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## La garantía constitucional del deber de reenvío prejudicial

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Estudios Constitucionales

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REVIEW BY

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Article 267(3) TFEU imposes an obligation on domestic courts against whose decisions there is no judicial remedy under national law. The Court of Justice has outlined the scope of this obligation through the *acte clair* and

*acte éclairé* doctrines (*Cilfit, Case 283/81*). The remedies foreseen in EU law in the event that those courts fail to comply with this obligation are scarce, since they are reduced to a possible infringement procedure against the Member State in question (*Commission v France, Case C-416/17*). However, EU law does not impose on the Member States an obligation to make specific judicial remedies available to individuals who may be harmed by the said infringement. It is not, therefore, uncommon that the failure to comply with the duty to make a reference for a preliminary ruling by national courts does not lead to practical consequences under EU law.

Although this duty is found in EU law, its breach may, however, have legal effects within the framework of two other legal systems, which may thus contribute to promoting compliance with the obligation of Article 267(3) TFEU. In the first place, the breach of the latter may lead to a violation of the right to a fair trial, enshrined in Article 6 of the European Convention for the Protection of Human Rights. In order to declare this violation, the European Court of Human Rights requires that the decision not to make a reference for a preliminary ruling provides no reasoning at all, therefore being an arbitrary decision (*Ullens de Schooten, Applications No. 3989/07 and 38353/07*).

Second, some national legal systems provide for an individual claim for the constitutional protection of fundamental rights against judicial rulings of courts of last instance. This is the case of the appeal before the Spanish Constitutional Court (*recurso de amparo*), which can be lodged in case of violation of the fundamental right to an effective judicial protection enshrined in Article 24 of the Spanish Constitution. Like the Constitutional Courts of some other Member States, the Spanish Constitutional Court has developed a doctrine by virtue of which the failure to make a reference for a preliminary ruling that violates Article 267(3) TFEU may, in addition to infringing EU law, violate the right to effective judicial protection as a matter of domestic constitutional law.

This is the topic Xabier Arzo deals with in this outstanding book. After exploring the foundations and scope of the duty to refer to the Court of Justice under EU law, as well as the case law of both the European Court of Human Rights, and the national Constitutional Courts of Germany, Austria, Slovenia, Slovakia, and the Czech Republic, the author critically examines the case law of the Spanish Constitutional Court and comes up with an alternative proposal.

Regarding preliminary references on questions of validity, on the one hand, the Court has not yet ruled on judicial decisions failing to comply with the *Foto-Frost* doctrine (*Case 314/85*). However, Spanish academic doctrine has unanimously submitted that those rulings would not only violate Article 267 TFEU, but also the right to obtain a reasoned decision, which is an integral part of the fundamental right to effective judicial protection under Article 24 of the Spanish Constitution. As far as preliminary questions of

interpretation are concerned, on the other, the Constitutional Court has traditionally carried out a deferential approach. This rests on the idea that Article 267(3) TFEU, without prejudice to its crucial role as an interface between supranational and domestic courts, is a procedural rule that does not belong to the content of the fundamental right to effective judicial protection under the national Constitution. For this reason, the Court only recognises it has been violated when the judicial decision, in addition to failing to make a mandatory reference for a preliminary ruling on the interpretation of EU law, presents other particular features.

As a default rule, the Court requires that the judicial decision falls within one of the three cases in which the Constitutional Court declares an infringement of the right to obtain a reasoned judicial ruling: (i) the decision provides no reason at all as for not making the reference (bare arbitrariness); (ii) the legal reasoning supporting the decision suffers a manifest logical flaw (manifest irrationality); or (iii) the ruling contains a patently mistaken factual statement (patent factual error). As can be seen, these standards provide for a limited review, but they are still sharper than that of the European Court of Human Rights, since the Spanish Constitutional Court does not limit itself here to verifying whether or not the challenged judicial ruling gives reasons for not referring to the Court of Justice.

In some scenarios though, the Constitutional Court carries out a more intense review. This is the case when the national court has failed to comply with the duty to refer a question of interpretation, while at the same time disapplying a parliamentary statute – which Spanish courts can do only by virtue of primacy of EU law. The Constitutional Court strictly verifies here whether or not the judicial decision complies with the jurisprudence of the Court of Justice on the interpretation of Article 267(3) TFEU, and not only if its legal reasoning suffers arbitrariness or unreasonableness, or if it contains factual errors.

Xabier Arzoz not only carries out a detailed examination of this case law, but also comes up with a normative claim. In his view, constitutional review from the perspective of the right to an effective judicial protection of rulings

that interpret both domestic and EU law must, on a general basis, be deferential. An external or limited standard of review would be acceptable here. In turn, when it comes to assessing compliance with Article 267(3) TFEU, as well as with the case law of the Court of Justice construing this provision of the Treaty, judicial decisions should be subject to strict scrutiny under the right to effective judicial protection of Article 24 of the Constitution, therefore granting no deference to ordinary courts. Accordingly, in case a Spanish court fails to comply with Article 267(3) TFEU as interpreted by the Court of Justice, either on questions of validity or of interpretation, the Constitutional Court should declare a violation of the national Constitution even if the judicial decision does not (i) disapply a parliamentary statute, and (ii) does not commit any of the three said

qualified breaches of the right to a reasoned judicial decision.

The recent [Judgment of the Constitutional Court No 37/2019](#) seems – although not conclusively – to follow that direction in a case where the Supreme Court had declared that the interpretation of secondary law was sufficiently clear in the Court of Justice’s case law. The Constitutional Court upheld the appeal and remanded the case for a preliminary reference to the Supreme Court. The author advocates for a consolidation of this case law. This would not only link the standard of review applied by the Spanish Constitutional Court with the case law of the Court of Justice; it would also align the former with other national counterparts, such as the Austrian and the German Constitutional Courts, that are currently sharpening the tools of constitutional review of judicial compliance with Article 267(3) TFEU.

However, it should also be borne in mind that such a development of the Court’s jurisprudence would bring about two major constitutional transformations: first, the duty to make references for preliminary rulings to the Court of Justice would simply transmute into a fundamental right protected by the national Constitution – despite it not being recognised by EU law as an individual right, and even less as an integral part of the fundamental right enshrined in Article 47 of the Charter; and second, the Spanish Constitutional Court would not only be the guardian of the Constitution, but also of the specific cooperation scheme among supranational and national courts outlined by Article 267 TFEU – which could give rise to divergent orientations to ordinary courts, as well as to (even more) conflicts between domestic Constitutional Courts and the Court of Justice. It is thus doubtful, to say the least, that national Constitutional Courts should take this role at all.

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