

Book Review: Broberg, Morten and Fenger, Niels: *Preliminary References to the European Court of Justice*,  
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Regarding the issue of the reference for preliminary ruling increase, it has been argued that the Court of Justice of the European Union ('CJEU') has been the 'victim of its success'. We might say that the same applies to *Preliminary References to the European Court of Justice by Morten Broberg and Niels Fenger*. The updated and revised third edition of this volume, finally published with Oxford University Press in 2021, was indeed very much awaited and 'called for' across Europe following the success of the first two, published in 2008 (in Danish; while an English edition was out in 2010) and in 2014 and translated into Romanian, French, and German.

Like the previous editions, the volume is dedicated to Professor Ole Due and carries out a detailed and thorough analysis of the preliminary reference procedure ('PRP'). The analysis is updated to 2020, except for chapter 2, which focuses on the ten-year period from 1 January 2009 to 31 December 2018 (p 29). Besides the hardback version, it is worth noting that the volume is available as E-book and in the Oxford Scholarship Online library.

Being the two Authors leading scholars in the field, suffices it to recall their current affiliation: Morten Broberg is Professor and Honorary Jean Monnet Professor at the Faculty of Law of the University of Copenhagen while, as of 1 December 2019, Niels Fenger is serving as Danish Parliamentary Ombudsman.

Considering that this review concerns the third edition of the volume, before moving on, it is necessary to tackle two – let's say – 'preliminary questions'. On the one hand, one might wonder whether this new edition was needed six years after the second one. On the other hand, no substantive amendment to Article 267 TFEU (originally 177 and then 234 of the 1957 of the Treaty of Rome) has been made over the last seventy years and this mechanism has been undoubtedly the subject of numerous studies already. Hence, one might also question, more generally, whether a (further) half-thousand-page examination of the PRP was necessary.

With regard to the former aspect, it is self-evident that the impact of some innovations introduced by the Lisbon Treaty couldn't be duly taken into account in the case law examination behind the 2014 edition (for example, the extension of the CJEU's PRP competence in the field of Police and Judicial Cooperation). This is why a new edition able to take into consideration the first ten-year period after Lisbon was a good idea, as the proliferation of the studies on some of the said innovations in the proximity of the tenth anniversary confirms. At the same time, the rise in the number of references over the five years 2015-2020 urged a new edition soon.

The second question finds a partial answer on page 2, where the PRP's crucial role in the development of EU law and its multifaceted functions are sketched. In addition to this, the PRP *modus operandi* evolution experienced over the last seventy years (in the absence of any amendment to Article 267) is easily noticeable from the analysis carried out in the book. Indeed, we might say that the procedure enshrined today in Article 267 TFEU is not 'merely' the keystone of the EU judicial system (Opinion 2/13, Para 176), but it is a sort of 'mirror' of the European integration process as a whole. It 'somatises' the different issues affecting this process over time and, at the very same time, shapes the EU integration. This explains the evergreen interest in the PRP and justifies the large number of studies published over the last few years on this subject.

For these reasons, this new edition is greatly welcomed and comes at the right time. The third edition shares many of its predecessors' features and strengths, including the book structure and the methodology approach.

About the structure, it comprises 13 chapters covering almost any aspect of the PRP, arranged by the Authors in order to 'broadly mirror the order in which the various issues connected with a reference under Article 267 arise for a national court' (p 3). Thanks to its pragmatic approach, the volume continues to primarily be the pole star of any national judge and legal practitioner confronted with such issues. The reduction in the character size of the brief analysis of the cases that are mentioned in the text body is new to this edition. In the light of this primary target, this stylistic decision proves to be effective in this reviewer's opinion. However, this monumental book will undoubtedly continue to serve as a point of reference for academics and students across Europe too.

Like the previous editions, moreover, the volume adopts a 'pure' legal perspective (except for the quantitative analysis in chapter 2), which is apparent from the bibliography, mainly involving legal scholarship in English, Danish, and French, and from the rich 'table of cases' section. The Authors clearly state that the 'role' and the 'significance' of the PRP for the European integration process

and its development (pp 2-3) and the internal organisation and working method of the Court (p 6) are not in-depth investigated in the volume. However, this methodology choice does not prevent them from laying down broader reflections, as we are about to see.

Below, the most interesting aspects of each chapter will be briefly highlighted. Particular attention will be devoted to those sections that have been updated the most *vis-à-vis* the previous editions (and thus include new findings, as well as to those passages that, in light of recent developments, are of undoubted topicality for the PRP's future development.

Chapter 1 briefly introduces the path followed by the PRP, from the first 1961 preliminary reference to the present, outlining the different issues encountered by the Court of Justice over time. The broader context in which this procedure should be understood is also sketched: the other possibilities to make references to the CJEU (for example, on the basis of the so-called Brussel I and Rome I Regulations) or to other Union bodies (to seek guidance in the interpretation of EU law) are briefly presented. Examining the EFTA Court system here is an added value for the subsequent analysis as it allows to draw comparisons and point of contact between that system and the PRP (see, *e.g.*, pp 89-90 and 321-3 and 338 ff). The section discussing possible reforms to the system is a second aspect that is worth mentioning (p 20 ff). Here, the Authors take a clear stance in favour of the transfer of certain (limited) PRP competence to the General Court as the best long-term solution should the increase in the number of PRP show no sign of abating in the future (pp 22-3, and 28).

The quantitative analysis in chapter 2 aims to understand the most relevant factors that determine the variations in the Member States' use of the PRP. The analysis draws from an article published by the Authors and Henrik Hansen in the *European Law Review* in 2020 (p 29, footnote 4). It relies on proxies (which have some limits, as acknowledged by the Authors) and is based on 'multivariate regression model' (p 41). The study seems to be more mature in several respects *vis-à-vis* the previous editions of the book, and the findings suggest that the central government total expenditure on law courts (linked to the number of cases before national courts, p 31) is the dominant proxy able to explain more than the 70% of the variations (pp 41-2). Further aspects that are considered to impact on the number of references are, for instance, the intensity of intra-EU-trade and the duration of the EU membership. Although the writing style remains clear, the chapter's technical character makes sometimes it challenging to grasp some methodology choices behind the analysis and the ultimate significance of some of the findings, in respect to which reading the 2020 article may help. In general, it

is possible to wonder whether this is the correct position of this analysis in light of the book's overall structure. Another possibility would have been to place it at the end of the volume.

Chapters 3, 4, 5 and 6, deal with the *noyau dur* of the PRP, as shaped by the CJEU's case law over the last sixty years. More specifically, they analyse, respectively, the (EU) meaning of 'court or tribunal of a Member State', the category of questions which can be referred to the Court and their range *vis-à-vis* EU law, the 'relevance' of a preliminary question which determines whether it will be admissible or not, and the scope of application of the duty to refer under Article 267(3). The main strengths of this part of the book are the thoroughness of the case law analysis and of the categorisation of the possible scenarios, which is arguably the most complete and updated on the market. A further aspect is the following: with regard to many issues, the book does not merely provide the reader with a clear 'picture' of the present situation but summarises in a few words how the understanding of those issues has developed over time.

As regards chapter 3, the analysis of the limitations on the 'right to refer' imposed by national law has been updated significantly, taking into consideration the Court rulings in *A* (Case C-112/13) and in some recent cases arisen mainly in Poland and Bulgaria (p 83 ff). The investigation of these issues is of the utmost importance today, considering that the relationships between the CJEU and national higher courts are tense and similar cases are currently pending before the Court (for example, concerning Hungarian and Romanian legislation). This is the reason why it is argued that the intertwined issues relating to the 'multiple loyalties' of national judges and to 'dual preliminary' would have deserved closer examination (on these issues, see, e.g., Giuseppe Martinico, *Multiple loyalties and dual preliminary: The pains of being a judge in a multilevel legal order*, in *International Journal of Constitutional Law*, 2012, pp 871-896).

In chapter 4, it is contended that, in 'truly exceptional circumstances', the CJEU could consider to be admissible a preliminary question on the 'validity' of the treaties and also declare invalid treaty provisions for breaching some fundamental constitutional principles of EU law (pp 89-90). Although the Authors' stance is based, at least in part, on the experience of the EFTA Court and is shared by some EU law scholars, the feasibility of such a reference might be at least doubted and thus discussed further. However, the twenty-page analysis devoted to the distinction between the acts of the Union's institutions, bodies, offices, and agencies (on which the CJEU has the competence to rule) and the agreements under international law (which fall outside that competence) is remarkable (pp 101-119). In the same vein, the study of the limits of the Court's

jurisdiction and the major inconsistencies in this line of jurisprudence is also of paramount importance today (p 121 ff). Suffice it to recall situations where the facts of the main proceeding predate the Member State accession to the Union (p 134 ff) or where the level of details of the Court's judgment amounts to a *de facto* application of EU law, thus blunting the distinction between interpretation and application of EU law and the allocation of roles between the CJEU and national courts (pp 138-139).

Chapter 5 focuses on the 'relevance' requirement (*i.e.*, the fact that the answer sought by national courts via the PRP must be relevant to solve the main proceeding) and on the delicate assessment in this regard. Although this assessment is at first in the hands of the national courts, it is highlighted that the CJEU can have a say in this aspect in many circumstances. Building on the categorisation developed in the previous editions, the analysis of the more recent case law allows the Authors to outline some *new* trends about the Court's assessment of the admissibility of PRP (see, *e.g.*, pp 159-60 and 180-2).

The duty to refer under Article 267(3) TFEU, in chapter 6, is one of the sections of the book which has undergone the most significant update due to the well-known developments that occurred since the previous edition. However, being updated to 2020, Case C-561/19, *Consorzio Italian Management II* ('*CIM II*') could not be included in the analysis so much so that future updates seem necessary already. Coming back to the 'add-ons', this third edition examines the developments about both the interpretation of that provision (with the relaxation of the said duty in *X and van Dijk* and *Ferrera da Silva e Brito* soon abandoned in *Association France Nature Environnement*) (pp 213-7) and the consequences of the breach of the said duty. Two aspects appear to be of topical interest besides *Commission v France (Advance Payments)* (pp 241-2). First, it is worth recalling the analysis, albeit brief, of the national procedures under which one can introduce a complaint before the Constitutional Court for violation of the duty to refer (pp 235 ff). Indeed, these procedures, which are in force in some Member States, have recently been the subject of interest in the academic literature. With regard to the Spanish system, see Xabier Arzoz Santisteban, *La garantía constitucional del deber de reenvío prejudicial*, Madrid, Centro de Estudios Políticos y Constitucionales, 2020. Second, the Authors scrutinise the failure to refer in light of Article 6(1) of the European Convention on Human Rights ('ECHR') (as interpreted by the Strasbourg Court). Since Article 47(2) of the Charter of Fundamental Rights of the EU ('Charter') corresponds to this ECHR provision, it is argued that Article 47(2) must be understood as prohibiting national courts of last instance from *arbitrarily* refusing to make a preliminary

ruling to the Court (p 245). The topicality of this position and the direct link with the recent judgment in *CIM II* is self-evident. Indeed, in this judgment, the CJEU explicitly affirmed that last instance national courts, when they decide not to refer a question, are under a duty to state the reasons. According to the Court, that duty results from Article 267 TFEU read in light of Article 47(2) of the Charter (Para 51). The relationship between the PRP and the right to effective judicial protection has been recently explored, *inter alia*, by Clelia Lacchi, *Preliminary References to the Court of Justice of the European Union and Effective Judicial Protection*, Brussels, Larcier, 2020.

Chapters 7 and 8 complete the toolkit in the hands of national judges *before* deciding to refer to the CJEU. More in detail, the former examines the situations where national courts have discretion as to refer to the Court and sketches out the several criteria to be considered, including the Court's power to restrict the temporal effect of a given interpretation of EU law and the time necessary to obtain the preliminary ruling. The stage of the main proceeding in which a reference should be made is also examined here. Chapter 8 focuses on the 'form' and 'content' requirements of a reference. As for the 'form', the new edition takes into consideration the introduction of e-Curia (p 269). Building on Article 94 of the Court's Rules of Procedure and on the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, both the requirements and the best practices for the reference's content are carefully examined. Even here, the overview of the variations in national practices about the role of the parties in preparing the preliminary question (pp 267-8) and of the 'proactive approach' of some national courts, which propose their interpretation of the EU law provisions at stake, (pp 278-9) is of great interest.

In the following two chapters, the Authors lay down a detailed description of the procedural aspects of the PRP. Chapter 9 takes a closer look at the possible scenarios before the national court after the reference has been made, including the *interim* relief measures which may be sought. Its first section deals with the possibility to challenge the decision to refer (pp 295-303). This section is inherently linked to the analysis carried out in Chapter 3 (section 6.3, p 87 ff), so much so that the Authors might consider *not* dividing the treatment of this subject matter into two different chapters. The procedure before the Court of Justice is analysed in detail in chapter 10, also exploring the possibility of submitting observations on the preliminary reference and the representation and language rules applicable to the proceeding. The Expedited Procedure and the Urgent Preliminary Ruling Procedure are also examined (p 394 ff). In this regard, the updated data on the length of these procedures and the recent case law in this

regard may well satisfy the curiosity of national judges and practitioners about these special procedures.

The crucial factor for any ‘dialogue’ is understanding what the other part says. This is precisely the rationale behind the last three chapters. In a nutshell, chapter 11 deals with the ‘types’ of ruling and the different Court’s approaches in answering the preliminary questions and chapter 12 with the binding effects of the ruling, while some insights on the regime governing costs and legal aid are briefly laid down in chapter 13.

In chapter 11, the Authors come back to the ‘troubled’ distinction between ‘interpretation’ and ‘application’ in investigating how the Court tailors the preliminary ruling to the facts of the case. This issue, already treated in chapter 4 while exploring the limits of the Court’s jurisdiction, is significant for the reflection on the future of the PRP. The study of the Court’s approaches to the facts of the case (p 387 ff) allows the reader, even when lacking any direct experience about how the CJEU works, to grasp the basic elements behind the drafting of a ruling.

The binding effect of the preliminary ruling in the main proceeding and beyond it is examined in chapter 12, where the Authors advocate its ‘general effect’ and put forward five (to some extent convincing) arguments (pp 407-8). The effect of the preliminary ruling beyond the main proceeding has been debated extensively in academic literature and still represents an open issue. In this regard, much depends on the precise understanding of ‘*erga omnes* effect’ and ‘general effect’. By these terms, here the Authors mean that ‘all national courts are obliged to apply not only the operative part of a preliminary ruling but also its ratio when interpreting EU law’ (p 408). The temporal effect of the preliminary rulings and the circumstances that may justify a limitation on these effects, a further topical question with which national judges are confronted, are also in-depth analysed in the same chapter (p 411 ff). This chapter could have complemented by a brief outline of the ‘structural principles’ and ‘remedies’ that govern the situations where the national legal order is found to be incompatible with EU law (e.g., primacy, direct effect, disapplication, consistent interpretation, and State liability). National courts and practitioners could benefit from such addition the most. For a similar editorial decision see recently, for example, Celestina Iannone and Fabio Ferraro (eds), *Il rinvio pregiudiziale*, Giappichelli Editore, 2020.

Overall, the book’s third edition offers an up-to-date and clearly written examination of almost any aspect of the PRP, from the arising of a ‘relevant question’ of EU law before national courts to the allocation of costs. The reasons

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behind the need for this new edition have been highlighted in the preceding discussion. Thanks to the in-depth case law analysis and the monumental categorisation of any possible scenario, the volume does not merely provide the reader with a clear and comprehensive understanding of the PRP *today* but also sheds some light on the near future of this cooperation procedure. This amounts to one of its major strengths and is why this new edition continues to be a 'classic' for academia and students and a pole star for national judges and practitioners. Hence, it might be time for the Authors to consider a translation of the book into other (at least) EU languages to allow a broader number of readers to have a deeper understanding of the keystone of the judicial system of the EU.

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