

# In Search of a 'Manifest Infringement of the Applicable Law' in the Terms set out in Köbler

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## Abstract

*According to the judgment of the CJEU in Köbler, Member States are liable for a manifest infringement of the applicable EU law by their courts adjudicating at last instance. The aim of the present analysis is to examine whether, and under what circumstances, a breach of EU law qualifies as 'manifest' in the terms set out in Köbler. As Prechal points out, State liability 'originates from the breach of a Community law obligation and not from the Community law provision itself, such as a Treaty provision or a directive'. Therefore, this study takes as its starting point the procedural obligations of Member State courts regarding the application of EU law. Thus it offers a systematic analysis of judicial violations of EU law in order to find out whether they could eventually qualify as manifest infringement in the terms of the Köbler judgment.*

## I Introduction

The Court of Justice of the European Union (CJEU) held in its judgment in *Köbler*<sup>1</sup> that Member States are obliged to make good the damage caused to individuals in cases where the infringement of EU law stems from a decision of a Member State court adjudicating at last instance.

The research shows that *Köbler* liability is a rarely used method to remedy violations of EU rights in practice.<sup>2</sup> Since the pronouncement of the CJEU judgment in 2003, only about 35 cases judged on the basis of the *Köbler* principle

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All views expressed herein are strictly personal. Any comments are welcome at the author's email address: [zsolia.varga@curia.europa.eu](mailto:zsolia.varga@curia.europa.eu).

<sup>1</sup> Case C-224/01 *Köbler* [2003] ECR I-10239.

<sup>2</sup> The research is based on cases that have been made publicly accessible either through databases or in other forms such as collections and digests of case-law. Naturally, there may be judgments that were never reported and therefore were not considered. The main sources for the identification of national cases are as follows:

– ACA Europe, National reports, 'Consequences of incompatibility with EC law for final administrative decisions and final judgments of administrative courts in the Member States', 21st colloquium, Warsaw (15 June 2008), [www.aca-europe.eu/index.php/en/colloquies-top-en/244-21st-colloquium-in-warsaw-from-15-to-16-june-2008](http://www.aca-europe.eu/index.php/en/colloquies-top-en/244-21st-colloquium-in-warsaw-from-15-to-16-june-2008) (last visited 15 May 2016);

have been reported from the 28 Member States.<sup>3</sup> In these cases, pecuniary compensation has only been awarded on four occasions so far.<sup>4</sup> There are several reasons for that. On the one hand, reasons external to the doctrine – such as the remedial structure of Member States, the existence of alternative remedies, and the reticence by national courts to accept judicial liability – hinder its practical use. On the other hand, reasons inherent to the principle – namely the strict condition on the gravity of the breach – also have an influence on its application.<sup>5</sup> The focus of this paper is on the latter condition, i.e. the criterion established by the CJEU regarding the gravity of the breach of EU law.

Academics anticipated shortly after the pronouncement of the CJEU judgment that the practical effect of *Köbler* would depend on how the CJEU interprets the term ‘manifest’ breach.<sup>6</sup> Since then, this criterion has been thoroughly analysed. It has notably been subject to criticism by several scholars;<sup>7</sup> and Scherr

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– bulletin *Reflets: Informations rapides sur les développements juridiques présentant un intérêt communautaire*, curia.europa.eu/jcms/jcms/j02\_7063/ (last visited 15 May 2016);

– the *Commission's Annual Reports to the European Parliament on Monitoring the Application of EU Law* (Annex VI: Application of Community law by national courts: a survey), ec.europa.eu/atwork/applying-eu-law/index\_en.htm (last visited 15 May 2016);

– the Internet site of the Associations of the Councils of State and Supreme Administrative Jurisdictions of the European Union, especially the databases Jurifast, [www.aca-europe.eu/index.php/en/jurifast-en](http://www.aca-europe.eu/index.php/en/jurifast-en) (last visited 15 May 2016) and Dec.Nat, [www.aca-europe.eu/index.php/en/dec-nat-en](http://www.aca-europe.eu/index.php/en/dec-nat-en) (last visited 15 May 2016);

– the Internet site of the lus Commune Casebooks for the Common Law of Europe, especially the Jean Monnet Database on State Liability, [www.casebooks.eu/JeanMonnetDatabase/StateLiability/](http://www.casebooks.eu/JeanMonnetDatabase/StateLiability/) (last visited 15 May 2016).

3 For a presentation of these cases, see the article by Zs.Varga, ‘The Application of the Köbler Doctrine by Member State Courts’, *ELTE Law Journal* (2016).

4 (IT) Tribunale di Genova, Sentenza, 31/03/2009, *Fallimento Traghetti del Mediterraneo/Repubblica italiana*, reported by B. Gencarelli, ‘Rapport italien’, in L. Coutron/J.-C. Bonichot (eds.), *L'obligation de renvoi préjudiciel à la Cour de justice une obligation sanctionnée?* (Bruxelles: Bruylant, 2014), 279; (FI) Korkein oikeus, tuomio, 05/07/2013, A Oy, KKO:2013:58, reported in *Reflets* 3 (2013), 22-23; (SE) Justitiekanslern, Beslut, 06/04/2009, *Flexlink AB*, drn 2409-08-40, reported by F.-L. Göransson, ‘Rapport suédois’, in Coutron/Bonichot, *L'obligation de renvoi 2014 (op. cit.)*, 493-495; (BG) Okrazhen sad Yambol, Reshenie, 26/11/2015, reported in *Reflets* 1 (2016), 14. A uniform method is applied to refer to national judgments in footnotes.

5 For an analysis on the reasons hindering the practical use of the *Köbler* doctrine, see the article by Zs.Varga, ‘Why is the Köbler principle not applied in practice?’, *Maastricht Journal of European & Comparative Law* 23(6) (2016).

6 T. Tridimas, ‘State Liability for Judicial Acts Remedies Unlimited?’, in P. Demaret/I. Govaere/D. Hanf (eds.), *European Legal Dynamics. Revised and Update Edition of 30 Years of European Legal Studies at the College of Europe ? = Dynamiques juridiques européennes. Édition revue et mise à jour de 30 ans d'études juridiques européennes au Collège d'Europe* (Brussels/Bruxelles: P.I.E. Peter Lang, 2007), 154-155.

7 See for example B. 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?’, *CML Rev.* 46(3) (2009), 792; M. Breuer, ‘State Liability for Judicial Wrongs and Community Law: The Case of Gerhard Köbler v Austria’, *EL Rev.* 29(2) (2004), 243-254; P. Cabral/M.C. Chaves, ‘Member State Liability for Decisions of National Courts Adjudicating at Last Instance’, *Maastricht Journal of European & Comparative Law* 13(1) (2006), 123; C.D. Classen, ‘Case C-224/01, Gerhard Köbler v. Republik Österreich’, *CML Rev.* 41(3) (2004), 816-817; M.J. Golecki/B. Wojciechowski, ‘The Application of Law within a Multicentric Legal System: Economic Analysis of Köbler and Traghetti’, in T. Buksinski/P.W. Juchacz (eds.), *Multicentrism*

has already offered a detailed analysis of this criterion from a comparative law perspective.<sup>8</sup> The present study aims to synthesise the existing knowledge regarding the criterion of ‘manifest infringement of the applicable law’ from the *Köbler* judgement, then to complete it with several new findings. For this reason, it builds on different opinions by legal writers, as well as on the case-law of national courts on judicial liability for breaches of EU law. Particularly, it seeks to identify the scenarios which can potentially reach the required level of gravity of breach so that State liability occurs. In this respect, the study takes as a starting point the procedural obligations of Member State courts regarding the application of EU law.

This paper is divided into eight parts. Part I is the introduction; and Part II describes the criterion of ‘manifest infringement of the applicable law’. Part III examines the procedural obligations of Member State courts regarding the application and the correct interpretation of EU law in order to identify scenarios eventually amounting to such a qualified infringement. Part IV analyses the impact of the violation of the referral duty on the gravity of the breach of EU law and presents a theory on possible manifest infringements. Part V is devoted to the breach of the obligation to refer a preliminary question to the CJEU as a separate ground for liability; while Part VII deals with the issue of damages liability for violation of the Charter. Part VII summarises the relevant case-law of the national courts regarding *Köbler* claims; and Part VIII is the conclusion.

Before starting the analysis, it needs to be emphasised that this article concerns national courts adjudicating at last instance only.<sup>9</sup> This is due to the fact that only a breach of EU law by these courts can trigger liability for the State<sup>10</sup> and that only national courts of last instance are under the obligation to make

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*as an Emerging Paradigm in Legal Theory* (Frankfurt am Main: Peter Lang, 2009), 195-197; J. Komárek, ‘Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order’, *CML Rev.* 42(1) (2005), 17; P.M. Rodríguez, ‘State Liability for Judicial Acts in European Community Law: The Conceptual Weaknesses of the Functional Approach’, *Columbia Journal of European Law* 11 (2004-2005), 614-615; R. Valutytė, ‘Concept of Court’s Fault in State Liability Action for Infringement of European Union Law’, *Jurisprudence* 18(1) (2011), 37, 47; P.J. Wattel, ‘Köbler, CILFIT and Welthgrove: We Can’t Go on Meeting like This’, *CML Rev.* 41(1) (2004), 177-190.

<sup>8</sup> K.M. Scherr, ‘The Principle of State Liability for Judicial Breaches: the Case Gerhard Köbler v. Austria under European Community Law and from a Comparative National Law Perspective’, Thesis-European University Institute (2008); K.M. Scherr, ‘Comparative Aspects of the Application of the Principle of State Liability for Judicial Breaches’, in *ERA Forum* 12 (Springer, 2012), 565-588.

<sup>9</sup> More precisely, the ECJ refers to ‘court or tribunal of a Member State against whose decisions there is no judicial remedy under national law’. See Case C-99/00 *Lyckeskog* [2002] ECR I-4839, para. 16 and Case C-210/06 *Cartesio* [2008] I-9641, para. 79. See also K. Lenaerts/I. Maselis/K. Gutman (authors), J.T. Nowak (ed). *EU Procedural Law* (Oxford: Oxford University Press, 2014), 96-97.

<sup>10</sup> *Köbler*, paras. 33-34; Case C-173/03 *Traghetti del Mediterraneo* [2006] I-5177, para. 33, Case C-160/14 *Ferreira da Silva e Brito e.a.*, not yet published, EU:C:2015:565, para. 47.

a reference for preliminary ruling.<sup>11</sup> Therefore, even though the procedural obligations of national courts regarding the application of EU law apply to all jurisdictional instances, only breaches committed by national courts of the last instance are relevant for the purposes of the present analysis.

## II Manifest Breach of EU Law

### 1 The CJEU Judgment

According to the CJEU, State liability for damage caused by Member State bodies is governed by the same conditions, whichever body is responsible for the infringement.<sup>12</sup> Therefore, the conditions of the liability are as follows: where the rule of law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. However, the CJEU added that the specific nature of the judicial function and the legitimate requirements of legal certainty justify a more restricted interpretation of ‘a sufficiently serious breach’ when it comes to a breach committed by a Member State court adjudicating at last instance:

‘State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law.’<sup>13</sup>

In order to determine whether this condition is satisfied, various factors must be taken into account, including:

‘the degree of clarity and precision of the rule infringed, whether 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.’<sup>14</sup>

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<sup>11</sup> Art. 267(3) TFEU.

<sup>12</sup> *Köbler*, paras. 51-52.

<sup>13</sup> *Köbler*, para. 53.

<sup>14</sup> *Köbler*, para. 55.

‘In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter.’<sup>15</sup>

Therefore, in situations where the violation of EU law is attributable to a Member State court, the general condition of State liability concerning the gravity of the breach, i.e. the ‘sufficiently serious breach of EU law’ is met where the national court commits a ‘manifest infringement of the applicable law’.

The CJEU has summarised its conclusions in the operative part of the judgment in the following words:

‘[...] the principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.’

What is interesting for the purposes of the present analysis is to examine whether, and under what circumstances, the breach of EU law qualifies as manifest. According to the doctrine, two factors are most relevant. The first one is the clarity and precision of the law in the area where the violation has taken place. The second one is the disregard of the duty to make a reference for a preliminary ruling to the CJEU. The problems that transpire from the practical application of these two criteria are, however, deeper than what they first seem.<sup>16</sup>

Before studying the factors to be taken into account, it is noteworthy to examine what the ‘violation of the applicable [EU] law’ means in the context of State liability.

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<sup>15</sup> *Köbler*, para. 56. On the question whether it means to build a judicial hierarchy in the EU, see for example Komárek, ‘Federal Elements in the Community Judicial System’ 2005 (n. 7), 9-34; and J. Komárek, ‘Inter-Court Constitutional Dialogue after the Enlargement – Implications of the Case of Professor Köbler’, *Croatian Yearbook of European Law and Policy* 1(1) (2005), 92-94.

<sup>16</sup> G. Anagnostaras, ‘Erroneous judgments and the prospect of damages: The scope of the principle of governmental liability for judicial breaches’, *EL Rev.* 31(5) (2006), 744.

## 2 Violation of the Applicable EU Law

Due to the decentralised enforcement of EU law, EU norms are primarily applied and enforced by national courts and authorities.<sup>17</sup> One might think that Member State bodies, including courts, are obliged to apply these *substantive* EU rules in every case. However, the non-application or the misinterpretation of such norms does not amount to a violation of EU law in every situation. This is because substantive EU norms do not have to be applied directly and obligatorily by Member State authorities in every situation.<sup>18</sup>

As a matter of fact, the application of substantive EU rules is obligatory for Member State bodies only under the conditions developed in the case-law of the CJEU.<sup>19</sup> It means that *substantive* EU norms must only be enforced if correspondent *procedural* EU obligations are imposed on Member State bodies with regard to the application of EU law in the specific case. It means that the violation (misinterpretation or non-application) of the substantive provision qualifies as a breach of EU law only where *a procedural obligation to apply this norm exists* in the case at hand.<sup>20</sup> Once the national court has the obligation to *apply* the substantive norm, it also has to ensure that it is *correctly* understood and applied. It means that in such situations either the misinterpretation or the non-application of the substantive norm qualifies as a breach of EU law.

It is therefore important for the purposes of this study to distinguish between the substantive EU rules and the procedural EU obligations. It is also necessary to recall the procedural duties of national courts, as *Köbler* liability arises in the event of violation of these obligations. The well-known procedural duties of

<sup>17</sup> G. Anagnostaras, 'Not as Unproblematic as You Might Think: The Establishment of Causation in Governmental Liability Actions', *EL Rev.* 27(2) (2002), 665; F. Becker, 'Application of Community Law by Member States' Public Authorities: Between Autonomy and Effectiveness', *CML Rev.* 44(4) (2007), 1036; T. Lock, 'Is Private Enforcement of EU Law through State Liability a Myth? An Assessment 20 Years after Francovich', *CML Rev.* 49(5) (2012), 1675; K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union', *CML Rev.* 44(6) (2007), 1659; Lenaerts et al., *EU Procedural Law 2014* (n. 9), 3, 13-14; J.T. Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institution under Article 10 EC', *Fordham International Law Journal* 31(5) (2007), 1484.

<sup>18</sup> Consider, for example, the absence of horizontal direct effect of non-implemented directives.

<sup>19</sup> G. Anagnostaras, 'State Liability v Retroactive Application of Belated Implementing Measures: Seeking the Optimum Means in Terms of Effectiveness of EC Law', *Journal of Current Legal Issues* 11(1) (2000); R. Caranta, 'Judicial Protection against Member States: A New Jus Commune Takes Shape', *CML Rev.* 32(3) (1995), 704; D. Nassimpian, 'And We Keep on Meeting: (de)fragmenting State Liability', *EL Rev.* 32(6) (2007), 821; P. Van Cleynenbreugel, 'The Confusing Constitutional Status of Positive Procedural Obligations in EU Law', *Review of European Administrative Law* 5(1) (2012), 91.

<sup>20</sup> As Prechal emphasises, State liability 'originates from the breach of a Community law obligation and not from the Community law provision itself, such as a Treaty provision or a directive' S. Prechal, 'Member State Liability and Direct Effect: What's the Difference After All?', *European Business Law Review* 17(2) (2006), 301.

national courts regarding the application of EU law<sup>21</sup> are as follows: (1) the obligations to apply directly effective EU law and protect the rights which it confers on individuals; (2) to leave unapplied national rules that are contrary to EU law; (3) and to interpret and apply national laws as far as possible so as to make them compatible with EU law. Taking into account the above, we can add to this list the obligation of national courts (4) to ascertain that the content of the substantive provision is *correctly* understood and applied in the case. Moreover, if the national court encounters doubts regarding the above obligations, (5) it is required to make a preliminary reference to the CJEU.<sup>22</sup> These procedural obligations have, however, their own limits; and they apply only if certain conditions are fulfilled.

Accordingly, the five main scenarios that may lead to the violation of EU law in terms of the *Köbler* judgment are the scenarios in which the national court, in breach of its corresponding procedural obligations: (1) does not apply an EU norm that has direct effect; (2) continues to apply a national rule that is contrary to the EU law; (3) does not give an interpretation to the national law that is consistent with the EU norm; (4) misinterprets the substantive EU norm or (5) does not refer a preliminary question to the CJEU.<sup>23</sup>

In any case, the breach of these procedural obligations should result in a breach of the substantive EU norm which confers rights on individuals, so that State liability arises. These infringements are, typically, the following: in scenarios (1) to (3), the non-application of the substantive norm; in scenario (4), the misinterpretation of the substantive norm; and in scenario (5), either the non-application or the misinterpretation of the substantive norm.<sup>24</sup>

<sup>21</sup> The list summarised here is by no means complete and I have only included duties that are of primary interest to this work. For a more comprehensive list, see M.L.H.K. Claes, *The National Courts' Mandate in the European Constitution* (Oxford: Portland, Hart Publishing, 2006), 58-59; N. Fennelly, 'The National Judge as Judge of the European Union', in A. Rosas/E. Levits/Y. Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law - La Cour de Justice et La Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (Springer, 2013), 64-78; Lang, 'The Development by the Court of Justice' 2007 (n. 17), 1499-1514. The violation of each obligation enumerated by these authors could theoretically be examined in order to decide whether they can give rise to compensation in the terms of *Köbler*. Relying on the method used in this article, it could be analysed whether, for example, the breach by the national court of its duty to raise questions of EU law of their own motion where national law provides the same duty or power, can qualify as a manifest breach of the applicable law.

<sup>22</sup> As a supplementary obligation, we can add to this list obligation (6) to decide on the request in reasonable time. However, as this violation does not relate directly to the subject of this paper and it will not be analysed further.

<sup>23</sup> See also Tridimas 'State Liability for Judicial Acts' 2007 (n. 6), 155.

<sup>24</sup> Scenario (4) shows that there is no clear distinction between the procedural obligations and the substantive EU norms. However, I found this distinction useful as it helps to clarify that the violation (including the misinterpretation) of the substantive norm is only a violation of EU law where there is a procedural obligation to apply (and correctly interpret) the substantive norm.

Moreover, the violation of the above – *substantive* and *procedural* – EU rules by a national court is not sufficient in itself to entail liability for the State. According to the CJEU, liability for judicial breaches ‘can only arise in the exceptional case where the court has manifestly infringed the applicable law’. This raises the questions whether and if so, under what circumstances, a breach can be qualified as manifest. To answer these questions, it is noteworthy to go through the relevant factors the CJEU enumerated in *Köbler* with regard to the evaluation of the gravity of the breach.<sup>25</sup>

### 3 Factors to be Taken into Account

According to the CJEU, various factors must be taken into account in order to determine whether the breach of EU law by the Member State court is manifest. These factors are as follows.

#### Degree of clarity and precision of the rule infringed

In my understanding, this factor refers to the *substantive* EU norm which confers rights to individuals and which is not, or is incorrectly applied in the procedure. If this norm is clear, it means that the content and the extent of the right conferred to individuals are obvious, and the national courts should not encounter problems concerning its interpretation. However, the clarity of the substantive norm is independent from the question to whether it should be applied in national proceedings.<sup>26</sup> This latter issue relates to the procedural obligation – that is to say, to the obligation of the national court regarding the application of the substantive EU norm.

The question whether the infringement was intentional, whether the error of law was excusable or inexcusable and the position taken, where applicable, by a Community institution

In my view, these criteria are primarily related to the violation by the Member State court of its *procedural* obligation regarding the application and/or the correct interpretation<sup>27</sup> of a substantive norm. Therefore, they should be analysed with regard to the procedural obligation which the Member State

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<sup>25</sup> *Köbler*, para. 55.

<sup>26</sup> It is, however, true that there is a connection between this criterion and the procedural obligation to apply directly the EU norm that has direct effect given that the clarity of the norm is a condition of this latter obligation. However, this connection is indirect.

<sup>27</sup> *Ferreira da Silva e Brito e.a.*



court breaches when it refuses to apply, or when it does not interpret correctly, the substantive EU norm.

Non-compliance by the national court with its obligation to make a reference for a preliminary ruling

I think that the referral duty cannot be isolated from the procedural obligation of the Member State court to apply and ensure the correct interpretation of EU law. On the contrary, the obligation to make a reference for preliminary ruling emerges only in situations where either the interpretation of the substantive norm and/or its application in the national proceedings<sup>28</sup> is ambiguous. It is, however, unclear whether the consideration of this factor actually raises or lowers the standard of liability. A separate point will be dedicated to this issue.<sup>29</sup>

The next part of this paper will present an analysis of the procedural obligations mentioned in Part II in order to identify scenarios of a ‘manifest infringement of the applicable [EU] law’ by the national courts.

### III Procedural Obligations of Member State Courts

#### 1 Application of EU Provisions with Direct Effect

##### The Principle of Direct Effect

The first obligation of national courts emanates from the seminal judgment of *van Gend & Loos*, which introduced the doctrine of direct effect to the EU legal order.<sup>30</sup> In this landmark case, the CJEU established that certain EU rules are capable of producing direct effects and creating individual rights, which national courts must protect. In other words, direct effect enables individuals to invoke EU provisions immediately before a national court. From the point of view of the procedural obligation of Member State courts, direct effect means that national courts *are bound to enforce and apply directly those provisions of EU law that have direct effect*.<sup>31</sup>

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<sup>28</sup> See for example Case C-441/14 *DI*, not yet published, EU:C:2016:278, para. 15. In this case, the content of the substantive provisions, i.e. Articles 2 and 6(1) of Directive 2000/78 and the general principle prohibiting discrimination on the grounds of age was clear but the national court did not know how to handle its procedural obligation to apply it in a dispute between private parties.

<sup>29</sup> See part III, point 6, as well as part IV, point 2.

<sup>30</sup> Case 26/62 *van Gend & Loos* [1963] ECR 3.

<sup>31</sup> See for example J.L. Da Cruz Vilaça, ‘Le principe de l’effet utile du droit de l’Union dans la jurisprudence de la Cour’, in Rosas et al. (eds.), *The Court of Justice 2013* (n. 21), 281-289.

## The Limits of this Obligation

Not all EU provisions however, have direct effect. According to the threshold criteria developed by the CJEU, a substantive EU norm has to be clear, precise, and unconditional in order to produce such an effect.<sup>32</sup> It also depends on the type of EU legislative act containing the EU norm to determine whether the latter has direct effect.<sup>33</sup> For example, directive provisions have direct effect only if the Member State has not transposed the directive into the national legal system by the deadline.<sup>34</sup> Moreover, even under these conditions, directives only produce direct effect in legal relations between an individual and the State,<sup>35</sup> but not between individuals.<sup>36</sup> Therefore, there might be situations where it is not evident whether the substantive EU norm has direct effect indeed. If there is any doubt, the Member State court has to make a reference for a preliminary ruling to the CJEU, which is the competent court to decide on the direct effect of the substantive EU norm.<sup>37</sup>

## Conclusion

Taking into account the above considerations, we can conclude that the national court appears to commit a manifest infringement of its procedural duty to apply directly a provision of EU law that has direct effect only in a situation where the direct effect of this substantive norm has already been confirmed by the CJEU.

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<sup>32</sup> The clarity of the substantive norm and that of the procedural obligation to apply it are, however, separate issues. See M. Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Oxford and Portland Oregon: Hart Publishing, 2004), 56-59.

<sup>33</sup> See for example G. Kofler, 'Direct Applicability and Direct Effect', in C. Brokelind (ed.) *Principles of Law: Function, Status and Impact in EU Tax Law* (IBDF, 2014), 273-301.

<sup>34</sup> Case 41/74 *Van Duyn* [1974] ECR 1337.

<sup>35</sup> See M. Dougan, 'The "Disguised" Vertical Direct Effect of Directives?', *The Cambridge Law Journal* 59(3) (2000), 586.

<sup>36</sup> See for example Case C-66/95 *Marshall* [1997] ECR I-2163; Case C-91/92 *Faccini Dori* [1994] ECR I-3325; Case C-192/94 *El Corte Inglés* [1996] ECR I-1281; as well as Dougan, 'The "Disguised" Vertical Direct Effect' 2000 (n. 35), 586-587.

<sup>37</sup> See Art. 267 TFEU.

## 2 Disapplication of National Legal Provisions Contrary to EU Law

### The Principle of Primacy

The principle of primacy, along with the direct effect, is another special feature that makes EU law unique.<sup>38</sup> The CJEU originally established this principle in the *Simmenthal* judgment.<sup>39</sup> Due to the doctrine of primacy, EU law takes precedence over conflicting national law.<sup>40</sup> It means that national courts are under the procedural obligation *to refuse of their own initiative to apply any conflicting provision of a national rule* if it is necessary to give the full effect of EU law.<sup>41</sup>

### The Limits of this Obligation

At first sight, the conflict between the national provision and the EU rule appears to be the only criterion necessary to trigger the duty of the national court to leave the domestic rule unapplied. However, the limits of this

<sup>38</sup> S. Prechal, 'Does Direct Effect Still Matter?', *CML Rev.* 37(5) (2000), 1047. For a comprehensive analysis of the principle of primacy of EU law and the presentation of the Member States' position in this regard, see M. Claes, 'The Primacy of EU law in European and National Law', in A. Arnulf/D. Chalmers (eds.), *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015), 178-211.

<sup>39</sup> Case 106/77 *Simmenthal* [1978] ECR 629, paras. 21 and 24. See also, for example, joined Case C-13/91 and C-113/91 *Debus* [1992] ECR I-3617, para. 32; Case C-258/98 *Carra and Others* [2000] ECR I-4217, paras. 16-17; Case C-617/10 *Åkerberg Fransson*, published in the electronic Reports of Cases, para. 45; Cases C-112/13 A, not yet published, EU:C:2014:2195, para. 36; Cases C-5/14 *Kernkraftwerke Lippe-Ems*, not yet published, EU:C:2015:354, para. 32.

<sup>40</sup> Even if Member States had not easily accepted this doctrine at the beginning, now it seems to be generally recognised and applied by national courts. See in this regard (AT) VfGH, Urteil, 24/02/1999, B 1625/98, reported in *Reflets* 1 (2000), 5; OGH, Entscheidung, 22/10/2015, 10 ObS 148/14h, reported in *Reflets* 1 (2016); (UK) Court of Appeal (England), Civil Division, judgment, 08/03/2000, The Queen/Durham County Council and others, ex parte Rodney Huddleston, reported in *Reflets* 1 (2001), p. 12; (IT) Corte di Cassazione, Sezione tributaria, sentenza, 14/07/2004, Società Sief e altra/Amministrazione delle finanze dello Stato, reported in *Reflets* 1 (2005), 16; (CZ) Ústavní soud, usnesení ze dne 21/02/2006, Pl. ÚS 19/04, reported in *Reflets* 1 (2007), 23; Ústavní soud, usnesení ze dne 02/12/2008, Pl. ÚS 12/08, reported in *Reflets* 2 (2009), 20; (HU) Kúria, ítélet, Kfv.II.38.010/2014/15.

<sup>41</sup> See also D. Colgan, 'Triangular Situations: The Coup de Grâce for the Denial of Horizontal Direct Effect of Community Directives', *European Public Law* 8(4) (2002), 545-568; D-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Heidelberg: Springer, 2010), 68-75; T. Tridimas, 'Black, White, and Shades of Grey: Horizontality of Directives Revisited', *Yearbook of European Law* 21(1) (2001), 327-354; T. Tridimas, 'Horizontal Effect of Directives: A Missed Opportunity?', *European Law Review* 19(6) (1994), 621-636.

obligation are not clear, even in the CJEU's jurisprudence. In fact, two differing concepts can be deduced from the case-law.<sup>42</sup>

According to the first theory, the obligation to leave a conflicting national rule unapplied is independent from whether the EU rule fulfils the threshold criteria of direct effect and whether the legal relationship between the parties is horizontal or vertical.<sup>43</sup> As a consequence, the principle of direct effect is neither necessary, nor even relevant regarding the duty of the Member State court to leave a conflicting national rule unapplied. For example, the *CIA Security*, *Pafitis*, *Ruiz Bernáldez*, *Unilever*, and *Unilever Italia* cases were decided on the basis of this first concept.<sup>44</sup> All cases concerned horizontal situations, characterised by the absence of the relevant EU directive having direct effect.<sup>45</sup> Nevertheless, this has not prevented the CJEU from concluding that the national court had the obligation to leave the conflicting national rule unapplied in order to give effect to EU law. In these judgments, the CJEU has implicitly recognised the horizontal direct effect of unimplemented directives in exclusionary situations.<sup>46</sup>

According to the second theory, the national court is not required to leave the conflicting national rule unapplied in the absence of direct effect of the relevant EU provision.<sup>47</sup> This conclusion results from the limits of the direct effect principle and, mainly, from the rule excluding the horizontal direct effect of directives. Therefore, the obligation of national courts is limited to the duty to interpret the national rule as far as possible in conformity with the EU provision.<sup>48</sup> The traditional case-law concerning the absence of directives' horizontal direct effect reflects this position.<sup>49</sup>

<sup>42</sup> M. Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy', *CML Rev.* 44(4) (2007), 933, 951. See also Dougan, *National Remedies before the Court of Justice* 2004 (n. 32), 59-62.

<sup>43</sup> In Dougan's classification, this concept is the 'primacy model' of the application of EU law, based on civil law traditions and on the importance principles, as opposed to remedies.

<sup>44</sup> Case C-194/94, *CIA Security International* [1996] ECR I-2201; Case C-441/93 *Pafitis and Others* [1996] ECR I-1347; Case C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829; Case C-77/97 *Unilever* [1999] ECR I-431; Case C-443/98 *Unilever* [2000] ECR I-7535. See also Dougan, 'The "Disguised" Vertical Direct Effect' 2000 (n. 35), 594-596; Dougan, 'When Worlds Collide!' 2007 (n. 45), 949; M. Dougan, 'Case C-443/98, *Unilever Italia v. Central Food*, Judgment of the Court of Justice of 26 September 2000, [2000] ECR I-7535. Full Court', *CML Rev.* 38(1) (2001), 1503-1517.

<sup>45</sup> According to several academic writers, in spite of the fact that these cases concerned horizontal relations, they were characterised by some public law element.

<sup>46</sup> In several other decisions, the CJEU stated that the general principle prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, precludes national legislation which is in violation of this principle even in disputes between private parties. See Case C-144/04 *Mangold* [2005] ECR I-9981, para. 78; Case C-555/07 *Kücükdeveci* [2010] I-365, para. 27; *DI*, para. 27.

<sup>47</sup> According to Dougan, this is the 'trigger model' of the application of EU law, based on common law traditions and on the importance remedies, as opposed to principles.

<sup>48</sup> Alternatively, the individual has the right to pecuniary compensation from the State.

<sup>49</sup> *Faccini Dori*, paras. 20-25; *El Corte Inglés*, paras. 15-17.

The doctrine struggles to find a rationale for the coexistence of these approaches and has not yet managed to isolate the decisive factors governing the choice between the two concepts.<sup>50</sup> Moreover, there have been cases before the CJEU where the Advocate Generals and the CJEU had differing opinion as to which concept to follow. For example, in the *Pfeiffer* and *Berlusconi* cases, the CJEU insisted on the absence of the horizontal direct effect of the EU directives, despite the proposals of AG Ruiz-Jarabo Colomer and AG Kokott to treat these cases as exclusionary situations.<sup>51</sup> At last, in terms of the CJEU judgments, the Member State courts were not required to leave the national rule unapplied, but only to apply the consistent interpretation rule, which has an important limitation: no *contra legem* interpretation is required.<sup>52</sup>

### Conclusion

After all, the scope of the obligation to leave national rules unapplied is not always clearly defined. One may assume that the breach of this duty can qualify as a manifest infringement of the applicable law only if it contradicts a specific case-law of the CJEU on the matter.

### 3 Conforming Interpretation of the Domestic Legal Provision with that of the EU Law

#### The Principle of Conforming Interpretation

The third obligation of national courts to be addressed here is the application of the rule of conforming interpretation.<sup>53</sup> This obligation

<sup>50</sup> Dougan, 'When Worlds Collide!' 2007 (n. 45); Dougan 2000; C. Hilson/A. Downes, 'Making Sense of Rights: Community Rights in E.C. Law', *EL Rev.* 24(2) (1999), 126-127; D. Leczykiewicz, 'Enforcement or Compensation? Damages Actions in EU Law after the Draft Common Frame of Reference', *Legal Research Paper Series* 59/2012 (University of Oxford, 2012), 231-247; S. Prechal, 'EC Requirements for an Effective Remedy', in J. Lonbay/A. Biondi (eds.), *Remedies for Breach of EC Law* (Chichester: John Wiley & Sons, 1997), 3-13.

<sup>51</sup> Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835; joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565; Opinion of AG Colomer in Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835; Opinion of AG Kokott in Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-356. See also S. Prechal, 'Joined Cases C-397/01 to C-403/01, Bernhard Pfeiffer et al.', *CML Rev.* 42(5) (2005), 1445-1463.

<sup>52</sup> Dougan, 'When Worlds Collide!' 2007 (n. 45), 953-955.

<sup>53</sup> The term 'conforming interpretation' is used by Fennelly, 'The National Judge as Judge' 2013 (n. 21), 68. Wallerman uses the term 'harmonious interpretation' for the same concept. See A. Wallerman, 'Towards an EU Law Doctrine on the Exercise of Discretion in National Courts? The Member States' Self-Imposed Limits on National Procedural Autonomy', *CML Rev.* 53(2) (2016), 347-349. On the principle of conforming/harmonious interpretation, see, for example G. Betlem, 'The Principle of Indirect Effect of Community Law', *European Review of Private Law* 3(1) (1995), 1-19; S. Drake, 'Twenty Years after Von Colson: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights', *EL Rev.* 3(3) (2005), 329-349; Dougan,

originally grew out of Article 10 TEC.<sup>54</sup> As Tridimas points out, the failure by Member State courts to interpret national law in conformity with non-directly effective provisions of EU law may, in principle, trigger State liability.<sup>55</sup>

The CJEU has established this doctrine, also referred to as 'indirect effect' of EU law, in the *von Colson* and *Marleasing* judgments.<sup>56</sup> According to the principle, Member State courts have to give – as far as possible – an interpretation to the national norm which makes it consistent with the EU rules. The interpretative obligation<sup>57</sup> of national courts may arise either when the substantive EU norm does not have direct effect and, therefore, cannot be directly applied, or where the substantive EU norm has direct effect. As for the latter, in several judgments, the CJEU has argued that Member States have to leave unapplied national rules only where the result required under (directly applicable) EU law cannot be achieved by adopting a consistent interpretation of the domestic law.<sup>58</sup>

### The Limits of this Obligation

Due to the principle of legal certainty, there are limits to the indirect effect of EU norms. In particular, Member State courts are not required to interpret national rules *contra legem*.<sup>59</sup> As a matter of fact, this obligation is quite vague. This is primarily due to the fact that, in terms of the CJEU case-law, national courts are obliged to interpret national law in the light of the directive only 'as far as possible'.<sup>60</sup> Nevertheless, according to the judgment in

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'When Worlds Collide!' 2007 (n. 45), 946-947; Galetta, *Procedural Autonomy of EU Member States* 2010 (n. 41), 22-30; Hilson/Downes, 'Making Sense of Rights' 1999 (n. 50), 127-129.

<sup>54</sup> (EU) Art. 10 TEC, which was replaced, in substance, by Article 4, para. 3, TEU. See also Dougan, 'When Worlds Collide!' 2007 (n. 45), 946. Several judgments from national courts show the acceptance of this doctrine by Member State courts. See (PL) Trybunał Konstytucyjny, *Gender Equality in the Civil Service Case*, reported by M. Bobek, 'Thou Shalt Have Two Masters; The Application of European Law by Administrative Authorities in the New Member States', *REALaw* 1(1) (2008), 53; (CZ) Nejvyšší správní soud, rozsudek, 29/09/2005, 2 Afs 92/2005-45, reported by Bobek *ibid.*, 54; (EL) Trimeles Dioikitiko Protodikeio Peiraira, apofasi tis 06/10/2010, 4768/2010, reported in *Reflets* 1 (2012), 18-19. See also (LV) Augstākās tiesas Senāts, 18/12/2013, Lieta Nr. C04330607, SKC-3/2013, reported in *Reflets* 1 (2014), 33-35.

<sup>55</sup> Tridimas 'State Liability for Judicial Acts' 2007 (n. 6), 157.

<sup>56</sup> Case 14/83 *von Colson and Kamann* [1984] ECR I-891, para. 28; Case C-106/89 *Marleasing* [1990] ECR I-4135, para. 8.

<sup>57</sup> The term 'interpretative obligation' is borrowed from Drake, 'Twenty Years after Von Colson' 2005 (n. 53).

<sup>58</sup> From these judgments it transpires that consistent interpretation should have the priority and only if that is not possible, direct effect is the next option. Case 157/86 *Murphy and Others* [1988] ECR I-57/86, para. 11; Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paras. 38-40; Case C-487/12 *Vueling Airlines*, not yet published, EU:C:2014:2232, para. 47-48; *DI*, paras. 35-37.

<sup>59</sup> Case C-105/03 *Pupino* [2005] ECR I-5285, para. 47. See also Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, para. 110; Case C-26/13 *Kásler and Káslerné Rábai*, not yet published, EU:C:2014:282, para. 65.

<sup>60</sup> For a further issue concerning the limit of imposing obligations upon individuals, see Case C-168/95 *Arcaro* [1996] ECR I-4705, para. 42; as well as P. Craig, 'Directives: Direct Effect, Indirect Effect and the Construction of National Legislation', *EL Rev.* 22(6) (1997), 526-528; Drake, 'Twenty Years after Von Colson' 2005 (n. 53), 337-338, 348; Hilson/Downes, 'Making Sense of

DI, the national court cannot claim that it is impossible for it to interpret the national provision in a manner that is consistent with EU law for the mere reason that it has consistently interpreted that provision in a manner that is incompatible with EU law.<sup>61</sup> In all, the respect of the scope of application and the limits of this duty might be problematic in several cases.

### Conclusion

In conclusion, the violation of the conforming interpretation principle appears to be manifest only if it constitutes an obvious breach of the already established case-law on the particular question at hand. It means that not only the EU rule relevant to the case but also the national provision concerned by the CJEU precedent need to be the same as the ones in the case at hand.

#### 4 Obligation to Give a Correct Interpretation to the Substantive Norm

##### The Obligation of Correct Interpretation

Given its obvious nature, the obligation of national courts to ensure that the content of the substantive provision is correctly understood and applied in the case is not usually enlisted as an autonomous procedural obligation of national courts.<sup>62</sup> Contrary to the three obligations above that aim to ascertain that the EU norm is *applied* in a case, this obligation relates to the *content* of the substantive norm. Therefore, the misinterpretation of the substantive norm is usually considered as a mere violation of that norm, and is not linked to any procedural obligation. Nevertheless, it does not change the fact that the national court has got the obligation to ensure the correct interpretation of the norm. As the procedural obligations of national courts are of primary importance in this study, it is necessary to consider this obligation separately.

##### The Limits of this Obligation

Contrary to the above three obligations related to the application of the substantive norm, this procedural obligation is not restricted by any

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Rights' 1999 (n. 50), 127-129; B. Ryan, 'A Private Enforcement of European Union Labour Laws', in C. Kilpatrick/T. Novitz/P. Skidmore (eds), *The Future of Remedies in Europe* (Oxford, UK: Hart Publishing, 2000), 149.

<sup>61</sup> DI, paras. 33-34.

<sup>62</sup> Claes, *The National Courts' Mandate* 2006 (n. 21), 58-59; Fennelly, 'The National Judge as Judge' 2013 (n. 21), 64.

criteria or limit. In each case where a substantive norm is applicable, it should be understood and applied correctly. The problem in this regard is that the interpretation of a legal norm might be (and often is) ambiguous.

### Conclusion

Therefore, the misinterpretation of a substantive norm appears to amount to a manifest infringement only where the correct interpretation of the norm is evident from the CJEU case-law.

## 5 Interim Conclusions Regarding the Gravity of the Violation of the Procedural Obligations

As can be seen from the above analysis, in every scenario of violation by a Member State court of its procedural obligation to apply or correctly interpret a substantive EU norm, the gravity of the breach depends on the existence of a relevant CJEU case-law. Therefore, to address the issue of a manifest breach, it is important to distinguish between two situations, namely, where there is no CJEU judgment available on a question of application or interpretation of the substantive norm; and where there is established case-law on the specific matter.

In the first situation, a misinterpretation or non-application of the EU provision and the violation of the referral duty will – at least partially – coincide. Therefore, the question arises whether it is the misinterpretation or non-application of the norm, or the violation of the referral obligation that may entail State liability. This scenario will be developed further in the point devoted to the violation of the obligation to make a reference for preliminary ruling.<sup>63</sup>

In the second situation, the duty to apply and the interpretation to give to the substantive EU norm are straightforward. It appears, therefore, that the national court commits a manifest violation only in situations where it is established in case-law that, under circumstances similar to the case at hand, (1) the substantive norm has direct effect and therefore it should be applied; or (2) the national provision should be left unapplied; or (3) the national provision should be interpreted in a certain way to ensure its consistent interpretation with the EU law; or (4) the substantive EU norm should be interpreted in a certain way.

This conclusion is in line with the statement of the CJEU in *Köbler*, according to which ‘in any event, an infringement of Community law will be sufficiently

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<sup>63</sup> See Part IV on the ‘Manifest Infringement of the Applicable Law and Impact of a Breach of the Referral Duty’.



serious where the decision concerned was made in manifest breach of the case-law of the Court on the matter.<sup>64</sup>

This reasoning leads us to the next question which concerns the obligation of the national courts to make a reference for preliminary ruling to the CJEU.

## 6 Obligation to Submit a Request for a Preliminary Ruling to the CJEU

### Preliminary Remarks

According to some authors, the impact of the failure to make a reference for a preliminary ruling on the *Köbler* liability proved to be the thorniest question of all.<sup>65</sup> This issue concerns the relationship between the two (sets of) obligations set before national courts, namely; to apply and correctly interpret the substantive EU norm; and to make a preliminary ruling in case of doubt about the correct interpretation or application of the norm.<sup>66</sup>

From now on, I will not distinguish between the different procedural obligations, analysed above, regarding the application and the correct interpretation of the substantive norm.<sup>67</sup> On the contrary, I will oppose the *obligation to make a reference for a preliminary ruling* (or *referral duty*) to the *obligation to apply and correctly interpret the substantive norm*, whatever the procedural obligation of the Member State court is in this regard. Therefore, I will refer to the breach of this latter duty under the general terms of *mistaken application or interpretation of EU law* from now on.

Although the CJEU has clearly established that failure to make a referral when under an obligation to do so constitutes an important liability factor, it remained silent on the circumstances which would actually lead to a successful claim.<sup>68</sup> That has left two important questions unanswered: whether the breach of the referral duty is sufficient in itself to trigger liability of the Member State; and what the impact of the breach of this obligation would be on the gravity of the infringement of EU law.

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<sup>64</sup> *Köbler*, para. 56.

<sup>65</sup> Nassimpian, 'And We Keep on Meeting' 2007 (n. 19), 824.

<sup>66</sup> It is true that the first obligation applies to all Member State courts, while the second one only to the national court of last instance. However, as *Köbler* liability emerges only at the time of the violation of EU law by Member State court adjudicating at last instance, this distinction has no relevance for the purposes of the present paper, since it concerns only violations by these courts.

<sup>67</sup> These comprise the duties to apply the directly effective EU; to leave unapplied national rules that are contrary to EU law; to interpret and apply national laws as far as possible so as to make them compatible with EU law; and to ensure that the substantive EU norm is correctly understood and applied in the case. See part III, points 1, 2, 3 and 4.

<sup>68</sup> Nassimpian, 'And We Keep on Meeting' 2007 (n. 19), 826. See also Anagnostaras, 'Erroneous judgments and the prospect of damages' 2006 (n. 16), 739.

Before attempting to answer these questions, several preliminary points need to be addressed. It is necessary to examine the constitutive elements of the *violation of the obligation to make a reference for preliminary ruling*. In this respect, the following point concentrates on the scope of the referral duty, on the violation of this obligation, and on its qualification as a manifest breach.

## The Obligation to Make a Reference for a Preliminary Ruling

### *The Scope of the Referral Duty*

There are several rules in EU law determining the conditions under which courts of last instance are obliged to submit a question for preliminary ruling to the CJEU. The primary rule in this regard can be found in Article 267(3) TFEU. Under this provision, if a question on the interpretation of the EU law is raised before a court against whose decisions there is no judicial remedy, this court is bound to bring the matter before the CJEU. However, the CJEU has set a threefold limit to this general obligation in the *CILFIT* judgment.<sup>69</sup> Therefore, national courts of last instance are exempted from the obligation to make a reference in the following situations: first, if the question is not relevant; second, if the question raised is materially identical to a question which has already been subject to a preliminary ruling in a similar case (*acte éclairé*); and third, if the correct application of the EU law is so obvious that it leaves no scope for any reasonable doubt (*acte clair*).

### *The Violation of the Referral Duty*

With regard to the definition of a breach of the referral duty, it is much more difficult to provide a clear one than expected. It appears logical to simply state that there is a violation of the obligation to make a reference if the rules under which it is obligatory are not respected. These rules are established in Article 267(3) TFEU and in the *CILFIT* judgment. However, it is also possible to evaluate the violation of the referral duty against the obligation to state reasons for a decision not to submit a referral. These two possibilities – to which I will refer, respectively, as the *material element* and the *procedural element* of the referral duty – are further developed below.

### *– Violation of the Material Element of the Referral Duty*

As already explained, the referral is obligatory under the conditions set in Article 267(3) TFEU and in the *CILFIT* judgment. Due to the

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<sup>69</sup> Case 283/81 *CILFIT and Others* [1982] ECR 3415. See also Opinion of AG Wahl in joined Cases C-72/14 and C-194/14 *X and van Dijk* not yet published, EU:C:2015:319, para. 62; and Opinion of AG Bot in Case C-160/14 *Ferreira da Silva e Brito e.a.* not yet published, EU:C:2015:390, para. 90.

subjective nature of these conditions, considerable discretion remains with the national court on whether or not to make a preliminary reference. In terms of the CJEU jurisprudence, in principle a reference should be made only where the interpretation of EU law is necessary for the national judge to render their decision.<sup>70</sup> The evaluation of this necessity is inevitably subjective and leaves a considerable margin of discretion with the national court. This margin of discretion makes it difficult to evaluate whether the violation of the referral duty has taken place.

The most problematic in this regard is the application of the *acte éclairé* doctrine, according to which the national court does not have to make a reference if there is established CJEU case-law on the matter. However, the exercise of the judicial function – both by the CJEU and the national court – consists of the interpretation of legal norms and the application of the norms to individual cases; and the legal and factual background of different cases will coincide only in the rarest circumstances. This will make it difficult for the national court to evaluate whether the CJEU precedent is applicable to the case before it. Moreover, it will be similarly difficult to assess in hindsight whether the national court was indeed under the obligation to make a referral. The situation is similar concerning the application of the *acte clair* doctrine, which also presupposes the interpretation and the application of legal rules to a concrete situation.<sup>71</sup>

#### – Violation of the Procedural Element of the Referral Duty

Taking the above difficulties into account, it is not surprising that several academics and jurisdictions do not apply the *CILFIT* criteria to assess whether a breach of the referral duty has taken place. Instead, they have chosen a more objective standard, which is the obligation to state reasons for a refusal.<sup>72</sup>

<sup>70</sup> Case C-136/12 *Consiglio Nazionale dei Geologi and Autorità garante della concorrenza e del mercato*, published in the electronic Reports of Cases, para. 25; *Ferreira da Silva e Brito e.a.*, paras. 37 and 45.

<sup>71</sup> Wattel, 'Köbler, CILFIT and Welthgrove' 2004 (n. 7), 182.

<sup>72</sup> The ECtHR case-law shows that this court qualifies a refusal by the national court contrary to the principle of fair trial – enshrined under the Art. 6 ECHR – if it is 'arbitrary', that is to say not motivated. However, in *Schipani*, the ECtHR went further as it found a violation of Article 6 ECHR on the ground of a non-referral in a case where the national court had considered the arguments of EU law, but omitted all reference to whether the issue was an *acte clair* or an *acte éclairé*. See for example (ECtHR) *Divagosa Company v. Spain*, Decision of 12 May 1993, no. 20631/92; *Ullens de Schooten and Rezabek v. Belgium*, Judgment of 20 September 2011, nos. 3989/07 and 38353/07, § 54; *Dhahbi v. Italy*, Judgment of 8 April 2014, no. 17120/09; *Schipani v. Italy*, Judgment of 21 July 2015, no. 38369/09. See also (HU) Alkotmánybíróság, határozat, 14/07/2015, no. 26/2015 (VII. 21.); L. Coutron, 'L'irénisme des cours européennes. Rapport introductif', in Coutron/Bonichot, *L'obligation de renvoi* 2014 (n. 4), 49319-20; R. Valutyté, 'State Liability for the Infringement of the Obligation to Refer for a Preliminary Ruling under the European Convention on Human Rights', *Jurisprudencija* 19 (2012), 7-21.

According to Classen, the procedural obligation to give motives can be deduced from Article 267(3) TFEU and the *CILFIT* judgment.<sup>73</sup>

In my opinion, the obligation to request a preliminary ruling from the CJEU is different from the obligation to state reasons for a decision rendered on whether to make a reference. Therefore, the transformation of the former duty to the latter obligation does not seem correct at first sight. Neither Article 267(3) TFEU nor the *CILFIT* judgment make a reference to the obligation to state reasons; instead, they establish the conditions under which a referral is obligatory.<sup>74</sup> However, if we consider the *CILFIT* conditions and their application in practice, such a transformation might be justified. As already explained, the application of the *CILFIT* criteria comprises the interpretation of law and the application of legal rules to a specific case. It follows from the CJEU case-law that misinterpretation of law will only amount to a (sufficiently serious) breach if the infringement is manifest. This rule can be applied to violations of the *CILFIT* criteria as well. It means that if a national court unlawfully deals a case under the *acte clair* or *acte éclairé* doctrines, it will, objectively, infringe its obligation to make a reference. However, if the court justifies its (erroneous) decision, this statement of reasons would turn the breach of law to a misinterpretation of law. Therefore, it is possible to conclude that the (manifest) violation of the referral duty will occur precisely where the national court does not give reasons for its decision on not making a reference. This conclusion can be, therefore, indirectly deduced from CJEU case-law, especially from the *CILFIT* and *Köbler* judgments.<sup>75</sup>

The clear advantage of this interpretation is that, since the duty to give reasons for a decision is straightforward, the violation of this obligation can be objectively evaluated. However, it still remains a problem that such a violation can be established only on rare occasions. In practice, a simple reference to the notions of *acte clair* or *CILFIT* will probably be sufficient to be exempted from liability.<sup>76</sup>

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<sup>73</sup> Classen, 'Case C-224/01' 2004 (n. 7), 820-821.

<sup>74</sup> C. Lacchi, 'Multilevel Judicial Protection in the EU and Preliminary References', *CML Rev.* 53(3) (2016), 702.

<sup>75</sup> For a different explanation regarding the relationship between the material and the procedural element of the referral duty, see C. Lacchi, 'The ECtHR's Interference in the Dialogue between National Courts and the Court of Justice of the EU: Implications for the Preliminary Reference Procedure', *REALaw.* 8(2) (2015), 108-111.

<sup>76</sup> In its recent case-law the ECtHR does not content any more with a sole statement of reasons for a decision on not-referral but considers also the content of the reasoning. See Lacchi, 'The ECtHR's Interference in the Dialogue' 2015 (n. 75), 102-105, 108 and (ECtHR) *Schipani v. Italy*, Judgment of 21 July 2015, no. 38369/09.

*Simple or a Serious Breach of the Referral Duty*

As for the third point, with the infringement of the referral duty being already difficult to establish, it is even more problematic to distinguish between ordinary and serious breaches. In my view, it is neither possible nor necessary to differentiate between simple and qualified breaches of the referral duty.<sup>77</sup> This conclusion applies irrespectively of whether the *CILFIT* criteria or the obligation to state reasons is used as a standard to evaluate the breach of the referral duty.

## Conclusion

In conclusion, due to the nature of the obligation to submit a referral and the criteria attached to this obligation, a violation of a manifest breach of a referral duty seems even more difficult to establish than the violation of the other procedural obligations of the national courts.

Having analysed the above judicial breaches regarding the application of EU law having been analysed, we can summarise the findings and provide a theory on the breaches that probably qualify as a ‘manifest infringement of the applicable law’ in the terms of *Köbler*.

#### IV Manifest Infringement of the Applicable Law and Impact of a Breach of the Referral Duty

The next issue to analyse refers to the circumstances that can lead to a finding of a manifest breach of EU law, taking into account an eventual breach of the referral duty. This analysis will help to shed further light on the impact of the breach of the referral duty on the seriousness of the violation of EU law.

Several academics have already provided theories regarding the scenarios that may lead to a finding of a manifest breach of EU law. In this respect, they have also evaluated the impact of the breach of the referral duty on a breach of the EU law. My theory is mainly based on Anagnostaras’ concept, combined with AG Léger’s opinion, Classen’s theory and the ECtHR case-law.<sup>78</sup>

<sup>77</sup> From the theoretical point of view, one might consider the situation where a national court has first made, and later withdrawn, a reference for preliminary ruling. However, the CJEU did not accept such a distinction in the *Köbler* judgment. See *Köbler*, paras. 117-118.

<sup>78</sup> Opinion of AG Léger in Case C-224/01 *Köbler* [2003] ECR I-10239, paras. 139-141; Anagnostaras, ‘Erroneous judgments and the prospect of damages’ 2006 (n. 16), 744-746; Classen, ‘Case C-224/01’ 2004 (n. 7), 819-821.

## 1 Manifest Breach of the Applicable Law

I think that the relevant distinction to be taken into account is whether or not there is any established CJEU case-law on the matter of law which is central to the dispute. On the basis of this distinction, I will examine the gravity of the *mistaken application or interpretation of EU law*, then will move on to the seriousness of the *breach of the obligation to make a preliminary reference* to the CJEU.

### Violation of the Established CJEU Case-Law

My first scenario is a situation where there is established case-law regarding the application and/or the interpretation of the substantive EU rule relevant to the case before the national court, yet the national court renders a judgment which is contrary to these CJEU precedents.<sup>79</sup> This breach will probably qualify as a manifest infringement, sufficient to establish State liability. It results explicitly from the *Köbler* judgment, and has been confirmed by legal writers.<sup>80</sup>

Analysing this scenario from a systemic point of view, the following conclusions can be drawn. Such a manifest breach of EU law means that not only the substantive EU norm was clear but also the procedural obligation of the Member State court on how to apply and interpret it was obvious. Accordingly, the *mistaken application or interpretation of EU law* amounted to a grave breach. However, it is not evident whether a violation of the duty to refer a preliminary question has eventually occurred.

As a matter of fact, the consideration of the *violation of the referral duty* in this situation will lead to various results depending on what is meant by a violation of this obligation. Two possibilities exist in this regard: either to consider the violation of Article 267(3) TFEU and the misuse of the *CILFIT* exceptions; or to take into account the absence of a statement of reasons for not making a reference.

First, if the breach is understood as a violation of Article 267(3) TFEU or a misuse of the *CILFIT* exceptions, strictly speaking, there is no breach of the referral duty. It is because there is no obligation under these rules to make a preliminary reference where the EU law in question is clear and precise.<sup>81</sup>

<sup>79</sup> On this matter see E. Várnay/M. Papp, *Az Európai Unió joga* (Budapest: Complex Kiadó, 2010), 354-378.

<sup>80</sup> *Köbler*, para. 56; as well as Anagnostaras, 'Erroneous judgments and the prospect of damages' 2006 (n. 16), 744; Classen, 'Case C-224/01' 2004 (n. 7), 819; B. Hofstätter, *Non-Compliance of National Courts: Remedies in European Community Law and Beyond* (The Hague: T.M.C. Asser Press, 2005), 134-135; Tridimas 'State Liability for Judicial Acts' 2007 (n. 6), 155.

<sup>81</sup> It is possible to argue that a Member State court cannot deviate from the established CJEU case-law – *unless making a reference for a preliminary ruling*. Such interpretation could eventually link the deviation from the established case-law to the duty of referral. Nevertheless, I support

Therefore, the question whether there has been a *violation of the referral duty* is not relevant and should be ignored while determining the gravity of the breach of EU law. In fact, taking the (non-) violation of the referral duty into account would result in making the conditions of liability less strict. Moreover, accepting that the violation of the referral duty is a decisive condition to finding a manifest breach would even result in exempting the court from liability in the end.

Secondly, State liability would be rendered less strict if, when considering the violation of the referral duty, it were defined as the violation to state reasons for a decision of non-referral. In practice, it can even occur that an erroneous statement of reasons is sufficient to exonerate the State from liability. On the other hand, the absence of a statement of reasons will not have much influence on the liability which, should already have been established based on the manifest infringement of the CJEU case-law.

Therefore, if the national court renders a judgment which is manifestly contrary to the established CJEU case-law, such deviance should in itself be sufficient to entail liability. It should not be considered whether a violation of referral duty has taken place or not.<sup>82</sup> This is because the obvious mistake in the *interpretation or application of the substantive EU law* is already a manifest infringement of the applicable law, which in itself is sufficient to trigger liability. If we add one more condition to be satisfied to trigger liability, it can only result in making the conditions of liability less – and not more – strict. In other words, it will be more difficult for the aggrieved individual to invoke State liability as they will have to prove the breach of the national court in its referral duty as well.

### Violation in the Absence of Established CJEU Case-Law

My second scenario is for a situation where there is no established case-law on the matter; and the national court interprets and applies the ambiguous EU provision without making a preliminary reference. It may occur that the interpretation followed by the Member State court turns out to be incorrect only in hindsight, due to the development of the CJEU's jurisprudence. Such a *mistaken application or interpretation of EU law* will certainly not amount in itself to a manifest infringement of the applicable law, as the interpretation

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the view that the violation of the established CJEU case-law is not permitted – either with or without referral.

<sup>82</sup> According to Jans, liability of the State depends in the first place on the violation of the EU law in the strict sense, and not on the violation of Article 267(3) TFEU. See J.H. Jans, 'State Liability and Infringements Attributable to National Courts: A Dutch Perspective on the Köbler Case' in: J.W. De Zwaan, J.H. Jans, F.A. Nelissen & S. Blockmans (Eds.) *The European Union: an Ongoing Process of Integration: Liber Amicorum Alfred E. Kellermann* (The Hague: TMC Asser Press, 2004), p. 171.

of the EU law was not obvious at the time of the deliberation of the national court.<sup>83</sup>

Therefore, it seems relevant to examine whether the eventual *violation of the duty to make a preliminary reference* will have as a result, the aggravation of such simple breach. According to *Köbler*, this additional infringement should have to contribute to the finding of the manifest breach. In order to verify whether this is the case, it is necessary to consider the two possible interpretations regarding the violation of the duty to refer a preliminary question: first, the violation of Article 267(3) TFEU and the misuse of the *CILFIT* exceptions; second, the absence of a statement of reasons for a decision of non-referral.

As for the first possibility, it has already been shown that the main problem is the difficulty in establishing a violation of the *CILFIT* criteria. Presuming that this establishment is theoretically not excluded, such a finding may have the result of qualifying a simple violation of EU law as manifest.

As for the second possibility, taking the eventual violation regarding the obligation to state reasons into consideration might contribute to finding a serious breach. In fact, if the national court does not provide any explanation as to why it has not submitted a request for preliminary ruling to the CJEU, this infringement – together with the *mistaken application or interpretation of EU law* – might result in triggering liability.

Therefore, if the *mistaken application or interpretation of EU law* is not manifest in itself, the *breach of the obligation to refer a preliminary question* may have the result of aggravating the simple breach and making it a manifest violation. However, taking into account the difficulties regarding the establishment of a violation of the *CILFIT* conditions, this possibility is primarily relevant in situations where the national court omits completely to explain why it has not made a reference.

## 2 Impact of the Violation of the Referral Duty on the Gravity of the Breach

Finally, we can examine the impact of an eventual breach of the referral obligation on the conditions of *Köbler* liability. The general problem in this regard is that if we consider the *Köbler* judgment as imposing a supplementary condition – i.e. the *breach of the referral duty* – to the list of liability factors, it could mean that the aggrieved party will have to prove two violations by the court: the *mistaken application or interpretation of EU law* and the *violation of the referral duty*.

Moreover, the violation of Article 267(3) TFEU or the misuse of the *CILFIT* exceptions seems to be even more difficult to establish than the *mistaken appli-*

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<sup>83</sup> Case C-168/15 *Tomášová*, not yet published, EU:C:2016:602, para. 33.



cation or interpretation of EU law. This is mainly due to the *CILFIT* criteria, which leaves a considerable margin of discretion with the national court on whether or not to make a reference and, as a consequence, makes it difficult to establish judicial malpractice in this regard. Thus, in practice, by adding this criterion to the list of liability conditions, the CJEU has probably imposed a less strict liability on national courts than it would have resulted without taking this criterion into account. This factor has contributed to make the liability conditions more subjective, which is contrary to the recommendations after the economic analysis of *Köbler* and *Traghetti del Mediterraneo*.<sup>84</sup>

This is especially problematic where the *mistaken application or interpretation of EU law* is already manifest. In my opinion, in such situations the violation of the referral duty should not be taken into consideration at all. This is an issue on which the doctrine is also especially hesitant. In fact, several academics and national courts have chosen to qualify the deviation from the established CJEU case-law as comprising not only a violation of EU law but also a violation of the duty to refer.<sup>85</sup> In my opinion, this solution can be criticised from the strictly theoretical point of view – even if it is acceptable from a practical standpoint.

The one scenario where taking the breach of the referral obligation into account contributes to imposing a stricter liability on the State is a situation where the *mistaken application or interpretation of EU law* by the court was not manifest, due to the absence of established CJEU case-law on the question. If, in such a situation, the national court chooses a wrong interpretation without even considering submitting a preliminary question, that can result in the liability of the State. However, that violation will probably be established only if the national court failed to justify its decision; judicial malpractice regarding Article 267(3) TFEU and the *CILFIT* criteria being difficult to prove. In my view, liability will only occur where the national court ignores the request of the party to make a preliminary reference. In this case, the *mistaken application or interpretation of an ambiguous EU norm* combined with the *breach of the referral duty* might amount to a serious breach of EU law in the sense of *Köbler*.

### 3 Conclusion

In conclusion, the breach of EU law by the national court is manifest in two situations. First of all, in the cases where the national court has not applied or has misinterpreted the substantive EU rule, without even consid-

<sup>84</sup> Case C-173/03 *Traghetti del Mediterraneo* [2006] ECR I-5177. For further information, see the analysis by Golecki/Wojciechowski, 'The Application of Law' 2009 (n. 6), 189-197.

<sup>85</sup> Hofstötter, *Non-Compliance of National Courts* 2005 (n. 80), 134-135; Tridimas 'State Liability for Judicial Acts' 2007 (n. 6), 155. See the case-law of the BVerfG regarding a 'deliberate deviation of the CJEU case-law without willingness to make a submission' and R. Valutytė, 'Legal Consequences for the Infringement of the Obligation to Make a Reference for a Preliminary Ruling under Constitutional Law', *Jurisprudencija* 19(3) (2012), 1175.

ering making a reference on the question that has not been clarified yet by the CJEU. Secondly, where the national court has deliberately deviated from the established CJEU case-law. As for this second scenario, it is irrelevant whether the national court has been under the obligation to make a reference to the CJEU and whether it has breached that obligation. In summary, the *Köbler* doctrine appears to protect individuals against manifest and deliberate violations of EU law in the first place.<sup>86</sup>

## V Violation of the Referral Duty as a Separate Ground for Liability

### 1 Case-Law and the Doctrine

The next issue to be addressed is the possibility to bring a liability suit for the mere infringement of the obligation to make a reference to the CJEU, without connecting it with the *mistaken application or interpretation of a substantive EU norm*.

There has already been a request for preliminary ruling before the CJEU on this question. In the case *Consiglio Nazionale dei Geologi*, the referring court asked the CJEU about the factual and legal circumstances under which the failure to comply with Article 267(3) TFEU constitutes a ‘clear breach of EU law’ in the sense of the *Köbler* judgment. Unfortunately, the CJEU has not answered this question, which was considered manifestly irrelevant and hypothetical in the context of the main proceedings.<sup>87</sup>

In *Diageo Brands*, the CJEU argued that an unjustified failure on the part of the court to make a referral would have resulted in rendering the Member State liable in accordance with the rules established in this respect by the CJEU case-law and, especially, in *Köbler*.<sup>88</sup> This statement appears to suggest that the violation of Article 267(3) TFEU is capable of triggering State liability in itself. Nevertheless, I think that we should not make far-reaching conclusions from this sentence which referred to a purely hypothetical situation in the case. Moreover, the CJEU has also added that such liability would have only emerged ‘in accordance with the rules established in this respect’. In fact, there has not yet been clear indication on the part of the CJEU regarding the question whether the violation of the referral obligation can be a separate ground for liability.

<sup>86</sup> Nevertheless, the high standard of liability for judicial breaches is a common feature of liability regimes in Europe. See Scherr, ‘The Principle of State Liability’ 2008 (n. 8), 585.

<sup>87</sup> *Consiglio Nazionale dei Geologi and Autorità garante della concorrenza e del mercato*, paras. 20 and 35.

<sup>88</sup> Case C-681/13 *Diageo Brands*, not yet published, EU:C:2015:471, para. 66.

Meanwhile, the doctrine seems to be unanimous in the conclusion that the mere infringement of the referral duty is not sufficient to entail liability for the State.<sup>89</sup> This is mainly for two reasons. First, it is not possible to establish causation of (material) damage by a failure to make a reference. Second, the possibility to receive compensation exists only when the infringed provision intends to confer rights upon individuals. However, the obligation to make a reference serves the uniform application of the law and the interests of effective judicial protection. It does not create any enforceable rights, separate from the ones that arise from the substantive provisions. Therefore, academic writers conclude that the decisive factor for State liability is whether the national judgment is substantively wrong, i.e. whether there has been a mistaken application or interpretation of the substantive EU rule.<sup>90</sup> On the contrary, the violation of the referral duty is not a sufficient ground in itself to trigger State liability.

## 2 Analysis

I think that an important distinction to make with regard to this analysis is whether Article 267(3) TFEU is to be considered a *procedural* obligation of the national court, which supports the correct application and interpretation of a substantive norm, or whether it is to be considered as the *substantive* norm infringed in itself.<sup>91</sup>

The confusion regarding the *procedural* or *substantial* nature of Article 267(3) TFEU is understandable. In fact, the procedural obligations of national courts – as well as of other national bodies – are often strictly linked to, and even inseparable from the substantive norm whose application they protect. This is

<sup>89</sup> Opinion of AG Léger in Case C-173/03 *Traghetti del Mediterraneo* [2006] ECR I-5177, paras. 147-152; Anagnostaras, 'Erroneous judgments and the prospect of damages' 2006 (n. 16), 745-746; Classen, 'Case C-224/01' 2004 (n. 7), 820; Hofstötter, *Non-Compliance of National Courts* 2005 (n. 80), 132-136; Rodríguez, 'State Liability for Judicial Acts' 2004-2005 (n. 7), 617-618; Wattel, 'Köbler, CILFIT and Welthgrove' 2004 (n. 7), 178-179.

<sup>90</sup> In the same line, see also O. Dubos/D. Katz/P. Mollard, 'Rapport français', in Coutron/Bonichot, *L'obligation de renvoi* 2014 (n. 4), 219-220; Jans, 'State Liability and Infringements' 2004 (n. 82), 171; T. Lock, 'Taking National Courts More Seriously? Comment on Opinion 1/09', *EL Rev.* 36(4) (2011), 584; E. Várnay, 'Az ACTE CLAIR-tan és a CILFIT-feltételek, avagy az előzetes döntéshozatalra irányuló előterjesztési kötelezettség korlátozott korlátozása', *Magyar Jog* 52(2) (2005), 105. For a different, albeit much earlier view see B.H. ter Kuile, 'To Refer or Not to Refer: About the Last Paragraph of Article 177 of the EC Treaty', in D. Curtin/T. Heukels (eds.), *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers*, Vol. II. (Dordrecht: Martinus Nijhoff Publishers, 1994), 389.

<sup>91</sup> In addition to the above, it also emerged in the legal doctrine that the referral duty may come under the scope of application of several procedural fundamental rights of the parties, protected under the Charter. Several legal writers argue that the violation of the referral duty might entail a violation of the parties' right to a fair trial or an effective remedy, which are now enshrined under Article 47 of the Charter. Here the question is whether Article 267(3) TFEU comes under the scope of application of the Charter. This will be further analysed in Part VI on the 'Referral Duty and the Charter'.

the case with the obligations to apply *the* directly effective substantive norm or to leave unapplied *the* national provision that is contrary to the EU provision. With regard to these, the connection between the substantive norm and the procedural obligation to apply it is obvious. Moreover, these obligations are often not codified under the Treaty but they have been developed in the case-law of the CJEU. The obligation to make a preliminary reference is different from this point of view, as it has a double value: on the one hand, it is a procedural obligation supporting the application and the correct interpretation of the substantive EU norm; on the other hand, it is a *prima facie*, original obligation imposed on the Member State court by the Treaty. This is why there may be doubt regarding its relationship with the infringed substantive EU norm or even it is suggested that it is the infringed substantive norm itself which should be applied.

### Referral Duty as a Procedural Obligation of National Courts

I think that the correct interpretation of the referral duty is to consider it as a procedural obligation imposed on the national courts by the Treaty. This is in line with the CJEU case-law according to which the preliminary procedure serves the dialogue between judges with the aim of ensuring the uniform application of EU law.<sup>92</sup>

Therefore, in the dichotomy of procedural obligations and substantive norms the referral duty qualifies as a procedural obligation, similar to the obligation to apply a directly effective norm or to interpret it correctly. If it is the case, the discussion whether it confers rights on individuals is indifferent. In fact, this latter criterion is to be evaluated with regard to the substantive norm whose correct application or interpretation is a procedural duty is to support.

It can be demonstrated through the example of the violation of Article 288 TFEU. The procedural obligation of the national legislation to transpose a directive into the domestic legal order is on express provision laid down in the Treaty, similarly to Article 267(3) TFEU. These two articles are, therefore, susceptible to trigger similar confusion.<sup>93</sup> Regarding Article 288 TFEU, it is established in CJEU case-law that the violation by the Member State legislative body of its obligation to transpose a directive into the national legal order is a sufficient ground to establish State liability. Nevertheless, Article 288 TFEU does not confer any substantive right on individuals. In fact, concerning the violation of Article 288 TFEU, the examination of the violation of substantive rights has

<sup>92</sup> Case C-605/12 *Welmory*, not yet published, EU:C:2014:2298, para. 33; Case C-316/10 *Danske Svineproducenter*, EU:C:2011:863, para. 32; Case C-138/08 *Hochtief and Linde-Kca-Dresden* [2009] I-9889, paras. 20 and 21.

<sup>93</sup> Nevertheless, the question whether an EU rule is a substantive norm or a procedural obligation must not be decided on the basis of its codified nature. There may be non-codified substantive norms (general principles) and, as we have seen, codified procedural obligations as well.

always been carried out regarding the specific directive provision that was infringed because the directive had not been implemented.<sup>94</sup> Transposing this solution to breaches of the referral duty means that it is not Article 267(3) TFEU but the substantive norm (the correct interpretation or application the reference should support) that needs to confer rights on individuals.

The above considerations do not change the fact that it is the violation of the *procedural* obligation – Article 288 TFEU or Article 267(3) TFEU – that triggers liability.<sup>95</sup> Nevertheless, this violation must be coupled with the infringement of a *substantive* norm conferring rights on individuals.<sup>96</sup> I agree with Reich, who argued that the condition regarding the conferral of individual rights must be understood as the principle of *ubi ius ibi remedium* turned upside down: if the individual does not have a right under EU law, then they cannot claim compensation: ‘Where there is no right there is no remedy!’<sup>97</sup> It means that the criterion regarding the conferral of individual rights is important in order to identify the ‘protective scope’ of the EU norm, or the person entitled to compensation.<sup>98</sup>

<sup>94</sup> See D. Ruiz-Jarabo Colomer, ‘Once upon a Time, Francovich: From Fairy Tale to Cruel Reality?’, in L.M.P. 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* (Oxford/Portland: Hart Publishing, 2010), 407-409. On the relationship between provisions which have direct effect and which confer individual rights, see G. Anagnostaras, ‘State Liability and Alternative Courses of Action: How Independent Can an Autonomous Remedy Be?’, *YEL* 21(1) (2001), 358-360; T. Eilmansberger, ‘The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link’, *CML Rev.* 41(5) (2004), 1226; Hilson/Downes, ‘Making Sense of Rights’ 1999 (n. 50), 123-124, 130; Prechal, ‘Member State Liability and Direct Effect, 2006 (n. 20), 305-306; W. Van Gerven, ‘Of Rights, Remedies and Procedures’ (2000) 37(3) *CML Rev.* p. 507.

<sup>95</sup> This conclusion is reinforced by the consideration that, as far as the non-implementation of a directive is concerned, the margin of discretion of the legislative body is evaluated against Article 288 TFEU, i.e. against the procedural obligation imposed on the legislature. As the implementation duty is a crystal-clear obligation, the legislature enjoys no discretion in this regard and such violation is sufficiently serious to trigger liability. See Joined Cases C-6/90 and C-9/90, *Francovich and Others* [1991] ECR I-5357; *Faccini Dori*; *El Corte Inglés*; joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961; Case C-319/96 *Brinkmann Tabakfabriken* [1998] ECR I-5255; Case C-111/97 *EvoBus Austria* [1998] ECR I-5411; Case C-452/09 *Iaia and Others* [2011] ECR I-4043.

<sup>96</sup> It could be also the violation by the national court of its obligation to apply the principle of direct effect or indirect effect.

<sup>97</sup> N. Reich, ‘Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights’, *CML Rev.* 44(3) (2007), 719-721; Prechal, ‘Member State Liability and Direct Effect, 2006 (n. 20), 305-306. On the connection between the preliminary reference procedure and the right to effective judicial protection, see Lacchi, ‘Multilevel Judicial Protection in the EU’ 2016 (n. 74), 687-691.

<sup>98</sup> See also Eilmansberger, ‘The Relationship between Rights and Remedies’ 2004 (n. 94), 1245; Prechal, ‘Member State Liability and Direct Effect, 2006 (n. 20), 310; Ruiz-Jarabo Colomer, ‘Once upon a Time’ 2010 (n. 94), 407-409; M.T. Vehovec, ‘The Cause of Member State Liability’, *European Review of Private Law* 20(3) (2012), 876.

That means in practice that if the violation of the referral duty does not result in a simultaneous violation of individual rights conferred by a substantive EU norm, such a breach is not capable of triggering State liability. This conclusion is in line with the academics' findings: the infringement of the referral duty must be coupled with the infringement of the substantive EU provision to trigger State liability. Nevertheless, I think that the main problem in this regard is not the fact that Article 267(3) TFEU itself does not confer any individual rights, but the absence of a violation of a substantive norm conferring such rights.<sup>99</sup>

### Referral Duty as a Substantive Norm of the Treaty

The second, albeit purely hypothetical possibility to deal with here is to consider Article 267(3) TFEU as a 'substantive' norm in the terms of this analysis. The procedural obligation regarding this substantive norm would be to apply it. In this scenario, it would indeed be relevant whether Article 267(3) TFEU confers rights on individuals or not. As we have already seen, this provision does not confer any substantive right on individuals according to the CJEU.<sup>100</sup> Consequently, the breach of this provision cannot entail liability for the State, since one of the conditions for such liability is that the infringed EU norm confers rights on individuals.

### 3 Conclusion

State liability occurs where a national court has infringed its procedural obligation to apply a substantive EU norm, which results in a breach of individual rights of a party to the proceedings. According to the present CJEU case-law and after the theoretical analysis of the rules on State liability, both the violation of substantive norm conferring individual rights and the infringement by the national court of its procedural obligation are necessary so that liability can be invoked. As the mere breach of the referral duty does not result in the infringement of substantive rights of individuals, it is not sufficient in itself to trigger liability for the State. Therefore, it is not necessary to address

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<sup>99</sup> I must admit that this distinction is tiny and without any practical importance. However, I think that from the systemic point of view it is worth to make this distinction and emphasise that Art. 267(3) TFUE is parallel – regarding the concept of state liability – to Art. 288 TFUE or to the other procedural obligations of national courts or state bodies with regard to the application of EU law.

<sup>100</sup> Nevertheless, Lacchi argues that preliminary references may be covered by the right to effective judicial protection under EU law and may be linked more closely to individuals' rights if analysed in the light of Article 47 of the Charter. See Lacchi, 'Multilevel Judicial Protection in the EU' 2016 (n. 74), 705-706.

here the problem concerning the absence of material damages in the case of violation of the referral duty alone.

## VI Referral Duty and the Charter

### 1 Case-Law and the Doctrine

The very last theoretical problem, to which I refer for the sake of completeness, concerns the violation of the Charter on the grounds of breach of the referral duty. In fact, it emerged in legal writing that the referral duty may come under the scope of application of several procedural fundamental rights of the parties, protected in the now legally binding Charter. Several legal writers argue that the violation of the referral duty might entail a violation of the parties' right to a fair trial or an effective remedy, which are enshrined under Article 47 of the Charter. They argue that the violation of the referral duty might also give rise to liability of the State through the violation of the parties' fundamental procedural rights.<sup>101</sup> Nevertheless, we can also observe severe concerns regarding the extension of the scope of State liability for breaches of the Charter in the legal literature.<sup>102</sup>

It is important to emphasise that neither the relevance of the preliminary procedure under Article 47 of the Charter, nor State liability for violation of the Charter are recognised by the CJEU. Therefore, the following discussion is purely and strictly theoretical.

### 2 Theoretical Analysis

It is opportune to address this issue in two phases. The first phase is to examine whether there is a violation of a Charter in the event of a violation of the referral duty. The second phase to deal with is the damages liability under the Charter.

#### Violation of the Charter

The main question in this regard is whether Article 267(3) TFEU comes under the scope of application of the Charter. To address this issue, it is noteworthy to distinguish again between the two situations with respect to the possible interpretations of the violation of the referral duty. It is possible to take into consideration the violation of the material element (Article 267(3)

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<sup>101</sup> Lacchi, 'Multilevel Judicial Protection in the EU' 2016 (n. 74), 705-706.

<sup>102</sup> Rodríguez, 'State Liability for Judicial Acts' 2004-2005 (n. 7), 618-619.

TFEU and the misuse of the *CILFIT* exceptions), on the one hand, or the violation of the procedural element (the obligation to state reasons for the non-referral decision), on the other hand.

*Violation of the Material Element of the Referral Duty*

The first possibility is based on the material element of the referral obligation, i.e. on the violation of the rule enshrined under Article 267(3) TFEU (or the misapplication of the *CILFIT* criteria). In this respect, the question is whether the right to an effective remedy in the terms of the Charter includes or may include the right to have someone's case referred to the CJEU, if the conditions under Article 267(3) TFEU and the *CILFIT* judgment are met. Given that the CJEU has so far interpreted the preliminary procedure as a tool of co-operation between the courts and not as a 'remedy', the violation of the referral duty cannot, logically, come under the scope of application of Article 47 of the Charter.<sup>103</sup>

*Violation of the Procedural Element of the Referral Duty*

The second scenario is when the national court does not give reasons for its decision not to make a referral. Contrary to the above situation, in this scenario the questions are not whether Art. 267(3) TFEU is a remedy and whether it should be protected as such under Article 47 of the Charter. What is important here is whether the violation of the parties' right to be given reasons for a decision of a national court (specifically regarding the refusal to make a referral) may have a relevance from the point of view of the EU law and may infringe Article 47 of the Charter.

In fact, in the CJEU case-law, the violation of the obligation to give reasons for a decision comes under the scope of application of Article 47 protecting the 'Right to an effective remedy and to a fair trial'.<sup>104</sup> Since Member States are obliged to respect the Charter when they apply EU law,<sup>105</sup> the absence of any statement of reasons for a decision on not to make a referral in a case related to the interpretation of EU law may, theoretically, amount to an infringement of Article 47 of the Charter.<sup>106</sup> Nevertheless, there is no CJEU case-law confirming this theory.

<sup>103</sup> For a plea for analysing preliminary reference in the light of Article 47 of the Charter, see Lacchi, 'Multilevel Judicial Protection in the EU' 2016 (n. 74), 703-707.

<sup>104</sup> Case C-300/11 *ZZ* [2013] published in the electronic ECR, EU:C:2013:363, para. 65; Case C-619/10 *Trade Agency* [2012] published in the electronic ECR, EU:C:2012:531, paras. 60-62; Case C-430/10 *Gaydarov* [2011] ECR I-11637, para. 41.

<sup>105</sup> Charter, Art. 51.

<sup>106</sup> Case C-279/09 *DEB* [2010] I-13849, para. 59.



## Damages Liability Under the Charter

Moreover, even if we accept the theoretical possibility of a violation of the Charter for breach of the referral duty (or breach of the duty to state reasons), we have to face the problem concerning the damages in an eventual liability action. In fact, the mere violation of the right to a fair trial does not cause material damage to the individual. Therefore, State liability for such an infringement could only occur if non-material damage is also to be compensated.<sup>107</sup> With regard to State liability, the CJEU has not imposed such an obligation yet. Nevertheless, the General Court has already awarded compensation for non-pecuniary loss resulting from the violation of fundamental procedural rights by the EU institutions.<sup>108</sup>

### 3 Conclusion

There are major problems in establishing liability for violation of the Charter by reason of the infringement of Article 267(3) TFEU on the side of a national court. First, taking into account the present CJEU jurisprudence, only the violation of the obligation to state reasons (for a decision on not making a referral) could be regarded as a breach of the Charter. Secondly, the establishment of such liability would necessitate the recognition of State liability for moral damages, which has not been confirmed by the CJEU yet.

<sup>107</sup> For several suggestions consisting in amending the conditions of State liability under Köbler, see Lacchi, 'Multilevel Judicial Protection in the EU' 2016 (n. 74), 705-706. She argues that, for example, the non-compliance with Article 47 of the Charter of the last instance national court's refusal to refer, would lead to the recognition of a manifest infringement of EU law and a violation of a right under EU law, i.e. the right to preliminary references and effective judicial protection.

<sup>108</sup> Case T-217/11 *Staelen v. European Ombudsman*, not yet published, EU:T:2015:238, para. 269, 293. The Court rejected the appeal against this judgment of the General Court by its order C-338/15 P, not yet published, EU:C:2016:599. Moreover, the undue delay in proceedings by the General Court has given rise to compensation in several cases. See for example Case C-185/95 P *Baustahlgewebe v. Commission* [1998] ECR I-8417; joined cases C-238/99P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99P *Limburgse Vinyl Maatschappij and Others v. Commission* [2002] I-8375; Case C-385/09 *Der Grüne Punkt - Duales System Deutschland v. Commission* [2010] ECR I-10385, paras. 183-185, 194; Case C-40/12 P *Gascogne Sack Deutschland v. Commission*, published in the electronic ECR, EU:C:2013:768, paras. 89-90; Case C-243/12 P *FLS Plast v. Commission*, published in the electronic ECR, EU:C:2013:768, para. 135; Case C-467/13 P *ICF v. Commission*, not yet published, EU:C:2014:2274, paras. 57-58.

## VII Case-Law of the Member State Courts

Considering all arguments above, the criterion of ‘manifest infringement of the applicable law’, combined with the obligation of the national courts to refer a preliminary question to the CJEU, renders the establishment of liability possible only on rare occasions. In fact, the research confirms that in many cases national courts have refused the liability claims because they did not find a ‘manifest breach of the applicable law’. Their main arguments are as follows. Firstly, the interpretation of the EU norm was ambiguous at the time the erroneous decision was made; therefore, the violation of the applicable law was not manifest.<sup>109</sup> Secondly, the violation of the referral duty was not in itself sufficient to establish a sufficiently serious breach triggering liability of the State.<sup>110</sup> And thirdly, there was not any violation of EU law<sup>111</sup> and/or breach of the referral duty in the case at hand.<sup>112</sup>

In the available databases, there have been only four successful *Köbler* liability claims so far. These cases are all specific for a certain reason. In two of them, the domestic rules were found contrary to the EU law; and not only their application by the national Supreme Courts.<sup>113</sup> Thus, there has been a general violation of EU law by several branches of government, leading together to the finding of a serious breach. In this respect, in the Finnish case of 2013, the defendant was the State, and in a Bulgarian case of 2015, all the three branches of government. Therefore, the civil courts adjudicating on the State liability claims had the possibility to address the breach of EU law by the State as an entity, without the need to narrow the scope of the examination to the judgments of the national Supreme Courts. In fact, at the time the contested judgments were made, there were already serious doubts about the compatibility of the national legislation

<sup>109</sup> (FR) Tribunal de grande instance de Paris, 07/05/2008, no. 04/13911, reported by Dubos et al., ‘Rapport français’ 2014 (n. 90), 222-223; (DE) Bundesverwaltungsgericht, Urteil, 09/06/2009, 1 C 7.08, NVwZ 2009; (UK) Court of Appeal (England), Civil Division, judgment, 12/05/2010, *Cooper/Her Majesty’s Attorney General*, [2010], reported in *Reflets* 3 (2012), 21; (PL) Naczelny Sąd Administracyjny, Wyrok, 26/06/2014, I FNP 5/14, reported in database JuriFast.

<sup>110</sup> (AT) VfGH, Erkenntnis, 13/10/2004, A5/04, reported in *Reflets* 2 (2005), 9; VfGH, Beschluss, 19/06/2013, A2/2013 ua, reported in *Reflets* 3 (2013), 17.

<sup>111</sup> (FR) Conseil d’État, décision, 18/06/2008, *Gestas*, reported in *Reflets* 3 (2008), 19; (PL) Naczelny Sąd Administracyjny, Wyrok, 26/08/2011, I GNP 1/11.

<sup>112</sup> (BG) Sofiyski gradski sad, Reshenie, 03/01/2014, *Pretsiz-2 EOOD/Varhoven administrativen sad*, 1782/2013, reported in *Reflets* 1 (2014), 16; (DE) Bundesgerichtshof, Beschluss, 28/10/2004, III ZR 294/03, reported by D. Dittert, ‘Rapport allemande’, in Coutron/Bonichot, *L’obligation de renvoi* 2014 (n. 4), 77-78; (PL) Naczelny Sąd Administracyjny, Wyrok, 11/06/2014, I GNP 2/14, reported in *Reflets* 3 (2014), 38; (FR) Cour de cassation, Arrêt, 26/10/2011, no. 1002 (10-24.250), reported by Dubos et al., ‘Rapport français’ 2014 (n. 90), 223-224.

<sup>113</sup> (FI) Korkein oikeus, tuomio, 05/07/2013; (BG) Okrazhen sad Yambol, Reshenie, 26/11/2015.

with the EU rules in both cases.<sup>114</sup> Thus several branches of government contributed to the damage caused by the application of national rules contrary to the EU law in the claimants' cases. In this context, the civil courts adjudicating on the liability claims found that the national Supreme Courts had committed a manifest breach of EU law when applying the highly doubtful provisions of national law.

The other two successful *Köbler* actions are also particular in a certain way. As for the damages awarded by an Italian court in 2009, the national decision was made in the proceedings that gave rise to the preliminary ruling in *Traghetti del Mediterraneo*.<sup>115</sup> As for the Swedish decision of 2009, damages have been awarded not in ordinary liability proceedings before the civil court but in a specific procedure before the *Justitiekanslern*.<sup>116</sup>

## VIII Conclusion

In this paper, I have examined several questions regarding the establishment of a manifest infringement of the applicable law in the terms of *Köbler*. The main conclusions are as follows.

The research and the theoretical reflection confirm that only in rare circumstances it is possible to find a manifest breach of EU law on the side of the national court.

Firstly, the breach of EU law by a national court is considered manifest in two situations. The first case is where the national court has made a mistake in the interpretation or application of the substantive EU rule, without even considering making a reference on a question that has not been clarified yet by the CJEU. The other scenario is where the national court has deliberately deviated from the established CJEU case-law. It seems, therefore, that it is of primary importance whether there is an established CJEU jurisprudence on the matter central to the dispute. It is what the CJEU also pointed out in paragraph 56 of the *Köbler* judgment.

Secondly, the violation of the referral duty does not appear to be sufficient in itself, neither in practice, nor in theory, to trigger State liability.

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<sup>114</sup> In the Bulgarian case the Commission had already initiated infringement proceedings, and in the Finnish case the CJEU had already rendered a judgment declaring the Finnish regulation non-compliant with the EU law.

<sup>115</sup> (IT) Tribunale di Genova, Sentenza, 31/03/2009.

<sup>116</sup> (SE) Justitiekanslern, beslut, 06/04/2009.

Thirdly, the violation of the referral duty cannot give rise to liability on the grounds of violation of the Charter either.

Lastly, the national courts adjudicating on liability claims for violation of EU law also experience problems to find a manifest infringement. According to the research conducted, only on four occasions has such liability been established so far.