

# STATE LIABILITY FOR THE INFRINGEMENT OF THE OBLIGATION TO REFER FOR A PRELIMINARY RULING UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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**Abstract.** *The article deals with the question whether a state might be held liable for the infringement of the European Convention on Human Rights if its national court of last instance fails to implement the obligation to make a reference for a preliminary ruling to the Court of Justice of the European Union under the conditions laid down in Article 267 of the Treaty on the Functioning of the European Union and developed in the case-law of the Court. Relying on well-established practice that an arbitrary decision not to refer a question for a preliminary ruling theoretically could infringe the right to a fair trial, the author analyses the practical application of the “arbitrariness rule” and discusses whether the European Court of Human Rights has established any specific criteria that national courts are required to bring into play in order to substantiate the decision not to refer.*

**Keywords:** *European Union law, preliminary ruling, state liability, national courts, European Convention on Human Rights, right to a fair trial.*

## Introduction

The preliminary ruling procedure provided for in Article 267 of the Treaty on the Functioning of the European Union (hereinafter TFEU) is an instrument of cooperation between the Court of Justice of the European Union (hereinafter CJEU) and national courts by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give a judgment in cases upon which they are called to adjudicate<sup>1</sup>. The procedure is established with a view of ensuring the proper application and uniform interpretation of EU law in all the Member States, between national courts, in their capacity as courts responsible for the application of EU law, and the CJEU<sup>2</sup>.

Although Article 267 TFEU clearly specifies that national courts which act as a final resort, against whose decisions there is no judicial remedy, are obliged to exercise the reference for a preliminary ruling, in its practice the CJEU developed the exceptions to the obligation. In the well-known *Cilfit* judgment and many cases that followed it the CJEU stated that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the CJEU, unless it has established that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court (*acte éclairé*) or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (*acte clair*)<sup>3</sup>. The settled case-law also indicates that national courts and tribunals remain, in any event, entirely at liberty to bring a matter before the CJEU if they consider it appropriate to do so<sup>4</sup>.

It has been argued by some commentators that the exceptions formulated in *Cilfit* judgment creates a lacuna in judicial protection by providing circumstances where individuals will not have access to the CJEU<sup>5</sup>. D. Chalmers and other scholars mention that the practice of many senior national courts is irregular and share the opinion that *Cilfit* grants national courts some leeway for decision-making in a highly distorted manner<sup>6</sup>.

The ruling in the case of the Austrian Professor Mr. Gerhard Köbler<sup>7</sup> opened the floor for widespread discussions if a state could be held liable under EU, national and/or international law when a national court of last resort infringed EU law by refusing

1 Case C-500/04, *Proxxon* [2006] ECR I-1545, para. 17.

2 Case 107/76, *Hoffmann-La Roche* [1977] ECR 957, para. 5; Case 283/81, *Cilfit and Others* [1982] ECR 3415, para. 7; Case C-337/95, *Parfums Christian Dior* [1997] ECR I-6013, para. 25; Case C-393/98, *Gomes Valente* [2001] ECR I-1327, para. 17; Case C-99/00, *Lyckeskog* [2002] ECR I-4839, para. 14; Case C-495/03, *Intermodal Transport* [2005] ECR I-8151, para. 38.

3 Case 283/81, *Cilfit and Others* [1982] ECR 3415, para. 21.

4 *Ibid.*, para. 15; Case C-260/07, *Pedro IV Servicios* [2009] ECR I-2437, para. 31; Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09, *Boxus* [2011] ECR 2011, para. 32.

5 Arnulf, A. Reflections on Judicial Attitudes at the European Court. *ICLQ*. 1985, 34: 168, 172. Cited by: Chalmers, D.; Davies, G.; Monti, G. *European Union Law: Cases and Materials*. Cambridge: Cambridge University Press, 2010, p. 177.

6 Chalmers, D.; Davies, G.; Monti, G., *supra* note 5, p. 177.

7 Case C-224/01, *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239.

to refer a case under Article 267 TFEU<sup>8</sup>. The question of the legal consequences under EU law was thoroughly analysed by the author in the article “The legal consequences for disregarding the obligation to make a reference for a preliminary ruling to the Court of Justice”. The author came to the conclusion that taking into account the criteria of a sufficiently serious breach formulated in *Köbler* case, the infringement of the obligation to make a reference for a preliminary ruling is one of the most important criteria in assessing whether a state has to pay damages for the loss suffered by an individual, but the infringement itself is not sufficient to make a state liable<sup>9</sup>.

This conclusion does not imply that other legal remedies are not available in the case of infringement of Article 267 TFEU. E.g. in his opinion in *Köbler* case, Advocate General M.P. Léger argued that the breach of Article 267 TFEU may give rise to liability of a state for infringement of the European Convention on Human Rights (hereinafter ECHR) but did not analyse thoroughly the conditions of such liability, limiting himself solely to mentioning of several examples<sup>10</sup>. The issue did not receive enough attention from scholars either. Most of the scholars were dealing with the question of the possible consequences of non-referral under EU law, simply mentioning the existing practice of the European Court of Human Rights (hereinafter ECtHR) without deeper analysis<sup>11</sup>.

Therefore, this article focuses on the possible consequences under the ECHR of a refusal by a domestic court to refer a question for a preliminary ruling to the CJEU, specifically the analysis of the decisions on admissibility adopted by the ECtHR. This article is the second article from the cycle of the articles on the legal consequences of disregarding the obligation to make a reference for a preliminary ruling to the CJEU under EU, international and national law and aims to analyse whether a state might be held liable for the infringement of the ECHR if a national court of last instance fails to implement the obligation to make a reference for a preliminary ruling to the CJEU under the conditions set out in Article 267 TFEU and formulated in the case-law of the Court.

## 1. Non-Referral for a Preliminary Ruling as an Infringement of the Right to a Fair Trial

The analysis of interaction between international and EU law has already been started in 1990 by the institutions securing the correct implementation of the ECHR. Giving

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8 Opinion of Advocate General Léger in Case C-224/01, *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239, para. 147.

9 Valutyte, R. The Legal Consequences for Disregarding the Obligation to Make A Reference for a Preliminary Ruling to the Court of Justice. *Jurisprudencija*. 2010, 3(121): 177–194.

10 Opinion of Advocate General Léger in Case C-224/01, *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239, para. 147.

11 Broberg, M.; Fenger, N. *Preliminary reference to the European Court of Justice*. Oxford: Oxford University Press, 2010, p. 271–272; Hofstotter, B. *Non-compliance of National Courts. Remedies in European Community Law and Beyond*. The Hague: T.M.C. Asser Press, 2005, p. 134; Schermers, H. G.; Waelbroeck, D. F. *Judicial protection in the European Union*. The Hague, London, New York: Kluwer Law International, 2001, p. 272; Breuer, M. State liability for judicial wrongs and Community law: the case of *Gerhard Köbler v. Austria*. *European Law Review*. 2004, 29: 243, 251.

reference to the practice of 1958<sup>12</sup>, the Human Rights Commission observed that the Convention does not prohibit a Member State from transferring powers to international organisations. Nonetheless, the Commission recalled that if a state contracted treaty obligations and subsequently concluded another international agreement which disabled it from performing its obligations under the first treaty it would be answerable for any resulting breach of its obligations under the earlier treaty and also considered that a transfer of powers does not necessarily exclude state's responsibility under the Convention with regard to the exercise of the transferred powers<sup>13</sup>.

Later the position of the Human Rights Commission was expounded by supplementing its argumentation with the legal basis and specifying that under Article 1 of the Convention a state is responsible for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international obligations. In the Commission's view, Article 1 of the Convention makes no distinction as to the type of rule or measure concerned and does not exclude any part of a state's "jurisdiction" from scrutiny under the Convention<sup>14</sup>. Thus, taking the wording of the Commission, it is clear that a state can be held liable for violations of fundamental rights guaranteed by the ECHR even when the violations are the consequence of implementation of EU law.

As to the implementation of the obligation to make a reference for a preliminary ruling under Article 267 TFEU, several aspects must be emphasised.

First of all, it is clear from the case-law of the ECtHR that the ECHR does not guarantee the absolute right to have the issue of EU law discussed before the CJEU<sup>15</sup>. In a number of cases the ECtHR reiterated that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law even when that law refers to international law or agreements. Equally, the judicial organs of the EU are better placed to interpret and apply Union's law<sup>16</sup>.

On the other hand, this does not mean that the right to have the provisions of EU law analysed before the CJEU is not protected indirectly. The Court's expression that the ECHR does not guarantee "the absolute right" can be interpreted in the way that this right is protected indirectly, by securing the rights stipulated by the Convention, i.e. the right to a fair trial laid down in Article 6(1) of the ECHR which can be infringed in the

12 No. 235/56 (dec.), 10 June 1958.

13 *United Communist Party of Turkey and Others v. Turkey*, no. 19392/92, § 29, 30 January 1998.

14 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 153, 30 June 2005.

15 *Societe Divagva s. Spain* (dec.) no. 20631/92, 12 May 1993; *André Desmots v. France* (dec.), no. 41358/98, § 2, 23 March 1999; *Schweighofer and Others v. Austria* (dec.), nos. 35673/97, 35674/97, 36082/97 and 37579/97, 24 August 1999; *Peter Moosbrugger v. Austria* (dec.), no. 44861/98, § 2, 25 January 2000; *mutatis mutandis Coëme and Others v. Belgium* (dec.), no. 32492/96, 32547/96, 33209/96 and 33210/96, § 114, 22 June 2000; *Canela Santiago v. Spain* (dec.), no. 60350/00, 4 October 2001; *Bakker v. Austria* (dec.), no. 43454/98, 13 June 2002; *Pedersen and Pedersen v. Denmark* (dec.), no. 68693/01, § 2a, 12 June 2003; *John v. Germany* (dec.), no. 15073/03, 13 February 2007; *Herma v. Austria* (dec.), no. 54193/07, § 2, 8 December 2009.

16 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 143, 30 June 2005; *Herma v. Austria* (dec.), no. 54193/07, § 2, 8 December 2009.

case of a non-referral to the CJEU. In this respect the ECtHR emphasised that its only function under Article 6 of the ECHR is to examine cases in which it is alleged that the specific procedural guarantees laid down in this provision have been disregarded in the proceedings before the national courts, or that the proceedings considered as a whole have been conducted in such a manner as to not ensure a fair hearing to the applicant<sup>17</sup>. In other words, a person can submit a claim against a state only in case where the state implementing EU law infringes the rights conferred on a person by the Convention, in this particular case the right to a fair trial.

Furthermore, although the right to a fair trial encompasses many aspects, the ECtHR so far has confined itself only to the prevention of the situation where a national court takes an arbitrary decision not to refer a question for a preliminary ruling to the CJEU. The ECtHR reiterated that there may be certain circumstances in which the refusal by a national court might infringe the principle of the fairness of judicial proceedings, as set forth in Article 6(1) of the ECHR, particularly when it appears to be arbitrary<sup>18</sup>.

For a long time there was no clear concept of an arbitrary decision not to refer question for a preliminary ruling to the CJEU and the practice of the ECtHR implicitly signaled that arbitrariness was related to the failure to implement the obligation to motivate decisions<sup>19</sup>, established in Article 6(1) of the Convention. In a number of cases the ECtHR reiterated that Article 6(1) of the ECHR obliged national courts to give reasons for their decisions, but the Court never went on to specify the ambit of motivation in the cases concerning non-referral for a preliminary ruling. The only guidance were the statements of a general nature that the question whether a court had failed to fulfill the obligation to state reasons, deriving from Article 6 of the Convention, could only be determined in the light of the circumstances of the case<sup>20</sup> and that the obligation to motivate decisions could not be understood as requiring a detailed answer to every argument<sup>21</sup>.

As mentioned above, EU law obliges national courts to motivate the decision to refer or not to refer a question for a preliminary ruling to the CJEU taking into account the *Cilfit* criteria. Thus, the question to be analysed is how the ECtHR evaluates the arbitrariness of a refusal to refer for a preliminary ruling, i.e. whether the ECtHR has developed its own criteria or it analyses if the criteria provided in *Cilfit* case are satisfied.

17 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 143, 30 June 2005, *Ullens de Schooten and Rezabek v. Belgium*, no. 3989/07 and 38353/07, § 54, 20 September 2011.

18 *Societe Divagsa v. Spain* (dec.) no. 20631/92, 12 May 1993; *Peter Moosbrugger v. Austria* (dec.), no. 44861/98, § 2, 25 January 2000; *Canela Santiago v. Spain* (dec.), no. 60350/00, 4 October 2001; *Pedersen and Pedersen v. Denmark* (dec.), no. 68693/01, § 2a, 12 June 2003, *Coëme and Others v. Belgium* (dec.), no. 32492/96, 32547/96, 33209/96 and 33210/96, § 114, 22 June 2000.

19 *Higgins and other v. France*, no. 20124/92, § 42, 19 February 1998, *Predil Anstalt S.A. v. Italy* (dec.), no. 31993/96, 8 June 1999.

20 *Ruiz Torija v. Spain*, no. 18390/91, § 29, 9 December 1994; *Pedersen and Pedersen v. Denmark* (dec.), no. 68693/01, 12 June 2003; *Pornina v. Ukraine*, no. 63566/00, § 23, 18 July 2006; *Higgins and other v. France*, no. 20124/92, § 42, 19 February 1998, *Predil Anstalt S.A. v. Italy* (dec.), no. 31993/96, 8 June 1999.

21 *Van de Hurk v. the Netherlands*, no. 16034/90, § 61, 19 April 1994.

## 2. Practical Application of the “Arbitrariness” Rule

### 2.1. Reference to *Cilfit* Exceptions

To start of, it is worth mentioning that in neither of the cases decided before the ECtHR the Court found any arbitrariness which could lead to the conclusion that the refusal to refer a case to the CJEU infringed the applicants’ rights as guaranteed by Article 6 of the ECHR and applications were rejected as being manifestly ill-founded.

As mentioned above, for a long time there was no clear concept of an arbitrary decision not to refer a question for preliminary a ruling and deficient substantiation of the decisions not to refer was not established because in most cases national courts had based their decisions on irrelevance of a question raised by an applicant and/or clarity of a legal provision of EU law, i.e. *Cilfit* criteria. *Dotta*, *Moosbrugge* and *Schweighofer* cases belong to a group of cases where national courts established that both criteria (the irrelevance and clarity) should be applicable. In parallel, the decisions on admissibility in *Desmots*, *Matheis* and *Bakker* cases form a part of the case-law where the ECtHR accepted that the reference to one of the criteria, whether irrelevance of a question raised or *acte clair* doctrine, is sufficient to escape the arbitrariness in the decision to refuse to refer a case to the CJEU.

The *Dotta* case<sup>22</sup> illustrates the situation where the national courts had found no relevance of the questions raised by the applicants and had applied *acte clair* doctrine. Making reference to the content of the decisions of Italian national courts, the ECtHR emphasised that that the principles and rules of EU law on common market and free movement of goods relied upon by the applicant were not relevant, and the principle of non-discrimination based on nationality did not pose any problems of interpretation. Moreover, the ECtHR took account of the fact that the national court had explained that the limitation provided for by Article 633 of Italian Code of Civil Procedure was not based on nationality of a debtor but on the fact that the headquarters, domicile or residence of a debtor, whether Italian or foreigner, was located on the territory of Italy<sup>23</sup>.

The same approach was taken in *Schweighofer* and *Moosbrugger* cases. In *Schweighofer* case<sup>24</sup> the ECtHR accepted the reasoning of the Supreme Court of Austria,

22 On 7 May 1997 the holder of Gambol fashion company asked the court of Bologna for a payment injunction ordering Spanish society Canedo S.L., which had headquarters in Spain, to pay 5 849 700 Italian lira. The request was based on a letter from the Spanish company in which it had clearly recognised its debt. According to Article 633 of the Italian Code of Civil Procedure a payment injunction could be issued when a debtor had his headquarters, domicile or residence in Italy, thus the national court refused to issue the payment injunction. This court also refused to ask whether or not the limitation provided for in Article 633 was consistent with the principles and rules of the establishment of common market, free movement of goods and the principle of non-discrimination on the grounds of nationality.

23 *Dotta v. Italy* (dec.), no. 38399/97, § 13, 7 January 1999.

24 The Vienna Regional Court convicted the applicants of having partly committed and partly aided and abetted tax evasion, smuggling and a breach of foreign exchange regulations under section 24 of the Foreign Exchange Act. It found that the applicants breached foreign exchange regulations by exporting Austrian schillings to Switzerland without the permission of the Austrian National Bank, or by manipulating bank

which examined the applicants' arguments at length and gave detailed reasons for its finding, that the legal question raised was not directly relevant in the context of the case, and even if it was, the EU law allowed Member States to take common measures of foreign exchange control<sup>25</sup>. In *Moosbrugger case*<sup>26</sup>, the ECtHR noted that the Supreme Court of Austria had held that it was not necessary to refer the case to the CJEU because no relevant question of EU law had been raised by the applicant and that the applicant's case did not fall within the scope of EU legal provisions related to the freedom to provide services as he was a farmer by profession<sup>27</sup>.

Another interesting example of application of *Cilfit* criteria is *Bosphorus case*. This was the exceptional case where the ECtHR was asked to evaluate whether the Supreme Court of Ireland did not have to refuse to ask the consultation from the CJEU. The ECtHR, basing its decision on the wording of the CJEU in *Cilfit* case, confirmed that the Supreme Court had rightly implemented the obligation to make a reference for a preliminary ruling. First of all, the ECtHR established that the question was of central importance to the case. Secondly, it ascertained that neither *acte clair* nor *acte éclairé* was applicable: the answer to the interpretative question put to the CJEU was not obvious (the conclusions of the Sanctions Committee and the Minister for Transport conflicted with those of the High Court) and there was no previous ruling by the CJEU on the point<sup>28</sup>.

The *Matheis* and *Bakker* cases are the examples of the case-law where only one criterion, namely the issue of relevance of the questions raised to the resolution of the substantive action, was at issue. Deciding *Matheis* case, the ECtHR admitted that the Federal Constitutional Court did not explicitly deal with the applicant's request for a preliminary ruling. However, the decisive factor for not finding arbitrariness in the decision was the argument employed by the Constitutional Court that the applicant had not established that her constitutional complaint related to any relevant question

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accounts falsifying a flow of money from Switzerland. Asking to refer the case to the CJEU for a preliminary ruling the applicants relied on Section 61 of the Criminal Code, which provides *inter alia* that the criminal law is to be applied retroactively if it is more favourable than the law which was in force at the time the offence was committed, and argued that they should not have been convicted under section 24 of the Foreign Exchange Act. According to the applicants, this offence had already been invalidated at the time of the first instance judgment, as the Austrian National Bank had liberalised the foreign exchange market in 1991. Moreover, Austria's accession to the EEA on 1 January 1994 and to the EU on 1 January 1995 had invalidated the Foreign Exchange Act as a whole.

25 *Schweighofer and Others v. Austria* (dec.) nos. 35673/97, 35674/97, 36082/97 and 37579/97, § 3a, 24 August 1999.

26 As a result of water regulation proceedings, part of the applicant's real property was declared a water protection zone, which implied restrictions as to the management of his agricultural estate. Arguing that, due to the establishment of the water protection zone, a loss in value was much higher than the compensation fixed, the applicant asked to re-calculate the compensation. Before the Supreme Court he also argued that the situation where the calculation of compensation is not based on building values infringes EU law and asked the Supreme Court to refer the question for a preliminary ruling.

27 *Peter Moosbrugger v. Austria* (dec.), no. 44861/98, § 2, 25 January 2000.

28 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 147, 30 June 2005.

of EU law<sup>29</sup>. Similarly, in *Bakker* case the ECtHR took account of the fact that the administrative court had explained at some length why, in its view, the applicant's case had not raised any preliminary question of EU law. It further held that there was no issue that would require a preliminary ruling by the CJEU, since the applicant's requests did not concern the interpretation of a specific provision of EU law but rather challenged the implementation of national law exercised by the Austrian authorities<sup>30</sup>.

The *Desmots* case, where the criterion of *acte clair* is employed, exemplifies the same general approach taken by the ECtHR<sup>31</sup>. The ECtHR takes account of the circumstance that the Council of State rejected the request of a preliminary ruling "in the absence of any serious difficulties in interpretation" of the EU primary law provisions related to the freedom of establishment of self-employed persons. In its decision refusing to ask for a preliminary question, the Council of State asserted that the provisions related to the freedom of establishment of self-employed persons constituted no obstacle to the application of the provisions of Decree No. 71-942 of November 26, 1971, under which the transfer of a notary office was subject to the approval of national authorities<sup>32</sup>.

To summarise the practice of the application of the "arbitrariness" rule in this group of cases, it is clear that, independently from the number of *Cifit* criteria employed, the reference to the exceptions to the obligation to initiate the preliminary ruling procedure

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- 29 *Matheis v. Germany* (dec.), no. 73711/01, § 3, 1 February 2005. At the time of marriage with a retired civil servant, who died in a decade, the applicant was receiving a pension under the statutory old-age insurance scheme, an additional pension under a supplementary insurance scheme for bank employees and an additional monthly allowance granted by her former employer. According to the Civil Servant's Pension Act a civil servant's widow, whose marriage has been celebrated after the civil servant has entered retirement, is not allowed to a regular survivor's pension, but to a maintenance allowance, which is meant to ensure that her overall monthly income reaches at least the amount of the regular survivor's pension. It was calculated as follows: from the amount of the regular survivor's pension the competent authorities deduce the widow's own earned income and income replacements, with the exception of an allowance which amounts to 30% of the minimum survivor's pension. The applicant requested the Federal Constitutional Court to seek a preliminary ruling by the CJEU as to whether the national legal practice on the assessment of income replacements complied with EU law, in particular with the law on equal treatment.
- 30 *Bakker v. Austria* (dec.), no. 43454/98, 13 June 2002. The applicant was a physiotherapist who completed his professional training in Belgium and received his diploma that was recognized in 1995 by Austrian authorities upon the accomplishment of two additional exams. From 1987 to 1993 he worked as a physiotherapist in Austria during which time he was employed by an association working in that field. After the recognition of diploma, the applicant applied for permit to work as a self-employed physiotherapist. His request was rejected because he did not have "authorized" 2 years professional practice required by the Nursing Act: the applicant had worked at the association before he was authorized to work as physiotherapist in Austria following recognition of his foreign diploma. The applicant filed a complaint with the Administrative Court asking the court to seek a preliminary ruling on the question whether the refusal to exercise his profession as a self-employed physiotherapist in Austria was in accordance with EU law.
- 31 The applicant working as a notary asked to move his office to another area. After various bodies, including the Commission on the Location of Notaries' Offices, had expressed their opposition to such a move, the Minister of Justice refused the application. The applicant applied to the Administrative Court to have the decision set aside. When his application was dismissed, he appealed to the Conseil d'Etat, which quashed the court's judgment, holding that decisions on the relocation of solicitors' offices fell within its own jurisdiction and were not subject to appeal. The Conseil d'Etat then dealt with the merits of the case itself and dismissed the application including the request to seek a preliminary ruling.
- 32 *André Desmots v. France* (dec.), no. 41358/98, § 2, 23 October 2001; also see: *Canela Santiago v. Spain*, no. 60350/00, § 11-12, 4 October 2001.



laid down in the *Cilfit* case is sufficient to escape the arbitrariness of the decision not to refer a question for a preliminary ruling. The question that is still open is to what extent national courts have to motivate their decisions to choose one or another *Cilfit* criterion.

As noted above, the ECtHR emphasises that its only function under Article 6 of the ECHR is to examine cases in which it is alleged that the specific procedural guarantees laid down in this provision have been disregarded in the proceedings before the national courts, or that the proceedings considered as a whole have been conducted in such a manner as to not ensure a fair hearing to the applicant<sup>33</sup>. Recently in *Ullens de Schooten and Rezabek* the ECtHR specified the ambit of this function in the cases concerning non-referral for a preliminary ruling, stating that in this particular instance its function is to ensure that a decision was properly motivated but not to correct the mistakes of the interpretation or the application of the relevant legal provisions<sup>34</sup>. Furthermore, in *John v. Germany* where the applicants complained about lack of reasons, the ECtHR observed that it was acceptable under Article 6(1) for the national superior courts to dismiss a complaint by mere reference to the relevant legal provision governing the admissibility of such complaints if the matter did not raise a fundamental legal issue<sup>35</sup>.

This wording allows drawing the conclusion that in the case of non-referral for preliminary ruling the right to a fair trial guaranteed by the Convention could be infringed only if a national court entirely omits to make reference to the exceptions laid down in the *Cilfit* case. The refusal to refer a question for a preliminary ruling will not be vitiated by arbitrariness if a national court employs at least one of the arguments, whether irrelevancy of a particular question or existence of the practice of the CJEU related to a particular legal question, or clarity of the applicable provision of EU law.

## 2.2. Reference to the Criteria Other than *Cilfit* Exceptions

Another question to discuss is whether besides the exceptions formulated in the *Cilfit* case there are any other criteria that could be employed in order to substantiate the decision not to refer for a preliminary ruling to the CJEU.

To this aim it is important to analyse the wording of the ECtHR in *Ullens de Schooten and Rezabek* case in which the Court outlined its case-law in cases concerning non-referral and for the first time provided the concept of an arbitrary decision not to refer a question for a preliminary ruling. It stated that the decision would be vitiated by arbitrariness if the applicable provisions did not provide for an exception to the application of the principle of preliminary ruling, as well as in the case where the refusal was based on the reasons other than those related to the applicable legal provisions and it was not properly motivated<sup>36</sup>.

33 *Ibid.*, § 143, *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, § 54, 20 September 2011.

34 *Ullens de Schooten and Rezabek v. Belgium (dec.)*, nos. 3989/07 and 38353/07, § 61, 20 September 2011.

35 *John v. Germany (dec.)*, no. 15073/03, 13 February 2007.

36 *Ullens de Schooten and Rezabek v. Belgium (dec.)*, nos. 3989/07 and 38353/07, § 59, 20 September 2011.

Analysing the wording of the ECtHR, it is clear that there are several ways of motivation in line with the minimum requirements of Article 6(1) of the Convention.

First of all, as it has been analysed above, the decision of non-referral can be motivated by the application of the exceptions formulated in the *Cilfit* case. As the ECtHR does not check the content neither of applicable national nor EU law, it is enough to indicate which *Cilfit* exception is applicable in the particular case as it was done by the national courts in the cases referred above (*Dotta*, *Moosbrugger*, *Desmots*, *Matheis*, etc.).

Another type of motivation mentioned in *Ullens de Schooten and Rezabek* case allows basing the decision not to refer a question for a preliminary ruling on other arguments than the *Cilfit* exceptions. Although this possibility is expressly mentioned only in this case, in reality it reflects the Court's practice in the case *John v. Germany* where the ECtHR accepted that in certain circumstances national courts could substantiate their decisions of a non-referral to the CJEU without reference to the *Cilfit* exceptions.

The analysis of the two decisions allows indicating two situations where the decision not to refer can be based on reasons other than those related to the applicable EU law provisions.

Firstly, the decision not to refer will not be vitiated by arbitrariness if an applicant does not raise any legal question related to the interpretation or validity of EU law. In the case *John v. Germany*<sup>37</sup> the decisive factor for not finding arbitrariness in the decision was the fact that the applicant's submissions to the Federal Court of Justice neither had contained an express request for a reference under Article 267 TFEU nor express and precise reasons for the alleged necessity of a preliminary ruling. Even the detail that the applicant had raised the question related to the application of EU law before the Court of Appeal<sup>38</sup> did not influence the finding of the ECtHR.

*Ullens de Schooten and Rezabek* case presents another example of the reason not related to the *Cilfit* exceptions. The Court of Cassation based its decision not to refer on the principles that allowed national courts not to apply EU law in certain exceptional circumstances and the ECtHR accepted the arguments. In this particular case the national court relied on the case-law of the CJEU where the Court had found that the principle

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37 The applicant was an operator of a service station. He concluded a service-station agreement with an oil company, which contained an exclusive purchasing clause, according to which the applicant was obliged to buy petrol from the company for a period of twenty years. The applicant had challenged the contract and the oil company sued the applicant asking to declare the contract between the parties as being valid and to order the applicant to refrain from purchasing, storing and selling other companies' petrol. In the appeal proceedings, the applicant asked the court to dismiss the appeal and, alternatively, to make a referral to the CJEU. The Court of Appeal stated that it had not been obliged to seek a preliminary ruling by the CJEU since the applicant could still lodge an appeal on points of law with the Federal Court of Justice. The applicant lodged an appeal on points of law with the Court requesting the Court to set aside the judgment of the Appeal Court and to decide in accordance with his motions lodged in the appeal proceedings, which also included his alternative motion to request a preliminary ruling. However, his submissions to the Federal Court of Justice did not contain an express request for a reference. The Federal Court of Justice refused to admit the applicant's appeal on points of law, finding that the case was neither of fundamental importance, nor that it had reasonable prospects of success.

38 *John v. Germany* (dec.), no. 15073/03, 13 February 2007.

of *res judicata* – that a matter that has been adjudicated by a competent court cannot be pursued further by the same parties – took precedence over EU law<sup>39</sup>.

The attention should be paid to the fact that the ECtHR does not provide with any exhaustive list of the criteria other than the *Cilfit* exceptions. The specific examples that show up analysing the recent case-law of the ECtHR indicate that the case-law of the Court develops and the obligation to motivate the decision to refuse to refer a question for a preliminary ruling is not limited to the indication of a particular exception. In other words, a national court can justify non-referral by any reason non-related to the legal question raised by an applicant or to the provision of EU law applicable in a particular case. On the other hand, differently from the situation where the *Cilfit* criteria are applied, the ECtHR makes it clear that any use of the arguments not related with the applicable legal provisions have to be properly motivated. Thus, a national court, non-referring to the CJEU, can substantiate the non-referral by any due reason as long as it can justify its choice.

## Conclusions

1. Although the ECHR does not guarantee the absolute right to have the EU legal issue discussed before the CJEU, a state can be held liable before the ECtHR if its national court of last instance adopts an arbitrary decision not to refer a question for a preliminary ruling thus infringing the right to a fair trial guaranteed by Article 6 of the ECHR. The standard of arbitrariness is directly linked to the obligation to motivate the decisions, the ambit of which depends on the circumstances of each case and the arguments chosen by national courts in order to substantiate the non-referral.

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39 Belgian nationals F. Ullens de Schooten and I. Rezabek were directors of an accredited laboratory named Biorim, which carried out clinical tests eligible for reimbursement, by the National Sickness and Invalidation Insurance Institute. In appeal proceedings Brussels Court of Appeal sentenced the applicants to five and three years' imprisonment respectively for failure to comply with Article 3 of Belgian Royal Decree no. 143, which only allowed people holding certain qualifications to operate laboratories carrying out clinical tests eligible for reimbursement under the sickness and invalidity insurance scheme, and ordered them to pay fines of 500,000 and 300,000 Belgian francs. The Court of Appeal as well as later the Court of Cassation dismissed Mr Ullens de Schooten's argument that Article 3 of the Decree was incompatible with EU law without taking into account that before the appeal proceeding took place F. Ullens de Schooten had lodged a complaint against Belgium with the European Commission, which later confirmed that Article 3 of the Decree was incompatible with EU law. As a consequence Belgium amended Article 3, abolishing the requirement to have particular qualifications. Later the Mons Court of Appeal dealt with the civil claims, ordering the applicants to pay 1,859,200 EUR to six mutual insurance companies. The applicants lodged an appeal on points of law, submitting that the Court of Cassation should apply to the CJEU seeking a preliminary ruling on the issue of incompatibility with EU law and on the approach to be taken in the case. The court dismissed their appeal. In the second case, brought by Mr Ullens de Schooten, which originated in the same set of facts, the appeal to the courts against the suspension of accreditation affecting the laboratory and the applicants was dismissed by the Conseil d'Etat, which refused to refer the questions raised by Mr Ullens de Schooten to the CJEU for a preliminary ruling. The Conseil d'Etat, observing that the laboratories referred to in Article 3 of the Royal Decree did not fall within the categories covered by Article 106 TFEU (ex Article 86 TEC), held that EU law was not applicable.

2. Basing its decision not to refer a question for a preliminary ruling, a national court can employ any criterion laid down in the *Cilfit* case-law. National courts can contend that the question raised by an applicant is irrelevant or the provision of EU law in question has already been interpreted by the CJEU, or the correct application of EU law is so obvious as to leave no scope for any reasonable doubt. The mere reference to the exceptions from the obligation to refer a question for a preliminary ruling formulated in *Cilfit* case is sufficient to escape the arbitrariness of the decision not to refer a question for a preliminary ruling.

3. The analysis of the decisions on admissibility related to the implementation of the obligation to make a reference for a preliminary ruling to the CJEU also shows that the motivation of the decisions of national courts of last instance not to refer is not limited to the exceptions formulated in *CILFIT* case, thus the courts can present other arguments not related directly to the applicable EU provisions. As the ECtHR does not provide any exhaustive list of the arguments, a national court can employ any duly justified reason. So far it has been recognised that the decision not to refer will not be vitiated by arbitrariness if the applicant does not raise any legal question related to the interpretation or validity of EU law before a national court of last instance or a national court of last instance bases its decision not to refer on the principles established by the CJEU that in certain circumstances allow national courts not to apply EU law.

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## VALSTYBĖS ATSAKOMYBĖ PAŽEIDUS PAREIGĄ KREIPTIS Į TEISINGUMO TEISMĄ PREJUDICINIO SPRENDIMO PAGAL EUROPOS ŽMOGAUS TEISIŲ KONVENCIJĄ

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**Santrauka.** Šio straipsnio tikslas – išnagrinėti, kokios teisinės pasekmės nacionaliniams teismams nepateikus prejudicinio klausimo ES Teisingumo Teismui valstybei gali kilti pagal Europos žmogaus teisių konvenciją. Tai yra antrasis straipsnis iš straipsnių ciklo „Teisinės pasekmės pažeidus pareigą kreiptis į Teisingumo Teismą prejudicinio sprendimo“, kuriuo siekiama visapusiškai išanalizuoti, ar ES, nacionalinė ar tarptautinė teisė numato pareigą valstybei atlyginti žalą individui, jei jos nacionalinis teismas pažeidžia pareigą kreiptis prejudicinio sprendimo.

Vertinant EŽTT suformuluotas taisykles akivaizdu, kad taikant *Cilfit* byloje suformuluotas pareigos kreiptis prejudicinio sprendimo išimtis, teismo pareigos motyvuoti sprendimą nesikreipti prejudicinio sprendimo apimtis yra minimali. Teisė į teisingą teismą, kuri apima ir pareigą motyvuoti sprendimus, būtų pažeista tik tokiu atveju, jeigu nacionalinis teismas

*nenurodytų priežasčių, kodėl nepateikia prejudicinio klausimo. Vertinant EŽTT praktiką, atkreipiamas dėmesys ir į tendenciją, kad Teismas, sprenddamas, ar nesikreipimo atveju buvo pažeista Konvencija, nenagrinėja ES teisės turinio bei to, ar nacionalinis teismas teisingai taikė acte clair arba acte éclairé doktrinos kriterijus. Kad EŽTK nebūtų pažeista, pakanka minimaliai argumentuoto sprendimo.*

*EŽTT praktikos analizė taip pat rodo, kad atsisakymą kreiptis į ES Teisingumo Teismą prejudicinio sprendimo nacionalinis teismas gali motyvuoti argumentais, kurie nėra tiesiogiai susiję su taikoma ES teise. EŽTT nepateikia baigtinio priežasčių, nesusijusių su Cilfit išimtimis, sąrašo, taigi nacionalinis teismas sprendimą nesikreipti prejudicinio sprendimo gali pagrįsti bet kokiais motyvuotais argumentais. Iki šiol Teismo priimtų sprendimų dėl priimtinumų analizė leidžia teigti, jog teisė į teisingą teismą nebus pažeista, jeigu nacionalinis teismas atsisako kreiptis prejudicinio sprendimo dėl to, kad pareiškėjas klausimo dėl kreipimosi į ES Teisingumo Teismą nekėlė galutinės instancijos teisme, arba ES teisėje suformuluoti principai leidžia byloje netaikyti ES teisės.*

**Reikšminiai žodžiai:** *Europos Sąjungos teisė, prejudicinis sprendimas, valstybės atsakomybė, nacionalinis teismas, Europos žmogaus teisių konvencija, teisė į teisingą teismą.*

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