

## ‘Grow Up!’: Rethinking the Preliminary Reference Procedure from the Perspective of Maturity

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### ABSTRACT

*The clash between the German Constitutional Court and the Court of Justice of the European Union (‘CJEU’) in May 2020 over economic policy highlights the growing tension between the European Union (‘EU’) and courts of last instance in Member States. This article argues that such tensions demand a legal order which respects national judicial hierarchies, thereby becoming mature. Through an examination of the preliminary reference procedure, this article puts forward a novel set of reforms which seek to engage with national courts of last instance, while forcing lower national courts to treat EU law as national law where possible. This is achieved by suggesting limitations to the circumstances in which courts can refer cases to the CJEU. These proposed reforms mark a departure from the conventional aim of the procedure – to ensure uniformity – which is abandoned in favour of a focus on national judges’ abilities to provide confident interpretations of EU law. In addition to focusing on bringing the legal order to maturity through respect of national hierarchies, this article suggests a robust system of holding national courts to account through clearer rules and reforms to Köbler liability. All of this, it follows, would result in a mature legal order based on genuine trust, which facilitates interactions between the CJEU and national courts as the EU continues to legislate in constitutionally sensitive areas.*

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## INTRODUCTION

This article assesses the Article 267 TFEU<sup>1</sup> preliminary reference procedure in light of the EU legal order's maturity. In doing so, it challenges the current underlying aim of the status quo – securing uniformity across the legal order – by arguing that it is incompatible with a mature legal order. Instead, if we are to take maturity seriously and facilitate judicial cooperation at the highest level, the main purpose of the procedure ought to be resolving the confusion faced by national judges in a way that focuses on clarity and respecting national judicial hierarchies.

A legal system can be described as mature when the law is applied by national courts simply because it is the law, as is the case when national courts apply national law. This entails a legal system where external intervention and incentives are not required to ensure that law is applied. In a mature legal order, national courts treat EU law as if it is national law – as far as it is possible to do so in light of the doctrine of supremacy – and apply it as such. While some might take issue with this conception of maturity, it has been chosen because it aligns with the notion of national courts as 'Community courts when applying Community law'.<sup>2</sup> Such a vision is uncontroversial so long as we support the basic ideals of European integration. Capturing maturity in this way places emphasis on two elements. First, courts in a mature legal order would apply EU law because it is their duty to apply the law. This stands in contrast to legal orders where courts apply the law because of external – usually political – motivations and incentives. Second, courts within mature legal orders trust each other to apply the law, resulting in appeals processes which serve the purpose of eliminating legal mistakes rather than creating an adversarial stage for courts.

In the first section, I will lay out the development of the EU's legal order to date, highlighting how its initial aim of making EU law effective has been achieved, and that maintaining the judicial architecture, which secured that aim, gives rise to inefficiencies. In light of the CJEU's encroachment into increasingly

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<sup>1</sup> Consolidated Version of the Treaty on the Functioning of the European Union 2008 (TFEU 2008) C115/216.

<sup>2</sup> Philip Allott, 'Preliminary Rulings – Another Infant Disease' (2000) 25(5) *EL Rev* 538, 541.

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constitutionally sensitive areas of national law, now is the right time to move towards a mature legal order. Next, in the second section, it will be argued that pursuing uniformity is incompatible with a mature legal order and that resolving any confusion faced by national judges is a more suitable aim. Section Three outlines why national courts of last instance (“COLIs”) play a central role in a mature legal order, how their cooperation can be enticed by respecting national judicial hierarchies and enforced through a clear and reasonable set of guidelines. This section will also serve to highlight the immaturity in the status quo, which is addressed through a novel set of reforms introduced in Section Four. These reforms seek to lay the groundwork for a mature legal order by limiting the circumstances in which lower national courts (“LNCs”) can send preliminary references, while also providing clear guidance for when COLIs are obliged to send references. Finally, Sections Five and Six address some of the challenges which the proposed reforms to Article 267 and Article 258 TFEU might face,<sup>3</sup> stressing that these reforms do not seek to create a perfect EU legal order, but instead attempt to reshape the reference procedure from a tool securing uniformity to a tool resolving confusion. In the process, it will be argued that these reforms are a step in the right direction towards developing a mature EU legal order.

## I. WHY NOW IS THE TIME FOR MATURITY

Before examining the core purpose at the heart of the preliminary reference procedure and analysing the status quo, it is useful to chart how the EU’s legal order has changed from its inception. This analysis begins with the legal order’s initial aims, going on to explain how those aims continue to underpin its judicial architecture more than 50 years after its earliest seminal cases. In addition to reflecting on where the legal order has come from, this analysis highlights the tensions which will shape its future, suggesting that now is the right time for it to transition to maturity.

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<sup>3</sup> TFEU 2008 (n 1).

### **A. Initial focus on effectiveness**

From the early 1960s, with the cases of *Van Gend en Loos*<sup>4</sup> and *COSTA*,<sup>5</sup> the EU legal order in its infancy had one main aim: ‘to ensure that domestic courts cooperate and apply its jurisprudence’.<sup>6</sup> In other words, this required the creation of a legal order which enabled ‘not only Member States but also individuals’ to enforce EU law against third parties or their governments, ideally through a local court.<sup>7</sup> This aim can also be described as ensuring that EU law is effective. In pursuing this aim, the doctrines of supremacy and direct effect, supplemented by the (then) Article 177 TFEU procedure,<sup>8</sup> sought to draw upon two key actors: LNCs and litigants. It is in examining the interplay between these two actors that we can explain why the Article 267 procedure looks as it does today.

#### *(1) The role of LNCs*

Lower national courts were crucial to the CJEU’s mission for three reasons. The first is that their rulings are able to increase constitutional pressure on national governments. If EU law was simply another form of international law, it would be easy for Member States to ‘shift the locus of the dispute to the interstate or Community plane’.<sup>9</sup> Rather, Weiler outlines that involving LNCs meant that governments were ‘faced with legal actions before their own courts’ and ‘within their own legal order’.<sup>10</sup> Using LNCs’ authority in this way was crucial in making EU law effective because it meant that governments were faced with a choice: fulfil their obligations under EU law, or enter into conflict with the judiciary of their own legal system and cause a constitutional crisis in the process.

A second important consideration is that national courts are able to facilitate

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<sup>4</sup> Case 26/62 *NV Algemene Transport- en Expeditie-Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

<sup>5</sup> Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

<sup>6</sup> Arthur Dyevre, ‘Unifying the Field of Comparative Judicial Politics: towards a General Theory of Judicial Behaviour’ (2010) 2 *European Political Science Review* 297, 323.

<sup>7</sup> Pierre Pescatore, ‘The Doctrine of “Direct Effect”: An Infant Disease of Community Law’ (2015) 40(2) *EL Rev* 135, 137.

<sup>8</sup> Treaty Establishing the European Community [1992] OJ C224/63.

<sup>9</sup> Joseph Weiler, ‘A Quiet Revolution: The European Court of Justice and Its Interlocutors’ (1994) 26(4) *CPS* 510, 513.

<sup>10</sup> *ibid* 513.

easy access to EU law for litigants. Putting aside the fact that local courts reduce costs for litigants, it is crucial to recognise that the Article 177 procedure provided a simpler way for litigants to access EU law. Phelan highlights how the (then) Article 169 TFEU<sup>11</sup> procedure would require those ‘adversely affected by treaty violations to wait for the Commission to bring a Member State before the Court’ without much power to hurry proceedings along or to be personally involved.<sup>12</sup> In much the same way that the Human Rights Act of 1998 brought human rights home to the UK,<sup>13</sup> the use of LNCs in the Article 177 procedure brought EU law home to litigants in Member States. Once we consider that accessibility of EU law by litigants was fundamental to the creation of an effective legal order, this element is particularly important.

Third and finally, the importance of LNCs in the early stages of the legal order can also be attributed to the need for EU law to be represented as important, and be represented often. In its infancy, EU law’s power and authority stemmed in some part from the law’s visibility to national judges, politicians, and litigants. Therefore, when Burley and Mattli emphasise the link between visibility, scope, and effectiveness to the CJEU’s prestige and power, they are highlighting how LNCs were able to place EU law within the legal field of view and therefore increase its power.<sup>14</sup> The more visible EU law became, the greater its effect on the decision-making of non-judicial actors.<sup>15</sup> The idea was a simple one: EU law needed consistent publicity in its infancy to encourage engagement from courts and litigants.

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<sup>11</sup> Treaty Establishing the European Community [1992] OJ C224/61.

<sup>12</sup> William Phelan, ‘The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt’ (2017) 28(3) *European Journal of International Law* 935, 938.

<sup>13</sup> Secretary of State for the Home Department, ‘Rights Brought Home: The Human Rights Bill’ (CM 3782, 1999).

<sup>14</sup> Anne-Marie Burley and Walter Mattli, ‘Europe before the Court: A Political Theory of Legal Integration’ (1993) 47(1) *International Organisation* 41, 64.

<sup>15</sup> Alec Stone Sweet and Thomas Brunell, ‘The European Court and the national courts: a statistical analysis of preliminary references, 1961–95’ (1998) 5(1) *Journal of European Public Policy* 66, 72-73.

*(2) The role of litigants*

While the role of LNCs is important, largely because they facilitated access to EU law for litigants, it is crucial to address the way in which litigants themselves feature in the infant legal order's mechanisms for effectiveness.

The main way that this was achieved was through litigants as enforcers of EU law. There are two ways of expressing this. First is the idea that the doctrine of direct effect created 'millions of EU law policemen that could make sure Member States respected their rights under EU law'.<sup>16</sup> EU law was made effective because litigants would bring cases to LNCs and potentially use other mechanisms such as infringement proceedings to enforce their rights (if they were not enforced by the courts). For the EU, this was particularly useful in making efficient use of the Commission's resources, as outlined by Cuyvers.<sup>17</sup> Rather than having the Commission investigate breaches of EU law, the legal order is made effective by having thousands of unpaid investigators bringing cases to national courts.

A second point is that litigants also make EU law effective by drawing on a pre-EU principle that courts will attempt to deal with litigants' disputes in line with their wishes. This principle is supported by the post-EU propensity of national judges to abide by litigants' wishes when they asked for preliminary references,<sup>18</sup> with this effect being particularly strong in civil cases as opposed to criminal ones.<sup>19</sup> Effectively, the idea was that litigants integrating EU law into their disputes – either through their contracts or through their litigation strategies – would induce national courts to participate in the legal order because courts want to facilitate litigants' disputes.

These two ideas help us to see how litigants contributed to the effectiveness of

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<sup>16</sup> Armin Cuyvers, 'The Scope, Nature and Effect of EU Law' in Armin Cuyvers and others (eds) *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill 2017) 161, 167.

<sup>17</sup> *ibid* 167.

<sup>18</sup> Veerle Heyvaert, Justine Thornton and Richard Drabble, 'With reference to the environment: the preliminary reference procedure, environmental decisions and the domestic judiciary' (2014) 130 *Law Quarterly Review* 413, 432.

<sup>19</sup> Damian Chalmers, 'The Much Ado about Judicial Politics in the United Kingdom' (2000) The Jean Monnet Centre <<https://jeanmonnetprogram.org/archive/papers/00/000101.html>>, ch VII.

EU law in its infancy.

### ***B. The current state of the legal order***

Some 57 years after the seminal ruling in *Van Gend en Loos*,<sup>20</sup> we are in a strong position to be able to assess the success of the EU in crafting an effective legal order. It is clear that EU law is a legal order of major importance both in its Member States and around the world. Businesses rely on EU law to govern their day-to-day operations, while litigants have had landmark successes in using EU law to claim rights against their governments and other private parties.<sup>21</sup> In light of this, it is uncontroversial to state that the EU's legal order is now effective.

Yet, it is a natural side-effect of the CJEU's approach in the last 57 years that COLIs have fallen by the wayside in terms of their integration into the legal order. After all, the EU's strategy in achieving effectiveness was to provide LNCs with incentives and power, which often came at the expense of COLIs' interests. This is what Komárek refers to as the ECJ's 'displacement doctrine', where 'ordinary courts' replace constitutional courts in national hierarchies through the preliminary reference procedure.<sup>22</sup> These incentive structures will be analysed in more detail later, but the main point is that the CJEU's focus so far has been on engaging with LNCs and not COLIs.

We can see the impact of this isolation in the way that COLIs have dealt with the duty to refer cases to the CJEU created by *CILFIT*.<sup>23</sup> In 2018, only 568 references were sent by all of the courts within all (then) 28 Member States.<sup>24</sup>

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<sup>20</sup> *Van Gend en Loos* (n 4).

<sup>21</sup> For example, see Case 43/75 *Defrenne v Sabena (No 2)* [1976] ECR 455 and Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECR I-2358.

<sup>22</sup> Jan Komárek, 'National constitutional courts in the European constitutional democracy' (2014) 12(3) *International Journal of Constitutional Law* 525, 527.

<sup>23</sup> Case 283/81 *Srl CILFIT v Ministry of Health* [1982] ECR 3415.

<sup>24</sup> Court of Justice of the European Union, 'Judicial Statistics 2018' (Press Release No 39/19, 2019) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-03/cp190039en.pdf>> accessed 7 September 2020.

Combining Bobek's methodology with the most recent data available,<sup>25</sup> it is reasonable to estimate that COLIs in the EU decide tens of thousands of cases a year.<sup>26</sup> While we would not expect all cases coming to COLIs to be referred to the CJEU, the use – and potential abuse – of the *acte clair* doctrine is a useful indicator of the appetite of COLIs to engage with the CJEU as active participants in the EU legal order. Therefore, in bringing LNCs into the fold within the last 57 years, the CJEU has achieved the effectiveness that it sought but has simultaneously strained its relationship with COLIs.

### ***C. The need for maturity***

There are two reasons why now is the right time for the EU legal order to begin its transition into maturity. The first is that the nature of the EU as a set of institutions has changed dramatically since its creation. It now deals with two of the most constitutionally sensitive areas of law in existence: fiscal policy and criminal law. These are two hallmarks of the nation state and draw particular attention from COLIs. A second reason is that it is inefficient for the EU to maintain the status quo now that it has achieved its goals. Moving towards maturity would represent a more efficient allocation of time and resources and a move in the best interest of litigants.

#### *(1) Constitutional sensitivity*

The EU's increasing expansion into constitutionally sensitive areas of law is exemplified by two cases: *Gauweiler*<sup>27</sup> and *Melloni*.<sup>28</sup> These illustrate how EU law now clashes with national constitutional norms in economic policy and criminal law respectively. These clashes will increasingly take place between constitutional courts and the CJEU, making a relationship of cooperation and genuine respect

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<sup>25</sup> Michal Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts' in Maurice Adams and others (eds), *Judging Europe's Judges* (Hart 2013) 197, 208.

<sup>26</sup> Achieved by adding up data found in European Commission for the Efficiency of Justice, 'Country Profiles' (2018) <<https://www.coe.int/en/web/cepej/country-profiles>> accessed 7 September 2020.

<sup>27</sup> Case C-62/14 *Gauweiler and Others v Deutscher Bundestag* [2015] ECR I-400.

<sup>28</sup> Case C-399/11 *Stefano Melloni v Ministero Fiscale* [2013] ECR I-0000.

increasingly important for the EU's authority. It is only within a mature legal order that such a relationship can emerge.

Dealing with economic policy first, the principal issue in *Gauweiler* is as follows:<sup>29</sup> The European Central Bank ('ECB'), in the midst of the Euro Crisis, agreed to purchase government bonds from Member States so long as they complied with European Stability Mechanism rules. Focusing on this as 'an instrument of economic policy', the German Constitutional Court made two main points in their first reference to the CJEU.<sup>30</sup> First, this was 'not covered by the mandate of the ECB'.<sup>31</sup> Second, and perhaps more importantly, they suggested that this involvement in economic policy conflicted with the German constitutional right to vote on transferring power to the EU.<sup>32</sup> In May 2020, the conflict reared its head once again, with Karlsruhe ruling that the CJEU had 'exceeded its judicial mandate' by issuing an 'arbitrary' judgment which stated that the ECB's bond-buying was legal.<sup>33</sup> This clash is a clear example of how the EU's development has led to open conflict between the CJEU and COLIs.

If we are to look to the future of such conflicts, Dawson and De Witte's analysis of the post-Euro Crisis EU highlights how European economies are increasingly subject to Commission control. For example, '23 Member States [were, in 2013,] monitored and controlled by the Commission under the excessive deficit procedure', meaning that Member States were at risk of fines if their deficits exceed certain targets.<sup>34</sup> From the perspective of debtor states – not just creditor states such as Germany – the EU has encroached on the power of sovereign states to set their own fiscal policy. Given the volatility of some Member States' economies, especially in light of the COVID-19 pandemic, repeated clashes between national constitutional courts and the CJEU over the Economic and Monetary Union are likely. It is in the EU's interest for such

clashes to occur between constitutional courts who want to find a solution alongside the CJEU, rather than those which seek to one-up the European court.

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<sup>29</sup> BVerfG, Order of 14 January 2014, Case 2 BvR 2728/13.

<sup>30</sup> *ibid* para 77.

<sup>31</sup> *ibid* para 69.

<sup>32</sup> *ibid*.

<sup>33</sup> BVerfG, Judgment of the Second Senate of 05 May 2020, Case 2 BvR 859/15, para 163.

<sup>34</sup> Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76(5) MLR 817, 825.

Moving onto the issue of criminal law, the case of *Melloni*<sup>35</sup> is useful in illustrating how the EU's Area of Freedom, Security and Justice has given rise to tension between the aims of the EU on one hand and national constitutional rights on the other. In *Melloni*,<sup>36</sup> the issue was whether or not Italy was obliged to extradite a person who had been convicted *in absentia*, despite such a conviction being unconstitutional under Italian law.<sup>37</sup> The CJEU ruled that allowing Italy to avoid extraditing Mr Melloni would 'compromise the efficacy' of the European Arrest Warrant, effectively requiring that the Italian Constitution give way to EU law.<sup>38</sup> Such decisions pose a high risk of dramatic conflict between national constitutional courts and the CJEU. Under these circumstances, constitutional courts will effectively be arguing over 'respect for freedoms and rights of the individual' which are 'rooted in the culture of a nation',<sup>39</sup> making such conflicts incredibly sensitive.<sup>40</sup> Given that the stakes are so high, it is important to foster a culture of genuine trust between COLIs and the CJEU in order to mediate conflicts which arise.

## (2) Efficiency

Aside from being able to facilitate the resolution of clashes between COLIs and the CJEU, a mature European legal order is also able to more efficiently allocate judges' and litigants' resources in a way that the status quo cannot.

If we accept that EU law is now effective, any mechanism which exists to make EU law effective is redundant, and spending time or money on such a mechanism is inefficient. For example, a preliminary reference sent by a court that

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<sup>35</sup> *Melloni* (n 28).

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*

<sup>38</sup> *ibid* para 63.

<sup>39</sup> Markus Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47(2) CMLR 405, 407.

<sup>40</sup> Massimo Fichera, 'The European Arrest Warrant and the Sovereign State: A Marriage of Convenience' (2009) 15(1) ELJ 70, 74.

is certain of the answer to their question may have been worthwhile 40 years ago when engagement with the CJEU was intrinsically valuable to the legal order.<sup>41</sup> Now that EU law is effective, such a reference is no longer beneficial or productive. On the contrary, given that preliminary references take an average of 16 months, such references are a huge inefficiency in the legal order, wasting the time of litigants and the resources of the CJEU.<sup>42</sup>

In a mature legal order, where judges treat EU law in the same way that they treat national law, such inefficiencies can be eliminated, and the EU can focus its resources on achieving aims beyond the one which it has already achieved.

## II. CHALLENGING THE CORE PURPOSE OF THE PRELIMINARY REFERENCE PROCEDURE

### *A. Uniformity as incompatible with maturity*

On a superficial reading of CJEU case law, particularly the *Melki* case,<sup>43</sup> it would appear as if elements of maturity – such as EU law being treated as national law by national judges – are present in the preliminary reference procedure, which is grounded in ‘the basis of mutual trust and judicial dialogue’.<sup>44</sup> Indeed, if we take this in good faith, it seems as though the preliminary reference procedure effectively makes EU law an ‘integral part of national legal systems’.<sup>45</sup>

Therefore, on the face of it, the preliminary reference procedure as it currently exists can be said to have the right ingredients for a mature legal order. The CJEU trusts national courts to apply EU law, and LNCs apply EU law because it is as much a part of the national legal order as laws passed by national parliaments. In other words, if this version of events is true, EU law is applied as if it were national law, and the CJEU trusts national courts to continue behaving this way.

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<sup>41</sup> Weiler, ‘A Quiet Revolution: The European Court of Justice and Its Interlocutors’ (n 9) 513.

<sup>42</sup> Court of Justice of the European Union (n 24).

<sup>43</sup> Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5665.

<sup>44</sup> Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5665, Opinion of AG Mazák, para 64.

<sup>45</sup> Allott (n 2) 541.

If this superficial reading of the relationship between national courts and the CJEU were an accurate one, this contribution would end here. However, it is clear from any sustained examination of CJEU case law that the preliminary reference procedure is underpinned by a desire for uniformity and an implicit distrust that comes with that desire. Uniformity is at odds with maturity in two key ways: it necessitates constant intervention into national legal systems, and it encourages superficial dialogue between national courts and the CJEU.

(1) *Constant intervention*

Whenever national legal systems attempt to limit the circumstances in which LNCs can send preliminary references, they are met with the same response. Taking *Commission v France* as an example,<sup>46</sup> it is stated that any limitation to the Article 267 procedure is unacceptable because it enables ‘a body of national case-law that is not in accordance with the rules of EU law’ to be established in a Member State.<sup>47</sup> It does not matter whether there is some other mechanism for uniformity in place; the only mechanism to keep national legal systems in check deemed acceptable by the EU is for the CJEU to have a direct link with LNCs.

If we accept, as Komárek does, that total uniformity is a goal that ‘virtually no legal system may ever achieve’, it follows that the CJEU’s insistence on LNCs having the ability to send references is more about monitoring LNCs than it is about facilitating judicial dialogue.<sup>48</sup> The CJEU requiring constant access to LNCs being justified by an impossible goal lends weight to Komárek’s assertion that this

is a relationship built on ‘distrust of national courts’.<sup>49</sup> It is here that we see the first glimpses of immaturity. The CJEU claims to trust national courts to apply EU law faithfully but simultaneously rejects any restriction on its ability to monitor them. Chalmers’s description of the CJEU chasing ‘false phantoms of

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<sup>46</sup> Case C-416/17 *Commission v France* [2018] EU:C:2018:811.

<sup>47</sup> *ibid* para 109.

<sup>48</sup> Jan Komárek, “‘In the Court(s) We Trust?’ On the need for hierarchy and differentiation in the preliminary ruling procedure”, (2007) 32 *ELR* 467, 471.

<sup>49</sup> *ibid* 468.

non-compliance' is an apt one, capturing how the European legal order is based on a constant fear of LNCs failing to apply EU law.<sup>50</sup> This is a far cry from the atmosphere of mutual trust that the CJEU claims exist and which is required for a mature legal order.

It is also important to recognise that the freedom with which LNCs are able to refer cases to the CJEU places additional strain on claims to maturity because it creates the impression of EU law as a special type of law. This is captured in Allott's emphasis on alienation; by having free and frequent access to the CJEU, LNCs begin to see EU law as 'intrinsically external' or 'exotic'.<sup>51</sup> This is especially persuasive once we consider that, on the national level, it is rare for a national court to ask for advice from another court. As such, the argument that frequent references to the CJEU makes EU law 'more like international law than national law' is compelling, and it is precisely this element of novelty which needs to be surpassed in order for the EU legal order to mature.<sup>52</sup> In a mature legal order, a national judge must see national law and EU law as one and the same, and the unencumbered freedom to consult the CJEU for any reason serves to separate EU law from national law.

*(2) The quality of interactions under the status quo*

By placing uniformity at the heart of the preliminary reference procedure, the CJEU implicitly accepts that preliminary references can be sent for mere confirmation of a view, or to save a national judge from carrying out the requisite work to answer a question for themselves. Indeed, Bobek highlights how the CJEU's current vision of legitimacy hinges on national courts asking questions.<sup>53</sup>

This is problematic because it means that, in the pursuit of its own legitimacy, the CJEU has an interest in LNCs asking questions regardless of their content.

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<sup>50</sup> Damian Chalmers, 'Judicial authority and the constitutional treaty' (2005) *International Journal of Constitutional Law* 3(2-3) 448, 467.

<sup>51</sup> Allott (n 2) 542.

<sup>52</sup> *ibid* 542.

<sup>53</sup> Bobek (n 25) 200.

This poses two challenges: first, it discourages national judges from researching EU law and coming to decisions based on research and their own legal knowledge. It can be argued that preliminary references sometimes exhibit extensive legal research and legal expertise, with the case of *Danfoss*<sup>54</sup> given as an example of a reference sent alongside detailed descriptions of CJEU judgments.<sup>55</sup> However, the procedure is properly characterised as a shortcut. Those who consider the sending of a reference as labour-intensive place too much emphasis on the ‘time and intellectual effort required to write the reference’,<sup>56</sup> rather than highlighting the more intellectually challenging labour of researching EU law, weighing up alternative solutions, and writing a judgment on the basis of that research. The latter form of labour being outsourced to the CJEU is precisely what enables LNC judges to ‘dispose of work-related problems’.<sup>57</sup> Judges deciding cases based primarily on national law spend time familiarising themselves with national law in order to answer difficult questions. However, when dealing with difficult questions of EU law, national judges are presented with a shortcut by the CJEU: rather than undertaking independent research, they can send for a preliminary reference and have the answers presented to them. As a result, we see that national judges are encouraged to treat EU law differently to national law, limiting the EU legal order’s maturity.

Second, the freedom for any LNC to send a preliminary reference to the CJEU means that the complexity of cases which are subject to references varies dramatically. The consequence of this, as highlighted by Komárek, is that the CJEU deals with ‘cases of minor importance’ alongside cases of constitutional

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<sup>54</sup> Case C-94/10 *Danfoss A/S and Sauer-Danfoss ApS v Skatteministeriet* [2011] ECR I-9963.

<sup>55</sup> Anna Wallerman, ‘Who is the national judge? A typology of judicial attitudes and behaviours regarding preliminary references’ in Clara Rauegger and Anna Wallerman (eds), *The Euroseptic Challenge: National Implementation and Interpretation of EU Law* (Hart 2019) 163.

<sup>56</sup> Nicolas Lampach and Arthur Dyevre, ‘Choosing for Europe: Judicial Incentives and Legal Integration in the European Union’ (2017) Working Paper <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2926496](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2926496)> accessed 7 September 2020, 7.

<sup>57</sup> Stone Sweet and Brunell (n 15) 73.

importance.<sup>58</sup> While it is not argued that hierarchy is essential to a mature legal order – emphasis on hierarchy fails to recognise that the CJEU is not an appellate court and does not decide on the facts of cases; it is most accurately considered as separate from national hierarchies – the varying complexity of the work undertaken by the CJEU does not match its level of expertise, and this, separate from considerations of hierarchy, results in allocational inefficiency. When we consider that one of the driving motivations for moving towards a mature legal order is to increase efficiency, such inefficiencies enforce the need for such a legal order.

### ***B. Resolving confusion as an alternative***

It has been argued that focusing on uniformity as a main aim is incompatible with the EU's maturing as a legal order because it encourages frequent supervision of national courts by the CJEU. In turn, this ensures that EU law remains alien and exotic compared to national law. The alternative aim supported in this article is that of resolving confusion.

The reasons are straightforward. Striving for uniformity encourages LNCs to avoid dealing with difficult questions of EU law, whereas requiring them to show confusion requires a high level of research. It would require them in the first instance to attempt to find answers to questions of EU law in the same way that they would with national law. Similarly, where uniformity encourages constant, frequent intervention and supervision by the CJEU, a focus on resolving confusion would reflect a true environment of mutual trust: LNCs would go to the CJEU when they encounter difficulty, and beyond this, the CJEU would trust them to apply EU law faithfully. This, in my view, lays the groundwork for the EU to mature as a legal order.

## **III. PLACING COLIS AT THE CENTRE OF REFORM**

Under the status quo, the preliminary reference procedure opts to allow LNCs to voluntarily engage with the CJEU. COLIs, on the other hand, are subject

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<sup>58</sup> Komárek (n 22) 489.

to an obligation to refer in all circumstances save for those outlined in *CILFIT*.<sup>59</sup> This is unsatisfactory because, even if we adopt the aim of securing uniformity, it is inaccurate to suggest that COLIs actually send references when they are obliged to. If we are to recalibrate the procedure to focus on resolving confusion, LNCs will see their power to refer come under certain limitations. This makes the relationship between COLIs and the CJEU even more important because, as outlined by Chalmers, COLIs possess ‘veto power over the Court of Justice’s rulings within their legal orders’ in that they represent the last chance for a national legal order to refer a case to the CJEU.<sup>60</sup>

I will outline how, in order to maintain the effective application of EU law at the national level while moving from ensuring uniformity to resolving confusion, the EU must induce COLIs to maintain a strong relationship with the CJEU by respecting national judicial hierarchies. In addition, it is crucial to refine the procedural rules governing COLIs and reform the sanctions against them for non-compliance to prevent COLIs from neglecting EU law. This can be described as appeasing COLIs from lower down the hierarchy while refining measures that restrict them.

### ***A. Fixing the detachment between COLIs and the CJEU***

In theory, COLIs and the CJEU have an incredibly close relationship, with the latter obliged to send references to the CJEU in all cases, subject to exceptions. This makes sense given the CJEU’s quest for uniformity; if the CJEU is able to monitor almost every case that goes to COLIs, they will be able to ensure that law is developing in the same way for each Member State.<sup>61</sup> Yet, this does not reflect the reality of the relationship between COLIs and the CJEU.

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<sup>59</sup> *CILFIT* (n 23).

<sup>60</sup> Damian Chalmers, ‘Judicial Preferences and the Community Legal Order’ (1997) 60 MLR 164, 180.

<sup>61</sup> *CILFIT* (n 23) para 7.

(1) *The obligation to refer*

First, the rules governing referrals from COLIs, as outlined in *CILFIT*,<sup>62</sup> are incredibly strict if read literally. Focusing particularly on the *acte clair* exception, COLIs can refuse to send a reference where the relevant EU law in a case is ‘so obvious that there can be no reasonable doubt’ as to its interpretation in all 27 of the EU’s Member States.<sup>63</sup> Taken literally, this criteria requires that judges in each Member State undertake the Herculean task of considering a question of EU law from various perspectives which are different from their own – a task which AG Stix-Hackl has called ‘ultimately impossible’.<sup>64</sup>

It is no surprise, then, that *CILFIT* in theory has given way to *CILFIT* in reality:<sup>65</sup> a range of relaxed interpretations of the textual *acte clair* requirement which differs between Member States. Despite the rule in *CILFIT* being clear,<sup>66</sup> its impracticality has led to multiple different applications. For example, AG Jacobs in *Wiener* has speculated that, in reality, *CILFIT* ought to be interpreted to require COLIs to consider the EU’s 23 official languages, rather than investigate the meaning of EU law in each of them.<sup>67</sup> Alternatively, we see the English Court of Appeal in *Cooper v AG* suggest that *CILFIT* only requires that national judges consider the fact that some issues which appear simple may actually be complex.<sup>68</sup> Taken literally, *CILFIT* is impossible to follow,<sup>69</sup> but attempts by national courts and other commentators to find a workable alternative are divergent. These differing interpretations leave room for exploitation and overuse of the *acte clair* exception. COLIs exploit the *acte clair* exception insofar as they use it for precisely the opposite purpose to the one it was created for; it was designed to prevent

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<sup>62</sup> *CILFIT* (n 2).

<sup>63</sup> *ibid* [16].

<sup>64</sup> Case C-495/03 *Intermodal Transports BV v Staatssecretaris van Financiën* [2005] ECR I-8151, Opinion of AG Stix-Hackl, para 102.

<sup>65</sup> *CILFIT* (n 23).

<sup>66</sup> *ibid*.

<sup>67</sup> Case C-338/95 *Wiener S.I. GmbH v Hauptzollamt Emmerich* [1997] ECR I-6495, Opinion of AG Jacobs, para 65.

<sup>68</sup> *Cooper v Attorney General* [2011] 2 W.L.R. 448 [71].

<sup>69</sup> *CILFIT* (n 23).

references being sent for questions of EU law which have clear answers, with COLIs instead using it for questions which seemingly do not have clear answers.

We see this exploitation from a range of COLIs, with the French Constitutional Court using the *acte clair* exception on 191 occasions in the 209 cases concerning EU law that it dealt with between 1978 and 2001.<sup>70</sup> In chasing uniformity as its goal through an excessively tight obligation to refer, the CJEU has managed to alienate cooperative COLIs while giving non-cooperative COLIs an excuse to avoid sending references when there is an unclear aspect of EU law. Cooperative COLIs, unable to access clear guidance on when they practically ought to refer cases, have formulated divergent principles. Some have adopted a *de minimis* approach,<sup>71</sup> where the decision to refer undergoes a cost-benefit analysis,<sup>72</sup> while others have opted for varying diluted versions of the *CILFIT* exceptions.<sup>73</sup> If the preliminary reference procedure is to shift its focus to resolving confusion, it must provide practical guidelines for COLIs to follow. These should reflect the procedure's objectives and foster a relationship of trust between the CJEU and national courts.

The irony of the CJEU's strict rules in *CILFIT* is that they provide the perfect avenue for non-cooperative COLIs to avoid sending preliminary references.<sup>74</sup> Heyvaert identifies COLIs' failure to send references as sometimes being driven by a 'wariness of national courts of letting matters of great national sensitivity or importance be determined by EU instead of national norms'.<sup>75</sup> COLIs who want to avoid sending references are harder to identify given that there is a reasonable excuse for not sending references: the impossible standards of *CILFIT*.<sup>76</sup> Dealing with cases such as these is crucial in building the atmosphere of mutual trust which is required for a mature legal order.

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<sup>70</sup> Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (2<sup>nd</sup> edn, OUP 2014) 237.

<sup>71</sup> See *Three Rivers District Council v Governor of the Bank of England* [2000] 2 WLR 1220.

<sup>72</sup> Takis Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40(1) CMLR 9, 47.

<sup>73</sup> *CILFIT* (n 23) para 4.

<sup>74</sup> *ibid.*

<sup>75</sup> Heyvaert and others (n 18) 431.

<sup>76</sup> *CILFIT* (n 23).

COLIs refusing to send references when they are obliged to is an existential problem facing the preliminary reference procedure, accentuated if LNCs lose their ability to send references freely. In addition, given the fact that COLIs often deal with cases of dramatic constitutional importance, a decision to not send a reference to avoid CJEU influence can stunt EU law's progression. Whether or not COLIs engage in this practice is up for debate, with Stone Sweet and Brunell suggesting there is little evidence for courts endorsing certain policy preferences through their decision not to refer.<sup>77</sup> However, it is too generous to suggest that all failures to refer are from cooperative COLIs who are simply confused about the *CILFIT* criteria. The solution to this challenge – developed further in later sections – can be found in appeasing COLIs from below, while creating clearer sanctions for non-compliance.

### *(2) The role of COLIs in influencing LNCs*

In addition to the importance of COLIs as a buckle between the CJEU and national judicial hierarchies, they also have a crucial role in any mature legal order as a source of discipline for LNCs.<sup>78</sup> While this point will be explored in more detail when justifying a proposed set of reforms, COLIs are able to regulate the actions of LNCs through the disapproval of their judgments, the ability to overrule their verdicts, and by sanctioning individual judges by limiting their personal career progression. Securing the cooperation of COLIs is important when replacing a system of surveillance which is linked to immaturity with one which aligns with maturity.

### ***B. Appeasing from below: making EU law 'normal' for LNCs***

At the core of the suggested reforms is a fundamental change in the role of LNCs. If our goal is to place COLIs at the heart of the relationship between the CJEU and national legal systems, it is important to recognise how disruption to national hierarchies can be a contributing factor in non-compliance from COLIs. In addition, distinct from their role in a strategy to appease COLIs, the way in

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<sup>77</sup> Stone Sweet and Brunell (n 15) 88.

<sup>78</sup> Andrew Le Sueur and Richard Cornes, 'What Do the Top Courts Do?' (2000) 53(1) *Current Legal Problems* 53, 69-71.

which LNCs treat EU law will impact the legal order's maturity insofar as it dictates whether EU law is normalised.

*(1) Incentive structures in place for LNCs*

A convincing justification for the adoption of EU law by LNCs is outlined in Weiler's judicial empowerment theory. Applying EU law enables LNCs to exert power against two key institutions: national governments and more senior courts.<sup>79</sup> First, EU law provides a range of new citizen-focused rights which can be enforced against national governments, giving LNCs power against national executive bodies with the EU's backing.<sup>80</sup> Second, direct access to the CJEU gives LNCs the ability to bypass more senior courts by engaging in dialogue with the CJEU.<sup>81</sup> This also opens up the possibility for judicial competition, which erodes national judicial hierarchies and trust between COLIs and the CJEU.

Alter's conception of judicial competition is characterised by 'national courts using (EU) law in bureaucratic struggles between levels of the judiciary'.<sup>82</sup> The clearest example of this is where a LNC frames a question to the CJEU in a way that secures a certain answer which may stand in opposition to the view held by a COLI.<sup>83</sup> Supporting this, empirical research undertaken by Mayoral reveals the 'assertion of legal authority over other courts' as a motivation for judges sending references to the CJEU.<sup>84</sup>

While Broberg and Fenger argue that judicial competition is based on limited, often anecdotal evidence, and that it 'fails to capture the typical candidate

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<sup>79</sup> Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors' (n 9) 523.

<sup>80</sup> Burley and Mattli (n 14) 63.

<sup>81</sup> Joseph Weiler, 'The Transformation of Europe' (1991) 100(8) *Yale Law Journal* 2403, 2426.

<sup>82</sup> Karen Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in Anne Marie Slaughter and others (eds), *The European Court and National Courts – Doctrine and Jurisprudence* (Hart, 1998) 241.

<sup>83</sup> Bobek (n 25) 221.

<sup>84</sup> Juan Mayoral, 'Judicial empowerment expanded: Political determinants of national courts' cooperation with the CJEU' (2019) *ELJ* 25(4) 374, 384.

for a preliminary reference case' insofar as it 'focuses almost exclusively on constitutional themes',<sup>85</sup> it is unfair to dismiss the theory as lacking importance. Even if we neglect significant evidence for the existence of judicial competition – Alter cites support from (then) future Advocate General Kokott's report of France's judicial hierarchy<sup>86</sup> amongst other reports<sup>87</sup> – the threat of judicial competition alone is still significant. Arguing that judicial competition is based on anecdotes still suggests that there is at least a misconception of competition existing, which is enough to disrupt trust between COLIs and the CJEU. Given that concerns of hierarchy have affected COLIs' willingness to cooperate with the CJEU, it is crucial to recognise how respecting national hierarchies COLIs might act as a concession which encourages future cooperation. Therefore, addressing the challenges posed by judicial competition will help to foster mutual trust between COLIs and the CJEU, facilitating a shift to resolving confusion as the procedure's main aim.

Each of the two manifestations of judicial empowerment theory is indicative of an immature legal order. The practice of attempting to incentivise lower courts into applying EU law is intrinsically tied up with the notion of EU law as 'exotic and external'.<sup>88</sup> As such, the incentive structure that was necessary in the preliminary reference procedure's infancy is unsuitable for a mature European legal order. If the focus is to shift to resolving confusion – eliminating frequent CJEU interventions – there must exist robust mechanisms to ensure that LNCs apply EU law without incentives that hinder the legal system's maturity.

## *(2) Further educating LNC judges*

It would be inaccurate to view the preliminary reference procedure as merely an attack on national judicial hierarchies. The procedure also has an important role in supplementing national judges' understanding of EU law. Prechal highlights a distinct lack of education among national judges who are applying

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<sup>85</sup> Broberg and Fenger (n 70) 56.

<sup>86</sup> Juliane Kokott, 'Report on France' in Anne Marie Slaughter and others (eds), *The European Court and National Courts – Doctrine and Jurisprudence* (Hart, 1998) 113.

<sup>87</sup> Alter (n 82) 244-245.

<sup>88</sup> Allott (n 2) 542.

EU law, placing emphasis on the fact that ‘judges in (newer Member States) were never trained in EU law’.<sup>89</sup> The threat to maturity is straightforward. If the ability of LNCs to send references is limited, it must be ensured that they are able to apply EU law without unlimited help from the CJEU. Without doing so, even cooperative LNCs will be unable to apply EU law faithfully.

Yet, the solution to the lack of education among national judges is not to train specialist judges in EU law.<sup>90</sup> If EU law is to become a non-exotic component of national legal systems, knowledge of its application must permeate the entire legal order.<sup>91</sup> It is not enough for cases marked as EU law cases to be dealt with by specialist judges at the national level; this is precisely the kind of foreign treatment that Allot highlights as being inconsistent with a mature European legal order. The proposed reforms will outline a way for national judges to learn EU law by applying it, ensuring that knowledge of EU law spreads in the same way that knowledge of national law does: through practical experience.

### ***C. Constraining from above: sanctioning uncooperative COLIs***

While the focus so far has been on limiting the interactions that the CJEU has with national courts, this argument would be incomplete if it did not consider how to deal with non-compliant COLIs. Having a mechanism for disciplining non-compliant COLIs is fully consistent with the notion of a mature legal order, so long as the mechanism of establishing liability respects national hierarchies. If the CJEU is to sanction national courts for a breach of mutual trust and confidence, they need to do so without disrespecting national hierarchies and therefore breaching the principle themselves.

#### *(1) The question of liability*

As things stand, applicants who seek to obtain compensation for a flagrant breach of EU law performed by a COLI will do so through proceedings which

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<sup>89</sup> Sacha Prechal, ‘National Courts in EU Judicial Structures’ (2006) 25 Yearbook of European Law 429, 433.

<sup>90</sup> *ibid* 436.

<sup>91</sup> *ibid*.

take place in a LNC. A lower court is placed in a position where they are to judge the actions of a higher court in what is a disruption of national judicial hierarchies. As Komárek highlights, national courts put in this ‘delicate situation’ would rather pass the case off to the CJEU through a preliminary reference.<sup>92</sup> The alternative to sending a reference in these circumstances, as outlined by Chalmers, is a situation wherein LNCs are able to ‘control the rulings of (COLIs)’ by sanctioning them using *Köbler* liability.<sup>93</sup>

LNCs are placed in an awkward position where they either send a case to the CJEU or they use EU law as a mechanism to leverage power over a COLI. In the former case, it seems as if there is an unnecessary additional step, and in the latter, we see a situation which aligns precisely with the immature features of judicial competition. A modification to this process would assist in the move towards maturity insofar as it protects national hierarchies and does not provide opportunities for EU law to be used as a tool in judicial competition.

## (2) *Strictness*

While the question of where *Köbler* hearings take place is an important one,<sup>94</sup> it does not address the fact that *Köbler* liability is a direct confrontation between the CJEU and COLIs. As such, it is of vital importance in both maintaining the relationship of mutual trust and ensuring that EU law is faithfully applied at the national level.

In light of the criticisms of *CILFIT*,<sup>95</sup> it is relatively clear that the *Köbler* procedure has lacked a practical set of rules to apply to the behaviour of COLIs. In their analysis of the procedure, de la Mare and Donnelly use the case of

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<sup>92</sup> Jan Komárek, ‘Federal Elements in the Community Judicial System’ (2005) 42 CMLR 9, 14.

<sup>93</sup> Damian Chalmers, ‘The Dynamics of Judicial Authority and the Constitutional Treaty’ in Joseph Weiler and Christopher Eisgruber (eds), *Altneuland: The EU Constitution in a Contextual Perspective* (2004), 24. Derived from Case C-224/01 *Köbler v Austria* [2003] ECR I-10239.

<sup>94</sup> Case C-224/01 *Köbler v Austria* [2003] ECR I-10239.

<sup>95</sup> *CILFIT* (n 23).

*Commission v Italy*<sup>96</sup> to support the idea that the CJEU has often chosen to find fault in national legislatures rather than COLIs.<sup>97</sup> Where the *CILFIT* guidelines are unclear and difficult to apply, this is a rational course of action; it is unfair to punish COLIs for failing to adhere to a set of guidelines which are almost impossible to follow.

Yet, going forward, if there is to be a mature EU legal order it is perfectly natural for *Köbler* liability to potentially result in COLIs being at fault. The rationale here is simple: where there are clear rules which create a system of mutual trust, the CJEU should be able to punish COLIs for clearly breaching those rules. Such a system is not only consistent with respecting national hierarchies but is also essential in upholding the rules which allow EU law to be applied while respecting national hierarchies.

#### IV. PUTTING FORWARD AN ALTERNATIVE

The foregoing analysis of the EU legal order has placed emphasis on the need for clear rules which force LNCs to treat EU law as they would national law and to maintain a strong working relationship between COLIs and the CJEU. It has been argued that ensuring uniformity as an aim of the Article 267 procedure is intrinsically linked to an immature legal order and that it instead ought to be replaced with the goal of eliminating confusion among national judges. In focusing on two core elements, namely a test of confusion and the ability of national judicial hierarchies to regulate themselves, a set of reforms are proposed.

##### ***A. A test of confusion***

Placing confusion at the centre of the preliminary reference procedure, as outlined in Section Two, is important because it changes the way in which national courts and the CJEU interact with one another. Rather than interactions being

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<sup>96</sup> Case C-129/00 *Commission v. Italy* [2003] ECR I-14637.

<sup>97</sup> Thomas de la Mare and Catherine Donnelly, 'Preliminary Rulings and EU Legal Integration: Evolution and Stasis', in Paul Craig, Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn OUP 2011) 378.

based on suspicion, they focus on solving difficult problems. Similarly, the procedure is no longer designed to provide an opportunity for LNCs to avoid thinking about problems of EU law. If LNCs are confused about the case before them, they are forced to think about EU law before sending a reference. As such, the shift enables – or requires – LNC judges to learn about EU law by actively solving problems. However, it is important to recognise why alternative mechanisms of learning EU law through attempting to answer questions can be unsatisfactory.

*(1) The 'green light' procedure – an incomplete reform*

A popular reform among EU law scholars has been the introduction of a 'green light' process for preliminary references. The idea has been mooted for over 20 years by a range of academics, with Weiler outlining the reform as far back as 1987.<sup>98</sup> In short, the idea is as follows: whenever a national court sends a reference to the EU, it must attempt to answer the questions that it wants the CJEU to answer. The national court's answers to these questions, sometimes referred to as a draft judgment, would either be endorsed as non-objectionable or would be replaced by a correct set of answers by the CJEU.<sup>99</sup> Here, the advantage as compared to the status quo is that national courts learn EU law by attempting to answer difficult legal questions.

However, the green light procedure is unsatisfactory for two reasons. The first is that it fails to deal with the possibility of judicial competition. If there exists a desire in some LNCs to endorse a certain version of EU law for the purpose of exerting power over a COLI, a green light procedure would only help them in achieving their aim. Bobek describes judicial competition as being performed through the formulation of questions in a certain way; a green light procedure would go a step further in allowing LNCs to put forward reasoned arguments to

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<sup>98</sup> Joseph Weiler, 'The European Court, National Courts and References for Preliminary Rulings – The Paradox of Success: A Revisionist View of Article 177 EEC' in Henry Schermers and others (eds.) *Article 177 EEC: Experiences and Problems* (Elsevier 1987) 366-378.

<sup>99</sup> European Union Committee, *The Workload of the Court of Justice of the European Union* (HL 2012-13, 163) paras 109-111.

the CJEU without any input from COLIs.<sup>100</sup> On the face of it, there becomes an accentuated risk of LNCs using their position to convince the CJEU that a certain reading of EU law, which may be disputed by a COLI, is correct.

Second, and more important, is the fact that the green light procedure fails to capture the goal of normalising EU law. The ‘green light’ system would enable a national court to be relatively certain in the application of EU law – that is, to be able to say that the answer to question x is y – and to still send a reference to the CJEU. This means that EU law is treated as something of a novelty; national courts need their well-reasoned answers double-checked, either for the purposes of affirmation or to give legitimacy to their decisions against another state actor. If the EU legal order is to mature, this cannot be the case. In precisely the same way that trust is needed between national courts and the CJEU, national courts need to trust their own ability to apply well-reasoned interpretations of EU law.

*(2) A test of confusion – the judicial supermarket*

The main strength of using a test of confusion – distinct from the ‘green light’ procedure – is that it requires national courts to explain why they are confused. This involves explaining that there are at least two reasonable interpretations of EU law and going through the reasoning for each in turn. Alternatively, it might involve a national court explaining why there is no reasonable interpretation of EU law to be applied, evaluating the best candidate explanations but ultimately explaining why they are unreasonable.

In explaining this test, it is useful to draw parallels with the EU’s intellectual property regime, specifically its guidance on confusion between trademarks. Putting the rules explained in *SABEL* simply,<sup>101</sup> a trademark will be likely to cause confusion where the average consumer would confuse brand x with brand y. In other words, brand x will cause confusion where a consumer looking for brand y might select brand x by mistake. Factors such as goods being sold in the

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<sup>100</sup> Bobek (n 25) 221.

<sup>101</sup> Case C-251/95 *SABEL BV v Puma AG, Rudolf Dassler Sport* [1997] ECR I-6191.

same types of shops and whether products are closely related or complementary are relevant.<sup>102</sup>

Returning to the judicial context, this trademark test can be applied to the preliminary reference procedure. A national judge, endowed with the legal knowledge that is a prerequisite for becoming a judge, is sent to the hypothetical judicial supermarket to find a reasonable answer to a question of EU law. In order for them to argue that they are confused, they would have to point to two or more answers which cause confusion. Alternatively, they might say that there is no reasonable answer to the question of EU law in the imaginary supermarket and explain why that is the case. For a judicial test, authority supporting divergent reasonable interpretations takes the role of products. In resolving a question of free movement of goods, authority stemming from the European Arrest Warrant may not be as relevant as, say, authority stemming from the free movement of services in much the same way that a brand of shampoo is unlikely to cause confusion when shopping for a soft drink.

Here, the strength of a confusion-based test is that it normalises EU law whilst allowing an avenue for national judges to seek help for the trickiest problems that may arise. It provides clarity to national courts about when they can refer, despite there being an element of discretion inherent in such a system. Similarly, it means that the act of sending a reference would require that a national judge thinks about a question of EU law, considering why there are multiple answers to a question or why there is no reasonable answer to a question at all. This is the sort of system which is conducive to a mature legal order.

### ***B. Enforcement mechanisms within national hierarchies***

Alongside a clear test of confusion, the second main element of this set of reforms is the utilisation of national judicial hierarchies. While respecting national judicial hierarchies is important in building trust between COLIs and the CJEU, each national judicial hierarchy also has internal mechanisms to regulate the behaviour of LNCs. It follows that a mature legal order will substitute constant

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<sup>102</sup> For a more comprehensive explanation of the trademark test of confusion, see Ann Bartow, 'Likelihood of Confusion' (2004) 41 San Diego Law Review 721.

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supervision for trust in national mechanisms of ensuring compliance with EU law, as EU law becomes simply another part of national law.

Writing in the context of EU law, Mayoral illustrates the ‘labour market theory’ which suggests judges are motivated by ‘factors such as preserving or furthering their reputation amongst judges’ alongside other elements such as ‘promotional prospects’.<sup>103</sup> The idea is that judges behave in a way that will earn them the prestige and salary increases that come with promotion. Breaking the mould – as with in any profession – is dangerous for judges because it can mean falling foul of occupational expectations, which in turn has a knock-on effect on an individual’s ability to achieve promotion.

However, it is important to recognise that this theory is not exclusive to the EU and has existed in some form in national legal systems for hundreds of years. Duxbury, writing on the issue of why judges choose to follow precedent, also draws attention to desires for ‘personal promotion’.<sup>104</sup> Another important element for Duxbury is the fact that LNCs are worried that appeal courts, including COLIs, will think that their judgments lack authority.<sup>105</sup> Aside from feeding into concerns about personal promotion, judges in LNCs would much rather have their decisions endorsed by senior judges than have them rejected.

By refocusing the preliminary reference procedure on respecting COLIs and national hierarchies, the EU legal order moves away from having a CJEU which constantly checks up on LNCs towards an order which utilises traditional national enforcement mechanisms. This feeds into an overarching narrative of trust, where EU law is treated in the same way as national law.

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<sup>103</sup> Mayoral (n 84) 377.

<sup>104</sup> Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press 2008) 154-155.

<sup>105</sup> *ibid* 155.

### C. A set of reforms

Preliminary references may only be sent by COLIs, subject to three exceptions:

1. An obligation to refer where a LNC has determined that a piece of EU law ought to be declared unlawful and is unable to do so subject to the principles outlined in *Foto-Frost*.<sup>106</sup>
2. The ability to refer where a LNC is able to prove that they are so confused about a principle of EU law that they would not be able to make a reasonable decision.
3. An obligation to refer where an appeal court (or COLI) comes to a conclusion on a matter of EU law that is different from that reached by a court below it in the judicial hierarchy.

The first exception is straightforward. Under the principles outlined in *Foto-Frost*,<sup>107</sup> only the CJEU can declare a piece of EU law invalid; national courts need to receive confirmation from the CJEU in order to disapply EU law which they believe to be invalid. As argued by Broberg and Fenger, it would be deeply undesirable for national courts to continue to apply a piece of EU law that they deem to be unlawful until the case reaches a COLI who can subsequently send a reference to the CJEU.<sup>108</sup>

Underpinning the second and third exceptions is a focus on the objective of resolving confusion. Where a LNC can show that they are confused on a matter of EU law, there is merit in allowing the CJEU to resolve the confusion. This is not immature because it requires LNCs to engage with EU law in order to prove that there is sufficient confusion. Where two national courts disagree – for example, France’s *Cour de Cassation* disagreeing with its *Cour d’appel*, and both courts believe they are not confused, there is sufficient evidence that there is

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<sup>106</sup> Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

<sup>107</sup> *ibid.*

<sup>108</sup> Broberg and Fenger (n 70) 31.

confusion to be resolved. In these circumstances, a preliminary reference is needed. Under this system, COLIs are free to decide whether or not to refer, subject only to the obligations created by the first and third exceptions.

(1) *Dealing with Köbler*

Making reforms to *Köbler* liability makes sense in light of the suggested reforms to preliminary references for two reasons. First, following on from the aim of moving towards maturity, the liability question outlined above poses a threat to national judicial hierarchies insofar as it involves a LNC holding power over a COLI. Second, given the clearer proposed obligation to refer for COLIs, imposing sanctions on COLIs who neglect their obligation is no longer unfair. Both of these reasons feed into the general idea that a mature legal order – one with a genuine atmosphere of mutual trust and confidence – can have sanctions for breaching the trust instilled in national courts by the CJEU.

There are at least three potential options for changing the venue of *Köbler* liability in order to respect national judicial hierarchies: allowing applicants to apply directly to the CJEU for a remedy, forcing LNCs to refer *Köbler* cases to the CJEU for the CJEU to decide cases, or bringing *Köbler* liability under the infringement procedure in Article 258. Only the third approach is tenable.

First, allowing applicants to apply to the CJEU directly in such cases would disrupt the division of labour between national courts and the CJEU. Having established strict standing requirements for direct applications in *Plaumann*,<sup>109</sup> the European court has envisioned that national courts would act as a filter, assisting in case management.<sup>110</sup> Here, the concern is that allowing direct applications to the Court, even for *Köbler* liability, will open the ‘floodgates’, allowing ‘spurious

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<sup>109</sup> Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95.

<sup>110</sup> Anthony Arnall, 'Judicial Review in the European Union' in Anthony Arnall and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 401.

actions by opportunistic litigants'.<sup>111</sup> Without assessing the merits or demerits of this approach, it would be undesirable to start carving out small exceptions to the division of labour that has been struck.

Second, the solution of having litigants go to a national court in the first instance and then have the CJEU deal with the case after a reference is sent is undesirable for two reasons. The first is that it invites a degree of artificiality, which is unnecessary. Having a national court rubber-stamp a judgment given by the CJEU simply because of being afraid of upsetting the institutional balance outlined in the first solution is a waste of national courts' time. A second, more powerful objection is that such a solution would undermine the purpose of preliminary references: courts send references to 'ask questions on EU law', not to have the CJEU decide cases for them.<sup>112</sup> Whether or not this happens in reality is the subject of debate, but nonetheless, it is not my intention to warp the reference procedure from a tool to answer questions into a decision-making mechanism.

The most suitable solution would be to bring *Köbler* liability under the remit of infringement proceedings carried out by the Commission with fines acting as compensation for applicants who previously would have gone through national courts to receive a remedy. There are two main perks to this approach. First, it removes *Köbler* liability from the remit of LNCs and therefore respects national hierarchies. The second is that the infringement procedure is based, in the first instance, on dialogue and 'quiet accommodation' with Member States.<sup>113</sup> In a mature legal order, it is consistent with an atmosphere of mutual trust that an EU institution can engage in dialogue with a national court where a misapplication of the law is alleged. Given that 92% of cases in infringement proceedings are dealt with before going to the CJEU, this is a great opportunity to resolve conflicts

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<sup>111</sup> Adam Cygan, 'Protecting the Interests of Civil Society in Community Decision-Making – The Limits of Art. 230 EC', 52 *International and Comparative Law Quarterly* (2003) 995, 997.

<sup>112</sup> Armin Cuyvers, 'Preliminary References under EU Law' in Armin Cuyvers and others (eds) *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill 2017) 275, 275.

<sup>113</sup> Richard Rawlings, 'Engaged Elites. Citizen Action and Institutional Attitudes in Commission Enforcement' (2000) 6 *European Law Journal* 4, 9.

between COLIs and EU institutions outside of the courtroom, fostering a relationship of trust.<sup>114</sup>

Practically, this can be achieved through a modification to Article 258 to cover ‘manifest breaches of EU law’ by courts adjudicating in the last instance alongside the failure of Member States to fulfil their Treaty obligations.<sup>115</sup> Such a term would serve to explicitly bring COLIs within the remit of the Article 258 procedure, while also serving to clarify the benchmark required for a COLI’s non-compliance to attract sanctions from the EU.

## **V. ADDRESSING CONSEQUENCES OF AND CHALLENGES TO REFORMING ARTICLE 267**

In light of the reforms to Article 267 proposed in the preceding section, the potential impacts of limiting the ability to refer on a range of stakeholders will be considered alongside some challenges to the suggested reforms. The response to these challenges will focus on the three key advantages of the proposed set of reforms: their ability to create a mature legal order, their addition of consistency to the procedure, and their inherent focus on resolving confusion. From this perspective, many of the challenges raised against limiting references are weakened significantly, while others aim to create a different type of legal order – specifically one which focuses on uniformity – than the one argued for in this article. While I recognise that these reforms are not perfect and will not create a perfect legal order, I will highlight how they potentially improve the status quo and can lay the groundwork for a mature legal order.

### ***A. Maturity***

One of the main strengths of the proposed reforms is that they focus on securing a mature legal order. When assessing challenges from this perspective, it

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<sup>114</sup> Melanie Smith, ‘Enforcement, Monitoring, Verification, Outsourcing: The Decline and Decline of the Infringement Process’ (2008) 33 *European Law Review* 777, 778.

<sup>115</sup> *Köbler* (n 94) para 17.

becomes clear that much of the criticism against limiting referrals come from a focus on maintaining uniformity rather than resolving confusion.

*(1) Weakening the relationship between LNCs and the CJEU*

An understandable criticism of the set of reforms is that it would weaken the relationship between LNCs and the CJEU. Arnall puts forward the case that a refusal to answer a question posed by an LNC ‘would risk serious damage to the spirit of cooperation on which the procedure depends’,<sup>116</sup> with Jacobs also arguing that limiting references would alienate LNCs from EU law.<sup>117</sup> Koopmans goes as far as to argue that LNCs would become ‘second-rate courts’ in the legal order.<sup>118</sup> The argument here is that the set of reforms may be counter-intuitive. In seeking to secure the cooperation of COLIs in national judicial hierarchies and move towards a mature legal order, the reforms may weaken the cooperation of LNCs. Given that only a tiny proportion of cases reach the COLI in each Member State, this would mean that EU law would return to its foundational issue: ensuring that EU law is applied at the national level. In other words, the set of reforms might take one step forward and three steps back.

While this criticism holds weight, there are two main objections. The first is that the proposed set of reforms would only result in questions being rejected by the CJEU if there is no confusion. If it is the case that ‘the spirit of cooperation’ between LNCs and the CJEU is fundamentally about LNCs being able to double-check their answers on questions of EU law, this conception of cooperation is focused more on securing uniformity than it is about enabling maturity. Second, it is important to recognise that the proposed set of reforms are based on utilising enforcement mechanisms within Member States’ judicial hierarchies: those

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<sup>116</sup> Anthony Arnall, ‘Judicial Architecture or Judicial Folly? The Challenge Facing the EU’ (1999) *ELR* 516, 519.

<sup>117</sup> Francis Jacobs, ‘Introducing the Court’s Paper’ in Alan Dashwood and Angus Johnston (eds), *The Future of the Judicial System of the European Union* (Hart 2001) 11.

<sup>118</sup> Thijmen Koopmans, ‘The Future of the Court of Justice of the European Communities’, in Ami Barav and Derrick Wyatt (eds), *Yearbook of European Law* 11 (1991) 15, 29.

relating to Mayoral's labour market theory.<sup>119</sup> This makes it increasingly unrealistic that EU law would cease to be effective, given the existence of an active base of litigants and a set of COLIs who are potentially more engaged in the EU legal order. While interaction with the CJEU was important in ensuring the cooperation of LNCs in the EU legal order's infancy, this can no longer be the case if the legal order is to mature.

*(2) Stunting the development of EU law*

The preliminary reference procedure has given rise to many of the influential cases that drove forward the development of the EU's legal order. Looking at the seminal case of *Van Gend en Loos*,<sup>120</sup> de la Mare and Donnelly put forward the argument that 'the truly radical party' in that case was 'the Dutch national court' who sent a preliminary reference.<sup>121</sup> A difficulty here is that, under the proposed reforms, LNCs will not be able to send references for the sole purpose of pushing forward the development of EU law. This issue is accentuated by the idea that LNCs' stake in the development of EU law is important in maintaining their cooperation.<sup>122</sup> It is here that we see a potential link between a more limited role in shaping EU law to a reduction in engagement with the legal order itself.

There are three responses to this criticism. The first is that there is a crucial difference between the perspective outlined in this article and the perspective which focuses on maintaining an immature legal order. Mature legal orders do not have the development of their case law as the main objective; in a mature legal order, courts apply the law because it is the law, and disputes drive legal development as a consequence. Nonetheless, a strength of the reforms proposed is that it brings precisely the sort of cases which drive legal development – those where there is genuine confusion regarding EU law – to the forefront of the preliminary reference procedure.

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<sup>119</sup> Mayoral (n 84) 376.

<sup>120</sup> *Van Gend en Loos* (n 4).

<sup>121</sup> de la Mare and Donnelly (n 97) 382.

<sup>122</sup> Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors' (n 9) 523.

A second response links closely to the first. In their analysis of the American system of docket control, Koopmans argues that a crucial sign that a legal order is mature enough to limit referrals is where 'it is (relatively) easy to predict whether a certain case can ultimately contribute to the growth of the Community legal system'.<sup>123</sup> While the EU and US legal orders have significant differences in their perceived legitimacy and authority, the crucial element to consider is whether they can identify cases which are complex and warrant further examination by more experienced judges. Given the age of the EU legal order, the maturity of its academic community, and the sophisticated development of its core principles, it is now at the stage where this is possible. Even if it were not, the proposed set of reforms still highlights contentious areas of EU law – those which create confusion – and sends them to the CJEU, making it a good tool for identifying important legal cases even when lawyers and academics cannot.

Third and finally, a mature legal order should not need to dangle a metaphorical carrot – in this case, the ability to shape EU law – in front of LNCs in order to encourage their engagement with the legal order. Instead, the internal enforcement mechanisms outlined in Section Four are highlighted in large part because of their ability to keep LNCs engaged – in a way that is consistent with maturity – as their role within the legal order changes.

### *(3) CJEU dodging controversy*

Once the CJEU is able to reject preliminary references because there is no demonstrated confusion, it becomes a possibility that this power will be exercised for reasons other than its intended purpose. In particular, Koopmans suggests that this might occur in the face of so-called 'perilous questions'; questions which are controversial and politically sensitive.<sup>124</sup> If the CJEU refuses to deal with these questions, there is a risk of a legal black hole developing, where there is a legal question which needs resolving and no authority willing to resolve it.

It is important here to remember that Koopmans writes in the context of the US Supreme Court. If the CJEU's track record is anything to go by, cases such

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<sup>123</sup> Koopmans (n 118) 30.

<sup>124</sup> *ibid.*

as *Gauweiler*<sup>125</sup> and *Coman*<sup>126</sup> are examples of the CJEU dealing robustly with politically sensitive, ‘perilous questions’. There is little to suggest that the proposed reforms would change that. To go a step further, if the proposed reforms are successful in improving the relationship between COLIs and the CJEU, the former is likely to send a greater number of controversial cases to the latter than they do currently, facilitating the development of the legal order and its body of law.

*(4) A lack of judicial education accentuated*

As highlighted previously, a problem with the current legal order is that national judges often lack a comprehensive understanding of EU law. This problem is made worse when we consider, as Prechal does, that limiting access to the CJEU can accentuate national judges’ lack of knowledge.<sup>127</sup> This might lead to situations where national judges do not know what they do not know, potentially applying a version of EU law that they believe is correct when in reality there is a more reasonable alternative conception. In particular, some Member States are vulnerable to such challenges because of their judiciary being especially unengaged with developments in EU law.<sup>128</sup>

This is a difficult challenge to overcome, and it might mean that judges remain unconfident in applying EU law in the period immediately after the reforms are implemented. However, this can be considered a teething period in the transition to a more mature legal order, where judges learn how to apply EU law by applying it. The obligation to refer where two courts disagree would mean that an entire legal order – all of the judges in a hierarchy – would have to apply the same incorrect reading of EU law in order to avoid a reference being sent. While not being impossible, this event would be unlikely and could occur in precisely the same way under the status quo.

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<sup>125</sup> *Gauweiler and Others v Deutscher Bundestag* (n 27).

<sup>126</sup> C-673/16 *Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] EU:C:2018:385.

<sup>127</sup> Prechal (n 89) 441.

<sup>128</sup> Lars Hornuf and Stefan Voigt, ‘Analyzing preliminary references as the powerbase of the European Court of Justice’ (2015) 39(2) *European Journal of Law and Economics* 287, 303.

## ***B. Consistency***

A second strength of the proposed reforms is that they bring a degree of consistency to the preliminary reference procedure. This is to be contrasted with the status quo, where LNCs are given total discretion as to whether they send references or not. While there is a formal level of consistency with COLIs, the overuse of the *acte clair* doctrine makes practical consistency more elusive. The following challenges to the proposed reforms can be addressed through references to the improved consistency that they achieve.

### *(1) Relationship with Article 263*

An ongoing challenge in the EU's legal order has emerged from the restrictive standing requirements for judicial review of EU law, as outlined in *Plaumann*.<sup>129</sup> The CJEU's response to criticism of *Plaumann*,<sup>130</sup> specifically that there is limited access for individual litigants to the CJEU, is that the preliminary reference procedure works to mitigate any issues caused by the restrictive standing requirements of Article 263.<sup>131</sup> These two procedures work together to establish 'a complete system of legal remedies and procedures'.<sup>132</sup> It follows from this that a restriction to the Article 267 procedure therefore disrupts the balance within the system of legal remedies because it limits access to the CJEU.

However, from this perspective, the proposed reforms would actually mark an improvement in this regard. The main criticism made against Article 267 in its current form from this perspective is that there is insufficient certainty that an applicant will be able to access the CJEU, mainly for the purpose of challenging the legality of EU law. Under the status quo, a national court might conclude that the relevant EU law is valid, or they may send a reference that does not accurately capture the litigant's grievance. AG Jacobs argues that national courts' discretion to refuse to send a reference because a litigant 'fails to create sufficient doubt' as

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<sup>129</sup> *Plaumann & Co v Commission* (n 109).

<sup>130</sup> *ibid.*

<sup>131</sup> TFEU 2008 (n 1).

<sup>132</sup> Case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, para 2.

to the legality of EU law is problematic.<sup>133</sup> This is because a national court which fails to properly appreciate the strength of a litigant's claim would effectively block the litigant from accessing a judicial remedy. While the suggested reforms do not require a reference in all cases, the introduction of mandatory referrals, where two courts in a hierarchy disagree, helps to limit LNCs' discretion to some extent. In this sense, the suggested reforms add a degree of certainty to litigants' pursuit of accessing the CJEU.

## (2) *Disrupting trust between Member States*

A perceived benefit of the current rules is that they give Member States confidence that other Member States are not applying diverging interpretations of EU law. This is important in the context of the internal market, where minor differences in regulations can give firms in one Member State a competitive advantage over those in another. This is highlighted by Mancini and Keeling, who use the example of equal pay for men and women having the potential to create a competitive advantage for a Member State failing to follow EU law's guidance.<sup>134</sup> In theory, the discretion of LNCs to refer questions to the CJEU was enough to maintain uniformity across the EU.

This criticism mistakes a system which pursues uniformity for a system which is able to meaningfully achieve uniformity. Aside from total uniformity being unattainable, as outlined by Komárek above, there are practical barriers to achieving a degree of uniformity under the status quo. For example, a mischievous LNC could exercise their discretion and not send a reference to the CJEU, while a complicit COLI is able to exploit the *acte clair* doctrine, as many COLIs have over the past 20 years. While precisely the same situation can arise if the proposed reforms were implemented, it is important to highlight how the new rules would make it easier to impose *Köbler* liability on these judicial systems. Currently, the lack of clarity and consistency with regards to the *CILFIT* criteria's application means that there is not a robust system in place for sanctioning non-compliant

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<sup>133</sup> Case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, Opinion of AG Jacobs, para 41.

<sup>134</sup> Frederico Mancini and David Keeling, 'From *CILFIT* to *ERT*: THE Constitutional Challenge Facing the European Court' in Ami Barav and Derrick Wyatt (eds), *Yearbook of European Law* 11 (1991) 2.

judicial systems. The proposed reforms and the consistency that they bring would rectify this.

### ***C. Focus on resolving confusion***

Being able to focus on resolving confusion, and therefore being a more direct system for solving litigants' problems, is the third main strength of the proposed reforms. This strength is able to respond to criticism relating to the ability of the reformed legal order to provide access to justice for litigants.

#### *(1) Litigants forced to pursue COLIs*

A criticism of any reform which limits the ability of LNCs to send preliminary references is that where litigants want to access the CJEU, and LNCs are unable to facilitate said access, they will pursue appeals through the national judicial hierarchy in order to achieve their goals.<sup>135</sup> This poses two problems. The first is that it will cost litigants an excessive amount of money to access the CJEU, meaning that well-funded litigants have privileged access to a certain level of justice. The second is that COLIs and appeal courts will see an increase in cases which could have been dealt with by LNCs. Heyveart's research into the role litigants' requests for references played in UK judges' decisions to send references is particularly convincing, showing that requesting a reference increased its likelihood significantly.<sup>136</sup> This may reflect the desire of litigants to access the CJEU, with a preliminary reference being the only way to satisfy that desire.

While it is logical that a litigant who wants to access the CJEU at the expense of anything else would, under the reforms proposed, continue to a COLI in the hope that one of the courts in the hierarchy disagrees with another, this exercise is something of a tautology. To suggest that litigants care about whether the CJEU gives its opinion is to misrepresent the reality of disputes in court. For Alter, the main aim of litigants is to 'pressure a government to comply with EU law': to have

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<sup>135</sup> Henry Schermers, 'Problems and Prospects' in Alan Dashwood and Angus Johnston (eds), *The Future of the Judicial System of the European Union* (Hart 2001) 33.

<sup>136</sup> Heyveart and others (n 18) 419.

EU law applied to their case.<sup>137</sup> Yet, it is difficult to perceive how the proposed reforms would make it any more difficult for litigants to access EU law. If there is a straightforward answer to a question, the reforms would require that a LNC applies that answer and not subject litigants to months of waiting in order to have that answer double-checked. Where there are multiple answers to a question, LNCs are free to request clarification as under the status quo. Equally, where a litigant faces up against a non-compliant judicial system topped by a complicit COLI, they will be more likely to find success through *Köbler* liability than they are currently as a result of a clearer obligation to refer. A focus on resolving confusion is able to capture litigants' interests in having EU law applied to their case, as well as their interest in not facing undue delays while references are sent off.

## VI. ADDRESSING CONSEQUENCES OF AND CHALLENGES TO REFORMING ARTICLE 258

Playing a supporting role to the reforms proposed to Article 267, the suggested modification to Article 258 serves to create a way of enforcing *Köbler* liability which respects national hierarchies and aligns with a mature legal order. I will briefly address some of the challenges facing this modification to *Köbler* liability.

### *A. Disrupting judicial independence*

Modifying Article 258 to use infringement proceedings as a sanction against COLIs could blur the line between the governments of Member States and their courts, giving rise to issues related to the separation of powers and judicial independence. Member States could complain that they are being challenged as a result of the behaviour of their courts, over which they have no control.

Dealing with this challenge, it is important to highlight that precisely the same issues were raised in the case of *Köbler*.<sup>138</sup> The CJEU in that case dealt with these issues by highlighting that 'the principle of liability in question concerns not the personal liability of the judge but that of the State', and so judicial

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<sup>137</sup> Karen Alter, 'The European Union's Legal System and Domestic Policy: Spillover or Backlash?' (2000) 54(3) *International Organisation* 489, 493.

<sup>138</sup> *Köbler* (n 94).

independence is unlikely to be affected.<sup>139</sup> In fact, dealing with judicial failure to enforce EU law through infringement proceedings cuts through the artificial distinction between judicial non-cooperation and state non-cooperation. For example, in *Commission v France*,<sup>140</sup> the French police's failure to enforce EU law creates a discrepancy between the law on the books – as enacted by the legislature – and the law which individuals are able to access and utilise. Precisely the same can be said for the impact of COLIs who fail to apply EU law; ultimately, there is a disconnect between the law that is enacted and the law that is enforced.

### ***B. Damaging legal certainty***

Enabling the Commission to challenge the decisions of COLIs could – if the Commission requires the decision be reopened or modified – have an adverse effect on legal certainty. In turn, this would hinder the ability of EU citizens to plan their affairs around COLI decisions, as well as interfere with the principle of *res judicata*.<sup>141</sup>

As with the challenge posed by judicial independence, the concerns raised over *res judicata* were addressed in *Köbler* by AG Léger.<sup>142</sup> In order for *res judicata* to be applicable, there must be a 'threefold identity of subject-matter, legal basis and parties between a dispute already resolved and a subsequent dispute'.<sup>143</sup> Under the status quo and under any reformed procedure, the parties to the original decision are not the same parties to a hearing concerning the COLI's liability. However, even if *res judicata* applied, it is crucial to recognise that changing the outcome of a COLI's decision would be something of a nuclear option; Taborowski highlights how 'Member States would still have in many cases the

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<sup>139</sup> *ibid* para 42.

<sup>140</sup> Case C-265/95 *Commission v France* [1997] ECR I-6959.

<sup>141</sup> Frans Timmermans, 'Use of the infringement procedure in cases of judicial errors', in Jaap de Zwaan and others (eds.), *The European Union: An Ongoing Process of Integration – Liber Amoricum* Alfred E Kellerman (Cambridge University Press 2004) 157.

<sup>142</sup> *Köbler* (n 94).

<sup>143</sup> Case C-224/01 *Köbler v Austria* [2003] ECR I-10239, Opinion of AG Léger, para 101.

choice between a range of other remedy measures'.<sup>144</sup> When we consider the propensity of the Commission to settle cases before reaching the CJEU, the likelihood of such a dramatic confrontation seems low.

### ***C. Accentuating Article 258's existing weaknesses***

It could be argued that there are general issues with infringement proceedings which may be accentuated when they are modified to deal with COLIs. These concern the exclusion of litigants and complainants, as well as the excessive time taken for infringement proceedings to run to completion.<sup>145</sup> On average, infringement proceedings take 38 months from start to finish, which would be an incredibly long time for litigants to wait to see the outcome of a case and potentially receive compensation.<sup>146</sup>

While the Article 258 procedure does face challenges more generally, it is important to recognise that it has significant advantages over the current *Köbler* procedure. For example, having the Commission bear the costs of investigation and litigation saves litigants from having to finance costly trips to national courts. While some challenges to the Article 258 procedure may still prevail, these are mitigated somewhat by two factors. First, it is likely that cases concerning COLIs are unlikely to require as much investigation as other Article 258 cases, in large part because the entirety of the potential infringement is contained in a hundred-page judgment. Second, these cases are few in number and are unlikely to drain the Commission's resources significantly. Between 2003 and 2016, only 35 reported cases concerned *Köbler* liability, highlighting how the additional duty of monitoring COLIs will not cause the Commission to be overwhelmed or result in further delays for litigants.<sup>147</sup> In light of this, it does not appear as though the proposed reform would aggravate the current problems facing the Article 258 procedure and may help litigants who struggle to finance legal challenges against COLIs.

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<sup>144</sup> Maciej Taborowski, 'Infringement Proceedings and Non-Compliant National Courts' (2012) 49 CMLR 1881, 1910.

<sup>145</sup> Rawlings (n 113) 13.

<sup>146</sup> European Commission, 'Single Market Scoreboard' (2019) <[https://ec.europa.eu/internal\\_market/scoreboard/performance\\_by\\_governance\\_tool/infringements/index\\_en.htm#facts-figures](https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/infringements/index_en.htm#facts-figures)> accessed 17 September 2020.

<sup>147</sup> Zsófia Varga, 'Why is the Köbler Principle Not Applied in Practice?' (2016) 23(6) Maastricht Journal of European and Comparative Law 984, 988.

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#### ***D. Qualifying remarks***

This approach moves towards a mature method of enforcing breaches of mutual trust and confidence while respecting national judicial hierarchies and using mechanisms which focus on resolving disputes through respectful and frank dialogue. This is not presented as a perfect reform. After all, some may disagree with the Commission having any role in challenging COLIs, and others may argue that the proposed reform does not fit well within the existing Article 258 procedure. Even those who agree with my overall aims might suggest creating a new, bespoke procedure for enforcing liability. However, this article seeks to highlight how modifying the way in which we enforce *Köbler* liability can serve to respect national courts, encourage future cooperation, and establish clear sanctions for breaching clear rules.

### **CONCLUSION**

In order to cultivate a mature legal order, the EU must recognise that the aims which served to create an effective legal order are not conducive to fostering cooperation between all national courts and the CJEU. Shifting to a focus on resolving confusion is appealing because it goes directly to the core function of a legal order: to produce accurate legal decisions. Rather than pursuing the impossible aim of securing uniformity, the proposed reforms focus on securing a legal order which respects national judicial hierarchies, applies law accurately to litigants' cases, and has clear rules for national courts to follow. Even setting aside the normative aim of pursuing a mature legal order, these reforms are deeply practical in that they are grounded in the way that the system actually operates, rather than in the largely theoretical suggestion that uniformity across 27 legal systems can be achieved and is currently achieved by the status quo. As such, these reforms ought to be compared to the status quo as it actually operates – with the *acte clair* exception being overused by COLIs – rather than the status quo as it operates in theory.

Yet, moving towards a mature legal order is, in itself, a practical goal. Dramatic confrontations between the CJEU and COLIs are not simply a temporary inconvenience for the EU and are best dealt with in an atmosphere of genuine trust and cooperation. Therefore, this article has proposed reforms which do not deserve to be called impractical or unrealistic but might accurately be

labelled radical. Given the ambition of the European project and the scale of the challenges faced by the EU's legal order today, radical reform may be precisely what is needed to spark the EU's evolution.