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Amending the Preliminary Reference Procedure for the Administrative Judge

Commentary on the Report of the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, submitted in June 2008

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Abstract

This article analyzes the Report on the Preliminary Reference Procedure prepared by the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU on 2008. It explores the proposals submitted by the higher national administrative courts, and develops in a critical light the main points of the Report. The article also develops some issues ignored by the Report, such as the difficulties raised by the analysis of technical non-legal questions, the degree of detail in the ECJ's replies and the problematic application of Community primacy by national administrative authorities. Overall, it will be submitted that any analysis concerning the preliminary reference procedure eventually leads to a debate on the very essence of the judiciary in the EU. Whether the Report contends a particular conception of the judiciary, is a matter that will also be explored.

I Introduction

European law is a creature of dialogue: constitutional dialogue, political dialogue, institutional dialogue and, above all, judicial dialogue. Discourse among courts has enabled the European Communities and Union to develop the foundations that articulate the relations between Community and national law, the development of fundamental rights, the creation of European remedies, the enforcement of fully-fledged freedoms of movement and the design of a European judiciary close to a federal compound of judicial authorities. Communication among courts has proved a cornerstone of European integration and the tool that has enabled such process is the preliminary reference procedure, as stated in Article 234 TEC.

It is therefore unsurprising that a constant focus of attention lies in this procedural mechanism and that proposals aiming at improving the development of EC law take Article 234 of the EC Treaty (hereinafter referred to as TEC) as the starting point of analysis. Such is the case of the Report presented by the Association of the Councils of State and Supreme Admin-

[1] All opinions are strictly personal. Many thanks to Sacha Prechal for useful comments. The usual disclaimer applies.

istrative Jurisdictions of the EU (hereinafter referred to as ACSSAJ) on June 2008, which purports a series of reforms of the preliminary reference procedure with the aim of improving the rapport between the European Court of Justice and its national administrative counterparts[2]. This document is of particular importance for several reasons: first, it is a complete analysis of the strengths and weaknesses portrayed by the preliminary reference procedure, and therefore serves as a diagnose for future changes; second, the text is authored by a significant actor in the implementation of Article 234 TEC, the national courts[3]; and third, it sheds light in a variant of EU law that proves of the utmost importance, administrative law and its specialized courts.

This article will briefly summarize the main proposals outlined by the report, followed by a critical analysis of the suggestions laid by the ACSSAJ. It will be claimed that the preliminary reference procedure does not only require changes in its current regulation, but also in the way the ECJ approaches its own role in the Union's judicial structure. Article 234 TEC is a procedure, but it also embraces a particular vision of the role of Community and national courts. It is through this instrument that the Treaties define the scope and content of the judiciary of the European Union, a characterization that the ECJ shapes in a subtle process of power-allocation that requires complicity and obedience from its domestic counterparts. To this end, the Report sheds some light in how national courts are willing to engage and obey, but also in the limits of such attitude.

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[2] The Report was drafted by a working group set up on 14 May 2007, chaired by Pieter Van Dijk, President of the Administrative Jurisdiction Division of the Dutch Council of State. The group was formed by 10 other members, in representation of the Supreme Administrative Courts (Pascal Gilliaux [Belgium], Tuula Pynnä [Finland], Julien Boucher [France], Michael Groepper [Germany], Henri Campill [Luxembourg], Hanna Sevenster [Netherlands], Stanislaw Biernat [Poland], Manuel Campos [Spain], Ivan Verougstraete [Belgium] and Pauline Koskelo [Finland]), an observer of the European Court of Justice (Judge Christiaan Timmermans) and a secretary (Albert Heijmans). The working group held a meeting on 3 December 2007, and its conclusions were adopted by the General Assembly of the ACSSAJ on 18 June 2008. The document has been published in the ACSSAJ's newsletter n. 20, available on the Association's website: http://www.juradmin.eu/en/newsletter/pdf/Hr_20-En.pdf. All references made in this article to the Report use the numbering as appears in the Association's newsletter n. 20.

[3] It is, however, quite surprising to see that the composition of the working group was not very plural. No representatives of common law countries were present, and of the new twelve member States only Poland had a voice. This is a comment that does not question the sensibility of the members to the different legal traditions that participate in the ACSSAJ and Chapter 1 of the Report mentions that the Administrative Court of Austria, the Supreme Court of Cyprus and the Supreme Administrative Court of the Czech Republic submitted their observations to the activities of the working group.

II The Proposals of the Report

Among the many and interesting points made by the Report, there are several propositions that deserve special attention in this paper. In brief, the Report proposes substantial changes in the current practice of publication of references, in the *acte clair* doctrine, in the powers of national courts when referring orders are appealed and on expediency of the reference procedure. For the sake of clarity, in this section I will address these issues following the Report's arguments and in the following section they will be scrutinized in a critical light.

1 Transparency Revisited

Preliminary references suffer a considerable transparency deficit. Once the national judge poses the query, the question (and the question only) is published in the Union's Official Diary, but hardly any other data will ever be known until the Opinion of the Advocate General or the judgment of the ECJ are rendered. It must be noted that a reference is a complex and detailed document in which fact, law and legal reasoning unite with the aim of giving the ECJ a complete outlook of the case at hand.[4] All these contents will remain unheard by the legal community, and the mere question will usually be published at a late stage of the procedure. Only member States and the Commission will systematically be kept informed of the content of references, in order to safeguard their ability to introduce written submissions in the procedure.[5]

The Report strives to deliver a realistic alternative to the current practice, dividing its normative proposals into two groups: one directed to national

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4 The drafting of a preliminary reference is no easy task and good proof of it is the Information Note adopted by the ECJ, on references from national courts for a preliminary ruling (2005/C 143/01), where practical instructions are given to national judges regarding the contents of a referring order. According to the ECJ, 'a maximum of about ten pages is often sufficient to set out in a proper manner the context of a reference for a preliminary ruling. [...] In particular, the order for reference must:
- include a brief account of the subject-matter of the dispute and the relevant findings of fact [...],
- set out the tenor of any applicable national provisions and identify, where necessary, the relevant
national case-law [...]
- identify the Community provisions relevant to the case as accurately as possible;
- explain the reasons which prompted the national court to raise the question of the interpretation or validity of the Community provisions and the relationship between those provisions and the national provisions applicable to the main proceedings;
- include, where appropriate, a summary of the main arguments of the parties.'

5 Art. 23 of the Statute of the Court.

courts, and the other to the ECJ. As for domestic judges, the Report suggests that national supreme courts should publish immediately the full text of all references for preliminary rulings on the national level, but also at the international level as a result of cooperation between courts.[6] The JURIFAST network, created by the ACSSAJ, is already acting as a source not only of judgments, but also references.[7] Also, a similar proposal is addressed to the ECJ, so that references may be published at the institution's web site in all EU languages.[8] The Report notes that this suggestion was made in 2003, after the Association's General Assembly was held in Helsinki in May 2002, but with no present results.[9] It is important to note that, to this regard, the Report insists on the importance of transparency in the context of an enlarged Union, where 'the need for information about and transparency of the reference has increased. Access to the full text of a reference made by a domestic court would help other national courts to decide whether there is a real need for a reference to the ECJ'.[10]

2 Acte Clair, *CILFIT* and the Obligation of National Courts of Last Instance to Make a Reference

The second major proposal concerns paragraph 3 of Article 234 TEC and the obligation of national courts to make references to the ECJ when points of EU law pose problems of interpretation and/or validity. As it is well known, the ECJ relaxed the burden of making the reference when the query was 'clear' or had been previously 'cleared' by a previous ECJ decision, as stated in the well-known judgments of *CILFIT*[11] and *Da Costa*.[12] The Report approaches the matter proposing a subtle change in the *CILFIT* test, pointing at the need to identify the underlying consequences and relevance of 'the question'.[13] This is purported by reconceptualizing *CILFIT* as a 'commonsensical' test. Therefore, 'the national courts should consider whether the problem under consideration is worth the burden of a reference for a preliminary ruling. Interpretation with common sense entails that the lesser the problem, the more the national court can convince itself that it is capable, at first sight, to solve itself the question on the basis of its own knowledge and understanding of EU law, as the Court should not be both-

6 Report, p. 19-20.

7 This database can be consulted at the ACSSAJ's web page: http://www.juradmin.eu/en/jurisprudence/jurifast/jurifast_en.php.

8 Article 104, paragraph 1 of the Rules of Procedure already imposes an obligation on the Court to translate references to the language of each member State, in order to proceed with the obligation of notification stated in Article 23 of the Statue.

9 Report, p. 23.

10 *Ibid.*

11 Case 283/81 *Cilfit and Others* [1982] ECR 3415.

12 Joined Cases 28/62, 29/62 and 30/62 *Da Costa and Others* [1963] ECR 31.

13 Report, p. 19 and 23.

ered by minor problems or by problems the national court itself can solve in a satisfactory and acceptable way'.[14] As a result, the Report points at the dated conditions imposed by *CILFIT*, such as the need to interpret an EC provision in the light of all its linguistic versions, and concludes by stating that a majority of ACSSAJ's members recommend 'that the Court of Justice should seize a suiting opportunity to clarify its position in a judgment, taking into account that since *CILFIT*, the number of member states and languages have increased.'[15]

3 Quashing a Reference on Appeal

The Report makes a brief but important observation concerning the appeal of reference orders before an internal superior court. This issue is of a particular importance at the present time, due to the ECJ's recent decision in *Cartesio,*[16] which has recognized the autonomy of the referring court when making references, extending such autonomy to its very limits: if the appellate court quashes the referring order, *Cartesio* establishes that 'it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it'.[17] Writing before *Cartesio* was delivered, the ACSSAJ contended that when a reference is brought on appeal, 'the referring court should always inform the ECJ that an appeal has been lodged and request as a rule, unless the appeal is clearly lodged for purposes of delay or is reckless and provocative, that consideration of the case be deferred.'[18] The Report is apparently taking an opposite stance to the one finally adopted in *Cartesio* and due attention to this collision of opinions will be analyzed in the substantive section of this article.

4 Hasty References

The Report also invests considerable efforts in purporting means that may accelerate the preliminary reference, stating as a matter of principle that 'although definite progress has been made as a result of the measures taken in recent years [...], the situation is still not satisfactory at present'.[19] It carries on claiming that 'on the whole, preliminary ruling proceedings still take rather long', and 'every effort must be made to reduce the duration of the procedure still further'.[20]

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[14] Report, p. 19.

[15] Report, p. 23.

[16] Judgment in Case C-210/06 *Cartesio* [2008] ECR I-0000.

[17] *Supra*, paragraph 96.

[18] Report, p. 20.

[19] Report, p. 12.

[20] *Ibid.*

To this end, the Report makes a series of recommendations that should contribute to shorten the present 15-month average period of duration, with the aim of reducing it down to 12. First, it purports the creation of a filtering system, in case the ECJ's docket worsens in the future.[21] Second, it proposes the introduction of advisory opinions (*avis contentieux*) 'on la legal question in connection with a main cause of action if the legal question is new, particularly difficult and comes up in a considerable number of cases'.[22] Third, the Report recommends that the participation of the Advocate General should be limited furthermore, interpreting Article 20 of the Statute of the Court as to include the criterion of 'the importance of the points of law raised by a preliminary question for the development of Community Law'.[23] Fourth, the already well-known 'green light' procedure should be introduced, inviting national judges to propose in the referring order an answer to the issue raised, which could be 'green-lighted' with expediency by the ECJ.[24] Last, but not the least, the Report purports the insertion of a new ground for the issue of reasoned orders pursuant to Article 104, paragraph 3, of the Rules of Procedure, allowing the ECJ to solve cases in this fashion when questions 'are of minor importance to the unity, the coherence and the development of community law'.[25]

It is to be seen if these measures will effectively achieve further expediency in the current preliminary procedure. And if so, attention must be paid to the overall effects of acceleration in the case law, in its coherence and its ability to convince its national counterparts. This will be analysed in the sections that follow.

III The Report in Context

Before developing any criticism, it must be said that the Report strikes a proper balance between realistic and utopian claims. In contrast with other proposals dealing with the preliminary reference procedure, the ACSSAJ has distinguished between different intensities of reform depending on the provisions to be modified. Most suggestions depend upon the modification of the Rules of Procedure, and ultimately deal with a Treaty change, being the latter the most rigid expression of reform.[26] This typology gives the Report a shifting degree of realism, but also gives the reader

[21] Report, p. 14.

[22] Report, p. 14-15.

[23] Report, p. 16.

[24] Report, p. 16-17.

[25] Report, p. 17.

[26] 'The working group has decided not to put forward proposals for treaty amendment, because it is unlikely that they could be realised in the near future' (Report, p. 13). Despite this firm proposal, the working group proposed some changes concerning the introduction

a better perspective of the proposals being made. Having said this, it is not always possible to agree with the proposals brought forward, as will be proved in the following lines.

1 On Transparency and References: Judging with the Administrative Judge

The Report takes a powerful stance on the need to enhance transparency at certain stages of the preliminary reference procedure and the text is quite right in pointing at the unsustainable lack of publicity currently affecting referring orders. Publishing the complete text of a reference is an important step in the development of a wider and better-illustrated legal community in the Union, but is certainly a partial measure that could be accompanied by other proposals, which the Report does not address.

At the outset, it is useful to stress that a preliminary reference is not a procedure concerning two parties in an adjudicative context. Quite the contrary, Article 234 TEC designs a mechanism that enhances judicial cooperation in the solution of an abstract legal question. The detail of the main procedure is only relevant for the purposes of Article 234 TEC depending on the questions posed by the national judge, and it could be said, quite radically, that the legal situation of the parties becomes a secondary concern for the ECJ. In *Cartesio*, it has been claimed that 'the system established by Article 234 TEC [...] instituted direct cooperation between the Court of Justice and the national courts by means of a procedure *which is completely independent of any initiative by the parties*'.[27]

This is of course an obtuse way of looking at things and the ECJ itself has proved to take a different track in several occasions. However, it is important to note that Article 234 TEC plays a peculiar role when dealing with individual plaintiffs, with conventional adjudicative procedures and with the way in which justice is delivered overall. This anomalous background should be taken into account at the time of introducing procedural guarantees, since these might be good-willed but of scarce use, or pernicious results. Having said this, it must be recognized that the publication of references is a positive measure that points in the right direction, but certainly insufficient if the global outcome of the Report is to introduce transparency to the practice of Article 234 TEC. Thus, additional suggestions could have been posed, as will be now portrayed.

Transparency in a preliminary reference procedure entails access to documents, but also the development of other means of action, such as communication among actors involved in the procedure. Due to the institutional peculiarities of Article 234 TEC, private parties are not the sole interested

of a filtering system, the possibility for the Court to adopt its own Rules of Procedure and the creation of an advisory preliminary opinion of a general nature by the Court.

[27] *Supra,* paragraph 90 (italics added).

subjects in the resolution of a case, but a wide array of States, public administrations, national courts, European institutions and, of course, individuals. Improving transparency can thus be the result of a better-articulated procedure that safeguards the voice of all the institutional actors involved in a query, and this is not only obtained by publishing the complete text of references. Once such step is taken, it is imperative that access to the ECJ is also in the hands of non-State actors with a special interest in the issues posed. In the same fashion that member States, Institutions and parties in the main procedures are empowered to submit observations before the Court, similar access should be offered to other organizations or individuals with direct interest in the issues posed. It is important to bear in mind that Article 234 TEC is an alternative to a consultative competence, uniting the concrete detail of a particular case with the abstract conditioning of a general query. The ECJ is not only rendering its authoritative opinion in the case at hand, but also in all the future cases that should arise under similar circumstances. This pre-emptive role that Article 234 TEC attributes to the Luxembourg court has been traditionally displayed with a worrying lack of information and input from non-governmental voices that would strengthen and empower the final legal response. After all, transparency does not only entail a right to *hear*, but also the power to *be heard*.

Also, it is surprising that a Report elaborated by national judges does not make a special emphasis on the role of the referring judge *in the course* of the preliminary procedure before the ECJ. If Article 234 TEC is a dialogue between courts, where private parties are foreign to the dynamics of the ECJ's decision-making process, transparency should at least be enhanced as far as the referring judge is concerned. Informal communication, as purported in the Report, is not enough in order to assure full cooperation with the referring judge. Considering the importance displayed by the referring court or judge, as well as the use that the ECJ could make by having direct contact with them, it would be interesting to consider the possibility of enabling referring authorities to be present at hearings, as observers, or even allow them to *demand* a hearing in the ECJ pointing out at particular questions that could be addressed by the ECJ. Even if the referring judge would not be given the power to direct questions to the participants in the procedure, in the course of a hearing there are important data or legal arguments that may be of the utmost importance when delivering the judgement in the national fore. It must be noted that national judges do not have the ability to question other member States in the course of the domestic procedure, and if so, they do so at a high cost in resources and time that may make this measure impractical. Giving an active role to the national judge could improve not only communication, but also the self-perception of *European* judge that every national court must be duly aware of.

2 National Supreme Courts and the Future of *CILFIT*

The criticisms made by the Report to the *CILFIT* doctrine are well founded. It is true that certain requirements of the *CILFIT* test are outdated, such as the need to compare all linguistic versions of a Community provision. However, the Report sets aside the underlying critique to the past twenty five years of *acte clair*: a wide and well-interiorized re-interpretation of the obligation under Article 234, paragraph 3, and the *CILFIT* case law, to such an extent that the general rule (the obligation to submit the reference) has now become an exception to a new general rule (the faculty, under the *CILFIT* terms, to make a reference).[28]

Understandably, the Report makes hardly any mention to the current state of judicial implementation in the member States but, even if it did, it would be hard to imagine any harsh self-evaluation on the matter. However, the underlying problem that keeps *CILFIT* being a contended and misinterpreted judgment does not lie in its harshness, as the Report claims, but in its incapacity to act as a genuine supervisory mechanism of Supreme Court action. This lack of perspective is even more worrying in the present circumstances, now that the ECJ has declared that national judicial decisions can give rise to damages actions and that the Commission has launched its first infringement procedure against a member State on the grounds of a judgement of a Supreme Court. These two lines of action require clear criteria when it comes to the obligation of Article 234, paragraph 3, TEC. The harshness of *CILFIT* and the ECJ's unwillingness to make it good sits uncomfortably with the role of national courts of last instance that refuse to make references and eventually decide in disconformity with EC law. However, this anomalous context becomes even more worrisome when seen in the light of the new coercive means of control created in *Köbler*[29] and *Commission* v. *Italy*[30].

In *Köbler*, the ECJ stated that, in order to determine whether there has been a manifest breach of EC law on the part of a national court, all the factors which characterise the situation should be balanced, including, '*in particular*, the degree of clarity and precision of the rule infringed, whether

[28] Although no empirical studies have been made on the global application of *CILFIT* and Article 234, paragraph 3 TEC throughout the twenty seven member States, the ECJ's Annual Report sheds some light on the matter. In its 2008 Report, it is quite surprising to see that Germany's Bundesverwaltungsgericht has made eighty-eight references in over fifty years. The French Conseil d'Etat only referred forty two orders in the same time period, and the Italian Consiglio di Stato sixty-two. In twenty-two years, the Administrative Chamber of the Spanish Supreme Court has made nineteen references to the ECJ. Considering the work load of these jurisdictions, it is hard to imagine that only this small amount of references were not 'clear' as for the issues of EC law they posed.

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

[30] Case C-129/00 *Commission* v. *Italy* [2003] ECR I-14637.

the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution *and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC*'.[31] Therefore, not making the reference when the court is deciding in last instance is an important element to bear into consideration (although not the only one) in the conferral of damages[32]. In fact, a *Köbler*-type action for damages will usually be justified on two grounds: a substantive breach of EC law and the infringement of Article 234, paragraph 3 TEC, as a result of not referring the question to the ECJ. Of course there will be cases in which an action for damages will be exercised even with an existing previous preliminary judgment of the ECJ, but the current practice shows that manifestly incompatible national case-law will frequently be rendered without the cooperative role of the ECJ. It is therefore important that the *CILFIT* conditions are clearly settled by the Luxembourg court in a transparent manner that guarantees the plaintiff's right to claim damages. Otherwise, the *Köbler* case-law becomes an empty artifice of hardly any operative consequences for the *justiciable*.

The same concerns rise when *CILFIT*'s current state is analyzed in the light of infringement procedures launched by the Commission (Article 226 TEC) against judicial decisions of member States. As is well known, the lack of infringement actions for this form of State action came partly to an end when the Commission brought charges against Italy in case C-120/00.[33] The difficulties of attacking a member State for the decisions of their judiciaries are easy to convey, but the Commission seems more willing now to initiate this course of action as in the past. It is thus important that the ECJ clears its *CILFIT* dictum if Article 226 TEC is to become a new mechanism in the supervision of national judicial action. If the present situation is maintained, the Commission's ability to substantiate procedures of this nature will be in peril due to the lax and confusing conditions that the Court is imposing on the obligation of Article 234, paragraph 3 TEC. This may explain why the Commission's position in the latest infringement against judicial decisions, *Commission* v. *Spain*,[34] is rather ambivalent as to the source of the infringement, proof of the institution's uncertainty when dealing with questionable national judgments of Supreme Courts that refused at one point to make a reference to the ECJ.

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[31] *Supra*, paragraph 55 (Italics added).

[32] On the conditions for liability under *Köbler* and the role of Article 234, paragraph 3 TEC. see K.M. Scherr, '*The Principle of State Liability for Judicial Breaches. The case of Gerhard Köbler* v. *Austria under European Community Law and from a comparative national law perspective*', Doctoral Thesis submitted at the EUI, on August 2008, p. 28-39.

[33] *Supra*.

[34] Case C-154/08 (pending).

If the EC legal order is to have a 'complete system of actions and procedures',[35] the two procedural safeguards that act as a last course of legal protection of the individual must be fleshed in a manner that makes them operative and real. The current distortion of the *CILFIT* doctrine is no good precedent to such purpose, and its future relaxation would only increase the *lacunae* in the fragile arsenal of legal protection that EC law grants to the individual.

3 The Pre-*Cartesio* Remarks of the Report and its Post-*Cartesio* Afterlife

The Report, as previously mentioned, makes an expressive defence of the ability of national superior courts to quash a referring order to the ECJ issued by an inferior national court. Coming from the Association of Councils of State and Supreme Administrative jurisdictions, the Report's firm stance on national judicial hierarchy is hardly a surprise. However, only a few months after the text was made public, the ECJ delivered its decision in *Cartesio*, pointing at exactly the opposite direction. A brief mention should at least be made to this important and complex decision and due regard should be taken to the fact that national supreme courts will be at odds to comply with the Court's approach to national judicial hierarchy.

In *Cartesio*, a Hungarian judge questioned if a national rule, that allowed a separate appeal against a decision making a reference, was compatible with Article 234 TEC. According to the provisions under scrutiny, the appellate court had the power to vary that decision, to set aside the reference for a preliminary ruling and to order the first court to resume the domestic law proceedings. When confronted with this supervisory role of appellate courts over inferior judges who make a reference pursuant to Article 234 TEC, the ECJ gave a powerful support to the latter by claiming that 'it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it.'[36] For the sake of clarity, the judgement goes even further and states that the ECJ must 'abide by the decision to make a reference for a preliminary ruling, which must have its full effect so long as it has not been revoked or amended by the referring court, *such revocation or amendment being matters on which that court alone is able to take a decision*.'[37]

Cartesio raises many questions about the degree of interference that the ECJ is willing to inflict on national judicial autonomy, but it is clear from its wording that national courts that engage in a preliminary discourse with the

[35] Case 294/83 *Les Verts* v. *Parliament* [1986] ECR 1339, paragraph 23.

[36] *Ibid.*, paragraph 96.

[37] *Ibid.*, paragraph 97 (Emphasis added).

Luxembourg Court are protected from most appellate intrusions of superior domestic courts. When the ECJ states that a revocation or an amendment from the appellate jurisdiction is a matter that the inferior court 'alone is able to take a decision on', it is conferring on the said court a power to disregard a judgement delivered by an appellate court, on a case that will eventually return to that same jurisdiction when the judgements of the ECJ and the referring court are dictated. This result is even more striking when reading the ACSSAJ Report, which openly recognizes that an annulled reference order binds the referring judge, and therefore deprives the ECJ from the opportunity to render a judgment on the case.

The judgment in *Cartesio*, which sits uncomfortably with *Rheinmühlen II*,[38] is still a decision to develop in the Court's case-law. The way in which the ruling is drafted allows a certain margin of manoeuvre to national courts, as has been recently proved in *Nationale Loterij*.[39] Thus, the referring judge will be free to decide on the consequences of the appellate decision only 'if the main proceedings remain pending before the referring court in their entirety'.[40] This condition allowed the ECJ to remove from the docket the reference made by the Haselt local court which had been quashed by the Court of Appeal of Antwerp, but which, at the same time, judged on the substance of the case. Also, it is still open to discussion whether the powers granted on national inferior courts are only in their hands when the appeal has been lodged on the grounds of EC law, or whether it is an unlimited faculty that precludes the effects of the appeal whatever the motives were. Due regard should also be made in the future to the opposite circumstance posed in *Cartesio*: an appeal against a *refusal* to make a preliminary reference. Will the appellate Court's decision to quash the inferior judge's decision to deny the reference be also a 'matter on which [the latter] court alone is able to take a decision'?

These issues are awaiting further clarification from the ECJ, but in the meantime it would be of valuable use if the ACSSAJ, in one of its future reports, dedicates its attention to the practical and institutional consequences of *Cartesio*.

IV Discretion, Factual Analysis and Expediency in the Context of Administrative Litigation

Despite the Report's efforts to engage into a wide array of questions, there are surprising issues left untouched. Considering the fact that the text has been drafted in representation of the supreme administra-

[38] Case 146/73 *Rheinmühlen II* [1974] ECR 139, paragraph 3.

[39] Reference for a preliminary ruling from the Rechtbank van koophandel, Hasselt (Belgium), of December 22 2006, Case C-525/06.

[40] Paragraph 95.

tive jurisdictions of the EU, it is remarkable to see how the peculiarities and complexities of administrative litigation do not appear as a principal or accessory subject. On the contrary, the Report purports a series of reforms that could be just as valid for cases of civil, criminal or labour law before the ECJ, but hardly any proposals are made dealing with the specific problems posed by and in national administrative courts.[41]

The review of administrative discretion is a classic subject of study in public law that keeps focusing the attention of administrative lawyers. A significant feature of the administrative legal systems of the twenty-seven member States is the wide variety of *intensities* in the judicial review of administrative action. While British courts struggle with the *Wednesbury* standard of scrutiny, continental jurisdictions make use of more incisive methods of control of discretion.[42] This diversity comes to an end when the ECJ rules in the context of a preliminary reference and imposes on the national administrative judge a specific legal result, notwithstanding the margin of discretion in the hands of the national administration. Such result is not always, though, the rule, and the Luxembourg Court can give advice to the national administrative judge on the normative premises of the case, but leaving the concrete result (and the eventual control of discretion) in the hands of the referring judge. This erratic approach of the ECJ to the control of discretion of national authorities is deeply attached to the institutional balance that the preliminary reference must safeguard, but it can also be a source of controversy depending on the national referring court and the legal administrative tradition in which it operates. This issue is not addressed in the Report, and it would have been interesting to know the Supreme Administrative Courts' position on a question as important as the review of discretionary administrative action.

Similarly relevant is the question of evidence and factual analysis in the course of the preliminary reference procedure. As is well known, the referring judge provides the ECJ with the factual data necessary to render an answer to the queries posed. However, administrative law can pose complex matters regarding fact that need a closer cooperation between the national and European courts. To this effect, Articles 45 to 53 of the Rules of Procedure are clearly insufficient, but also inappropriate in practical terms.

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[41] It must be recognized that the ACSSAJ has issued several reports on specific administrative issues, in the course of its biannual *colloques* since 1968, on matters as varied as the drawing up of administrative acts, the scope and results of the annulment of an administrative act by the judge, the execution of the individual administrative decisions and the intervention of the courts in the execution of the decisions, or the latest report, from 2008, on the consequences of incompatibility with EC law for final administrative decisions and final judgments of administrative courts.

[42] On discretion and its judicial review in comparative perspective, see R. Caranta, 'On Discretion', in: S. Prechal & van Roermund (eds.), *The Coherence of EU Law*, Oxford, Oxford University Press, 2008, p. 187-195.

It is obvious that the referring court is the best suited authority to provide factual information regarding a specific case. When such data are lacking, the ECJ has employed an irregular approach, sometimes requesting further information from the national court, or, in the worse of cases, declaring the reference inadmissible. This latter course is becoming more frequent and worrying, and one wonders why the ECJ does not demand more cooperation from the referring judge before reaching the most drastic of results. In *Asemfo*,[43] the Spanish Supreme Court was dispatched with a partial declaration of inadmissibility due to a lack of motivation in the referring order. The fact that the ECJ did not even attempt to establish a channel of communication in order to obtain the necessary data shows a worrying lack of support on the work of its national counterparts. The Report could have provided some insight into this important matter, which is still open for the ECJ to reconsider.

Another striking absence concerns the *Fratelli Costanzo*[44] case law, according to which all national administrations are under the obligation to set aside national provisions that come into conflict with EC norms. One of the main criticisms this decision has received deals with the inability of national administrations to make references, in contrast with national courts, that can also set aside national rules, but with the interpretative help of the ECJ. The power that *Costanzo* grants to national administrations is even more striking when compared with the inability of executive bodies to set aside parliamentary statutes, or other written provisions in the law: a task that member States grant solely to the courts. Michal Bobek has written in this review, in regard to *Costanzo*, that 'there is something deeply perturbing about an administrative authority that should start setting aside national constitutional provisions based on its own reading of, for instance, a Commission regulation'.[45] He is certainly right, and the ECJ could strive to reform the overwhelming power it is granting to administrative authorities by either reconsidering the *Costanzo* case law, or by limiting its scope to those administrative independent bodies that are empowered to make preliminary references. Either way, this is an issue of crucial importance for administrative courts that should have been approached by the Report. It is true that the ECJ does not appear to be willing to change its case law, but some signals from its national counterparts would definitely be of help. However, this has been unfortunately left for another occasion.

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43 Case C-295/05 *Asemfo* [2007] ECR I-2999.

44 Case 103/88 *Costanzo* [1989] ECR 1839.

45 M. Bobek, 'Thou Shalt Have Two Masters; The Application of European Law by Administrative Authorities in the New Member States', [2008] *REALaw*, p. 63.

V The Underlying Debate: What Court of Justice for What Kind of Europe?

Every study on the role and reform of the preliminary reference procedure entails, directly or indirectly, a broader reflection about the European judiciary. Article 234 has fleshed the very relationship between European and national courts, but also between legal orders. In his exhaustive *ouvre* on the role of national judges as community judges, Olivier Dubos states that 'si le Président Lecourt a pu s'interroger sur ce qu'aurait été le droit des Communautés sans les arrêts de 1963 [*Van Gend en Loos*] et 1964 [*Costa/Enel*], il convient encore une fois de rappeler que ces arrêts fondateurs comme tant d'autres, ont été rendus suite à une question préjudicielle, et que l'article 234 est un indice de l'immédiateté et de la primauté du droit communautaire. Dès lors qu'eût été le droit des Communautés sans l'article 234?'[46] Indeed, even the existence of EC law owes its current role and authority to the preliminary reference procedure and therefore any exploration into the future of this mechanism is, at least, a *périple* into the unknown confines of a future European judiciary. The Report of the ACSSAJ shrewdly points in a specific direction and it does so in the subtlest of manners: by not saying it openly.

A proposal of change that avoids addressing crucial issues such as the development of *Köbler*,[47] *Kühne & Heitz*,[48] *Lucchini*[49] or infringement actions against national judicial action;[50] that proposes a relaxation of the *CILFIT* conditions; that poses a special emphasis on the need to accelerate the procedures before the ECJ; that supports the quashing of referring orders on appeal; that purports the creation of advisory preliminary opinions that will eventually decrease the number of preliminary references; and that recommends a more modest participation of Advocate Generals in references, is clearly an invitation to enhance the role of national supreme jurisdictions in detriment of the ECJ. Being a proposition drafted by the supreme courts themselves, it is hardly surprising that the results prove to be of this nature. However, it is the tacit spirit underlying the Report that could be open to criticism. In a European Union with twenty-seven member States and their respective judiciaries, the authority of EC law depends more than ever on the existence of an unquestioned Court that purports a uniform and coherent interpretation of the law. The role of national courts, and particularly of national courts of last instance, is essential in the safeguard of the European judiciary, but their actions can not become immune to the infringement of EC law, particularly in areas of non-constitutional relevance. This is the case

[46] O. Dubos, *'Les juridictions nationales, juge communautaire'*, Dalloz, Paris, 2001, p. 74.

[47] *Supra*.

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

[49] Case C-119/05 *Lucchini* [2007] ECR I-6199.

[50] *Supra*.

of administrative law, which does not necessarily concern with issues touching upon fundamental rights, national identity or the national distribution of powers. When cases are foreign to theses sensitive constitutional terrains, the ECJ must count with an authoritative voice, both when declaring the law and when the time comes to enforce it.[51] The Report of the ACSSAJ was an excellent opportunity to explore the way in which the ECJ could fashion its relationship with national courts in these non-constitutional contexts, but the text fails to address the question directly and its proposals strive too eagerly to safeguard the autonomy of national voices. Whether this is the aim pursued or not, it certainly raises questions about the willingness of national administrative jurisdictions to address the current crucial issues that surround EC law, its judiciary and its most precious jewel: the preliminary reference procedure. Maybe in the following years, when the ACSSAJ presents its next Report, the opportunity will not be lost.

[51] I have supported the need to distinguish between constitutional and non-constitutional issues when developing an approach to the ECJ's position in the European judiciary, in D. Sarmiento, '*CILFIT* and *Foto-Frost*' in M. Poiares Maduro & L. Azoulai (eds.), '*The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*', Hart, Oxford-Portland, 2009.