FROM THE DUTY TO REFER TO THE DUTY TO STATE REASONS: THE PAST, PRESENT AND FUTURE OF THE PRELIMINARY REFERENCE PROCEDURE

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Although national courts of last instance are subject to a duty to refer under Article 267, paragraph 3, TFEU, the Court of Justice has significantly qualified that duty since Cilfit, thereby contributing to making failures to refer a widespread phenomenon. While reasserting a strict duty to refer is no realistic option in view of the workload of the Court, of the habits taken by national courts of last instance and also of the cooperative relationship that underpins the preliminary reference procedure, it was arguably imperative for the Court of Justice to alter its case-law in a way that would, at the same time, keep the flexibility offered by Cilfit, ensure that national courts of last instance do not unduly escape what formally remains of their duty to refer and devise suitable monitoring mechanisms and ultimately sanctions against unlawful failures to refer.

The Court of Justice has recently embarked on that path by clarifying the scope of the still relative duty to refer and, above all, by coming up with an absolute duty for national courts of last instance to state reasons when deciding not to refer questions to the Court. While that duty raises new challenges for the preliminary reference procedure, this paper claims that it is a most suitable means to guarantee the effectiveness of the duty to refer. By modifying the place of the parties to the main processing within the preliminary reference procedure, the duty to state reasons does not only enhance the latter's rights but it also heralds a new approach to the issue of the enforcement of the duty to refer.

Keywords: Court of Justice; Article 267 TFEU; National courts of last instance; Duty to refer; *Cilfit*; Duty to state reasons

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I. INTRODUCTION

The issue of Member States' compliance with EU law has always been key in the story of European integration. When reflecting more particularly on preliminary references and the authority of the Court of Justice of the European Union (hereinafter 'the Court' or 'the Court of Justice'), it is common to look downstream: do national courts comply with the judgments issued by the Court within the preliminary reference procedure? Ominous cases where a national court decides in all awareness not to comply with a preliminary judgment of the Court are usually resounding. The main

snubs of such breed are well-known.[1] However, cases of loud non-compliance represent the tip of the non-compliance iceberg. Most cases of non-compliance are actually silent, if not mute.[2] They can themselves be divided into two categories. First, when a national court does not comply with a Court's judgment and no one realises it: that is particularly so when, despite its goodwill, a national court is unable to apply or simply understand one of those sometimes-cryptic judgments, especially in complex and technical matters. As a result, the national court may adopt a solution which is at odds with the Court's judgments. Second, more upstream, when a national court does not comply at all with Article 267 TFEU: the former silences the Court itself by not offering it the opportunity to make a pronouncement on an issue of EU law that arose before the national court.

This paper focuses on the latter phenomenon: failures to refer. A failure to refer occurs when a national court does not refer questions whereas it is subject to the obligation to do so. Since first and second instance courts have only a faculty to refer under Article 267, paragraph 2, TFEU, failures to refer can therefore merely originate in national courts of last instance upon which Article 267, paragraph 3, TFEU imposes a duty to refer where a question concerning the interpretation, or the validity of EU law is raised before them.

[1] See the cases of non-compliance of the Czech Constitutional Court following Case C-399/09 *Landtová* EU:C:2011:415; of the Danish Supreme Court following Case C-441/14 *Dansk Industri* EU:C:2016:278; of the German Federal Constitutional Court following Case C-493/18 *Weiss* e.a. EU:C:2018:1000; of the Romanian Constitutional Court following Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia "Forumul Judecătorilor Din România" e.a.* EU:C:2021:393.

[2] See Michal Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice Through the Eyes of National Courts', in Maurice Adams, Johan Meeusen, Gert Straetmans, Henri de Waele (eds), *Judging Europe's Judges* (Hart 2013) 197-234.

Although national courts of last instance are subject to a duty to refer in such circumstances, failures to refer have become a widespread phenomenon.[3] While some national courts of last instance have a good record of preliminary references to the Court of Justice, others feature an abnormally low number of references.[4] That phenomenon may be explained by various political and sociological reasons.[5] Those reasons range from sheer negligence (I do not bother with EU law) to the lack of sufficient knowledge about EU law (I do not really know what to do with that argument deriving

[3] More generally on the attitude of national judges vis-à-vis preliminary references and the practice of not referring cases, see Morten Broberg, Niels Fenger, 'Variations in Member States' Preliminary References to the Court of Justice - Are Structural Factors (Part of) the Explanation?', (2013) 19 European Law Journal 488; Jasper Krommendijk, *National Courts and Preliminary References to the Court of Justice* (Edward Elgar 2021); Tommaso Pavone, 'In This Bureaucratic Silence EU Law Dies': Fieldwork and the (Non-) Practice of EU Law in National Courts', in Mikael Madsen, Fernanda Nicola, Antoine Vauchez (eds), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022) 27-48.

[4] Measuring failures to refer on the part of national courts of last instance is a daunting task. No precise judicial statistics are available to that effect. However, it is possible to get a rough idea by carrying out a cross-analysis of various data provided by the Court of Justice, namely the total number of cases referred to the Court per Member State (while keeping in mind the overall size of the population in each Member State) together with the breakout between the cases referred by the courts of last instance as opposed to the other national courts; see Cour de Justice de l'union Européenne, *Rapport annuel 2022 Statistiques judiciaires de la Cour de justice* (CURIA 2022), 23-27. In the official statistics it appears that Belgian, German, Italian, Dutch, Austrian or Portugal courts of last instance have a good record of preliminary references while French, Spanish, Hungarian or Romanian courts of last instance do not. See also Chantal Mak, Elaine Mak, Vanessa Mak, 'De verwijzende rechter. Rechtspolitieke verandering via prejudiciële vragen van lagere rechters aan het Europese Hof van Justitie' (2017) Nederlands Juristenblad 1724.

[5] On the various reasons underpinning the decision of national courts (not) to refer, see Krommendijk (n 3), 77-109; Niels Fenger, Morten Broberg, *Preliminary References to the European Court of Justice* (3rd edn, Oxford University Press 2021), chapter 6.

from EU law), pragmatism, sometimes combined with overconfidence (I think I know what EU law means and I can avoid further delay and settle the issue myself) or distrust towards the Court's authority (I do not want to take the risk of asking questions to the Court for fear the latter reaches an outcome that I do not like).

Beyond those reasons, failures to refer would arguably not be that widespread if the Court of Justice itself had not legally contributed to them ever since *Da Costa*[6] and, above all, in the by now venerable *Cilfit* judgment.[7] While the duty to refer is worded in absolute terms in Article 267, paragraph 3, TFEU indeed, the Court interpreted it in a highly relative manner back in 1982. That judgment famously laid down three exceptions to the national courts of last instance's duty to request a preliminary ruling: a) when the question on EU law raised is irrelevant; b) when the EU law provision in question has already been interpreted by the Court (*acte éclairé*); c) when the

[6] Case 28 to 30/62, *Da Costa en Schaake NV et al*. EU:C:1963:2.

[7] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA* v *Ministry of Health* EU:C:1982:335. Among the vast literature, see for example Gerhard Bebr, 'The Rambling Ghost of "Cohn-Bendit": Acte Clair and the Court of Justice' (1983) 20 Common Market Law Review 439-472; Haltje Rasmussen, 'The European Court strategy in Cilfit. Or: Acte Clair, of Course! But What does it Mean?' (1984) 9 European Law Review 242-259; Koen Lenaerts, 'La modulation de l'obligation de renvoi préjudiciel' (1983) Cahiers de droit européen 471; Federico Mancini, David Keeling, 'From CILFIT to ERT : the Constitutional Challenge facing the European Court' (1991) 11 Yearbook of European Law 1; David Edward, 'Cilfit and Foto-Frost in their historical context', in Miguel Poiares Maduro, Loïc Azoulai (eds), *The Past and Future of EU Law* (Hart 2010) 173-184; Anthony Arnull, 'Judicial Dialogue in the European Union', in Julie Dickson, Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 199; Jacobien van Dorp, Pauline Phoa, 'How to Continue a Meaningful Judicial Dialogue About EU Law? From the Conditions in the CILFIT Judgment to the Creation of a New European Legal Culture' (2018) 34 Utrecht Journal of International and European Law 73–87.

correct application of EU law is so obvious as to leave no scope for any reasonable doubt (the *acte clair* doctrine).

The *Cilfit* exceptions have been described by commentators such as Mancini, Keeling or Rasmussen as the result of a give-and-take.[8] When it comes to the third exception indeed, *Cilfit* granted a great deal of discretion to national courts of last instance while, at the same time, curtailing that discretion by setting out a few 'criteria'[9] that national courts have to look at to decide whether there is reasonable doubt.[10] By failing to impose on

[8] Mancini and Keeling (n 7), Rasmussen (n 7).

[9] Views have differed regarding the nature of the various elements set out by the Court as cumulative, 'to-be-ticked' criteria or a as general interpretive toolbox to assess the existence or absence of reasonable doubt as to the correct application of EU law. See Rasmussen (n 7); Hjalte Rasmussen, 'Remedying the Crumbling EC Judicial System' (2000) 37 Common Market Law Review 1071; Takis Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 Common Market Law Review 42. Following the judgments in Cases C-72/14 and C-197/14 *X and van Dijk* EU:C:2015:564 and Case C-160/14 *Ferreira da Silva e Brito* EU:C:2015:565, the general view nowadays is that they are not strict criteria to be fulfilled in all circumstances. See Alexander Kornezov, 'The New Format of The Acte Clair Doctrine And Its Consequences' (2016) 53 Common Market Law Review 1317; Agnè Limante, 'Recent Developments in the Acte Clair Case Law of the EU Court of Justice: Towards a more Flexible Approach' (2016) 54 Journal of Common Market Studies 1384-1397 ; Case C-561/19 *Consorzio Italian Management II* EU:C:2021:291, Opinion of AG Bobek, para 69 ff.

[10] Those criteria were laid down in paragraph 16 to 20 of the judgment. According to the Court, 'before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice … The existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.' That entailed more specifically, first, a comparison of the different language versions ; second, the taking account of the specific terminology used by EU law and the fact that legal concepts do not necessarily have the same meaning in EU law and in the law of the

national courts of last instance a preliminary reference in all circumstances, the Court of Justice also managed to secure its own operability by avoiding an avalanche of preliminary references, to allow the settlement of disputes before national courts within a reasonable time and, last but not least, to ensure mutual trust between the Court of Justice and national courts of last instance.[11]

Forty years later, *Cilfit* seems so entrenched that it is probably illusory to think that the *acte clair* exception could be purely discarded and a strict duty to refer imposed now that the Court of Justice and national courts of last instance have become quite accustomed to it. However, that case-law should not be seen as 'the end of history' for the preliminary reference procedure. Three sets of structural and circumstantial reasons indeed plead for its refinement.

First, the duty to refer on the part of last instance national courts is of constitutional importance within the overall scheme of the Treaties.[12] Failures to refer – more specifically failures to comply with the duty to refer – are arguably as dangerous for the authority of EU law as banks' payment defaults are for global financial stability. As is well-known, the preliminary reference procedure, as the 'keystone of the EU judicial system,'[13] has greatly contributed to the gradual building up of the authority of EU law through

various Member States (reflecting the idea of autonomous EU law concepts); third, a comprehensive interpretation of EU law provisions in the light of their context, objectives and the EU's state of evolution at the date on which the provision in question is to be applied.

[11] On the various positive externalities generated by Cilfit, see Lorenzo Cecchetti, 'CILFIT 'Motionless Titan' Has Moved, Albeit Softly and With Circumspection: Consorzio Italian Management II' (REALaw.blog 21 January 2022), <https://realaw.blog/?p=898>, first accessed on 12 October 2022.

[12] See eg Pierre Pescatore, 'Interpretation of Community Law and the Doctrine of "Acte Clair"', in Bathurst et al. (eds), Legal Problems of an Enlarged European Community (Stevens and Sons 1972) 27-46.

[13] Opinion 2/13 *Accession of the EU to the Convention* EU:C:2014:2454, para 176.

the various doctrines and principles that the Court has come up with along the years. It is therefore somewhat disturbing that an EU law provision as pivotal as Article 267, paragraph 3, TFEU has been interpreted by the ultimate guardian of EU law as leaving an extensive, unmonitored discretion to national courts of last instance.

Second, emboldened by that wide discretion, national courts of last instance have increasingly done what pleases them, with little or no motivation at all when deciding not to refer questions to the Court. Arnull warned back in 1989 already about the risk of abuse inherent in that discretion.[14] Over the course of time, also because of the Court's own fluctuations in its approach to *acte clair,*[15] that abuse has gradually materialised. National courts indeed tend not to apply at all the *Cilfit* criteria when evaluating *acte clair*.[16] When they do, they often taken the liberty to substitute those criteria with their own standards and concepts. For example, while the French Council of State is of the view that it must refer only when facing a 'serious difficulty' in interpreting EU law[17] the Supreme Court of Cyprus only refers 'interpretive questions of general interest'.[18] Furthermore, some national legislators

[14] Anthony Arnull, 'The Use and Abuse of Article 177 EEC' (1989) 52 Modern Law Review 622.

[15] See *X and van Dijk* (n 9) and *Ferreira da Silva e Brito* (n 9).

[16] See Niels Fenger, Morten Broberg, 'Finding Light in the Darkness: On The Actual Application of the Acte Clair Doctrine' (2011) 30 Yearbook of European Law 180; Research Note No 19/004 of May 2019 of the Directorate-General for Library, Research and Documentation of the Court of Justice concerning the 'Application of the Cilfit case-law by national courts or tribunals against whose decisions there is no judicial remedy under national law' <www.curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/ndr-cilfit_synthese_en.pdf>, first accessed on 12 October 2022.

[17] Conseil d'État (Council of State), judgment of 26 February 2014, n° 354603, FR:2014:354603.

[18] Cypriot Anotato Diskastirio Kyprou (Supreme Court), Proedros Tis Demokratias v Vouli Ton Antiprosopon, appeal 5/2016 of 5 April 2017.

themselves have adopted measures that limit referrals.[19] Such threats for the future of the preliminary reference procedure raise the issue of the necessary establishment of monitoring mechanisms whereby abuses of national courts could be identified.

Third and in relation to monitoring, there is the issue of the sanction attached to failures to refer. Until recently, the consequences deriving from such failures to refer were extremely circumscribed, if not inexistent, under EU law.[20] Things have radically changed, in the judgment of 2018 in *Commission v France*,[21] where the Court sentenced for the first time a Member State for non-compliance with the duty to refer by a court of last instance.

Certainly, there was no principled reason why an infringement judgment should not target the case-law of a court of last instance if the latter appeared in contradiction with EU law. The ensuing asymmetry between the loose character of the duty to refer deriving from *Cilfit* and the severity of the sanction now attached to the failure to comply with it is however puzzling. Indistinctively sanctioning national courts of last instance within infringement proceedings for their failure to refer indeed appears excessive

[19] See, for instance, the Polish and Romanian limitations on referrals and the way they have been addressed by the Court of Justice in respectively Case C-824/18 *A.B.* EU:C:2021:153, para 91; Case C-430/21 *RS* EU:C:2022:99, para 65 to 67.

[20] Morten Broberg, 'National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom' (2016) 22 European Public Law 243-256.

[21] Case C-416/*17 Commission v France* EU:C:2018:811. See Araceli Turmo, 'A Dialogue of Unequals – The European Court of Justice Reasserts National Courts' Obligations under Article 267(3) TFEU' (2019) 15 European Constitutional Law Review 340; Stéphane Gervasoni, 'Repenser les termes du dialogue des juges' (2019) Actualité juridique du droit administratif 150; Anastasia Iliopoulou-Penot, 'La sanction des juges suprêmes nationaux pour défaut de renvoi préjudiciel' (2019) Revue française du droit administratif 139.

in the absence of an absolute duty to refer, where those courts enjoy so much discretion.

The Court of Justice came to such finding in a rather blunt and unqualified manner. While the Court in *Köbler* had meticulously carved out the conditions under which a finding of the violation of the duty to refer could occur for the purposes of Member State liability for national courts' wrongdoings, it did not, in *Commission v France,* take account of the specificity of the judicial function. The Court did not conduct either a separate assessment of the violation of the duty to refer in the light of the *Cilfit* criteria but conflated the finding of the violation of the duty to refer with that of the violation of a substantive EU law provision.[22] Although sanctioning failures to refer appears legitimate, sanctions should arguably be tailored to the loose character of the duty to refer that was promoted by the Court of Justice itself.

Against that background, while reasserting a strict duty to refer is no realistic option in view of the workload of the Court, of the habits taken by national courts of last instance and also of the cooperative relationship that underpins the preliminary reference procedure, it was arguably imperative for the Court of Justice to find new avenues that would, at the same time, keep the welcome flexibility offered by *Cilfit,* ensure that national courts of last instance do not unduly escape what formally remains of their duty to refer and find suitable monitoring mechanisms and ultimately sanctions against unlawful failures to refer.

Recent cases, in particular *Consorzio Italian Management II,* have offered the Court of Justice an opportunity to go back to *Cilfit* and address some of those contemporary challenges for the preliminary reference procedure. After setting out the tweaks brought to the assessment of *acte clair* **(II)**, I will analyse the main innovation of *Consorzio Italian Management II*, namely the duty for national courts of last instance to state reasons when deciding not

[22] Ibid., para 112.

to refer questions to the Court **(III)**. I argue that by modifying the place of the parties to the main proceedings within the preliminary reference procedure, the duty to state reasons does not only enhance the latter's rights but it also heralds a new approach to the issue of the enforcement of the duty to refer.

II. THE REFINED ASSESSMENT OF *ACTE CLAIR* IN THE COURT OF JUSTICE'S RECENT CASE-LAW

The Italian *Consiglio di Stato* has recently given to the Court of Justice several opportunities to amend its case-law on the duty to refer and its exceptions.[23] The Court of Justice has tinkered with the *acte clair* exception by slightly revising its evaluation in *Consorzio Italian Management II*[24] **(a)** followed by a couple of cases **(b)**.

1. Consorzio Italian Management II

Consorzio Italian Management II is the follow-up to *Consorzio Italian Management I*. In that case with two episodes, a temporary association of undertakings providing various services and the Italian railway infrastructure

[23] The reason why the Italian Council of State has appeared particularly preoccupied by the extent of the duty to refer of national courts of last instance mainly lies in the fact that, in Italy, failures to refer may trigger the civil liability of judges. There has thus been a recent trend for the Council of State to start systematically referring preliminary questions to the Court of Justice in order to avert the filing of actions for damages against them. See, to that effect, Case C-144/22 *Società Eredi Raimondo Bufarini Srl – Servizi Ambientali* EU:C:2022:1013, para 22.

[24] Case C-561/19 *Consorzio Italian Management II* EU:C:2021:291. See Morten Broberg, Niels Fenger, 'If You Love Somebody Set Them Free : On the Court Of Justice's Revision of The Acte Clair Doctrine' (2022) 59 Common Market Law Review 711-738; Lorenzo Cecchetti, Daniele Gallo, 'The Unwritten Exceptions to the Duty to Refer After Consorzio Italian Management II: 'CILFIT Strategy' 2.0 and its Loopholes' (2022) 15 Review of European Administrative Law 29-61; François-Xavier Millet, 'Cilfit Still Fits' (2022) 18 European Constitutional Law Review 533-555.

manager concluded a public contract for the supply of cleaning services for national railway infrastructure. During the performance of that contract, the infrastructure manager refused the undertakings' request to review the contract price. That refusal was challenged before an Italian regional administrative court and, subsequently, before the *Consiglio di Stato* (the Italian supreme administrative court) on the grounds that Italian law, which allowed the exclusion of price review, was in breach of EU law.

That case gave rise to two successive preliminary references. In Case C-152/17, in its judgment of 19 April 2018,[25] a three-judge chamber found inadmissible most of the request for a preliminary reference for the non-applicability or lack of relevance of the EU law provisions raised by the referring court. The Court only offered an interpretation of Directive 2004/17 to the effect that the latter did not preclude national rules which do not provide for price review after a contract has been awarded in the sectors covered by that directive. Upon the applicants' further questions in relation to other substantive provisions of EU law in the matter of public procurement, the *Consiglio di Stato* referred Case C-561/19 six months later and asked a most welcome question regarding the scope of Article 267, paragraph 3, TFEU in the specific circumstances of the case.

In his Opinion,[26] Advocate General Michal Bobek conspicuously took the view that the case at hand was a good case not only to clarify *Cilfit* and its exceptions but to revisit them.[27] In view of both the (in)ability or reluctance of national courts of last instance to apply the *Cilfit* criteria and, above all, the type and degree of uniformity that should be aimed at the EU level,[28] he made a proposal to amend the duty to refer so that the scope of the latter

[25] Case C-152/17 *Consorzio Italian Management I* EU:C:2018:264.

[26] Opinion of AG Bobek (n 9).

[27] For ealier proposals in the legal scholarship to revisit the acte clair criteria, see eg Morten Broberg, 'Acte clair revisited: Adapting the acte clair criteria to the demands of times' (2008) 45 Common Market Law Review 1383-1397.

[28] Opinion of AG Bobek (n 9), para 180.

would match its macro-function, namely preventing judicial divergences across and within the Member States as far as the interpretation of EU law is concerned.[29] That proposal, which arguably did not depart from the *Cilfit* exceptions, in particular *acte clair*, but rather tried to streamline their application and make their outcome more predictable, consisted in the following three-pronged test: 'a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law is to refer the case to the Court of Justice provided that it raises (i) a general issue of interpretation of EU law (as opposed to its application); (ii) to which there is objectively more than one reasonably possible interpretation; (iii) for which the answer cannot be inferred from the existing case-law of the Court of Justice (or with regard to which the referring court wishes to depart)'.[30] As regards more specifically the second condition, that AG Bobek developed most as a way to polish *acte clair*, the duty to refer was to become strict 'where there are two or more potential interpretations proposed before the national court of last instance'.[31]

Although the Court's judges had certainly a whole range of options in their hands, the Court decided to repeat in an (almost) unaltered manner the three classic exceptions to the duty to refer.[32] As far as the evaluation of 'reasonable doubt' is concerned, the Court restated the various criteria. It however brought a few clarifications regarding their evaluation.[33]

First, the Court made it clear that national courts of last instance are not required to examine each of the language version, but 'must bear in mind those divergences between the various language versions of that provision of which it is aware, in particular when those divergences are set out by the

[29] Ibid., paras 132-133 and para 149.

30 Ibid., para 134.

[31] Ibid., para 157.

[32] *Consorzio Italian Management II* (n 24), para 33.

[33] Ibid., paras 40 to 43 and 45-46.

parties and are verified'.[34] Second, the Court insisted that the need to avoid interpretive divergences applies to both divergences 'among the courts of a Member State or between the courts of different Member States'.[35] Third, 'national court or tribunal of last instance must be convinced that the matter would be equally obvious to the other courts or tribunals of last instance of the Member States and to the Court of Justice'.[36] Fourth, the Court held that 'the mere fact that a provision of EU law may be interpreted in another way or several other ways, in so far as none of them seem sufficiently plausible for the national court or tribunal concerned…, is not sufficient for the view to be taken that there is reasonable doubt as to the correct interpretation of that provision'.[37] Fifth, it is now the interpretation of EU law (rather than its application) that must leave no scope for reasonable doubt.[38]

When looking in detail at each of the five clarifications brought in by *Consorzio Italian Management II*, it is beyond doubt that they have an added value inasmuch as they facilitate the assessment of the existence of *acte clair*. However, most of them generate their own interpretive issues and do not make the outcome of that assessment significantly more predictable. To take just two examples,[39] as far as the comparative evaluation of language versions is concerned, the Court did not explain in detail what is exactly expected from national courts although assumingly sufficient to look at one or two foreign versions. Likewise, it remains uncertain whether *lower* courts' interpretive doubt is relevant for a national court of last instance to determine whether an EU law provision is clear. On the one hand, the Court has altered *Cilfit* by indicating that the interpretation in issue should be equally obvious

[34] Ibid., para 44.

[35] Ibid., para 49.

[36] Ibid., para 40.

[37] Ibid., para 48.

[38] Ibid., para 33.

[39] For further development on the outstanding problems deriving from *Consorzio Italian Management II* (n 24), see Millet (n 24) 545-547.

to the Court and to the national courts of last instance.[40] On the other hand, the Court has not been specific when stating that national courts of last instance should be vigilant when there are divergences 'among the courts of a Member State or between the courts of different Member States.'[41]

2. Orders of 15 December 2022

The Court of Justice has also had a couple of other occasions to further clarify the scope and intensity of the duty to refer in similar cases raising the same legal issue. In its orders of 15 December 2022,[42] the Court brought clarification in two respects.

First, the Court extensively relied on *Consorzio Italian Management II* to confirm the relative nature of the duty to refer and its three exceptions. It however carved out a situation whereby the duty to refer becomes actually strict, namely when the national court of last instance wishes, in the wake of *Association France Nature Environnement*,[43] to avail itself of the possibility to maintain certain effects of national acts that are incompatible with EU law.[44] Because such faculty is to remain a strict exception to the immediate disapplication rule, national courts cannot indeed enjoy their usual leeway to decide whether to refer. In order to escape their duty to refer, they must provide a very detailed assessment that includes analysis of the case-law of other national courts of last instance.[45] It remains that that scenario is quite circumscribed to the extent that it only concerns the situation whereby a

[40] *Consorzio Italian Management II* (n 24), para 40.

[41] Ibid., para 49.

[42] *Società Eredi Raimondo Bufarini Srl – Servizi Ambientali* (n 23) paras 48 and 50. See also Case C-597/21 *Centro Petroli Roma* EU:C:2022:1010, paras 51 and 58.

[43] Case C-379/15 Association France Nature Environnement EU:C:2016:603, paras 51-52.

[44] *Società Eredi Raimondo Bufarini Srl – Servizi Ambientali* (n 23) para 50.

[45] Ibid., para 51.

national court contemplates to provisionally keep applying an unlawful national act.

Second, the Court of Justice gave further guidance on the practical evaluation of *Cilfit*'s general criterion for a national court of last instance to be 'convinced that the interpretation of EU law would be equally obvious to the Court and to the other supreme courts in the Member States'.[46] The Court made it clear that the analysis of the 'obviousness to all' must be conducted in an objective manner, without looking into the many competing interpretations that other courts may adopt.[47] Through that limited clarification, the Court further secured the discretion of national courts of last instance when deciding whether to refer questions to the former.

III. The new duty to state reasons: a breakthrough for the preliminary reference procedure

Although the latest clarifications regarding the evaluation of reasonable doubt should certainly not be overlooked as they make the outcome of that key assessment somewhat more predictable, they should not be overestimated either. It is conspicuous that the Court did not want to do away with *acte clair.* Again, that is not a problem per se. What is arguably of utmost importance nowadays is rather to find means to prevent abuses by national courts of last instance of the wide, largely unmonitored discretion that *Cilfit* has awarded them.

In that regard (and irrespective of whether that breakthrough and its implications were fully thought through by the Court), the Court of Justice has found a clever manner in *Consorzio Italian Management II* to limit those abuses while sticking to the wide discretion that it introduced in *Cilfit*: obliging national courts of last instance to state reasons when they

[46] *Consorzio Italian Management II* (n 24), para 40; *Cilfit* (n 7) para 16.
[47] Ibid., paras 48-49.

intentionally fail to refer questions to the Court.[48] According to the Court, which echoes AG Bobek's proposal to impose on national courts of last instance a new, 'correlating duty to specifically and adequately state reasons'[49] for not referring questions of EU law to the Court,[50] it follows from the system established by Article 267 TFEU, read in the light of the second paragraph of Article 47 of the Charter, that a national court of last instance that is of the view that it does not have to refer because the situation at hand falls within one of the three exceptions to the duty to refer must state the reasons for its decision not to refer.[51]

Accordingly, in the absence of a strict duty to refer, national courts of last instance are now under a strict duty to establish that they fall within one of the three *Cilfit* exceptions to the duty to refer in order to ground their decisions *not* to refer. Arguably influenced by the case-law of the European Court of Human Rights ('the ECtHR'), that duty aptly strengthens the effectiveness of the duty to refer. It also raises new challenges regarding the practicalities of the duty to state reasons and the issue of the most suitable remedy in the context of a duty that enhances the place of the parties to the main proceedings within the preliminary reference procedure.

3. The influence of the ECtHR

Although the Court of Justice did not cite the ECtHR case-law in its judgment, it would be hard to deny the latter's influence on the former as far as that new duty to state reasons is concerned. That duty was indeed originally devised by the ECtHR within those situations in which it had to examine refusals of national courts to refer a case to the Court of Justice, both

[48] For earlier scholarly proposals to that effect, see Kornezov (n 9); Jasper Krommendijk, '"Open Sesame!": Improving Access to the ECJ by Requiring National Courts to Reason Their Refusals to Refer' (2017) 42 European Law Review 46-62.

[49] Opinion of AG Bobek (n 26), para 178.

[50] Ibid., paras 135 and 168.

[51] *Consorzio Italian Management II* (n 24), para 51.

in relation to the application of the Bosphorus presumption[52] and, autonomously, with regard to Article 6(1) of the Convention. It is in that second situation that the ECtHR has specifically derived a duty to state reasons for national courts of last instance from Article 6(1) of the Convention.

In *Ullens de Schooten* v *Belgium*, the ECtHR took the view that national courts of last instance which refuse to refer to the Court of Justice a preliminary question on the interpretation of EU law that has been raised before them are obliged, under Article 6(1) of the Convention, to give reasons for their refusal, not in general but in the very light of the three exceptions provided for in the *Cilfit* case-law of the Court of Justice.[53] However, the ECtHR did not find any violation of Article 6(1) in that particular case since the obligation to state reasons had been fulfilled.

In *Dhabi* v *Italy*,[54] the ECtHR sentenced for the first time a state for the wrongful failure to refer a case to the Court of Justice. In that case, a Tunisian national lawfully working in Italy sought to obtain payment by the Italian authorities of a family allowance under the association agreement between the Union and Tunisia. Upon challenging the refusal before the Italian courts, the applicant asked the latter to refer the case to the Court of Justice for an interpretation of the association agreement. His application was dismissed in first instance, on appeal and finally before the court of cassation both on the merits and as regards the request for a preliminary ruling that the applicant had filed.

Against that background, the ECtHR did not only conclude that there had been a violation of article 14 of the Convention in conjunction with Article

[52] *Bosphorus* v *Ireland*, App No 45036/98 (ECtHR 30 June 2005); *Michaud* v *France* App No 12323/11 (ECtHR, 6 December 2012).

[53] *Ullens de Schooten and Rezabek* v *Belgium* App No 3989/07 and 38353/07 (ECtHR 20 September 2011), para 62.

[54] *Dhahbi* v *Italy* App No 17120/09 (ECtHR 8 April 2014). For a recent confirmation, see *Georgiou* v *Greece* App No 57378/18, point 25 (ECtHR 14 March 2023).

8. It also held that Italy breached Article 6(1) of the Convention on account of the fact that the Court of Cassation did not state any reasons for not referring the case to the Court of Justice, or even mention the fact that the applicant had filed a request for a preliminary ruling.[55]

4. Making effective the duty to refer by proceduralising it

With the introduction of that ECtHR-inspired duty to state reasons, the Court of Justice has found an appropriate way to make up for the wide discretion of the national courts of last instance that has been largely untouched by the Court in *Consorzio Italian Management II*. The three exceptions to the duty to refer, in particular *acte clair*, have not only been solemnly confirmed but they have found a new function. In full accordance with the ECtHR case-law, it is not only expected from national courts of last instance to state reasons in a general way. They must specifically do it in the light of those three exceptions. By obliging national courts of last instance to enter into an argumentative exercise explaining why they consider a referral superfluous, the Court of Justice has proceduralised the duty to refer. Thereby, it has enhanced the latter's effectiveness: there is no absolute duty to refer but there is an absolute duty to state reasons for national courts of last instance in order for the latter to establish that they have remained within the boundaries of their discretion. It follows, first, that failures to refer can no longer be looked in isolation but in conjunction with failures to state compelling reasons; and second, that national courts of last instance are accountable under EU law for such failures.

Most interestingly, the duty to state reasons also bears constitutional consequences regarding the very nature of the preliminary reference procedure. It is rather well-known that that procedure was conceived of as an objective procedure. The Court of Justice has always consistently held that there is no subjective right for the parties to the main proceedings to a

[55] Ibid., paras 32-33.

preliminary reference under EU law.[56] Arguably, recognising such right would not only go against the intention of the drafters of the Treaties but it would also entirely change the nature of the preliminary reference procedure and the respective roles of the Court of Justice and national courts of last instance. The ECtHR has always respected that situation by holding that there is no such right under the Convention either.[57]

The duty to state reasons however alters the nature of the preliminary reference procedure. The duty to state reasons is itself classically associated with private parties as a corollary of an individual's right to defense. Far more than a mere procedural tool, it thus introduces a strong element of subjectivation by enhancing the place of the parties to the main proceedings. Their involvement is further secured in Consorzio Italian Management II where it transpires that national courts of last instance, although not bound by the parties' arguments, should take them seriously and engage with them to come to its decision as to whether to refer. For instance, a national court of last instance 'must bear in mind those divergences between the various language versions of that provision of which it is aware, in particular when those divergences are set out by the parties and are verified'.[58] Further, where a court of last instance 'is made aware of the existence of diverging lines of case-law', it 'must be particularly vigilant in its assessment of whether or not there any reasonable doubt'.[59]

[56] Preliminary references do 'not constitute a means of redress available to the parties to a case pending before a national court or tribunal' and are 'completely independent of any initiative by the parties' (*Consorzio Italian Management II* (n 24) paras 53-54).

[57] In *Ullens de Schooten* v *Belgium* (n 53) para 57, the ECtHR explicitly refused to recognise on the basis of the Convention any 'right to have a case referred by a domestic court to another national or international authority for a preliminary ruling'.

[58] *Consorzio Italian Management II* (n 24) para 44.

[59] Ibid., para 49.

It follows that arguments raised by the parties to the main proceedings have a necessary impact on the duty to state reasons inasmuch as it is expected from national courts of last instance to explicitly engage with those very arguments within their statement of reasons to explain that the parties were wrong in considering that an EU law provision was not clear. Accordingly, although it primarily remains an objective cooperation mechanism between courts, the preliminary reference procedure has undergone an unexpected reorientation towards the parties.

5. *Forthcoming challenges for the duty to state reasons*

With the duty to state reasons the Court is now confronted to new challenges inherent therein. First, there is the question of the scope and extent of the statement of reasons: what is to be exactly expected from national courts of last instance within their statement of reasons **(1)**? Second, there is the question of monitoring and compliance: who is to monitor whether national courts of last instance comply with the duty to state reasons and what shall be the sanction for not complying therewith **(2)**?

A. *Modus operandi*

Regarding the modus operandi of the duty to state reasons, now that the Court has durably sealed the fate of *Cilfit*'s exceptions to the duty to refer, it is logical that the duty to state reasons be tailored to those exceptions. Both duties share the same scope and national courts are now to systematically justify themselves in the light of the three exceptions to the duty to refer (and the guidance provided by the Court). National courts of last instance should therefore explain *in concreto* which one of those three situations applies to the case at hand to justify their decision not to refer.

As regards the first exception, as to whether the EU law question raised is irrelevant for the purposes of settling a case, stating reasons should be relatively straightforward: the national court is to explain why that provision

is inapplicable in the factual circumstances of a case so that it is obviously not needed to ascertain its true meaning.[60]

Should the question appear potentially relevant, arguing the second and third exceptions is for its part somewhat trickier. To prove that the second or third exception come into play, national courts of last instance will be under a heightened level of scrutiny since they will have to explain why they can interpret EU law themselves without endangering the latter's uniform interpretation.

In that respect, national courts must either make argument based on the most relevant case-law of the Court or demonstrate that the EU law provision in issue is clear. Each of those situations raises its own set of difficulties.

Within the first scenario (corresponding to *acte éclairé*), what kind of argument may exactly be made? An easy case is the one where a national court of last instance takes the view that a previous judgment (or jurisprudential line) does apply, since it should cite and engage with that judgment in order to duly explain why that case-law applies to the case at hand and what solution derives from it. A more uncertain case is the one where a national court of last instance is fully aware of the Court's case-law but is of the view that it is not appliable to the factual situation at hand. In an ideal world, such 'distinguishing' technique, which is the result of the (negative) application of EU law to the national context, should be allowed since it does not challenge the *interpretation* of EU law. In practice, however, the national court will have to provide a detailed statement of reasons in such a scenario to prove its point. Admittedly, the line may be thin between 'true' and 'false' departures from previous case-law, that is failing to apply a previous judgment either because the national court simply does not want to (contestation of the Court's judgment, thus true departure) or because it

[60] The best example to that effect is the specific situation at hand in *Consorzio Italian Management II* (n 24) itself since the substantive provisions of EU law bore no connection with the case as the Court held in the remainder of the judgment.

considers it too different to be relevant (distinguishing, thus false departure). Unlike Advocate General Bobek,[61] the Court of Justice however did not expressly impose to comply with the duty to refer when a national court of last instance departs from the Court's case-law, which leaves the issue open. It is however to be expected, especially in the light of the judgment in *Commission* v *France*,[62] that the Court will prove demanding vis-à-vis national courts of last instance so that the latter sufficiently explain: a) why the situation at hand is different from a situation dealt with in a previous judgment; b) how EU law is then irrelevant (first exception to the duty to refer), or why EU law is clear as far as the situation at hand is concerned (third exception to the duty to refer). It follows that a national court of last instance will thus fall back on the two other exceptions to the duty to refer and cannot simply rely on the Court's case-law to dismiss it.

Within the second scenario (corresponding to *acte clair*), it will not be straightforward in practice for a national court of last instance to show that the interpretation of the EU law provision in issue 'does not leave scope for any reasonable doubt'.[63] Although such task will undoubtedly be easier to carry out thanks to the clarifications that were brought in by the Court, it has been explained above how those clarifications generate their own uncertainties. More generally, as it stands, the *acte clair* exception to the duty to refer still expects too much from those 'mortal national judges not possessing the qualities, time, and resources of Dworkin's Judge Hercules',[64] namely to think just like the Court of Justice and apply the latter's methods of interpretation consisting in looking at the text (in the light of other language versions), context and purpose of the provision in issue. On the

[61] Opinion of AG Bobek (n 26), para 164.

[62] In that judgment, the Court found a violation of Article 267, paragraph 3, TFEU by the French State because the Conseil d'Etat had departed from a previous Court's judgment regarding the UK (see para 111). It would appear that that departure might have been a false one within the terminology adopted herein.

[63] See *Consorzio Italian Management II* (n 24), para 39 ff.; *Cilfit* (n 7) paras 16 and 21.

[64] Opinion of AG Bobek (n 26) para 104.

one hand, national courts should certainly be more acquainted with those methods nowadays. On the other hand, expecting them, for the mere purpose of deciding on whether they must refer a case to the Court, to interpret EU law in the way the Court does is paradoxical since it ultimately suggests that the latter's interpretive guidance would anyhow not be needed.

Be it as it may, because the *acte clair* exception remains blurred in its contours, the statement of reasons in that regard cannot be overly strict. Arguably, the expected level of detail of the statement of reasons will vary from one situation to another, depending on the perceived 'threat' on the authority of EU law. Yet again, the ECtHR standard as a minimum standard under EU law, in accordance with Article 52(3) of the Charter,[65] provides further guidance as to what should be the intensity of the review of that statement of reasons. The ECtHR has indeed proved rather reasonable in its assessment of the duty to state reasons. Hence, a summary reasoning suffices when a case raises 'no fundamentally important legal issues or had no prospects of success'.[66] Further, *in concreto*, the reasons for the rejection of the request for a preliminary ruling under the *Cilfit* criteria can be deduced from the reasoning of the remainder of the decision given by the court in question (or from reasons considered implicit in the decision rejecting the request)'.[67] In more difficult or important cases, the ECtHR expects national courts of last instance to explicitly refer to the three *Cilfit* criteria and explain which of those criteria was used as the basis for deciding not to transmit the case to the Court of Justice.[68] Clearly, those are minimum requirements and the Court of Justice will probably might somewhat higher expectations,

[65] See Article 52(3) of the Charter.

[66] *Sanofi Pasteur* v *France* App No 25137/16 (ECtHR 13 February 2020), para 70 and the case-law cited.

[67] Ibid.

[68] Ibid., paras 73 to 79. See also *Bio Farmland Betriebs* v *Romania* App No 43639/17 (ECtHR 13 July 2021).

including when it comes to *acte clair*.[69] It is notably to be expected, in relation with the subjectivation of the preliminary reference procedure induced by the duty to state reasons, that national courts of last instance will have to engage with the specific arguments made by the parties within their requests for a preliminary ruling.

B. Enforcing the duty to state reasons

Last but not least, there is the enforcement issue. Although it constitutes a breakthrough in itself, the duty to state reasons – and, together with it, the duty to refer – could quickly become a dead letter, should it remain unenforced. Arguably, the duty to state reasons will not be that easy to enforce simply because monitoring it closely is impossible. There is indeed no task force within the Commission or within the Member States in charge of systematically supervising national courts of last instance that would ensure that the latter have duly engaged with requests for a preliminary ruling.

With the discovery of the duty to state reasons, there has been a shift in the focus from the duty to refer to the duty to state reasons that has necessary consequences at the enforcement level. What is now to be enforced in the first place is the duty to state reasons indeed as an absolute duty that does not tolerate exceptions. As a logical consequence, a national court of last instance is unlikely to be sanctioned for non-compliance with the duty to refer in isolation, as it was in *Commission v France*, but for non-compliance with the duty to refer in combination with the failure to state reasons.

That shift is bound to have an impact on how infringement proceedings operate in such circumstances. With the new duty to state reasons, it is indeed primarily the failure to comply with that duty that could give rise to

[69] In the two abovementioned orders of 15 November 2022, the Court however held that national courts do not have to conduct a detailed assessment establishing that the meaning of an EU law provision is equally obvious to the Court and to other Member States' courts.

findings of infringement. The sanction should logically hit only those situations where a national supreme court has made no effort to motivate their decision not to refer, or where that motivation is preposterous. Assumingly, infringement proceedings will then be launched only against national courts of last instance in the exceptional circumstances of either a repetitive, systemic lack of statement of reasons by a national court of last instance, or a gross and intentional misrepresentation of the situation at hand by a national court of last instance made up to eschew its duty to refer, in other words an egregious breach of the duty to refer that cannot find any justification. Such limitation of the scope of infringement proceedings appears appropriate in view of the specific nature of the judicial function, the discretion left to national courts of last instance by *Cilfit* and the accompanying uncertainty inherent in the scope of the duty to refer, all overlooked in *Commission v France*.

Now, the shift from the duty to refer to the duty to state reasons and the ensuing subjectivation of the preliminary reference procedure give new salience to the legal remedies where private parties are primarily involved. Arguably, parties to the main proceedings are already key enforcement actors of the duty to refer before the ECtHR and those constitutional courts of the Member States,[70] which both monitor the statement of reasons, albeit on their own terms and legal basis. With a duty to state reasons grounded in EU law the parties to the main proceeding now occupy centre stage under EU law also.

In particular, parties to the main proceedings are to become a prominent actor for the enforcement of the duty to refer by the lower courts of the

[70] See Clélia Lacchi, 'Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question to the Court of Justice of the EU' (2015) 16 German Law Journal 1663.

Member States. In spite of *Köbler*[71] that opened up the possibility of liability proceedings against a Member State for the action of the national courts of last instance, it was up to now virtually impossible to trigger Member State liability purely on the basis of a failure to comply with the duty to refer in view of the highly relative nature of that obligation and the fact that there is no subjective right to be granted a request for a preliminary reference.[72] That situation has now changed with the duty to state reasons. The latter arguably makes it easier for the parties to the proceedings to obtain damages.[73] Should the Court establish (which would only be logical) the existence of a subjective right for the parties to the main proceedings to obtain a statement of reasons from the duty to state reasons, those parties could then rely before the competent, lower national court of law on the fact that that right has been violated by a national court of last instance by a faulty statement of reasons for not referring a case to the Court of Justice.[74] As a consequence, they could possibly claim that they suffered loss of opportunity or moral damage from the combination of the failure to state reasons and the failure to refer.[75]

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[71] Case C-224/01 *Köbler* EU:C:2003:513, para 55, where the Court held that non-compliance with the duty to refer was but one factor within the assessment of a sufficiently serious breach of a right-conferring EU law provision.

[72] Precisely, in *Köbler* (n 71), the Court found no violation of the duty to refer.

[73] For a slightly less optimistic view, see Imelda Maher, 'The CILFIT Criteria Clarified and Extended for National Courts of Last Resort Under Art. 267 TFEU' (2022) 7 European Papers 1, 265, 271.

[74] Somewhat ironically, a lower national court would then be assessing whether its supreme court made a suitable evaluation of *acte clair* while, potentially, the latter court would have disregarded the interpretive doubt raised by the former court (or another lower court). Such situation confirms that interpretive doubt coming from lower courts should not be dismissed as irrelevant by courts of last instance.

[75] Again, the ECtHR case-law is instructive for that matter. While the Strasbourg Court sometimes considers that the mere finding of a violation of Article 6(1) of the Convention by a failure to refer constitutes just satisfaction, it has also awarded

IV. Conclusion

Ever since *Cilfit*, the Court of Justice has interpreted the duty of national courts of last instance to refer in a highly relative manner. In recent judgments, in particular *Consorzio Italian Management II*, the Court of Justice slightly refined its classic case-law on the famous exceptions to the duty to refer. Beyond the welcome tweaks that made the assessment of *acte clair*, the Court found a clever way to keep the wide discretion offered by *Cilfit* to national courts of last instance while ensuring that the latter do not abuse of that discretion: 'a national court of last instance that is of the view that it does not have to refer because the situation at hand falls within one of the three exceptions to the duty to refer must state the reasons for its decision not to refer.'[76]

Influenced by the case-law of the ECtHR, that duty to state reasons enhances the effectiveness of the duty to refer through the latter's proceduralisation. While there is no absolute duty to refer, there is now an absolute duty to state reasons for national courts of last instance to establish that they have remained within the boundaries of their discretion. That evolution bears consequences at the constitutional level regarding the very nature of the preliminary reference procedure. The duty to state reasons indeed alters the nature of that procedure by enhancing the place of the parties to the main proceedings: national courts of last instance must explicitly and duly engage, within their statement of reasons, with the specific arguments made by the parties in their requests for a preliminary ruling.

With the duty to state reasons, the preliminary reference procedure is to face new challenges: what is to be exactly expected from national courts of last instance within their statement of reasons and, above all, who is to monitor

damages in such case (see, respectively, *Sanofi Pasteur* v *France* (n 66) and *Bio Farmland Betriebs* v *Romania* (n 68), with regard to the moral damage that resulted from the failure to refer).

[76] See *Consorzio Italian Management II* (n 24), para 51.

whether national courts of last instance comply with the duty to state reasons and what shall be the sanction for not complying therewith? Monitoring national courts of last instance's failures to refer has indeed become paramount in the context of a rise of the contestation of EU law. Although it constitutes a breakthrough in itself, the duty to state reasons – and, together with it, the duty to refer – could quickly become a dead letter, should it remain unenforced.

Arguably, enforcing the duty to state reasons is however no easy task to the extent that a close monitoring is simply impossible. In that context, it is crucial that monitoring and the sanctions attached to non-compliance with the duty to refer remain in tune with the highly relative nature of the duty to refer. With the shift from the duty to refer to the duty to state reasons, failures to refer can no longer be looked in isolation but in conjunction with failures to state compelling reasons.

That change has necessary consequences at the enforcement level. First, it follows that a national court of last instance is unlikely to be sanctioned in the future for non-compliance with the duty to refer in isolation, as it was in *Commission* v *France*, but rather for non-compliance with the duty to refer in combination with the failure to state reasons. Second, in line with the subjectivation of the preliminary reference procedure induced by the duty to state reasons, the parties to the main proceedings arguably have a subjective right to obtain a statement of reasons. Those parties could then turn to the competent lower court of law in the Member States to trigger the *Köbler* liability in case of a faulty statement of reasons for not referring a case to the Court of Justice. Although the parties to the main proceedings remain – understandably so – without a right to a preliminary reference, they end up significantly and unexpectedly better off with the new duty for national courts of last instance to state reasons when they decide not to refer questions to the Court of Justice.