

PRELIMINARY
REFERENCES TO
THE EUROPEAN
COURT OF
JUSTICE

SECOND EDITION

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REFERENCES FOR PRELIMINARY RULINGS

1. Introduction

1.1. Preliminary Rulings in the European Union's Judicial System

A reference for a preliminary ruling is a request from a national court of a Member State to the Court of Justice of the European Union to give an authoritative interpretation on an EU act or a decision on the validity of such an act. In this situation the Court of Justice does not function as a court of appeal which rules on the outcome of the main proceedings before the referring court: it makes judgment neither on the facts in the main proceedings nor on the interpretation and application of national law. Moreover, in principle, it does not pronounce itself on the concrete application of EU law in the main proceedings before the referring court. Finally, while a preliminary ruling is normally given in the form of a judgment, the ruling is addressed only to the referring court, but not to the parties to the main proceedings. Only the referring court's subsequent decision can be enforced against those parties. As a matter of principle, the preliminary reference procedure is therefore an expression of an interplay and allocation of tasks between national courts and the Court of Justice.¹ It is this interplay which is the subject of this book.

Already the Treaty establishing the European Coal and Steel Community (ECSC)—the first stone laid in founding the European Union—from 1951 made provision for the preliminary reference procedure.² However, it has been Article 267

¹ For a discussion as to whether the relationship between national courts and the Court of Justice is in reality hierarchical or rather has the character of cooperation between equals see T de la Mare and D Donnelly, 'Preliminary Ruling and EU Legal Integration: Evolution and Stasis' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, 2011), 363, 377–8, and A Dashwood and AC Johnston, 'Synthesis of the Debate' in A Dashwood and AC Johnston (eds), *The Future of the Judicial System of the European Union* (2001), 55, 58–9.

² Art 41. The ECSC Treaty expired on 23 July 2002. However, the Court of Justice has ruled that it continues to have jurisdiction to interpret ECSC measures, see Case C-119/05 *Lucchini* [2007] ECR I-6199, para 41.

TFEU (originally Article 177 and subsequently Article 234 in the Treaty of Rome of 1957) that has ensured the prominent position of the preliminary reference procedure on the legal map of Europe. By this provision the six original Member States of the European Economic Community gave their national courts the possibility, and in some cases the obligation, to make preliminary references. This Article states as follows:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

The preliminary ruling procedure has several important functions:

- It gives national courts access to help in resolving interpretative issues concerning EU law.
- It helps to ensure the uniform interpretation of EU law throughout the Union.
- It helps to ensure the effective application of EU law, just as it contributes to domesticating EU law and moving EU law away from assuring compliance only through a system of international surveillance so that it also contains a supplementary system of private enforcement that is not influenced by political discretion.
- It plays an important role in the political integration of the EU.³

Preliminary rulings have played a crucial role in the development of EU law, and some of the most fundamental principles of EU law have been laid down in connection with preliminary rulings. This includes, for example, such central principles as

³ This fourth aspect will not be dealt with in this book. The question is dealt with by, among others, H Rasmussen, *On Law and Policy in the European Court of Justice* (1986), chs 8 and 14; J Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration', *Journal of Common Market Studies*, 31(4) (1993), 417, 421ff; M Maduro, *We, the Court: The European Court of Justice & the European Economic Constitution* (1998), 9, 26ff; A Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', *International Organization*, 47(1) (1993), 41–76; W Mattli and A Slaughter, 'Revisiting the European Court of Justice', *International Organization*, 52(1) (1998), 177–209; and J Pitarakis and G Tridimas, 'Joint Dynamics of Legal and Economic Integration in the European Union', *European Journal of Law and Economics*, 16(3) (2003), 357–68.

direct effect and supremacy of EU law. One consequence of the preliminary ruling procedure has been to bind the national courts more closely to the Court of Justice. This has meant that these courts, functionally speaking, also act as EU courts. Or, in the words of the Court of Justice ‘the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties’.⁴

As Article 267 has direct effect, many Member States have made no supplementary national legislation regulating when and how a preliminary reference should be made or how a preliminary ruling should be applied by the national courts. Instead, such questions are often regulated by a combination of case law of the Court of Justice and general procedural codes of the different Member States.

1.2. The structure of this book

This book examines the different aspects of the preliminary reference procedure. It is divided into 13 chapters which broadly mirror the order in which the various issues connected with a reference under Article 267 arise for a national court.

In this introductory chapter we first give an account of the development of the preliminary procedure (section 2). Thereafter we give a brief outline of the different types of preliminary references in the EU system (section 3). We then give a short account of the broadly similar reference procedure laid down in the European Economic Area (EEA) Agreement (section 4) followed by an account of other ways of obtaining guidance on interpretation of EU law, namely questions to the Commission and the European Ombudsman (section 5). The chapter ends with a discussion of what future changes one might envisage for the preliminary reference procedure in the coming years (section 6).

Next, Chapter 2 analyses the use of the procedure and discusses the variations in frequency of references between the different Member States. Chapter 3 discusses which bodies may make preliminary references while Chapter 4 examines which questions can be referred for a preliminary ruling. Chapter 5 discusses the requirement that an answer to the preliminary question is relevant for the resolution of the main proceedings. Chapter 6 defines when a national court must make a preliminary reference. Chapter 7 discusses when a national court that is not obliged to make a preliminary reference should make such a reference. The form and content of a preliminary reference is the subject of Chapter 8. Chapter 9 provides an account of the steps that a national court may take after having made its reference while Chapter 10

⁴ See Opinion 1/09 *European and Community Patents Court* 8 March 2011, paras 83 and 85. See also R Lane, ‘Article 234: A Few Rough Edges Still’ in M Hoskins and W Robinson (eds), *A True European: Essays for Judge David Edward* (2003), 327; M Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (2004), 3; and C Barnard and E Sharpston, ‘The Changing Face of Article 177 References’, *CML Rev*, 34 (1997), 1113, 1113ff.

contains an analysis of the procedure before the Court of Justice and discusses how written and oral observations may be presented. Chapter 11 examines the preliminary ruling as such, including the extent to which the Court of Justice reformulates the preliminary question. Chapter 12 considers the binding effect of a preliminary ruling. Finally, Chapter 13 describes the rules on costs and legal aid.⁵

2. History and Development of the Preliminary Reference Procedure

The preliminary ruling procedure laid down in what is now Article 267 TFEU was inspired by various reference systems in the founding Member States. Of particular significance were the procedures in Italian and German law where certain matters are referred to the Constitutional Court for a preliminary ruling. The French system, in which general courts can refer different matters to administrative courts for a preliminary ruling and vice versa, also served as a model. In comparison, at the inception of the European Communities there was no other system of cooperation between an international court and national courts which could serve as inspiration. The preliminary ruling procedure was thus one of the very first forms of advanced cooperation between national courts and an international court. The procedure has since been a model for the establishment of various national procedures,⁶ as well as for the advisory opinion system that has been introduced through Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.⁷

The Court of Justice received its first preliminary reference in 1961.⁸ In the early years the number of preliminary references was very limited. In the ten years from 1960 to 1969 there were only 75 references, in other words an average of fewer than

⁵ A brief note on terminology: in this book the Court of Justice of the European Union is referred to as the 'Court of Justice' and only where there is no risk of misunderstanding the term 'Court' will be used. The General Court of the European Union is referred to as the 'General Court'. A national body which fulfils the definition in Art 267 of a 'court or tribunal of a Member State' and therefore is entitled to make a preliminary reference is referred to as a 'national court' or a 'referring court'. The term 'body' is used in respect of both entities that are covered by Art 267's definition of a court and those that are not.

⁶ See in more detail H Kanninen, Association of the Councils of State and Supreme Administrative Jurisdiction of the European Union, 18th Colloquium 2002, General Report on the Colloquium subject 'The Preliminary Reference to the Court of Justice of the European Communities', point 3. The most important example is probably the Benelux Court of Justice of 1965. Similarly, the Community Patent Convention of 1989 envisages the establishment of a system in which a supranational court may issue preliminary rulings.

⁷ Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms is accessible at <<http://conventions.coe.int/Treaty/EN/treaties/html/Prot16ECHR.htm>>. The protocol is accompanied by an explanatory report which is accessible at <<http://conventions.coe.int/Treaty/EN/Reports/Html/Prot16ECHR.htm>>.

⁸ Case 13/61 *Bosch* [1962] ECR 45 (original reference Rec 1962 89).

eight per year. Against this background it is hardly surprising that the Court of Justice developed a practice that was characterized by a desire not to discourage references. Among other things, the Court of Justice laid down a broad definition of what was to be considered ‘a court or tribunal of a Member State’, and it expressly refrained from assessing the relevance of a question referred. Likewise, it applied some rather relaxed requirements regarding the referring court’s description of the facts and national law as well as regarding the precision of the preliminary question as such. It was also characteristic that the Court described the relationship between itself and the national courts as that of a non-hierarchical cooperative procedure between equal partners, where each was responsible for clearly defined tasks.

Following its somewhat hesitant beginning the preliminary reference procedure has grown rapidly and today is in danger of becoming a victim of its own success.

In the period between 1961 and 1998, the number of annual references grew by 16 per cent on average, with an overall increase of nearly 100 per cent in the period from 1990 to 1998.⁹ Then came a period where the volume of cases was more or less constant. However, in the last couple of years a new upward trend is recognizable, and in 2012 the Court of Justice received 404 references.¹⁰ At the end of 2012 886 cases were pending before the Court of Justice, of which 537 were preliminary references.¹¹

An important consequence of the large number of references is that the average time taken to deal with each reference is substantial. Another consequence is that it has become increasingly difficult for the Court of Justice to ensure full coherence within its case law, as it has grown to such magnitude that it has become virtually impossible even for the members of the Court to know all the cases. While in 1975 the time spent dealing with a preliminary reference case was six months, by 2012 the average time was 15.7 months. Indeed, the figure of 15.7 months was a drop from a peak of 25.5 months in 2003. These figures cover wide variations between individual cases, and on several occasions a preliminary ruling has not been rendered until over four years after the national court made the reference.¹²

⁹ This significant increase of references cannot be attributed to the enlargement of the EU. Admittedly, Austria, Finland, and Sweden joined the Union during the period, but only in 1996 so that courts in these three Member States only had a marginal influence on the total increase.

¹⁰ The leading topics were taxation (57 cases); area of freedom, security, and justice (56 cases); social policy (34 cases); approximation of laws (30 cases); consumer protection (22 cases); freedom of movement for persons (21 cases); principles of European law (21 cases); and environment (19 cases); see the Court of Justice 2012 Annual Report, point 3, p 91.

¹¹ The Court of Justice 2012 Annual Report, point 13, p 105.

¹² Case C-142/05 *Mickelsson* [2009] ECR I-4273, where the reference was received at the Court on 24 March 2005. Warnings of the problems flowing from the increased number of preliminary references were given at an early stage, see J Weiler’s contribution to a conference in 1985 published in ‘The European Court, National Courts and References for Preliminary Rulings—The Paradox of Success: A Revisionist View of Article 177 EEC’ in H Schermers et al (eds), *Article 177 EEC: Experiences and Problems* (1987), 366; T Koopmans, ‘The Future of the Court of Justice of the European Communities’ in A Barav and DA Wyatt (eds), *Yearbook of European Law*, 11 (1991), 1;

Presumably, the considerable time it takes to obtain a preliminary ruling deters a number of national courts from using this procedure even though otherwise the nature of the main proceedings justifies doing so.¹³ In a resolution of 9 July 2008 on the role of the national judge in the European judicial system, the European Parliament argued that the duration of the preliminary ruling procedure was excessively long and considerably reduced the attractiveness of the procedure for national judges.¹⁴

Arguably, the increase in the volume of cases was a contributory factor to the Court of Justice changing its practice in the mid 1990s on a number of important points regarding preliminary references. During this period the Court tightened the conditions under which a national court may make a reference and it established more stringent requirements regarding the formulation of a preliminary reference.¹⁵ The 1990s also witnessed a change in the Court of Justice's practice whereby still more emphasis was put on the procedural rights of those entitled to present observations in the preliminary procedure before the Court.¹⁶

While the case law has become more detailed, at the same time the exposition of the principles underpinning the preliminary ruling procedure and the allocation of jurisdiction between the Court of Justice and the national courts have become more blurred. In legal literature it has even been argued that the spirit behind the preliminary ruling procedure has come under attack.¹⁷ Moreover, EU law is primarily based on decentralized enforcement, and the most powerful—and for the Court of Justice the most dangerous—means whereby the national courts can show their dissatisfaction is by refusing to recognize the rulings of the Court of Justice. From a strategic point of view, therefore, good relations with the national courts continue to be of considerable importance to the Court of Justice.¹⁸

Whereas such concerns may seem somewhat exaggerated, the continued increase in cases before the Court of Justice entails a risk that, in the long run, the system

and H Rasmussen, 'Docket Control Mechanisms, the EC Court and the Preliminary References Procedure' in M Andenas (ed), *Article 177 References to the European Court: Policy and Practice* (1994), 83, 100.

¹³ See Ch 7, section 2.2 herein.

¹⁴ EP Resolution of 9 July 2008 on the role of the national judge in the European judicial system (A6-0224/2008), points F and 25, <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0352>>.

¹⁵ See Ch 8 herein. The tightening of the Court's practice regarding access to make preliminary references has not been unequivocal, however. Thus, since the 1990s it has increasingly accepted references where, strictly speaking, EU law does not apply in the main proceedings. See Ch 4, section 4.3 herein. Moreover, as explained in Ch 6, section 3.4, it has refrained from following repeated invitations to relax the national courts of last instance's obligation to make preliminary references.

¹⁶ See Ch 8, sections 3.1 and 3.2.5 herein.

¹⁷ D O'Keefe, 'Is the Spirit of Article 177 under Attack? Preliminary References and Admissibility', *EL Rev*, 23 (1998), 509.

¹⁸ T Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure', *CML Rev*, 40 (2003), 9, 37.

will end up in a gridlock which may put the preliminary reference system into jeopardy. For that reason, several measures have been taken in order to make the Court better suited to dealing with the pressure of cases—measures that have already shown their positive effect. Indeed, the average 15.7 months that it took in 2012 to process a preliminary reference is the shortest since the end of the 1980s.

Most of the measures taken concern the internal organization of the Court's working methods and therefore fall outside the ambit of this book.¹⁹ However, the Court has also engaged upon a number of measures that directly affect the preliminary procedure as such, and the ability to decide cases via a simplified procedure in the form of a reasoned order has enabled it to decide simpler cases more speedily.²⁰ Similarly, the Nice Treaty introduced the possibility of delivering judgments without the Advocate General giving an Opinion; something which is now often used and which has contributed significantly to reducing the length of the proceedings.²¹ Moreover, the special urgent procedure for handling preliminary references in the areas entitled Area of Freedom, Security and Justice (AFSJ) under Title V of Part Three TFEU has made it possible to deal more swiftly with these types of cases.²² Finally, a key objective of the Court's 2012 Rules of Procedure²³ is to continue the efforts to maintain the Court's capacity to dispose within a reasonable period of time of the cases brought before it. Thus the 2012 rules of procedure have introduced a number of measures to ensure that cases are dealt with swiftly and efficiently. Those measures include, in particular, vesting in the Court the possibility of adopting a decision with a view to limiting the length of written pleadings or observations lodged before it, as well as a relaxation of the preconditions for the Court's adoption of reasoned orders, particularly where the answer to a question referred by a national court or tribunal for a preliminary ruling admits of no reasonable doubt. Also the report for the hearing, which prior to the adoption of the 2012 rules of procedure was a source of costs and delay in the handling of cases, was abandoned. Moreover, as a rule the Court may dispense with an oral hearing if on reading the written pleadings or observations lodged by the parties it considers that it has sufficient information.

¹⁹ For example, more cases may be decided by small chambers, the length of the judgments may be kept down (making translation faster), reports for the hearing are made shorter and are normally only translated into the language(s) of the case, Opinions by the Advocates General are not given in more than half of all cases (53 per cent in 2012) and where they are given, as a main rule, the Opinions by the three revolving Advocates General are generally drafted in one of the Court's 'pivot' languages rather than in their own language. See in more detail V Skouris, 'Self-conception, Challenges and Perspective of the EU Courts' in I Pernice et al (eds), *The Future of The European Judicial System in a Comparative Perspective* (2005), 19.

²⁰ See Ch 10, section 5.1 and Ch 11, section 1 herein.

²¹ Art 20 of the Statute of the Court of Justice and herein, Ch 11, section 1 herein.

²² See Ch 10, section 5.3 herein.

²³ OJ 2012 L265/1.

3. Possibilities of Making References to the Court of Justice Other than on the Basis of the Treaties

As observed earlier in section 1 herein, Member State courts were first granted the possibility of making preliminary references by Article 41 of the Treaty establishing the European Coal and Steel Community (ECSC).²⁴ In practice Article 267 TFEU, however, accounts for the vast majority of preliminary references, and today this provision has become almost synonymous with the preliminary reference procedure.

However, there are other bases for making preliminary references to the Court of Justice than the now defunct Article 41 of the ECSC Treaty and Article 267 TFEU, namely on the basis of a number of 'EU conventions' adopted outside the Treaty framework. Many of these conventions include provisions on preliminary rulings. In most respects these other bases correspond to Article 267, but in certain regards there are differences, sometimes differences of considerable importance. Where such differences exist, they are identified and examined in the relevant chapters of this book.²⁵

Of particular significance when it comes to preliminary references based on conventions has been the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. As of 2002 the Brussels Convention has been replaced by the so-called Brussels I Regulation.²⁶ This regulation is based on Title IV of the former EC Treaty which meant that preliminary references regarding this regulation were governed by Article 68 of that Treaty. Due to the Danish opt-out on justice and home affairs, the Brussels I Regulation does not apply in Denmark.²⁷ Moreover, it has been pointed out that the Brussels

²⁴ The ECSC Treaty entered into force on 23 July 1952 and expired on 23 July 2002.

²⁵ Prior to the entry into force of the Lisbon Treaty in 2009 the most important other bases concerned matters within the field of police and judicial cooperation. Following the Lisbon Treaty Art 267 however also covers new legal measures in this field. For an account of the workings of the system prior to the entry into force of the Lisbon Treaty, see M Broberg and N Fenger, *Preliminary References to the European Court of Justice* (1st edn, 2010), in particular 9–10, 97–100, 109–13. To some extent the pre-Lisbon reference system continues to apply, see further Ch 6, section 3.5.1 herein.

²⁶ Reg 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

²⁷ Thus, strictly speaking, the Brussels Convention continues to apply with regard to Denmark. Denmark has, however, entered into an agreement with the EU whereby, vis-à-vis Denmark, the rules of the Brussels I Regulation replace those of the Brussels Convention within the former's field of application; Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] OJ L299/62. As concerns the jurisdiction of the Court of Justice in interpreting this agreement, Art 6(1) of the agreement provides that Danish courts and tribunals shall request the Court of Justice to give a ruling thereon 'whenever under the same circumstances a court or tribunal of another Member State of the European Union would be required to do so in respect of the Brussels

Convention also continues to apply where the Brussels I Regulation does not apply *ratione loci*, namely to overseas territories such as Mayotte (France) and Aruba (the Netherlands).²⁸

Like the Brussels Convention, the Convention on the law applicable to contractual obligations,²⁹ the so-called Rome Convention, has been replaced by a regulation, the Rome I Regulation.³⁰ As with the Brussels Convention, the Danish opt-out on justice and home affairs means that the Rome I Regulation will not apply to Denmark. The Rome Convention, therefore, continues to apply vis-à-vis Denmark.

In addition to the above, there are a number of conventions adopted on the basis of Title VI of the former EU Treaty prior to the introduction of Article 35 of that Treaty. These are: the Convention on the establishment of a European Police Office;³¹ the Convention on the protection of the European Communities' financial interests and the Protocol to that Convention drawn up on 27 September 1996;³² the Convention on the use of information technology for customs purposes;³³ the Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union;³⁴ the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters;³⁵ the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations;³⁶ the Convention

I Regulation'. Whilst perhaps not in full conformity with the overall objective of the agreement, this wording would seem to mean that only Danish courts of last instance are competent to request a preliminary ruling with regard to the agreement.

²⁸ C Naômé, *Le renvoi judiciaire en droit européen* (2nd edn, 2010), 70.

²⁹ [1998] OJ C27/3. (Consolidated version).

³⁰ Reg 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L177/6.

³¹ See protocol drawn up on the basis of Art K.3 of the Treaty on European Union, on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office [1996] OJ C299/2.

³² Council Act of 29 November 1996 drawing up, on the basis of Art K.3 of the Treaty on European Union, the protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests [1997] OJ C151/1.

³³ Council Act of 29 November 1996 drawing up, on the basis of Art K.3 of the Treaty on European Union, the protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the use of information technology for customs purposes [1997] OJ C151/15.

³⁴ [1997] OJ C195/2. See Art 12.

³⁵ Protocol, drawn up on the basis of Art K.3 of the Treaty on European Union, on the interpretation, by the Court of Justice of the European Communities, of the convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters [1997] OJ C261/18.

³⁶ [1998] OJ C24/2. See Art 26.

drawn up on the basis of Article K.3 of the Treaty on European Union on driving disqualifications;³⁷ and the Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters.³⁸

4. References to the EFTA Court

4.1. The Procedure for Making a Preliminary Reference to the EFTA Court

The preliminary reference procedure is not only of relevance to the courts in the Member States of the EU. It is also important for the national courts in Iceland, Lichtenstein, and Norway, as a result of the participation of these countries in the EEA.

According to Article 107 and Protocol 24 to the EEA Agreement, an EFTA State that is party to the EEA Agreement can decide that its courts may make references for preliminary rulings to the Court of Justice. So far no such decisions have been taken. The courts in these three EFTA States cannot therefore refer preliminary questions to the Court of Justice. Instead, they must make such references to the EFTA Court.³⁹

The procedure for making a preliminary reference to the EFTA Court is laid down in Article 34 of the 'Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice' (SCA). According to that provision, the EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement. Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.

Although Article 34 SCA resembles Article 267 TFEU, there are a number of differences between these provisions.

The first difference with Article 267 TFEU is that Article 34 SCA does not provide for any mandatory references for national courts or tribunals whose decisions are final. Thus, even if its decision will be final, a national court or tribunal is not under an obligation to refer the question to the EFTA Court. According to the EFTA Court, this reflects not only the fact that the depth of integration under the EEA

³⁷ [1998] OJ C216/2. See Art 14.

³⁸ Protocol drawn up on the basis of Art K.3 of the Treaty on European Union, on the interpretation by the Court of Justice of the European Communities of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters [1998] OJ C221/20.

³⁹ On the other hand, courts in the EU Member States can, and in certain situations shall, make preliminary references to the Court of Justice in relation to the EEA Agreement under the normal rules in Art 267 TFEU; see Ch 4, sections 3.3.8 and 4.4 herein.

Agreement is less far-reaching than under the EU treaties; it also means that the relationship between the Court and the national courts of last instance is, in this respect, more partner-like.⁴⁰

Moreover, Article 34 SCA provides that an EFTA State may limit references to only those courts whose decisions are final. Of all the original EEA EFTA States only Austria made use of that possibility, and after Austria joined the EU it is now not being used.

The second difference is that the rulings of the EFTA Court under Article 34 SCA are merely advisory to the national court. Due to constitutional reasons, the EFTA States did not want to give the EFTA Court competence to give binding interpretations on the EEA Agreement. Whilst this is important from a formal point of view, the practical implications of this difference vis-à-vis the EU legal system should not be overestimated. A national EFTA-State court that has requested an advisory opinion would surely be reluctant to disregard that opinion. It has, moreover, been argued that if the referring EFTA-State court should disregard an advisory opinion of the EFTA Court that finds part of an EFTA State's legislation incompatible with EEA law this would amount to a violation of the EEA Agreement by the EFTA

⁴⁰ Case E-18/11 *Irish Bank Resolution Corporation*, [2012] EFTA Report, 592. The EFTA Court, however, also made a curious remark that 'courts against whose decisions there is no judicial remedy under national law will take due account of the fact that they are bound to fulfil their duty of loyalty under Article 3 EEA' without explaining what that more precisely entailed. Presumably, the EFTA Court referred implicitly to an argument previously made by both Magnusson and Baudenbacher according to which it follows from the principles of judicial protection and loyalty laid down in Art 3 EEA that national courts of last instance are not free to decide whether or not to refer, but that criteria similar to those found in Art 267(3) TFEU should apply by analogy to the national courts in the EFTA countries, see S Magnusson, 'On the Authority of Advisory Opinions, Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court', *Europarättslig Tidskrift* (2010), 528, and C Baudenbacher, *The EFTA Court in Action* (2010), 21–2. This view is however irreconcilable with the clear wording of Art 34 SCA and the deliberate intention of the EFTA States not to copy Art 267 TFEU in full. According to Magnusson (539), where a court of last instance refuses to make a reference to the EFTA Court the result is that a party to the main proceedings 'has been denied the opportunity (and the procedural right) to have its case (or the EEA part of its case) resolved by the competent judicial institution'. However, even under EU law, the preliminary reference procedure does not constitute a means of redress available to the parties to the main proceedings, see Case 283/81 *CILFIT* [1982] ECR 3415. Moreover, it would be inappropriate to characterize the national supreme courts of the three EEA EFTA States as anything less than 'competent judicial institution[s]'. In the *Irish Banks* judgment, the EFTA Court also indicated that a lack of referral to the EFTA Court could possibly constitute a violation of Art 6 of the European Convention of Human Rights, see para 64. See on this issue in Ch 6, section 5.5 herein. That being said, in relative terms the national courts of the EFTA countries have been slightly more reluctant in making preliminary references than have their EU counterparts. On this aspect see H Haukeland Fredriksen, 'Om mangelen på tolkningspørsmål fra norske domstoler til EFTA-domstolen', *Jussens Venner* (2006), 372; HP Graver, 'The Effect of EFTA Court Jurisprudence on the Legal Orders of the EFTA States' in C Baudenbacher, P Tresselt, and T Orlygsson (eds), *The EFTA Court: Ten Years On* (2005), 79, 82–6; and DT Björgvinsson, 'Application of Article 34 of the ESA/Court Agreement by the Icelandic Courts' in M Monti et al (eds), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher* (2007), p 37.

State concerned.⁴¹ This view might, at first sight, seem surprising, as the national court has no obligation to follow the advisory opinion of the EFTA Court. The reasoning, however, is that the infringement would not stem from the fact that the national court did not follow the advisory opinion, but rather from the fact that the national court, by arriving at a result which differed from that of the EFTA Court, had applied the EEA Agreement incorrectly. Therefore, the EFTA Surveillance Authority should be able to bring an infringement case against the EFTA State concerned for having failed to fulfil its obligation to apply EEA law correctly. For obvious reasons one would expect that where such a case was brought before the EFTA Court, the EFTA Court would stick to the view on the law which it has previously expressed in its preliminary advisory opinion, and thus it would very likely find in favour of the EFTA Surveillance Authority.

The third difference is that in contrast to the Court of Justice of the European Union's jurisdiction under Article 267 TFEU, the EFTA Court's jurisdiction under Article 34 SCA does not extend to questions of validity of what, in EU law, would be labelled secondary measures or secondary acts. This is due to the fact that EEA law is generated by way of amending the EEA Agreement so that, formally speaking, EEA legislation does not operate with a hierarchy of norms similar to that known in EU law. Since the EFTA Court is not competent to review the legality of EEA acts corresponding to directives and regulations, it cannot annul such acts, where that legislation does not conform to the main part of the EEA Agreement (corresponding to the EU Treaties) or to general principles of a constitutional nature. In this regard the EFTA Court's jurisdiction differs from that of the Court of Justice.

As the EFTA Court's advisory opinion in *CIBA* demonstrates, there is, however, a fine line between decisions on validity and decisions on interpretation. In that case, the referring court had asked whether the EEA Joint Committee was empowered to decide that an EFTA State could adopt derogations from the existing Union *aquis*. Arguing that the competence of the EFTA Court was exhaustively listed in the SCA, the Norwegian government contended that the Court could not rule on the validity of a decision of the EEA Joint Committee. The EFTA Court dismissed that argument by stating that the question related to the interpretation of the provisions of the EEA Agreement concerning the competences of the EEA Joint Committee and to the interpretation of provisions that the EEA Joint Committee had agreed to insert in an annex to the Agreement. According to Article 34 SCA, the Court had jurisdiction to give advisory opinions on the interpretation of the 'EEA Agreement' and, pursuant to Article 1(a) SCA, that term included both the main part of the EEA Agreement and its Protocols and Annexes, as well as the acts referred to therein. Since there was no relevant legal source to suggest that any provision governing the

⁴¹ See C Baudenbacher, 'The Legal Nature of EEA Law in the Course of Time' in DT Björgvinsson (ed), *Afmelisrit Thor Vilhjálmsen* (2000), 39, 46.

function of the EEA Joint Committee should be excluded from the jurisdiction of the Court under Article 34 SCA, the Court declared itself competent to answer the question, notwithstanding that it related to the competence of the EEA Joint Committee.⁴²

This advisory opinion in *CIBA* illustrates that the EFTA Court, in the same manner as the Court of Justice, seeks to construe the preliminary procedure in the spirit of cooperation which should rule the relationship between, on the one hand, these two courts and, on the other, the national courts and tribunals. Had the EFTA Court declined to answer the question referred in the *CIBA* case, the national courts would have been on their own in ruling upon the validity of acts of the EEA Joint Committee and the EFTA Surveillance Authority. As a consequence of this, and of the fact that a national court can hardly have the competence to declare such acts invalid *erga omnes*, a national court's decision not to apply such an act would endanger the uniform application of EEA law. A similar reasoning has led the Court of Justice in *Foto Frost*⁴³ to hold that national courts have an obligation to refer questions on the validity of secondary EU acts if they are inclined to find the relevant acts illegal. Whether a parallel obligation can be imposed on national courts of an EFTA State is, in the light of wording of the SCA, doubtful.

The advisory opinion in *CIBA* concerned an indirect validity assessment of a decision of the EEA Joint Committee authorizing certain derogations from the EU rule that was incorporated into the EEA Agreement. Whereas it follows from the judgment that the EFTA Court can control the legality of such acts, it can hardly be envisaged that the EFTA Court will stretch its jurisdiction so as to encompass also an indirect validity assessment of the EU act that has been made part of the EEA Agreement. Such an assessment would interfere with the Court of Justice's monopoly on ruling on the validity of secondary EU law as laid down in the *Foto Frost* case. This means that the EFTA Court cannot rule on the 'constitutional' validity of secondary EU law that is incorporated into the EEA Agreement but only on the validity of the adaptations to the EU act that the EEA Joint Committee should make. That limitation does in fact exclude a substantial part of the protection of individual rights, which are offered by the judicial system of the EU. It is, however, a logical consequence of the whole EEA set-up.⁴⁴

4.2. Competence and Procedure

The EFTA Court is competent under Article 34 SCA to interpret the Protocols to the EEA Agreement unless another result clearly follows from the provisions of

⁴² Case E-6/01 *CIBA* [2002] EFTA Court Report, 281.

⁴³ Case 314/85 *Foto Frost* [1987] ECR I-4199, and see Ch 6, section 4.2 herein.

⁴⁴ See O Due, 'The EFTA Court and its Relationship to the European Court of Justice' in G Sundström (ed.), *The Fifth Nordic Conference on EFTA and the European Union* (1994), 52 (61).

the Agreement.⁴⁵ In contrast, as a point of departure, the EFTA Court does not have jurisdiction over the application or interpretation of the different bilateral Free Trade Agreements, which still exist between the EFTA States and the EU. However, exceptions to the general rule of separation between the EEA Agreement and the bilateral Free Trade Agreements exist in the form of clauses connecting both sets of law. Thus, where the relevant provision of the EEA Agreement is phrased in a way that explicitly calls for an assessment of which of two trade regimes is more favourable in a given factual situation, this is to be distinguished from an interpretation of the Free Trade Agreement.⁴⁶

The EFTA Court has held that the expression ‘court or tribunal’ in Article 34 SCA must be given its own interpretation. In this interpretation, it is not decisive how the body has been labelled under national law. The EFTA Court further noted, that the purpose of Article 34 SCA is to establish co-operation between the EFTA Court and the courts and tribunals in the EFTA States. It is intended as a means of ensuring a uniform interpretation of the EEA Agreement and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of the EEA Agreement. Building on this, from an EU point of view well known, aim, the EFTA Court applied the same criteria as are known from the case law of the Court of Justice in relation to Article 267 TFEU, namely whether the body requesting an advisory opinion had been established by law, had a permanent existence, exercised binding jurisdiction, was bound by rules of adversary procedure, applied the rule of law, and could be considered independent.⁴⁷

The EFTA Court has also sought to apply the principles concerning the distribution of competences between the national court and the court giving the preliminary judgment developed by the Court of Justice in relation to Article 267 TFEU. Thus, the EFTA Court has held that it does not have competence to rule on the interpretation of provisions of national legislation.⁴⁸ Likewise, it has recalled that the procedure provided for in Article 34 SCA is an instrument of cooperation between the EFTA Court and the national courts. In this respect, it is a matter for the national court to examine and evaluate evidence and to make factual findings, and then apply the EEA law (as construed by the EFTA Court) to the facts of the case.⁴⁹

⁴⁵ Case E-2/03 *Ásgeirsson* [2003] EFTA Court Report 185.

⁴⁶ Case E-2/03 *Ásgeirsson* [2003] EFTA Court Report 185.

⁴⁷ Case E-1/94 *Restamark* [1994] EFTA Court Report 15; Joined Cases E-8/94 and E-9/94, *Mattel* [1994–1995] EFTA Court Report 113; Case E-4/04 *Pedidel* [2005] EFTA Court Report 1; Case E-4/09 *Inconsult Anstalt* [2009–2010] EFTA Court Report 86; and Case E-1/11 *Dr A* [2011] EFTA Court Report 484. See also Ch 3, sections 2–3 herein.

⁴⁸ Case E-2/95 *Eidesund* [1995–1996] EFTA Court Report 1; Case E-3/95 *Langeland* [1995–1996] EFTA Court Report 36; Case E-1/01 *Einarsson* [2002] EFTA Court Report 1; Case E-1/10 *Periscopos* [2009–2010] EFTA Court Report 198; and Case E-2/11 *STX Norway Offshore* [2012] EFTA Court Report 4. As for Art 267 see Ch 4, section 4.4 herein. For a modification wholly corresponding to Union law see E-17/11 *Aresbank* [2012] EFTA Court Report 592.

⁴⁹ Case E-8/00 *LO* [2002] EFTA Court Report 114, and see with regard to Art 267 TFEU, Ch 4, sections 4.5 and 4.6 herein.

Once again drawing an analogy to Article 267 TFEU, the EFTA Court has held that under Article 34 SCA it is for the national court to assess whether an interpretation of the EEA Agreement is necessary for it to give judgment.⁵⁰ A party to the main proceedings cannot make the EFTA Court extend the subject matter of a preliminary reference. Since the issues before the EFTA Court are determined by the preliminary reference, the role of the parties is, in the proceedings before the EFTA Court, limited to making suggestions to the Court as to how the reference should be interpreted and the questions answered.⁵¹ Inspiration from the case law concerning Article 267 TFEU has also led the EFTA Court to hold that it can decline to answer a request for an advisory opinion if the question is hypothetical or has no connection with the circumstances or purpose of the main proceedings.⁵² The Court has moreover reiterated the case law of the Court of Justice according to which, in order to provide a useful interpretation in the context of a preliminary ruling, it is necessary that the referring national court sets out the factual circumstances of the submitted questions. The EFTA Court furthermore referred to case law of the Court of Justice that this information must not only enable the EFTA Court to give a reply to the national court, but must also give the governments of the Contracting Parties and other interested parties the opportunity to submit observations pursuant to the Statute of the EFTA Court.⁵³ In this respect, Article 96(3) of the EFTA Court's rules of procedure lays down that a request for an advisory opinion shall be accompanied by a description of the facts of the case as well as a presentation of the provision in issue in relation to the national legal order. According to paragraph 4 of the same provision, the EFTA Court may further ask the national court for clarification.⁵⁴

In *CIBA*, the question arose whether a request for an advisory opinion could be declared inadmissible due to the fact that the same national court had already received an advisory opinion relating to the same dispute before it. The EFTA

⁵⁰ Case E-1/95 *Samuelsson* [1994–1995] EFTA Court Report 145; Case E-5/96, *Ullensaker Kommune* [1997] EFTA Court Report 30; Case E-7/01 *Hegelstad* [2002] EFTA Court Report 310; Case E-2/03 *Ásgeirsson* [2003] EFTA Court Report 185; Case E-5/10 *Kottke*, [2009–2010] EFTA Court Report 320; and Case E-18/11 *Irish Bank Resolution Corporation* [2012] EFTA Court Report 592. As for Art 267 TFEU, see Ch 5 herein.

⁵¹ Case E-6/96 *Wilhelmsen* [1997] EFTA Court Report 53, Case E-10/12 *Hardarson*, Judgment of 25 March 2013; and see similarly with regard to Art 267 TFEU, Ch 10, section 3 herein.

⁵² Case E-1/95 *Samuelsson* [1994–1995] EFTA Court Report 145; Case E-6/96 *Wilhelmsen* [1997] EFTA Court Report 53; Case E-2/03 *Ásgeirsson* [2003] EFTA Court Report 85; Case E-10/04 *Piazza* [2005] EFTA Court Report 76; and Case E-13/11 *Granville Establishment* [2012] EFTA Court Report 400. See similarly with regard to Art 267 TFEU, Ch 5, section 4 herein.

⁵³ Case E-4/01 *Karlsson* [2002] EFTA Court Report 240, and see similarly with regard to Art 267 TFEU, Ch 8, section 3 herein. The influence of the case law of the Court of Justice can also be seen when the EFTA Court answers a request for advisory opinion with reference to other EEA provisions than the ones mentioned by the national court in its question, see eg Case E-4/07 *Porkelsson* [2008] EFTA Court Report 3, and cf Ch 11, section 2.3 herein.

⁵⁴ This possibility was used in Joined Cases C-8/94 and E-9/94 *Mattel* [1995] EFTA Court Report 113.

Court referred to the case law of the Court of Justice according to which a further reference to that court may be justified: inter alia, when the national court encounters difficulties in understanding and applying the preliminary judgment, when it refers a fresh question of law, or when it submits new considerations which might lead to a different answer to a question submitted earlier. In contrast, it is not permissible to use the right to refer a question as a means of contesting the validity of the earlier judgment. The EFTA Court found that the same reasoning should apply in relation to the advisory opinion procedure under Article 34 SCA.⁵⁵

5. Other Ways of Obtaining Legal Guidance from European Union Bodies

5.1. Asking the European Commission for guidance on the interpretation of EU law

5.1.1. *Questions on competition and State aid law*

Procedures whereby national courts may seek assistance from the European Commission have been laid down in the fields of competition and State aid. In some cases these procedures may serve as a substitute for a preliminary reference to the Court of Justice. In this respect, it is of particular importance that the Commission normally will be able to provide an opinion within a significantly shorter time frame than it takes to receive a preliminary ruling from the Court of Justice. Another important difference is that whilst a preliminary ruling by the Court of Justice is binding on the referring court, such an opinion by the Commission is not binding. Obtaining an opinion from the Commission neither affects the national court's possibility of making, nor (where applicable) its obligation to make, a preliminary reference to the Court of Justice.

In competition matters the Commission's provision of assistance to national courts has been set out in Regulation 1/2003 'on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty'⁵⁶ together with the Commission's 'Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC'.⁵⁷ According to this notice, the Commission's duty to assist national courts in the application of EU competition law first of all consists of an obligation to transmit factual information to these courts. For example, a national court may request certain documents from the Commission or may ask for information of a procedural nature regarding such matters as whether a certain case is pending before

⁵⁵ Case E-6/01 *CIBA* [2002] EFTA Court Report, 281.

⁵⁶ [2003] OJ L1/1. Arts 81 and 82 of the EC Treaty correspond to Arts 101 and 102 TFEU.

⁵⁷ [2004] OJ C101/54. Arts 81 and 82 of the EC Treaty correspond to Arts 101 and 102 TFEU.

the Commission, whether the Commission has initiated a procedure on a certain matter, or whether it has taken a position in a given case. A national court may also obtain information about when the Commission expects that a decision will be taken. Indeed, knowledge thereof may be relevant if the national court considers staying proceedings or adopting interim measures.⁵⁸

The notice also provides that a national court may ask the Commission for its opinion on questions concerning the application of the EU competition rules, including its assessment of economic, factual, and legal matters. In this respect, the Commission will, however, limit itself to providing the national court with the requested information or clarification, without considering the merits of the case pending before the national court. Moreover, the Commission will not hear the parties to the case before it submits its opinion to the national court. The parties must therefore deal with the Commission's opinion as part of the case and in accordance with the relevant national procedural rules.⁵⁹

In the field of State aid the Commission has issued a 'Commission notice on the enforcement of State aid law by national courts'.⁶⁰ This notice by and large mirrors the previously described notice on cooperation in competition matters. Thus, the State aid notice also envisages two different forms of Commission support for national courts; first, the national court may ask the Commission to provide information that is in the Commission's possession, and second, the national court may ask the Commission for a non-binding opinion concerning the interpretation of the State aid rules. As in the field of competition, the parties involved in the national proceedings are not heard before the Commission renders its opinion in a State aid matter. Moreover, an opinion under the State aid notice does not consider the merits of the case pending before the national court.⁶¹

⁵⁸ The national court's request for assistance may be submitted in writing to: European Commission, Directorate General for Competition, B-1049 Brussels, Belgium or sent electronically to <comp-amicus@cec.europa.eu>. Further description of the Commission's practice in cooperating with national courts is given in the Commission's annual reports on Competition Policy.

⁵⁹ According to Regulation 1/2003 Art 15(3), the Commission is also competent to submit observations as *amicus curiae* on issues relating to the application and effectiveness of Arts 101 or 102 TFEU to a national court which is called upon to consider those provisions, see Case C-429/07 *X BV* [2009] ECR I-4833, and, before the entry into force of Regulation 1/2003, the English case *Hasselblad v Orbinson* [1985] All ER 173. In this respect, Regulation 1/2003 distinguishes between written observations, which the Commission may submit on its own initiative, and oral observations, which can only be submitted with the permission of the national court. As the regulation specifies that observations shall only be submitted when the coherent application of Arts 101 or 102 TFEU so requires, the Commission in practice limits its observations to an economic and legal analysis of the facts underlying the case pending before the national court. Moreover, the Commission normally only presents observations in appeal cases.

⁶⁰ 2009/C 85/01.

⁶¹ Requests for support in the field of State aid must be addressed to: European Commission, Secretariat-General, B-1049 Brussels, Belgium.

In a case concerning subsidies within the limits of the environmental support framework, the Dutch *College van Beroep voor het bedrijfsleven* (Administrative Court for Trade and Industry) put various questions to the European Commission that were answered in less than three months. The answers were reproduced *in extenso* in the judgment of the Dutch court.⁶²

In *Airport of Eelde*, the Dutch *Raad van State* put questions concerning State aid to the Commission that were answered in less than four months. The Dutch court allowed the parties to the proceedings the possibility of commenting first on the draft questions and, subsequently, on the Commission's answers.⁶³

5.1.2. Questions that do not concern competition or State aid law

It is not often that national courts ask the Commission for assistance when deciding disputes involving EU law other than that of competition or State aid law.⁶⁴ It appears that they prefer either to solve the cases themselves or to use the preliminary procedure.

In the limited number of cases where such a request has nonetheless been made from a national court, the Commission has generally been relatively open to supplying the national court with factual information. Indeed, the Commission is under an obligation to aid the requesting national court with regard to such information, subject to the confidentiality provision in Article 339 TFEU and applicable secondary law.⁶⁵

In *Canadane Cheese Trading*, the Greek Council of State asked the Commission for information concerning the issue whether Feta cheese was first and foremost sold in Greece. In the opinion of the Greek court an answer to that question was relevant for deciding whether an exclusive right to use the Feta name for cheese made in a special manner was justifiable. After having received this information the Greek court made a preliminary reference to the Court of Justice.⁶⁶

In contrast, the Commission has generally abstained from providing a legal opinion on the interpretation of the EU provisions at issue in the national proceedings. Until now, the Court of Justice has not clarified whether this approach is compatible with the general loyalty clause in Article 4(3) TEU. It is, however, submitted that the obligations of the Commission must depend on the kind of EU rule that the question relates to.

⁶² AWB/05/59, Judgment of 10 July 2007.

⁶³ Case 200603116/1, Judgment of 11 June 2008.

⁶⁴ H Kanninen, Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, 18th Colloquium 2002, General Report on the Colloquium Subject 'The Preliminary Reference to the Court of Justice of the European Communities', points 3.8 and 3.10.

⁶⁵ Case C-2/88 IMM *Zwartveld* [1990] ECR I-3365.

⁶⁶ Case C-317/95 *Canadane Cheese Trading* [1997] ECR I-4681; and decisions from the Greek Council of State nos CE 1873/1993, CE 3381/1995, and CE 2469/1997.

If the dispute before the national court concerns an area where the Commission can issue binding decisions, such as in the fields of State aid and competition law mentioned in section 5.1.1 herein, the Commission arguably both can and should assist the national court with an interpretation of EU law. In this situation, the competence of the Commission to issue an opinion follows logically from its more embracing power to issue binding decisions on the same matter. Moreover, it may sometimes be necessary for the Commission and the national court to coordinate their respective actions regarding these types of EU rules in order to avoid irreconcilable positions being taken.

The legal situation is less clear where the national court's question relates to an EU rule that does not grant the Commission competence to issue binding decisions so that the Commission may only enforce its legal position by initiating infringement proceedings before the Court of Justice under Article 258 TFEU.

On the one hand, Article 4(3) TEU establishes a general duty on the Commission to loyally cooperate with national courts and to assist them when needed in order to ensure a correct application of EU law. Moreover, the Commission might wish to steer the development of EU law and to make sure that it is applied correctly. Besides, in many instances the Commission has published guidelines and notices on how various EU rules should be applied. It would thus not be a major step if the Commission would assist national courts in specific cases as long as it only makes general observations and refrains from providing a suggestion for the resolution of the specific case before the national court.

It may also be argued that, particularly where the applicable EU act has been issued by the Commission, it would be less appropriate if the Commission were to refuse to provide a national court that requested an interpretation of this act and hide behind a statement that only the Court of Justice may provide an authoritative interpretation of the relevant rule.

On the other hand, the obligation for the Commission to cooperate loyally with national courts must be construed in light of the overall judicial system laid down in the treaties. Under that system, only the Court of Justice may authoritatively determine the content of EU law. Moreover, Article 267 EU law provides a special mechanism for national courts to request such authoritative interpretations without giving the Commission any equivalent competence.

Where a national court entertains doubts of such magnitude that it contemplates asking the Commission for advice, it might be presumed that the right interpretation of the relevant EU provision is open to doubt. However, if the Commission offers the assistance requested by the national court the result might be that the national court refrains from making a preliminary reference to the Court of Justice on the matter. Thus, not only will the Court of Justice not be given the possibility of authoritatively clarifying the obscure EU law provision; if the ruling of the

national court is not subject to appeal the failure to refer the question to the Court of Justice may constitute a violation of the obligation on courts of last instance to make a preliminary reference as laid down in Article 267(3).⁶⁷

Moreover, even when the question stems from a court against whose decision a right to appeal exists, for the Commission to provide the national court with a form of assistance that Article 267 has placed in the hands of the Court of Justice arguably could constitute a '*détournement de procédure*'. At the very least, one would have to admit that such a practice would not provide for the same legal guarantees as does the preliminary reference procedure laid down in Article 267.

First, an opinion given by the Commission cannot be considered to reflect the position that the Court of Justice would have taken in a preliminary ruling on the same matter. Indeed, this is clear from the fact that the Court of Justice does not invariably follow the observations made by the Commission as *amicus curiae* in preliminary rulings. In fact, there is not even a guarantee that an opinion given by one of the Commission's directorates general (department) will eventually correspond to the position that the Commission itself may take should the same question subsequently be raised in a preliminary reference.

Second, whereas both Member States and EU institutions have a right to present observations in a preliminary reference procedure before the Court of Justice,⁶⁸ neither will normally be invited to present their view on the matter before the Commission provides an opinion to the national court. Not only does this mean that the Commission's answer is likely to be given on a less informed basis than is a preliminary ruling by the Court of Justice; it may also raise issues of rights of defence in cases where the Commission's interpretation implies that national law is incompatible with EU law. Indeed, the alternative to having the national court striking down the national legislation on the basis of a Commission opinion might sometimes be that the Commission commences infringement actions against the Member State regarding this legislation. In such proceedings the Member State concerned will have a right to be heard both before the Commission reaches its own position on the matter in a reasoned opinion and if the case ends up before the Court of Justice.

5.2. Asking the European Ombudsman for Guidance on the Interpretation of EU Law

National ombudsmen do not qualify as courts within the meaning of Article 267 and they can therefore not obtain preliminary rulings from the Court of Justice.⁶⁹ However, since in some respects ombudsmen's workings resemble those of an

⁶⁷ See Ch 6, section 5 herein.

⁶⁸ See Ch 10, section 3.1 herein.

⁶⁹ See Ch 3, section 3.2.4 herein.

administrative court and, generally speaking, public authorities comply with ombudsman opinions, it has been recommended that national ombudsmen should have access to obtaining authoritative advice on the correct interpretation of EU law.⁷⁰ To some extent, this need is met by the national ombudsmen's access to a 'report' of the European Ombudsman on a query concerning EU law and its interpretation.

Thus, in September 1996 the national ombudsmen and similar bodies together with the European Ombudsman agreed upon a procedure whereby the European Ombudsman will receive queries from national ombudsmen about EU law and either provide replies directly or channel the query to an appropriate Union institution or body for response.⁷¹ As of January 2013, 53 such queries had been received.⁷²

The query procedure is based on a non-binding policy agreement between the members of the European network of ombudsmen and is not mentioned in the European Ombudsman's Statute or the Ombudsman's Implementing Provisions. Basic guidelines for the handling of queries are, however, provided in the European Ombudsman's *Legal Officer Handbook*.⁷³

In practice the European Ombudsman will forward the query to the relevant EU institution (usually the Commission) for an opinion and, normally, the Ombudsman does not consider it necessary to carry out an independent and separate examination of the legal issues involved if the opinion obtained is satisfactory.⁷⁴

This has been reflected in the European Ombudsman's report on a query from the Danish Ombudsman where for reasons of confidentiality the Danish Ombudsman asked the European Ombudsman not to submit the case to any other authority, including the European Commission. The European Ombudsman observed that he had no authority to engage in a procedure such as the one found in (what is now) Article 267, by providing interpretation of EU law provisions in pending cases, which concerned national authorities. Although one could argue that nothing hinders an abstract interpretation of the provisions in question by the European Ombudsman, such an interpretation would in reality find either in favour of or

⁷⁰ M Broberg, 'Preliminary References by Public Administrative Bodies: When Are Public Administrative Bodies Competent to Make Preliminary References to the European Court of Justice?', *European Public Law*, 15 (2009), 207, 220.

⁷¹ Letter from the European Ombudsman to the Network of National Ombudsmen and similar bodies of 4 October 1996. The quotation has, inter alia, been reproduced in the European Ombudsman's Annual Report 2000 at p 197. See also Statement adopted at the Sixth Seminar of the National Ombudsmen of EU Member States and Candidate Countries, Strasbourg 14–16 October 2007, <<http://www.ombudsman.europa.eu/en/resources/statement.faces>>.

⁷² Information provided by the European Ombudsman P Nikiforos Diamandouros in a letter of 30 January 2009 to the authors together with information in subsequent annual reports by the European Ombudsman.

⁷³ *The Legal Officer Handbook* is a purely internal and non-binding document.

⁷⁴ eg The European Ombudsman's Annual Report 1999 at 242.

against the national authority concerned. Due consideration had also to be given to the fact that the Statute of the European Ombudsman explicitly provided that no authorities other than EU institutions and bodies came under his mandate. Therefore, the European Ombudsman had to limit himself to undertaking research to provide the Danish Ombudsman with all necessary elements for the case he was examining.⁷⁵ In the actual case the European Ombudsman concluded that there was no case law that directly took a view on the question, that no literature dealing with the question had been found, and that in the preparatory works on the relevant EU act there appeared to be no view on the specific questions that interested the Danish Ombudsman, although a *passus* in the explanatory memorandum on that act ‘could have a bearing on the question’.⁷⁶

It thus appears that the query procedure primarily functions as a kind of transmission service whereby the European Ombudsman assists the national ombudsmen (and similar bodies) in obtaining an opinion by the relevant EU institution.

In 2008 the European Ombudsman received a query from the Danish Ombudsman on the interpretation of Directive 2003/4 on public access to environmental information. Following an eight-page reply from the Commission the European Ombudsman welcomed the Commission’s thorough and well-reasoned opinion on the query and, in the light of the content of that opinion and recalling that the Danish Ombudsman had no comments to make on it, the European Ombudsman considered that the issues raised in the query had been adequately addressed and clarified. The European Ombudsman therefore closed the query.⁷⁷

Where for one reason or another it is not possible to obtain such an opinion the European Ombudsman will assist the national ombudsman who has made the query by providing relevant legal sources that may be of relevance in answering the query. In contrast, the European Ombudsman will normally not express his own opinion as to the interpretation or validity of the EU act in question.⁷⁸

The assistance provided by the European Ombudsman to the national ombudsmen and similar bodies may be of substantial help to the latter. Nevertheless, we have a reservation regarding the European Ombudsman’s practice of transmitting the query to the relevant EU institution to obtain its view on the interpretation or validity of the EU act in question and, often, simply forwarding this opinion to the national ombudsman who has made the query with the rubric that the European

⁷⁵ Query Q1/99/PD reported in The European Ombudsman’s Annual Report 1999 at 243–4.

⁷⁶ The European Ombudsman’s Annual Report 1999 at 245.

⁷⁷ Query Q5/2008/PB from the Danish Ombudsman to the European Ombudsman on the interpretation of Directive 2003/4 of 28 January 2003 on Directive 2003/4 of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313 [2003] OJ L41/26.

⁷⁸ This has also been established in the European Ombudsman’s *Legal Officer Handbook* for the handling of queries. For an apparent exception, see the case reported in the European Ombudsman’s Annual Report 2007 at 93.

Ombudsman has no remarks to make on the EU institution's reply. To our mind, the EU institution cannot always be regarded as an independent arbiter in relation to these EU acts where it may have been responsible for their adoption or is responsible for enforcing Member State compliance therewith. Indeed, this presumably is one of the reasons why the national ombudsmen do not contact the Commission (or other EU institution) directly in order to obtain guidance on the interpretation of EU law. It is therefore problematic that through the formal intervention of the European Ombudsman the opinion of the EU institution is given a rubber stamp which does not appear fully justified. It follows that it may be worth considering a revision of the present practice.

6. The Preliminary Reference System in the Future

6.1. Overview

As explained earlier in section 2, the Court of Justice has taken a number of steps to manage its case-load more efficiently and has succeeded in bringing down the time it takes to process a preliminary reference. Indeed, in 2012 (the latest figures available at the time of writing) the average length of preliminary proceedings was the lowest in the entire period for which the Court has reliable statistical data.

However, to some extent the more recent reduction in the average handling time may be attributed to the three latest enlargements of the EU and the consequent increase from 15 to 28 judges sitting in the Court. Until now this expansion has not been followed by a similar increase in cases from the new Member States.⁷⁹ There is normally a certain time-lag before the full weight of a new Member State is reflected in the Court's case-load.⁸⁰ Thus, it may be expected that within the foreseeable future there will be a substantial growth in the number of both preliminary references and direct actions relating to the new Member States. At the same time there has been an extension of the areas of law in which it is possible to make a preliminary reference. Of particular importance is the Lisbon Treaty's expansion of the Court's jurisdiction in the field of police and judicial cooperation.⁸¹ On that basis, it has been predicted that the Court will soon face 'another crisis of workload'.⁸²

⁷⁹ See Tables 2.2 and 2.3 in Ch 2, section 1 herein. M Bobek, 'Learning to Talk: Preliminary Rulings, the Courts of the new Member States and the Court of Justice', *CML Rev*, 45 (2008), 1611, 1642, notes that the increase in the number of judges has not been matched by a proportionate reduction in the length of proceedings. However, a proportionate reduction was not to be expected considering that much of the time spent on a preliminary reference is connected with work such as translation which is not dependent on the capacity of the Court's judges.

⁸⁰ See Ch 2, section 2 herein.

⁸¹ See Ch 4, section 2.2.2 herein.

⁸² House of Lords, European Union Committee, 14th Report of Session 2010–11, 'The Workload of the Court of Justice of the European Union', 8 and 17–18.

The future challenge for the preliminary procedure is thus to achieve a balance where the Court is not asked to treat more cases than it can handle while still ensuring that EU law is being developed primarily by the Court of Justice itself. Indeed, if no measures are taken it is not unlikely that both the unity and the impact of the Court's decisions will diminish as their number increases and as they deal more frequently with questions of secondary importance or of interest only in the context of the case concerned. The difficulty in this task has not become smaller considering that presently the Member States' appetite on embarking on further Treaty change is rather limited, just as it is unlikely that changes of a more costly nature will find favour with the Member States in times where the States themselves are facing tough budgetary decisions.⁸³

In the following sections we will discuss various measures that may be taken in order to cater for the problems that will flow from the expected increase in the number of references. We first consider the possibility of transferring (some) preliminary reference cases to the General Court (section 6.2). Thereafter we examine the so-called green light procedure, namely a procedure where the referring court explains how it believes that the preliminary question should be answered following which the Court of Justice may either give a green light to the proposed solution or admit the case for normal consideration, thus itself giving a preliminary ruling (section 6.3). Following this, we look at what is normally referred to as docket control, meaning that the Court of Justice is given the power to choose which of the preliminary references it will admit for a normal examination and which it will decline to consider (section 6.4). Another way that has been suggested for coping with the expected problems is to limit the right of national courts to make preliminary references so that only references by courts of last instance will be admitted (section 6.5). We then consider the possibility of introducing decentralized EU courts to relieve the pressure on the Court in Luxembourg (section 6.6). Finally, we sum up what, in our opinion, is the best way forward (section 6.7).

6.2. Transfer of Preliminary Cases to the General Court

According to Article 256 TFEU, the Council may decide that the General Court shall be given jurisdiction to give preliminary rulings in 'specific areas' which are to be laid down by the Court's Statute. The relevant parts of the provision read as follows:

3. The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute.

⁸³ House of Lords, European Union Committee, 14th Report of Session 2010–11, 'The Workload of the Court of Justice of the European Union', 24.

Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

To date the General Court has not been attributed any such preliminary cases. Nor is such transfer on the immediate agenda. To some extent this may be explained by the fact that presently the case-load of the Court of Justice is smaller than that of the General Court meaning that on average the Court of Justice spends less time on processing its cases than does the General Court. A prerequisite for transferring cases therefore seems to be a substantial increase of judges in the General Court from the present 28.

Several provisions in the Statute of the Court of Justice and its Rules of Procedure have already been introduced to cater for such a transfer.⁸⁴ These provisions shall ensure that where there is a serious risk of the unity or consistency of EU law being affected, the Court of Justice shall be given the powers to review a preliminary ruling of the General Court. In the first place this review will be performed by the First Advocate General of the Court of Justice who may propose, within one month of delivery of a preliminary ruling of the General Court, that the Court of Justice reviews that ruling. Within one month of receiving this proposal, the Court of Justice shall decide whether or not the preliminary ruling should be reviewed. If it decides in the affirmative it will deal with the case by means of an urgent procedure. If at that point the Court of Justice finds that the preliminary ruling of the General Court affects the unity or consistency of EU law, the answer it gives to the preliminary question will replace the one initially given by the General Court.

In addition, instead of processing a preliminary reference at the very outset of the procedure the General Court may itself refer a case to the Court of Justice if the case requires a decision of principle likely to affect the unity or consistency of EU law.

While arguably these safety valves are necessary to ensure the coherence of EU law, they simultaneously make the preliminary reference procedure more complicated and in those situations where these special procedures are actually put into use, they are likely to mean that the procedure will take even longer than is the case today.

One problem in relation to a transfer of 'specific areas' of preliminary cases to the General Court is the difficulty in identifying areas of EU law that constitute separate bodies of law whose interpretation is unlikely to affect other areas of law.

⁸⁴ Arts 62–62b of the Statute as well as Arts 191 and 194–5 of the Court's Rules of Procedure.

It has been argued that transferring certain groups of cases to the General Court may risk compromising the need for uniform interpretation.⁸⁵ Indeed, considering that any subject matter of EU law may involve aspects of EU constitutional law, it would not be easy to separate so-called ‘constitutional issues’, to be reserved to the Court of Justice, from other types of issues, susceptible to be transferred to the General Court.⁸⁶

That being said, it seems likely that this problem will only materialize infrequently.⁸⁷ Most preliminary questions are of a rather technical nature. They thus relate to questions that would in many national legal systems never arrive at a supreme court and it is therefore not obvious why in a multi-instance court system EU law should not be able to live with a similar treatment to that in national legal systems. Moreover, it is not easy to see why every single constitutional issue or problem of unity and coherence must necessarily be dealt with by the Court of Justice; in our opinion only novel, complex, and important issues need to be decided by the Court of Justice itself as the ‘supreme court’ of EU law.

The reservations outlined here regarding a transfer of competence to the General Court seem to be based on a belief that the safeguards provided by the treaties and the Statute of the Court of Justice would not suffice to avoid such risks.⁸⁸ It is, however, not clear why that should be the case.⁸⁹ Not even the present system guarantees full coherence and unity as most of the cases in the Court of Justice are decided by smaller chambers. Hence, incoherence may already arise under the present scheme where there is no system of rectification like the one envisaged if a transfer of jurisdiction is made to the General Court.

Others fear that national courts of last instance, in particular, might be less inclined to refer preliminary questions to a court which is not the ultimate court within its own legal system. The logic seems to be that a change of partner in a

⁸⁵ R Colomer, ‘La Réforme de la Cour de justice opérée par la traité de Nice et sa mise en oeuvre future’, *Revue trimestrielle de droit européen*, 37(4) (2001), 705–25.

⁸⁶ K Lenaerts, ‘The Unity of European Law and the Overload of the ECJ: The System of Preliminary Rulings Revisited’ in I Pernice et al (eds), *The Future of The European Judicial System in a Comparative Perspective* (2005), 212, 233. See also the opinions of K Schiemann, A Arnall, and E Sharpston in House of Lords, European Union Committee, 14th Report of Session 2010–11, ‘The Workload of the Court of Justice of the European Union’, 30 and 62.

⁸⁷ T Tridimas, ‘Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure’, *CML Rev*, 40 (2004), 9, 20–1.

⁸⁸ Indeed, this seems to be the opinion of the Court of Justice itself when the Court, in its proposal of 28 March 2011 for amendments to the Statute of the Court of Justice at p 9, argues that a transfer of certain types of preliminary reference cases should not be made *inter alia* because the review procedure is ‘not an appropriate tool for ensuring consistency of case law other than in relation to important issues of principle’. The Court also expresses the previously discussed fear that the allocation of questions between the two courts ‘could create confusion among the Member States’ courts and discourage them from referring such questions’.

⁸⁹ B Vesterdorf, ‘A Constitutional Court for the EU?’ in I Pernice et al (eds), *The Future of the European Judicial System in a Comparative Perspective* (2005), 83, 88, but contrast with Advocate General Colomer in paras 71–4 of his Opinion in Case C-17/00 *De Coster* [2001] ECR I-9445.

long-standing relationship might endanger the mutual confidence that the present system is believed to represent.⁹⁰ The validity of these arguments is very difficult to assess. However, they should probably not be overemphasized. Indeed, it does not seem very likely that courts of last instance of the Member States would disregard the obligation to refer laid down in Article 267(3) merely because jurisdiction is transferred from the Court of Justice to the General Court.

In our opinion it might not be ideal to divide competence in the field of preliminary references between the Court of Justice and the General Court. Nevertheless, if the number of cases before the Court of Justice develops as it is feared they might, radical steps will be necessary. In such a scenario, transferring competence to the General Court in certain limited fields of the law appears to represent the best long-term solution compared to other solutions that have been tabled until now.

Possible areas to be transferred to the General Court are customs matters and trade mark cases⁹¹ as well as questions relating to the Brussels I Regulation, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.⁹² Moreover, it has been argued that a substantial proportion of preliminary questions involve indirect challenges to the validity of EU legislation and that the substance of such cases is very similar to direct actions under Article 263 TFEU which at present are already heard by the General Court. It has therefore been suggested that the General Court should also be able to deal with such issues of law when they emerge indirectly via national courts as requests for preliminary rulings.⁹³

It is true that a transfer of this type of case might create a certain synergy effect. Moreover, at first sight it may seem odd that different courts hear the case depending on whether it has gone directly to Luxembourg or originates from national proceedings. Nevertheless, as pointed out by Judge Lenaerts, such reasoning overlooks the fact that a judgment of the General Court in a direct case is subject to full appeal to the Court of Justice on points of law thereby giving the latter an effective vehicle to steer the interpretation and development of EU law. In contrast, a preliminary ruling by the General Court will not be subject to a right of appeal, but will in principle be definitive, subject only to exceptional review on the proposal of

⁹⁰ See A Dashwood and AC Johnston, 'Synthesis of the Debate' in A Dashwood and AC Johnston (eds), *The Future of the Judicial System of the European Union* (2001) 55, 63.

⁹¹ P Dyrberg, 'What Should the Court of Justice Be Doing', *EL Rev*, 26 (2001), 291, 296–7; J Azizi, 'Opportunities and Limits for the Transfer of Preliminary Reference Proceedings to the Court of First Instance' in I Pernice et al (eds), *The Future of The European Judicial System in a Comparative Perspective* (2005) 241, 251–3; and N Forwood in House of Lords, European Union Committee, 14th Report of Session 2010–11, 'The Workload of the Court of Justice of the European Union', 31. Forwood also mentions competition cases.

⁹² Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1. See further O Due, 'The Working Party Report' in A Dashwood and AC Johnston (eds), *The Future of the Judicial System of the European Union* (2001), 87, 89.

⁹³ P Craig and G de Búrca, *EU Law, Text, Cases and Materials* (2011), 482.

the First Advocate General of the Court of Justice. It could therefore just as well be argued that the parallelism between direct actions and preliminary rulings would be more likely to be broken than achieved by such a transfer, as the General Court would effectively be delivering quasi-final preliminary rulings in areas of law in which it acts as a true first instance court on points of law when it hears similar issues in direct actions. It will only be possible to achieve full parallelism in those special areas where the General Court in direct cases functions as an appellate court.⁹⁴ Hitherto the General Court has only had this function in areas that do not give rise to preliminary references, namely staff cases.

6.3. Green Light Procedures

Another way of dealing with the expected increase in the number of preliminary references is via a so-called 'green light procedure'. Under this procedure, when making a preliminary reference national courts would be encouraged, and perhaps even obliged, to include a proposal suggesting the answers to be given. The Court of Justice may then dispose of the case by giving a 'green light' to this proposal, with or without modifications. Where the Court of Justice does not immediately agree with the referring court's proposal, or where for other reasons the Court is of the view that the case should be dealt with in a more elaborate manner, the case will be submitted for the ordinary preliminary reference procedure.⁹⁵

The green light procedure may take many different forms. In particular, it may be of importance whether the Member States and EU institutions are given the possibility of presenting their view on the substance of the question, whether they are only given the right to comment on the feasibility of giving the green light, or whether they are not given any possibility at all of presenting their view before the Court of Justice has decided whether or not to give the green light.

A variant of this idea consists of a 'red light procedure' whereby the referring court delivers a 'judgment nisi', namely a 'draft judgment' that is sent to the Court of Justice together with a preliminary reference; if the Court of Justice then fails to respond to the reference within a given time limit, the national court's 'draft judgment' becomes final.⁹⁶

⁹⁴ K Lenaerts, 'The Unity of European law and the Overload of the ECJ: The System of Preliminary Rulings Revisited' in I Pernice et al (eds), *The Future of The European Judicial System in a Comparative Perspective* (2005), 212, 234–6, 256.

⁹⁵ On such a model see further the Court of Justice's 1999 'Report on the Future of the Judicial System of the European Union'; and the 2000 Report of the Working Party on the Future of the European Communities' Court System (the so-called 'Due Report'). In a resolution of 9 July 2008 on the role of the national judge in the European judicial system, the European Parliament has called for the consideration of a 'green light' system, see point 13 of the resolution. See also F Jacobs in House of Lords, European Union Committee, 14th Report of Session 2010–11, 'The Workload of the Court of Justice of the European Union', 31–2, who advocates for such a reform.

⁹⁶ A Dashwood and AC Johnston, 'Synthesis of the Debate' in A Dashwood and AC Johnston (eds), *The Future of the Judicial System of the European Union* (2001), 45, 68–9.

Depending on the way in which the referring court presents its proposal, both a green light system and a red light system could provide an efficient means for the Court of Justice to dispose of a considerable number of preliminary references. At best, the procedure could enable the Court to find the right balance between, on the one hand, its limited resources and, on the other hand, the need for unity and consistency in the interpretation and development of EU law. In the long run the role of the Court could evolve from its present role of de facto semi-adjudication into a role of partial monitoring of the administration of EU law at the national level.

A green light procedure is not without its problems however. For such a procedure to work well, the referring court must have a good knowledge of the relevant field of EU law.⁹⁷ While it might already be tricky to identify the relevant EU law question, it is an altogether more difficult matter to come up with a qualified proposal for its resolution. For that reason, a green light procedure would probably work best if it is merely an option for the referring court which may continue to pose questions under the classical preliminary reference procedure.

In addition, a green light procedure would raise a host of questions concerning the precedent value of the referring court's opinion when it is accepted by the Court of Justice. It should, for example, be clear whether the Court of Justice agrees only with the proposed conclusions or also with the national court's legal reasoning. Presumably, it should be provided that under such a system only a 'normal' preliminary ruling of the Court of Justice with reasons would constitute a binding precedent on national courts other than the referring court.

6.4. Docket Control

The US Supreme Court applies a so-called *certiorari* system—sometimes referred to as docket control—whereby it carries out a preliminary examination in order to decide whether to hear a case or let the decision of the lower court stand without having been tried by the Supreme Court. It has been discussed whether the Court of Justice should apply a similar system.⁹⁸

Introducing a docket control system would provide a structural response to the expected growth in the number of preliminary references. By allowing the Court of Justice to weed out, at a preliminary stage, cases of lesser importance from the point of view of the uniformity and development of EU law, such a system would enable the Court to concentrate on the most notable issues of EU law. Thereby,

⁹⁷ X Groussot et al, *Empowering National Courts in EU Law* (2005), 26.

⁹⁸ H Rasmussen, 'Remedying the Crumbling EC Judicial System', CML Rev, 37 (2000), 1071–112; and F Jacobs in House of Lords, European Union Committee, 14th Report of Session 2010–11, 'The Workload of the Court of Justice of the European Union', 31.

the Court might be able to influence the development of the law in a more effective manner than under the present system where much of its time is spent on trifling cases.

A docket control system however involves a risk of distorting judicial cooperation between the national courts and the Court of Justice, which has hitherto been heralded as the heart and soul of the preliminary procedure.⁹⁹ A way of diminishing this risk could possibly be by combining a docket control system with the green light system discussed earlier, so that in its preliminary reference the national court would include a proposed reply to the question referred. Such a combination also has the advantage that the proposed reply could provide a basis for the Court's decision as to whether to admit the preliminary question or whether to leave it to the national court to interpret the relevant EU rule itself.

Another advantage of a docket control system is that it is likely to prompt national courts to exercise increased selectivity regarding which questions to refer and thus encourage them to exercise more fully their own functions as EU courts. The other side of the coin however is that if the national courts become too restrained this could jeopardize the preliminary ruling system's objective of ensuring a uniform interpretation of EU law. Moreover, this would place the Court of Justice in a position to 'pick and choose' enabling it to circumvent sensitive issues;¹⁰⁰ arguably it might be possible to eliminate this risk by leaving the decision of which cases to admit to an independent review body.

Finally, one should be hesitant in drawing parallels with the US system. While the US system functions as part of an appeal procedure, the preliminary reference system does not. The US Supreme Court exercises its discretion upon a reading of a decision of a lower federal court, and if the Supreme Court refuses to hear a case, the decision of the lower federal court will stand. In comparison, if a docket control system were to be introduced as part of the preliminary reference system, the Court of Justice would be required to decide on whether to admit the case before the referring court has pronounced its own view on the matter. Moreover, if the Court of Justice refuses to hear the case because it is not sufficiently important or novel, no EU court will have pronounced itself on the issue in doubt.¹⁰¹ Whereas the US Supreme Court occupies a superior hierarchical position vis-à-vis the court whose decision is subject to the docket control decision, the Court of Justice and

⁹⁹ A Arnall, 'Judicial Architecture or Judicial Folly? The Challenge Facing the EU', in A Dashwood and AC Johnston (eds), *The Future of the Judicial System of the European Union* (2001), 41, 45, as well as A Dashwood and AC Johnston, 'Synthesis of the Debate', in the same book, 55, 64.

¹⁰⁰ T Koopmans, 'The Future of the Court of Justice of the European Communities' in A Barav and DA Wyatt (eds), *Yearbook of European Law*, 11(1991), 1, 30.

¹⁰¹ P Graig and G de Búrca, *EU Law, Text, Cases and Materials* (2007), 496; and T Koopmans, 'The Future of the Court of Justice of the European Communities' in A Barav and DA Wyatt (eds), *Yearbook of European Law*, 11(1991), 1, 29.

national courts do not form part of one and the same judicial system and are thus not in a hierarchical relationship with one another. Rather, the preliminary reference system is based on cooperation and dialogue between different types of court each having their respective function.¹⁰² These important differences may make it difficult to introduce a docket control system in a satisfactory manner.

6.5. Limiting the Right to Refer to Courts of Last Instance

Another option could be to limit the right to make a preliminary reference to national courts of last instance.¹⁰³ Indeed, this system has previously been applied with regard to references under Article 68¹⁰⁴ of the former EC Treaty as well as to references made under Article 35¹⁰⁵ of the former EU Treaty provided a Member State had made a declaration under Article 35(3)(a) to this effect.¹⁰⁶

Today a large number of references are made by courts other than those of last instance.¹⁰⁷ Therefore, allowing only courts of last instance to refer is likely to lead to a considerable reduction in the number of references and thus to a reduction of the time it takes to deliver a preliminary ruling in those few remaining cases.

However, limiting the right to make preliminary references to courts of last instance could have the perverse effect of encouraging litigants to pursue their cases to the highest court simply to gain access to the Court of Justice.¹⁰⁸ This will not only create unnecessary work at the national level it will also mean that some national cases will take even longer time to solve than they do today. Moreover, if such a practice were to become widespread, the desired reduction in the work-load of the Court of Justice could be more limited than is otherwise expected. In this connection it should not be forgotten that, as a main rule, national courts of last instance are under a duty to refer questions of EU law which arise in the main proceedings.

Second, preliminary references from lower courts have played a crucial role in the development of EU law, and there is no reason to assume that this will not continue to be the case in the future as well. Therefore, restricting lower courts' access to make preliminary references may adversely affect the future development of EU law.

¹⁰² The Due Report, 21, and section 1 herein.

¹⁰³ For an advocate of such a system, see H Rasmussen, 'Remedying the Crumbling EC Judicial System', *CML Rev*, 37 (2000), 1071–112.

¹⁰⁴ Concerning visas, asylum, immigration, and other policies related to free movement of persons.

¹⁰⁵ Concerning police and judicial cooperation in criminal matters.

¹⁰⁶ The Treaty of Lisbon abandoned this limitation on the right to refer. See M Broberg and N Fenger, *Preliminary References to the European Court of Justice* (1st edn, 2010).

¹⁰⁷ See M Broberg and N Fenger, *Preliminary References to the European Court of Justice* (1st edn, 2010), 38 ff.

¹⁰⁸ O Due, 'The Working Party Report' in A Dashwood and AC Johnston (eds), *The Future of the Judicial System of the European Union* (2001), 87, 88; and H Schermers, 'Problems and Prospects', in the same book at 31, 33–4.

Third, a system with restricted access to make preliminary references may negatively affect the uniform interpretation and application of EU law amongst the national courts. Not only may this adversely affect the legal protection that EU law offers, it could also be argued that it might alienate lower courts from EU law.¹⁰⁹

Moreover, a limitation like the one set out here will mean that questions which primarily arise in cases that rarely reach the highest national courts are unlikely to be referred to the Court of Justice. In practice it means that important questions of EU law may never reach the Court of Justice if such questions arise in those cases where normally the parties do not have the necessary resources to bring the question all the way to the highest national courts.

Fourth, the Court of Justice has sole jurisdiction to declare an EU act invalid. Therefore, if a question of the validity of an EU act arises before a national court this court is obliged to make a preliminary reference to the Court of Justice before it may declare the EU act invalid. However, where a national court is not competent to make a preliminary reference it will be placed in an unacceptable position where it will either have to declare the EU act invalid in contravention of the practice of the Court of Justice, or will have to pass judgment based on an EU act that the national court considers to be invalid.

In conclusion, limiting the access to make preliminary references to courts of last instance would not be a recommendable solution to the problems connected to the Court's case-load.

6.6. Decentralized European Union Courts

Finally, a radical way of relieving the preliminary reference pressure on the Court of Justice is by setting up a number of regional courts that may undertake parts of the work that weighs on the Court today.¹¹⁰ This could be done either by setting up a number of new EU courts or by appointing a number of existing national courts to act as specialized EU law courts. Either way, the regional courts would be subject to some kind of control by the Court of Justice.

Creating such regional courts to answer preliminary questions would do much to put the Court of Justice in a position where it could focus upon the most important EU law issues. Another advantage of a system whereby regional courts answer preliminary references would be its proximity to the referring national courts and the parties to the main proceedings. This would particularly be the case if one were to establish decentralized EU courts in all Member States, as these courts would then

¹⁰⁹ See further the discussion by F Jacobs, 'Introducing the Court's Paper' in A Dashwood and AC Johnston (eds), *The Future of the Judicial System of the European Union* (2001), 9, 11.

¹¹⁰ J Jacqué and J Weiler, 'On the Road to European Union—A New Judicial Architecture: An Agenda for the Intergovernmental Conference', *CML Rev*, 27 (1990), 185, 192.

be able to operate in the language of the referring court, thereby also removing the need for expensive and time-consuming translation.

At the same time a decentralization of the system will make it more difficult to ensure the requisite unity and coherence of EU law. Indeed, it has been argued that the location of the Court of Justice in one place has a significant integrative effect and contributes to ensuring the unity and coherence of the law. In comparison, decentralizing the system entails a risk that 'national' or 'regional' EU law may develop.¹¹¹ Therefore some kind of appeal procedure to the Court of Justice would have to be established.¹¹² Such a structure would, however, bear a clear resemblance to a federal structure. Moreover, whenever a ruling by one of the regional courts was examined by the Court of Justice this could lead to unduly long delays.¹¹³

In conclusion, in our opinion, regional courts should not be the first choice for solving the problems stemming from the expected increase in the number of preliminary references.

6.7. The Best Way Forward?

To sum up, today the average length of preliminary proceedings is the lowest in more than 20 years. Nevertheless, it is likely that the number of references will increase significantly in the future. Therefore, if no preventive measures are taken there is a risk that the efficiency of the preliminary ruling system will be seriously threatened. To meet this threat, should it materialize, a number of different solutions have been put forward. The most important of the proposed solutions have been considered here. All of these proposed solutions display strengths as well as weaknesses. One solution, however, stands out as superior, namely the transferring of (certain) preliminary references to the General Court whilst simultaneously substantially increasing the number of judges at that Court.

¹¹¹ S Prechal, 'The Preliminary Procedure: A Role for Legal Scholarship?' in *The Uncertain Future of the Preliminary Rulings Procedure*, Symposium Council of State, the Netherlands, 30 January 2004; A Arnull, 'Judicial Architecture or Judicial Folly? The Challenge Facing the EU' in A Dashwood and AC Johnston (eds), *The Future of the Judicial System of the European Union* (2001), 41, 45; and O Due, 'The Working Party Report' in the same book, 87, 88.

¹¹² According to the proposal made by J Jacqué and J Weiler, preliminary rulings made by the regional courts would be open to appeal by the parties in the main proceedings, the Commission, the Council, the European Parliament, and/or the Member States, but it would still be within the discretion of the Court of Justice whether to hear the appeal. An appeal would be granted if the case raised an important issue of EU Law, if the regional court decision created inconsistency between the jurisprudence amongst the regional courts, or if the Court of Justice believed that a clear error of law had been committed, see J Jacqué and J Weiler, 'On the Road to European Union—A New Judicial Architecture: An Agenda for the Intergovernmental Conference', *CML Rev*, 27 (1990), 185, 193.

¹¹³ T Koopmans, 'The Future of the Court of Justice of the European Communities' in A Barav and DA Wyatt (eds), *Yearbook of European Law*, 11 (1991), 28.