courts reconnecting the omission to refer for a preliminary ruling under the obligation laid down in Article 267(3) TFEU to the breach of constitutional rights.[111] This further implies that the duty to refer and the role of national judges as EU judges are reinforced.[112]

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[107] Tribunal Constitucional [TC] [Spanish Constitutional Court], Case No. STC 27/2013.

[108] *Id.*

[109] Tribunal Constitucional [TC] [Spanish Constitutional Court], July 12, 2012, STC 145/2012. Sarmiento, *Reinforcing the (domestic) constitutional protection of primacy of EU law: Tribunal Constitucional*, (note 59), 885.

[110] Sarmiento, *supra* note 109, at 884.

[111] Andreas Voßkuhle, *The cooperation between European Courts: The Verbund of European Courts and its legal Toolbox*, *in* THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE 81, 90 (Allan Rosas, Egils Levits, & Yves Bot eds., 2013).

[112] Allan Rosas, *The National Judge as a EU Judge: Opinion 1/09*, in CONSTITUTIONALISING THE EU JUDICIAL SYSTEM: ESSAYS IN HONOUR OF PERNILLA LINDH, 105–21 (Pascal Cardonnel, Allan Rosas, & Nils Wahl eds., 2012).

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This line of case law is also symptomatic of the fact that Member States have internalized EU law into their national legal systems. Indeed, the integration between EU law and national law is enhanced by procedural guarantees which are established at national level in order to comply with the duty for national judges to make a preliminary reference to the CJEU. As rightly pointed out, this practice transforms "an obligation of EU law also into a duty to refer under […] constitutional law".[113]

Nonetheless, a number of issues as regards the compatibility of that practice with the case law of the CJEU and the relations between the CJEU and Constitutional Courts deserve further discussion. I will examine the interplay between the case law developed by these Constitutional Courts and the exceptions elaborated by the CJEU as to the duty to refer for courts of last instance. Moreover, I will discuss whether preliminary references on validity should be subject to such a constitutional guarantee also for lower courts (I). Next, I will focus on the compatibility of the constitutional review of the duty to refer under Article 267(3) TFEU with the case law of the CJEU concerning the interferences with the court's decision regarding preliminary references (II). In addition, attention will be drawn to the constitutional review by these courts in the framework of the judicial protection of individuals (III). Finally, I will highlight some considerations concerning the role of Constitutional Courts *vis-à-vis* the CJEU and the preliminary reference procedure (IV).

I. Exceptions to the Duty to Refer: What Should National Judges Take Into Account?

The obligation to refer set out in Article 267(3) TFEU assumes a different significance at national level than at EU level. Indeed, the CJEU asks national judges to look at the substantial content of the obligation to refer, that is, an issue concerning EU law, which is raised in the proceeding, is relevant in order to take a decision and that the *acte clair* and *acte éclairé* doctrines do not apply.[114] On the contrary, at national level, these Constitutional Courts require that, when refusing to make a reference under Article 267(3) TFEU, national judges comply with a series of procedural conditions, that is, a reasoning showing how the court of last instance deals with its obligation to refer and the motions of the parties as well as the lack of any doubts as regards EU law. One may argue, in this regard, that in the process of internalizing EU law, the Constitutional Courts have included the obligation provided for in Article 267(3) TFEU in national procedural criteria, with an impact on the margin of appreciation of national judges when deciding on whether to ask the CJEU for a preliminary ruling.

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[113] Sarmiento, *Reinforcing the (domestic) constitutional protection of primacy of EU law*, *supra* note 59, at 882; *see also* Opinion of Advocate General Cruz Villalón at para.25, Case C–173/09, Elchinov (June 10, 2010), 2010 E.C.R. I–08889.

[114] *CILFIT,* Case C–283/81. This consideration could also be supported by the fact that the procedural rules governing the decision to ask preliminary questions to the CJEU fall, in principle, within the procedural autonomy of Member States.

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The question is whether, and to what extent, the conditions attached to the refusal of national courts of last instance to refer a preliminary question, as elaborated by the Constitutional Courts, are consistent with the exceptions developed by the CJEU.

To this end, I will briefly recall the criteria under EU law. It follows from the settled case law of the CJEU that national judges of last instance must decide whether or not to refer to the CJEU, according to the *CILFIT* criteria exclusively. Moreover, in the light of the principles of equivalence and effectiveness of EU law as well as the principle of sincere cooperation, the national court's decision as to whether or not to refer to the CJEU cannot be affected by national procedural rules limiting it.[115] In essence, national judges have the exclusive competence to assess the relevance of the question in order to resolve a dispute brought before them.[116] It follows that, pursuant to the obligation to make a reference for a preliminary ruling laid down in Article 267(3) TFEU, the national court may refrain from referring where it considers that a specific question related to EU law is not necessary to enable it to give judgment.[117] It should also be observed, in this regard, that a question of EU law may be relevant in order to resolve the dispute even though the parties to the main proceeding did not invoke the issue. In those cases, national courts should raise it by their own motion. And the other way round: the request of the parties to the main proceeding does not affect the decision of the national judge as to whether or not to refer.

Concerning the *CILFIT* criteria, by virtue of the *acte éclairé* doctrine, national courts of last instance may not be constrained by asking for a preliminary reference where a materially identical question was already clarified by the CJEU through a preliminary ruling and the decision may be based on that judgment.[118] This exception includes cases in which, even though the questions are not identical, the answer of an earlier question explained the issue in an unambiguous way.[119] The exceptions concerning the *acte clair* doctrine might be more complex. In these cases, even though there is not a previous ruling of the CJEU, national judges of last instance may refrain from referring where the correct application of EU law is so obvious as to leave no scope for any reasonable doubt. The *acte clair* requires

[115] Diana-Urania Galetta, PROCEDURAL AUTONOMY OF EU MEMBER STATES: PARADISE LOST? 68–74, 81–100 (2010).

[116] In fact, before the CJEU, there is a presumption of relevance to the referred questions and indeed Article 267 TFEU only requires that the judge considers a question necessary and not that the question is necessary. *See* Case C–379/98, PreussenElektra, 2001 I–02099, para. 38; Case C–103/08, Gottwald, 2009 E.C.R. I–09117, para. 16; Morten Broberg & Niels Fenger, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE 156, 161 (2d ed. 2014).

[117] *CILFIT*, Case C–283/81 at para. 10. This is a consequence of the fact that the CJEU refuses to rule on general or hypothetical questions or where the questions are raised in a fictitious dispute. Case 244/80, Foglia v. Novello, 1981 E.C.R. I–03045; Case C–215/08, E. Friz, 2010 E.C.R. I–02947.

[118] *CILFIT*, Case C–283/81 at para. 14.

[119] BROBERG & FENGER, *supra* note 116, at 233.

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not only that the concerned national court is convinced about a certain interpretation of EU law, but also that the courts of the other Member States and the CJEU agree, in order to prevent national courts from applying EU law inconsistently. Recently, the CJEU gave further indications on the *acte clair* doctrine in two judgments delivered the same day. In *Ferreira da Silva*, the CJEU pointed out that a national court within the meaning of Article 267(3) TFEU is obliged to make a reference where the interpretation of EU law is subject to conflicting decisions of lower courts and it frequently gives rise to difficulties of interpretation in the Member States.[120] Meanwhile, in *X and T.A. van Dijk*, the CJEU ruled that national courts of last instance are not required to make a reference due to the fact that a lower domestic court has referred a preliminary question on a case involving the same legal issue.[121]

However, how should national courts comply with this requirement in practice?[122] There exist divergent approaches in the national courts concerning the application of the *acte clair* doctrine.[123] It has already been mentioned, for instance, that the parties to the proceedings in the Czech Republic and Slovenia assume a procedural role inasmuch as the national judge must examine the issue of EU law that they have raised and provide a duly substantiated decision when refusing to refer to the CJEU, accordingly. Another interesting example is offered by the case law of the second Senate of the German Federal Constitutional Court. Unlike the first Senate, this panel interprets the *acte clair* doctrine in the sense that national judges of last instance may refrain from referring where the correct application of EU law is *justifiable* in that diverging opinions are not clearly preferred.

The abstract content of the *CILFIT* criteria leads to a divergence among national courts as regards the interpretation of Article 267(3) TFEU. Yet these criteria should be interpreted narrowly, since they are the exception to an obligation.[124] One may ask, however, how a narrow application can be reviewed, since they are related to the margin of appreciation of

[120] *Ferreira da Silva e Brito*, Case C–160/14 at paras. 41–45.

[121] Joined Cases C–72/14 & 197/14, X and T.A. Van Dijk,(Sept. 9, 2015), http://curia.europa.eu/.

[122] How can national judges be sure that other national judges in another Member State will follow the same view? Or, how can they be convinced that the CJEU will interpret the issue in the same sense, bearing in mind the dynamic nature of its case law? See, BROBERG & FENGER, *supra* note 116, at 237–38; Daniel Sarmiento, CILFIT *and* Foto-Frost*: Constructing and Deconstructing Judicial Authority in Europe*, *in* THE PAST AND FUTURE OF EU LAW 192, 196 (Miguel Poiares Maduro & Loïc Azoulai eds., 2010).

[123] The analysis developed in this article is limited to the experiences of the Member States of the Constitutional Courts in question.

[124] It is worth mentioning that, while Advocate General Bot pointed out that the CJEU should adopt a strict position concerning the obligation under Art. 267(3) TFEU, Advocate General Wahl argued against a rigid reading of the *CILFIT* case law. *See* Opinion of Advocate General Bot at para. 101, Case C–160/14, Ferreira da Silva e Brito, (June 11, 2015); Opinion of Advocate General Wahl at para. 62, Joined Cases C–72/14 and C–197/14, X and T.A. van Dijk, (May 13, 2015).

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national judges. It is therefore not surprising that these Constitutional Courts added a number of procedural requirements, with the purpose of monitoring the decision not to refer to the CJEU.

The duty to give reasons for the refusal to refer, which is put forward by the Czech and Slovenian Constitutional Courts (and the ECtHR as well), is not expressly required by EU law but it appears to comply with it. National judges in fact should give reasons for their refusal to refer to the CJEU according to the case law of the CJEU. Besides, the requirement of reasoning reinforces the obligation to refer under Article 267(3) TFEU and does not affect the role of the national judge or the nature of the preliminary reference procedure as indicated by the CJEU. Rather, it is controversial that those Courts link this requirement to a request of the party who invokes EU law and asks the national to refer to the CJEU. The emphasis given to the role of the parties in order to assess whether a refusal to refer violates Article 267(3) TFEU is not compatible with the latter since Article 267 TFEU does not entail that the parties to the proceedings influence the decision to trigger a reference for a preliminary ruling.

Moreover, as far as the Spanish Constitutional Court is concerned, the interpretation and internalization of the *CILFIT* criteria could also be questioned. The Spanish Constitutional Court, in essence, deems that national judges are obliged to refer due to the existence of a reasonable doubt in two cases. The first is where there is a previous judgment of the CJEU declaring the incompatibility of a national provision with EU law and the domestic court decides to apply that provision. The second is where the national judge sets aside a domestic provision as incompatible with EU law, without referring under the conditions set by Article 267(3) TFEU and the case law of the CJEU. While the first hypothesis reflects the *CILFIT* doctrine in a consistent way, one may ask whether the second one does not deviate from the CJEU's case law in that it requires, as a prerequisite, a decision not to apply a national provision.

The importance attached to the *CILFIT* criteria is linked to the fact that, when those exceptions do not apply, national courts of last instance do not have jurisdiction to interpret EU law. Similarly, it is appropriate to point out that national courts, either of last instance or lower courts, cannot rule on the validity of EU law since only the CJEU enjoys jurisdiction to declare an EU act void or invalid.[125] It should follow from this that the

[125] *Foto-Frost*, Case 314/85. In this regard, it is worth remembering that a preliminary ruling might be the only possibility for individuals in order to obtain a ruling on the legality of EU acts. A direct action is admissible under Article 263(4) TFEU. However, despite the relevant amendment of the Treaty of Lisbon, the conditions of Article 263(4) TFEU provide narrow access to the CJEU. In this regard, see Antonio Creus, *Commentaire des décisions du tribunal dans les affaires T-18/10 Inuit et T-262/10 Microban*, 3 CAHIERS DE DROIT EUROPEEN 659–78 (2011); Melchior Wathelet & Jonathan Wildemeersch, *Recours en annulation: une première interprétation restrictive du droit d'action élargi des particuliers?* 12 J.D.E. 75–79 (2012); Jonathan Wildemeersch, *La condition de l'article 263, alinéa 4, TFUE relative à l'absence de mesures d'exécution et l'arrêt Telefónica : de l'inutilité d'une réforme : CJUE, gde ch., 19 décembre 2013, Telefónica/Commission, aff. C-274/12 P*, 4 REVUE DES AFFAIRES EUROPÉENNES 861–71

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constitutional review concerning the obligation to refer of courts of last instance must also apply, at least in theory, to the decision of any national court which does not ask the CJEU for a preliminary ruling on validity. In fact, it is always incumbent upon national judges to make a reference to the CJEU in those cases. Nevertheless, in practice, this possibility is ruled out, since the constitutional review can be engaged exclusively when all other national remedies have been exhausted.[126] It is worth noting that by all accounts the Constitutional Courts in question do not differentiate their assessment between preliminary questions on validity and preliminary questions on interpretation. However, the criteria that they have established apply to preliminary references on interpretation since there might be exceptions to the obligation under Article 267(3) TFEU. On the contrary, national judges are always required to refer to the CJEU when they doubt the validity of an EU act. Therefore, it should not be possible to transpose the same criteria.

II. Whether and When a Superior Court May Interfere with a Lower Court's Decision Regarding a Preliminary Reference

It is also necessary to draw attention to the case law of the CJEU concerning the possibility for higher courts to intervene against the lower court's decision to refer for a preliminary ruling to the CJEU. This case law suggests that the latter is not willing to accept the interference of Constitutional Courts concerning the preliminary reference procedure.

In *Cartesio*, the CJEU pointed out that Article 267 TFEU confers an autonomous jurisdiction on the referring court to make a preliminary reference.[127] Hence, a higher court cannot prevent a lower one from exercising the right to make a preliminary reference.[128] Similarly, in *Melki and Abdeli*, the CJEU ruled that Article 267 TFEU precludes national legislation which prevents domestic courts from exercising their right or fulfilling their obligation to refer questions to the CJEU for a preliminary ruling.[129] The CJEU went on in *Križan* and

(2013); Case C–583/11, P Inuit Tapiriit Kanatami and Others v. Parliament and Council, (Oct. 3, 2013), http://curia.europa.eu/; Case C–133/12 P, Stichting Woonlinie and Others v. Commission, (Feb. 27, 2014), http://curia.europa.eu/.

[126] It is certainly possible that the decision of a national judge will be corrected beforehand. However, since these Constitutional Courts have elaborated a link between the obligation under Art. 267(3) TFEU and a constitutional right, it must be stressed that the duty to refer under EU law provides the same obligation for courts of last instance and for all the courts where a question of validity arises. *See also* Paul Craig, *The Classics of EU Law Revisited:* CILFIT *and* Foto-Frost, *in* THE PAST AND FUTURE OF EU LAW 185, 189 (Miguel Poiares Maduro & Loïc Azoulai eds., 2010).

[127] *CARTESIO Oktató és Szolgáltató bt.*, Case C–210/06.

[128] Morten Broberg & Niels Fenger, *Preliminary references as a right: But for Whom?*, 36 EUR. L. REV., 276–88 (2011); *see also* BROBERG & FENGER, *supra* note 116, at 327–36.

[129] *Melki and Abdeli*, Cases C–188/10 and C–189/10. In particular, national courts shall remain free to refer to the CJEU for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, any question which they consider necessary.

stressed that Article 267 TFEU gives national courts the widest discretion in making a reference to the CJEU when questions involving the interpretation of EU law or the validity of provisions of EU law are raised in a case before them.[130] This must be so even though it implies that the national court will not follow a decision of its Constitutional Court, which set aside its first decision, and even though a national rule obliges the former to resolve the dispute by following the legal opinion of the latter court.[131] Furthermore, in *A v. B and others*, the CJEU dealt with the duty of national courts under Article 267(3) TFEU where national legislation appears to be incompatible with both EU and national constitutional law. More specifically, since the jurisdiction of the Austrian Constitutional Court to review the constitutionality of national legislation covers the provisions of the Charter, Austrian courts could not refrain *ex officio* from applying a legislative provision contrary to the Charter. They had to apply to the Constitutional Court for that provision to be struck down.[132] The CJEU clarified that EU law requires that the court called upon to apply EU law must be free to set aside national legislative provisions that might prevent EU rules from having full force.[133] Moreover, where a national legislative provision is not only contrary to EU law but also unconstitutional, the existence of a national procedural rule establishing a mandatory reference to the Constitutional Court cannot prevent a national court from exercising the right or obligation under Article 267 TFEU.[134] In addition, where the rights guaranteed by a national constitution and those guaranteed by the Charter apply simultaneously to national legislation implementing EU law, within the meaning of Article 51(1) of the Charter, the jurisdiction of the CJEU to declare an EU act invalid cannot be undermined. Hence, before the review of constitutionality can be carried out in relation to the same grounds which cast doubt on the validity, national courts are required to refer to the CJEU a preliminary question.[135]

What is not clear is whether those considerations concerning the autonomous jurisdiction of national courts under Article 267 TFEU also apply when the national court has declined to make a reference and a Constitutional Court finds that such a reference must be made.

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[130] *Križan and Others*, C–416/10.

[131] Nicolas Cartiat & Arnaud Hoc, *Arrêt « Križan » : dans quelle mesure le juge national est-il tenu de poser une question préjudicielle?*, JOURNAL DE DROIT EUROPEEN 97 (2013). It is also interesting to observe that this case law reverses the hierarchy between superior and lower courts in that the lower court enjoys an autonomous jurisdiction concerning the decision to refer to the CJEU and the superior court cannot overturn its ruling and prevent it from referring. BROBERG & FENGER, *supra* note 116, at 328.

[132] *A* v. *B and Others,* Case C–112/13.

[133] *Id.* at paras. 36–37.

[134] *Id.* at para. 38.

[135] *Id*. at paras. 41–43.

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If one assumes that the purpose of the abovementioned case law of the CJEU is to preserve the autonomous jurisdiction of the referring court, this will lead to the conclusion that Constitutional Courts cannot intervene against the refusal to refer of a national court, even if the latter court was obliged to refer under Article 267(3) TFEU. Nevertheless, if one reads the CJEU's rulings in *Cartesio, Melki and Abdeli, Križan,* and *A v. B and Others* as aiming to enhance the effectiveness of EU law, as it indeed seems to be, and that the autonomous jurisdiction of the referring court is a consequence of that, the exercise of the constitutional review on the refusal to refer may be considered consistent with the CJEU's case law. The limits to national procedural law, which prevent a higher court from overruling a lower court's decision to make a preliminary reference, increase the probability that a preliminary question on interpretation or validity will arrive at the CJEU. This serves the purpose of the effectiveness of EU law insofar as a national court will be willing to refer since it does not assume the risk that its decision can be appealed before a higher court and that the latter will prevent it from making a reference.[136]

The effectiveness of EU law and its correct application may benefit from a decision of a Constitutional Court to overturn the decision of a national court for refusing to refer under Article 267(3) TFEU. Moreover, it is convincing that preventing a national court from making a reference to the CJEU is a more significant interference in the jurisdiction of that court than requiring national judges to ask for a preliminary ruling of the CJEU under Article 267(3) TFEU.[137] This view is also consistent with the *CILFIT* case law, where it seems that the CJEU privileges that national courts make a preliminary question, although the latter is not necessary, rather than that the national courts disregard their duty to refer.[138]

III. Protection of Individuals: State Liability for Judicial Infringement of EU Law and Judicial Review by Constitutional Courts

Although the EU Treaties do not establish any sanction for the failure to refer a question to the CJEU, the latter pointed out in *Köbler* the right of individuals to obtain payment of damages due to State liability for judicial decisions, including the decision not to refer under Article 267(3) TFEU.[139] Member States could be liable to pay for infringements of EU

[136] BROBERG & FENGER, *supra* note 116, at 335.

[137] *Id.*

[138] *CILFIT*, Case C–283/81 at para. 15. Indeed, after having established the exceptions to the obligation to refer, the CJEU points out that, in all such circumstances, it must not be forgotten that national courts remain at liberty to bring a matter before the court if they consider it appropriate to do so. Moreover, according to Art. 99(1) of the CJEU's Rules of Procedure, the CJEU may decide to rule by reasoned order, where a question referred to it for a preliminary ruling is identical to a question on which it has already ruled (i.e., *acte éclairé*), where the reply to such a question may be clearly deduced from existing case law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt (i.e., *acte clair*). Rules of Procedure of the Court of Justice of 25 September 2012 (O.J. L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013).

[139] *Köbler*, Case C–224/01; *Traghetti del Mediterraneo,* Case C–173/03; *Commission/Italy*, Case C–379/10.

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law concerning the decision of a national judge of last instance where the rule of EU law infringed is intended to confer rights on individuals, the breach is sufficiently serious (within the meaning of a manifest infringement, taking into account the specific nature of the judicial function), and there is a direct causal link between that breach and the loss or damage sustained by the injured parties.[140] In *Traghetti del Mediterraneo*, the CJEU further stressed that Member States cannot adopt or maintain in force legislation that limits or excludes state liability for judicial damages due to a national court's failure to refer a preliminary question to the CJEU. Such legislation, which would render it impossible or illusory to obtain damages, would overlook the principle of *Köbler*.[141] The CJEU pointed out that the assessment of the existence of a manifest infringement of EU law, which entails state liability, however, belongs to the procedural autonomy of Member States. Indeed, the CJEU aims at setting a threshold necessary and sufficient to found a right in favor of individuals to obtain redress.[142] It follows that Member States might establish a higher level of protection of individuals' rights by imposing less strict requirements.[143]

Nevertheless, scholars criticize this line of case law for lack of effects. Indeed, on the one hand, it is not probable that a lower court, which is called to decide whether a superior court's decision not to refer infringed EU law in a sufficiently serious way, will assess the liability of the superior court.[144] Similarly, if the matter has to be decided before the very same supreme court which refused to make a reference, it would not be surprising for this court to deny its liability for the infringement of the obligation to refer.[145] On the other hand, it could be hard to demonstrate that the conditions required to be fulfilled are met in practice.[146] In this regard, scholars have suggested that, in order to avoid judicial liability, the national courts should explain why they did not consider that they were under an

[140] *Köbler*, Case C–224/01.

[141] *Traghetti del Mediterraneo*, Case C–173/03 at para. 24; *cf. Ferreira da Silva e Brito*, Case C–160/14 at paras. 46–60; Bjorn Beutler, *State Liability for Breaches of Community Law by national courts: is the requirement of a manifest infringement of the applicable law an insurmountable obstacle?*, 46 COMMON MKT. L. REV. 773, 785 (2009); Nicolo Zingales, *Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law?*, 11 GERMAN L. J. 419-438 (2010).

[142] Malenovský, *supra* note 13, at 218.

[143] *Köbler*, C–224/01 at para. 57.

[144] Claus Dieter Classen, *Case C–224/01,* Gerhard Köbler v. Republik Osterreich*, Judgment of 30 September 2003, Full Court*, 41 COMMON MKT. L. REV. 813, 818 (2004).

[145] BROBERG & FENGER, *supra* note 116, at 269–70.

[146] Roger Van den Bergh, *Francovich and its Aftermath: Member State Liability for Breaches of European Law from an Economic Perspective, in* THE PAST AND FUTURE OF EU LAW 423, 430 (Miguel Poiares Maduro & Loïc Azoulai eds., 2010); Peter J. Wattel, *Köbler*, CILFIT *and* Welthgrove*: We can't go on meeting like this*, 41 COMMON MKT. L. REV. 177–190 (2004).

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obligation to make a reference or why a reference was not appropriate.[147] Such a condition, which recalls the view of the Czech and Slovenian Constitutional Courts as well as the ECtHR, would enhance the implementation of the principle developed in *Köbler* and, thereby, the effectiveness of EU law and the judicial protection of individuals.

That said, one might query whether the intervention of the Constitutional Courts in question could be regarded as a valuable contribution in terms of judicial protection of individuals. It appears that the case law concerning the constitutional review of the duty to refer under Article 267(3) TFEU reinforces the protection of individuals in that the refusal is subject to an appeal. Moreover, it may be argued that the right to make a constitutional complaint will decrease the probabilities that individuals will also bring an action for damages against the State, since they are already entitled to ask their Constitutional Court for the assessment of the decision not to refer of a national court of last instance. This appeal will lead to a decision, which will validate or overturn the previous ruling, giving Constitutional Courts the opportunity to prevent damages from occurring.[148]

It should also be noted that the differing practices of the concerned Constitutional Courts affect the margin of appreciation of the national judges concerning the decision whether to refer to the CJEU by imposing different conditions. This could lead to divergent outcomes as regards the constitutional complaint. Furthermore, in some Member States, it is not even possible to challenge the refusal to refer of a national court of last instance. Stated differently, one may point out the existence of discrimination among individuals on two levels. On the one hand, there is a differentiation of treatment between individuals of those Member States in which it is possible to challenge the decision not to refer to the CJEU by a constitutional complaint, and individuals of the other Member States where this possibility does not exist. On the other hand, concerning the first category of individuals (i.e., individuals of those Member States in which it is possible to challenge the omission to refer to the CJEU by a constitutional complaint), diverging criteria are used in order to assess their appeal on the same matter. Moreover, in Germany, there is a difference concerning the interpretation of the criteria even between the two Senates of the Federal Constitutional Courts. Having regard to such a situation, one may ask whether the diverging interpretations of the Constitutional Courts in question and the fact that the possibility of challenging the refusal to refer under Article 267(3) TFEU before the Constitutional Courts exists only in some Member States might produce unequal judicial

[147] CAROLINE NAOME, LE RENVOI PREJUDICIEL EN DROIT EUROPEEN: GUIDE PRATIQUE 49 (2d. ed. 2010).

[148] Malenovský, *supra* note 13, at 218; Classen, *supra* note 144, at 814. Taking the example in *Köbler*, if Mr. Köbler had had the possibility to bring an action for the violation of the right to a lawful judge before the Austrian Constitutional Court, an action for damages against the Republic of Austria would probably not have been brought. However, as mentioned, the Austrian Constitutional Court can exert its constitutional review only on administrative decisions.

protection of fundamental rights in Europe and, in particular, infringe the principle of equality of arms as part of the right to a fair trial at EU level. A claim against this, nevertheless, is that, concerning the national court's refusal to refer to the CJEU, Member States regulates the judicial protection among individuals insofar as they specify the detailed rules to engage State liability for judicial acts according to *Köbler*.

Furthermore, it is interesting to briefly observe that, regarding the duty to provide reasons as to the decision not to refer to the CJEU imposed by Article 6(1) ECHR, the ECtHR's case law may influence the discretion of Member States' courts when deciding not to refer.[149] A reasoned decision seems to be needed only when a party to the proceedings duly requested the national judge to refer. It follows that where a question of interpretation or validity of EU law arises and where, due to the lack of parties' requests, the domestic court should, yet it does not, make a preliminary reference *ex officio*, national judges are not constrained to give reasons as regards the *CILFIT* doctrine. Against this backdrop, it could also be mentioned that this case law of the ECtHR seeks to increase the collaboration with the CJEU by enhancing the obligation to refer under Article 267(3) TFEU, albeit limiting the assessment of the ECtHR to the presence of a reasons without going further to question whether national courts interpret EU law correctly.[150] However, the result is an interference with the CJEU and the functioning of the preliminary reference procedure, which could undermine the autonomy of the EU legal order.[151] Furthermore, should this interpretation of the ECtHR be followed by national courts, the role of domestic judges and the nature of the preliminary reference procedure could be affected by giving new light to the procedural rights of the parties to the main proceedings.[152]

IV. Some Considerations on the Relationship between Constitutional Courts and the CJEU Emerging from this Practice

The jurisdiction of these Constitutional Courts over the duty enshrined in Article 267(3) TFEU in light of constitutional rights reveals significant aspects of the interplay between the CJEU and national courts and of the architecture of the EU legal order.[153] In this regard,

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[149] Malenovký, *supra* note 13, at 224.

[150] Christiaan Timmermans, *Will the Accession of the EU to the European Convention on Human Rights Fundamentally Change the Relationship Between the Luxemburg and the Strasbourg Court?*, European University Institute, Centre for Judicial Cooperation, Distinguished Lecture (2014/01), *available at* http://cadmus.eui.eu/handle/1814/31932.

[151] Malenovský, *supra* note 13, at 222.

[152] Besides, since Article 47 of the Charter should be interpreted within the same meaning of Article 6(1) ECHR, one may ask whether the former may be violated by the denial to refer to the CJEU without giving reasons. *Cf.* Clelia Lacchi, *The interference of the ECtHR in the dialogue between national courts and the Court of Justice of the EU: implications for the preliminary reference procedure,* REV. EUR. ADMIN. L., 2/2015 (forthcoming).

[153] Malenovský, *supra* note 13, at 219.

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it has been observed that the intervention of Constitutional Courts may shape the interaction between domestic ordinary courts, Constitutional Courts, and the CJEU in a "triangular relation."[154] In other words, as a consequence of the possibility for individuals to appeal the decision not to refer of a domestic court of last instance, a Constitutional Court might rule on the interpretation of EU law given by that court and assess its admissibility in relation to the question whether the national judge of last instance was obliged to refer a preliminary question to the CJEU. Thus, Constitutional Courts come into the dialogue between national judges and the CJEU, with the task of supervising ordinary courts.

In this context, one may ask whether Constitutional Courts accept their role of referring courts under Article 267(3) TFEU. More specifically, do the criteria that these Constitutional Courts have elaborated in order to review the decision not to refer apply to them as well? Since, in the view of these Constitutional Courts, a violation of the obligation to make a reference under Article 267(3) TFEU may infringe a constitutional provision, and since Constitutional Courts, as courts of last instance, are obliged to refer a question to the CJEU, the same considerations should also apply to them. The refusal to refer to the CJEU *via* the preliminary reference procedure could also violate the relevant individuals' constitutional rights due to a Constitutional Court's refusal to refer. Yet, decisions of Constitutional Courts are not subject to appeal.

It appears that the Constitutional Courts in question, with the exception of the Austrian Constitutional Court, are rather reluctant to refer to the CJEU. In fact, the German,[155] the Slovenian,[156] and the Spanish[157] Constitutional Courts made their first reference to the CJEU only recently,[158] while the Czech and the Slovak Constitutional Courts have not yet submitted a request for a preliminary ruling. As regards both the Czech and the Slovak

[154] *Id.*

[155] BVERFG, Jan. 2014, Case No. 2 BvR 2728/13; Case C–62/14, Gauweiler and Others (June 16, 2015), http://curia.europa.eu/.

[156] Nov. 6, 2014, Case No. U–I–295/13.

[157] Tribunal Constitucional (Constitutional Court) [T.C.], June 9, 2011, Case No. 86/11 of 9 June 2011; Case C–399/11, Melloni (Feb. 26, 2013), http://curia.europa.eu/.

[158] It is worth remembering that the French *Conseil constitutionnel* submitted, for the first time, a preliminary reference to the CJEU in 2013. The *Conseil constitutionnel* was called to assess whether the principle of equality before the law and the right to an effective judicial remedy were violated by the national provisions transposing the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (O.J. 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24). In order to reply to the question, the *Conseil Constitutionnel* asked the CJEU to interpret, in essence, the compliance of the relevant provisions with the Council Framework Decision and the right to effective judicial remedy. Case C–168/13 PPU, Jeremy F. (May 30, 2013), http://curia.europa.eu/.

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Constitutional Courts, scholars have argued that these courts agree that ordinary courts of last instance are bound by Article 267(3) TFEU. However, at the same time they tacitly deny that they are subject to the same requirements, since they reserve for themselves a different role (i.e., supervising the constitutionality) and they stress that their jurisdiction does not overlap with that of the CJEU.[159]

One may indeed observe that the obligation to refer under Article 267(3) TFEU has been transformed into a national constitutional obligation. The Constitutional Courts examined here determine whether national judges were constrained to make a preliminary reference.[160] Accordingly, these Constitutional Courts seem to assume the role of supreme supervisors of the effects of EU law in the national legal order. It is true that they are also subject to the obligation to refer to the CJEU. Nonetheless they are their own guardians in that their decision cannot be reviewed. In this regard, it should be noted that some Constitutional Courts, namely the German Federal Constitutional Court and the Czech Constitutional Court, proclaim their capacity to assess whether the EU institutions transgress the limits of their conferred powers and to determine the compatibility of EU law with their legal order in line with the *ultra vires* doctrine.[161] These courts point out that the transfer of sovereign powers to the EU did not imply that EU action or the CJEU's

[159] Dumbrovský, *supra* note 38, at 101, 105.

[160] *Id.* at 105.

[161] Paul Craig, *The ECJ and ultra vires action: a conceptual analysis*, 48 COMMON MKT. L. REV. 395–437 (2011). Two recent examples are the German Federal Constitutional Court's reaction to *Åkerberg Fransson* (Case C–617/10, Åkerberg Fransson, (Feb. 26, 2013), http://curia.europa.eu/) in the *Counter-Terrorism Database* judgment (BVERFG, April 24, 2013, Case No. 1 *BvR* 1215/07) and the order of 14 January 2014 of the German Federal Constitutional Court concerning a request for a preliminary ruling, which raises the question of the legality of the Outright Monetary Transactions (OMT) program. The question was submitted in the context of an *ultra vires* review of EU acts, which might have consequences for the constitutional identity of Germany. In this regard, Advocate General Cruz Villalón in his Opinion of 14 January 2015 pointed out, "if a national court or tribunal were reserved for itself the last word on the validity of an EU act, the preliminary ruling procedure would then be merely advisory in nature." *See* Opinion of Advocate General Cruz Villalón at paras. 35–38, Case C–62/14, Gauweiler and Others (Jan. 14, 2015), http://curia.europa.eu/. As for the German Federal Constitutional Court, see Daniel Thym, *Separation versus Fusion or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the Constitutional Court and the European Court of Justice*, 9 EUR. CONST. L. REV. 391, 391–419 (2013); Jonathan Waltuch, *La guerre des juges n'aura pas lieu. A propos de la décision Honeywell de la Cour constitutionnelle fédérale allemande*, 2 REVUE TRIMESTRIELLE DE DROIT EUROPEEN 329–60 (2011); G. Luebbe-Wolff, *supra* note 24; A. Pliakos and G. Anagnostaras, *supra* note 24, at 109–23. Concerning the Czech Constitutional Court, which in the *Holubec* decision of January 2012 (ÚS 5/12) declared an EU act *ultra vires* in reaction to the *Landtová* judgment of the CJEU (Case C–399/09, Landtová, 2011 E.C.R. I–05573), see Jiří Zemánek, *L'arrêt de la Cour constitutionelle tchèque du 31 janvier 2012, les retraites slovaques XVII : le principe de l'égalité de traitement—Un motif de rebellion contre la Cour de Justice de l'Union européenne?*, 3 C.D.E. 709 (2012); Georgios Anagnostaras, *Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court*, 14 GERMAN L. J. 959–73 (2013).

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interpretation can expand the EU competence embodied in the Treaties.[162] Accordingly, they may intervene where this happens and declare an EU act inapplicable.

E. Conclusion

This glimpse at the case law of the Constitutional Courts of the Federal Republic of Germany, Austria, Spain, the Czech Republic, Slovakia, and Slovenia has unveiled a heterogeneous perception of the responsibility incumbent on courts of last instance under the preliminary reference procedure.

The comparative analysis has illustrated a further aspect of the relationship between Constitutional Courts, or at least some of them, and the CJEU, which may be referred to as "indirect cooperation." In other words, the Constitutional Courts in question engage in an indirect dialogue with the CJEU, notably by means of domestic courts. This line of case law, on the one hand, has the capacity to enhance the implementation of the obligation to refer under Article 267(3) TFEU. These Constitutional Courts, on the other hand, do not safeguard the jurisdiction of the CJEU for "good will."[163] In fact, as has been pointed out, this practice contributes to the avoidance of the risk of State liability for judicial breaches. This also carries an improvement in the effectiveness of the judicial protection of individuals.

Additionally, through this practice, the Constitutional Courts in question impose, to a certain extent, their supremacy. Certainly, the obligation to make a reference for a preliminary ruling under Article 267(3) TFEU is reinforced within the national legal orders. However, through their constitutional review, these Constitutional Courts enjoy the power to monitor the dialogue of national courts with the CJEU. Indeed, the judicial construction linking the preliminary reference procedure to constitutional rights justifies the legitimacy of their review and, above all, gives these Constitutional Courts the last word on Article 267(3) TFEU. Therefore, it appears that this line of case law concerning the obligation for national courts of last instance to make a reference under Article 267(3) TFEU shows a further aspect in which the preliminary reference procedure plays a crucial role in highlighting the existing tension between some Constitutional Courts and the CJEU through their relationship with ordinary courts of last instance.

Overall, one may argue that the implications of this practice are positive for the effectiveness and the primacy of EU law. A possible counterview to this is that the autonomy of the EU legal order could be undermined due to the interference of these

[162] It is interesting to note that the German Federal Constitutional Court developed three lines of case law concerning its constitutional review *vis-à-vis* EU law, namely fundamental rights review, *ultra vires* review, and constitutional identity review.

[163] Sarmiento, *Reinforcing the (domestic) constitutional protection of primacy of EU law*, *supra* note 59, at 887.

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Constitutional Courts in the interpretation of Article 267(3) TFEU. Nevertheless, the Constitutional Courts in question reply to a situation that is characterized by a gap in EU law: there is an obligation to refer but no remedies to enforce or review its implementation.[164] In this context, a reply at national level seems appropriate also in the light of Article 19(1)(2) TEU, according to which "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

[164] EU law leaves this implementation to the margin of appreciation of national judges, according to the indications established in the case law of the CJEU. However, as has been seen, there might be cases where national courts of last instance do not comply with their obligation to refer.

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