

## Summary

### Violation of the duty to make a preliminary reference under Article 234 (3) EC Treaty

According to Article 234 (3) of the Treaty establishing the European Community (EC Treaty), national courts of last instance „shall“ refer to the European Court of Justice (ECJ) questions concerning the interpretation of a provision of EC law. Lower courts, in the language of the EC Treaty „any court or tribunal“, are not subject to this obligation, but they „may“ make a preliminary reference at their discretion.

Courts of last instance are, therefore, under an obligation to make such references. Exceptions to this obligation were set out by the ECJ in the *CILFIT* judgment. A domestic court of last instance is not required to make a preliminary reference, where the question of interpretation is irrelevant, where the ECJ has already ruled on the point, or in a case where the interpretation of Community law is self-evident. However, many cases do not fall within the scope of the *CILFIT* exceptions; there is, accordingly, often a clear obligation on Member State courts of last instance to refer to the ECJ. What happens if a national court of last instance breaches its duty to make a reference to the ECJ? What are the remedies or possibilities of appeal guaranteed against an arbitrary, obviously unfounded violation of Article 234 (3) EC Treaty? This book is addressed to the resolution of this difficult question.

The opening part of the book reviews the doctrinal background. It delimits the scope of the obligation to refer incumbent on the courts of last instance and then defines what is to be understood under the Community concept of a „court of last instance“. These doctrines are then applied to the judicial structure of the Czech Republic in order to determine which Czech courts will be, after the Czech accession to the European Union, under the duty to refer to the ECJ. The opening part also gives a detailed description of the exceptions to the duty to refer, as set out by the ECJ in its case law.

The main part of the book is devoted to an investigation, which is performed on three different levels, national, Community and international, of legal remedies that exist against a breach of the duty to make a preliminary reference.

There are two possible remedies on the national level. Firstly, there is a remedy based on the principle of the „lawful judge“ first fashioned by the German Federal Constitutional Court. The German Federal Constitutional Court may, on the basis of an individual constitutional complaint, review the constitutionality of a decision of a national court

of last instance not to refer an issue to the ECJ. If it finds that there was a violation of the duty to refer under Article 234 (3) EC Treaty, it may quash the decision and send it back to the respective national court of last instance. The same „*lawful judge*“ approach was adopted in Austria shortly after its accession to the European Union.

Drawing a general conclusion from the legal situation in Germany and Austria, it is submitted that the „*lawful judge*“ approach may work in any legal system fulfilling three conditions: Firstly, there is a separate and specialised constitutional jurisdiction; secondly, the legal system guarantees the right to a lawful judge (or fair trial); and thirdly, the domestic constitutional court has jurisdiction to hear individual constitutional complaints, by which it is possible to question the constitutionality of individual judicial decisions. When applying these conditions to the legal systems of selected candidate countries (the Czech Republic, the Slovak Republic, Poland and Hungary), it can be deduced that the „*lawful judge*“ approach could be adopted, once this question should be raised, in the Czech Republic and in the Slovak Republic.

The second remedy on the national level may consist in separate proceedings before national courts for breach of Community law, relying on the principle of state liability, as elaborated by the ECJ in the *Francovich* and *Brasserie du Pêcheur/Factortame III* cases. It is submitted that the conditions for state liability under Community law are sufficiently broad to allow for holding a Member State liable for judicial breaches of Community law. Moreover, the recent Opinion of Advocate General Léger in the case *Köbler v. Austria* speaks clearly in favour of extending the principle of state liability to judicial breaches of Community law. Should the ECJ decide to follow the Opinion of its Advocate General, it is merely a matter of time before the principle of state liability is extended to cases of the violation of the duty to make a preliminary reference under 234 (3) EC Treaty.

The only conceivable remedy on the Community level is an Article 226 proceeding for infringement of the Treaty brought by the Commission. However, until very recently the Commission, as well as the ECJ, refused to consider this option, arguing that the infringement proceedings machinery is not the proper tool for enforcing the obligation to refer. This area of law may, nevertheless, undergo radical changes in the near future. If the ECJ decides to follow the Opinion of Advocate General Geelhoed in the case *Commission v. Italy*, Article 226 EC Treaty could be used for the first time in its history to sanction breaches of Community law attributable to the national judiciary. However, the *Commission v. Italy* case is concerned with systematic and recurring breaches of Community law by the national judiciary. The infringement proceedings under Article 226 EC Treaty would thus still remain

an inappropriate tool for enforcing the obligation to make a preliminary reference under 234 (3) EC Treaty in individual cases.

The only possible remedy on the international level is an application to the European Court of Human Rights in Strasbourg. However, as of yet the applications to the Strasbourg court concerning alleged violations of the duty to make a preliminary reference under 234 (3) EC Treaty, claiming violations of Articles 6 (1) (fair trial), 13 (the right to an effective remedy) and 14 (the prohibition of discrimination) of the European Convention of Human Rights, have failed at the admissibility stage. Although it might have been believed that, following the Strasbourg Court's ruling in the *Matthews* case, it would reconsider its lenient approach vis-à-vis Community law and the ECJ, the reality will probably be less dramatic. It may be considered that the European Court of Human Rights is well aware of the sensitivity of enforcing the obligation to refer for the relationship between national courts and the ECJ and that it will, therefore, continue to dismiss applications to review alleged breaches of the duty to refer under Article 234 (3) EC Treaty.

An extensive investigation of legal remedies yields the conclusion that the legal protection of individuals against possible breaches of Article 234 (3) EC Treaty is far from ideal. Compliance with this provision is left to the goodwill of national courts and individuals are mostly left without any remedies in respect of their rights. Such a practice is unsatisfactory and requires reforms.

In the book's concluding part, two main streams of possible reform proposals are examined. The first one is an „*internal*“ reform, i.e. a reform which could be accomplished by the ECJ itself, by modifying its case-law, without any revision of the founding treaties. There are three options open to the ECJ when deciding anew about the interpretation of Article 234 (3) and the *CILFIT* criteria. Firstly, it could overrule *CILFIT* and put the cooperation with national courts of last instance on a new, more realistic basis. Secondly, it could make sure that the obligation of the courts of last instance to refer to the ECJ is enforced. Thirdly, it also could, in one masterpiece of judicial drafting, do both: modify the *CILFIT* criteria as to reflect the current state-of-play in, and needs of, the European Union and start to enforce this modified duty to refer.

The second stream of reform proposals involves possible amendments to the treaties. It becomes apparent that it is difficult to discuss the reform of Article 234 (3) EC Treaty separately from an overall reform of the preliminary ruling procedure. Moreover, it is also short sighted to discuss the reform of Article 234 EC Treaty separately without taking into account serious problems the whole Community judicial structure is facing. Therefore, new institutional possibilities for the

preliminary ruling procedure are outlined in the concluding part of the book. The author concludes that the time is ripe for at least a partial metamorphosis of the preliminary ruling procedure. A new type of appeal should be introduced, called e. g. „*complaint of breach of Community law*“; which would enable appeals against decisions of national courts of last instance to Community courts. Such a substantial change should be accompanied by changes in institutional framework. Unfortunately, the legislative endeavours on the Community level in the last decade more resemble an awkward patching of the most serious gaps in the judicial structure than a conceptually coherent and well thought-out reform.