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THE "EUROPEANISATION" OF THE PORTUGUESE COURTS

I. INTRODUCTION

The treaties, which during the 1950s created the foundations of what is today the EU[1], granted – albeit discretely – an essential role to the courts of the Member States: that of applying EU law as common courts.

EU law is directed towards individuals and not only towards Member States and, moreover, has a binding force superior to that of international law. The Europeanisation of national courts has thus been essentially a consequence of their duty to apply also to private parties "a common European law", primarily of an economic nature.[2]

Each of the three treaties originally foresaw a single central court – the Court of Justice of the European Union (ECJ) – conceived as a special court endowed with the competences that national courts could not properly exercise. Amongst those competences is the guarantee of the uniform interpretation and application of EU law throughout the Member States. The relationship that the EU treaties originally established between the ECJ and national courts was not hierarchical but cooperative.[3] This feature of the EU jurisdictional system remains unchanged.[4]

Within the scope of that "co-operation between courts", an important set of "European duties" has been assigned to national courts. Such duties have been creatively extracted mainly from the most important of the founding treaties – the Treaty of Rome.

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[1] The European Coal and Steel Treaty, signed in Paris on 18 April 1951, entered into force on 24 July 1952 and was abolished on 23 July 2002. The European Economic Community and the European Atomic Energy Treaties were signed in Rome on 25 March 1957 and came into force on 1 January 1958. In contrast to the first treaty, they contain a clause that expressly states their permanent application. In 1992, with the entry into force of the Treaty on the European Union (TUE), the European Economic Community Treaty became the European Community Treaty. The Lisbon Treaty, which has been in force since 1 December 2009, states in Article 1(3) *in fine* that the "Union shall replace and succeed the European Community". From that date, the Treaty of Rome became the Treaty on the Functioning of the European Union (TFEU). This text will refer only to the Union. All the articles from the TEU and the TFEU will be quoted with their new numeration, except when otherwise results from the text.

[2] The EU treaties also grants the public administrations of the Member States the role of "common enforcers" of EU law. Litigation between Member States and individuals concerning the interpretation and the enforcement of EU law must be settled by the national courts.

[3] The original European Communities sought "an improved means of inter-state diplomacy". Therefore, the treaties were a continuation of the European diplomatic tradition, without prejudice that they constitute "a greater rupture with the European *Machtpolitik* tradition." (Magnette, 2006: pp. 11 and 31).

[4] The establishment of the Court of First Instance in 1988 (now recalled as General Court) and the European Civil Service Tribunal in 2004, both of which were granted specific competences that cannot be properly exercised by national courts, in no way changes the deeper logic of the EU jurisdictional system.

These "Europeanising impulses" largely jurisdictional in origin – and of which national courts are also "co-authors" – will be briefly identified before determining the extent to which the Portuguese courts have adapted to them since Portugal's accession to the EU.

II. THE ESSENTIAL FEATURES OF THE EU JURISDICTIONAL SYSTEM

The "European duties" conferred upon Member States' courts can be explained with reference to the nature of the EU jurisdictional system. Therefore, it is first worth recalling the essential features of this system, within which these obligations have been delineated.[5]

1. NATIONAL COURTS AS EU COMMON COURTS

Since its foundation, the EU has organised itself according to the principle of subsidiarity. This meant rejecting the creation of its own system of courts to apply EU law. The Treaty of Rome gave that responsibility to national courts, which thereby became the "EU common courts". In other words, the Member States' courts took on the obligation to apply EU law in addition to their duty of applying national law. The powers at their disposal as national courts do not necessarily coincide with their powers as EU courts. In the latter capacity, the ECJ has vested in them the power to either set aside national norms conflicting with EU law or to suspend their application.[6]

2. THE COURT OF JUSTICE OF THE EUROPEAN UNION AS GUARANTOR OF THE UNIFORM INTERPRETATION OF EU LAW BY NATIONAL COURTS

One power that obviously had to be reserved to the ECJ is that of guaranteeing the uniform interpretation of EU law. However, to achieve this objective a federalist solution was rejected. This would grant the ECJ the final power to set aside national judicial decisions inconsistent with EU law and would thus entail the establishment of a hierarchical relationship between national courts and the ECJ.

One of the most original aspects of the EU jurisdictional system is the result of the approach adopted by the Treaty of Rome, aimed at preventing the establishment of divergences on questions of EU law. It is thereafter outlined in Article 267 of the TFEU

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[5] The fundamental legal basis of these obligations is now outlined in Article 4(3) of the TEU. It is worth remembering its wording: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives."

[6] These "Europeanising impulses" for the national courts were made explicit by the ECJ in two well-known decisions: the Simmenthal case, 106/77 (9 March 1978), and the Factortame case, 213/89 (19 May 1990).

that if a national court has doubts on the interpretation of EU law it may refer the question directly to the ECJ.[7] However, if the court which has doubts is a court of last resort, this faculty becomes an obligation.

This is the so-called preliminary ruling procedure, the framework within which the relationship between the ECJ and the national courts operates.

3. RELATIONS BETWEEN THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE NATIONAL COURTS IN THE PRELIMINARY RULING PROCEDURE

3.1. THE NATURE OF THE PRELIMINARY RULING PROCEDURE

References to preliminary rulings are an instrument for national courts but not for parties. Such procedure consists of three phases: (1) the national judge refers the question to the ECJ, (2) the ECJ answers through a preliminary ruling and (3) the national judge applies the ECJ's preliminary ruling to the pending case.

This has important consequences for individuals: they have neither the right to refer a question to the ECJ, nor can they prevent the national court from referring questions. The decision to do so rests exclusively with the national courts, which choose whether or not to request a preliminary ruling, regardless of the preference of the parties in the case.[8]

Nevertheless, once the national court has decided to refer to the ECJ, all parties in the national case may take part in the correspondent proceedings opened before the ECJ.[9] In such proceedings there are no cross-examinations and replies are restricted to the oral phase of the process.

In order to ensure a continued co-operation with the national courts, the ECJ established a presumption that questions referred are pertinent. Such presumption can only be rebutted in exceptional circumstances: (i) when it is manifest that the interpretation of EU law has no relation to reality or with the object of the litigation in the national court; (ii) when the problem is of an hypothetical nature; and (iii) when the ECJ does not have the factual and legal elements necessary to present a useful answer to the questions referred. In these exceptional circumstances, the ECJ can declare the reference inadmissible.[10]

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[7] The national judge's doubts may also concern the *validity* of a EU act *vis-à-vis* the Treaties and the principles contained therein.

[8] The decision to refer can be subject to an internal appeal. But this appeal cannot restrict the power of the lower court to refer a question to the ECJ. As the ECJ stated in Cartesio, C-210/06, para. 53, a lower court remains "subject to the remedies normally available under national law. Nevertheless, the outcome of such an appeal cannot limit the jurisdiction conferred by Article 267 of the TFEU on that court to make a reference to the Court if it considers that a case pending before it raises questions on the interpretation of provisions of Community law necessitating a ruling by the Court".

[9] In addition to the parties in the main process, EU institutions and Member States may also present their observations to the ECJ in the framework of a preliminary ruling procedure. For more information on the observations presented by the Portuguese State, see Coutinho, 2006.

[10] See, amongst others, the ECJ decision in Beck and Bergdorf, C-355/97 (7 September 1999), para. 2.

3.2. CASES OF MANDATORY REFERENCE FOR A PRELIMINARY RULING

The aim of Article 267(3) of the TFEU – that of ensuring the uniform interpretation and application of EU law – is to determine those cases in which a reference to the ECJ should not be considered as an option for the national court, but rather as an obligation.[11]

The most obvious example occurs when the reference for interpretation or validity of EU law is, to quote Article 267(3) of the TFEU, "raised in a case pending before a court or tribunal of a Member State, against whose decision there is no judicial remedy under national law". If the court was not obliged to refer the matter to the ECJ, and was able to reach a decision alone, the objective of ensuring the uniform interpretation and application of EU law would be frustrated. This "solitary" interpretation or appreciation of the validity of an EU provision could result in a solution contrary to that of any other national court of last instance.

It follows from Article 19(1) *in fine* of the TEU that the ECJ has the final say in cases involving the interpretation and validity of EU law (Weiler, 1991: p. 2414). This explains why the ECJ has interpreted Article 267(3) of the TFEU in order to provide a very strict delimitation of cases in which an exception to the obligation to refer can be accepted. According to a consistent case law, such an exception is only acceptable if the national court of last instance can invoke the following: (i) that the EU law question is not pertinent for the resolution of the national judicial case; (ii) that the question raised is materially identical to a previous ECJ decision; or (iii) that the correct application of EU law may be so obvious as to leave no scope for any reasonable doubt. The latter possibility must be assessed on the basis of the characteristic features of EU law and the particular difficulties to which its interpretation gives rise as well as the risk of divergences in judicial decisions within the EU.[12]

The other, less obvious, case that the ECJ has identified as being subject to a mandatory reference for a preliminary ruling occurs when the national court does not decide in last instance and has doubts about the validity of EU law *vis-à-vis* the treaties. In this case, and contrary to the text of Article 267(2) of the TFEU, the ECJ transformed this court into one "against whose decisions there is no judicial remedy under national law". Therefore, this court is obliged to refer a question whenever it considers EU law to be invalid[13].

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[11] In the ECJ's own words, the "obligation to refer is (…) particularly designed to prevent a body of national case-law that is not in accordance with the rules of Community law from being established in any Member State". See the case Gomes Valente, C-393/98 (22 February 2001), para. 17.

[12] According to the ECJ, it must be borne in mind that EU legislation is drafted in several languages and that the different versions are all equally authentic. An interpretation of EU law provision thus involves a comparison of the different language versions. Even where the different language versions are entirely in accord with one another, EU law uses terminology which is peculiar to it. Furthermore, legal concepts do not necessarily have the same meaning in EU law and in the law of the various Member States. In addition, "every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied." In order to limit as far as possible the exceptions to the duty to refer, the ECJ further emphasises that, in any case, the national judge must be convinced that the matter is equally obvious to the courts of the other Member States and to the ECJ. This somewhat rigid and dated case law, which might have become to some extent impractical in an enlarged EU, was expounded in *CLIFIT*, 283/81 (6 October 1982), paras 16–21, and was reiterated in Intermodal, C-495/03 (15 September 2005), para. 45.

[13] See Foto-Frost, 314/85 (22 October 1987).

III. NATIONAL COURTS DUTIES AS EU COURTS

1. THE DUTY TO ENFORCE EU LAW

As stated above, the "keystone" of the EU jurisdictional system is the preliminary rulings procedure, which has potential consequences that were unforeseen by the authors of the treaties. In fact, within the framework of such procedure it has been possible to confer upon EU law a binding force similar to that of national law.

This became clear when, in a judgment of 5 February 1963, the ECJ responded in the affirmative to the question of whether Article 12 of the Treaty of Rome (now Article 30 of the TFEU) – which was directed to Member States[14] – produced an "internal effect". In other words, a Dutch court asked if parties could "lay claim to individual rights which the national courts must protect". The question concerned the company *Van Gend & Loos*, which imported urea formaldehyde from Germany. The company invoked Article 12 to contest the decision of the Dutch administrative authorities obliging it to pay more customs duties.

The principle of the direct effect implies that the Treaty of Rome "is more than an agreement which merely creates mutual obligations between the Contracting States". According to the ECJ, the task assigned to it under Article 267 of the TFEU confirms that the Member States have acknowledged that EU law has an authority which can be invoked by their nationals before the national courts. Moreover, "the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 (now Articles 258 and 259 of the TFEU) to the diligence of the Commission and of the Member States".

In the case *Van Gend & Loos*, the ECJ also established the supremacy of EU law over conflicting national law – albeit implicitly. In effect, EU law is able to produce immediate internal effects and to confer individual rights that the national courts must protect, only if conflicting national law, whether prior or posterior to EU law, constitutional or infra-constitutional, is not applied by those courts.[15]

National courts thus began to increase the frequency of preliminary references to the ECJ in order to obtain decisions on the compatibility of national law with EU law, understood as a higher law.[16] Indeed, this soon came to represent the largest proportion of cases referred to the ECJ. However, the ECJ never considered itself competent to answer such questions directly in the framework of Article 267 of the TFEU[17].

Notwithstanding, instead of declaring them inadmissible, the ECJ reformulates these questions when necessary, seeking always to give the national court all the elements necessary to enable it to decide by itself on the compatibility of national law with EU

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[14] This article, in its original version, stated: "Member States shall refrain from introducing, as between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relations with each other."

[15] See Costa-ENEL, 6/64 (15 July 1964).

[16] Amongst the cases referred by Portuguese judges see, for example, Tribunal da Relação de Lisboa, 1140/90 (10 December 1990) *Colectânea de Jurisprudência* V (1990), pp. 160–161. In this case, the Portuguese court expressly asked the ECJ to rule on the compatibility of a decree-law provision with the Treaty of Rome's provisions on the free movement of persons and services.

[17] See Pretore di Salò, 14/86 (11 June 1987), para. 15.

law.[18] To that effect, the ECJ demands from national courts the factual and legal framework of the national case in which the reference is made. Failure to do so may result in the reference being declared inadmissible.[19]

Once the ECJ enacts such a ruling, the referring court is obliged to set aside any national law incompatible with EU law and must decide the pending case based on this ruling.[20] In this sense, a reference to the ECJ has an outcome that is comparable to that which occurs in federal systems when state law conflicts with federal law.[21]

2. COROLLARIES OF THE DUTY TO ENFORCE EU LAW

The principles of direct effect and supremacy contributed decisively to the autonomisation of EU law as a new type of law; more compelling than international law and almost as compelling as national law (Magnette, 2006: p. 152). The ECJ, always in co-operation with the national courts, proceeded to develop a collection of supplementary means to guarantee the effectiveness of EU law. Amongst the most relevant are the principle of consistent interpretation and the principle of Member States' responsibility for the violation of EU law.

2.1. THE PRINCIPLE OF CONSISTENT INTERPRETATION

According to this principle, the Member State's courts must interpret national norms in conformity with EU law. This results from Article 4(3) of the TEU which imposes on all national authorities, including, within the scope of their responsibilities, courts, the obligation to adopt any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the EU treaties or resulting from the acts of the EU institutions.

This principle assumes special importance in relation to directives. The direct effect of these acts can only be invoked in proceedings between individuals and public authorities (direct vertical effect)[22], and not between individuals (direct horizontal effect). Moreover, the direct effect of a directive can only be invoked in cases where there has been no transposition into national law within the established deadline, or where the transposition was concluded in an incorrect manner[23].

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[18] According to a ECJ former judge, "(…) having paid lip service to the language of the Treaty and having clarified the meaning of the relevant Community measure, the Court usually went on to indicate to what extent a *certain type* of national legislation can be regarded as compatible with that measure. The national judge is thus led hand in hand as far as the door; crossing the threshold is his job, but now a job no harder than child's play" (Mancini, 1989: p. 606).

[19] See Telemarsicabruzzo, C-320/90, C-321/90 and C-322/90 (26 January 1993).

[20] "The national courts are presented, in the legal order of the respective Member States, as the final recourse against the national norms conflicting with Community law." (Dubos, 2001: p. 56).

[21] This confirms the single nature of the European integration project, which has proved itself capable of achieving a level of legal integration similar to far more advanced federations, whilst retaining strong –even reinforced – Member States (Magnette, 2006: p. 142). Magnette (2006: p. 152) notes that, if the EU Member States submit themselves to a constitutional discipline, it is by the force of their own will, and not because they are subordinated to the sovereignty and to the State authority of an "European people" – which obviously does not exist.

[22] In this context, the ECJ interprets the concept of public authority in very wide-ranging terms. See Foster, C-188/89 (12 July 1990), para. 20.

[23] See Ratti, 148/78 (5 April 1979), paras 23 and 24.

It follows from the principle of consistent interpretation that "national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 [now Article 288 of the TFEU]."[24] This "indirect direct effect" to a large extent mitigates the absence of the directive's direct horizontal effect.[25]

2.2. THE PRINCIPLE OF MEMBER STATES' RESPONSIBILITY FOR THE VIOLATION OF EU LAW

This principle, the most recent of the corollaries to the principle of the effectiveness of EU law, was initially invoked by the ECJ against the Italian State for not transposing, within the established deadlines, a directive whose provisions were not unconditional and sufficiently precise. That meant that such provisions could not be invoked before a national court.

According to the ECJ, in such cases "the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible."

The ECJ has held that this right to reparation depends on the fulfilment of three conditions: (i) the EU provision infringed must be intended to confer rights on individuals; (ii) the breach must be sufficiently serious; and (iii) there must be a direct causal link between the breach of the obligation resting on the Member State and the loss or damage sustained by the injured parties.[26]

More recently, the ECJ – always within the preliminary rulings framework – extended the principle of responsibility for the infringement of EU law to the decisions of the national courts adjudicating at last instance. Nevertheless, State liability for such an infringement "can be incurred only in the exceptional case where the court has manifestly infringed the applicable law."

Among the factors that the competent national court hearing a claim for reparation due to a judicial decision of that nature must take into account are "in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and the non-compliance by the court [ad-

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[24] See Von Colson and Kamann, 14/83 (10 April 1984), para. 26. According to the Arcaro ruling, C-168/95 (26 September 1996), the obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit "where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions" (para. 42).

[25] The principle of consistent interpretation was even extended to the framework decisions of the former EU's third pillar through the ECJ's ruling on the Pupino case, C-105/03 (16 June 2005). This has contributed towards a considerable strengthening of the efficacy of these legal acts, which were closer to international law, and particularly attenuated the reach of the former Article 34(2)(b) of the TUE, which stated that "framework decisions do not produce a direct effect".

[26] See Francovich et al., C-6/90 and C-9/90 (19 November 1991), para. 33, and Brasserie du Pêcheur et. al., C-46/93 and 48/93 (5 March 1996), paras 51–52.

judicating at last instance] in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234" (now Article 267 TFEU).[27]

Developing this case law, the ECJ, prompted by an Italian court that had referred a question for preliminary ruling concerning the State's responsibility for an infringement of EU law allegedly committed by one of the country's supreme courts, ruled that EU law precludes national legislation which (i) excluded State liability, in a general manner, for damage caused to individuals by an infringement of EU law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question "results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court", and (ii) limited such liability solely to cases of intentional fault and serious misconduct on the part of the court, if "such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the *Köbler* judgment." Since the interpretation of legal norms and the assessment of facts and evidence are the true essence of the jurisdictional function, such law would be tantamount to rendering meaningless the principle of State responsibility for the violation of EU law by a national court adjudicating at last instance.[28]

With this decision, the "Europeanising impulses" emitted to national courts by the ECJ case law reached a new peak. It becomes possible for a lower court competent to hear claims for reparation to judge and, eventually, sanction the actions of a higher court for infringements of EU law and, particularly, for infringing the duty to refer imposed by paragraph three of Article 267 of the TFEU. This has been seen as a curious inversion of roles in the national legal hierarchy.

2.3. THE PRINCIPLE OF PROCEDURAL AUTONOMY AND ITS LIMITS

In the absence of provisions adopted by the EU, the national courts competent to apply EU law are in principle bound by their procedural judicial organisation laws. It is, therefore, within this framework that individuals must seek to protect their rights granted by EU law. The principle, according to which national courts must comply with national procedural law when applying EU law, is called the principle of procedural autonomy of Member States.[29]

Since differences in procedural law can have serious repercussions on substantive law, the principle of the effectiveness of EU law had to impose limits on the principle of procedural autonomy of Member States. These limitations are twofold: (i) national procedural law cannot make a distinction between the demands of individuals based on EU law and their demands based on national law (the principle of equivalence); and (ii) even if such distinction is not made, national procedural law cannot render virtually impossible or excessively difficult the exercise of rights conferred by EU law (the principle of effectiveness).[30]

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[27] See Köbler, C-224/01 (30 September 2003), paras 53–56.

[28] See Traghetti del Mediterraneo, C-173/03 (13 June 2006), paras 36 and 40.

[29] See Rewe, 33/76 (16 December 1976).

[30] See Aprile, C-228/96 (17 November 1998), para. 18.

EU law proscribes, as a breach of the principle of equivalence, that in order to exercise rights conferred by EU law – such as the right of reparation for damages caused by the Member State for the non transposition of a directive – the individual must pay legal expenses and meet deadlines more onerous than those that would result from the exercise of a similar right based on the national law. The injured party can invoke such principle before the national court in order to eliminate the discrimination.

Similarly, EU law proscribes, in the name of the principle of effectiveness, that national procedural law, despite being applied indiscriminately, establishes rules of proof that create a practical impossibility for an injured party to exercise the right of refund for any undue payments. In such a case, the injured party can invoke the principle of effectiveness in order to prevent the application of national norms demanding such a proof.

These principles represent strong "Europeanising impulses" for the national courts, leading them to set aside, when necessary, any conflicting national provisions. These "impulses" also extend to the national legislator and lead it to establish procedural rules compatible with EU law.

It remains to be seen to what extent the principle of State responsibility for the infringement of EU law by a national supreme court will imply the adaptation of the judicial organisation of the Member States in order to prevent or limit the effects of the "hierarchical inversion" mentioned above. In any case, it is essential to avoid an eventual scenario whereby a supreme court could review, on appeal, a decision of a lower court that imputes on the same supreme court an infringement of EU law. Otherwise, the principle of impartiality would be impaired.[31]

IV. A WEAK POINT OF THE EU JURISDICTIONAL SYSTEM: THE PRECARIOUS NATURE OF THE GUARANTEES FOR COMPLIANCE WITH ARTICLE 267(3) OF THE TFEU

The preliminary ruling procedure has succeeded to such an extent that the ECJ has become a so-called "victim of its own success" (Koopmans, 1987: pp. 347–357). This disguised the main weaknesses of this procedure: the precarious nature of the guarantees provided by the EU legal order itself for compliance with the duty to refer set out in Article 267(3) of the TFEU.[32]

It has been claimed that a Member State can, under Article 258 of the TFEU, be called before the ECJ for infringements of EU law by its courts. Nevertheless, the Commission only recently initiated infringement proceedings in cases related to failures to refer in breach of Article 267(3) of the TFEU.[33]

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[31] See, however, judgement of the Supremo Tribunal de Justiça of 3 December 2009, P. 9180/07.3TBBRG.G1.S.1, *Cadernos de Justiça Administrativa*, n.º 79, 2010, pp. 29–37, with a critical annotation of Mesquita (2009: pp. 37 to 45); see also Silveira (2009: pp. 773 to 804) and Piçarra (2010: pp. 12 to 16).

[32] At the national level, some Member States have developed internal mechanisms to guarantee compliance with the duty to refer questions to the ECJ. For example, the German Federal Constitutional Court, the Austrian Constitutional Court and the Spanish Constitutional Court have all declared themselves competent to control failures to refer by courts against whose decisions there is no judicial remedy under national law. For a discussion of the Portuguese case, see Piçarra (1991).

[33] In a case regarding the Swedish supreme court's failure to refer cases to the ECJ. See Schmauch (2005) and Bernitz (2006).

It could also be argued that as a result of the *Köbler* case law, State responsibility emerges if the duty to refer is breached. Nonetheless, Article 267(3) of the TFEU was never intended to confer rights upon individuals, and particularly the right to a preliminary reference. This has always been rejected in the name of the "inter-court" procedural nature of such mechanism.

Nevertheless, as a result of the *Köbler* and *CILFIT* decisions, a supreme court that wishes to avoid the serious risk of giving rise to Member State responsibility must carefully assess the necessity to make a preliminary reference and cannot – except when a case is materially identical to one on which the ECJ has already made a ruling – simply resolve the question *ex officio*, through the simple invocation of the clarity of the EU provisions in question (Wattel, 2004: p. 178). This is the most recent "European duty" national courts are pledged to fulfil in this context.

V. PORTUGUESE COURTS' REACTIONS TO THE "EUROPEANIZING IMPULSES"

The evolution of EU law has been the result of some pro-activity on the part of the ECJ; however, it has never ceased to be supported by a real legal dialogue with the national courts through the preliminary reference mechanism. By making references to the ECJ, the national courts have allowed EU law both to expand its ambit and ensure its progressive and systematic internal consolidation. The almost complete acceptance of the ECJ's preliminary rulings gave EU law practically the same binding force attributed to domestic law.

The second part of this chapter provides a brief outline on how Portuguese courts have reacted to the "Europeanising impulses" cited above during the first two decades of Portugal's membership in the EU. This will also enable an assessment of the dialogue established between Portuguese courts and the ECJ, as well as their contribution towards the development of EU law.

It is important to analyse first the way in which Portuguese courts have used the preliminary rulings procedure, which is the main framework for the establishment of such a dialogue.

1. PORTUGUESE COURTS AND ARTICLE 267 OF THE TFEU

Table I. Preliminary References by Member State

Year	Austria	Belgium	Denmark	Finland	France	Germany	Greece	Ireland	Italy	Luxembourg	Netherlands	Portugal	Spain	Sweden	United Kingdom	Total
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
1986	–	13	4	–	19	18	2	4	5	1	16	0	1	–	8	**91**
1987	–	15	5	–	36	32	17	2	5	3	19	0	1	–	9	**144**
1988	–	30	4	–	38	34	0	0	28	2	26	0	1	–	16	**179**
1989	–	13	2	–	28	47	2	1	10	1	18	1	2	–	14	**139**

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
1990	–	17	5	–	21	34	2	4	25	4	9	2	6	–	12	**141**
1991	–	19	2	–	29	54	3	2	36	2	17	3	5	–	14	**186**
1992	–	16	3	–	15	62	1	0	22	1	18	1	5	–	18	**162**
1993	–	22	7	–	22	57	5	1	24	1	43	3	7	–	12	**204**
1994	–	19	4	–	36	44	0	2	46	1	13	1	13	–	24	**203**
1995	2	14	8	0	43	51	10	3	58	2	19	5	10	6	20	**251**
1996	6	30	4	3	24	66	4	0	70	2	10	6	6	4	21	**256**
1997	35	19	7	6	10	46	2	1	50	3	24	2	9	7	18	**239**
1998	16	12	7	2	16	49	5	3	39	2	21	7	55	6	24	**264**
1999	56	13	3	4	17	49	3	2	43	4	23	7	4	5	22	**255**
2000	31	15	3	5	12	47	3	2	50	0	12	8	5	4	26	**223**
2001	57	10	5	3	15	53	4	1	40	2	14	4	4	4	21	**237**
2002	31	18	8	7	8	59	7	0	37	4	12	3	3	5	14	**216**
2003	15	18	3	4	9	43	4	2	45	4	28	1	8	4	22	**210**
2004	12	24	4	4	21	50	18	1	48	1	28	1	8	5	22	**247**
2005	15	21	4	4	17	51	11	2	18	2	36	2	10	11	12	**216**
Total	**276**	**358**	**92**	**42**	**436**	**946**	**103**	**33**	**699**	**42**	**406**	**57**	**163**	**61**	**349**	**4063**

1.1. WHAT THE FIGURES REVEAL

Table I shows the number of references made by Member States' courts between 1986 and 2005.[34] Taking the absolute figures as a starting point, it should be noted that, compared to the Portuguese courts, only the Irish, Luxembourgeois and Finnish courts have manifested less interest in making references to the ECJ. Portuguese preliminary references represent only 1.4 per cent of the total number of references sent to the ECJ during the period in question.

The rate of references from Portuguese courts has also been erratic. Following a slow start up in the 1980s, there was a gradual increase that reached its peak in 2000. In recent years there has been observed a sharp fall in the number of referrals, which contrasts with the general trend across Member States. Since 2001, Portuguese courts have referred an average of just over one case per year. To some extent, this undermines the thesis proposed by Sweet and Brunnel (1998: p. 73), who claim that there is a direct link between the evolution of a country's GDP and the levels of trade with other Member States, on the one hand, and the number of cases referred to the ECJ by the national courts, on the other.

One of the possible explanations for these figures is Portugal's small population in comparison with other Member States. The population variable – which must not be considered as decisive – allows for the calculation of the relative value of the total number of cases referred (see Table II).

[34] The twelve most recent Member States have not been included since there is no data available to enable a useful comparison.

Table II. Preliminary References and Population of Member States (1986–2005)

Country	Number of references	Population (in millions)	Ratio references/ population
Austria	276	8.20	33.65
Belgium	357	10.40	34.32
Denmark	92	5.40	17.03
Finland	42	5.20	8.07
France	436	60.50	7.20
Germany	946	82.50	11.46
Greece	103	11.10	9.27
Ireland	42	4.10	10.24
Italy	699	58.50	11.94
Luxembourg	33	0.46	71.73
Netherlands	406	16.30	24.90
Portugal	57	10.50	5.42
Spain	163	43.00	3.79
Sweden	61	9.00	6.77
United Kingdom	349	60.00	5.81

The introduction of this scale element worsens Portugal's relative position, since its courts are the penultimate in terms of the *ratio* of population to number of references (5.42), exceeding Spain (3.79) and coming in some distance behind courts of Member States with similar populations, such as the Netherlands (24.90), Austria (33.65) and Belgium (34.32).

1.2. THE AUTHORS OF THE PORTUGUESE PRELIMINARY REFERENCES

Analysing Portugal's references from the perspective of their authors – that is to say, the courts that made the reference to the ECJ (see Table III) – produces a conclusive set of data.[35]

Table III. Origin of the Preliminary References in Portugal (1986–2005)

	Number of references	%
Constitutional Court	0	0.0
Supreme Court of Justice (STJ)	1	2.0
Supreme Administrative and Tax Court (STA)	32	56.0
2sd Instance Administrative and Tax Courts	3	5.0
Court of Appeal (Civil)	2	4.0
1st Instance Administrative and Tax Courts	11	19.0
1st Instance Civil Courts	8	14.0
Total	**57**	**100.0**

[35] For more on Portugal's preliminary references, see Margarido (1999).

The first relevant fact to note is the disproportionate number of cases referred by the administrative courts (80 per cent) and those referred by the civil courts (20 per cent). Nevertheless, this may be partially justified by the fact that EU law continues to be essentially of an economic and administrative nature.

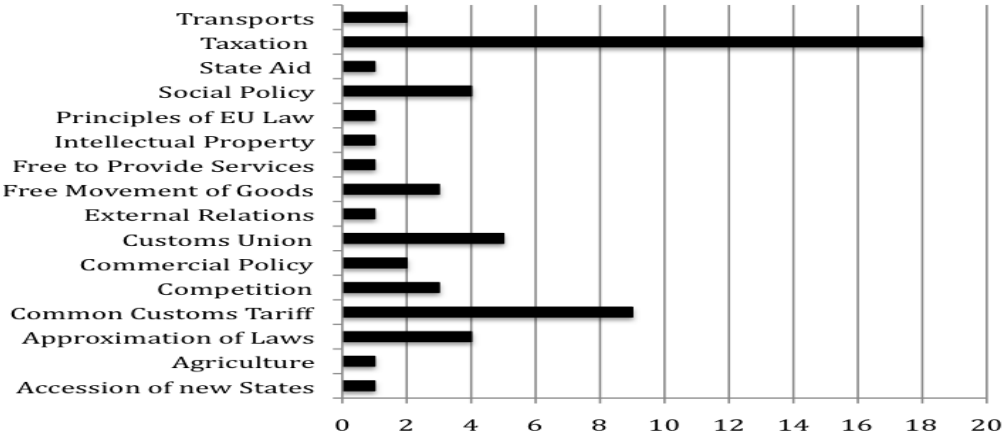
The second fact worth noting is that only approximately one-third of the cases referred originated in lower courts, which are by far the most numerous courts in the Portuguese jurisdictional system – as indeed they are in every jurisdictional system. This figure clearly contrasts with the situation in the majority of Member States and, therefore, casts some doubts on Weiler's judicial empowerment thesis, which states that are essentially lower courts that feel a greater need to refer cases to the ECJ for a preliminary ruling. Weiler argues that through this mechanism lower courts obtain "powers reserved to the supreme courts" (Weiler, 1991: p. 2426).

In the case of Portugal, the Supreme Administrative Court (STA) made more references (32) than all the lower administrative and tax courts combined (14). The same cannot be said of the civil courts. The statistics reveal that it took the Supreme Court of Justice (STJ) – which for the purposes of Article 267(3) of the TFEU is one of the highest courts in the land – 20 years to make its first reference to the ECJ.[36] All the country's lower civil courts have, taken together, referred fewer than ten cases to the ECJ.

It should also be noted in this context that the Portuguese Constitutional Court has never made a reference to the ECJ within the framework of Article 267 TFEU, a fact that is consistent with the general trend found in the other Member States. However, the Portuguese constitutional court has recognised its duty to refer in a manner that is uncommon amongst its peers.[37]

1.3. THE SUBJECT MATTERS OF THE PORTUGUESE PRELIMINARY REFERENCES

Figure I. Subject Matter of Portuguese Preliminary References (1986–2005)



[36] This occurred on 3 November 2005, in Process 05B1640, which, curiously, was heard by a former Portuguese judge in the ECJ, José Carlos Moitinho de Almeida.

[37] See ruling 163/90 (23 May 1990), in *Acórdãos do Tribunal Constitucional* 16 (1990), p. 301, and ruling 606/94 (22 November 1994), [in:] *Acórdãos do Tribunal Constitucional* 29 (1994), p. 161. See also Vilaça, Pais Antunes and Piçarra (1991: p. 301).

Figure I shows the existence of a "scale of priorities" concerning matters referred to the ECJ; a scale that, above all, reflects the fact that the administrative and tax courts make the greatest number of references. As the graph clearly shows, tax questions and those relating to customs duties accounted for 18 and 14 respectively, representing 56 per cent of the total. Following far behind are questions relating to the approximation of laws (4), social policy (4), competition (3) and the free movement of goods (3).

A closer analysis of the preliminary references also allows the collection of other conclusive data. The first is connected to the fact that such cases generally pertain to the interpretation of highly specific and technical norms of EU law. Perhaps it is for this reason that ECJ preliminary rulings have only very rarely had a significant impact on the Portuguese legal order. The main exceptions, however, have been some cases regarding notary and registry emoluments, and the cases concerning the maximum cost of car insurance. Both cases resulted in legislative changes.

1.4. THE ECJ'S REACTION TO PORTUGUESE PRELIMINARY REFERENCES

The picture outlined would be incomplete without a generic comment on the answers the ECJ has given to Portuguese preliminary references.

In this respect, there have been several cases in which the ECJ has refused to provide an answer, since it considered the reference to be inadmissible because, contradicting the settled case-law, the Portuguese court (i) did not define the factual and legislative context of the questions which it was asking or, at the very least, explained the factual circumstances on which those questions were based; (ii) did not set out the precise reasons why it was unsure as to the interpretation of EU law and why it considered it necessary to refer questions to the ECJ for a preliminary ruling, or (iii) did not provide at the very least some explanation of the reasons for the choice of the EU provisions which it required to be interpreted and of the link which it established between those provisions and the national legislation applicable to the dispute in the main proceedings[38].

This seems to reveal a certain lack of understanding on the part of some Portuguese courts as to how the preliminary rulings procedure works.

1.5. PORTUGUESE COURTS AND THE DUTY TO REFER

A closer examination of the judicial cases that involved the application of EU law, but which did not result in references for preliminary rulings, reveals some infringements of Article 267(3) TFEU – including frequent examples of clear misunderstandings of the fundamental duty to refer.

It is worth mentioning those cases in which the national court recognised the existence of doubts in the interpretation of EU law, but decided to resolve such doubts without the ECJ's support. In other cases, the same court has concluded that a reference is only necessary when confronted with unavoidable interpretative doubts.

On the other hand, numerous rulings that refused parties' requests for referrals invoked – either explicitly or implicitly – the so-called theory of *acte clair*, without taking into account the criteria established by the ECJ in the *CILFIT* case.

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[38] See the recent order of the ECJ of 25 February 2010 in case Santa Casa da Misericórdia de Lisboa *vs.* Liga Portuguesa de Futebol Profissional e. a., C-55/08, paras 14 and 16–17.

Moreover, there have been several cases in which the courts refused an *ex officio* power to refer, or where they excluded a reference concerning certain EU acts, such as recommendations.

Finally, it should be noted that, paradoxically, most of the cases mentioned were heard in the STA, which is the Portuguese court responsible for most of the country's preliminary references.

2. THE PORTUGUESE PECULIARITY

Contrary to that which may be observed in other Member States, the assimilation of "European obligations" has occurred rather uneventfully in Portugal.

The principles of supremacy and direct effect of EU norms were swiftly accepted by the Portuguese courts, although in many cases Article 8 of the Constitution provided the basis for that reception rather than recognition of the autonomy of EU law. In contrast to certain French and German courts, Portuguese courts had no difficulty in accepting their duty to enforce directly European directives. The same is true with respect to the principles of consistent interpretation and the State's responsibility for infringements of EU law.

During the first 20 years of EU membership there have been few examples of rebellious attitudes by Portuguese courts *vis-à-vis* their "European obligations"[39].

How, then, can we explain this apparent peculiarity; the small number of cases referred to the ECJ, given the acceptance by the Portuguese courts of their "European obligations" related to the application of EU law? There are a number of possible factors that should be considered in providing an answer to this question.

Firstly, when Portugal joined the EU, the Member States courts had, to a significant extent, overcome the resistance that originally surrounded some of the more "revolutionary" principles of EU law, such as those of supremacy and the direct effect.

Secondly, the revisions of the Portuguese constitution have, in some ways, incorporated these principles and facilitated the acceptance of newly created ones.

Thirdly, the Portuguese constitution explicitly entitles each court to set aside provisions that are considered to be unconstitutional – a competence that gives all courts equal status. With this embedded "autonomy", the Portuguese courts may have felt less need than their European counterparts to seek support from the ECJ on the interpretation and application of EU law.

CONCLUSIONS

More than 20 years after Portugal's accession, EU law still does not have an impact on the Portuguese legal order comparable to the impact experienced in other Member States (Fausto de Quadros, 2010: p. 76).

Without prejudice to the fact that some Portuguese courts are still not completely familiar with the preliminary reference procedure, the rare use of this mechanism by lower courts is largely rooted in the particular status they have been vested with by the

[39] For an example see the judgement of the Supremo Tribunal de Justiça of 3 December 2009, quoted above, footnote 35.

1976 Constitution. This status allows them to decide upon the most important questions of law without the need to seek advice or rulings from superior courts. Concerning the highest courts, if on one hand the absence of references for preliminary rulings by the STJ is perplexing, on the other hand the STA's successive violations of the duty to refer might also have something to do with the rigidity of the criteria set out in *CILFIT*.

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