An Analysis of the Relationship between National Courts and the Court of Justice of the European Union – Shifting from Cooperation to Superiority

MONIKA KIRILOVA KIROVA

This article examines the nature of the relationship between national courts and the Court of Justice of the European Union. It opens with a discussion about the notion of cooperation between these courts. This is followed by an examination of the CJEU’s position as a superior court. It concludes with an analysis of the impact of the decision in Gerhard Köbler v Republik Österreich [2003] and its implications for the relationship.

Introduction

Ever-increasing European integration has led to greater empowerment of its institutions, among them the Court of Justice of the European Union (CJEU). As a result, the Court has taken an active part in the evolution of the European Union by shaping the Community’s legal order. Contradicting the initial conception of the European Union as an international organisation, the Court has allowed individuals to enforce rights granted under European Union law in national courts, and has thus put the nature of the Union one step closer to a federation. Although the CJEU might be the leading figure in the transformation of the legal order, national courts play a fundamental role in the application of Union law. Relations between CJEU and national courts in light of the ‘preliminary ruling procedure’ have been described as cooperative. However, certain flaws within the procedure have led to situations where the national courts have become reluctant to refer cases to the CJEU. In addition, although the CJEU is seeking cooperation, it shapes the manner of this cooperation, thus positioning itself as a superior court. The establishment of the

1Monika Kirilova Kirova is second year Law student at the University of Exeter. The author can be contacted at monikakirovaa@gmail.com.
Acte Clair doctrine and the introduction of State liability for judicial errors in *Gerhard Köbler v Republic Österreich* [2003] will be given as examples of the possible transformation of the relationship between the national courts and the CJEU.

**Preliminary Ruling Procedure – The Matter of Cooperation**

The relationship between the CJEU and the national courts has been well defined by Article 267 of the Treaty on the Functioning of the European Union 2007 (TFEU). Under this Treaty provision, the CJEU has the jurisdiction to give rulings on questions of interpretation and validity of EU law at the request of a national court using the ‘preliminary ruling procedure’. The justification for this competence is found in the Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union (1995: 11):

> [a]ny weakening... of the uniform application and interpretation of Community law throughout the Union would be liable to give rise to distortions of competition and discrimination between economic operators, thus jeopardizing equality of opportunity as between those operators and consequently the proper functioning of the internal market.

The preliminary ruling procedure facilitates ‘direct cooperation’ (*Slob* [2006]: 34) between the CJEU and the national courts. It has been further described as a relationship of trust and dialogue. More importantly, it is a source of mutual learning of practices and underlying principles (*Arnull* 2010: 62).

National courts play a significant role in this fruitful communication. They initiate the dialogue by asking a question, and they eventually apply EU law. It could be argued that Member States’ courts initially favoured this approach of mutual communication. Lord Denning’s speech (*HP Bulmer Ltd & Anor v. J. Bollinger SA & Ors* [1974]: 420) shows that English courts have

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2 ‘Acte Clair’ – a doctrine in European law according to which cases involving a law with a reasonably obvious interpretation do not need to be referred to the CJEU.

3 When the CJEU gives a preliminary ruling, it only explains the meaning of a certain provision of law (or invalidates a provision, where needed), and does not give judgment; i.e. it does not decide upon the outcome of the dispute.
recognised the CJEU as the “supreme court” and “ultimate authority” in questions of European Union law. Similar examples can also be found in other jurisdictions. In *Simmenthal II* [1978], the preliminary reference was successfully used to clarify an important aspect of EU law’s supremacy. It was decided that national courts could refuse to apply incompatible legislation without consulting a Constitutional Court.⁴

However, the spirit of mutual assistance between national courts and the CJEU might be threatened because of certain imperfections in the procedure itself: namely unacceptable delays, extra costs and incomprehensive judgments. Consequently, the UK’s highest courts became wary of making a reference to the CJEU, as observed by Kenny (2012: 438) and Rasmussen (2000: 1072). The average length of the preliminary ruling procedure in 2012 was 15.7 months (Statistics Concerning Judicial Activity in 2012: Consolidation of the Results Achieved in Recent Years 2012). An example of an English courts’ consideration of such factors can be found in *Abbey National Plc &Ors v The Office of Fair Trading* [2009], where it was held that the public interest⁵ in resolving the dispute heavily outweighed the need to make a reference.

Moreover, some of the CJEU’s rulings are quite laconic and abstract. Bobek (2008: 1641) warns that such rulings could be annulled due to the lack of reasoning, had they been created in a national court. An illustration of this point is the case of *O’Byrne v Aventis Pasteur SA* [2008], where the ambiguity of the CJEU’s answer led to a request for second reference. More significantly, as mentioned by Lord Mance (2013: 445), out of all five judges hearing *O’Byrne v Aventis Pasteur SA* [2008], only one, Lord Rodger, seemed to be able to correctly grasp the CJEU’s point from the first reference.

Although English courts have not yet explicitly rejected the idea of cooperation, the above examples prove their lack of enthusiasm for engaging in a dialogue with the CJEU. Indeed, they

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⁴ The ability of a lower national court to set aside domestic legislation without consulting the Constitutional Court could be viewed as revolutionary, because it was contrary to the constitutional tradition in some Member States (this case refers to Italy). By having such impact on the domestic legal system, the existence of the preliminary ruling procedure proves to be extremely significant for the development of the Community legal system.

⁵ Unlike cases where only certain individuals will be concerned, this decision has the potential to affect many people, because it considered the lawfulness of banks’ fees for unauthorised overdraft.
might still participate in cooperation solely because they are supposed to take part in the development of the Community legal order due to the United Kingdom’s membership of the European Union. Moreover, Arnulf (2010: 81) suggests that they simply do not wish to oppose Parliament’s will to be part of the Community.

Taking into an account the flaws of the preliminary ruling procedure, it is suggested that other, more effective ways of ensuring the unified application of European Union law should be adopted. Sabel and Gerstenberg (2010: 513) propose the coordinated constitutional order approach as a possible solution. This approach commits national courts and supranational tribunals to mutual monitoring, acceptance and adjusting to the other’s legal traditions and fundamental principles. It is likely that this method is capable of resolving the current problems in the preliminary ruling procedure, as supported by Kenny (2012: 448).

**Is the CJEU Superior to National Courts?**

It appears that national courts are not always eager to engage in a cooperative dialogue with the CJEU. However, it should be pointed out that the CJEU itself has also departed from the cooperative manner. By defining the mode of cooperation, it has positioned itself as a superior court. Although it is widely accepted that the decision, whether or not to refer, is entirely at the discretion of the national courts, the CJEU has placed certain restrictions on this discretion. More importantly, when introducing new concepts, it does not consult with national courts, but simply imposes its novel approach. For instance, it introduced the Acte Éclaire doctrine in *Da Costa en Schake NV, Jacob Meijer NV and Hoechst-Holland NV n Nederlandse Belastingadministratie* [1963]; according to which if the question has already been answered in a previous ruling, the national court is not obliged to refer. Consequently, it extended the principle in *Srl CILFIT and Lanificio di Govardo SpA v Ministry of Health* [1982] by declaring that if the interpretation of EU law is so obvious that it leaves no reasonable doubt, the obligation to make a reference is suspended. Tridimas (2003: 12) described this approach as evolutionary in the relationship

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6 Acte Éclaire - a French term used to describe a situation where the CJEU have already ruled on an identical question.

7 This approach is also known as the ‘CILFIT criteria’, or the Acte Clair doctrine.
between CJEU and national courts, because the CJEU uses it to “establish the normative value of its ruling”.

Furthermore, the fact that the CJEU allows national courts to use their discretion in these very specific circumstances supports the notion that the CJEU views itself as a superior court. For instance, national courts must firstly examine all language versions, and then conclude that the understanding is identical in every language. Such a duty could prove to be very demanding, potentially discouraging national courts from using their freedom to decide cases independently from CJEU. Consequently, the narrow scope of liberty provided to national courts implies that the CJEU has declared itself as the sole creator and interpreter of European Union law.

Although the CJEU has gradually tried to impose its superiority in the initial relationship of cooperation, the national courts seem unwilling to entirely accept this. According to Broberg (2008: 1396), the doctrine of Acte Clair has been used more than expected. For instance, the EU Commission brought proceedings against Sweden because the Swedish courts failed to comply with their obligation to refer in several cases. Consequently, it may be that the CILFIT criteria has been used so often that it has led to a divergence in the meaning of European Union law across Member States, as noted by Tridimas (2003: 47).

Furthermore, Kenny (2012: 448) argues that in Abbey National, the UK Supreme Court modified the CILFIT criteria by accepting a unanimous decision to allow an appeal; meaning that the matter is now clear. Such an endeavour could be perceived as inimical to the notion of the CJEU’s superiority, because the national court altered the doctrine without consulting the CJEU. From a national court’s perspective, the Acte Clair doctrine has been used more as a way of escaping from the preliminary ruling procedure than as a tool of emphasizing CJEU’s superiority. Drawn together, even though the CJEU is the court which expressly shapes the relationship with national courts, the latter have found ways to modify the boundaries of this relationship.
**Köbler- The CJEU’s New Method of Establishing Superiority**

The relationship between national courts and CJEU has been in a state of constant development, as exemplified by the analysis above. It has been amended by the decision in the Köbler where the CJEU once again exercised its power to regulate the relations with national courts. In this case Professor Köbler had an age addition rejected, on the basis that he had not achieved the fifteen years of required service. However, Köbler believed he was eligible, as he had worked in another EU country for a long period. He argued that this breached European Union law on the basis of free movement of workers, but the Supreme Administrative Court in Austria withdrew its application for preliminary reference and interpreted the law to find against Mr Köbler. He brought his case before the Regional Civil Court in Austria, which asked the CJEU whether State liability can also be incurred for judicial wrongs. The CJEU answered in the affirmative, as well as pointing out that such liability will arise where the breach of EU law is sufficiently serious. An example the CJEU gave was the failure to comply with the obligation to refer. The Supreme Administrative Court, however, was not found to be in breach in this instance. Taking into account the earlier observation that the Acte Clair doctrine has been largely overused, it could be suggested that the CJEU introduced the concept of State liability for judicial errors in order to restrict national courts’ liberty to rely on the doctrine, as supported by Groussot and Minssen (2007: 386). Komarek (2005: 15) argues that by exposing the judiciary to scrutiny in this way, it gave national courts more incentive to make references to the CJEU. These conclusions can be drawn by examining the practical outcomes of the Köbler judgment.

To begin with, such liability might not be as novel as pronounced, because in international law the State is viewed as an entity, and can incur liability no matter whether the legislature, executive or judiciary is in breach. The principle of State liability had been introduced in *Francovich and Bonifaci v Italy* [1991]. Under this principle, a State will be liable if it fails to implement a directive.\(^8\) It has been further extended in *Brasserie du Pecheur SA v Germany* [1996], where it was held that incorrect implementation of a directive will suffice for a breach of European Union law. Moreover, Toner (1997: 169) emphasises that once State liability for

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\(^8\) Such liability will arise only if the result of the directive aims to grant rights to individuals, the content of these rights is identified in the directive, and the State’s failure to implement the directive caused the damage to the individual.
wrongful damage is accepted, it is difficult to justify the immunity of the judiciary; especially when taking into account the consequences a wrongful judgment might have on an individual. In addition, liability for judicial errors is the next reasonable step in ensuring the effectiveness of European Union law. As Nassimpian (2007: 830) proposes, liability for judicial errors acts as an incentive for the judiciary to give efficient protection of individual rights. Arnull (2010: 61) considers that such liability addresses the fundamental role of the Member States’ judiciary in the application of European Union law.

Furthermore, by taking into account the practical application of the decision, it could be argued that the threshold for incurring liability is extremely high. Anagnostaras (2006: 753) argues out that it can hardly ever be satisfied. The CJEU has placed boundaries on the extent of the liability by declaring that it will only occur very rarely. Additional support for this proposition is given by the requirement that the national court must have manifestly infringed European Union law where example of such infringement is non compliance with the duty to refer. The fact that the national court’s act in Köbler was not found to be sufficiently grave, supports the proposition that it is not yet clear what amounts to such an infringement. Moreover, Anagnostaras (2006: 746) underlines the difficulty in fulfilling the causation test, due to the uncertainty as to whether the court would have decided the case differently, had it referred. As a result, due to the practical difficulty in satisfying the test of liability, it appears that the CJEU’s aim might have been to fortify the reliance on the preliminary ruling procedure.

Conclusion
It is suggested that the relationship between the CJEU and the national courts has changed throughout the years. Although the preliminary ruling procedure was initially established as an opportunity for communication between CJEU and the national courts, the problems of the system have discouraged English courts from taking part in this cooperation. The UK’s House of Lords considered the unacceptable delays, costs and incomprehensive rulings as crucial factors in making their decision whether to refer or not. However, it is not only the national courts which are in the process of abstaining from the notion of cooperation.
The CJEU’s positioning as a superior court has also affected the initial idea of partnership. It sought to limit national courts’ discretion in determining the question of making a reference by introducing the Acte Clair doctrine. Unexpectedly, the doctrine has been relied on in a wide spectrum of cases, implying national courts’ eagerness to undertake an independent role in the development of the European Union’s legal order and the non-acceptance of the CJEU’s self-positioning as a superior court. As a result, the CJEU may perceive it necessary to intervene, as in Köbler where State liability for judicial errors was established. However, the CJEU set a high threshold for incurring liability, reminding national courts that they should consult it by making a reference. In consequence, the CJEU once again succeeded in putting forward its will and emphasising its superiority.

The author agrees with the prediction made by Wattel (2004: 178) that eventually courts might engage in referring only because they do not want their governments to be held liable. Unfortunately, this is a significant departure from the genuine aim of the preliminary ruling procedure and can potentially place courts in a political dispute. This article recommends that the CJEU should seek a more effective mechanism for achieving the unified interpretation and application of EU law. Judicial collaboration, created by the mutual agreement of deferring to each other’s decisions, might be capable of resolving the current problems with the system.
Bibliography


Cases C-6 and 9/90 Francovich and Bonifaci v Italy [1991] ECR I-5357.


Case C-224/01 Gerhard Köbler v Republik Österreich [2003] ECR I-10239.

Case C—496/04 Slob [2006] ECR.


