

## Preliminary Rulings and Judicial Politics

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# PRELIMINARY RULINGS AND JUDICIAL POLITICS

**Anthony Arnall\***

## **Introduction**

The central role played by the preliminary rulings procedure in the development and functioning of the Union legal order is undisputed. In a report on the application of the Treaty on European Union issued in the run-up to the 1996 IGC,<sup>1</sup> the Court of Justice described it as

the veritable cornerstone of the operation of the internal market, since it plays a fundamental role in ensuring that the law established by the Treaties retains its Community character with a view to guaranteeing that the law has the same effect in all circumstances in all the Member States of the European Union.

In Opinion 2/13,<sup>2</sup> the Court stated that the judicial system of the Union

has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law..., thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties...<sup>3</sup>

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\*Barber Professor of Jurisprudence, University of Birmingham, UK. I am grateful to my colleague, Sophie Boyron, for discussing with me the approach of the French courts.

<sup>1</sup> 'The Proceedings of the Court of Justice and Court of First Instance of the European Communities', 22–26 May 1995 (No. 15/95) para 11.

<sup>2</sup> EU:C:2014:2454.

<sup>3</sup> Opinion, para 176.

The procedure has acquired this exalted status by happenstance rather than design. The idea of incorporating in the Treaty framework a system of preliminary rulings originated in a suggestion by Maurice Lagrange, the principal architect of the Court and later an Advocate General at the Court from 1958-64, during the discussions which led to the ECSC Treaty. He envisaged what became Article 41 ECSC as an addendum to a provision – later Article 40 ECSC – giving national courts and tribunals a limited jurisdiction over disputes involving the Community and persons other than its servants. The principle underlying the suggestion was that the Court of Justice should have the exclusive right to rule on questions of Community law.<sup>4</sup>

Although the Court would later hold that Article 41 ECSC permitted national courts to seek preliminary rulings on questions of interpretation,<sup>5</sup> the text of the provision envisaged preliminary rulings only on questions of validity. It was not until the negotiations on what was to become the EEC Treaty that the idea of expressly allowing the Court to give preliminary rulings on questions of interpretation was put forward. The author of that proposal was Nicola Catalano, the Italian member of the *groupe de rédaction*, former legal adviser of the High Authority and later a Judge at the Court from 1958-61. Based on Italian law, Catalano's proposal had originally suggested that national courts should have the right to seek preliminary rulings on the *application* of Community law and that it should state expressly that the rulings of the Court would be binding on national courts.<sup>6</sup> Those particular suggestions did not survive the drafting process, although there is a fine line between interpreting and applying the law<sup>7</sup> and the binding nature of preliminary rulings would later be confirmed by the

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<sup>4</sup> A Boerger-De Smedt, 'La Cour de Justice dans les Négotiations du Traité de Paris Instituant la CECA' (2008) 14 *Journal of European Integration History* 7, 28-29.

<sup>5</sup> Case C-221/88 *Busseni* EU:C:1990:84.

<sup>6</sup> A Boerger-De Smedt, 'Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome' (2012) 21 *Contemporary European History* 339, 352.

<sup>7</sup> M Rasmussen, 'Constructing and Deconstructing 'Constitutional' European Law: Some Reflections on How to Study the History of European Law' in H Koch et al (eds), *Europe: The New Legal Realism* (DJØF, 2010) 639, 642.

Court.<sup>8</sup> More significantly, the result, as Morten Rasmussen has observed, was a system that ‘would depend completely on the cooperation of national Courts in order to function.’<sup>9</sup> It is unlikely that the future significance of the system was fully appreciated.<sup>10</sup>

Much ink has been spilt by both lawyers and political scientists in attempting to explain why so many national courts played their part so conscientiously in making the preliminary rulings procedure a success. One of the most significant insights has been the theory of judicial empowerment advanced by Joseph Weiler and later developed by Karen Alter in her writings on what she calls inter-court competition.

Weiler suggested that, when a national court made a reference for a preliminary ruling, a form of judicial empowerment was in operation. This enabled lower national courts in particular to exercise powers they had not previously enjoyed, bypassing their hierarchical superiors in the process:<sup>11</sup>

Lower courts and their judges were given the facility to engage with the highest jurisdiction in the Community and, even more remarkable, to gain the power of judicial review over the executive and legislative branches even in those jurisdictions where such judicial power was weak or non-existent. Has not power been the most intoxicating potion in human affairs?

Alter developed Weiler’s thesis, claiming:<sup>12</sup>

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<sup>8</sup> E.g. Case 29/68 *Milchkontor v Hauptzollamt Saarbrücken* EU:C:1969:27 ; Case C-173/09 *Elchinov* EU:C:2010:581. See below.

<sup>9</sup> Above, n 7, 643.

<sup>10</sup> Boerger-De Smedt, above, n 4, 30; Rasmussen, above n 7, 643.

<sup>11</sup> J Weiler, *The Constitution of Europe* (CUP, 1999) 197.

<sup>12</sup> ‘Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration’ in A-M Slaughter, A Stone Sweet and J Weiler, (eds), *The European Courts and National Courts—Doctrine and Jurisprudence* (Hart, 1997) 227, 241.

that different courts have different interests *vis-à-vis* EC law, and that national courts use EC law in bureaucratic struggles between levels of the judiciary and between the judiciary and political bodies, thereby inadvertently facilitating the process of legal integration.

According to Alter, it was the difference between the interests of lower and higher courts that was crucial. She argued that the preliminary rulings procedure enabled the former to circumvent the case law of the latter by enlisting the help of the Court of Justice. The procedure might as a corollary threaten the authority and independence of the higher national courts.<sup>13</sup>

The famous English case of *Bulmer v Bollinger*,<sup>14</sup> decided shortly after UK accession, showed awareness by a higher national court (the English Court of Appeal) of the threat posed to its authority by the preliminary rulings procedure. In that case, Lord Denning MR laid down an elaborate set of guidelines for the benefit of English judges called upon to decide points of Community law before giving judgment. The guidelines seemed calculated to encourage English judges to resolve questions of Community law for themselves and only to request preliminary rulings in exceptional circumstances. It seems likely that Lord Denning saw in the Court of Justice a rival which might limit the power of the higher English courts to control lower courts and influence the future direction of the law.

### **The *Križan* case**

In the years that have passed since *Bulmer v Bollinger*, a substantial body of case law has developed supporting the theory of inter-court competition at the national level. The potential for such competition to be deliberately exploited by the Court of Justice was highlighted in *Jozef Križan and Others v Slovenská inšpekcia životného prostredia*,<sup>15</sup> a case which perfectly

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<sup>13</sup> K Alter, *Establishing the Supremacy of European Law* (OUP, 2001) 47–52.

<sup>14</sup> [1974] Ch 401.

<sup>15</sup> Case C-416/10 EU:C:2013:8.

illustrates the capacity of the preliminary rulings procedure to subvert national judicial hierarchies.

Underlying the *Križan* case was a complicated dispute over the proposed construction of a landfill site in the Slovak town of Pezinok. The intervener in the main proceedings was granted a permit by the competent Slovak authority to build and operate the site. The appellants in the main action brought an administrative appeal against the authority's decision to grant the permit on the basis that the application had not initially contained the urban planning decision required by national law and that, when that decision was submitted, it was not published.

When the administrative appeal was unsuccessful, the appellants brought proceedings in the Regional Court of Bratislava, an administrative court of first instance. Those proceedings were also unsuccessful, so the appellants lodged a further appeal with the Supreme Court of the Slovak Republic. The Supreme Court overturned the outcome of the administrative appeal and quashed the decision to issue the permit on the basis that the competent authorities had breached the rules on public participation in the procedure and had not properly appraised the environmental impact of the proposed venture.

The respondents thereupon appealed to the Constitutional Court of the Slovak Republic, which held that the Supreme Court had infringed the respondents' fundamental rights under the Slovak Constitution and the European Convention on Human Rights. It also found that the Supreme Court had exceeded its powers by examining the lawfulness of the procedure and of the environmental impact assessment decision, which had not in any event been contested by the appellants. The Constitutional Court therefore set the contested judgment aside and sent the case back to the Supreme Court so that it could give a fresh ruling.

Under Slovak law, the Supreme Court was bound by the judgment of the Constitutional Court. However, the Supreme Court still entertained doubts about whether the contested decisions were consistent with EU law. It therefore referred a number of questions to the Court of Justice of its own motion. It is the first question that is relevant to the present discussion. It had two parts.

The first part asked whether a national court was entitled of its own motion to make a reference to the Court of Justice ‘following a referral back after the constitutional court of the Member State concerned has annulled its first decision and although a national rule obliges it to resolve the dispute by following the legal opinion of that latter court.’<sup>16</sup>

The second part of the question asked ‘whether Article 267 TFEU must be interpreted as obliging that same national court to refer a case to the Court of Justice although its decisions may form the subject, before a constitutional court, of an action limited to examining whether there has been an infringement of the rights and freedoms guaranteed by the national Constitution or by an international agreement.’<sup>17</sup>

On the first part, Advocate General Kokott pointed out that the case law of the Court showed that ‘neither the requirements of the Constitutional Court nor the fact that the parties have not asked for questions to be referred to the Court of Justice preclude a reference for a preliminary ruling.’<sup>18</sup> Article 267 TFEU, she said, conferred on national courts ‘the widest discretion – which may be exercised *ex officio* or at the request of the parties – to make a reference to the Court of Justice if they consider that a case pending before them raises issues involving an interpretation or assessment of the validity of provisions of European Union law and requiring a decision by them.’<sup>19</sup>

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<sup>16</sup> Judgment, para 62.

<sup>17</sup> Judgment, para 62.

<sup>18</sup> Opinion, para 55.

<sup>19</sup> Opinion, para 56 (footnotes omitted).

The Court agreed, declaring:<sup>20</sup>

A rule of national law, pursuant to which legal rulings of a higher court bind another national court, cannot take away from the latter court the discretion to refer to the Court of Justice questions of interpretation of the points of European Union law concerned by such legal rulings. That court must be free, if it considers that a higher court's legal ruling could lead it to deliver a judgment contrary to European Union law, to refer to the Court of Justice questions which concern it...

Having made a reference, the referring court would be bound by the interpretation given by the Court of the provisions in question. If in the light of that interpretation the referring court concluded that the ruling of the higher court was not consistent with Union law, it would be obliged to disregard it. Those principles applied not just to relations between ordinary national courts but also to relations between a constitutional court and other national courts. The Court emphasised that 'rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of European Union law...'<sup>21</sup>

The second part of the Supreme Court's first question was essentially designed to establish whether it constituted a court of last resort for the purposes of Article 267 and was therefore subject to the obligation to refer laid down in the third paragraph of that article.

A court of last resort for these purposes is, as Article 267 puts it, a court 'against whose decisions there is no judicial remedy under national law...' Advocate General Kokott said that a judicial remedy in this context 'must allow the raising, as its subject-matter, of a question concerning the correct application of European Union law...'<sup>22</sup> Although the decisions of the Supreme Court were subject to review by the Constitutional Court, that court was

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<sup>20</sup> Judgment, para 68.

<sup>21</sup> Judgment, para 70.

<sup>22</sup> Opinion, para 57.



‘limited to ensuring compliance with the Slovak Constitution’ and did not have the power ‘to verify compliance by national authorities and courts with European Union law.’<sup>23</sup> She therefore proceeded on the basis that the Supreme Court was covered by the obligation to refer imposed by the third paragraph of Article 267, at least for the purposes of the present dispute.

Again the Court agreed with the Advocate General. The Supreme Court was, it said, <sup>24</sup>

required to submit a request for a preliminary ruling to the Court of Justice when it finds that the substance of the dispute concerns a question to be resolved which comes within the scope of the first paragraph of Article 267 TFEU. The possibility of bringing, before the constitutional court of the Member State concerned, an action against the decisions of a national court, limited to an examination of a potential infringement of the rights and freedoms guaranteed by the national constitution or by an international agreement, cannot allow the view to be taken that that national court cannot be classified as a court against whose decisions there is no judicial remedy under national law within the meaning of the third paragraph of Article 267 TFEU.

The Court therefore answered the first question in the following terms: ‘Article 267 TFEU must be interpreted as meaning that a national court, such as the referring court, is obliged to make, of its own motion, a request for a preliminary ruling to the Court of Justice even though it is ruling on a referral back to it after its first decision was set aside by the constitutional court of the Member State concerned and even though a national rule obliges it to resolve the dispute by following the legal opinion of that latter court.’<sup>25</sup>

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<sup>23</sup> Opinion, para 58.

<sup>24</sup> Judgment, para 72.

<sup>25</sup> Judgment, para 73; operative part, para 1.

## **Observations on the Court's ruling in *Križan***

The answer given by the Court to the first part of the first question referred to it by the Slovakian Supreme Court was based on established case law laying down a principle that should be uncontroversial.

The Court has made it clear that, 'in order to ensure the primacy of EU law', the functioning of the system of cooperation between the Court of Justice and the national courts established by Article 267 means that a national court must 'be free to refer to the Court of Justice for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate...' <sup>26</sup> The preliminary rulings procedure is 'completely independent of any initiative by the parties'.<sup>27</sup> Thus, the wide discretion enjoyed by national courts whenever they consider that a question of Union law needs to be answered to enable them to give judgment may be exercised either at the request of the parties to the main action or of the national court's own motion.<sup>28</sup> It is also well established that a preliminary ruling binds the referring court as to the interpretation or validity of the provision in question.<sup>29</sup>

It is therefore evident that a national rule to the effect that courts are bound by the rulings of a higher court cannot deprive lower courts of the right to make a reference to the Court of Justice where they wish to check that such rulings are compatible with Union law. If the contrary were the case, the primacy of Union law would be compromised. This was underlined by the Court in *Elchinov*,<sup>30</sup> where it recalled, citing *Simmenthal*,<sup>31</sup> that 'a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those

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<sup>26</sup> Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* EU:C:2010:363, para 52 of the judgment.

<sup>27</sup> Case C-210/06 *Cartesio* EU:C:2008:723, para 90.

<sup>28</sup> *Cartesio*, para 88; Case C-104/10 *Kelly* EU:C:2011:506, para 61.

<sup>29</sup> Above, n 8.

<sup>30</sup> Case C-173/09, para 31 of the judgment. See also Case C-396/09 *Interedil* EU:C:2011:671, para 38 of the judgment.

<sup>31</sup> Case 106/77 EU:C:1978:49.

provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation’, such as a rule requiring it to follow the decisions of a higher court. It is not necessary for the court in question ‘to request or await the prior setting aside of that national provision by legislative or other constitutional means...’

The logic underlying the principles referred to above is ineluctable and they were all well established at the time of the reference in *Križan*. It was not therefore necessary for the first part of the first question referred in that case to be put to the Court of Justice. This point will be pursued below.

The response of the Court of Justice to the second part of the first question was more interesting. *Križan* was not the first case to raise the question whether a national court whose decisions were only in limited circumstances subject to appeal to a higher court constituted a court ‘against whose decisions there is no judicial remedy’ within the meaning of the third paragraph of Article 267. The language of the Treaty might suggest that any judicial remedy, however limited, is enough to remove the obligation to refer. Moreover, the burden on the Court of Justice would be very heavy if too many national courts were required to refer. However, the effectiveness of the procedure in ensuring the uniform application of Union law would be enhanced if the number of national courts with the discretion not to refer were kept to a minimum.<sup>32</sup> So a balance needs to be struck.

The English case of *Chiron Corporation v Murex Diagnostics*<sup>33</sup> raised the issue in connection with the arrangements for appealing from the Court of Appeal to the House of Lords (now the UK Supreme Court). Such an appeal may only be brought with the permission of either the Court of Appeal or the higher court. If the Court of Appeal refuses permission, does that turn it into a court of last resort for the purposes of Article 267? In *Chiron*, the Court of Appeal held that the possibility of making an application to the House of Lords for permission

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<sup>32</sup> A Arnall, *The European Union and its Court of Justice* (OUP, 2<sup>nd</sup> ed, 2006) 120.

<sup>33</sup>. [1995] All ER (EC) 88, [1995] FSR 309. See D Anderson and M Demetriou, *References to the European Court* (Sweet & Maxwell, 2<sup>nd</sup> ed, 2002) 167-169.

to appeal constituted a 'judicial remedy' within the meaning of Article 267. The Court of Appeal could not therefore be considered a court of last resort itself for the purposes of that provision.

No reference to the Court of Justice was made in *Chiron*, but the position taken by the English Court of Appeal was endorsed in *Lyckeskog*.<sup>34</sup> In that case, a reference was made by the Court of Appeal for Western Sweden, which wanted to know if it was a court of last resort under Article 267. The referring court's decision in the main action would be subject to appeal to the Swedish Supreme Court, but only if the Supreme Court declared it admissible on grounds set out in the Swedish Code of Procedure. The Court of Justice ruled that the possibility of an appeal to the Supreme Court meant that the Court of Appeal could not be considered a court of last resort, even where the merits of the appeal would only be examined by the Supreme Court if it declared the appeal admissible.

*Lyckeskog* was followed in *Cartesio*,<sup>35</sup> which concerned a dispute over whether an amendment should be made to the entry in the Hungarian commercial register concerning Cartesio's company seat. The dispute reached the Regional Court of Appeal, Szeged, where two questions concerning the status of that court under Article 267 arose.

The first was whether the referring court, when hearing an appeal against a decision of a lower court responsible for maintaining the commercial register, constituted a court of tribunal of a Member State, given that the proceedings before both the referring court and the lower court were not *inter partes*. In considering whether a body constitutes a 'court or tribunal of a Member State' for the purposes of Article 267, the Court of Justice normally mentions as one of the factors to be taken into account whether the procedure followed by the body concerned is *inter partes*,<sup>36</sup> although it has made it clear that this

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<sup>34</sup> Case C-99/00 EU:C:2002:329.

<sup>35</sup> Case C-210/06 EU:C:2008:723.

<sup>36</sup> See e.g. Case 61/65 *Vaassen v Beambtenfonds Mijnbedrijf* EU:C:1966:39; Case C-53/03 *Syfait and Others* EU:C:2005:333; Case C-96/04 *Standesamt Stadt Niebüll* EU:C:2006:254 .

is not an absolute criterion.<sup>37</sup> Moreover, the Court has rejected as inadmissible references made by courts responsible for registers relating to, for example, land<sup>38</sup> or companies,<sup>39</sup> where their decisions are administrative rather than judicial in character. However, the Court held in *Cartesio* that the referring court, which was acting in an appellate capacity, was ‘called upon to give judgment in a dispute and is exercising a judicial function.’<sup>40</sup> It therefore constituted a court or tribunal even though the proceedings before it were not *inter partes*.

Those obstacles having been overcome, the second question fell to be considered. This asked whether the referring court was a court of last resort for the purposes of the third paragraph of Article 267. That issue arose because, as the Court explained,<sup>41</sup>

...although Hungarian law provides that decisions delivered on appeal by the referring court may be the subject of an extraordinary appeal – in other words, an appeal on a point of law before the Legfelsőbb Bíróság [Supreme Court], the purpose of which is to ensure the consistency of the case-law – the possibilities of bringing such an appeal are limited, in particular, by the condition governing the admissibility of pleas, which is linked to the obligation to allege a breach of law, and in view of the fact...that under Hungarian law an appeal on a point of law does not, in principle, have the effect of suspending enforcement of the decision delivered on appeal.

Citing *Lyckeskog*, the Court held that the restrictions applicable to appeals to the Supreme Court ‘do not have the effect of depriving the parties in a case before a court whose decisions are amenable to an appeal on a point of law of the possibility of exercising effectively their right to appeal the decision handed

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<sup>37</sup> Case C-54/96 *Dorsch Consult* EU:C:1997:413, para 31 of the judgment; Case C-17/00 *De Coster* EU:C:2001:651, para 14 of the judgment.

<sup>38</sup> Case C-178/99 *Salzmann* EU:C:2001:331.

<sup>39</sup> Case C-111/94 *Job Centre* EU:C:1995:340; Case C-86/00 *HSB-Wohnbau* EU:C:2001:394.

<sup>40</sup> Judgment, para 58.

<sup>41</sup> Judgment, para 75.

down by that court in a dispute such as that in the main proceedings.<sup>42</sup> It followed that the referring court was not subject to the obligation to refer laid down in the third paragraph of Article 267.

To summarise, the Court of Appeal in *Lyckeskog* was found not to be a court of last resort because of the possibility of an appeal to the Supreme Court, even though the merits of the appeal would only be examined by the Supreme Court where it had declared the appeal admissible. True, the Court did emphasise that, if a question of Union law arose for decision, ‘the supreme court will be under an obligation...to refer a question to the Court of Justice for a preliminary ruling either at the stage of the examination of admissibility or at a later stage.’<sup>43</sup> However, if the Supreme Court happened to examine the question of Union law at the admissibility stage and concluded that no reference was necessary, there could be no guarantee that it would revisit the issue later even if its significance emerged more clearly when the substance of the case was being considered. In *Cartesio*, the referring court was found not to be a court of last resort even though the right to bring an appeal to the Constitutional Court was limited to points of law and did not have suspensory effect. However, in *Križan*, the Supreme Court was found to be a court of last resort because the appellate jurisdiction of the Constitutional Court was limited to alleged infringements of the rights and freedoms guaranteed by the national constitution or by an international agreement. Neither the Opinion of Advocate General Kokott nor the judgment of the Court contained any detailed analysis of the scope of the right to appeal to the Constitutional Court.

The first principle applied by the Court of Justice in *Križan* – that a rule of national law making the rulings of a higher court binding on an inferior national court cannot deprive that court of its right to invoke the preliminary rulings procedure – undoubtedly has the potential to undermine national judicial hierarchies and fuel inter-court competition. This is an

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<sup>42</sup> Judgment, para 78.

<sup>43</sup> Judgment, para 18.

unintended and unavoidable consequence of the preliminary rulings procedure and its underlying logic. That logic was exploited by the Slovak Supreme Court when it made an unnecessary reference on a question the answer to which was clear. It doubtless took the view that it would be useful from the perspective of Slovak judicial politics to have specific confirmation from the Court of Justice of its right to refer.

The second of the Court's findings – that the referring court constituted a court of last resort within the meaning of the third paragraph of Article 267 – reinforced the position of the Supreme Court by shielding it from criticism that it had acted unlawfully by enlisting the assistance of the Court of Justice. However, the conclusion reached by the Court of Justice on the status of the Supreme Court under Article 267 is not easy to reconcile with its previous case law, where limited rights of appeal were found to constitute a judicial remedy under Article 267 even though they might have prevented the issues of EU law in play from receiving a proper airing.

The suspicion that the Court of Justice was intervening directly in a domestic dispute between two national courts could and should have been allayed by a more detailed examination of the Slovakian Constitutional Court's appellate jurisdiction. An important question would seem to have been whether it might have had jurisdiction to consider alleged infringements of a party's rights under EU law on the ground that they were based on an 'international agreement'. The Court's judgment did not address the question whether the appellants' rights under Union law were less firmly protected under the Slovak system than under the Swedish or Hungarian systems. Yet this needed to be established in order to justify the apparent departure from the approach taken in *Lyckeskog* and *Cartesio*. Indeed, those decisions might have been interpreted as attempts to control the volume of references by minimising the class of national courts covered by the obligation to refer. That imperative was not of course expressly articulated, but *Križan* might be said to underline the dangers for the Court of allowing itself to be influenced by unarticulated managerial

considerations such as this which seem in a later case to be less pressing than other competing factors.

### **The contrast with *Melki and Abdeli***

The Court's approach in *Križan* contrasts with its approach in *Melki and Abdeli*,<sup>44</sup> another case that may usefully be examined through the prism of inter-court competition. A reference to the Court of Justice by the French Cour de Cassation, the case involved two Algerian nationals unlawfully present in France. They were stopped by the police under the French Code of Criminal Procedure near the French border with Belgium, detained and served with deportation orders. Before the competent judge at first instance, the individuals concerned raised a priority question on constitutionality, that is, a plea alleging that their rights and freedoms guaranteed by the French Constitution had been prejudiced. The claimants argued that the provisions of the French Code of Criminal Procedure authorising border controls at or near the borders of France with other Member States were contrary to the Treaty rules on the free movement of persons and that those rules enjoyed constitutional status under the French Constitution.

Article 61-1 of the Constitution provided (so far as relevant) that, where it was claimed in proceedings before a court or tribunal that the rights and freedoms it guaranteed were prejudiced by a legislative provision, the matter could be brought before the Conseil Constitutionnel by way of a reference from the Cour de Cassation. The judge at first instance decided to invoke that provision and submitted to the Cour de Cassation the question whether the disputed provisions of the Code of Criminal Procedure were compatible with the Constitution. The legislation applicable required the Cour de Cassation to 'rule as a matter of priority on the referral of the question on constitutionality to the Conseil constitutionnel'<sup>45</sup> and to deliver its decision within three months.

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<sup>44</sup> Joined Cases C-188/10 and C-189/10 EU:C:2010:363.

<sup>45</sup> English translation taken from para 14 of the judgment of the Court of Justice.



The Cour de Cassation pointed out that the case raised the question whether the Code of Criminal Procedure was consistent with both EU law and the Constitution. However, it considered that the effect of the relevant national provisions was to deprive it of the opportunity to make a reference to the Court of Justice for a preliminary ruling where a priority question of constitutionality had been referred to the Conseil Constitutionnel. Since it took the view that its decision on whether to refer the case to the Conseil Constitutionnel depended on the interpretation of EU law, it referred two questions to the Court of Justice before taking that decision. The first question asked whether Article 267 precluded national provisions requiring courts to rule as matter of priority on the submission to a higher court of the question of the constitutionality of a domestic provision where the doubt as to its constitutionality arose because it was alleged to be contrary to EU law. The second question sought guidance on the compatibility with EU law of provisions such as those of the French Code of Criminal Procedure in dispute.

The ruling of the Court of Justice was given under the accelerated procedure laid down by the Statute<sup>46</sup> and Rules of Procedure.<sup>47</sup> The Court began by declaring:<sup>48</sup>

...Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling.

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<sup>46</sup> See now Art 23a.

<sup>47</sup> See now Art 105.

<sup>48</sup> Judgment, para 57.

However, it went on to add:

...Article 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free:

- to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary,
- to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and
- to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.

It is for the referring court to ascertain whether the national legislation at issue in the main proceedings can be interpreted in accordance with those requirements of EU law.

It is not difficult to see *Melki and Abdeli* as a struggle between two courts. The origins of the Cour de Cassation can be traced back to the French revolution and beyond.<sup>49</sup> By contrast, the Conseil Constitutionnel is a relative newcomer created in 1958 by the Constitution of the Fifth Republic<sup>50</sup> (though the provisions on priority questions on constitutionality at issue in *Melki and Abdeli* were introduced only in 2009). The Conseil Constitutionnel states revealingly on its web site that it is not a supreme

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<sup>49</sup>[https://www.courdecassation.fr/cour\\_cassation\\_1/presentation\\_2845/r\\_cour\\_cassation\\_30989.html](https://www.courdecassation.fr/cour_cassation_1/presentation_2845/r_cour_cassation_30989.html) (accessed 7 September 2016).

<sup>50</sup> See J Bell, *French Constitutional Law* (OUP, 1992).

court above the Conseil d'Etat and the Cour de Cassation.<sup>51</sup> Is this perhaps a tacit acknowledgment of latent judicial rivalry between a court anxious to cement its place in the national constitutional and judicial firmament and two established courts anxious to preserve theirs? Or is it rather that a powerful and self-confident newcomer is trying to avoid ruffling the feathers of two proud incumbents?

The measured nature of the judgment of the Court of Justice<sup>52</sup> showed that it was fully aware of these simmering tensions and did not wish to inflame them. Indeed, inter-court competition is not confined to the national arena and the Court of Justice may have wished gently to remind judicial interlocutors from one of the most important founding Member States of its own prerogatives. The subtlety of the Court's approach bore fruit in 2013, when the Conseil Constitutionnel itself made a reference for a preliminary ruling in proceedings on a priority question of constitutionality.<sup>53</sup> The Court may have felt it could deal more bluntly with the Constitutional Court of a small newcomer which had only recently emerged from the shadow of the Soviet Union. The wisdom of that more robust stance is considered in the final section of this contribution.

## **Conclusion**

The secrecy of the Court's deliberations means that we shall probably never know what lay behind the judgment in *Križan*.<sup>54</sup> Perhaps it was only a happy coincidence that the outcome was to shore up the position of a

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<sup>51</sup> 'Le Conseil constitutionnel n'est pas une cour suprême au-dessus du Conseil d'État et de la Cour de cassation': <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/le-conseil-constitutionnel/presentation-generale/presentation-generale.206.html> (accessed 7 September 2016).

<sup>52</sup> The Court's ruling on the substance of the case was also a qualified one: see para 75 of the judgment.

<sup>53</sup> Case C-168/13 PPU *Jeremy F v Premier ministre* EU:C:2013:358. The Court gave its ruling in under two months.

<sup>54</sup> The secrecy of the Court's deliberations has on the whole been strictly observed, though the way each judge voted in Case 26/62 *Van Gend en Loos* EU:C:1963:1 now seems to have been established. See M Rasmussen, 'From *Costa v ENEL* to the Treaties of Rome: A Brief History of a Legal Revolution' in MP Maduro and L Azoulai (eds), *The Past and Future of EU Law* (Hart, 2010) 69, 76-77; Rasmussen, above, n 7, 648-649.

national court that seemed more *europarechtsfreundlich* than its hierarchical superior. If so, that would be reassuring. The Court of Justice needs the cooperation of national supreme courts and, when dealing with them, should heed the advice of the late Sir Neil MacCormick to be circumspect and exercise ‘political as much as legal judgment.’<sup>55</sup> Playing judicial politics on an *ad hoc* basis may be tempting in isolated cases but will ultimately serve only to muddle the case law and stoke resistance to the requirements of EU law in the upper reaches of some national judiciaries.

Although the Bundesverfassungsgericht<sup>56</sup> did not ultimately resist the judgment of the Court of Justice in *Gauweiler*,<sup>57</sup> the stance for which it has become famous has influenced supreme courts all over the Union. This was dramatically illustrated in the so-called ‘Slovak pensions’ case,<sup>58</sup> where the Czech Constitutional Court declared a decision of the Court of Justice<sup>59</sup> ultra vires on the basis that it exceeded the powers transferred to the Union under the Czech Constitution. As a result, it declined to follow that decision, applying instead a constitutional principle and fundamental right of domestic origin.

Some national supreme courts in the Union are operating in contexts where the rule of law is not yet as firmly embedded as it is elsewhere. An example is Poland, where politically-motivated attempts to change the powers and membership of its Constitutional Court attracted criticism from the Venice Commission<sup>60</sup> and the intervention of the European Commission under its rule of law framework.<sup>61</sup> In its dealings with courts such as these, the Court of Justice should tread carefully, for heavy-handed interference may

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<sup>55</sup> N MacCormick, *Questioning Sovereignty* (OUP, 1999) 119.

<sup>56</sup> See its judgment of 21 June 2016.

<sup>57</sup> Case C-62/14 EU:C:2015:400.

<sup>58</sup> Pl. ÚS 5/12, 31 January 2012. See R Zbiral, “A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed *Ultra Vires*,” (2012) 49 *Common Market Law Review* 1475.

<sup>59</sup> Case C-399/09 *Landtová* EU:C:2011:415.

<sup>60</sup> The Venice Commission is the Council of Europe’s advisory body on constitutional affairs. See its report of 11 March 2016 (Opinion no 833/2015).

<sup>61</sup> COM(2014) 158 final (19 March 2014).

ultimately undermine the integrity of the preliminary rulings procedure and weaken the rule of law.