European Public Law, Vol. 26, Issue 3
Final manuscript – 4 September 2020

Just Say No! Appeals against Orders for a Preliminary Reference

Graham Butler[*] and John Cotter[**]

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Abstract

Can an order for a preliminary reference to the Court of Justice of the European Union (the Court), made by a lower instance national court, be subject to an appeal to a higher instance national court? To date, the Court has not been sufficiently clear on an answer to this exact question. The Court's *Cartesio* judgment mandated that national law could not permit a higher instance national court from varying an order for reference, setting aside an order for reference, or ordering the resumption of national proceedings whilst awaiting the return of the preliminary reference. However, the Court did not say that appeals against an order for reference, more generally, were incompatible, *per se*, with Union law. This article contends that such breadth given to higher instance national courts is contrary to the intent of Article 267 TFEU, which aims to ensure effective judicial dialogue between all national courts and the Court, uninterrupted by national law and practice. This article makes the case for ending this regime of undue deference to national procedural autonomy on this question, which is problematic in circumstances where the rule of law and judicial independence in all Member States cannot be assumed.

[*] Associate Professor of Law, Aarhus University, Denmark. gb@law.au.dk
[**] Lecturer in Law, School of Law, Keele University, United Kingdom. j.cotter@keele.ac.uk

Keywords

National courts; Court of Justice of the European Union; Preliminary reference procedure; national procedural autonomy; Appeals; Appellate courts.

1. Introduction

The effective functioning of the preliminary reference procedure, the paramount means of dialogue between national courts of EU Member States and the Court of Justice of the European Union (the Court), has important consequences for the functioning of entirety of the EU legal order. Given that an appeal against a lower court order to refer within the national legal system has, at the very least, the potential to interrupt the direct line of communication between the referring court and the Court, a question arises as to whether such appeals are permissible. Neither EU primary and secondary law make an explicit provision for an appeal against an order for a preliminary reference by a national court or tribunal.

There is case law on this matter. However, the Court has, as argued in this article, not taken sufficient account of the potential harmful effects of appeals of orders for a preliminary reference within national legal systems. National law cannot amend Article 267 TFEU; it stands alone, and has direct application in Member States. It imposes, without question, the possibility for all national courts to make a preliminary reference at their own motion, without any hindrance from higher instance national courts. Whilst it is accepted that Article 267 TFEU does not explicitly exclude appeals within a national legal system against orders for a preliminary reference,[1] such a reductive and literalist approach would be inappropriate when considering the meaning of the provision so central to the functioning of the EU legal order.

As long noted, 'the national court is…so to speak, the master of the preliminary reference'.[2] This includes *all* national courts. While Article 267 TFEU has the ideal of uniformity underpinning it, its usage varies across Member States because of differences in national procedural rules. The *CILFIT* case is still of relevance, in that 'it must not be forgotten that in all…circumstances national courts and tribunals…remain entirely at liberty to bring a matter before the Court if they consider it appropriate to do so'.[3] Accordingly, an appeal against a national court or tribunal's order for a reference has two distinct consequences. Firstly, it has the potential to affect the uniformity of Union

[1] Case C-146/73, *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1974:12 ('*Rheinmühlen-Düsseldorf II*'), paragraph 3; Case C-334/95, *Krüger GmbH & Co. KG v Hauptzollamt Hamburg-Jonas*, ECLI:EU:C:1997:378, paragraphs 50-54; Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, ECLI:EU:C:2008:723, paragraph 93.

[2] Gerhard Bebr, *Development of Judicial Control of the European Communities* (Martinus Nijhoff Publishers 1981). p. 398.

[3] Case C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, ECLI:EU:C:1982:335, paragraph 15.

law by, for instance, disincentivising lower court references; and, secondly, it filters the pursuit of effective legal remedies under Union law.[4]

This article argues that the Court should not allow, under any circumstances, higher instance national courts to entertain appeals of orders for a preliminary reference of lower instance national courts. It considers what the impact may be of a recent judgment of a higher instance court of a Member State, and what that reveals as regards the current state of the Court's jurisprudence on the issue of appeals of lower instance national courts' orders for a preliminary reference. This is done in light of the Court's lead judgment on this question in *Cartesio*,[5] which, whilst a step in the right direction, did not go far enough in protecting lower instance national courts.

Post-*Cartesio*, how national courts (and tribunals) are to respond to appeals of orders for preliminary references is unclear.[6] It has been openly pondered why the Court has never given a definitive answer on this issue, and why the Court wavered in its earlier case law. The Court's irresolute approach may have been an attempt to balance the interests of judicial dialogue on the one hand, and national procedural autonomy on the other.[7] In this article, it is argued that the Court will have to take a stronger stance to protect lower instance national courts against interference from higher instance national courts in the preliminary reference procedure than it previously did in judgments such as *Cartesio* and *Pohotovost*.[8] For the reasons set out herein, the article invites the Court to extend its jurisprudence to make a more assertive attempt at stopping higher instance national courts from entertaining appeals against orders for a preliminary reference from lower instance national courts.

2. As Union law stands – *Cartesio*

It is the most peculiar, often trivial, of circumstances that can give rise important matters of constitutional significance for the functioning of the EU legal order. This saga, relating to the question of appeals of orders for preliminary references, features a cereal exporter having an issue with a national intervention agency for cereal;[9] the moving of a company's registration from one Member State to another;[10] and a data protection commissioner in an EU Member State taking proceedings

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[4] David O'Keeffe, 'Appeals Against an Order to Refer under Article 177 of the EEC Treaty' (1984) 9 European Law Review 87. p. 100.

[5] Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, ECLI:EU:C:2008:723.

[6] A point even made by those stating the status quo, post-*Cartesio*, was sufficient. Michal Bobek, 'Cartesio: Appeals against an Order to Refer under Article 234(2) EC Treaty Revisited' (2010) 29 Civil Justice Quarterly 307. p. 313.

[7] Koen Lenaerts, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness' (2011) 46 Irish Jurist 13. p. 33.

[8] Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, ECLI:EU:C:2008:723, and, Case C-470/12, *Pohotovosť s. r. o. v Miroslav Vašuta*, ECLI:EU:C:2014:101.

[9] Case C-146/73, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1974:12 ('*Rheinmühlen-Düsseldorf II*'); and Case C-166/73, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1974:3 ('*Rheinmühlen-Düsseldorf I*'). Note, the two cases were referred by two different national courts in Germany.

[10] Case C-210/06, *Cartesio Oktató és Szolgáltaató bt*, ECLI:EU:C:2008:723.

against a technology company from the United States.[11] The case law from the Court concerning appeals of an order for a preliminary reference was initially inconsistent, but over time, has become more stringent, but not sufficiently stringent to protect lower instance national courts.

Since as far back as 1961, the Court has been dealing with the actions of higher instance national courts on this issue. In *De Geus v Bosch*,[12] the very first preliminary reference before the Court, the order for a preliminary reference was appealed within the national system. Advocate General Lagrange made clear that he did not agree with the assertion that an appeal of a lower instance national court's order for a preliminary reference would automatically suspend proceedings before the Court.[13] The Court agreed, stating that 'the Treaty makes the jurisdiction of th[e] Court dependent solely on the existence of a request for a preliminary ruling within the meaning of Article [267 TFEU]'.[14] Thus, from the outset, the Court acted in a manner that was not receptive to higher instance national courts interfering with lower instance national courts orders for preliminary references. The Court was of the view that its ability to deliver a judgment was based on the existence of questions asked of it by a national court, regardless of the position of the referring court in the national judicial hierarchy.

Despite the seeming assertion by the Court of the importance of lower instance national courts, the Court in *De Geus v Bosch* did not rule out the possibility of a higher instance national court overturning an order for a preliminary reference. Indeed, there may be a contradiction between the Court's insistences on the preliminary reference procedure having a true function, yet at the same time, asserting that appeals against an order to refer are a matter for national courts,[15] thus subjecting preliminary references to potential interference. The context of the case, occurring as it did in the earlier years of European legal integration, might give some indication as to why the Court might not have wished to antagonise higher instance national courts, who the Court would have viewed as an important ally.

A few years later in *Chanel v Cepeha*, on the suspensory effect of an appeal against an order for a preliminary reference, Advocate General Roemer took a different approach. He suggested the Court 'issue an order declaring that[,] for the moment[,] it cannot give a ruling on the questions submitted to it; [and that] it may only do so when the [national court] has given judgment on the appeal brought against the decision to make the reference',[16] and that given the appeal made, the

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[11] *Data Protection Commissioner v Facebook Ireland Limited and Schrems* [2017] IEHC 545, Costello J; which is Case C-311/18, *Facebook Ireland and Schrems*, ECLI:EU:C:2020:559 ('*Schrems II*').

[12] Case C-13/61, *Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn*, ECLI:EU:C:1962:11 ('*De Geus v. Bosch*').

[13] Opinion of Advocate General Lagrange, Case C-13/61, *Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn*, ECLI:EU:C:1962:3 ('*De Geus v. Bosch*'), page 59.

[14] Case C-13/61, *Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn*, ECLI:EU:C:1962:11 ('*De Geus v. Bosch*'), page 50.

[15] O'Keeffe (n 4). p. 92.

[16] Opinion of Advocate General Roemer, Case C-31/68, *SA Chanel v. Cepeha Handelsmaatschappij NV*, ECLI:EU:C:1969:18, page 412.

Court 'cannot simply ignore the situation'.[17] The Court, accepting the Opinion of the Advocate General, and turning on its back on its *De Geus v Bosch* judgment, suspended the case, 'pending notification to the Court that the appeal has been decided',[18] and the case was later removed from the register after the appeal at the national court was successful. The proposal of the Advocate General here, and the action by the Court, are highly regrettable, and case law that the Court soon came to regret. Comparing the actions of the Court in *De Geus v Bosch* with those in *Chanel v Cepeha*, we can see a noticeable change in the Court's approach. Moreover, in the order of the Court made in *Chanel v Cepeha*, the Court did not explain its change in approach in any way.

A further change in the Court's approach arrived not long after. In *BRT v SABAM*,[19] the defendant notified the Court that it had appealed the order for a preliminary reference of the national court to a higher instance in that Member State, and pleaded that the Court should suspend the proceedings, pending the outcome of the appeal. Advocate General Mayras noted that the Court had been informed by the lower instance national court that, notwithstanding that its order for a preliminary reference had been appealed, it 'does not wish [that] the Court…suspend the examination' of the questions referred.[20] Noting that the referring national court wanted answers, Advocate General Mayras proposed that the treaties, and more specifically Article 267 TFEU, established 'direct cooperation' between national courts and the Court, covering 'any question of interpretation of [Union] law which they consider necessary for the solution of disputes brought before them'.[21] The Court, concurring, stated that it is 'bound to give a reply',[22] as otherwise, in the given case, it would be 'depriving individuals of rights which they hold under the Treaty'.[23] Moreover, the Court added that a case 'continues as long as the request of the national court has neither been withdrawn nor become devoid of object'.[24] This, therefore, marked a return to the essence of *De Geus v Bosch*, and disavowed *Chanel v Cepeha*.

Subsequently, however, in the *Rheinmühlen-Düsseldorf* cases, the Court began to dither. It is necessary to distinguish the two *Rheinmühlen-Düsseldorf* cases – *Rheinmühlen-Düsseldorf I*[25] and

[17] Ibid., page 409.
[18] Order of the Court, Case C-31/68, *SA Chanel v. Cepeha Handelsmaatschappij NV*, ECLI:EU:C:1970:52, page 404.
[19] Case C-127/73, *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v. SV SABAM and NV Fonior*, ECLI:EU:C:1974:6 ('*BRT v. SABAM*') [First of two judgments].
[20] Opinion of Advocate General Mayras, *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v. SV SABAM and NV Fonior*, ECLI:EU:C:1973:157 ('*BRT v. SABAM*') [First of two Opinions], page 67.
[21] Ibid., page 69.
[22] Case C-127/73, *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v. SV SABAM and NV Fonior*, ECLI:EU:C:1974:6 ('*BRT v. SABAM*') [First of two judgments], paragraph 24.
[23] Ibid., paragraph 17.
[24] Case C-127/73, *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v. SV SABAM and NV Fonior*, ECLI:EU:C:1974:6 ('*BRT v. SABAM*') [First of two judgments], paragraph 9.
[25] Case C-166/73, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1974:3 ('*Rheinmühlen-Düsseldorf I*').

Rheinmühlen-Düsseldorf II.[26] The former, *Rheinmühlen-Düsseldorf I*, stressed the importance of the uniformity of Union law to which the preliminary reference procedure contributes. It thus confirmed the rights of lower instance national courts making orders for preliminary references, stating that 'the existence of a rule of domestic law whereby a court is bound on points of law by the rulings of the court superior to it cannot of itself take away the power provided for by Article [267 TFEU] of referring cases to the Court'.[27]

In *Rheinmühlen-Düsseldorf II*, whilst the Court did not say that orders for preliminary references from lower instance national courts could not be the subject of an appeal, it did point out that regardless of an order being appealed, the Court would '[n]evertheless, in the interests of clarity and legal certainty… abide by the decision to refer, which must have its full effect so long as it has not been revoked'.[28] Thus, it would proceed with a case as normal. However, regretfully, it went on to say that 'Article [267 TFEU] does not preclude a decision of such a court referring a question to this Court for a preliminary ruling from remaining subject to the remedies normally available under national law'.[29]

Academic writing differed on where the law stood at this juncture. One view was that 'no rule of national law can fetter the discretion of a lower court to make a reference'.[30] Another view was that appeals of orders made by lower instance national courts were allowed, and compatible with Union law.[31] Such appeals would, of course, have to be distinguished from any national law seeking to limit a national court's discretion to make an order for a preliminary reference in the first place, since such laws would clearly be contrary to Article 267 TFEU.

In 2008, the *Cartesio* judgment clarified the prior case law, and in some ways, extended it. The Court's approach in *Cartesio* has been described as moving from that seen in *Rheinmühlen-Düsseldorf II*, leaving national procedural laws alone, towards a system of harmonisation.[32] In *Cartesio*,[33] the Court clarified that Article 267 TFEU is to be interpreted in a manner that the jurisdiction of any national court to make an order for a preliminary reference cannot be called into

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[26] Case C-146/73, *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1974:12 ('('*Rheinmühlen-Düsseldorf II*'). Confusingly, the case lodged first was adjudicated upon later than the case lodged second.

[27] Case C-166/73, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1974:3 ('*Rheinmühlen-Düsseldorf I*'), paragraph 5.

[28] Case C-146/73, *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1974:12 ('('*Rheinmühlen-Düsseldorf II*'), paragraph 3.

[29] Ibid., paragraph 3.

[30] Francis G Jacobs and Andrew Durand, *References to the European Court: Practice and Procedure* (Butterworths 1975). p. 171.

[31] Finbarr Murphy, 'Campus Oil Ltd., Estuary Fuel Ltd., McMullan Bros. Ltd, Ola Teoranta, P.M.P.A. Oil Company Ltd., Tedcastle McCormick and Company Ltd. v. The Minister for Industry and Energy, Ireland, The Attorney General and The Irish National Petroleum Corporation Ltd. (1982–1983) J.I.S.E.L. 43; (1984) 1 C.M.L.R. 479.' (1984) 21 Common Market Law Review 741. p. 749.

[32] Bobek (n 6). p. 314.

[33] Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, ECLI:EU:C:2008:723.

question by the application of; 1) national procedural rules that permit an appellate court to vary the order for reference; 2) to set aside the reference; 3) and to order the referring court to resume the national law proceedings.[34]

The Court did not go as far as the Advocate General however, who had a bolder, more daring proposition. Advocate General Maduro noted '[t]he [t]reat[ies] did not intend that such a dialogue [between national courts and the Court] should be filtered by any other national courts, no matter what the judicial hierarchy in a State may be'.[35] He was more clearly in favour of an approach that appeals of orders for a preliminary reference by lower instance national courts could not be subject to appeal. Drawing support for this assertion, he relied approvingly upon the Supreme Court of Ireland's judgment in *Campus Oil* (analysed below).

While the *Cartesio* judgment does not compel the referring national court to withdraw or amend an original order for a preliminary reference subsequent to an appeal to a higher instance national court, the potential for an appellate procedure to delay, frustrate, and assert pressure on a lower instance national court is evident. The permissive approach by the Court in *Rheinmühlen-Düsseldorf II*, and in *Cartesio*, may, in demonstrating considerable deference to national procedural autonomy, have underestimated the potential stymying effect of such appeals, deterring the willingness of lower instance national courts to refer, and the enthusiasm of litigants to push for preliminary references.

Another point that should be borne in mind is that the *Cartesio* judgment also did not preclude higher instance national courts rules taking control of the main proceedings for itself on appeal, thereby obviating the need for any order for a preliminary reference made by a lower instance national court. This was made clear in the subsequent case of *De Nationale Loterij*,[36] in which the Court ruled that there was no need for it to reply to a preliminary reference sent to it by a lower court national court because a higher instance national court, taking the view that a preliminary reference was unnecessary, had ruled on the substance of the main proceedings, meaning there were no longer any proceedings pending. In so ruling, the Court referred to both *Rheinmühlen-Düsseldorf II* and *Cartesio* as authority for the proposition that Union law does not prohibit lower instance national court orders for references being subject to remedies normally available under national law.[37]

This judgment of the Court in *De Nationale Loterij* was particularly troubling. Unlike in the Court's *Cartesio* judgment (or *Schrems II* of the Supreme Court of Ireland, analysed below), where the referring lower instance national court retains possession of the main proceedings, and can ultimately decide whether or not to abide by the higher instance national court's judgment, the Belgian procedure in *De Nationale Loterij* dispossessed the referring lower instance national court of this discretion by taking the case from it. The potential for the creation of such appellate procedures,

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[34] Ibid., paragraph 98.

[35] Opinion of Advocate General Maduro, Case C-210/06, *Cartesio Oktató és Szolgáltató bt.*, ECLI:EU:C:2008:294, paragraph 19.

[36] Case C-525/06, *De Nationale Loterij NV v Customer Service Agency BVB*, ECLI:EU:C:2009:179.

[37] Ibid., paragraph 6.

effectively depriving lower instance national courts of their full discretion to make an order for a preliminary reference under Article 267 TFEU, should be obvious.

3. The definitively correct outcome – *Campus Oil*

Campus Oil, given its importance for the interpretation of the public security justificatory ground in Article 36 TFEU, requires no introduction to EU lawyers.[38] However, in the Member State in which the case originated, *Campus Oil* means many things, and the litigation gave rise to a number of judgments of significant importance on a variety of legal subject areas. Among this series of judgments is one that has had enduring consequences for the reception and functioning of Union law in the legal order of a Member State.

In an appeal of the order for a preliminary reference made by the High Court of Ireland, the appellate court, the Supreme Court of Ireland, ruled that such an order for a preliminary reference could not be the subject of an appeal to a higher instance national court.[39] The judgment is routinely cited, in Union law literature more generally, as support for such an assertion.[40] However, in 2019, the Supreme Court handed down judgment in *Data Protection Commissioner v Facebook Ireland Limited and Schrems*[41] (hereinafter, *Schrems II*, analysed in the next section), which, despite the Court's assertion to the contrary, appears to have significantly qualified the Supreme Court's earlier judgment in *Campus Oil*, on what are argued herein, dubious grounds, and questionable from the perspective of Union law.

In *Campus Oil*, the High Court made an order for a preliminary reference on two questions to the Court, enquiring as to the compatibility of national measures with provisions of EU primary law. The order was made before evidence and argument on the factual effects of the secondary legislation had been heard.[42] The High Court set out a limited set of facts agreed by the parties,[43] in circumstances

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[38] Case C-72/83, *Campus Oil Limited and others v Minister for Industry and Energy and others*, ECLI:EU:C:1984:256.

[39] *Campus Oil Ltd v Minister for Industry and Energy* [1984] 1 CMLR 479 (Walsh J; O'Higgins CJ and Hederman J concurring). See, Graham Butler, 'Standing the Test of Time: Reference for a Preliminary Ruling' (2017) 20 Irish Journal of European Law 103.

[40] For instance, Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (Oxford University Press 2010). p. 328. Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006). p. 525. Furthermore, at the Court, see, Opinion of Advocate General Maduro, Case C-210/06, *Cartesio Oktató és Szolgáltató bt.*, ECLI:EU:C:2008:294, paragraph 19, placing an emphasis of *Campus Oil* judgment of the Supreme Court of Ireland.

[41] *Data Protection Commissioner v Facebook Ireland Limited and Schrems* [2019] IESC 46 (Clarke CJ; O'Donnell, Dunne, Charleton, and Finlay Geoghegan JJ concurring).

[42] *Campus Oil Ltd v Minister for Industry and Energy* [1984] 1 CMLR 479 (Murphy J), at 484. See, Kamiel Mortelmans, 'Case 72/83, Campus Oil Limited and Others v. The Minister for Industry and Energy, and Others, Judgment of 10 July 1984, (1984) 3 C.M.L.R. 544.' (1984) 21 Common Market Law Review 687.

[43] As evidenced in the Opinion of Advocate General Slynn, Case C-72/83, *Campus Oil Limited and others v Minister for Industry and Energy and others*, ECLI:EU:C:1984:154, p. 2758.

where the wider range of factual circumstances were disputed.[44] However, the defendants argued before the High Court that a reference was not necessary or, alternatively, was premature, and the defendants appealed the eventual order for a preliminary reference to the Supreme Court.[45] At the time, Article 34.4.3° of the Constitution of Ireland (*Bunreacht na hÉireann*) provided, subject to exceptions prescribed by law, that 'all decisions of the High Court' could to be appealed to the Supreme Court.[46]

The Supreme Court (Walsh J, with O'Higgins CJ and Hederman J concurring) dismissed the appeal, holding that that the Supreme Court had no jurisdiction to entertain an appeal against the exercise by a lower court of its discretion to make an order for a preliminary reference. One of the more curious aspects of the Supreme Court's concise judgment is its cursory treatment of existing case law on the point from the Court, in particular *Rheinmühlen-Düsseldorf II*,[47] in which the Court had ruled that appeals against national court determinations to refer were not contrary to Union law, if permitted by national procedural rules. Although the Supreme Court acknowledged this jurisprudence in the penultimate paragraph of its judgment, stating that it was 'of interest in showing the views of the Court itself in examining the question as a question of [Union] law',[48] it did not rely upon the case law of the Court, since the matter was one of national law.

This statement was based on the premise that upon the Member State's accession to the Union, the EU treaties itself became part of domestic law. Reasoning as a matter of national law as to why a lower instance national court's order for a preliminary reference could not be the subject of an appeal, the Supreme Court pointed to the fact that the power conferred upon a national judge by Article 267 TFEU was 'without any qualification, express or implied, to the effect that it is capable of being

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[44] In the contemporary context, Article 94 of the Rules of Procedure of the Court requires a referring court to provide, in addition to the questions referred, 'a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based.'

[45] *Campus Oil* was Murphy J's only ever preliminary reference as a member of the High Court. Elaine Fahey, 'An Analysis of Trends and Patterns in the Irish Courts of Practice and Procedure in 30 Years of Article 234 Preliminary References' (2004) 11 Irish Journal of European Law 408. p. 443.

[46] This state of affairs changed as a result of the thirty-third amendment to the Constitution in 2013. It is now the Court of Appeal, established by the same amendment, which, subject to exceptions provided by law, has appellate jurisdiction from all High Court decisions (Article 34.4.1°). The Supreme Court is now the Court of Final Appeal, which can hear appeals from the Court of Appeal if the Supreme Court is satisfied the decision involves a matter of general public importance, or in the interests of justice it is necessary that there be an appeal (Article 34.5.3°). The Supreme Court may also, subject to regulations prescribed by law, hear appeals directly from the High Court "if the Supreme Court is satisfied exceptional circumstances warranting a direct appeal to it, and a precondition for the supreme court being so satisfied is the presence of either or both of the following factors: i the decision involves a matter of general public importance; ii the interests of justice." (Article 34.5.4°) See, Graham Butler, 'The Road to a Court of Appeal—Part I: History and Constitutional Amendment' 33 Irish Law Times 208; and, Graham Butler, 'The Road to a Court of Appeal—Part II: Distinguishing Features and Establishment' 33 Irish Law Times 222.

[47] Case C-166/73, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1974:3 ('*Rheinmühlen-Düsseldorf I*').

[48] *Campus Oil Ltd v Minister for Industry and Energy* [1984] 1 CMLR 479 (Walsh J; O'Higgins CJ and Hederman J concurring), at 487-488.

overruled by any other national court'.[49] The Supreme Court continued, '[t]he national judge has an untrammelled discretion as to whether he will or will not refer questions for a preliminary ruling under Article [267 TFEU] and in doing so he is not in any way subject to the parties or to any other judicial authority'.[50] Elaborating on this conclusion, the Supreme Court observed that the purpose of Article 267 TFEU was 'to enable the national judge to have direct and unimpeded access to the only Court which has jurisdiction to furnish him with [interpretation of Union law]'.[51] Fettering that right by making it subject to review on appeal would, according to the Supreme Court, 'be contrary to both the spirit and the letter of Article [267 TFEU]'.[52]

The Supreme Court also considered the argument advanced by the appellants that an appeal lay against the High Court's order for a preliminary reference by virtue of Article 34.4.3° of *Bunreacht na hÉireann*, which as mentioned previously, provided, subject to exceptions provided for by law, that all 'decisions' of the High Court could be appealed to the Supreme Court. The Supreme Court took the view, however, that the order made by the High Court did not constitute a 'decision' within the meaning of Article 34 of *Bunreacht na hÉireann*, since the High Court judge had not made any order having any legal effect on the parties, as he had not applied EU primary law to the case. Once that had been done, the Supreme Court reasoned, a 'decision' would have been made, which would be amenable to appeal.[53]

What must be emphasized at this juncture, however, and this point will be relevant in the assessment of the Supreme Court's judgment in *Schrems II* below, is that the Supreme Court's views on the defendants' argument on Article 34 of *Bunreacht na hÉireann* were *obiter*. In other words, the Supreme Court's observations on this point did not form part of the *ratio decidendi* of the judgment, that portion which, under the common law doctrine of *stare decisis*, is of binding precedential value in subsequent cases. The *ratio* of the judgment, rather, rested on the literal and purposive interpretation of Article 267 TFEU. This much is made by clear by the Supreme Court, which clearly stated that even if the order for a preliminary reference were a 'decision' within the meaning of Article 34 of *Bunreacht na h'Éireann*, the Court would rule that pursuant to Article 29.4.3° of *Bunreacht na h'Éireann*, the right of appeal would have to 'yield to the primacy of Article [267 TFEU]…'[54]

Several matters are worthy of further analysis. The Supreme Court's assertion that the matter was purely a question of national law is not inconsistent with the Court's ruling in *Rheinmühlen-Düsseldorf II,* which had made the question essentially one of national procedural law. It is, however, noteworthy that the Supreme Court did not acknowledge the jurisprudence of the Court as the source of its latitude to regard the question as one of national law. Instead, the Supreme Court adopted its own understanding of the meaning of the EU treaties in the specific context of national law. In doing

[49] Ibid., 486.
[50] Ibid., 486-487.
[51] Ibid., 487.
[52] Ibid., 487.
[53] Ibid., 487.
[54] *Campus Oil Ltd v Minister for Industry and Energy* [1984] 1 CMLR 479 (Walsh J; O'Higgins CJ and Hederman J concurring), at 487.

so, the Supreme Court adopted an interpretation, relying upon its own literal and purposive assessment, and one that is, as has been pointed out elsewhere, further reaching and more *communautaire* than that adopted by the Court itself.[55] While the Court has had a permissive approach, and one which was respectful of national procedural autonomy, the Supreme Court interpreted Article 267 TFEU as providing the national judge with an 'untrammelled discretion' as to whether to refer.[56]

Moreover, while the Supreme Court's interpretation of Article 267 TFEU was provided in a national context only, it is difficult to imagine why that interpretation would change in any other jurisdiction that, like the Member State in this case, had no pre-existing specific procedural rules on the question, given the absolute manner in which the interpretation is expressed. It is arguable, therefore, that while the Supreme Court accepted the doctrine of primacy of Union law *per se*, it is, at least indirectly, questioned the position of the Court as ultimate interpreter of the EU treaties in a national context. However, it is not evident that the Supreme Court was doing so consciously, or would accept this perception of its judgment, as it also acknowledged that the Court is the sole judicial actor with the jurisdiction to furnish rulings to national courts on interpretations of Union law.[57]

Notwithstanding these arguable logical inconsistencies in the judgment, *Campus Oil* represented a robust defence of the functioning of the preliminary reference procedure and a strong assertion of the unqualified right of lower instance national courts to make a reference to the Court – a direct line of communication that is not to be interrupted by a higher instance national court. It was this precedent with which the appellant in *Schrems II* contended, and it is to that case that this article now turns.

4. The definitively incorrect outcome – *Schrems II*

The procedural background of *Schrems II* is, as the Supreme Court itself pointed out, rather unusual. As the Supreme Court alluded to at the commencement of its judgment,[58] the proceedings constitute the latest episode in the continuing controversy concerning the transfer of data from the EU to third countries, with a privacy advocate and an American multinational company again finding themselves pitched against one another in a complex legal dispute. In the proceedings brought before the High Court, the Data Protection Commissioner (DPC) sought a single, declaratory relief: an Article 267 TFEU reference to the Court to question the validity of the aforementioned legal instruments.

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[55] Diarmuid Rossa Phelan and Anthony Whelan, 'National Constitutional Law and European Integration: FIDE Report' (1997) 6 Irish Journal of European Law 24. p. 37.

[56] *Campus Oil Ltd v Minister for Industry and Energy* [1984] 1 CMLR 479 (Walsh J; O'Higgins CJ and Hederman J concurring), at 487.

[57] Ibid., 487.

[58] *Data Protection Commissioner v Facebook Ireland Limited and Schrems* [2019] IESC 46 (Clarke CJ; O'Donnell, Dunne, Charleton, and Finlay Geoghegan JJ concurring), paras 1.1-1.7.

The nature of the proceedings, taken in isolation, might cause one to question whether a preliminary reference in these proceedings would be admissible before a national court. The text of Article 267 TFEU requires that a preliminary reference be necessary to enable the referring court to give judgment. In the proceedings before the High Court, the court was not confronted with a dispute in which it would be required to give judgment once the preliminary ruling was rendered. Two contestable assumptions, which are not the focus of this article, underpinned the proceedings. Firstly, the applicant, a public body, the DPC is not able to make an order for a preliminary reference itself; and secondly, that the ruling of the Court prior to the *Schrems* cases, to the extent that it requires Member States to ensure that data protection bodies (are enabled refer any doubts as to the validity of EU measures to the Court), overrides any concern about the admissibility of cases commenced solely for the purpose of obtaining a preliminary reference.

Despite opposition from the American multinational, the High Court made an order for a preliminary reference on eleven questions.[59] Facebook sought leave to appeal the order for a preliminary reference to the Supreme Court, despite concerns as to whether a lower instance national court decision to make an order for a preliminary reference could be appealed. The Supreme Court granted leave to appeal.[60] The appeal focussed on two sets of issues: first, whether a decision of a lower instance national court to make an order for a preliminary reference could, as a matter of national constitutional law, and Union law, be the subject matter of an appeal, and, if so, what the scope of such an appeal might be. Secondly, proceeding on the assumption that some form of appeal of the High Court's order for a preliminary reference was permissible, Facebook argued that the High Court had erred in its determination of the relevant U.S. law.

The Supreme Court commenced by noting that Court's jurisprudence in *Cartesio* and *Pohotovost* precludes an appellate court from 'interfer[ing] with the sole competence of the referring court to decide whether to maintain, withdraw or amend a reference already made'.[61] However, the Supreme Court moved in the next breath to conclude that in a case such as that at bar, the Supreme Court could in accordance with ordinary principles of national law, 'overturn findings of fact by the trial judge'.[62]

Turning to *Campus Oil*, the Supreme Court distinguished that case from the present one, pointing to the fact that the High Court in *Campus Oil* had not made any finding as to the facts or national law; and that this could be distinguished from the present *Schrems II* case, where the High

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[59] *Data Protection Commissioner v Facebook Ireland Limited and Schrems* [2017] IEHC 545 (Costello J).

[60] *Data Protection Commissioner v Facebook Ireland Limited and Schrems* [2018] IESC 38 (Clarke CJ; O'Donnell, Dunne, Charleton, and Finlay Geoghegan JJ concurring). See, Elaine Fahey, 'The Supreme Court Preliminary Reference in DPA v Facebook And Schrems: Putting National And European Judicial Independence At Risk?' (2019) 1 Irish Supreme Court Review 125.

[61] *Data Protection Commissioner v Facebook Ireland Limited and Schrems* [2019] IESC 46 (Clarke CJ; O'Donnell, Dunne, Charleton, and Finlay Geoghegan JJ concurring), para. 6.2.

[62] Ibid., para. 6.2.

Court had made a number of factual findings. Accordingly, the judgment of the High Court in *Schrems II* constituted a 'decision' in the context of Irish constitutional law, capable of appeal.[63]

The Supreme Court then created a further important distinction: between the order for a preliminary reference (defined narrowly by the Supreme Court as the questions being referred) on one hand; and any findings of fact and national law necessary to underpin the order for a preliminary reference on the other, with only the latter, having regard to *Campus Oil* of its own court, and *Cartesio* of the Court, being capable of being the subject of an appeal.[64]

Drawing upon the Court's case law on admissibility of references, the Supreme Court further stated that for a referring court to determine if a preliminary reference is necessary, it will have to at least consider matters of fact and/or national law, and in some cases, might even be necessary to deliver a preliminary judgment making a final determination on those matters. However, the Supreme Court was also keen to emphasize that an appellate court's jurisdiction to entertain factual or national law findings in a reference should not be exercised in the vast majority of cases. In particular, the Supreme Court highlighted 'the interests of justice and the proper use of judicial resources' as militating against such appeals in circumstances where, in the vast majority of cases, an aggrieved party could appeal the final determination of the lower court after the ruling had returned from the Court. The Supreme Court recognized that the result of such an appeal might mean that the fully resolved reference might turn out to have been unnecessary.[65]

The Supreme Court asserted that there were 'exceptional factors' at play which would justify allowing an appeal of the High Court's factual findings. The Supreme Court pointed to the *sui generis* nature of the proceedings, which had arisen because of the obligation imposed on Member States by the Court in a prior *Schrems* case, which required the referring national court to determine the facts and decide whether it shared the DPC's concerns. The Supreme Court added that while in most cases an appeal would be possible after the conclusion of the main proceedings before the referring court, that was not possible in the immediate case, where the sole relief sought was an order for a preliminary reference. For the Supreme Court to refuse the appeal in such circumstances would, according to its judgment, amount to abdication of its constitution role to review lower instance national courts' findings of fact.[66]

Having determined that there was no impediment in national law to the Supreme Court reviewing the factual findings of a lower court underpinning a reference, the Court then proceeded to consider whether Union law placed any limitations on this jurisdiction. Although maintaining that the *Cartesio* jurisprudence precluded an appeal of a lower instance national court's terms of the question themselves, the Supreme Court added that there was equally nothing in the Court's case law that prohibited an appeal against a finding of fact or national law underpinning an order for a preliminary reference, if permitted in law national law or procedure. The Supreme Court referred to the Court's

[63] Ibid., paras 6.3-6.4.
[64] Ibid., para. 6.5.
[65] Ibid., paras 6.6-6.10.
[66] Ibid., paras 6.13-6.14.

judgment in *Pohotovost* in which the Court had indicated that it was for a referring national court, when considering the judgment in an appeal against its decision to refer, to come to its own conclusion about whether it would be 'appropriate to maintain the reference…or to amend it or withdraw it'.[67]

Having concluded that it had the jurisdiction to entertain an appeal of the High Court judgment containing the order for a preliminary reference, albeit limited to consideration of the lower instance national court's factual findings, the Supreme Court reject Facebook's arguments that the High Court had erred, and dismissed the appeal.

5. Eleven issues with *Schrems II*

There are a number of problems with the Supreme Court's *Schrems II* judgment. The reasoning utilized by the Supreme Court to justify its conclusions is subtle, but constitutes a significant shift away from *Campus Oil*, which is problematic for a number of reasons. Despite being at pains to emphasize in its judgment that it was not doing so, the Supreme Court effectively, if not formally, overturned aspects of its earlier judgment in *Campus Oil* on its principle premise of it not being possible to appeal orders for a preliminary reference by lower instance national courts. Even if one were to categorise this foregoing observation as bombastic, the Supreme Court has at the very least seriously qualified the prohibition against appeals. It is thus contented that there are eleven identifiable issues with the judgment. It is suggested further below that these problems are a direct consequence of the permissive approach adopted by the Court in its case law on appeals against orders for preliminary references.

Firstly, the use of *Cartesio* by the Supreme Court in *Schrems II* as permission for higher instance national courts to maintain or carve out *de jure* or *de facto* jurisdictions is concerning. In effect, *Schrems II* opens up the potential for appellate courts to pass judgment on matters related to lower instances national court's orders for preliminary references. The Supreme Court in *Schrems II* over-relied on *Cartesio*, without looking at the entirety of the case law of the Court, and the spirit of why Article 267 TFEU is framed the way that it is. Article 267 TFEU requires faithful interpretation, and it is regretful the Supreme Court in *Schrems II* did follow such a reading. The judgment is incompatible with the true spirit and intent of the preliminary reference procedure, in that lower instance national courts are to be completely unfettered in their discretion to make an order for a preliminary reference, regardless of any findings of facts they may make.

Secondly, much of the Supreme Court's reasoning rested on an artificial distinction: namely, between (1) the decision to refer and the wording of the order for a preliminary reference, which cannot be the subject of an appeal, and (2) any factual or relevant national law findings underpinning the decision to refer and the order for a preliminary reference itself. This distinction is artificial, because the exercise by a higher instance national court of a lower instance national court's factual findings or determinations of national law may involve passing judgment, albeit indirectly, on the necessity of a preliminary reference or on the wording of the questions referred.

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[67] Ibid., paras. 6.16-6.18.

Therefore, while the lower instance national court may retain the discretion to maintain the preliminary reference and the wording of the questions, meaning the Supreme Court's judgment is, *stricto sensu*, consistent with the *Cartesio* judgment, it should be evident that the higher instance national court's collapsing of the factual nexus underpinning the order for a preliminary reference places a very significant *de facto* pressure on a lower instance national court to withdraw or amend the questions. Moreover, and this is effectively admitted by the Supreme Court itself, the distinction has no significance in Union law, since a preliminary reference remains pending in its entirety unless withdrawn or amended by the referring national court.

Thirdly, the Supreme Court's judgment relied on a misreading of its prior judgment in *Campus Oil*. Building on the foregoing distinction between the decision to refer, the order for a preliminary reference, and the factual findings underpinning the reference, the Supreme Court, without acknowledging that it is doing so, relied heavily on *obiter dicta* in *Campus Oil* to argue that factual findings underpinning a preliminary reference constitute a 'decision' for the purposes of Article 34 of the Constitution. In doing so, however, the Supreme Court ignored the *ratio* of the *Campus Oil* judgment, which focused on the spirit and the letter of Article 267 TFEU as requiring lower instance national courts to have direct and unimpeded access to the Court. Moreover, the Supreme Court failed to note the further *obiter* comments of the Supreme Court in *Campus Oil* that even if an order for reference were a 'decision' within the meaning of the Constitution, the effective functioning of Article 267 TFEU would have primacy over national constitutional provisions. As stated succinctly elsewhere, national constitutions 'yield[] to and [are] qualified by [Article 267 TFEU]'.[68]

Fourthly, the Supreme Court's newly found jurisdiction to review factual findings underpinning an order for a preliminary reference has the potential to undermine the direct and unimpeded access of lower instance national courts to the Court. The moral or political persuasiveness of the Supreme Court's determination may mean that lower instance national courts are unlikely to persist with their own version of the facts. Indeed, the Supreme Court made it clear that its judgments on the facts will be binding as a matter of national law.[69] Moreover, in the event that lower instance national courts persists with their previously found version of the facts, the Court could be confronted with two alternative accounts of the facts, a problem, which though not beyond solution, is hardly ideal.[70] Furthermore, the possibility of any appeals process, however narrowly defined, has the

[68] Mary Finlay and Niamh Hyland, 'The Duties of Co-Operation of National Authorities and Courts and the Community Institutions under Article 10 E.C.' (2000) 9 Irish Journal of European Law 267. p. 284. Note: the former of the two authors was a sitting judge in the Supreme Court judgment in *Schrems II*, and the latter acted as one of the Senior Counsel for Facebook in *Schrems II*.

[69] *Data Protection Commissioner v Facebook Ireland Limited and Schrems* [2019] IESC 46 (Clarke CJ; O'Donnell, Dunne, Charleton, and Finlay Geoghegan JJ concurring), para. 6.17.

[70] As a general rule, resulting from the division of competences between the referring court and the Court of Justice, the latter has no role in fact finding and must accept the version of the facts provided in the order for reference: Case C-140/09, *Fallimento Traghetti del Mediterraneo*, ECLI:EU:C:2010:335 (see, Bertrand Wägenbaur, *Court of Justice of the European Union: Commentary on Statute and Rules of Procedure* (Nomos, 2012). p. 68); Case C-232/09 *Danosa*, ECLI:EU:C:2010:674; Case C-310/09 *Accor*, ECLI:EU:C:2011:581 (see Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Oxford University Press, 2014). p. 233, fn. 92). The Court of Justice has also acknowledged this limitation on its own jurisdiction in preliminary references at Point 7 of its *Recommendations to national courts and*

potential to be used by litigants, to slow litigation. The utility of the preliminary reference procedure depends in large part on timeliness, and any interruption to the line of communication between national courts of any instance and the Court may render the preliminary reference procedure less attractive to lower instance national courts.[71]

Fifthly, unlike in the judgment in *Campus Oil*, the Supreme Court in *Schrems II* paid relatively little attention to the effective functioning of Article 267 TFEU. Rather, in determining whether the Supreme Court should exercise the jurisdiction to rule on underlying facts, the Supreme Court focused on factors that are related purely to the effective functioning of national court procedures ('the interests of justice and the proper use of judicial resources'[72]). In doing so, the Supreme Court, as stated above, ignored the *ratio* of the *Campus Oil* judgment, which related exclusively to the functioning of the preliminary reference procedure. When the Supreme Court did rely on Court jurisprudence (*Cartesio* and *Prohotovost*), it utilised them to support the general proposition that a higher instance national court cannot disturb the lower court's decision to refer or the wording of the questions in the order for a preliminary reference. That case law was thus used to permit the Supreme Court's assertion of appellate jurisdiction over underlying factual determinations. There was, thus, inadequate consideration by the Supreme Court of the impact of disrupting the line of communication between lower instance national courts and the Court, which was the basis of the *Campus Oil* judgment. Moreover, it is unfortunate that the Supreme Court did not engage further with the case law of the Court, as no reference was made to historical jurisprudence in this area.

Sixthly, given that the Supreme Court's judgment did entail an interference with the direct and unimpeded access of a referring lower instance national court to the Court, the Supreme Court failed to make a compelling case as to why the Court needed to exercise this jurisdiction in any situation. It failed to make a clear case for why such an appeal was necessary, especially given their potential disruptive effect. This is a marked error on part of the Supreme Court. Although it emphasised the jurisdiction could only be exercised in 'exceptional circumstances',[73] if it is the situation that lower instance national courts, as a matter of Union law, may ignore the Supreme

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tribunals in relation to the initiation of preliminary ruling proceedings (2012/C 338/01). It is exceedingly rare for the Court of Justice to depart from the facts stated in the order for reference, though Broberg and Fenger have identified four categories of cases where this has occurred, none of which would appear to apply in a case where a national appellate court's appraisal of the facts is different to that on an order for reference from a lower court (Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (Oxford University Press, 2014). p. 365. Article 101 of the Rules of Procedure of the Court of Justice also allows the Court to request clarification from the referring court.

[71] Koen Lenaerts, 'The Unity of European Law and the Overload of the ECJ: The System of Preliminary Rulings Revisited' in Ingolf Pernice, Juliane Kokott and Cheryl Saunders (eds), *The Future of the European Judicial System in a Comparative Perspective* (Nomos 2006). p. 211. See, Hjalte Rasmussen, 'Remedying the Crumbling EC Judicial System' (2000) 37 Common Market Law Review 1071.

[72] *Data Protection Commissioner v Facebook Ireland Limited and Schrems* [2019] IESC 46 (Clarke CJ; O'Donnell, Dunne, Charleton, and Finlay Geoghegan JJ concurring), para. 6.10.

[73] *Data Protection Commissioner v Facebook Ireland Limited and Schrems* [2019] IESC 46 (Clarke CJ; O'Donnell, Dunne, Charleton, and Finlay Geoghegan JJ concurring), para. 6.13.

Court's findings, it has to be questioned whether the appeals procedure, however narrow, is worth the interference in the dialogue between lower instance national courts and the Court.

The Supreme Court suggested that the benefit of being able to pass judgment on the findings of underlying fact by a lower instance national court, that it is less likely that the Court will be confronted with false information that may infect an eventual judgment. However, this ignores the fact that the questions in *Schrems II* relate to the validity of measures, rather than interpretation – an assessment that can more easily be carried out in a vacuum. It also ignored the fact that the parties can offer their own interpretation of the facts or national law in their pleadings before the Court in both written and oral form. Moreover, the Supreme Court neglected to fully consider the fact that the Court operates under the maxim *curia novit iura* (the court knows the law),[74] and is not fully dependent on the interpretations of national law presented by the national court.

Seventhly, it is perplexing why the Supreme Court actually chose to hear an appeal based upon the High Court judgment at all. The Supreme Court used the new leapfrog procedure to take the case for itself, rather than letting the Court of Appeal hear the case and thus apply the *Campus Oil* principle. The creation of the Court of Appeal in 2014, sitting between the High Court and the Supreme Court, allowed the Supreme Court to select which cases it decided to hear. This is turn, has allowed the Supreme Court to be extremely selective with its newfound docket control powers, allowing it to be more forceful in older lines of domestic jurisprudence that it wishes to amended, or overturn.[75] With the Supreme Court now able to control which cases it hears, *Campus Oil* appears to be a victim in this quest. The Supreme Court did not provide an affirmative reason for the importance of interfering with *Campus Oil*.

Eighthly, the Supreme Court also placed significant reliance on the *sui generis* nature of the proceedings in the case before it; specifically, the fact that the final determination would be taken by the Court, with the High Court having no further role in the proceedings. As such, the Supreme Court reasoned that there would, unlike in other cases where the referring court must apply the Court's judgment to determine the proceedings before it, be no opportunity for appeal to the Supreme Court.

Ninthly, it is noteworthy that the Supreme Court, in carving out the exception in the case before it, did not limit the scope of its appellate jurisdiction to just this situation. The judgment left open the possibility of there being other unspecified 'exceptional circumstances' that might warrant allowing an appeal of a referring court's factual findings. The Supreme Court did not satisfyingly close the issue, and thus left the issue open for it to revisit the issue again, should a given set of circumstances arise. For example, if the Supreme Court had upheld the appeal in relation to a finding of fact by the High Court, what obligation, if any, arises subsequently on the High Court judge who has made the order for reference?

Tenthly, the utility of the Supreme Court's appellate jurisdiction from an institutional self-interest perspective must be questioned. It can be argued that it served to heighten the risk of higher

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[74] David AO Edward, 'How the Court of Justice Works' (1995) 20 European Law Review 539. p. 545.

[75] Butler (n 46).

instance national courts authority being undermined by lower instance national courts ignoring it, as they are permitted to do as a matter of Union law. This dynamic was quite possibly at play in the United Kingdom (UK) in *Wightman*,[76] where it may have been foolhardy for the UK Supreme Court to block the order for a preliminary reference made by the Scottish Court,[77] lest its finding be ignored.

Eleventh, and lastly, it was perfectly possible for other judges other than the one delivering the judgment to elaborate more on the Supreme Court's thinking, or to take a more rounded view of the Court's interpretation of Union law and the applicable jurisdiction. Instead, there was one judgment from one member of the Supreme Court, with the four other sitting members of the Supreme Court concurring. None of them elaborated further in a concurrence (or dissent), and this is regrettable.

Cumulatively therefore, what becomes apparent from the entire *Schrems II* case was an undoubtable judicial mishap, which the Supreme Court may have only realised after it granted the defendant leave to appeal before it. Only with the eventual judgment in which the Supreme Court delivered, did it then begin to see the limitations imposed upon it.

6. Extending *Cartesio* to protect lower instance national courts

Whilst *Cartesio* is the lead case from the point of view of Union law regarding appeals of orders for reference, it is not a definitive framework. As the Supreme Court in *Schrems II* noted, 'there may…be questions as to the precise extent'[78] of the *Cartesio* judgment. This point has also been made elsewhere.[79] There are undoubtedly blind spots in the preliminary reference procedure,[80] including hasty referrals and non-referrals, but these can in many cases be beyond what the Court itself can do much about within its remit. By contrast, the Court has much power to rectify issues regarding appeals of orders for a preliminary reference – by prohibiting such higher instance national court behaviour.

Article 267 TFEU is expressed as conferring discretion on lower instance national courts as to whether to refer or not (subject to some minimal controls by the Court), and national procedural rules or practices cannot stand in the way of this discretion. The Court, if presented with an opportunity, should make this abundantly clear to all national courts, to tame any potential mischief. A consequentialist reading of how Union law will end up, if this matter is not dealt with, has already been pondering in judicial proceedings. As put by Advocate General Maduro regarding orders for preliminary references being fettered or filtered, he noted that 'it could happen that, by virtue of a

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[76] *Secretary of State for Exiting the European Union (Appellant) v Wightman and others (Respondents)*, UKSC 2018/2109 (Lady Hale, Lord Reed, and Lord Hodge), 20 November 2018.

[77] That lead to, Case C-621/18, *Andy Wightman and Others v Secretary of State for Exiting the European Union*, ECLI:EU:C:2018:999.

[78] *Data Protection Commissioner v Facebook Ireland Limited and Schrems* [2018] IESC 38 (Clarke CJ; O'Donnell, Dunne, Charleton, and Finlay Geoghegan JJ concurring).

[79] See, Morten Broberg and Niels Fenger, 'Preliminary References as a Right – but for Whom? The Extent to Which Preliminary Reference Decisions Can Be Subject to Appeal' (2011) 36 European Law Review 276.

[80] See, Graham Butler and Urška Šadl, 'The Preliminaries of a Reference' (2018) 43 European Law Review 120.

national rule or practice, orders for reference by power courts would systematically become subject to appeal, giving rise to a situation in which – at least de facto – national law allowed only courts of final instance to refer questions for a preliminary ruling'.[81] More forcefully, he stated, '[i]t would be tantamount to allowing national procedural law to alter the conditions set out in Article [267 TFEU]'.[82]

This is exactly why national practices, such as those in *Schrems II* ought not to be tolerated. Whilst national courts act as the indirect means of seeking access to the Court to determine the validity of Union law, this door must be kept open, for otherwise, the Court, which has limited means for applicants to seek access to it is already rather narrow, would be curtailing this access even further. As the Supreme Court admitted in *Schrems II*, it is 'not possible to adopt a hard and fast rule as to the proper approach…the [Supreme] Court should adopt' in such circumstances.[83] The statement is an admission that higher instance national courts have next-to-no wriggle room. Union law leans heavily in favour of not allowing appeals of orders for a preliminary reference, and it is a practice in which higher instance national courts should not be engaging.

6.1. The essential work of lower instance national courts

The EU judicial architecture, encompassing national courts as one of the elementary interlocutors, affords a separation between the role of the Court, and that of national courts within national legal orders of EU Member States. *All* national courts, whatever their instance, have an unfettered and unfiltered possibility to interact with the Court through the preliminary reference procedure.[84] Ensuring that lower instance national courts can make a preliminary reference is crucial to ensuring that Union law is interpreted uniformly, and applied consistency across all Member States. This is hampered if higher instance national courts can filter preliminary references by means of their own doing. Thus, it is contented that the Court needs to revisit *Cartesio*, building upon its prior jurisprudence by more affirmatively prohibiting higher instance national courts from entertaining appeals of orders for preliminary references from lower instance national courts.

There is no room for the policing of references by higher instance national courts. Many of the most important contributions to Union law and the judgments of the Court have been cases that have been referred to it by lower instance national courts. Despite the Court having previously stated that it is 'the judicial authorities of the Member States[] which are responsible for ensuring that

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[81] Opinion of Advocate General Maduro, Case C-210/06, *Cartesio Oktató és Szolgáltató b*t, ECLI:EU:C:2008:294, paragraph 20.

[82] Opinion of Advocate General Maduro, Case C-210/06, *Cartesio Oktató és Szolgáltató b*t, ECLI:EU:C:2008:294, paragraph 20. This point of view is implicitly disagreed with in the Opinion of Advocate General Cruz Villalón, Case C-173/09, *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa*, ECLI:EU:C:2010:336, paragraphs 34-39.

[83] *Data Protection Commissioner v Facebook* [2018] IESC 38 ('*Schrems II*'), Clarke CJ.

[84] This said, the possibility does not mean it is guaranteed interaction with the Court. For the Court has criteria that must be met by a referring body under Article 267 TFEU. See, Graham Butler, 'Independence of non-judicial bodies and orders for a preliminary reference to the Court of Justice', (2020) 45 European Law Review.

[Union] law is applied and respected in the national legal system',[85] this cannot be left unsupervised. The Court also has a protective role.

It has been noted that the use by the Court of the preliminary reference procedure as a means through which the Court has engaged in the process of 'reciprocal empowerment', enhancing the effectiveness and esteem of Union law, and thereby its own power, by empowering lower national courts and litigants at the expense of higher instance national courts and governments.[86] Even if this theory is not accepted, which pits lower instance national courts against their more senior brethren; it is almost undeniable that the effectiveness of the preliminary reference procedure will depend on the freedom of lower instance national courts to refer.

6.2. The value of lower instance national courts

In *Schrems II*, the Supreme Court attempting, in effect, to filter cases referred by lower instance national courts to the Court of Justice is puzzling, for national courts of all instances in the Member State have normally been prudent with their competence to refer. There has been no overload from national courts seeking interpretation of Union law from the Court. In fact, for many years, the opposite was quite the problem – the lack of references coming from Member State's courts.[87] They had tended not to make orders for preliminary references to the Court lightly, for it temporarily resulted in the staying of a case, in a Member State not exactly known for swift judicial processes.[88]

The High Court values highly its right to make orders for preliminary references. It has acknowledged the 'principle of judicial self[-]restraint' as to whether to make a preliminary reference or not.[89] That said, it has long been practice, in accordance with the judgment of *Pigs and Bacon Commission v McCarren*,[90] that a preliminary reference must be made where it is necessary to do so. In *People Over Wind and Peter Sweetman v Coillte Teoranta* case,[91] on an order to make a preliminary reference, it was said that '[i]t would damage the uniform interpretation and application of…Union law, diminish the preliminary ruling procedure, and be a disservice to persons coming before the courts with arguments arising out of or pursuant to Union law if the High Court were to seek single-handedly to resolve disputes, in instances where the need for a preliminary reference is necessary, in the hope that such a reference might in the future be made by an appellate court (assuming that a party aggrieved by the High Court's judgment had the financial resources required to sustain the bringing of such an appeal)'.[92] At an even higher instance, the then President of the

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[85] Case C-2/88 IMM, *J. J. Zwartveld and Others*, ECLI:EU:C:1990:440, paragraph 10.
[86] Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41. p. 64.
[87] For detailed analysis of this problem, see, Elaine Fahey, *Practice and Procedure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law from the Irish Courts* (First Law 2007).
[88] See, for example, *Keaney v Ireland*, Judgment of the European Court of Human Rights of 30 April 2020, Application no. 72060/17, concurring opinion of Judge O'Leary.
[89] *Friends of the Irish Environment Ltd v. An Bord Pleanála & anor*, [2019] IEHC 80, Simons J, paragraph 11.
[90] *Pigs and Bacon Commission v. McCarren* [1978] JISEL 87, Costello J.
[91] Case C-323/17, *People Over Wind and Peter Sweetman v. Coillte Teoranta*, ECLI:EU:C:2018:244.
[92] *People over Winds and Peter Sweetman v. Coillte Teoranta* [2017] IEHC 171, Barrett J, paragraph 21.

Court of Appeal noted, 'strictly speaking, this Court also enjoys the freedom as a matter of Union law to make an Article 267 [TFEU] reference, irrespective of any views which the Supreme Court may have expressed on the point'.[93]

The Supreme Court cannot and should not exercise censorship of lower instance national courts. Lower courts in Ireland are 'entirely competent to make a reference under Art[icle] 267 TFEU; [and] there is no practice whereby [their] competence in this regard has been yielded by [them] to the appellate courts' above them.[94] This could not be more correct. The judges of the Supreme Court of today were trained, and are knowledgeable in Union law. They should know better than to facilitate pleas of counsel before them who know, just like they do, that higher instance national courts, directly or in a circumventive fashion, are trying to restrict lower instance national courts, which is contrary to Union law. Lower instance national courts deserve the trust of higher instance national courts, and it is this trust that the Court, in Union law, must defend.

6.3. The rule of law and judicial independence

Schrems II occurred in a Member State that is not seeing elements of democratic backsliding.[95] In recent times, however, the Court has taken a particular strong line of jurisprudence regarding the independence of judges in national courts in other Member States.[96] It is conceivable that higher instance national courts could abuse powers at their disposal under national procedural laws and practices to police reference from lower courts. This is no longer a trite observation in circumstances where judicial independence and the rule of law are not to be assumed as guaranteed in practice in some Member States. The Court has recognised 'the link between judicial independence—and by extension the rule of law principle—and the procedure for a preliminary ruling'.[97]

It should not escape notice that the proceedings that gave rise to the judgment in *Cartesio* originated in Hungary not long after the accession of the Central and Eastern European states. Whilst just over ten years old, it can be argued that *Cartesio* is a judgment of its time. Elsewhere, *Cartesio* has been described the judgment as 'slim authority' for the Supreme Court's decision to entertain an appeal in *Schrems II*, pointing to the fact that *Cartesio* was an 'extraordinary decision' in terms of the

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[93] *Minister for Justice and Equality v. O'Connor* [2015] IECA 227. Ryan P, paragraph 34.

[94] *People over Winds and Peter Sweetman v. Coillte Teoranta* [2017] IEHC 171, Barrett J, paragraph 19.

[95] On the rule of law in the Member State concerned, see, Paul Gallagher, 'Challenges to the Rule of Law in 21st Century Ireland' in Eoin Carolan (ed), *Judicial Power in Ireland* (Institute of Public Administration 2018). Note: the author acted as one of the Senior Counsel for Facebook in *Schrems II*.

[96] Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117 ('*Association of Portuguese Judges*'); and, Case C-619/18, *European Commission v. Republic of Poland*, ECLI:EU:C:2019:531 ('*Independence of the Supreme Court*'), amongst others. See, Butler (n 84).

[97] Koen Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue' (2019) 38 Yearbook of European Law. p. 3.

complexity of its facts,[98] and one which has been characterised as one of the 'learning precedents' from the then recently acceded Member States.[99]

Cartesio also, crucially, pre-dates the emergence of subsequent rule of law and judicial independence issues in some of these Member States. The Court in *Association of Portuguese Judges*, a seminal case of judicial independence, pointed to the long-settled requirement that referring national courts be independent.[100] In recent years, questions have arisen as to the state of the rule of law in some Member States, with governmental interference with the independence of national courts being the subject of specific focus. While Article 258 TFEU proceedings maybe an effective tool to address infringements of the rule of law and the requirement of judicial independence, as demonstrated in *Commission v Poland*,[101] the preliminary reference procedure allows lower instance national courts, whose independence may not be compromised in the same manner as higher instance national courts, to make orders for preliminary references on issues pertaining to the rule of law, is also a mechanism of significant potential.[102]

There is a pending preliminary reference before the Court from a Hungarian court where, it is assumed, the issue of *Cartesio* will arise once more.[103] The Hungarian Supreme Court (*Kúria*) in September 2019 ruled that the lower instance national court's order for a preliminary reference relating to judicial independence in Hungary was unlawful. While *Cartesio* does not preclude a lower instance national court from persisting with the preliminary reference, pressure is brought to bear by the *Kúria*'s judgment that might operate as chilling effect on lower instance national court's willingness to refer in the future. It is doubtful that the Court in *Cartesio* foresaw such developments. The permissive approach taken by the Court heretofore, which has emphasised national procedural autonomy, must, it is respectfully submitted, be revisited in order to safeguard the functioning of the EU legal order.

7. Conclusion

There is no reason for the Court to be shy in extending its *Cartesio* judgment to prohibiting appeals of orders for preliminary references, for it has doled out sharp rebukes and limitations on

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[98] Fahey, 'The Supreme Court Preliminary Reference in DPA v Facebook And Schrems: Putting National And European Judicial Independence At Risk?' (n 60). p. 135.

[99] ibid. p. 135, citing Bobek (n 6).

[100] Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117 ('*Association of Portuguese Judges*'), paragraph 43. This notion of independence also applies to the question of admissibility of questions from referring tribunals under Article 267 TFEU. Case C-274/14, *Proceedings brought by Banco de Santander SA*, ECLI:EU:C:2020:17. In particular, see the discussion in the Opinion of Advocate General Hogan, Case C-274/14, *Proceedings brought by Banco de Santander SA*, ECLI:EU:C:2019:802. See, Butler (n 84).

[101] Case C-619/18, *European Commission v. Republic of Poland*, ECLI:EU:C:2019:531 ('*Independence of the Supreme Court*').

[102] See, Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue' (n 97).

[103] Case C-564/19, *IS*, lodged by the *Pesti Központi Kerületi Bíróság* (Central District Court, Pest) in Hungary at the Court on 24 July 2019.

national courts abilities before.[104] The time has come for the Court to take a more assertive approach than it did in *Cartesio*. The Court, elsewhere, has strongly defended the right of lower instance national courts to engage in judicial dialogue with the Court. It now needs to take its level of protection of lower instance national courts to another level.

As President Lenaerts has stated, 'limiting the autonomous jurisdiction of lower courts under [Article 267 TFEU] would be contrary to the reallocation of powers sought by the founding Treaties and the EU *acquis*'.[105] Therefore, the Supreme Court judgment in *Schrems II* serves as a timely reminder of the latitude afforded by the Court in its case law to higher instance national courts to develop and maintain powers of review over lower instance national courts' orders for preliminary references. While *Schrems II* has, as argued above, the potential to interfere with the functioning of the preliminary reference procedure, a procedure of fundamental importance to the effectiveness and uniformity of Union law, it is undeniable that it is, *stricto sensu*, for now, consistent with the jurisprudence of the Court. Arguably, the Supreme Court in *Schrems II* should have made an order for a preliminary reference to the Court on this point itself to determine its actual reviewing power, and how its proposed answer to the questions put to it on appeal were in compliance with *Cartesio* and Article 267 TFEU more generally. Regrettably, the Supreme Court did not do so.

The Supreme Court in *Campus Oil* ruled that appeals of orders to make a preliminary reference are 'contrary to both the spirit and letter of Article [267 TFEU]'.[106] The Court is now invited to follow this, and to fine-tune its doctrine on this matter, before questionable practices at national courts become more widespread. Advocate General Warner in *Rheinmühlen Düsseldorf I* back in 1973 got it most correct,[107] in that failing to prohibit higher instance national courts from interfering in dialogue between the Court and lower instance national courts is tantamount to enabling and seeing 'each Member State…free to qualify Article [267 TFEU]…in any way that it considers reasonable — free, in other words, to write its own chosen provisos into Article [267 TFEU]'.[108]

This is never going to be a question of legislative harmonisation or approximation of prohibiting appeals of orders for preliminary reference; the Court must take the lead here, when it is asked. In time, should other national courts in many Member States get hints of what occurred in *Schrems II*, the Commission should make active use of its infringement proceedings powers under

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[104] For example, Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452, that national court cannot invalidate Union law; and, Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, ECLI:EU:C:1990:257, that national courts shall grant interim measures, notwithstanding national law.

[105] Lenaerts, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness' (n 7). p. 37.

[106] *Campus Oil Ltd v Minister for Industry and Energy* [1984] 1 CMLR 479 (Walsh J; O'Higgins CJ and Hederman J concurring).

[107] Opinion of Advocate General Warner, Case C-166/73, *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1973:162 ('*Rheinmühlen-Düsseldorf I*'). In fact, this Opinion was strongly supported and endorsed by the Advocate General in the *Cartesio* case. Opinion of Advocate General Maduro, Case C-210/06, *Cartesio Oktató és Szolgáltató b*t, ECLI:EU:C:2008:294, paragraph 17.

[108] Opinion of Advocate General Warner, Case C-166/73, *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1973:162 ('*Rheinmühlen-Düsseldorf I*'), p. 43.