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THE IMPORTANCE OF INDIRECT
ACCESS TO THE ECJ AND THE
ISSUE OF COMPENSATION WHEN
THIS IS DENIED

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Summary

The importance of access to the ECJ, as the common judge of Europe, is of major importance for individuals as a way to ensure effective protection of those rights, which they derive from Community law. Due to the problems facing individuals as regards direct access, because of the requirement of them having to show direct and individual concern, the indirect way of access, by way of the national courts, is all the more important. The preliminary ruling procedure in Article 234 EC, by which this indirect access takes place, involves a series of problems, especially as regards national courts of last instance and their refusal to, from time to time, follow the obligation set out, and refer Community law issues to the ECJ. The importance and the complexity of the provision can be highlighted by applying Hohfeld's theory on rights. The necessity of access to justice and effective legal protection can further be highlighted by looking at the issues from a rights based perspective, as well as from the perspective of the rule of law. The inevitable outcome is that the national courts of last instance must not disregard their duty under Article 234 (3) EC. However, it has still happened that a national court has done just that. There must therefore, when this happens, be a possibility for an injured individual to get compensation for the damage inflicted. A possible way could be applying the principle of State liability. However, whether or not the principle could be used in this respect was, despite the positive remarks made by the ECJ in its well-known *Brasserie du Pêcheur* judgement, not established in the case law of the Court. The *Köbler* judgement has to some extent addressed this issue. However, the judgement by the ECJ in this case is by far free from criticism, since its point of focus seems to be misdirected.

Abbreviations

AG	Advocate General
CFI	Court of First Instance
ECHR	The European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights

1 Introduction

1.1 Background

The European Communities was created as an entity under public international law. The signatory states could perhaps not dream of, and did perhaps not even have the intention that their creation would be transformed into what it is today. An important actor in the Community has been the European Court of Justice, which through its constitutionalizing work has transformed the treaties into what could be labelled the Constitution of Europe. The individuals have been at the centre of attention and the ECJ has declared that the treaties not only concern rights and obligations of the Member States, but also, perhaps more importantly, of the individuals as well. The rights, which Community citizens derive from Community law, require adequate protection. To secure this protection individuals must have access to the ECJ, this because the ECJ is the only court that can be seen as the common judge of Europe. Individuals can gain access to the ECJ either directly or indirectly, by way of the national courts. Since the ECJ has put strict conditions as regards direct access, the most relevant way is indirect access, through the national courts. If access is denied, the individual must have access to an effective remedy. In cases of indirect access denied, this must mean that the state must be held liable to pay damages to the injured individual. It is against this background that this thesis is written.

1.2 Purpose

The overriding purpose of this thesis is to point at the necessity as well as the importance of individuals getting access to the ECJ for protection for their Community law based rights. Since direct access to the Court is limited, due to the strict requirements for individual access put up by the ECJ itself, the need for a proper understanding and application of the

indirect access procedure under Article 234 EC is necessary. National courts of last instance have, however, from time to time, had a tendency to not adhere to their obligation under the article, which is open for severe criticism. I also aim to point at there, in those cases where a national court of last instance does not follow its obligation under the article, must be a possibility for the injured individual to receive compensation from the wrong doing State.

1.3 Method

To achieve the purpose set out in this thesis, I will take a rights based approach to the Community, in the sense that the Community is to be seen as a political society in its own right from which constitution individuals derive certain rights, rights which in turn require Community protection. At the outset of this thesis, I will therefore stress the importance of access to the common judge in Europe, the ECJ, and the necessity of providing effective legal protection of the rights of individuals, since these are important ingredients in the rights based perspective on the Community as well as a part of and a requirement by the rule of law. I will then give a descriptive overview of Article 234 EC, focusing on its third subparagraph. Hohfeld's theory on rights will be applied in a view to further highlight the importance of the provision, as well as to point at its complexity. A brief presentation of the importance and development of the principle of State liability will further be undertaken. The importance of this principle, as a way of compensating an injured individual when a national court of last instance breaches its Community law obligation to make a preliminary reference, will be highlighted. In this respect a somewhat critical analysis of the Köbler judgement will be presented. In my concluding remarks I will also try to give a summarizing view of the problems involved, as well as some possible suggestions for future improvements.

1.4 Delimitations

In chapter 2 I will give a short presentation of Hohfeld's theory of rights, which will be applied on Article 234 (3) EC as to see what sort of Hohfeldian rights hide therein. Other philosophers have presented other theories on rights; those will however fall outside of the scope of the present thesis. As regards the access to the ECJ, the direct access under Article 230 EC will only be briefly mentioned in view of providing an understanding as to why the preliminary ruling procedure under Article 234 EC is of such major importance. Further, since the focus is on state-action, by way of the national courts, only the issue of State liability, and not Community liability, will be discussed.

2 Hohfeld's theory on rights

Hohfeld's theory falls under a grouping of theories called the will-theory, since they put focus on, and connects rights with, the will that is exercised.¹ Hohfeld published his definition and systematisation of rights² for the first time already in the year 1913. His theory makes a permanent contribution to clarity of thought and it forms an excellent starting point when embarking on a theoretical discussion on the issue of rights.³

According to Hohfeld, one of the reoccurring problems in judicial reasoning is the express or tactic assumption that all legal relations may be reduced to "rights" and "duties", and that these two categories are all that is needed to solve even the most difficult legal questions.⁴ Hohfeld therefore constructed a scheme, containing several categories of jural opposites and jural correlatives. The jural opposites are: rights – no-rights, privilege – duty, power – disability and immunity – liability. His jural correlatives are: right – duty, privilege – no-right, power – liability and immunity – disability. The focus point in the following examples will be the jural correlatives, since they will be used in relation to Article 234 (3) EC in chapter 3.5. He was, as has been stated, of the opinion that the term "right" was used to cover every case, even if the issue at hand instead might be a power, privilege or immunity, rather than a right in the strictest sense. Hohfeld aimed at limiting the term "right" to a more definite and appropriate meaning. The answer lay in the correlative "duty", because even those who use the word and conception "right" in its broadest possible way are used to thinking of "duty" as the obvious correlative. An example of the proper use of the term "right", which is also used by Hohfeld himself as a

¹ Whitecross Paton, George, A text-book of Jurisprudence [ed. Derham, David P.], third edition, Oxford University Press, 1964, p. 250.

² Hohfeld, Some fundamental legal conceptions as applied in judicial reasoning, Yale Law Journal, vol. 23, 1913-14, pp. 16-59.

³ Simmonds, N. E., CENTRAL ISSUES IN JURISPRUDENCE Justice, Law and Rights, Sweet & Maxwell, 1986, p. 130.

⁴ Hohfeld, Some fundamental legal conceptions as applied in judicial reasoning, Yale Law Journal, vol. 23, 1913-14, p. 28.

means of illustration is the following: If X has a right against Y that he shall stay of the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay of his place.⁵

As regards Hohfeld's other categories, the following may be stated. To understand his second category, privileges and no-rights, the following illustration, building on the above mentioned, may be helpful. X has a privilege to enter on his own land, which in turn means that Y has a no-rights that X shall not enter on his own land.⁶ The third category of jural correlatives is powers – liabilities. By having a power is meant that X has the ability to alter legal rights and duties, or legal relations in general. By its correlative, liability is meant that Y therefore, since X has the power, has the liability to have his legal situation altered by X's exercise of power.⁷ The fourth and final category is immunity – disability. By immunity means the freedom of Y from the legal power or controls of X as regards some legal relation.⁸

Hohfeld's theory on rights has been briefly presented with the aim of making the reader aware of the complexity of the concept of rights. This is an issue worth keeping in mind when reading through the rest of the thesis. Hohfeld's theory will be revisited, and also applied, in chapter 3.5, when I will give a plausible answer to the question: what sort of Hohfeldian "rights" we find in Article 234 (3) EC?

⁵ Hohfeld, Some fundamental legal conceptions as applied in judicial reasoning, Yale Law Journal, vol. 23, 1913-14, pp. 30-32.

⁶ Hohfeld, Some fundamental legal conceptions as applied in judicial reasoning, Yale Law Journal, vol. 23, 1913-14, p. 33.

⁷ Simmonds, N. E., CENTRAL ISSUES IN JURISPRUDENCE Justice, Law and Rights, Sweet & Maxwell, 1986, pp. 131-132.

⁸ Hohfeld, Some fundamental legal conceptions as applied in judicial reasoning, Yale Law Journal, vol. 23, 1913-14, p. 55.

3 Access to justice

3.1 Access to the common judge – a rights based perspective

According to the rights based perspective, the Community constitutes a political society and the source of rights of the individual is the Community Constitution, the Treaties. The rights based perspective on the Community is closely linked with the Lockean notion of Society, and rights of individuals and protection of those rights is closely linked with Locke's second necessary condition of Society, the access to a common and impartial judge competent to determine the content and scope of the individuals Community rights. The common judge of the Community is the ECJ, because this court is established in accordance with the Treaty, and since it is the only court competent to declare a Community act invalid as well as the final arbiter as regards how a Community act should be interpreted. Since Community rights require Community protection, the individual must be assured access to the ECJ. The task of protecting the rights of the individuals can even be seen as the most important task of the common judge. Access to justice can also be seen as the most important of all rights, since it is through upholding this right that all other rights are secured.⁹

3.2 Access to justice – a requirement of the rule of law

The rule of law may be presented as being two-sided. The objective side of the rule of law is related to the preservation of institutional balance, whereas the subjective side is concerned with the right of individuals to effective legal protection. However, only the latter is of interest for the present

⁹ Zetterquist, Ola, A Europe of the Member States or of the citizens? Two philosophical perspectives on sovereignty and rights in the European Community, KFS i Lund AB, 2002, pp. 359, 368 and 371.

purpose. The notion of effective legal protection flows from the elaboration of the ECJ of the principle that underline Article 220 EC, the article which is said to represent the rule of law in the Treaty text. The ECJ has stated that the Community is a Community governed by the rule of law. The Community legal system needs to be built on legally binding rules, which are uniformly applied and which ensure the protection of individual rights. In this connection, the ECJ has emphasized its own role as the supreme court of Europe, which task it is to ensure the uniform application of Community law in the Member States. According to the notion of effective legal protection it is required that every Community act, which affects the rights and obligations of individuals, has to be open for judicial review. In fact, since the Community is a Community of laws, and due to the position of the ECJ as the supreme and common court of Europe, all acts by the institutions having legal effects, must, in order to secure the rights of individuals, be reviewed by the ECJ. Access to this court is therefore of major importance for the individuals.¹⁰

3.3 Direct access, Article 230 (4) EC

This thesis will focus on the indirect access to the ECJ by means of the preliminary ruling procedure under Article 234 EC. However, a brief comment on the direct access procedure, and its shortcomings, is necessary in order to fully grasp the importance of the Article 234 EC procedure.

Article 230 (4) EC reads as follows:

Any natural or legal person may, under the same conditions, [lack of competence, infringement of an essential procedural requirement, infringement of the EC-treaty or of any rule of law relating to its application, or misuse of powers]institute proceedings against a decision addressed to that person or against a decision which, although in the form

¹⁰ Esteban Fernandez, Maria Louisa, *The Rule of Law in the European Constitution*, Kluwer law international, 1999, pp. 122-123 and 175.

of a regulation or decision addressed to another person, is of direct and individual concern to the former.

The principal judgement when discussing the issue of direct access for individuals to the European Courts is the Plaumann case¹¹. In this case the so-called “Plaumann-formula” was constructed. In paragraph 107 of the judgement, the ECJ stated the following:

“Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.”

This passage sets up two requirements for direct access by individuals who are not the addressees of a decision¹². The individual has to be directly affected as well as individually concerned by the Community act to be able to challenge it. Even though the ECJ has been given several possibilities to change its strict requirements on individual access, and even though the CFI¹³ as well as its own Advocate General¹⁴ have suggested otherwise, the Plaumann test is still the standard by which access under Article 230 (4) EC is to be judged¹⁵. Since direct access therefore is restricted it is all the more important that indirect access under the Article 234 EC procedure is open, otherwise access to the common judge will be denied and the ascertainment and protection of the Community rights of the individuals, will be hampered.

¹¹ Case 25/62 Plaumann v. Commission [1963] ECR 95.

¹² The Community legislative act does not have to be labelled as a decision to qualify for individual action. In *International Fruit* (Joined cases 41 to 44/70 *International Fruit Co. v. Commission* [1971] ECR 411), a regulation was seen as a bundle of individual decisions. A private party can therefore challenge a regulation if it in substance is a decision of direct and individual concern to him or her. This is now included in the text of the article itself.

¹³ In Case T-177/01 *Jego-Quere et Cie SA v Commission*.

¹⁴ Opinion of AG Jacobs in Case C-50/00 P *Union de Pequeños Agricultores v Council*.

3.4 Indirect access, Article 234 EC

3.4.1 General remarks

Article 234 EC, which contains the preliminary rulings procedure, can easily be seen as one of the most interesting and most important provisions in the EC-treaty. The article has played a major role in shaping Community law as well as deciding on the relationship between Community law and the national legal orders. Important concepts such as supremacy¹⁶ and direct effect¹⁷ have both been developed by the ECJ in judgements initiated by a preliminary reference by a national court. Since, as was shown above, individuals and companies rarely are given the possibility of direct access to the ECJ, or more correctly to the CFI¹⁸, the importance of this article in ensuring access to the common judge for protection of their rights should not be underrated. Examples of cases where preliminary rulings have proven particularly effective as a mean for securing rights of individuals claimed under Community law are: Defrenne¹⁹, where Mme Defrenne claimed arrears of salary from the Belgian airline SABENA on the ground that air hostesses and male members of the cabin crew performing identical duties did not receive equal pay; Klopp²⁰, where Dr Klopp, a Dutch lawyer who also was qualified for admission to the French bar, asserted his right to practice as an avocat at the Paris bar, whilst keeping his Dutch chambers, despite a rule of the Paris bar forbidding a second office outside Paris; and Cowan²¹, where Mr Cowan, an English tourist in Paris mugged at the Paris Metro, was found to be a recipient of services and could thereby benefit

¹⁵ The ECJ, in Case C-50/00 *Union de Pequeños Agricultores v Council*, once again stated that the Plaumann test was the applicable standard.

¹⁶ Case 6/64 *Costa v ENEL* [1964] ECR 585.

¹⁷ Case 26/62 *van Gend en Loos v Nedelandse Administratie der Belastingen* [1963] ECR 1.

¹⁸ Cases brought by individual applicants end up before the CFI. However, possibility of appeal to the ECJ exists on questions of law.

¹⁹ Case 43/75 *Defrenne v SABENA* [1976] ECR 455.

²⁰ Case 107/83 *Ordre des Avocats au Bureau de Paris v Klopp* [1984] ECR 2971.

²¹ Case C-186/87 *Cowan* [1989] ECR 195.

from the French compensation scheme for criminal injuries despite the objection launched that he was not a French citizen.²²

The preliminary reference procedure in Article 234 EC is important, finally, not just for the content of the rulings by the ECJ, but also for the legitimacy that the existence of the procedure has helped to confer upon the ECJ and so upon the Community as a whole.²³ Before taking a closer look at the different parts of the article, it can be useful to cite it in its totality.

Article 234 EC reads as follows:

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

- (a) the interpretation of the Treaty;*
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;*
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.*

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

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

²² Craig, Paul and Gráinne de Búrca, EU LAW Text, cases and materials, second edition, Oxford University Press, 1998, p. 406, and Brown, Neville L. and Tom Kennedy, The Court of Justice of the European Communities, fifth edition, Sweet & Maxwell, 2000, pp. 204-205.

²³ Anderson, David W.K. and Marie Demetriou, References to the European Court, second edition, Sweet & Maxwell, 2002, p. 26.

3.4.2 The provisions which can be referred

A national court can ask for a preliminary reference in relation to the three types of subject matter found in Article 234 (1) a, b and c. Binding as well as non-binding legal acts can be made subject of interpretation and questions of validity. It must, however, be made clear that under the preliminary ruling procedure the ECJ does not pass judgement on the validity of national laws. It merely interprets Community law. However, the consequence of such an interpretation is often that a national provision will be found to be incompatible with Community law, and from the supremacy of Community law follows that there lies an obligation on the national court or tribunal to redress the situation. The ECJ does not judge directly on the validity of the national law, but leaves this up to the national court.²⁴ But, in practice this is exactly what happens since the scope of action left for the national court often turns out to be very limited.

Even though the ECJ is not competent to answer questions concerning national law, the ECJ has declared itself competent to answer such questions in a case where national law was to be applied, but where the national legislator had declared that the national rules were to be identical with Community legislation in the area²⁵.²⁶

The questions put to the ECJ must further be real questions, which means that the Court will not accept fictive questions, questions not arising from a real and serious dispute/case.²⁷ The ECJ has also declined to accept a reference for a preliminary ruling on the question of the validity of a Community act where the party challenging the act before the national court

²⁴ Craig and de Búrca, *EU LAW Text, cases and materials*, second edition, Oxford University Press, 1998, pp. 409-410.

²⁵ Case C-28/95 *Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* [1997] ECR I-4162.

²⁶ Bernitz, Ulf and Anders Kjellgren, *Europarättens grunder*, Norstedts Juridik AB, 1999, pp. 144-145.

²⁷ Case C-83/91 *Mieliecke v ADVORGA, Fa Meyer A.G.* [1992] ECR I-4873.

could have challenged it directly under Article 230 since there was no doubt as to the party's legal standing to do so.²⁸

3.4.3 The decision to refer and the formulation of the question(s)

In the famous case *Costa v ENEL*²⁹, in which the principle of Community law supremacy was established, the ECJ also established another important principle, that it is for the national court, and the national court alone, to decide whether or not a reference to the ECJ is necessary to enable it to give judgement.³⁰ In this regard the ECJ has also ruled³¹ that this means that it is contrary to Community law for a national court to be prevented from making a reference by rules in national procedural law which stops a court from raising a matter of its own motion, where this had not been raised by the person concerned within a specified period of time, where that national rule cannot be justified on grounds of legal certainty or proper conduct of procedure. This case was distinguished in a later ruling³² where the ECJ stated that there was no such obligation on the national court if this meant that the national court thereby had to abandon the passive role assigned to it by national procedural law by going beyond the ambit of the dispute as defined by the parties themselves.³³

As regards the questions referred, these must be, as was mentioned above, real questions. In *Mielicke*³⁴, the ECJ refused to answer a question (or, rather, a questionnaire extending to some 4000 words) on the ground that it

²⁸ Brown and Kennedy, *The Court of Justice of the European Communities*, fifth edition, Sweet & Maxwell, 2000, pp. 207-208 and reference to Case C-188/92 TWD Deggendorf v Commission [1994] ECR I-833.

²⁹ Case 6/64 *Costa v ENEL* [1964] ECR 585.

³⁰ Brown and Kennedy, *The Court of Justice of the European Communities*, fifth edition, Sweet & Maxwell, 2000, pp. 214-215.

³¹ In case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgium* [1995] ECR I-4599.

³² Cases C-430-431/93 *Van Schijndel and Van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4599.

³³ Craig and de Búrca, *EU LAW Text, cases and materials*, second edition, Oxford University Press, 1998, p. 413.

³⁴ Case C-83/91 *Mieliecke v ADVORGA, Fa Meyer A.G.* [1992] ECR I-4873.

was hypothetical in nature, namely, the compatibility of the Second Company Law Directive with the doctrine in German company law of “disguised non-cash subscriptions”, a doctrine upon which Dr Meilicke had published a critical study. The questionnaire submitted by the German court closely resembled a series of questions set out in that study. But, as long as the questions referred are “real” questions, the formulation of those questions is a matter entirely left up to the national court.³⁵

3.4.4 Courts and tribunals of the Member States

According to Article 234 EC courts and tribunals³⁶ of the Member States are entitled to ask for preliminary rulings. It is a matter for the ECJ to decide what sort of bodies are to be seen as courts and tribunals under the article. When deciding on the matter, the ECJ will take a number of factors into account, including: whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether it applies rules of law, and whether it is independent.³⁷

The necessity of it being a court or tribunal making the reference can be problematic in, for example, the context of arbitration. The ECJ has held³⁸ that the fact that an arbitral body lays down a judgement according to law, and that the award is binding on the parties, will not be sufficient for it to be seen as a court or tribunal of a Member State. For this to be so, there must be a closer link between the arbitration procedure and the ordinary court system in the Member State.³⁹

³⁵ Brown and Kennedy, *The Court of Justice of the European Communities*, fifth edition, Sweet & Maxwell, 2000, pp. 216-217.

³⁶ In the other chapters of this thesis I have decided only use the collective term - “courts”.

³⁷ Craig and de Búrca, *EU LAW Text, cases and materials*, second edition, Oxford University Press, 1998, pp. 410-411.

³⁸ In case 102/81 *Nordsee Deutsche Hochseefischerie GmbH v Reederei Mond Hochseefischerie Nordstern AG and Co. KG* [1982] ECR 1095.

³⁹ Craig and de Búrca, *EU LAW Text, cases and materials*, second edition, Oxford University Press, 1998, p. 412.

3.4.5 Article 234 (2) EC – lower courts “may”

According to Article 234 (2) EC lower courts, that is courts that are not to be seen as courts of last instance under the criteria to be discussed in chapter 3.4.6, may ask the ECJ for a preliminary ruling. This obviously means that as regards them, there is no obligation. For the purpose of this thesis lower courts are of minor importance, and will therefore be left only with these basic comments.

3.4.6 Article 234 (3) EC – courts of last instance “shall”

As regards courts of last instance, the third paragraph of Article 234 EC put an obligation on these courts to make a reference for a preliminary ruling from the ECJ. The purpose of Article 234 (3) EC, has been described by the ECJ as follows:

“ [...] that obligation to refer is based on cooperation, with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice [...] and it is particularly designed to prevent a body of national case-law that is not in accordance with the rules of Community law from being established in any Member State.”⁴⁰

One of the questions that appears when reading Article 234 (3) EC is whether it is meant to apply only to those courts which decisions are never subject to appeal, or whether it extends to any court whose decision in a particular case is not subject to appeal. This distinction is of practical significance since the first interpretation (the abstract view) means that the provision only puts the obligation on actual national supreme courts, while the second interpretation (the concrete view) entails that lower courts, from

⁴⁰ Case C-393/98 *Ministerio Publico and Antonio Gomes Valente* [2001] ECR I-1327. Referred to in Anderson and Demetriou, p. 164.

time to time, might be under a duty to refer as well. To the extent that the ECJ has dealt with the issue, it has adopted the concrete view. The Court has concluded that Article 234 (3) EC applies, in addition to national supreme courts, also to those courts against whose decision there is no possible judicial remedy in the case at hand. A lower court may therefore bring itself within the ambit of Article 234 (3) EC if it has the conclusive power to deny leave to appeal. A national court will also fall within the provision if appeal from its judgement is excluded due to the fact of the small amount of money at stake in the case.⁴¹

However, even if courts of last instance and, depending on the case, sometimes also lower courts in the judicial hierarchy are under a duty to refer, it is not in all cases an absolute duty.

3.4.7 Exceptions to the duty to refer

3.4.7.1 General remarks

A national court may well feel that, even though one of the parties to the case before it has argued that there is a question of Community law to be considered, this claim is misconceived. The national court may argue that the question before it is so clear that no reference to the ECJ is called for, since the issue has been resolved by an earlier ruling by the ECJ or since the Community law issue is easily solved by the national court itself without there being a need for a preliminary ruling by the ECJ. However, on the other hand, what is obvious for one might be less obvious for another, and ECJ judgements may very well be open for interpretation. Be that as it may, the ECJ has left some room for manoeuvre open. The circumstances in which a national court, falling within the scope of Article 234 (3) EC, will

⁴¹ Anderson and Demetriou, *References to the European Court*, second edition, Sweet & Maxwell, 2002, pp. 165-166, and Brown and Kennedy, *The Court of Justice of the European Communities*, fifth edition, Sweet & Maxwell, 2000, p. 228.

not be obliged to make a reference to the ECJ can be summarized by the two French phrases, *acte éclairé* and *acte clair*.⁴²

However, before looking into these two exceptions, a different, but closely connected issue, must be mentioned. According to Article 10 EC (the principle of loyalty) a national court is under a duty to ensure that the state's obligations under Community law are fulfilled. National courts must also ensure the full effect of Community law and that those rights, which Community law confers on individuals, are protected.⁴³ The right, or duty, to ask for preliminary rulings is there in order to enable the national courts to carry out these duties. It has been said that Article 10 EC puts an obligation on the national courts to refer questions to the ECJ, because national courts have a duty to do all that is necessary to ensure that Community law is applied in a uniform manner throughout the Union.⁴⁴

3.4.7.2 Acte éclairé

The issue of *acte éclairé* was raised in *Da Costa*⁴⁵, where the ECJ ruled that even though the wording of Article 234 (3) EC unreservedly requires that every question of Community law interpretation is referred to it, the authority of an interpretation under this article already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. This is especially so when the question raised is materially identical with a question that has already been the subject of a preliminary ruling in a similar case. Thus, already in the early years of the Community, the ECJ accepted that the provision should not be interpreted literally. However, the circumstances in which the duty to refer could be exempted was at the time

⁴² Arnall, Anthony, The use and abuse of Article 177 EEC, in *The Modern Law Review* [vol. 52] Sept. 1989, pp. 622-639, p. 623.

⁴³ See Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629, paragraph 16, and Case C-213/89 *Factortame* [1990] ECR I-2433, paragraph 19.

⁴⁴ Temple Lang, John, The Duties of National Courts under Community Constitutional law, in *E.L.REV.* 22 [1997], pp. 3-18 at p. 5 and 15.

⁴⁵ *Joined Cases 28-30/62 Da Costa en Schaake N.V. v Nederlandse Belastingadministratie* [1963] ECR 31.

strictly limited, since only previous rulings delivered under the preliminary rulings procedure seemed to absolve the obligation.⁴⁶

The court repeated as well as widened the scope of the exemption in a judgement⁴⁷ some 20 years later, where it was stated that questions need not be referred where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, and even when the questions at issue are not strictly identical with those decided in a previous case. Nonetheless, the ECJ has continued to stress that all courts still are free to bring a matter of Community law before it, if they consider it appropriate to do so. The ECJ at the same time, obviously, remains free to reconsider its earlier rulings.⁴⁸

3.4.7.3 Acte clair

The acte clair doctrine, which was established in the CILFIT case⁴⁹, incorporates the previously discussed doctrine of acte éclairé and goes beyond it. The doctrine exempts courts from making a reference for a preliminary ruling whenever the answer to the proposed Community law question is sufficiently obvious for the national court, even if there is no previous ruling by the ECJ addressing the issue. Where this is the case a national court may resolve the issue itself without seeking guidance from the ECJ. However, the national court must be sure that the answer to the Community law question would be as obvious to courts in the other Member States as well as to the ECJ itself. When reaching this conclusion, the national court must keep in mind the characteristic features of Community law and the particular difficulties to which its interpretation gives rise, including:

⁴⁶ Arnall, The use and abuse of Article 177 EEC, in *The Modern Law Review* [vol. 52] Sept. 1989, pp. 622-639, pp. 623-624, and Anderson and Demetriou, *References to the European Court*, second edition, Sweet & Maxwell, 2002, pp. 173-174.

⁴⁷ Case 283/81 Srl CILFIT v Ministry of Health [1982] ECR 3415.

⁴⁸ Anderson and Demetriou, *References to the European Court*, second edition, Sweet & Maxwell, 2002, p. 174.

⁴⁹ Case 283/81 Srl CILFIT v Ministry of Health [1982] ECR 3415.

- (a) the need to compare all the, equally valid and authentic, language versions of the treaty;
- (b) the use of terminology peculiar to Community law and which can have a different meaning in Community law than it has in the national laws;
- (c) the need to place every provision of Community law in its context and interpret it in the light of the system established by the Treaty, keeping in mind both its objectives and to its state of evolution at the relevant date.⁵⁰

As with cases covered by the *acte éclairé* doctrine, the ECJ has declared that, even though a case may fall under the *acte clair* doctrine, a national court is still free to refer questions to the ECJ if it feels that this is necessary to enable it to rule in the case before it.⁵¹

There are many examples where national supreme courts have declined to make preliminary reference on grounds that do not appear to meet the strict requirements of the ECJ. The French Conseil d'Etat has several times refused to ask for a preliminary ruling notwithstanding the fact that its own equivalent to the AG in the ECJ argued that it was obliged to do so. The Hoge Raad of the Netherlands, the Swedish Supreme Administrative Court and the Spanish Supreme Court have also been criticised for their unwillingness to make preliminary references. There are signs pointing towards that Courts, being conscious of their obligations under Article 234 (3) EC, may have deliberately chosen to decide cases only using national law so as to avoid the obligation to refer. Cases that turned out at least partly on Community law in the lower courts but which were decided only

⁵⁰ Craig and de Búrca, *EU LAW Text, cases and materials*, second edition, Oxford University Press, 1998, pp. 420-421, Arnall, *The use and abuse of Article 177 EEC*, in *The Modern Law Review* [vol. 52] Sept. 1989, pp. 622-639, pp. 625-626, and Anderson and Demetriou, *References to the European Court*, second edition, Sweet & Maxwell, 2002, pp. 175-176.

⁵¹ Anderson and Demetriou, *References to the European Court*, second edition, Sweet & Maxwell, 2002, p. 177.

on basis of national law in the court of last instance have been fairly common both in the House of Lords and the Irish Supreme Court.⁵²

Support for a softening of the CILFIT doctrine has been raised in the debate. Easing CILFIT would, however, mean that national judges would acquire a greater say and a greater responsibility over the development of Community law. Good or bad, be that as it may. One important aspect of the Article 234 EC procedure is that it enables you, as a lawyer, to say to you clients where the interpretation or indeed the validity of a Community act is decisive for his or her rights or obligations, that in a last resort we can be ensured that this point will be decided by the ECJ.⁵³

National courts not referring or a softening of CILFIT give rise to the same type of problems. Not only denial of access to the common judge, but also problems as regards the uniform interpretation and application of Community law in the Member States.

3.5 Article 234 (3) EC according to Hohfeld's theory on rights

Before applying Hohfeld's theory on rights a quick recap of the terminology involved might be helpful to the reader. Hohfeld's jural correlatives are the following: right – duty, privilege – no-right, power – liability, and disability – immunity. Article 234 (3) EC could be explained by using these in a vast variety of different combinations; hopefully most of which will be covered.

When reading Article 234 (3) EC, it could be argued that the article only deals with the relationship between the ECJ and the courts of last instance of the Member States. A textual interpretation of the provision could

⁵² For more information see Anderson and Demeriu, *References to the European Court*, second edition, Sweet & Maxwell, 2002, pp. 177-180.

⁵³ Forwood, Nicholas and Hjalte Rasmussen, in *Access to Justice A record of thoughts and ideas dealing with interrelationship between national law and courts and Community law and courts* [ed. By Sundström and Kouppi], publications of the Finnish Association for European Law, Helsinki, 1999, p.140 and 191.

therefore, in Hohfeldian terms, give rise to the following scenario. The national court of last instance is under a duty to refer questions of Community law to the ECJ, which means that the ECJ has a right that the national courts of last instance should let it decide on the validity or the correct interpretation of Community law. One could also say that once a national court of last instance has sent questions to the ECJ, the ECJ is under a duty to answer them and the national court has the corresponding right of having those questions answered.

However, if looking behind the words of the provision, and instead seeing Article 234 (3) EC in the light of its purpose, to ensure that individuals get access to the common judge and effective legal protection of those rights that they derive from Community law, one might also claim the following. Individuals have a right to have access to the ECJ, which therefore means that the national courts of last instance have a duty to refer questions regarding individuals Community rights to the ECJ, since this is the common judge of Europe and the only court competent to decide on the matter. Not only will individuals be ensured effective legal protection, but the ECJ will also make sure that Community law is uniformly interpreted and applied throughout the Community, which is yet another purpose of the provision. One might also say that since an individual has the right of effective legal protection of his or her rights, this must mean that he or she also has a right that there be a competent court to secure those rights, and the ECJ is the only court which has this competence. An individual could also be said to have a privilege to bring Community law claims before a national court, which is the equivalent of there being a no-right on the side of the national court that an individual brings such a claim. The ECJ has with its judgement the power to change the legal position of an individual in the case pending before the referring court. This in turn means that the individual is under a liability to have his or her legal position changed by the preliminary ruling laid down by the ECJ.

3.6 Comments

As has been seen, the highly important issue of access to the common judge for protection of the rights of individuals is far from clear and straightforward. The possibilities for individuals to gain direct access to the ECJ, through the Article 230 EC procedure, are as have been shown strictly limited. Even though both one of the Courts own Advocate Generals as well as the CFI have tried to open up the possibility of direct access to a wider range of individuals, the Plaumann criterion of direct and individual concern still is what has to be fulfilled in order to gain direct access. The ECJ has justified this since the Article 234 EC procedure gives individuals a fully sufficient way to gain access to it by way of the national courts. However, as has been seen, from time to time national courts have refused to refer questions to the ECJ. The individual, when this happens, is denied access to the common judge and thereby denied having his, her or its Community rights tried, decided and protected. There therefore has to be a way for the damaged individual to receive compensation from the relevant Member State when a national court of last instance, in accordance with Article 234 (3) EC, refuses to refer questions to the ECJ. This issue was discussed in the Köbler case.

4 Indirect access denied – the question of State liability

4.1 State liability – an overview

As early as 1960, the ECJ hinted that a breach by a Member State of its obligations under the Coal and Steel Treaty could trigger an obligation to make good any resulting harm. In *Humblet*⁵⁴ the Court stated that “if the Court rules in a judgement that a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community law, that Member State is obliged, by virtue of Article 86 ECSC Treaty, to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued. This obligation is evident from the treaty and from the protocol which have the force of law in the Member States following their ratification and which take precedence over national law.” It is interesting to note that Article 86 of the old ECSC Treaty is the equivalent of Article 10 EC, which, as will be seen below, was supportive to the ECJ when establishing the doctrine of State liability.⁵⁵ However, in the early years the traditional approach of the ECJ as regards remedies was that the EC Treaty was not intended to create any new remedies.⁵⁶

The issue of State liability was not addressed again by the ECJ until 1991, when it delivered its famous *Francovich* judgement⁵⁷. In this case the ECJ established the principle of State liability and it based it on two intertwined sets of arguments, the principle of effectiveness and the principle of loyalty. An individual has to have the possibility to obtain redress, otherwise the full effectiveness of Community law and the protection of those rights granted to the individual by Community law will not be fulfilled. Member States

⁵⁴ Case 6/60 *Jean-E. Humblet v Belgian State* [1960] ECR 559.

⁵⁵ Lee, Ian B., In search of a theory of State liability in the European Union, Harvard Jean Monnet Working Paper 9/99, available at www.jeanmonnetprogram.org [2004-03-22].

⁵⁶ See Case 158/80 *Rewe v Hauptzollamt Kiel* [1981] ECR 1805, paragraph 44.

⁵⁷ Case C-6, 9/90 *Francovich v Italy and Bonifaci v Italy* [1991] ECR I-5357.

must take all action needed to ensure that they fulfil their obligations under the Treaty, which also entails paying damages to injured individuals.⁵⁸ The ECJ established certain conditions for State liability. Those conditions will be discussed further below.

Why the Court decided to abandon its earlier view that “Community law was not intended to create any new remedies”, and why it decided to do so at this particular point in time? What changed between 1981, and the no new remedies attitude, and 1991 when the ECJ declared that the principle of State liability was “inherent in the system of the Treaty”⁵⁹? Why did the ECJ decide to take such a fundamentally different approach in Francovich compared to before? With the important principles of supremacy, direct effect and indirect effect, the ECJ constitutionalized the treaty and aimed at securing the rights of the individuals. By the Francovich doctrine, the ECJ moved from an approach of rights, where the Court tried to make sure that an individual could rely on his or her Community rights before a national court, to an approach based on remedies aimed at making sure that the individual could receive compensation from the state not respecting those rights and thereby not fulfilling its Community law obligations. The approach by the ECJ can be encapsulated in the principle *ubi jus, ibi remedium*, according to which the value of a right is determined by the legal consequences that ensue from its violation, namely the remedies available for its enforcement. The common thread underlying the ECJ’s case law on remedies is the concern to ensure the availability of effective judicial protection. However, the question still remains, why did the ECJ change its policy as regards the creation of new remedies? Three factors have been singled out as justification for this change of attitude. First, the Commission’s internal market program, focusing on the harmonization of Member State laws by means of directives, provided a new impetus for the completion of the internal market, which made the need of adequate remedies for Member State failure to implement directives all the more

⁵⁸ See Case C-6, 9/90 Francovich, paragraphs 33-36.

important. Second, previous case law by the Court had prepared for an increased judicial intervention in the remedies area. Thirdly, Francovich was a perfect example of a grave, manifest and inexcusable breach, and thereby a perfect case by which to introduce the State liability doctrine.⁶⁰

In the *Brasserie du Pêcheur* case⁶¹, the ECJ moved the doctrine to new grounds and declared that a Member State shall be liable to pay damages to injured individuals in any case where the Member State breaches Community law and whatever organ of the state is responsible for the breach, be it the legislature, executive or even the judiciary, as long as the following three conditions are fulfilled: the ruled infringed must confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. Important to note is, as the ECJ has repeatedly emphasized, that the conditions differ depending on the nature of the breach. However, these conditions have been used as a general rule in subsequent case law.

As regards the three conditions which have to be fulfilled it can be stated that most of the focus in the case law of the ECJ as well as in legal doctrine has been on the two latter, seriousness of the breach and causality. When discussing if a breach is to be seen as a sufficiently serious breach, it is important to keep in mind that this condition is not assessed from the perspective of the individual. The issue is not the seriousness of the injury suffered by the individual or whether an individual right was violated. At the stage of determining the seriousness of the breach, the focus is instead on the conduct of the Member State and its relationship to the norm

⁵⁹ Case 6, 9/90 *Francovich*, paragraph 35.

⁶⁰ Tridimas, Takis, *The General Principles of EC Law*, Oxford University Press, 2000, pp. 323-324.

⁶¹ Case C-48/93 *Brasserie du Pêcheur SA v Germany*, and *R v Secretary of State for Transport, ex parte Factortame Ltd* [1996] ECR I-1929, paragraph 32 and 51.

established by Community law. Did the State deliberately violate the rule? If not, was the error unreasonable or inexcusable?⁶²

Concerning the third condition, the causality requirement, the ECJ has not given any specific guidelines. In fact, the ECJ has held that it is for the national court to determine whether there is a direct causal link between the breach and the damage sustained.⁶³ This reference has been called somewhat ambiguous, and it has been said that if the rules governing causation is left entirely up to the national courts, this will amount to a renationalization of the conditions of liability. Guidance on this condition is to be expected in subsequent case law.⁶⁴

Although Community law provides for the conditions of liability, the remedy of reparation is subject to national law. In *Brasserie du Pêcheur*⁶⁵ the ECJ held that reparation by Member States of loss or damage, which they have caused to individuals as a result of breaches of Community law, must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar domestic claims or actions based on domestic law and must not be such as to in practice make it impossible or excessively difficult to obtain reparation.

⁶² Lee, In search of a theory of State liability in the European Union, Harvard Jean Monnet Working Paper 9/99, available at www.jeanmonnetprogram.org [2004-03-22], p. 16.

⁶³ See for example Case C-48/93, *Brasserie du Pêcheur*, paragraph 65.

⁶⁴ Tridimas, *The General Principles of EC Law*, Oxford University Press, 2000, p. 326.

⁶⁵ Case C-48/93, *Brasserie du Pêcheur*, paragraph 90.

4.2 The Köbler judgement

4.2.1 Facts of the case

In the Köbler case⁶⁶, which was decided in September 2003, the ECJ extended the doctrine of State liability to the judiciary of the Member State, holding that a State is liable to pay damages to an injured individual caused by a manifest infringement of its national court(s) of last instance.

The case concerned a University professor who was refused a special length-of-service increment because during the requisite 15-year period he had performed his services not exclusively at Austrian Universities, but partly at universities in other Member States. The Austrian court of last instance handling the case had asked the ECJ for a preliminary ruling on the Community law aspects of the matter. While the case was pending before the ECJ, the ECJ decided another case, after which it asked the Austrian court if would consider withdrawing its reference, as the answers to its questions might be found in the previously decided case. The Austrian court accordingly withdrew its reference. The issue in this second case before a national court, was whether the Austrian State could be held liable to pay damages in accordance with the State liability doctrine since the court had wrongly handled and decided on the Community law issue.

4.2.2 The judgement by the ECJ

The ECJ started of by stating, as it has done so many times before, that the principle of State liability is inherent in the system of the Treaty, and that the principle applies to any case in which a Member State breaches Community law, whichever is the authority of the State whose act or omission is responsible for the breach.⁶⁷ As regards the possibility that such a breach could be performed by a national court, the ECJ drew on international law and declared that a State incurs liability for a breach of an

⁶⁶ Case C-224/01 Köbler v Austria

international commitment irrespective of whether the breach giving rise to the damage is attributable to the legislative, the judiciary or the executive. Under the ECHR the ECtHR has ruled that damages may be awarded when infringements stems from a decision of a national court of last instance. This as well as the fact that the application of State liability to judicial decisions has been accepted in one form or the other by most of the Member States, led the ECJ to decide that the same should apply in the Community legal order.⁶⁸

To ensure the full effectiveness of the rights which individuals derive from Community law, and keeping in mind the essential role played by the judiciary in protecting those rights, an individual cannot be precluded from obtaining damages from a Member State when his, her or its Community rights are affected by a Community law infringement attributable to a decision by a national court of last instance. The ECJ stressed the importance of the possibility of State liability in these instances, since a national court of last instance is usually the last place where individuals can assert their Community based rights, and since under Article 234 (3) EC these courts are under an obligation to refer questions of Community law to the ECJ.⁶⁹

Arguments were raised against expanding the principle of State liability to decisions by national courts of last instance. The arguments concerned the principle of legal certainty and, more specifically, the principle of *res judicata*, the independence and authority of the judiciary and the absence of a court competent to determine disputes relating to State liability in these cases.⁷⁰ The ECJ paid lip service to the principle of *res judicata*, but it nonetheless disregarded the arguments raised. As regards the argument concerning the absence of a competent court, the ECJ declared that it is for the Member States to enable those affected to rely on the principle of State

⁶⁷ Case C-224/01 Köbler, paragraphs 30-31.

⁶⁸ Case C-224/01 Köbler, paragraphs 32, 48 and 49.

⁶⁹ Case C-224/01 Köbler, paragraphs 33-36.

⁷⁰ Case C-224/01 Köbler, paragraph 37.

liability by affording them an appropriate right of action. In the absence of Community legislation in the area, it is for national law to designate the competent courts and to lay down the detailed rules for legal proceedings intended fully to safeguard those Community rights granted to the individuals. However, the lacking of a competent cannot in any case compromise the application of the principle of State liability.

Concerning the conditions for State liability, the ECJ stated that the normal conditions should be applicable also in these cases. The rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation and the damage sustained.⁷¹ The ECJ focused on the second criteria and stated that State liability can only be incurred in the exceptional case, where the national court has manifestly infringed the applicable law. When deciding if this is the case, the national court hearing the case must take into account all the factors of the case, and in particular: the degree of clarity and precision of the rule infringed; whether the breach was intentional; whether the error of law was excusable or inexcusable; the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation under Article 234 (3) EC. A breach will always be considered as sufficiently serious where the decision concerned was made in manifest breach of the case law of the ECJ in the matter.⁷²

The national court also put more case specific questions. It basically wanted the ECJ to apply the three conditions of State liability to the actual case pending before the national court. The ECJ stated that applying the criteria for State liability in a specific case is a duty of the national court. However, since it in the present case had all the necessary material, it decided to rule on the issue. As regards the first condition, the Republic of Austria argued that Article 234 EC was not intended to confer rights on individuals, and

⁷¹ Case C-224/01 Köbler, paragraphs 51-52.

⁷² Case C-224/01 Köbler, paragraphs 51-56.

accordingly the first condition for State liability was therefore not fulfilled. The ECJ, however, did not address this concern. It instead focused on provisions in a relevant Regulation, and stated that those provisions undisputedly conferred rights on individuals. The Court then went on to decide on the issue of whether the breach was sufficiently serious. It stated that the national court, which had asked for a preliminary ruling in the first place, ought to have maintained that request. The national court could not claim, under the CILFIT criteria, that the Community law issue was clear from previous case law or that it left no room for any reasonable doubt. The national court had therefore infringed Community law, by its judgement and its decision not to maintain the request. The infringement was, however, not seen as sufficiently serious and since the second criteria was not fulfilled, the State could not be held liable to pay damages under the State liability doctrine.⁷³

4.2.3 Critical comments

Since this is a fairly recent case not many have commented upon it. However, Wattel⁷⁴ has, in his comment to the case, raised many critical points regarding this judgement by the ECJ. He claims that if one combines the Köbler judgement with the CILFIT doctrine one will end up at the conclusion that if a national court of last instance wants to avoid the risk of making its government liable, it had better ask for a preliminary ruling in basically every case where Community law possibly confers a right on an individual which has not yet been dealt with by the ECJ. This is according to him problematic, since it leads to more cases being referred to a Court that already has a waiting period of more than two years for delivery of a judgement. Another problem, which also will lead to more cases being put before the ECJ, concerns the issue of deciding on the court competent to hear the case where a State is to be held liable to pay damages in accordance

⁷³ Case C-224/01 Köbler, paragraphs 89, 94, 100-103 and 118-124.

⁷⁴ Wattel, Peter J., Köbler, CILFIT and Welthgrove: We can't go on meeting like this, in *Common Market Law Review* 41 [2004], pp. 177-190.

with the principle of State liability when the error is attributable to a national court of last instance. Since the wrongdoing court cannot judge on these issues itself, special procedures will have to be created in the Member States. The courts deciding on these issues will also, naturally, send questions of Community law to the ECJ for preliminary rulings. The ECJ is in its case law often referring to the issue of effectiveness. However, the effectiveness of the system is exactly what you lose as the system is and will have to be constructed.⁷⁵

Before making my overall concluding comments, the issue of other possible ways to tackle the problem of denial of access justice will have to be addressed.

4.3 Other options

4.3.1 National constitutional appeal

The German Federal Constitutional Court decided in its well-known *Solange II* judgement⁷⁶ on an issue that has been deemed to be of great importance for those German litigants who rely on Article 234 EC. The German Court recognized that the ECJ is a statutory court, a lawful judge, within the meaning of Article 101 of the German Constitution. This because it is a sovereign organ of the judiciary established by the Community treaties, which on the basis and within the framework of a legally established jurisdiction and procedures in principle makes final decisions in a state of judicial independence on legal questions in accordance with legal rules and legal standards. Further, the members of the ECJ are subject to the obligations of independence and impartiality, and the procedural rules of the ECJ satisfy the due-process requirement of a state subject to the rule of law. The classification of the ECJ as a statutory court under German Constitutional law means that a litigant can complain to the German

⁷⁵ Wattel, Köbler, CILFIT and Welthgrove: We can't go on meeting like this, in *Common Market Law Review* 41 [2004], pp. 177-190, pp. 178-181.

Constitutional Court where a German court of last instance has neglected its obligation under Article 234 (3) EC to refer issues of Community law to the ECJ. This means that a constitutional complaint will be successful whenever a court in a clear case has refused to make a reference to the ECJ, and that the German Constitutional Court considers that a disregard of Community law in this respect constitutes a breach of the German Constitution and infringes the right of individuals to an effective legal remedy. The Constitutional Court has followed the judgement in its later judgements^{77 78}.

However, not all Member States have Constitutional Courts, and even if they do this is no guarantee that these courts will take the same view, as the German court did.⁷⁹ In those Member States where the courts of the Member State regard Community law as subordinate to the national constitution, there remains no possibility of internal control of whether the national courts correctly applied Community law on access to courts and to an effective legal remedy.⁸⁰

4.3.2 Appeal to the European Court of Human Rights

If the national courts, and especially those of last instance, refuse to obey their obligations under Article 234 EC, and if national constitutional courts, in those countries where they exist, adopt a view different from that of the German Constitutional court, the only option left for the individual whose Community rights are infringed is to appeal to the ECtHR and invoke the rights in Articles 6 and 13 of the ECHR to access to justice and to an effective legal remedy. And, as was stated earlier, the ECtHR has judged

⁷⁶ BvG 2 BvR 197/83, [1987] 3 C.M.L.R. 225.

⁷⁷ See BvG 2 BvR 808/82, [1989] 2 C.M.L.R. 902. and BvG 2 BvR 876/85, [1989] 1 C.M.L.R. 113.

⁷⁸ Frowein, J.A., in *Common Market Law Review* [1988] 25, pp. 207-213, at p. 205, and BvG 2 BvR 197/83, [1987] 3 C.M.L.R. 225 at pp. 250-251.

⁷⁹ As is seen from judgements of the Spanish Constitutional Court, which has taken the opposite view from that of the German Court.

⁸⁰ Zetterquist, Ola, *A Europe of the Member States or of the citizens? Two philosophical perspectives on sovereignty and rights in the European Community*, KFS i Lund AB, 2002, p. 383.

that a state may be liable to pay damages when a national court of last instance has breached the Convention.

5 Concluding remarks

The ECJ, in its capacity as the common judge of Europe, must provide effective legal protection of those rights that individuals receive from Community law. Effective legal protection is also a requirement of the rule of law, on which the Community, according to the ECJ, is based. As has been shown, it is therefore highly important that individuals get access to the common judge. Since individuals have problems living up to the strict requirement of direct and individual concern, in order to gain direct access to the ECJ, the preliminary rulings procedure under Article 234 EC is all the more important. In accordance with Article 234 (3) EC, national courts of last instance, according to the concrete view, are obliged to refer questions of Community law to the ECJ. The only exceptions are those that fall within the doctrines of *acte éclairé* and *acte clair*. However, national courts of last instances have, from time to time, given these exceptions a wider interpretation than was intended by the ECJ. National courts of last instance have also had a tendency to decide cases only on national law, so as to neutralize the obligation. The attitude of national courts is open for severe criticisms. As the system looks today, the obligation under Article 234 (3) EC must be seen as a real obligation, if not, individual's access to the common judge will be hindered, and national courts, without this co-operative procedure, cannot award sufficient protection to the individual.

If looking at Article 234 (3) EC through Hohfeldian spectacles, and from the viewpoint of this thesis, this provision can be claimed to put a duty on the national courts of last instance to refer questions of Community law to the ECJ. This rests on the fact that individuals have a right under the provision to have the common court of Europe try the case, decide on it, and thereby to ensure the protection of his or her Community rights. However, one should not forget the fact that, even though national courts of last instance can be said to be under a Hohfeldian duty under the provision, it is, under the present state of Community law, up to the national court alone to decide

on what questions to put to the ECJ. As has been seen, it is not every time that those questions coincide with those that the individual wants asked and answered. To secure that the obligation is followed, one might consider giving an individual, in cases of refusal to refer, a way of direct appeal to the ECJ. However, under the present structure this could be problematic, which will be addressed further below.

When national courts of last instance refuse to refer a case regarding individual rights to the ECJ for a preliminary ruling, the affected individual will be damaged. There must therefore be a way open for the individual to receive appropriate compensation from the responsible state for the damage inflicted on him. This issue was up for discussion in the Köbler case. The ECJ decided correctly when holding that a Member State can be held liable to pay damages when an individual's Community rights are affected by a Community law infringement attributable to a national court of last instance, such as a refusal to refer questions to the ECJ in accordance with the obligation in Article 234 (3) EC. The ECJ further decided that the same conditions as in other cases of State liability should be applicable even in this type of case. Interesting to note is that the ECJ, when deciding on the first condition of whether the provision concerned could be seen as conferring rights on an individual, focused on provisions in the Treaty and in a relevant regulation in place to secure the free movement of workers, instead on Article 234 EC itself. This issue was brought up by the Austrian government in its observation to the case, but was left hanging by the ECJ. The question whether or not Article 234 EC can be seen as conferring rights on individual was therefore not provided with an answer. In Köbler this was perhaps of minor importance, since the other rules breached obviously conferred rights on individuals. However, what will be the case when the other relevant Community legislation is found not to do just this? Will the ECJ then decide that Article 234 EC confers rights on individuals or not? Regrettably this question was not provided with an answer in Köbler.

The ECJ further found that even though there had been an infringement of the principle of the free movement of workers, this could not be seen as

sufficiently serious. Had the ECJ instead focused on Article 234 (3) EC, one could perhaps claim that a breach of this provision is by its very nature a sufficiently serious breach. A breach of this provision leads to an individual being denied access to the common judge, the most important right of them all, on which all other rights depend. Therefore, a breach of the obligation of a court of last instance to refer unclear questions of Community law must be regarded as sufficiently serious.

The Köbler judgement has, as described above, been criticized. Wattel has argued that a combination of CILFIT and Köbler will lead to severe problems for the ECJ, since more and more cases will be referred to it. The CILFIT doctrine should have been revisited and the national courts should thereby decide more cases than is allowed as the doctrine stands today. According to Wattel, effectiveness, which is a notion that the ECJ often refers to in its judgements, will be hampered, since to wait for two years or more for a judgement from the court can hardly be seen as effective. Wattel has focused on the effectiveness as regards the need for shorter waiting periods. One cannot disregard his arguments, since the concerns that he raises are highly relevant. However, when talking of effectiveness I would rather focus on it from the point of securing that the individuals Community rights are effectively protected. Effectiveness in this regard is best ensured if the ECJ gets to decide on the Community law issues.

The problems raised by Wattel are, however, not irrelevant. With more and more cases being referred to the ECJ, and with the bundle of cases, which is sure to arise in the new Member States, the effectiveness of the system can surely be questioned. Nonetheless, under the present structure of the judiciary in the Community, and in the present state of Community law, this is the only way to go in order to ensure the proper protection of the individuals. Perhaps a reform of the system is called for, but how to go about is a major issue. Should we perhaps create a new European court with the sole responsibility to hear cases referred for preliminary rulings, or should we give the present court more resources, or should perhaps only

national supreme courts be allowed to refer cases to the ECJ? Another possibility is to give individuals an option of direct appeal to the ECJ when a national court of last instance refuses to refer a case. This method would certainly ensure the effective protection of the rights of the individual. Or, perhaps, we should create a new European federal-like system of courts, with Community courts in all the Member States only dealing with Community law based claims. By doing so, we could perhaps make sure that the rule of law is effectively upheld, and that protection of individual rights is ensured.

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