

FEDERAL ELEMENTS IN THE COMMUNITY JUDICIAL SYSTEM - BUILDING COHERENCY IN THE COMMUNITY LEGAL ORDER

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1. Introduction – the Court of Justice as a Supreme Court of the Communities or a mere advisory partner?

The Court of Justice has an ambiguous status: is it the Supreme Court of the Community or isn't it? On the one hand it is (or at least it claims to be)¹ the ultimate interpretative authority of Community law. The Court seeks to achieve a uniform interpretation and application of Community law in all Member States.² This is so because

[a]ny weakening, even if only potential, of the uniform application and interpretation of Community law throughout the Union would be liable to give rise to distortions of competition and discrimination between economic operators, thus jeopardizing equality of opportunity as between those operators and consequently the proper functioning of the internal market.³

In order to achieve this aim it requires that its rulings be binding on all other actors interpreting and applying Community law. National courts are the most important of these actors; they form part of the Community judiciary.⁴ The Court of Justice may be understood as the *de facto* Supreme Court of this judicial system. This understanding of the Court is supported by its strong role in the legal integration of the European Communities.

On the other hand, from a formal point of view, the Court must pursue that aim from a very weak institutional position. There is no hierarchy amongst Community courts, and formally the Court of Justice is not standing on the top of the Community judicial system. Furthermore, the Treaty is silent as to the legal effects of its judgments. Thus, in order to achieve its aim, the Court has had to rely on the 'cooperative relationship', which it has been building with national courts since its very inception.⁵

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¹ In light of the judicial *Kompetenz-kompetenz* debate provoked by the Maastricht judgment of the German Federal Constitutional Court even this seems to be undermined by some national constitutional courts. The issue may become even more complicated after new member states' courts have come into play. See e.g. Sajo, "Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy", *Zeitschrift für Staats- und Europawissenschaften (ZSE)* 3/2004, 351-371.

² Case 166/73, *Rheinmühlen*, [1974] ECR 33, para. 2.

³ *Report of the Court of Justice on certain aspects of the application of the Treaty on European Union*, Luxembourg, May 1995, http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj_rep.html (24.6.2004), point 11.

⁴ Cf. Craig, "The Jurisdiction of the Community Courts Reconsidered" in: de Búrca and Weiler (Eds.), *The European Court of Justice* (OUP, 2001) at 178: "It is clear that properly understood we have three types of Community Court, not just two: the ECJ, the CFI, and national courts."

⁵ There is an immense literature on the role of national courts in establishing Community law in national legal orders. One of the most respected giving an overview from several (though not all) Member States is Slaughter, Sweet, Weiler (Eds.) *The European Court and National Courts – Doctrine and Jurisprudence* (Hart Publishing, 1998).

This weak formal institutional position of the Court of Justice may lead to disobedience on part of national courts which, either intentionally or due to ignorance, do not follow the Court's interpretations⁶ or make ultimate interpretations of Community law without turning to the latter through the preliminary ruling procedure prescribed by the EC Treaty.⁷ Such disobedience results in incoherencies within the Community legal order, since different interpretations of Community law will operate within different national legal orders.

The Court seeks to forestall or remedy this incoherence. Having no express powers of action therein, it must find them by its creative jurisprudence. The three judgements given in late 2003 and early 2004 are good examples of such creativity. In *Köbler*⁸ the Court confirmed that the principle of Member State liability for breaches of Community law also applies when a breach is attributable to a Member State court. In such cases, the affected claimant is entitled to bring another suit, affording the national judge hearing that case the opportunity to refer the issue to the Court of Justice at the "second attempt". *Köbler* should be read in conjunction with two other cases decided by the Court around the same time *Kühne & Heitz*⁹ and *Commission v. Italy*.¹⁰ The former established another way in which the Court of Justice may control the correct application of Community law by national courts. In certain circumstances the Court allowed the re-opening of a final administrative decision breaching Community law, which was given by a national administrative authority and subsequently confirmed by a national court having failed to refer the issue to the Court. Finally, the case of *Commission v. Italy* presented the Court with its very first opportunity to decide an infringement procedure initiated by the Commission against a Member State due to the fact that its courts (and administrative authorities) repeatedly decided a particular legal issue in conflict with Community law.

This article will discuss the judgments and the possible ways of their interpretation, focusing in particular on their federal elements (part 2-4). Part 5 will discuss their problems and shortcomings, i.e. particularly problematic acceptance of the judgments by national judiciary and also possible ineffectiveness of the Court's endeavours to promote coherency in the Community legal order since unworkable design of the preliminary ruling procedure. This fault was not

⁶ The most famous example of such a revolt is probably case *Cohn-Bendit* from the French *Conseil d'Etat* which denied that directives can have direct effect. *Minister of the Interior v. Cohn-Bendit* [1980] 1 C.M.L.R. 543.

⁷ Art. 234 EC. For an overview of instances where national supreme courts failed to refer preliminary questions correctly see Anderson, Demetriou, *References to the European Court* (Sweet&Maxwell, 2002) at 177-180. It is true however, that sometimes they do so for pragmatic or even legitimate reasons. No judge likes to hold up his decision for extra two years due to the preliminary rulings procedure, especially in criminal cases. This issue was discussed by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union at its 19th Colloquium. Cf. the General Report from the Colloquium, http://193.191.217.21/colloquia/2004/gen_report_en.pdf (28.11.2004) on pp. 71-73, mentioning such cases.

⁸ Case C-224/01, *Köbler*, [2003] 30.9. 2003, not yet reported. This article will not deal with the case exclusively from the point of view of the Member States liability. For such an analysis see Breuer, "State liability for judicial wrongs and Community law: the case of Gerhard Köbler v Austria" 29 *ELRev.* (2004), 243.

⁹ Case C-453/00, *Kühne & Heitz*, [2004] 13.1. 2004, not yet reported.

¹⁰ Case C-129/00 *Commission v. Italy* [2003] 9.12. 2003, not yet reported. This interrelation was amongst others indicated by advocates general in the cases. See opinion of AG Léger in Case C-224/01, *Köbler*, [2003] 8.4. 2003, not yet reported, para. 10, opinion of AG Geelhoed in Case C-129/00, *Commission v. Italy*, [2003] 3.6. 2003, not yet reported, para. 3. In his opinion in Case C-453/00, *Kühne & Heitz*, [2003] 17.6. 2003, not yet reported, AG Léger referred to *Köbler* when addressing points common to both cases – paras. 46 and 66 of his opinion therein.

remedied either by the Court (by reformulating the so called CILFIT test)¹¹ nor by the Member States, which even did not discuss the preliminary ruling procedure in the Convention of the Future of Europe.

2. *Köbler* – appeal and precedent in the Community judicial system

2.1. *The judgment*

The case concerned a university professor, Mr. Köbler, who claimed damages against the State of Austria because in his opinion the judgment of the Austrian Supreme Administrative Court (*Verwaltungsgerichtshof*), infringed directly applicable provisions of Community law, as interpreted by the Court of Justice, and thereby caused him a loss.¹²

Hearing the case of liability of the Austrian State, the regional civil court concerned (*Landesgericht für Zivilrechtssachen*) referred to the Court of Justice several questions which may be summarized as follows: whether a Member State can be held responsible for an act of its supreme court; if so, what the conditions for such liability are; and then finally whether such conditions were met in the case of professor Köbler.

The Court held that as a matter of principle, there is no exception to the principle of Member State liability for an unlawful act simply because the act stems from its judiciary. The Court emphasised “the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules”,¹³ stressing the importance of a court of last instance.¹⁴ This reflects the fact, that the Court founded the principle of Member States liability on legal protection of individuals;¹⁵ at the same time it shows Court’s concerns about incorrect interpretations and applications of Community law within national legal orders. Courts of last instances are then “barriers” between national and Community legal order, which does not allow the Court of Justice to have its say.

¹¹ The test was formulated by the Court in Case 283/81, *CILFIT*, [1982] ECR 3430. A national judge does not have to refer the question when the question of Community law raised in proceedings before him is irrelevant for his decision, or when the Community provision in question has already been interpreted by the Court, or finally when the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The last one of the conditions, known as *acte clair*, is the most controversial. When relying on it, the national judge has to bear in mind that Community legislation is drafted in several languages all being equally authentic. An interpretation thus involves a comparison of the different language versions. Furthermore, Community law uses terminology which is peculiar to it and its legal concepts do not necessarily have the same meaning in Community law as in the law of the various Member States. Finally, 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. See e.g. Anderson, Demetriou, op. cit. *supra* note 7 at pp. 130-186, particularly on *CILFIT* at pp. 173-183.

¹² It was a claim for a special length-of-service increment, which was granted to university professors under discriminatory conditions (their practice to be taken into account had to be solely in Austria), which infringed the free movement of workers principle. For a more detailed information on the facts of the case see Breuer, op. cit. *supra* note 8 or a Case Note by Classen, 41 CML Rev. (2004), 813.

¹³ *Köbler*, *supra* note 8, para. 33.

¹⁴ *Ibid.*, para. 34.

¹⁵ Cf. Harlow, “Francovich and the Problem of the Disobedient State” 2 ELJ (1996), 199 at 210-215, critical to a “right-based liability”. For another possible base, i.e. the principle of subsidiarity see Swaine, “Subsidiarity and Self-Interest: Federalism at the European Court of Justice” 41 Harv. Int’l. L.J. (2000), 1.

After confirming the existence of the principle of Member States liability for breaches of Community law committed by their supreme courts, the Court analysed the conditions for establishing such liability. The Court followed the threefold test for Member State liability which it had defined in its previous case-law: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties.¹⁶

According to the Court in *Köbler* these conditions apply as well for a case when loss or damage is caused by the decision of a national court adjudicating in last instance.¹⁷ However, in further elaborating the second of the conditions – that the breach must be sufficiently serious, the Court states that liability “can be incurred only in the *exceptional case* where [a court adjudicating in last instance] has manifestly infringed the applicable law”.¹⁸

These ‘exceptional cases’ are nevertheless defined by *the same* factors already stipulated by the Court in *Brasserie de Pêcheur/Factortame III* when defining ‘manifest and grave disregard of the limits on the discretion of a Member State or a Community institution’ in cases of “ordinary liability”.¹⁹ The Court merely added another factor - non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC.²⁰ In our search for federal elements within the Community judiciary, this factor is of great importance.

2.2. *The appellate theory*

Individuals do not have direct access to the Court of Justice from a national court hearing their case; there is no appeal allowing them to try to correct national courts’ disregard for Community law. The preliminary ruling procedure, the exclusive means of cooperation between the Community courts, is entirely in the hands of the judges, not of the parties.²¹ However, the liability action can be seen as an indirect possibility to appeal and reach the Court of Justice.²²

Firstly, the liability action against a decision of the court of last instance (very often a court higher up in the national judicial hierarchy) will be heard by a court that is inferior to it, whose willingness to refer a preliminary question is considered to be generally greater.²³ Secondly, and

¹⁶ *Köbler*, *supra* note 8, para. 51.

¹⁷ *Ibid.*, para. 52.

¹⁸ *Ibid.*, para. 53, emphasis added.

¹⁹ Cf. Joined cases C-46 and C-48/93, *Brasserie du Pêcheur/Factortame III*, [1996] ECR I-1029, para. 56. The relevant factors therefore are: the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, and the position taken, where applicable, by a Community institution. - *Köbler supra* note 8, para. 55.

²⁰ *Köbler*, *supra* note 8, para. 55.

²¹ Case 44/65, *Hessische Knappschaft*, [1965] ECR 965 at p. 970.

²² It is still true however, that the decision whether to refer a preliminary question to the Court of Justice remains exclusively in hands of the national judge, not the parties. The term “appeal” is used here as a metaphor rather than an exact description.

²³ This is explained by the “empowerment” of the lower courts, because the Art. 234 procedure enables them to evade their superior courts and gives them a power of judicial review, which they otherwise do not possess. Cf.

more importantly, the sensitivity of the issue of liability for judicial breaches within a judiciary plays significant role.

We saw that in *Köbler* the *Landesgericht für Zivilrechtssachen* asked the Court to rule on the question whether *all* the conditions of liability are fulfilled. It was rather extraordinary for a national court to ask the Court of Justice to do something like this. The general trend in liability cases has been to allow national courts to decide as much as they could, since they were best situated to apply the criteria for liability to the facts of the case before them.²⁴ However, in *Köbler* another consideration prevailed - namely the difficulty for a national court to decide on a breach of law allegedly committed by another court of higher instance.²⁵ It is submitted that a national court in such a delicate situation would probably rather refer the case than decide it itself and therefore allow the Court of Justice to give its authoritative interpretation of Community law. This is precisely what was foreseen by Advocate General Léger in *Köbler*, who expressed doubts as to a national court's impartiality when "judg[ing] other judges". He stated:

[i]n order to dispel any reasonable doubt as to its impartiality, the national court might choose to refer a question for a preliminary ruling and thus entrust to the Court the responsibility of examining whether the supreme court concerned has in fact acted in breach of Community law and, if so, to what extent.²⁶

Léger was not very persuasive in his rhetoric, to the effect that the preliminary ruling procedure is not "anything other than the expression of a mechanism of judicial cooperation founded on the logic of dialogue and mutual trust between courts".²⁷ *Formally*, it is still exclusively for a national court to decide whether or not it refers an issue to the Court; however, *in fact*, the national court will probably do so in order to avoid the necessity of judging a court superior to it, it would probably submit this court's judgment to the scrutiny of the Court of Justice. Therefore we may speak *cum grano salis* of an appellate procedure, yet one that operates by the force of circumstances rather than due to established hierarchy.

2.3. Binding force of the Court's judgments

There is another factor involved in establishing a 'sufficiently serious breach', which indicates that the Court acts rather as a Supreme Court in the Community, since it binds national courts by its case-law. The Court stated in *Köbler*: "In any event, an infringement of Community law will be sufficiently serious where the decision [of a national court] concerned was made in manifest breach of the case-law of the Court in the matter".²⁸ The use of this criterion indicates that the

Alter, "Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration" in: Slaughter, Sweet, Weiler (Eds.), op. cit *supra* note 5, at 241-246.

²⁴ See Tridimas, "Liability for breach of Community Law: Growing up and mellowing down?" 38 CML Rev. (2001), 301 at 316 and 332.

²⁵ Although in *Köbler*, the court having allegedly committed the breach (*Verwaltungsgerichtshof*) was an administrative court and the court hearing the liability action (*Landesgericht*) was a court pertaining to another (civil) jurisdiction. *Verwaltungsgerichtshof* was therefore not a superior court to *Landesgericht*. Nevertheless this could easily happen, if the court committing the breach was a civil court.

²⁶ Opinion of AG Léger in *Köbler*, *supra* note 10, para. 111.

²⁷ *Ibid.*

²⁸ *Köbler*, *supra* note 8, para. 56. See also *Brasserie de Pêcheur/Factortame III*, *supra* note 19, para. 57 where this factor appeared in slightly different words and Case C-118/00, *Larsy*, [2001] ECR I-5063, para. 44.

Court acts rather as a Supreme Court of the Community, since it equates disregard of its case-law as a breach of Community law.

It is interesting to consider the Court of Justice's statement in light of a study, published in 1984 by A.G. Toth, on the binding force and legal effects of the Court's judgments, between which he drew an important distinction.²⁹ The former "simply means that the judgment has the force of law: all those to whom it applies are under a legal obligation to comply with it. It implies a command that the judgment 'must be obeyed' or 'carried into effect'".³⁰ In contrast, the legal effects of a judgment refer to a situation where the latter "produces legal effects upon persons to whom they are not addressed and upon whom they are consequently not legally binding".³¹ He found that the Court's judgments certainly have legal effects beyond the scope of the case, however that "[n]either the European Court, nor the national courts, or third parties, are legally obliged to follow the Court's judgments in subsequent cases."³²

It is submitted that the line of case-law, beginning with the *Brasserie de Pêcheur/Factortame* judgment, has changed this position, and that the case-law of the Court has binding legal force on all national courts, and not merely the referring court, as well as other authorities.

When analysing this, we must further distinguish degrees of binding force in the Court's case-law. If a national court is bound to follow the case-law, but is allowed to deviate if there are good reasons to do so, the case-law only has persuasive authority. However, if the case-law is to be followed in every case, however good the reasons for not doing so may be, it is of binding authority.³³ It is proposed that the case-law of the Court is of binding, and not merely persuasive, authority.

The development of Community law has shown that a number of conclusions upon which Toth established his analysis have changed in time. One of those is of particular interest for our purposes: for there to exist an obligation on the part of national courts to follow the Court's case-law, "it is necessary that there be a relationship of hierarchical subordination between the national courts and the European Court"³⁴. In light of *Köbler* it seems not that necessary, since by attaching the sanction of liability in the case of non-compliance with its previous case-law, the Court has in fact tied down national courts without there being a formal hierarchy *stricto sensu*.

The Court has actually already demonstrated this on a breach committed by an administrative authority in *Larsy*.³⁵ The pragmatic approach of the Court, only seeking effectiveness of its case-law without claiming any hierarchy of Community courts, is well illustrated by Advocate General Léger's statement that

²⁹ Toth, "The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects" 4 YEL (1984), 1. This study remains the most detailed published in English, although the effects of the Court's case-law, particularly in the preliminary ruling procedure, were discussed by many authors.

³⁰ *Ibid.* at 5.

³¹ *Ibid.* at 44.

³² *Ibid.*

³³ *Ibid.* at 20.

³⁴ *Ibid.* at 33.

³⁵ *Larsy*, *supra* note 28.

[w]ithout entering into a debate relating to the nature of the authority with which the Court of Justice's rulings on interpretation are endowed, which a reply to the question raised does not warrant, I should make it clear that liability [of the administrative authority allegedly having breached Community law] will need to be evaluated in the light of the Court's judgment in *Brasserie du pêcheur and Factortame*. [... F]ailure on the part of a Member State or administrative authority to apply, to an identical situation, the approach taken by Community case-law constitutes a serious breach of Community law.³⁶

From this stated above we may conclude that propositions of law stated in the Court's case-law are binding on national courts and other national authorities.

2.4. *The Court's benevolence*

Breach of the case-law of the Court was nevertheless not the question raised by *Köbler*. The Court only dealt with the breach, on the part of the *Verwaltungsgerichtshof*, of the duty to refer a preliminary question after this court reclassified the contested increments from a bonus for the length of service to a bonus for loyalty, which was not covered by the judgment referred to by the Registrar in its response, *Schöning-Kougebetopoulou*.

What is striking is the fact that the Court disregarded its own standard of 'sufficiently serious breach' when applying the test to the case of professor Köbler. When coming to the conclusion that the breach committed was not sufficiently serious, it did not refer to any of the above-mentioned factors. It instead stated that "[i]t was owing to its [the Verwaltungsgerichtshof's] incorrect reading of that judgment that the Verwaltungsgerichtshof no longer considered it necessary to refer that question of interpretation to the Court."³⁷

According to this interpretation, every national court is excused whenever they "misread" the judgements of the Court of Justice. Bearing that in mind, one is justified in asking whether the test of sufficiently serious breach is of any real consequence for cases of alleged breach of Community law by Member State courts. We will see that in *Commission v. Italy* the Court, in enhancing its institutional position within the Community judiciary, was nevertheless keen on preserving its cooperative relationship with national courts and the same explanation most probably applies here.

The "appeals" through preliminary questions in liability actions and the binding force of the Court's case-law, as formulated in *Köbler*, is not however all which places the Court in the position as the Community Supreme Court. The judgment presented in the following section provides support for our "appellate theory" in another way.

3. *Kühne & Heitz* – does *res judicata* still matter?³⁸

Kühne & Heitz was a company seeking re-opening administrative procedure because the competent authorities misinterpreted certain provisions of the customs tariff to its detriment. Although the company appealed this administrative decision in the Netherlands Administrative Court for Trade and Industry (*College van Beroep voor het bedrijfsleven*), this court dismissed

³⁶ Opinion of AG Léger in *Larsy*, *supra* note 28, paras. 76-77, emphasis added.

³⁷ *Ibid.*, para. 123, emphases added.

³⁸ For a more detailed analysis of the case, concerning the relationship between *res judicata* and *effet utile* principles see Case Note by Caranta in this journal.

the appeal by its judgment of 1991. When ruling in the case, the *College van Beroep* did not refer a preliminary question to the Court of Justice (nor did the applicant request it do so).

Three years later the Court of Justice in *Voogd Vleesimport en -export*³⁹ showed Kühne & Heitz's position to have been correct. Following this judgment Kühne & Heitz requested from the customs authority repayment of the refunds which the latter had, in its view, wrongly required it to reimburse. The dispute reached the *College van Beroep* once again on appeal.

That time the *College van Beroep* referred to the Court of Justice for a preliminary ruling. In its order of reference to the Court of Justice the *College van Beroep* made a very extraordinary confession that it "mistakenly took the view that it was released from [the] obligation [to refer the preliminary question to the ECJ]".⁴⁰ The *College van Beroep* also pointed to the special position of the applicant, since the latter had exhausted the legal remedies available to it. Furthermore the interpretation of Community law applied by the *College van Beroep* had proved to be contrary to a judgment given subsequently by the Court of Justice. Finally, the applicant complained to the administrative body immediately after becoming aware of that judgment of the Court.

The *College van Beroep* formulated its preliminary question as follows:

Under Community law, in particular under the principle of Community solidarity contained in Article 10 EC, and in the circumstances described in the grounds of this decision, is an administrative body required to reopen a decision which has become final in order to ensure the full operation of Community law, as it is to be interpreted in the light of a subsequent preliminary ruling?⁴¹

All intervening parties⁴² as well as the Commission proposed that the question be answered in the negative.⁴³ All of them except one⁴⁴ rested their arguments on the principle of legal certainty and *res judicata*. Referring to these principles the Court held that "Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way".⁴⁵ However, the Court did not exclude such a possibility completely. An administrative authority has an obligation to review a final administrative decision when: (1) under national law, it has the power to reopen that decision; (2) the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance; (3) that judgment is, in the light of a subsequent decision given by the Court, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under Article 234(3) EC; and (4) the person concerned complained to the administrative body immediately after becoming aware of that

³⁹ Case C-151/93, *Voogd Vleesimport en -export*, [1994] ECR I-4915.

⁴⁰ *Ibid.*, para. 18.

⁴¹ *Ibid.*, para. 19.

⁴² The Netherlands Government, the French Government and the EFTA Surveillance Authority.

⁴³ See Opinion of AG Léger in *Kühne & Heitz*, *supra* note 10, paras. 32-35.

⁴⁴ The EFTA Surveillance Authority proposed answering in the negative basing its assertion on the principle of national procedural autonomy. See Opinion of AG Léger in *Kühne & Heitz*, *supra* note 10, para. 35.

⁴⁵ *Kühne & Heitz*, *supra* note 9, para. 24.

decision of the Court.⁴⁶ In reviewing its decision, the administrative body must take into account interests of third parties.⁴⁷

The most important of the above-listed criteria is that a final decision may be reopened only if that is allowed by national law. However, one should not be led to the conclusion that such a reopening is something exceptional in national laws concerning administrative procedures. It goes beyond the scope of this article to make a comparative analysis of all national administrative procedures, yet it should be noted that probably every national legal order allows some kind of extraordinary review of administrative decisions as the expression of a general principle of lawful government.⁴⁸ As we see, the power to reopen the decision is not further qualified, thus it could be interpreted very broadly and it may be well argued, that this condition actually does not preclude similar claims as the one of the *Kühne & Heitz* company.

How does this lend support to our proposed “appellate theory”? The point here is that the possibility of reopening final administrative decisions further motivates individuals to claim their Community rights in national courts. We have seen how strictly the conditions of liability for judicial breaches were formulated, or, how reluctant the Court was to find a ‘sufficiently serious breach’ in *Köbler*. It seemed that there is no point for an individual to pursue this “liability litigation”, when the chances of success are so low. However, the judgment of the Court in *Köbler* does not necessarily represent the end of the story for professor Köbler. This becomes clear if we put *Köbler* in the context of *Kühne & Heitz*.

In *Köbler* the Court clearly held that the decision of the *Verwaltungsgerichtshof* was based on an incorrect interpretation of Community law. Even though the decision of that court did not breach Community law in a “sufficiently serious manner”, that does not mean that Mr. Köbler would not be able to claim the contested increment from the administrative authority that rejected his claim at the very beginning of his saga.

Kühne & Heitz states that an administrative body is under an obligation to re-open its final decision when four conditions are met.⁴⁹ Thanks to the judgment given in the “liability litigation”, Prof. Köbler may satisfy all of them. The relevant provision of the Austrian Rules of Administrative Procedure allows him to ask the administrative body which in the very beginning decided not to grant him the contested increments to re-open that decision (the first condition).⁵⁰ The negative administrative decision was upheld by the *Verwaltungsgerichtshof*, which as the last instance decided improperly by failing to ask for a preliminary ruling. Prof. Köbler can refer

⁴⁶ *Ibid.*, para. 28.

⁴⁷ *Ibid.*, para. 27.

⁴⁸ See Schönberg, “Legal Certainty and Revocation of Administrative decisions: A Comparative Study of English, French and EC Law” 19 YEL (1999-2000), 257 for the UK and France. To mention an example of a new Member State, such a possibility exists in the Czech Rules of Administrative Procedure, Act. No. 71/1967 Official Gazette, § 62 (1) b) on the renewal of proceedings, which allows so in following words: “[t]he procedure before an administrative body concluded by a decision, which is final and conclusive, shall be renewed on a submission of a party, if the decision depended on an assessment of a preliminary question, which was decided differently by the competent body.” On situation in Austria see *infra* note 55.

⁴⁹ See *supra* note 46.

⁵⁰ Allgemeines Verwaltungsverfahren-Gesetz 1991 (AVG) BGBl. 51/1991, § 69 (1) 3. This provision is essentially the same as the relevant provision of the Czech Rules of Administrative Procedure cited in *supra* note 48.

to the Court of Justice's judgment given in *Köbler* to demonstrate that the decision of the *Verwaltungsgerichtshof* was based on a misinterpretation of Community law (the second and the third condition). If he were to come to the administrative authority immediately thereafter (the fourth condition), there would be nothing to prevent him from getting the increment – according to *Kühne & Heitz* at least.

Therefore, despite the low probability of success in the “liability litigation”, an individual may make use of this type litigation as a means to obtain a Court of Justice's interpretation of Community law, which then allows to this individual to seek reopening of an administrative decision which denied his Community right. From the Court's perspective, it means that more questions of Community law, otherwise left trapped in the national legal systems, will reach its courtrooms and that the Court has created further means for achieving coherency within the Community legal order.

4. *Köbler* and *Commission v. Italy*: end of the “sincere cooperative relationship” or its preservation for the future?

4.1. The need for cooperation within the Community judiciary

When communicating the strong messages towards national courts in the judgments we have dealt with above, the Court had to pay a price for its firmness. Seeing the changes in the relationship between the Court of Justice and its national interlocutors, Joseph Weiler observed as early as in 1993: “In the past the European Court was always careful to present itself as *primus inter pares* and to maintain a zone of autonomy of national jurisdiction even at the price of non-uniformity of application of Community law. If the new line of cases represents a nuanced departure from that earlier ethos, the prize may be increased effectiveness, but the cost may be a potential tension in the critical relationship between the European Court and national courts.”⁵¹

It seems that Weiler's prediction has become a reality. Perhaps the most significant cost of enhancing the Court's control over the application of Community law by national courts lies in the tendency to undermine the relationship of sincere cooperation within the Community judiciary.

The Court of Justice must rely on its national counterparts in order to project Community law into the national legal orders.⁵² The Court itself has underlined this necessity, e.g. in its report for the IGC in Nice when discussing reform proposals on preliminary ruling procedure⁵³ or in its own

⁵¹ Weiler, “The least-dangerous branch: A retrospective and prospective of the European Court of Justice in the arena of political integration” in: Weiler, *The Constitution of Europe* (Cambridge University Press, 1999) at 216. This chapter is based on Weiler's article published in 1993.

⁵² There is an immense literature on the role of national courts in establishing Community law in national legal orders. One of the most respected giving an overview from several (though not all) Member States is Slaughter, Sweet, Weiler (Eds.), *op. cit supra* note 5.

⁵³ *The Future of the Judicial System of the European Union*, accessible on the web-site of the Court: <http://curia.eu.int/en/txts/intergov/index.htm> (13.4.2004) at p. 24.

case-law.⁵⁴ From the other side, we may observe the same approach from the German Constitutional Court - *Bundesverfassungsgericht* (BVerfG),⁵⁵ whatever its motivation.

Now, by allowing individuals to sue Member States for judicial breaches committed by the Court's partners in the dialogue, the whole idea of the cooperative relationship may be damaged. Indeed, we may read anger between the lines of the article commenting on *Köbler*⁵⁶ which was written by a member of the Netherlands Supreme Court (*Hoge Raad*), a court which is one of the interlocutors of the Court of Justice in establishing Community law in the Netherlands. The author evaluates the judgment to be "mere token jurisprudence",⁵⁷ "a source of legal uncertainty, procedural entanglements and even more arrears in the decision of cases".⁵⁸ He then accuses the Court of infringing Community law at many instances under the heading "[T]hose who live in glass houses should not throw stones".⁵⁹ It is to be expected that *Köbler* will not be welcomed in any of the supreme courts throughout the Community.

4.2. *Commission v. Italy*

A prudent approach when dealing with infringements committed by national judiciaries, shown by the Court in *Köbler* by its benevolence towards *Verwaltungsgerichtshof's* breach, is also evident in *Commission v. Italy*. In this case the Commission instituted an action against Italy because the latter maintained in force a law⁶⁰ which, as construed and applied by the administrative authorities and the courts, was in breach of Community rules. The law governed rules of evidence in relation to a perennial problem of Community law – refusal by a Member State to repay charges levied in conflict with Community law because it is alleged that the claimant had passed them on – and the rule was a presumption that such charges had been passed on. The Court had previously held these Italian rules of evidence to be in breach of Community law.⁶¹ Although the original law, which gave rise to these findings, had been amended in 1990, further references from Italian courts followed.⁶² They showed that the law was still applied by the Italian courts to the effect that, in order to resist the repayment of customs duties or taxes paid in breach of Community law, the administration might rely on the presumption that such duties and taxes were normally passed on to third parties. This presumption had to be rebutted by a taxpayer seeking repayment.

⁵⁴ For a cooperative relationship between the Court of Justice and national courts and its formulation in the Court's jurisprudence see e.g. Case 16/65, *Schwarze*, [1965] ECR 877 at p. 886, Case 244/80, *Foglia*, [1981] ECR 3045, para. 20, Case C-83/91, *Meilicke*, [1992] ECR I-4871, para. 25, Case C-50/00P, *Unión de Pequeños Agricultores*, [2002] ECR I-6677, para. 42 (based on Art. 10 EC).

⁵⁵ *Kooperationsverhältnis* ('relationship of cooperation') – cf. Mayer, "The European Constitution and the Courts - Adjudicating European constitutional law in a multilevel system" Jean Monnet Working Paper 9/03, <http://www.jeanmonnetprogram.org/papers/03/030901-03.html> (11.1. 2004), at pp. 28-29. See also Kokott, "Report on Germany" in: Slaughter, Sweet, Weiler (Eds.), op. cit. *supra* note 5 at 108-110.

⁵⁶ Wattel, "*Köbler*, *CILFIT* and *Welthgrove*: We can't go on meeting like this", 41 CML Rev. (2004), 177.

⁵⁷ *Ibid.*, at 182.

⁵⁸ *Ibid.*, at 179.

⁵⁹ *Ibid.*, at 184-186.

⁶⁰ Art. 29(2) of the law implementing obligations resulting from Italy's membership in the EU (hereinafter "Community Law 1990"). See *Commission v. Italy*, *supra* note 10, para. 1.

⁶¹ Case 199/82, *San Giorgio*, [1983] ECR 3595 and Case 104/86, *Commission v. Italy*, [1988] ECR 1799. In these cases the law which preceded the Law from 1990 was examined by the Court

⁶² Case C-343/96, *Dilexport*, [1999] ECR I-579.

In its application, the Commission particularly pointed out the practice of the Supreme Court of Appeal (*Corte suprema di cassazione*) which was followed by many other trial courts in Italy.⁶³ This was a surprising allegation, since it was the first time the Commission had declared so openly that an alleged infringement consisted in a national judiciary's misapplication of Community law. Up till then the Commission's approach had been to overlook such misapplications, not so much because it considered them tolerable, but rather because of the sensitivity involved in "condemning" a national judiciary.⁶⁴ The Commission itself had even explicitly confirmed that this was its position.⁶⁵

At the beginning of its reasoning in the analysed case, the Court of Justice referred to its settled case-law, which confirmed that in an infringement procedure the failure to fulfil obligations may be found whichever organ of a Member State is responsible for the infringement, be it even a constitutionally independent institution.⁶⁶ This, together with another ruling cited by the Court, which states that "[t]he scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts",⁶⁷ could leave the impression that the Court was trying to justify a ruling finding an infringement based on the actions of the judiciary.

The Court even stated that Art. 29(2) of the Community Law 1990 was in itself neutral in respect of Community law and that it, therefore, must be examined in light of the interpretation given to it by Italian courts. The Court stressed that "[i]n that regard, isolated or numerically insignificant judicial decisions in the context of case-law taking a different direction, or still more a construction disowned by the national supreme court, cannot be taken into account. That is not true of a widely-held judicial construction which has not been disowned by the supreme court, but rather confirmed by it".⁶⁸ This indicates the Court's particular attention towards national

⁶³ *Commission v. Italy*, *supra* note 10, paras. 11-16. However, the Commission also mentioned the practice of Italian administrative authorities leading to the infringement – *ibid.*, para. 17. See also opinion of AG Geelhoed in *Commission v. Italy*, *supra* note 10, para. 24 and in particular para. 27.

⁶⁴ See e.g. Schermers, Waelbroeck, *Judicial Protection in the European Union*, 6th Ed. (Kluwer Law International, 2001) at 630-631 or in the context of a breach of the obligation to refer a preliminary question according to Art. 234 EC see Lenaerts, Arts, Bray (Ed.) *Procedural Law of the European Union* (Sweet&Maxwell, 1999) at 52. The latter nevertheless generally confirms such a possibility in the case where a national court deliberately ignores or disregards Community law – *ibid.*, at p. 98. AG Geelhoed referred to academic literature confirming such a possibility in note 22 of his opinion (opinion of AG Geelhoed in *Commission v. Italy*, *supra* note 10).

⁶⁵ See e.g. Seventh Annual Report to the European Parliament on Monitoring the Application of Community Law for 1989, COM (90) 288 final, O.J. 1990 C 232/1, at p. 232/54, para. 5, which mentions a situation when the Commission first notified that it would bring an action against France and subsequently disclaimed such an action saying that the problem was being resolved through cooperation between French authorities and the Commission's services. In its written reply to the question of Member of the European Parliament Tyrell the Commission referred to the cooperative relationship between the Court of Justice and national courts when asserting that an infringement procedure could disrupt it. See Written question No. 526/83 of 9 June 1983, O.J. 1983 C 268/25.

⁶⁶ *Commission v. Italy*, *supra* note 10, para. 29 referring to Case 77/69, *Commission v. Belgium*, [1970] ECR 237, para. 15.

⁶⁷ *Commission v. Italy*, *supra* note 10, para. 30 referring to Case C-382/92, *Commission v. UK*, [1994] ECR I-2435, para. 36.

⁶⁸ *Commission v. Italy*, *supra* note 10, para. 32. This statement of the Court echoed the opinion of Advocate General Warner in Case 30/77, *Bouchereau*, [1977] ECR 1999 at p. 2020, who then submitted that "[a] Member State cannot be held to have failed to fulfil an obligation under the Treaty simple because one of its courts has reached a wrong decision. [...] Judicial error is not a breach of the Treaty. [...] Art. 169 [now Art. 226] could only come into play in

supreme courts, which may affect interpretation given to Community law within the whole national judiciary. Advocate General Geelhoed further argued in favour of the possibility to find an infringement also in a case when inferior courts in a systematic fashion interpret and apply Community law in an erroneous manner, since then individuals would be discouraged from making appeals against such decisions to the supreme court and these decisions would remain uncorrected within the national legal order.⁶⁹

However, the Court of Justice did not go so far, and it eventually shifted its argumentation. The Court stated that the Italian legislation was insufficiently clear, since it had been subject to different judicial interpretations, some of them leading to infringements of Community law.⁷⁰ It came to the conclusion that the infringement occurred not as a result of the action of the judiciary, but as a consequence of Italy's

[f]ailing to amend Article 29(2) of [Community Law 1990], which is construed and applied by the administrative authorities and a substantial proportion of the courts, including the Corte suprema di cassazione, in such a way that the exercise of the right to repayment of charges levied in breach of Community rules is made excessively difficult for the taxpayer.⁷¹

It was a very diplomatic solution of the Court's dilemma, balancing between, on the one hand, the effectiveness of Community law, which would have been enhanced by an express condemnation of a Member State for breaches committed by its judiciary, and, on the other hand, the preservation of the cooperative relationship with national courts. The latter would be in danger had the Court acted too harshly against its national interlocutors. Contrary to *Köbler*, the Court in this case was not forced to find an infringement solely on a basis of a judicial act, and it availed itself of the possibility to circumvent this.

The Court seems to be in a schizophrenic position: on the one hand it is aware that national courts sometimes do not respect Community law and that it would be desirable to have means to force them to do so. On the other, the Court seeks to preserve the friendly relationship with these courts. Why is that?

It is well established that national courts are promoters of "the integration through law", especially lower courts.⁷² This is so not only because they are the instances supposed to protect Community law on a national level but also because they are the ones which start the judicial dialogue. By posing preliminary questions they allow the Court to establish the doctrines necessary for the proper functioning of the Community legal order.⁷³ Therefore, the Court of

the event of a court of a Member State deliberately ignoring or disregarding Community law" (cited in Schermers, Waelbroeck op. cit. *supra* 64 at 630).

⁶⁹ Opinion of AG Geelhoed in *Commission v. Italy*, *supra* note 10, para. 63.

⁷⁰ *Commission v. Italy*, *supra* note 10, para. 33.

⁷¹ *Commission v. Italy*, *supra* note 10, para. 41. AG Geelhoed came to a very similar conclusion, finding the infringement rather on the part of the national legislator than the judiciary. See Opinion of AG Geelhoed in *Commission v. Italy*, *supra* note 10, para. 66 and 117.

⁷² See *supra* note 23.

⁷³ All fundamental constitutional doctrines of the Court were formulated in preliminary rulings: direct effect (Case 26/62 *van Gend & Loos* [1963] ECR 1), supremacy (Case 6/64, *Costa*, [1964] ECR 614), protection of fundamental rights (Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125), member states liability (Joined cases C-6/90 and 9/90, *Francovich*, [1991] ECR I-5357), to mention the most important of them.

Justice cannot simply compel these courts to respect Community law. The Court must stay, in the eyes of national courts, as a partner, not a principal.

On the other hand, the Commission has shown far less restraint when it has initiated an infringement procedure against the Netherlands for a *single* judgment of its Supreme Court (Hoge Raad) breaching, according to the Commission, the principle of the free movement of workers.⁷⁴ Although it may be believed that the case will never reach the Court of Justice, the Commission may in this way promote more respect for the Court, without the latter's direct involvement in such sensitive disputes.⁷⁵

5. Problems posed by the judgments

Having discussed possible interpretation of the three judgments, the question of a prospective operation of this interpretation shall now be discussed. The persuasiveness of the Court's reasoning and subsequent acceptance of the judgments by national courts will be analysed first. Secondly, the problems of the effectiveness of the procedural path proposed by the judgments, which result from the unmanageable Court's case-load, will be shown. It deals with more general problems of the preliminary ruling procedure, which will be briefly touched on last.

5.1. *Persuasiveness and prospective acceptance of the judgments by national judiciaries – towards 'Judicial Deliberative Supranationalism'*

Throughout reading the judgments one may see that on several occasions the Court met difficulties when rebutting the arguments of Member States, which opposed liability for judicial breaches or the violation of the *res judicata* principle when an administrative authority is required to reopen its final decision given contrary to a later judgment of the Court.

To mention the most obvious of them, contrary to what the Court has said in *Köbler*⁷⁶ the principle of *res judicata* is genuinely endangered when an individual claims liability for a judicial decision. It follows not only from *Kühne & Heitz* that the original decision does not remain untouched if the applicant is allowed to seek its reopening before the administrative authority.

For example, we may imagine the situation where a national administrative authority gives consent to a development project in breach of the environmental impact assessment (EIA) procedure. This procedure is prescribed by Directive 85/334/EEC ("the EIA Directive") for certain categories of projects.⁷⁷ Before the authority may give its consent, a study on the impact of the intended project must be carried out. If the authority fails to do so, revocation or suspension of an already-granted consent may be required, subject to the limits laid down by the principle of Member State procedural autonomy.⁷⁸ Moreover, the relevant articles of the EIA

⁷⁴ See Press Release of 9 February 2004, IP/04/178.

⁷⁵ Speaking with experience from an administration of a new Member State, every danger of an infringement procedure is taken very seriously. Therefore, even without Court's proceedings or even a judgment, the mere possibility of such a case may have strong deterrent effect on judges to take Community law seriously.

⁷⁶ *Köbler*, *supra* note 8, para. 39.

⁷⁷ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effect of certain public and private projects on the environment, O.J. 1985 L 175/40. See e.g. Jans, *European Environmental Law*, 2nd Ed. (Europa Law Publishing, 2000) at 321-328

⁷⁸ Case C-201/02, *Delena Wells*, [2004] 7.1.2004, not yet reported, para. 65.

Directive are directly effective,⁷⁹ and a Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.⁸⁰

Applying our “appellate theory” to the case of a possible breach of the EIA Directive, imagine that the original grant of consent is appealed in a national court and this court fails to refer a question or decides in breach of the EIA Directive without breaching the obligation to refer (which is possible, since the Court has abundant case-law in this field and many questions thereon may be considered as *actes claires*). The decision granting consent subsequently becomes *res judicata* and the developer may start to carry out the project. However, if a party (be it e.g. some environmental organization) were to request the administrative authority to reconsider the decision granting the consent, such reconsideration would seriously undermined legal certainty of the developer, since the project may have already been implemented.⁸¹ Examples when national courts ruled in breach of the EIA Directive are known e.g. from the United Kingdom.⁸² It is unlikely that those decisions could be re-opened due to the long period from their issuance, however there are probably similar decisions issued more recently and that the stability of relations founded on such decisions may therefore be undermined.

Thus when denying that its decisions are in conflict with the principle of legal certainty or *res judicata*, the Court did not say the whole truth.

Moreover, in another passage of the judgment in *Köbler*, to a certain extent the Court was contradicting itself when it defined the conditions of the liability and stated: “[...] regard must be had to the [...] legitimate requirements of *legal certainty*, as the Member States which submitted observations in this case have also contended”.⁸³

Contrary to its previous argumentation on the question of principle (i.e. whether a Member State may be liable for a judicial breach), where the Court excluded the possibility of any conflict with the principle of *res judicata* (as an expression of a wider principle of legal certainty), here the Court is suddenly aware of the collision of principles, first, to make good any damage (or, protection of individuals or effectiveness of Community law) and second, of the legal certainty (and more particularly, though not expressly stated, *res judicata*). The rationality of such an approach is open to doubt. The Court would have enhanced the persuasiveness of its argumentation had it submitted to balancing argumentation, weighing the conflict of the principles.

As R. Alexy describes the balancing argumentation, “the greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other”.⁸⁴ When a court balances principles, it must according to R. Alexy firstly establish the

⁷⁹ *Ibid.*, para. 61.

⁸⁰ *Ibid.*, para. 66.

⁸¹ Although the Court of Justice does not order to re-open administrative proceeding unconditionally – it gives the national court reviewing the decision discretion how far to take into account interests of third parties - *Kühne & Heitz*, *supra* note 9, para. 27.

⁸² Harwood, “EIA, Development Consent and Duties on the Member State” 16 JEL (2004), 261.

⁸³ *Köbler*, *supra* note 8, para. 53, emphasis added.

⁸⁴ Alexy, “On Balancing and Subsumption. A Structural Comparison” 16 Ratio Juris (2003), 433 at p. 436.

degree of non-satisfaction of or detriment to the first principle (in our case it would be the principle of legal certainty). Subsequently, it defines the importance of the satisfaction of the competing principle (legal protection of individuals or effectiveness of Community law). Finally the court comes to a conclusion, giving reasons for favouring one of the principles.

In *Köbler*, the Court of Justice instead firstly excluded any possible conflict and then in another part of the judgment admitted that such a conflict exists. When dealing with the conflict, the Court only stated that there is another interest (legal certainty) which must be taken into account when establishing the seriousness of the breach, but it did not engage in any balancing of the competing interests.

Another problem arises when the Court refers to the principle of national procedural autonomy. We may see that on several occasions the Court seemed to use this principle as a shield against troublesome questions posed by the national court. Perhaps the most significant example is the question of which court is competent to determine liability actions based on judicial breaches. It is the main difficulty of the liability principle. The difficulty lies also in the fact that there is no guarantee that the court hearing the liability action will not make another mistake— why repeat the litigation instead of setting its final point, which would be the original, though unlawful, decision of the supreme court? Is it not better to accept that, as other human institutions, courts are fallible and that, due to their particular role (i.e. deciding in disputes), any mistakes they make may be difficult to remedy (in other words, it has to be accepted that some decisions will be incorrect and that it may be too costly to attempt to correct all errors)? Without discussing all these considerations the Court of Justice merely referred to the principle of national procedural autonomy and stated that “[i]t is not for [it] to become involved in resolving questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system”.⁸⁵

Sometimes it seems that the ‘judicial dialogue’ is not a real dialogue but only the Court’s giving orders to national courts (“protect effectiveness of Community law”) regardless of the possible difficulties they may have in carrying out such orders (“it is not for us to resolve your problems”). However, the problem of breaching *res judicata* or designating the competent court to hear an action for the liability of another (not only necessarily the supreme) court is universal in nature, and each legal order, in facing them, would necessarily have to confront the conflict between legality and the finality of disputes. Community law gives no weight to the importance of the rule infringed - it may be the improper classification of chicken legs (as in *Kühne & Heitz*) and still such a rule would claim primacy before conflicting national rule of a constitutional nature or a principle balancing the need for legality and finality of legal disputes. Unconditional principle of supremacy may then destroy that balance.

When the Court established the doctrine of direct effect and other principles enhancing effectiveness of Community law in the Member States, it simultaneously, to a certain degree, obliterated the distinction between the Community and national legal orders. It is submitted that it should have had in mind that Community law should not take precedence in *every* case, as the Court claims (arguing from the principle of supremacy). Having a uniform legal order also entails

⁸⁵ *Köbler*, *supra* note 8, para. 47, also referring to the Court’s previous “settled case-law” on that matter.

seeing its problems in their complexity, taking into account legal problems inherent in each legal system, not simply opting for the distinction whenever it conforms to the aim the Court is pursuing at the moment.

Having shown the problems of the Court of Justice's reasoning, it is not to undermine the outcomes achieved, i.e. more efficiency and coherency for Community law. It is rather a case for the Court's more persuasive reasoning, taking concerns of Member States and problems posed to their national legal orders more seriously. Otherwise the Court may, when promoting coherency of the Community legal order in a narrower sense (i.e. only on a Community level), create serious disturbances for national legal orders. We should have in mind that the multilevel system of the Community legal order is "composed of two complementary constitutional layers, the European and the national, which are closely interwoven and interdependent".⁸⁶

Arguments presented here suggest an approach, which may be called 'judicial deliberative supranationalism'.⁸⁷ According to it the Court would understand the Community legal order in the above-mentioned, wider sense, looking at the national legal orders as components not necessary on the inferior level of a hierarchy (the hierarchy which is denied by this approach). Concerns of national courts about this layer of the whole Community legal order would then be taken into account more seriously. The Court of Justice would have to base its reasoning not only on the "simple" principle of supremacy, but on rationality and coherency of its outcome with both layers – national and Community.

5.2. Ineffectiveness of the preliminary rulings procedure as the main obstacle

The previous lines lead us to another question we should pose in relation to the "appellate theory": does it really help individuals and consequently are they motivated to use it to allow the Court of Justice to have its say in questions of Community law? Time constraints may prove to be crucial when an individual decides whether or not to start Community law litigation.

If we look closely at the whole *Factortame* saga, we see that it took ten years of litigation to succeed with a Community-right-based claim in English courts. The story is well known to all Community lawyers, thus we will not deal with it in details. On 12 December 1988, the *Factortame* Company brought an action against the United Kingdom because of restrictive nationality requirements on registration of vessels.⁸⁸ During the litigation, the Court had a chance to clarify important principles of Community law, like the impact of national procedures on the effectiveness of Community law⁸⁹ or the liability of a Member State for breaches of Community law itself.⁹⁰ The final decision of the Court of Appeal in the United Kingdom, awarding damages to the untiring applicant was issued almost precisely a decade later – on 8 April 1998.⁹¹

⁸⁶ Pernice, "Multilevel constitutionalism in the European Union", 27 *ELRev.* (2002), 511 at 514.

⁸⁷ The concept of deliberative supranationalism is explained e.g. by Joerges, "'Deliberative Supranationalism' – Two Defences", 8 *ELJ* (2002), 133.

⁸⁸ Case C-221/89, *Factortame*, [1991] E.C.R. I-325. The action was raised against the decision of the Secretary of State of Transport based on the Merchant Shipping Act 1988.

⁸⁹ Case 213/89 *Factortame* [1990] ECR I-2433

⁹⁰ *Brasserie de Pêcheur/Factortame III*, supra note 19.

⁹¹ *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1998] 3 *CMLR* 192 CA.

The same would probably apply for professor Köbler. His story began in 1996. It took two years from his request for the increment to the dismissal of his application by the *Verwaltungsgerichtshof*. We must bear in mind that in this case the proper preliminary ruling procedure was replaced by a simplified procedure whereby the Registrar of the Court referred in accordance with Art. 104 (3) of the Rules of Procedure⁹² to another similar judgment. The *Verwaltungsgerichtshof* withdrew the question, without waiting for the complete preliminary ruling, which normally takes approximately two years.⁹³ Then the second claim came – the one of liability. As we know the Court of Justice gave its rulings in late 2003 and professor Köbler must now wait for the decision of the *Landesgericht*, which, in line with the rulings of the Court of Justice, will most probably dismiss the action of Mr. Köbler. However, making use of *Kühne & Heitz*, professor Köbler may turn to the administrative authority which took the original decision giving birth to his saga in 1996. And this time he should be successful, hopefully but not necessarily without further need to go to a court. It would come as a big surprise if his story ends before the end of this decade.

It may be argued that the Factortame saga as well as the case of professor Köbler is “a pioneer case” and that in similar litigations coming later it will not take so long to obtain what one expects from a national court, which applies correctly Community law and the Court’s jurisprudence. The problems of effectiveness of the “appeals” through liability actions are in fact problems of the preliminary ruling procedure. It is beyond the scope of this article to discuss them and possible reforms seeking to remedy them. Such a discussion may be found in many recent writings of distinguished scholars.⁹⁴ Only one remark will be made, however. It concerns the so called CILFIT test for the obligation of national courts of last instances to pose preliminary questions.⁹⁵ The test has been criticised for its unrealistic formulation, in fact not allowing national courts to decide independently any questions of Community law at all.⁹⁶ That some of the criteria of the test are not followed even by the Court itself was observed by Advocate General Jacobs in *Wiener*.⁹⁷ However in *Köbler* the Court applied CILFIT test without any change,⁹⁸ thus it still did not leave national courts any room for applying Community law independently. It is therefore submitted that the Court in *Köbler* should have clarified the obligation to refer, since the validity of the CILFIT test is more than questionable.⁹⁹ Other

⁹² Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991, O.J. 1991 L 176/7.

⁹³ The Court’s annual report from 2003 gives statistics on the duration of proceedings between 1998 and 2003. Annual Reports of the Court are available at <http://www.curia.eu.int/en/instit/presentationfr/rapport.htm> (11.5. 2004).

⁹⁴ See e.g. Craig, op.cit. *supra* 4 at 177-214, Edward, “Reform of Article 234 Procedure: The Limits of Possible”, in: O’Keeffe (Ed.), *Judicial Review in European Union Law. Liber Amicorum in Honour of Lord Slynn of Hadley*. (Kluwer Law International, 2000), 119-142, Rasmussen, “Remedying the Crumbling EC Judicial System” 37 CML Rev., 1071, Turner, Muñoz, “Revising the Judicial Architecture of the European Union” 19 YEL (1999-2000), 1.

⁹⁵ See *supra* note 11.

⁹⁶ Rasmussen, “The European Court’s Acte Clair Strategy in *C.I.L.F.I.T.*” 9 ELRev. (1984), 242.

⁹⁷ Opinion of AG Jacobs in Case C-338/95, *Wiener*, [1997] ECR I-6495, para. 65.

⁹⁸ *Köbler*, *supra* note 8, para. 118.

⁹⁹ For a proposal on how to reformulate the CILFIT test see Rasmussen, op. cit. *supra* 94 at 1107-1110 or Bobek, Porušení povinnosti zahájit řízení o předběžné otázce dle článku 234 (3) SES [Violation of the duty to make a preliminary reference under Article 234 (3) EC Treaty], (C.H. Beck, 2004), 125-128, who discusses problems of the CILFIT from a wider perspective of its effectiveness and outcomes for individuals. For an opposing view, rejecting the need for a reform, see Edward, “National Courts – the Powerhouse of Community Law”, 5 Cambridge Yearbook of European Law Studies (2002-2003), 1 at 7.

possible reforms, like limitation of national courts allowed to refer, *certiorari* option for the Court or a real appellate procedure are discussed in writings mentioned above.¹⁰⁰

However, it is not for the Court itself to perfect the judicial system of the Communities. It should be the Member States' task to reconsider the existing 'judicial architecture' so as to allow the Court of Justice to achieve its aim – protecting the rule of law. Unfortunately, the necessary reform of the preliminary ruling procedure was not discussed at all in the Convention on Future of Europe, which submitted the Draft Constitutional Treaty of the EU.¹⁰¹ Whether the possibility for the Court of First Instance to deal with preliminary reference will help to the effectiveness of the preliminary rulings is questionable, since the same was hoped about direct actions at the time of this court's establishment.

6. Conclusion

The Court of Justice's role is inherently difficult: it must ensure that when the Treaty is interpreted and applied, the law is observed. However, it was not given necessary powers to ensure this objective without reading the Treaty with a great deal of imagination, thus opening itself to the consequent accusation that “[it] does sometimes judgments outside, or *contrary to*, the text of the Treaties”.¹⁰²

Judgments delivered by the Court in *Köbler*, *Kühne & Heitz* and *Commission v. Italy* represent this creativity. One possible way of reading *Köbler* is to see the referral sent in the context of the claim of liability for a judicial breach as a special kind of an appellate procedure whereby the questions of Community law, improperly treated by the national court the judgement of which gave rise to the liability action, may eventually reach the Court of Justice on the “second attempt”. *Köbler* moreover confirmed the Court's endeavours to strengthen the authority of its judgements by imposing a sanction for the failure to follow them. Both these outcomes of *Köbler* may be seen as elements of the federal nature of the Court of Justice's jurisdiction, showing that this court acts as a true Supreme Court of the Community. *Kühne & Heitz* complement this “quasi-federal judicial system”. It motivates individuals to use the procedural paths given by *Köbler* and therefore bring to the Court of Justice questions of Community law otherwise locked within national legal orders. Lastly, *Commission v. Italy* closes the circle and shows the ambiguity of the Court's position: it strives to establish greater authority for itself within the Community judiciary; at the same time it still needs national courts as its partners, not inferiors.

Community law has become a part of the national laws of all Member States and the boundary between these two systems have become more invisible than at the time of the Communities' establishment more than fifty years ago. First critique focus on some shortcomings of the Court of Justice's reasoning, which undermine its persuasiveness and prospective acceptance by national courts, since then Court did not take concerns of national legal orders seriously. The approach called 'judicial deliberative supranationalism' is then proposed for enhancing cooperation between different levels of Community judiciary.

¹⁰⁰ See *supra* note 94.

¹⁰¹ Draft Treaty Establishing a Constitution for Europe, CONV 850/03, accessible at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (11.1. 2004).

¹⁰² Hartley, “The European Court, Judicial Objectivity and the Constitution of the European Union”. 112 LQR (1996), 95 at 102, emphasis added.

The second problem of the presented judgements lies in a fact that the Court of Justice failed to reformulate the duty of national courts to refer questions of Community law, set by the so called CILFIT test. Having not done this, the effectiveness of the presented judgements' "federal elements" is seriously undermined. Due to the unwillingness of Member States to reframe the preliminary ruling procedure, this problem remains unresolved.