



**RIGA
GRADUATE
SCHOOL OF
LAW**

**Failure to make a reference for a preliminary ruling to the Court of Justice of the European Union as a violation of Article 6 of the European Convention on Human Rights-
the interplay between the courts in Strasbourg and Luxembourg after the *Commission v France* judgement.**

BACHELOR THESIS

Author: Ieva Hūna
LL. B 2018/2019 year student
student number B016114

SUPERVISOR: KRISTAPS TAMUŽS
LL. M

DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

RIGA, 2019

ABSTRACT

Article 267(3) of the Treaty on the Functioning of European Union obliges national courts adjudicating in the last instance to make a reference for a preliminary ruling to the Court of Justice of the European Union for the correct interpretation and application of European Union law. Failure to do so may have consequences for the Member State under EU law as well as violate Article 6 of the European Convention on Human Rights. When ruling on such matter the European Court of Human Rights must not overstep the dividing line between the jurisdictions of itself and the Court of Justice of the European Union while preferably maintaining consistency or at least compatibility with European Union law while not compromising the protection of the right to a fair trial. The difficulty thereof is reflected in the case-law of the European Court of Human Rights, which may occasionally provide problematic solutions. However, examination in the context of the possible consequences in European Union in several aspects suggests a complementary relationship, which seems to be disrupted or at least diminished by the recent *Commission v France* judgement of the Court of Justice of the European Union.

Keywords: European Court of Human Rights, Court of Justice of European Union, reference for a preliminary ruling, right to a fair trial.

SUMMARY

This thesis examines the situation when a national court adjudicating in last instance refuses to make a reference for a preliminary ruling to the Court of Justice of the European Union from the perspectives of European Union law, the European Convention on Human Rights. This situation is analysed in the broader context of the relationship between the Court of Justice of the European Union and European Court of Human Rights.

Firstly, the case-law of the European Court of Human Rights is examined, tracing the development of the assess the attitude of the ECtHR and its conditions and requirements for finding a violation of Article 6 of the Convention in this situation. The difficulty of the task of the European Court of Human Rights not to overstep the dividing line between the its jurisdiction and that of Court of Justice is demonstrated. Comments and analysis are provided for the most notable cases. A mutually benefiting and complementary relationship is found between the requirements set by the European Court of Human Rights and European Union law.

Secondly, the situation is examined from the perspective of European Union law according to which, first, State liability and, second, direct action brought by the European Commission against the Member State are analyzed as the possible consequences. As for the first, Article 267(3) of the Treaty of the Functioning of European Union alone in its current form is found to be unable to invoke State liability and the obligation to provide reparation to the party who had requested making a reference for a preliminary ruling. However, a mutually benefiting and complementary relationship is again found between the requirements set by the European Court of Human Rights and criteria for invoking State liability for breaches attributable to the judicial branch. As for the second, direct actions brought by the European Commission against the Member State are identified as a more effective measure, which has been made available after the *Commission v France* judgement for the first time found an infringement of Article 267(3) of the Treaty on the Functioning of the European Union.

Thirdly, upon a closer analysis a critical view of the reasoning in the *Commission v France* judgement is provided. Apart from an effect purely in the European Union law field, the possible consequences of decreasing or entirely dismantling the margin of appreciation enjoyed by national courts adjudicating in last instance is identified. In the context of the case-law of the European Court of Human Rights it is found to diminish the mutually benefiting and complementary relationship identified in the interplay of both courts up to that judgement.

TABLE OF CONTENTS

Introduction	5
1. The preliminary ruling procedure and Article 267 TFEU	6
2. Exceptions to the obligation of Article 267(3) TFEU	7
3. Case- law of the European Court of Human Rights	8
3.1. Prohibition of arbitrary non- referral- cases arising from Belgium	9
3.1.1. The standard of non- arbitrariness and requirement to provide reasoning	10
3.1.2. The complementary relationship between the obligation under Article 267(3) TFEU and standard of non- arbitrariness	12
3.2. Refusals under Article 267(3) TFEU in admissibility decisions	13
3.2.1 An express request made by the applicant	13
3.2.2 Sufficient substantiation of the request by the applicant	15
3.2.3 A fundamental legal issue	17
3.3 Judgements decided on the merits	18
3.3.1. Adjusting the standard of non-arbitrariness to refusals under Article 267(3) TFEU	18
3.3.2. The Dhahbi judgement -first violation of Article 6 of the Convention by a refusal to refer a question to the CJEU	21
3.3.3. Developments after Dhahbi	22
3.3.4. Softening of the requirement to provide reasoning	25
4. Case- law of the Court of Justice of the European Union.....	26
4.1 State liability.....	26
4.1.2 Criteria for State liability	27
4.1.3 The Köbler judgement.....	28
4.1.4 The Ferreira da Silva judgement	30
4.1.5 State liability for a breach of Article 267(3) TFEU.....	30
4.1.6 Parallels	31
4.2 An action by the European Commission against a Member State.....	32
5. The <i>Commission v France</i> judgement.....	33
6. Conclusions.....	36
Bibliography.....	38

INTRODUCTION

The importance of the preliminary ruling procedure cannot be overstated not only for development of European Union (hereinafter EU) law but also the Union as a whole.¹ Playing the central role in the judicial cooperation between the Court of Justice of the European Union (hereinafter CJEU) and national courts, it ensures that EU law is applied and interpreted consistently in all Member States with their diverse judicial systems and traditions², thus making a uniform EU legal order a reality.

As established in Article 267 TFEU national courts have the opportunity to refer questions for preliminary rulings to the CJEU regarding interpretation, application or validity of EU law or its acts is necessary to deliver a judgement.³ In particular the national courts adjudicating in last instance are obliged by Article 267(3) TFEU to make a reference if such question arises. The failure to do so is an infringement of the Treaty for which the Commission may bring an action against the Member State. The possibility that the Commission may start such an action was considered hypothetical and the Commission's practice as reluctant. In the landmark case *Commission v France*⁴ of 8 October 2018, the CJEU found a failure of the French *Conseil d'État* (Council of State) to make a preliminary reference a breach of Article 267(3) TFEU. In the European legal regime this judgement interplays with the European Convention on Human Rights (hereinafter ECHR or Convention), particularly the right to fair trial established in Article 6.⁵

A situation often arises where a party to a pending case before a national court adjudicating in last instance requests to refer a question to the CJEU but the national court under the obligation of Article 267(3) TFEU decides the case without making a reference for a preliminary ruling to the CJEU. The party that disagrees with the outcome, considering that EU law should have been applied or had been incorrectly interpreted, has the option to make an application to the European Court of Human Rights (hereinafter ECtHR) claiming a violation of the right to fair trial established in Article 6 of the European Convention on Human Rights (hereinafter ECHR or Convention).

Here lies the problematic of the situation. The ECtHR finds itself in the unenviable situation where it must rule on an alleged violation of the ECHR which originates from an obligation of the Member State by EU law, which is beyond its jurisdiction to interpret. Although such situations demonstrate a fascinating clashpoint between the two international courts they have not received much attention in scholarship, which is mostly limited to the acknowledgement of the existing practice of the ECtHR without deeper analysis.⁶ This thesis will aim to contribute to the existing discussion both in a descriptive and analytical approach and answer the following two research questions. First, what has been the interplay between the CJEU and the ECtHR in finding the failure of national courts to make a preliminary reference to the CJEU a violation

¹ Morten Bromberg and Niels Fenger, "Preliminary references as a right- but for whom? The extent to which preliminary reference decisions can be subject to appeal," *European Law Review* 36(2) (2011): p.267.

² Anthony Arnall, *The European Union and its Court of Justice* (Oxford: Oxford University Press, 2006), p. 95.

³ Judgement of 16 January 1974, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-166/73, ECR 1974 -00033, para.2.

⁴ Judgement of 4 October 2018, *Commission v France*, C-416/17, EU:C:2018:811.

⁵ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Rome, 4 November 1950. Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf Accessed May 9, 2019.

⁶ Regina Valutyte, "State Liability for the Infringement of the Obligation to Refer for a Preliminary Ruling under the European Convention on Human Rights," *Jurisprudencija* 19(1) (2012): p.9.

of Article 6 ECHR? Second, how will the *Commission v France* judgement of 8 October 2018 affect this established interplay between the two Courts?

In order to do so, firstly, the case-law of the ECtHR will be analyzed to assess the attitude of the ECtHR and its conditions and requirements for finding a violation of Article 6 of the Convention. Then the legal consequences for a breach of Article 267(3) TFEU will be analyzed from two perspectives in EU law, State liability and an infringement action brought by the Commission. Lastly, the *Commission v France* judgement will be examined in detail and put in the context of the previous interplay between the two courts and conclusions will be made therefrom.

1. THE PRELIMINARY RULING PROCEDURE AND ARTICLE 267 TFEU

In the EU judicial system much of the responsibility for applying EU law belongs to the national courts of the Member States.⁷ Such a situation is problematic as the same rules need to be applied in a number of independent judicial systems with varying national traditions and this is very likely to produce inconsistent results.⁸ Therefore the preliminary ruling procedure is established to guarantee that “the [EU] law has the same effect in all circumstances in all Member States”⁹. The CJEU has defined that the aim of the preliminary ruling is to ensure “proper application and uniform interpretation of Community law” and in particular to “prevent a body of national case-law that is not in accordance with the rules of Community law”.¹⁰ The preliminary ruling procedure creates “a form of judicial conversation or dialogue”¹¹ between the national courts and the CJEU to jointly find a solution to a case that is in line with the applicable EU law.¹² In the EU judicial system, national courts function as “delegates” of the CJEU¹³ who stand at the frontline of EU law enforcement, while the CJEU is left with resolving the problematic questions¹⁴ often of fundamental importance where differences in interpretation might arise.

The preliminary ruling procedure enables a national court ruling of any instance to refer to the CJEU a question on EU law that is “necessary to enable it to give judgement”¹⁵. According to Article 267(1) TFEU¹⁶ the CJEU has jurisdiction to rule on particularly the interpretation of the Treaties and the interpretation, application of acts of the institutions, bodies, offices or agencies of the Union. It is not in its jurisdiction to decide on matters in national law and other international obligations.¹⁷ The preliminary ruling procedure on questions on this matter takes

⁷ Arnall, *supra* note 2, p. 95.

⁸ Arnall, *supra* note 2, p. 95.

⁹ Court of Justice of the European Union. “The Proceedings of the Court of Justice and Court of First Instance of the European Communities” a report of 22 to 26 May 1995 No. 15/95, para. 11. Available on: <https://publications.europa.eu/en/publication-detail/-/publication/cf9e5ef4-c498-4699-aaa7-449c04dce3e3> Accessed April 24, 2019.

¹⁰ Judgement of 22 February 2001, *Ministério Público and António Gomes Valente v Fazenda Pública*, C-393/98, ECR I-1327, para. 17.

¹¹ Arnall, *supra* note 2, p. 95.

¹² Arnall, *supra* note 2, p. 96.

¹³ Paul Craig “Community Court Jurisdiction Revisited” in *The European Court of Justice* ed. Grainne de Burca and J.H.H. Weiler (Oxford: Oxford University Press, 2001): p. 179.

¹⁴ *Ibid.*

¹⁵ Judgement of *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, *supra* note 3.

¹⁶ Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>. Accessed April 30, 2019.

¹⁷ Morten Broberg and Niels Fenger, Preliminary references to the European Court of

place as a separate step in the pending proceedings before a national court. The decision to make a reference for a preliminary ruling must be made entirely by the national court which should distance itself from any initiative from the parties.¹⁸ After receiving an answer from the CJEU in the form of a preliminary ruling, a national court proceeds by applying it to the facts of the case.¹⁹ The preliminary ruling is not addressed and cannot be enforced against the parties. It is strictly addressed only to the referring national court.²⁰ It would also be unsuitable for such purpose as the question referred and answer provided by the CJEU is formulated in an abstract manner.

Article 267 TFEU²¹ has a direct effect on national legal systems. According to Article 267(2) TFEU²² the national courts of Member States are allowed to decide whether to make a preliminary reference to the CJEU regarding interpretation of EU law.²³ That is not so for courts adjudicating in the last instance for which making a reference for a preliminary ruling is not an option but rather an obligation. This is established by Article 267(3) TFEU which provides that,

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.²⁴

Notably, Article 267(3) TFEU encompasses not only the courts who stand at the top of the hierarchy of a national judicial system or whose judgements are final. The main criterion for being under the obligation of Article 267(3) TFEU is that no judicial remedy is available to the judgement of that court under national law.²⁵

2. EXCEPTIONS TO THE OBLIGATION OF ARTICLE 267(3) TFEU

The obligation for national courts adjudicating in last instance is however not absolute. In the landmark *CILFIT* case²⁶ the Court established three situations when a national court adjudicating in last instance may dismiss its obligation under 267(3) TFEU to refer a question to the CJEU, also famously called the CILFIT criteria. First, if the question is irrelevant, that is, whatever may be the answer it would not affect the outcome of the case.²⁷ Second, if a materially identical question has been previously answered by the Court and thus the correct interpretation of EU law has already been provided also known as the *acte éclairé* doctrine. Thirdly, if no scope for reasonable doubt exists about the correct interpretation of EU law and thus any risk that a national court would apply EU law inconsistently is supposedly ruled out²⁸ known as the *acte clair* doctrine. Moreover, the CJEU has clarified that in order to rely on the

Justice. Second Edition (Oxford: Oxford University Press, 2014), p. 107.

¹⁸ Judgement of 9 November 2010, *VB Penzügyi Lizing Zrt. v. Ferenca Schneider*, C-137/08, EU:C:2010:659, para. 28.

¹⁹ Arnall, *supra* note 2, p. 98.

²⁰ Broberg and Fenger, *supra* note 17, p. 1.

²¹ The cases and materials used in this thesis often refer to the Article 234 EC or Article 177 EEC, corresponding to equivalent provisions in the previous treaties. The provisions on the preliminary ruling procedure and the obligation of national courts adjudicating in last instance will be referred to as Article 267 TFEU and Article 267(3) TFEU regardless of the numbering used in the original source.

²² Treaty on the Functioning of the European Union, *supra* note 16.

²³ Arnall, *supra* note 2, p. 114.

²⁴ Treaty on the Functioning of the European Union, *supra* note 16.

²⁵ Arnall, *supra* note 2, pp. 119-120.

²⁶ Judgement of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, C-283/81, ECR 1982-03415.

²⁷ Julia Laffranque, “(Just) Give Me a Reason,” *Juridica International Law review*, 27 (2018): p. 15.

²⁸ Broberg and Fenger, *supra* note 17, p. 235.

acte clair doctrine the national court of last instance must be “(..) convinced that the matter is equally obvious to the courts of other Member States and to the CJEU.”²⁹ Two steps are required for this to be satisfied. First, the national court of last instance must be certain that no ambiguity exists about the interpretation of EU law from its own perspective. Second, it must find that it is beyond reasonable doubt that courts of other Member States and the CJEU would come to the same conclusion. In these situations, the court of last instance is no longer required but still has the opportunity to make a preliminary reference³⁰ however the it is highly unlikely that in such situation the CJEU will address such question.

Article 267 TFEU leaves a margin of appreciation to national courts.³¹ The national courts are not required to be convinced beyond any doubt that a reference for a preliminary ruling need not be made. The margin of appreciation decreases for the courts higher in the hierarchy of the judicial system and is the smallest for courts adjudicating in last instance,³² for which it is expressed only as exceptions to an obligation, deriving from Article 267(3) TFEU.

3. CASE- LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Although no formal relationship exists between the CJEU and ECtHR, in practice both have been willing to take into consideration each other’s legal systems and avoid consistent case- law and imposing conflicting obligations to the states.³³ Moreover, the courts in Strasbourg and Luxembourg have strived to maintain mutual neutrality and respect for limits of their jurisdictions. The approach of the ECtHR to the procedural aspects before the CJEU in the in context of Article 6 of the Convention has been mentioned as a demonstration of particular deference towards EU law.³⁴ To that end in the *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v the Netherlands*³⁵ judgement the ECtHR found the EU legal system considerably different from that of Member States and fund that therefore different procedural rules can reasonably be applied and different standards are permitted by the ECtHR.³⁶ This has also been demonstrated in situations where a national court has failed to fulfil its obligation under Article 267(3) TFEU.

The CJEU considers itself the only authority to provide interpretation of EU law.³⁷ Even more, the CJEU has even avoided to address the failure to fulfil the obligation of Article 267(3) TFEU in the context of Article 6 of the Convention even when given an opportunity to

²⁹Judgement of *CILFIT*, *supra* note 26, para 16.

³⁰ Broberg and Fenger, *supra* note 17, pp. 233-235.

³¹ Vincent Delhomme and Lucie Larripa “C-416/17 Commission v France : Failure of a Member State to fulfil its obligations under Article 267(3) TFEU,” European Law Blog, November 22, 2018. Available on: <http://europeanlawblog.eu/2018/11/22/c-416-17-commission-v-france-failure-of-a-member-state-to-fulfil-its-obligations-under-article-2673-tfeu/> Accessed March 18, 2018.

³² Carri Ginter, “Legal implications of not asking a for preliminary rulings by the highest courts”, presentation in the Erasmus+ Jean Monet Conference Constitutional Law and Fundamental Rights, Riga Graduate School of Law, April 26, 2019.

³³ Peter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak, *Theory and Practice of the European Convention on Human Rights. Fifth Edition* (Mortsel: Intersentia, 2018), p. 340.

³⁴ *Ibid*, p. 343.

³⁵ Decision on admissibility delivered by a Chamber *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v the Netherlands* no. 13645/05, ECHR 2009.

³⁶ Van Dijk, Van Hoof, Van Rijn and Zwaak, *supra* note 33, p. 343.

³⁷ Zane Sedlova, *Tiesību aizsardzības mehānismi, ja tiesa neuzdod prejudiciālo jautājumu* (a dissertation) (Riga: Publication of Zane Sedlova with the support of sworn advocates’ office of Romualds Vosnovičš, 2017), p. 171.

do so. The matter was raised by Advocate General Léger in his opinion³⁸ for the landmark *Köbler* case. Advocate General Léger pointed out that a breach of Article 267 TFEU may result in an infringement of the Convention mentioning a few examples.³⁹ The CJEU however did not pick up the issues raised by Advocate General Léger and dismissed this matter entirely.⁴⁰ Whereas, the ECtHR for a long time refused to decide on any matter concerning the relationship of the CJEU and national courts. Applications regarding a refusal to make a reference for a preliminary ruling to the CJEU have been submitted to the ECtHR dating back as early as 1993.⁴¹ The ECtHR constantly declared such applications inadmissible⁴² despite their considerable number, while still analyzing the applicant's request and the national courts' refusal and its motivation.⁴³ These decisions allow to identify the factors considered by the ECtHR when deciding a possible violation of the right to fair trial⁴⁴ Only recently in 2011 in the *Ullens de Schooten*⁴⁵ judgement the ECtHR first decided on merits a case of a refusal to make a reference for a preliminary ruling. Several other judgements have followed including *Dhahbi v Italy*⁴⁶ which for the first time found a refusal to make a reference for a preliminary ruling to violate the right to fair trial. Nonetheless a decision finding the application inadmissible still remains the most likely outcome for a complaint of a violation of the right to a fair trial due to a breach of Article 267(3) TFEU by a national court.⁴⁷

3.1. Prohibition of arbitrary non-referral- cases arising from Belgium

Before delving into the judgements and decisions of the ECtHR regarding the refusal to make preliminary reference to the CJEU, three judgements that arise from the unique domestic preliminary question procedure in the court system of Belgium will be looked upon. Chapter II Article 26-30 of the Special Act of 6 January 1989 on the Constitutional Court of Belgium⁴⁸ (hereinafter the Special Act) obliges the lower instance courts of Belgium to ask a preliminary question to the Constitutional Court (at the time of the judgements named the Administrative Jurisdiction and Procedure Court) when ruling on a number of matters connected to the repartition of competences between the Federal State, the Monarch and the Regions as well as provides occasions where the courts are exempt from this obligation. This system provides a fertile ground for disputes on compatibility of a refusal to ask a preliminary question with Article 6 of the Convention and illustrates the attitude of the ECtHR to preliminary questions and the right to a fair trial generally. Delivered before the judgements and decisions specifically on the references for preliminary rulings to the Court of Justice according to Article 267(3)

³⁸ Opinion of Mr. Advocate General Léger delivered on 8 April 2003 for Judgement of 30 September 2003, *Gerhard Köbler v Republik Österreich*, C-224/01, ECR 2003 I-10239.

³⁹ Valutyè, *supra* note 6.

⁴⁰ Sedlova, *supra* note 37, p. 171, footnote 473.

⁴¹ The earliest example found by the author is the Admissibility decision *Divagsa Company v Spain*, no. 20631/92, 12 May 1993.

⁴² Sedlova, *supra* note 37, p. 173.

⁴³ Sedlova, *supra* note 37, p. 173.

⁴⁴ Sedlova, *supra* note 37, p. 176.

⁴⁵ Judgment on merits and just satisfaction delivered by a Chamber *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, ECHR 2011.

⁴⁶ Judgment on merits and just satisfaction delivered by a Chamber *Dhahbi v. Italy*, no. 17120/09, ECHR 2014.

⁴⁷ Carri Ginter, "Legal implications of not asking a for preliminary rulings by the highest courts", presentation in the Erasmus+ Jean Monet Conference Constitutional Law and Fundamental Rights, Riga Graduate School of Law, April 26, 2019.

⁴⁸ Belgium. Special Act of 6 January 1989 on the Constitutional Court (January 6, 1989, last amended January 15, 2017). Available on: <http://www.const-court.be/en/common/home.html> Accessed March 25, 2019.

TFEU these judgements established universal argumentation which applies to the failure to make a reference for a preliminary ruling to the CJEU as well.⁴⁹

3.1.1. The standard of non- arbitrariness and requirement to provide reasoning

In the *Coëme*⁵⁰ judgement the defendants disputed the jurisdiction of the Court of Cassation to hear the case of the defendants and compatibility of application of Code of Criminal Investigation with the Judicial Code and the Constitution of Belgium⁵¹ and requested the Court of Cassation to as a preliminary question to the Administrative Jurisdiction and Procedural Court on these issues.⁵² The Court of Cassation motivated the refusal to do so by stating that the subject of these questions did not concern a matter that requires asking a preliminary question according to Article 26 of the Special Law.⁵³ In their complaint to the ECtHR the applicants submitted *inter alia* that such a refusal was arbitrary and in breach of Articles 6 of the Convention.

The judgement established argumentation⁵⁴ that the ECtHR reiterates almost *verbatim* in all the cases concerning preliminary questions and which serves as a basis for elaboration on references for preliminary rulings to the CJEU. The ECtHR observed in the judgement that:

the Convention does not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling.⁵⁵

The formulation that the Convention “does not guarantee” such right has been interpreted by scholars in a twofold manner.⁵⁶ It can be seen as an acknowledgement that a decision to ask a preliminary question is a matter regulated by national and EU law which is outside the jurisdiction of the ECtHR to interpret. A more likely interpretation, although the right to a reference is not an “absolute right”, it is protected indirectly by securing the right to fair trial generally.⁵⁷

Further the ECtHR recalled that “right to court” guaranteed by the Convention is not absolute and subject to limitations, regarding which the State enjoys a “certain margin of appreciation” and ruled that

the right to have a preliminary question referred to a court cannot be absolute either, even where a particular field of law may be interpreted only by a court designated by

⁴⁹ Morten Bromberg, “National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom,” *European Public Law*, 22(2) (2016): p. 245.

⁵⁰ Judgment on the merits and just satisfaction delivered by a Chamber *Coëme and others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, ECHR 2000-VII

⁵¹ *Ibid.*, § 47.

⁵² *Ibid.*, § 111.

⁵³ *Ibid.*, § 47.

⁵⁴ The standard of non-arbitrariness was employed in a number of decisions before *Coëme* concerning references for a preliminary ruling to the CJEU, for instance the early examples Admissibility decision *Divagsa Company v Spain*, no. 20631/92, 12 May 1993; and Admissibility decision *N.S. v France*, no. 15669/89, 28 June 1993; Admissibility decision *Spiele v the Netherlands*, no. 31467/96, 22 October 1997; Partial admissibility decision *Schweigenhofer, Rauch, Heinemann and Mach v Austria*, nos. 35673/97, 35674/97, 36082/97 and 37579/97, 24 August 1999. See also Admissibility decision *Dotta v Italy*, no. 38399/97, 7 September 1999 and Admissibility decision *Preidl Anstalt S.A. v. Italy*, no. 31993/96, 8 June 1999, to which the ECtHR directly refers to in §114 in *Coëme*. It has however occurred that the first judgement of the ECtHR where this approach and the non-arbitrariness standard is used concerns the preliminary questions to the Belgian Administrative Jurisdiction and Procedure Court, which is also the first judgement where preliminary questions to that court have been subject to examination of the ECtHR.

⁵⁵ Judgment of *Coëme and others v. Belgium*, *supra* note 50, §114.

⁵⁶ Valutytè, *supra* note 6, p. 10.

⁵⁷ Valutytè, *supra* note 6, p. 10.

statute and where the legislation concerned requires other courts to refer to that court, without reservation, all questions relating to that field.⁵⁸

However, the Court did not rule out such option entirely by stating that

(..) it is not completely impossible that, in certain circumstances, refusal by a domestic court trying a case at final instance might infringe the principle of fair trial, as set forth in Article 6 § 1 of the Convention, in particular where such refusal appears arbitrary.⁵⁹

Thus, most importantly, the ECtHR established the standard that for a refusal to ask a preliminary question to be compatible with Article 6 § 1 of the Convention is must not appear arbitrary (hereinafter the standard of non- arbitrariness).⁶⁰ This became a universal standard in the future cases concerning refusals to ask preliminary questions to both national and international courts and tribunals and the right to a fair trial.

The ECtHR further provided the method to assess the arbitrariness of a refusal. The fact that the Court of Cassation considered the applicants claims and stated “sufficient reasons which do not appear arbitrary” for the refusal was sufficient for the Court to find no breach of Article 6 § 1 of the Convention. The Court did not analyze the decision any further in this respect. The presence of reasoning or providing reasons became the main instrument to assess the arbitrariness of a refusal in the subsequent cases⁶¹ both concerning preliminary questions to the Administrative Jurisdiction and Procedure Court of Belgium in cases *Ernst and Others v Belgium*⁶² and *Wynen and Centre Hospitalier Interregional Edith- Cavell v Belgium*⁶³ and references for preliminary rulings to the CJEU, as demonstrated in later chapters of this thesis.

The second subsequent case arising from Belgium *Wynen and Centre Hospitalier Interregional Edith- Cavell v Belgium*⁶⁴ decided on 5 February 2003 will be further analyzed to demonstrate the mutually beneficial effect of the standard of non- arbitrariness which is particularly highlighted by the separate of Judge Lemmens⁶⁵.

In *Wynen* the applicants had requested the Court of Cassation to ask a preliminary question to the Administrative Jurisdiction and Procedure Court on the compatibility of a national act, first, with the rules on distribution of power between the Belgian state and the regions and, second, the Constitution. The Court of Cassation dismissed these requests. For the first, the Court of Cassation held that the applicants had failed to sufficiently specify the alleged contraventions between the act and rules on distribution of powers. The second question was declared inadmissible. In their complaint to the ECtHR the applicants submitted that by dismissing the requests the Court of Cassation had violated their right to a fair trial under Article 6 of the Convention. The ECtHR reiterated the argumentation established in *Coëme* in the same wording as cited above, deciding on the violation of the right to fair trial by assessing the arbitrariness of the refusal. The ECtHR observed that the Court of Cassation “took account of the applicants’ complaints” and “ruled on the matter in decisions grounded on sufficient reasons

⁵⁸ Judgment of *Coëme and others v. Belgium*, *supra* note 50, § 114.

⁵⁹ Judgment of *Coëme and others v. Belgium*, *supra* note 50, § 114.

⁶⁰ Ola Johan Settem, *Applications of the ‘Fair Hearing’ Norm in ECHR Article 6(1) to Civil Proceedings* (Cham, Heidelberg, New York, Dordrecht, London: Springer, 2016), p. 383.

⁶¹ Bomberg and Fenger, *supra* note 17, p. 272.

⁶² Judgment on the merits and just satisfaction delivered by a Chamber *Ernst and Others v. Belgium*, no. 33400/96, 15 July 2003.

⁶³ Judgment on the merits and just satisfaction delivered by a Chamber *Wynen and Centre Hospitalier Interregional Edith- Cavell v. Belgium*, no. 32576/96, ECHR 2002-VIII.

⁶⁴ *Ibid.*

⁶⁵ Separate Opinion of Judge Lemmens to Judgment on the merits and just satisfaction delivered by a Chamber *Wynen and Centre Hospitalier Interregional Edith- Cavell v. Belgium*, no. 32576/96, ECHR 2002-VIII.

which do not appear to be tainted by any arbitrariness.”⁶⁶ Just like in *Coëme* the ECtHR did not give an elaborate explanation on the decision in the specific situation, limited by its jurisdiction and leaving interpretation of domestic legislation to national courts.⁶⁷

Judge Lemmens in his separate opinion picked up where the judgement had left and provided an insight into the argumentation. Although in agreement with the conclusion of the Court, he wrote that “it would be helpful to qualify somewhat the reasons that led to that conclusion”⁶⁸ and further undertook this task. Judge Lemmens identified that the Court of Cassation had in fact itself answered the second question on constitutionality that the applicants had wished to refer to the Administrative Jurisdiction and Procedure Court. However, it was not found to be a sufficient ground for a violation of Article 6 of the Convention for two reasons. First, assessing such conduct of the Court of Cassation is a matter of domestic law which is not for the ECtHR to resolve. Second, as the Court of Cassation resolved the matter in question and provided reasons for its decision, the refusal could not be considered arbitrary within the meaning of Article 6 of the Convention: “[e]ven supposing that that decision was questionable from the point of view of domestic law, I fail to see how that could be sufficient to make it arbitrary.”⁶⁹ The standard of non- arbitrariness and the requirement to provide reasoning complemented by the insight of Judge Lemmens should be further examined in the context of the obligation under Article 267(3) TFEU a and its exceptions.

3.1.2. The complementary relationship between the obligation under Article 267(3) TFEU and standard of non- arbitrariness

In context of the CILFIT criteria, it does not appear problematic that even questionability under domestic law would not make a refusal arbitrary. The requirement of non-arbitrariness does not contradict the application of CILFIT criteria but rather complements the latter. As required by EU law, the national court adjudicating in last instance must ground its refusal on one of the CILFIT criteria and moreover must be certain that, first, no ambiguity exists about the interpretation of EU law from its own perspective, second, it must find that it is beyond reasonable doubt that courts of other Member States and the CJEU would come to the same conclusion.

The standard of non- arbitrariness added by the ECtHR rather strengthens the application of the CILFIT criteria. A decision that is required not to be arbitrary by the ECtHR is also more likely to be sufficiently weighed out according to the CILFIT criteria and to leave out any ambiguity and contemplated to be in line with the hypothetical opinion of courts of other Member States and the Court of Justice. Also vice versa, contemplation of the CILFIT criteria *a priori* means that the decision is most likely not arbitrary. Thus, the CILFIT criteria and requirement for the decision not to be arbitrary supplement and endorse each other, promoting compliance both with EU law and Article 6 of the Convention.

Moreover, this “symbiosis” is also not disrupted by the approach that a decision may also not be found arbitrary even if questionable under domestic law, as pointed out by Judge Lemmens. As mentioned, the courts have a margin of discretion, although limited, when deciding whether

⁶⁶ Judgment of *Coëme and others v. Belgium*, *supra* note 50, § 115.

⁶⁷ Judgment of *Coëme and others v. Belgium*, *supra* note 50, § 116.

⁶⁸ Separate Opinion of Judge Lemmens to Judgment *Wynen and Centre Hospitalier Interregional Edith- Cavell v. Belgium*, no. 32576/96, *supra* note 65, section 4, para 1.

⁶⁹ Separate Opinion of Judge Lemmens to Judgment *Wynen and Centre Hospitalier Interregional Edith- Cavell v. Belgium*, section 4, para 6.

CILFIT criteria are met.⁷⁰ In other words, the CILFIT allow national courts to assume, without being sure beyond any doubt, that a solution of courts of other Member States and the Court of Justice would be the same. Allowing questionability under domestic law corresponds to the questionability of the assumed opinion of courts of other Member States and the Court of Justice.

3.2. Refusals under Article 267(3) TFEU in admissibility decisions

Having examined the general argumentation of the ECtHR in the cases about the Belgian domestic preliminary question procedure, the most important decisions on admissibility will be analyzed, which highlight the conditions and requirements considered by the ECtHR to references for preliminary rulings to the CJEU. The general argumentation is also applied in decisions on admissibility on references for preliminary rulings to the CJEU. The Convention does not guarantee the right to have a case referred to the CJEU for a preliminary ruling just as it does not in case of other national or international tribunals. The standard of non- arbitrariness is applied as well. The ECtHR expressly states that it does not exclude that a “refusal of a national court to decide in the final instance to refer the question for a preliminary ruling may, in certain circumstances, violate the principle the fairness of the procedure, in particular where such refusal appears to be arbitrary”⁷¹ thus not entirely ruling out an option that Article 6 of the Convention may be breached. For a long time in the early decisions on admissibility the examination was limited to reiteration of this argumentation⁷² and implicit signals that the arbitrariness was related to lack of motivation for the refusal.⁷³ The ECtHR consistently refused to examine the case on the merits refusing jurisdiction by stating that “it is not competent to examine alleged errors of fact or law committed by national courts.”⁷⁴ In later decisions the ECtHR adjusted its reasoning specifically to the obligation under Article 267(3) TFEU by setting two additional criteria to assess the standard of non- arbitrariness and specifying the requirement to provide reasoning thereby. These additional criteria, two that need to be met by the applicant and one that concerns the overall nature of the case, will be analyzed below.

3.2.1 An express request made by the applicant

The first criterion that the ECtHR uses to assess the standard of non- arbitrariness specifically for refusals to make a reference for a preliminary ruling to the CJEU is whether the applicant made an express request for the national court to do so. An analysis of the decisions of the ECtHR allow to conclude that Article 6 of the Convention will not be violated by not providing reasoning for a refusal where the applicant has simply referred to the possibility to make a reference without formally requesting it or where the national court has simply considered such a possibility at its own motion.⁷⁵

The ECtHR has demonstrated that it will not consider that there has been a violation of the right to a fair trial when a request to make a preliminary reference was not expressed at all. As in the

⁷⁰ Delhomme and Larripa, *supra* note 31.

⁷¹ Decision on admissibility delivered by a Chamber *Canela Santiago v. Spain*, no. 60350/00, 4 October, 2001.

⁷² Broberg and Fenger, *supra* note 17, p. 272.

⁷³ Valutyte, *supra* note 6, p. 11.

⁷⁴ Decision on admissibility delivered by a Chamber *Willem Arend Spiele v. the Netherlands*, no.31467/96, § 1, 22 October 1997.

⁷⁵ Morten Bromberg and Niels Fenger, “Preliminary references to the Court of Justice of the European Union and the right to a fair trial under Article 6 ECHR,” *European Law Review* 41(4) (2016): p. 605.

decision *Mens, Mens Hoek v the Netherlands*⁷⁶, the applicants had based their argumentation on the relevant EU legislation but never made an express request to make a reference. The ECtHR observed that “it does not appear that the applicants ever requested the Administrative Law Division to seek a preliminary ruling (..) or that they have argued before the Administrative Law Division that the procedure fell short of requirements under European Union rules.”⁷⁷ In the decision *Ryon v France*⁷⁸ the ECtHR approved this approach.⁷⁹ While in the two above-mentioned cases there was no express request, controversial situations arise when the request was expressed but it is questionable from a procedural point of view.

Prospects are not clear in the situation if the applicant has made the request as a conditional and/or alternative motion rather than a self-standing request. For instance, in *Krikorian v France*⁸⁰ the applicant sought annulment of domestic legislation and based his claims on a number of norms and general principles of Community law as well as several articles of the Convention and the International Covenant on Civil and Political Rights. In addition, he alleged the legislation’s incompatibility with the Constitution. On top of that, the applicant submitted that

in the alternative, if it considered it necessary to obtain an interpretation of Community law in order to decide the present dispute, the Conseil d’Etat would be led to put to the Court of Justice of the European Communities (...) the following question for a preliminary ruling (..)⁸¹

The ECtHR found the reasoning provided by the *Council d’État* was sufficient not to be arbitrary because *inter alia* the request was made only in the alternative.⁸² However, the case-law on the requirement for the request to be self-standing has not been consistent.⁸³ For instance in the admissibility decision *John v Germany*⁸⁴ the applicant, Mr. John asked the court “to dismiss an appeal alternatively, to make a referral to the European Court of Justice under Article 234 EC”.⁸⁵ The alternative nature of the request was not considered by the ECtHR. The decision however provides rich material for analysis on the other two criteria.

In *John v Germany* the ECtHR was presented with two refusals to make a reference for a preliminary ruling to the CJEU, the first by the Hanseatic Court of Appeal and the second by the Federal Court of Justice (adjudicating in last instance) and the Federal Constitutional Court. The applicant had made an express request to the Hanseatic Court of Appeal which refused to make a reference by stating that it was not under the obligation of Article 267 TFEU. In his application to the Federal Court of Justice Mr. John’s requested to overrule the judgement of the Hanseatic Court of Appeal and to “decide in accordance with his motions lodged in the appeal proceedings.”⁸⁶ The application did not contain a new express request to make a reference for a preliminary ruling. Lastly, the Federal Constitutional Court dismissed the constitutional complaint of Mr. John without giving any reasons.

⁷⁶ Decision on admissibility delivered by a Chamber *J.J.W.M. Mens and P.P.M. Mens- Hoeck v. the Netherlands*, no. 34325/96, 20 May 1998, the law.

⁷⁷ *Ibid.*

⁷⁸ Decision on admissibility delivered by a Chamber *Ryon v France*, no. 33014/08, § 32, 15 October 2013.

⁷⁹ Sedlova, *supra* note 37, p. 179.

⁸⁰ Decision on admissibility delivered by a Chamber *Philippe Krikorian v France*, no. 6459/07, 26 November 2013.

⁸¹ *Ibid.*, § 8.

⁸² Decision of *Krikorian v. France*, *supra* note 80, § 99.

⁸³ Sedlova, *supra* note 37, p. 180.

⁸⁴ Decision on admissibility *Lutz John v. Germany*, no. 15073/03, § 8, 13 February 2007.

⁸⁵ *Ibid.*, p. 2.

⁸⁶ *Ibid.*, p. 3.

The ECtHR declared the application inadmissible *inter alia* for the reason that the Mr. John's submissions to the Federal Court of Justice did not contain an "express request for a reference under Article [267(3) TFEU]." ⁸⁷ In these circumstances the ECtHR found that the national courts' decision could not be seen as arbitrary. It can be concluded that the ECtHR requires to make an express request at each instance where the matter is brought. This approach was subject to criticism both generally and specifically from the perspective of German procedural law. ⁸⁸ Rosalind English has argued that the submission to "decide in accordance with the motions lodged in appeal proceedings" was sufficient because the request to make a preliminary reference was one of the mentioned motions; other motions referred to in that formulation were acknowledged by the Federal Court of Justice. Even more, formulating the submission in such way is common for appeals to the Federal Court of Justice of Germany, in order to avoid an unnecessary repetition of the motions made to the lower court. ⁸⁹

Similarly, in admissibility decision *Herma v Germany*⁹⁰ the applicants had raised an alleged obligation to make a reference for a preliminary ruling in an application to the Frankfurt/ Main Court of Appeal. The court rejected the appeal and the applicants made a constitutional complaint to the Federal Constitutional Court. The applicants claimed that by the rejection they were not given a proper hearing. The Federal Constitutional Court refused to admit the complaint. Subsequently the applicants claimed a violation of right to fair trial *inter alia* by the national court's refusal to make a reference for a preliminary ruling. The ECtHR declared the claim inadmissible as domestic remedies were not exhausted. ⁹¹ So, the ECtHR implied that the fact that the decision which contained a request and was the subject matter in the constitutional complaint did not constitute a request also made to the Federal Constitutional Court.

3.2.2 Sufficient substantiation of the request by the applicant

The examination of *John v Germany* leads to the second criterion, that is, the obligation for the applicant to sufficiently substantiate the request. The ECtHR found no arbitrariness in the refusal of the Federal Court of Justice also because the submission of Mr. John did not contain "express and precise reasons for the alleged necessity of a preliminary ruling." ⁹² While in *John v Germany* the ECtHR expressly referred to lack of reasoning, in many decisions it sided with the national court, which had rejected a request for that reason, thus implicitly approving this reasoning.

In *Matheis v Germany*⁹³ the ECtHR sided with the Federal Constitutional Court which did not "explicitly deal with the applicant's request for a preliminary ruling" ⁹⁴ but found no arbitrariness in the refusal to do so as the applicant "did not establish that her constitutional complaint related to any relevant question of Community law." ⁹⁵ Similarly, in *Moosbrugger v Austria*⁹⁶ the ECtHR found no arbitrariness in the refusal of the Supreme Court of Austria which

⁸⁷ *Ibid*, p. 6.

⁸⁸ Rosalind English, "Lutz v Germany," *Human Rights and Public Law Update*, February 2007. Available at: http://www.preview2.lcor.enstar.net/1315/?form_1155.replyids=1081
Accessed 14 April 2019.

⁸⁹ *Ibid*.

⁹⁰ Decision on admissibility delivered by a Chamber *Claus and Heike Herma v. Germany*, no. 54193/07, 8 December 2009.

⁹¹ Decision of *Claus and Heike Herma v. Germany*, *supra* note 90, p. 11.

⁹² Decision of *Lutz John v. Germany*, *supra* note 84, p. 6.

⁹³ Decision on admissibility delivered by a Chamber *Erna Matheis v. Germany*, no. 73711/01, 1 February 2001.

⁹⁴ *Ibid*, § 3.

⁹⁵ *Ibid*.

⁹⁶ Decision on admissibility delivered by a Chamber *Peter Moosbrugger v. Austria*, no. 44861/98, 25 January 2000.

had not made a reference for a preliminary ruling because “no relevant question of EU law had been raised by the applicant.”⁹⁷ In the admissibility decision *Spiele v the Netherlands*⁹⁸ the applicant claimed a national rule to be incompatible with three EC directives and a judgement of the CJEU and requested the Court of Appeal of Arnhem made a reference for a preliminary ruling. The Court of Appeal of Arnhem did not find any incompatibility and found a reference for a preliminary ruling unnecessary. Notably, the court stated that the applicant had failed to indicate with which provision of this third Directive [the national rule] was incompatible.⁹⁹ The Supreme Court rejected the appeal in this matter, stating that the applicant had wrongly relied on the directive.¹⁰⁰ The ECtHR found that the national courts had sufficiently considered the applicants arguments and the refusal was thus not arbitrary.¹⁰¹ The argumentation of the ECtHR leaves it uncertain what substantiation needs to be provided by an applicant for it to be considered sufficient.

Some authors have identified the obligation for the applicant to sufficiently substantiate the request as an obligation for the applicant to demonstrate sufficient relevance specifically for EU law.¹⁰² Indeed in most of the respective decision the ECtHR refers to insufficient argumentation related to the EU law applicable to the case. However, the author finds identifying the criteria to be a demonstration of relevance for EU law flawed for two reasons. First, it implies that in fact the ECtHR would be itself examining whether the interpretation of EU law is relevant for resolving the case, the first CILFIT exception. As already noted, the ECtHR in has no jurisdiction nor has it demonstrated willingness to interpret EU law in this matter. Secondly, such examination is by its nature examination of the merits of the case, which the ECtHR does not intend to do in the form of a decision. For these reasons, the author holds that the reference to EU law which the ECtHR makes when finding insufficient substantiation by the applicant is made merely due to the fact that the dispute concerns EU law. Logically in that situation a sufficient substantiation would need to be made employing EU law. The requirement to sufficiently substantiate a refusal is a procedural not material one as examined by the ECtHR; it does not require specifically the demonstration of relevance to EU law.

In the context of *John v Germany*, the requirement to sufficiently substantiate the request has caused two points of criticism in the debate on the case- law of the Strasbourg court.¹⁰³ Firstly, the obligation of a court adjudicating in last instance to make a reference for a preliminary ruling is in no way conditional on whether a party makes such a request and gives sufficient reasons for the request. Although parties may do so, under Article 267 (3) TFEU the court should make a reference for a preliminary ruling *ex officio*. Even more the CJEU has emphasized that the national courts should avoid any influence from the parties before it.¹⁰⁴ The author sides with the critics who have called the criterion questionable¹⁰⁵ and argued that binding the referral to a sufficient request from the parties goes against the spirit of the

⁹⁷ Decision on admissibility delivered by a Chamber *Peter Mossbruger v. Austria*, no. 44861/98, § 1, 25 January 2000.

⁹⁸ Decision of *Spiele v. the Netherlands*, *supra* note 74.

⁹⁹ Decision of *Spiele v. the Netherlands*, *supra* note 74, the facts.

¹⁰⁰ Decision of *Spiele v. the Netherlands*, *supra* note 74, the facts.

¹⁰¹ Decision of *Spiele v. the Netherlands*, *supra* note 74.

¹⁰² See Zane Sedlova, *Tiesību aizsardzības mehānismi, ja tiesa neuzdod prejudiciālo jautājumu* (a dissertation) (Riga: Publication of Zane Sedlova with the support of sworn advocates' office of Romualds Vosnovičš, 2017); Regina Valutytė, “State Liability for the Infringement of the Obligation to Refer for a Preliminary Ruling under the European Convention on Human Rights,” *Jurisprudencija* (2012) 19(1).

¹⁰³ Laffranque, *supra* note 27, p. 21.

¹⁰⁴ Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings 2018/C 257/01 OJ, para. 3.

¹⁰⁵ Sedlova, *supra* note 37, p. 180.

preliminary ruling procedure.¹⁰⁶ Secondly, some critics argue that by this approach the ECtHR has in fact introduced an additional condition to the *Köbler* case-law.¹⁰⁷ On the one hand, this criticism is plausible. When a national court contemplates making a reference for a preliminary ruling, it should consider all external obligations, regardless whether they originate from the case-law of the Strasbourg or Luxembourg court. Nonetheless, the criticism ignores that this approach does not contradict the applicable EU law or step over the dividing lines of jurisdiction of both courts. The requirement to express a request and to sufficiently substantiate it concerns solely the interaction between the parties and the national court. EU law rules on the preliminary ruling procedure are completely detached from this matter and concern the interaction between different actors, the national court and the CJEU and specifically exclude the individual from the equation. A condition cannot be viewed as additional to those in EU law if it concerns an interaction between actors from which EU law deliberately disassociates itself.

3.2.3 A fundamental legal issue

John v Germany will be also used to demonstrate the third criterion, that is, whether the matter on which the reference for a preliminary ruling is requested raises a fundamentally important legal issue. It must be noted here that this criterion specifies the requirement to provide reasoning in the context of the obligation under Article 267(3) TFEU unlike the previous two, which were independent and additional. The ECtHR in *John v Germany* permitted that the superior national courts be exempted from the requirement to provide reasoning and dismiss the request by “mere reference to the relevant legal provisions (..) if the matter raises no fundamentally important legal issue.”¹⁰⁸ The ECtHR found that the situation at hand did not concern such a matter and concluded that the Federal Court of Justice and Federal Constitutional Court were not obliged to provide reasoning for the refusal.

Unlike the requirement to express request and to sufficiently substantiate it, the possibility not to provide reasoning if no fundamentally important legal issue has been raised risks stepping over the dividing lines of jurisdiction of both courts. The aim of the preliminary ruling of the CJEU is to clarify the correct interpretation and application of EU law. Whether a fundamental legal issue exists may be partially or even entirely a question of interpretation of EU law. A requirement to evaluate whether the matter concerns a fundamental legal question is futile. The national court in this situation is in fact would be asked to answer the question if the exceptions of Article 267(3) TFEU apply. Whereas the ECtHR in this situation would be required to do the same for the purpose of determining whether the national court was allowed to dismiss the obligation to give reasons. In other words, evaluating the fundamentality of the question poses a great risk for the ECtHR to apply EU law, about which the party and the national court disagree and which the ECtHR has no jurisdiction or willingness to interpret. It must be noted here that the ECtHR approved this condition again in the *Case of Baydar v the Netherlands*¹⁰⁹ analyzed below.

John v Germany also illustrates a hesitant and inconsistent attitude towards using the Article 267(3) TFEU obligation in the reasoning of the ECtHR. The ECtHR assessed that the Hanseatic Court of Appeal had rightly substantiated its refusal on the fact that it was not a court adjudicating in last instance and thus not under an obligation to make a reference for a preliminary ruling deriving from Article 267 TFEU. However, as regards for the refusal of

¹⁰⁶ Laffranque, *supra* note 27, p. 21.

¹⁰⁷ Laffranque, *supra* note 27, p.21.

¹⁰⁸ Decision of *Lutz John v. Germany*, *supra* note 84, p. 7.

¹⁰⁹ Judgement on Merits and Just Satisfaction *Baydar v the Netherlands*, no.55385/14, 24 April 2018.

Federal Court of Justice and Federal Constitutional Court, the ECtHR departed from further looking at the obligation in Article 267 TFEU. Contrary to the examination of the refusal of the Hanseatic Court of Appeal, the ECtHR did not consider the obligation of Article 267 TFEU. The ECtHR seemingly avoided to examine the refusals any further than agreeing with the national court on an obvious non-existence of an obligation. Although it would indeed not be within the jurisdiction of the ECtHR to examine whether the obligation of Article 267 TFEU applied in the specific case, an acknowledgement of the obligation while looking at the Hanseatic Court of Appeal but departing from it while looking at the Federal Court of Justice an addressee of the provision is problematic.

3.3 Judgements decided on the merits

Having examined the most notable decisions on admissibility, the few judgements that have been delivered by the ECtHR on refusals to make a reference for a preliminary ruling to the CJEU will be looked upon. In decisions on admissibility the ECtHR did not distinguish between purely domestic and EU law when it comes to the material questions of the case when a reference for a preliminary ruling has been refused. As early as in 1958, it has been indicated that “if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty”.¹¹⁰ In the famous *Bosphorus* judgement¹¹¹ it was elaborated that a State is responsible under the Convention regardless of whether the act or omission was a consequence of domestic law or resulted from the necessity to comply with an international obligation. The judgement stipulated that a State may be held liable also for the violations as a result of implementation of EU law.¹¹² In the context of a refusal to make a reference for a preliminary ruling this is perhaps best demonstrated in the admissibility decision *Herma v Germany*¹¹³ where the ECtHR expressly stated that it is for the national courts to interpret and apply domestic law “even when that law refers to international law or agreements” and the ECtHR limits itself solely to the effects of the latter and their compatibility with the Convention¹¹⁴ thus confirming its respect for the exclusive right of the CJEU to interpret EU law. Since the first judgement on the merits was decided the ECtHR demonstrated that when it comes to procedural questions such as the obligation of Article 267(3) TFEU the ECtHR recognizes the special legal regime of EU law.

3.3.1. Adjusting the standard of non-arbitrariness to refusals under Article 267(3) TFEU

The application in *Ullens de Schooten and Rezabek v Belgium*¹¹⁵ was the first concerning the refusal to make a reference for preliminary ruling to the CJEU that was declared admissible and decided on the merits by the ECtHR. The judgement was delivered contrary to the widespread and well-founded view that it is very unlikely that the ECtHR would rule on the obligation under Article 267(3) TFEU in the context of Article 6 of the Convention.¹¹⁶ It did even more than that; the ECtHR established three additional criteria for assessing the standard of non-

¹¹⁰ Decision on admissibility delivered by a Chamber *X v. Germany*, no. 235/56, decision of the Commission of 10 June 1958, *Yearbook* 2, p. 256.

¹¹¹ Judgement on merits *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, no. 45036/98, §153, ECR 2005-VI.

¹¹² Valutyte, *supra* note 6, p. 10.

¹¹³ Decision of *Claus and Heike Herma v. Germany*, *supra* note 90.

¹¹⁴ Laffranque, *supra* note 27, p. 20.

¹¹⁵ Judgment of *Ullens de Schooten and Rezabek v. Belgium*, *supra* note 45.

¹¹⁶ Sedlova, *supra* note 37, pp.183-184.

arbitrariness by reviewing the relevant practice of the CJEU¹¹⁷ and substantiated its judgement on them, delving into the obligation under Article 276(3) TFEU and the CILFIT criteria.

Ullens de Schooten arose from two applications that concerned the legal proceedings surrounding a clinical biology laboratory *Biorim*, whose clients were receiving reimbursement from the National Institute for Sickness and Invalidity for services from Biorim in violation of the Royal Decree no. 143 of 30. December 1982 (hereinafter Royal Decree). In the first application, the applicants, Mr. Ullens de Schooten and Mr. Rezabek who were directors of Biorim were convicted by the Brussels Court of First Instance and imposed prison sentences and fines.¹¹⁸ In their appeals to the Brussels Court of Appeals the applicants argued that the Royal Decree was incompatible with the EC Treaty and a reference for a preliminary ruling should be made to the CJEU on this matter. The Brussels Court of Appeals ruled that the Royal Decree was compatible with Community law and there was no need to make a reference for a preliminary ruling.¹¹⁹ The Court of Cassation dismissed an appeal against this decision. Meanwhile the applicants lodged a complaint against Belgium with the European Commission on the incompatibility of the Royal Decree with the EC Treaty. The Commission started infringement proceedings against Belgium for this matter and issued a reasoned opinion on this matter.¹²⁰ While the infringement proceedings were pending, the applicants sought a preparatory hearing at the Mons Court of Appeal arguing that the Royal Decree was incompatible with the EC Treaty, supported by the Reasoned Opinion issued by the Commission and again requested that a reference for a preliminary ruling to be made. The Mons Court of Appeal dismissed the applicants' arguments. The applicants again appealed to the Court of Cassation which subsequently dismissed their appeals. It argued that the *res judicata* doctrine allowed not to review a decision that was final under the domestic procedural rules, even though it appears to be in breach of EU law.¹²¹ The Court of Cassation accordingly refused to make a reference for a preliminary ruling based on *act éclairé* doctrine. A few months later Belgium amended the Royal Decree according to the reasoned opinion of the Commission.¹²²

The second application was made by Mr. Rezabek alone who challenged the administrative decision that suspended the accreditation of *Biorim* also on the basis of the Royal Decree.¹²³ The Royal Decree had already been amended when the matter reached the *Council d'État*. Mr. Rezabek disputed the compatibility of the Royal Decree with the EC Treaty and requested that a reference for a preliminary ruling be made. The *Council d'État* dismissed the appeals and refused to make a reference for a preliminary ruling. The *Council d'État* in its explanation expressly recognized its obligation under Article 267(3) TFEU and reiterated the three exceptions to that obligation. Relying on the material issue the *Council d'État* refused to make a reference for a preliminary ruling as it could not have affected the outcome of the case.¹²⁴

The ECtHR first recognized the main question before it, that is, whether the refusal by the Court of Cassation and the *Conseil d'État* to refer to the CJEU the questions submitted by the applicants for a preliminary ruling as requested by the applicants violated Article 6 of the Convention.¹²⁵ The ECtHR acknowledged the "particular significance" of the preliminary

¹¹⁷ Bromberg and Fenger, *supra* note 75, p. 601.

¹¹⁸ Judgment of *Ullens de Schooten and Rezabek v. Belgium*, *supra* note 45, § 5-9.

¹¹⁹ Judgment of *Ullens de Schooten and Rezabek v. Belgium*, *supra* note 45, § 10-12.

¹²⁰ Judgment of *Ullens de Schooten and Rezabek v. Belgium*, *supra* note 45, § 14-15.

¹²¹ Judgment of *Ullens de Schooten and Rezabek v. Belgium*, *supra* note 45, § 22.

¹²² Judgment of *Ullens de Schooten and Rezabek v. Belgium*, *supra* note 45, § 16.

¹²³ Judgment of *Ullens de Schooten and Rezabek v. Belgium*, *supra* note 45, § 23-27.

¹²⁴ Judgment of *Ullens de Schooten and Rezabek v. Belgium*, *supra* note 45, § 29.

¹²⁵ Judgment of *Ullens de Schooten and Rezabek v. Belgium*, *supra* note 45, § 55.

ruling procedure in the “jurisdictional context of the European Union” and its purpose to ensure the proper application and uniform interpretation of EU law and to prevent divergences in judicial decisions and questions of EU law.¹²⁶ Then it observed that such an obligation arises from Article 267(3) TFEU and that exceptions for the obligation have been established in the CILFIT case- law, particularly, the relevance of the question and the *acte clair* and *act éclairé* doctrines.¹²⁷

The ECtHR reiterated that “the Convention does not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling”. It went on that where in a legal system there exists a mechanism that only a particular court may interpret a particular field of law and other courts are required to refer questions of that field of law to that court, it is for the other courts to decide, according to the mechanism, whether a question needs to be referred or not when a request to do so is made.¹²⁸ The passage obviously describes the preliminary ruling procedure between the national courts and the CJEU. The formulation emphasizes that it is “according to the mechanism (..) for the court to verify”¹²⁹ the need to make a reference for a preliminary ruling. Two conclusions can be made from this. First, the ECtHR acknowledges the in the decision to make a reference for a preliminary ruling under Article 276(3) TFEU should be made exclusively on the initiative of the courts and not parties to the proceedings.¹³⁰ Secondly, by emphasizing the “legal mechanism” which governs the obligation to make references, it recognizes the importance of the EU legal regime also when deciding on refusals in the of Convention rights.

That conclusion is supported by the fact that the ECtHR explicitly referred to the “particular significance [of the preliminary ruling procedure] in the jurisdictional context of the European Union”¹³¹ and expressly cited the CJEU on its importance in ensuring the proper application and interpretation and preventing divergences in judicial decisions on questions of Community law.¹³² The ECtHR continued by stating that the fairness of the proceedings may be infringed, if the refusal proves arbitrary, that is, not accompanied by adequate reasons¹³³ thus confirming the previously established requirement. However, it went on to specify that it may be so

where there has been a refusal even though the applicable rules allow no exception to the principle of preliminary reference or no alternative thereto, where the refusal is based on reasons other than those provided for by the rules, and where the refusal has not been duly reasoned in accordance with those rules.¹³⁴

The ECtHR thus added three more criteria to assess the standard of non-arbitrariness. In context of Article 267(3) TFEU the court adjudicating in last instance is required to

indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the Court of Justice, or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt.¹³⁵

¹²⁶ Judgment of *Ullens de Schooten and Rezaček v. Belgium*, *supra* note 45, § 56.

¹²⁷ Judgment of *Ullens de Schooten and Rezaček v. Belgium*, *supra* note 45, § 58.

¹²⁸ Judgment of *Ullens de Schooten and Rezaček v. Belgium*, *supra* note 45, § 57.

¹²⁹ Judgment of *Ullens de Schooten and Rezaček v. Belgium*, *supra* note 45, § 58.

¹³⁰ Court of Justice of the European Union. Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 2018/C 257/01, para. 3.

¹³¹ Judgment of *Ullens de Schooten and Rezaček v. Belgium*, *supra* note 45, § 58.

¹³² Judgment of *Ullens de Schooten and Rezaček v. Belgium*, *supra* note 45, § 58.

¹³³ Bromberg, *supra* note 49, p. 246.

¹³⁴ Judgment of *Ullens de Schooten and Rezaček v. Belgium*, *supra* note 45, § 59.

¹³⁵ Judgment of *Ullens de Schooten and Rezaček v. Belgium*, *supra* note 45, § 62.

The criteria undoubtedly correspond to the CILFIT criteria. Thus, a national court under the obligation of Article 267(3) TFEU must give reasons why a CILFIT criterion can be applied in the situation at hand.¹³⁶ This specification to the standard of non-arbitrariness has been repeated in the following judgements almost *verbatim*.¹³⁷ Having adjusted the standard of non-arbitrariness to refusals under Article 267(3) TFEU, the ECtHR found no arbitrariness in the refusals of *Council d'État* and the Court of Cassation.

Although *Ullens de Schooten and Rezabek v Belgium* marks an end to the reluctance of the ECtHR to put EU law into the equation, the judgement still demonstrates a great respect for the exclusive right of the CJEU to decide on the correct interpretation and application of EU law and its own limitation to evaluating only the fairness of proceedings according to the mentioned criteria.¹³⁸ In the circumstances where the European Commission had explicitly provided an answer and there was no question on whether the *Council d'État* could have relied on the exceptions of Article 267(3) TFEU, the ECtHR restrained itself from considering this matter entirely.

The judgment allows to safely conclude that merely a reference to the CILFIT criteria and a reasonable justification for it excludes the possibility of a violation of Article 6 of the Convention¹³⁹ A violation of the Convention may be committed if a reference to the CILFIT exceptions is entirely neglected.¹⁴⁰ Moreover a reference to only and at least one of the CILFIT exceptions is sufficient, even in the circumstances where it is hard to determine the precise requirements for the reasoning in support to a reference to that exception.¹⁴¹ The question is still left uncertain, whether a refusal can be based on other reasons than a justified reference to at least one CILFIT exception.¹⁴² The answer is provided in the later *Baydar*¹⁴³ judgement analyzed in below.

3.3.2. The *Dhahbi* judgement -first violation of Article 6 of the Convention by a refusal to refer a question to the CJEU

The requirement to provide reasoning in the light of CILFIT criteria was applied in *Dhahbi v Italy*¹⁴⁴ where the ECtHR first found a refusal to make a reference for a preliminary ruling to the CJEU to violate Article 6 of the Convention.¹⁴⁵

The case concerned an interpretation of the Association Agreement between the EU and Tunisia also known as the Euro-Mediterranean agreement, which prohibited discrimination based on the nationality of Tunisian nationals working in the EU and their families and allowed them to enjoy “social security” benefits just as EU citizens do. The applicant Mr. Dhahbi was a Tunisian national, lawfully working and residing in Italy with his family and three underaged children. Mr. Dhahbi was denied payment of the family allowance as Italian legislation made the allowance conditional *inter alia* on being an Italian national. Mr. Dhahbi complained that the

¹³⁶ Sedlova, *supra* note 37, p.186.

¹³⁷ Bromberg and Fenger, *supra* note 75, p. 602.

¹³⁸ Sedlova, *supra* note 37, p. 188.

¹³⁹ Sedlova, *supra* note 37, p. 188.

¹⁴⁰ Valutyte, *supra* note 6, p. 15.

¹⁴¹ Bromberg and Fenger, *supra* note 75, p.605.

¹⁴² Valutyte, *supra* note 6, p. 15.

¹⁴³ Judgement of *Baydar v. the Netherlands*, *supra* note 109.

¹⁴⁴ Judgment of *Dhahbi v. Italy* *supra* note 46.

¹⁴⁵ European Court of Human Rights. Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb) as updated on 31 August 2018, pp. 50-51. Available at: https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf Accessed on April 2, 2019.

Italian legislation was in conflict with the Euro-Mediterranean agreement and in these circumstances, he was entitled to the family allowance. Alternatively, he requested the Italian courts to make a reference for a preliminary ruling to the CJEU to ascertain whether the family allowance fell within the interpretation of “social security” and thus the scope of the Euro-Mediterranean agreement. Having exhausted domestic remedies and without having received a preliminary ruling from the CJEU, the applicant made an application to the ECtHR claiming *inter alia* a violation of Article 6 of the Convention, as the Court of Cassation had refused to make a reference for a preliminary ruling to the CJEU although it was obliged to do so under Article 267(3) TFEU.

The ECtHR easily recognized Article 267(3) TFEU to be applicable to the Court of Cassation as a court adjudicating as last instance and therefore recognized that it was required to provide reasoning in the light of the exceptions provided in the case-law of the CJEU¹⁴⁶ that is, the CILFIT criteria. Mr. Dhahbi had provided extensive argumentation to substantiate the applicability of the Euro-Mediterranean agreement to the Italian legislation on family benefits or at least prove uncertainty on this matter. Mr. Dhahbi referred to the case-law of the CJEU where it had recognized the direct applicability of principle of non-discrimination in the field of social security, the interpretation of which had been sufficiently broad, in context of the agreement between EU and Morocco. Mr. Dhahbi argued that this argumentation was “fully transposable” to the situation at hand.¹⁴⁷ Even more, he argued that the Court of Cassation had ignored the meaning of “social assistance” in EU law and its relevance to the principle of non-discrimination, supported by extensive case-law of the CJEU.¹⁴⁸

The ECtHR found that the Court of Cassation had not substantiated its refusal by any of the three exceptions of Article 267(1) TFEU. Even more, the reasoning of the Court of Cassation had not considered the argumentation of the applicant. Nor had it made any reference to the case-law of the CJEU; the ECtHR thus concluded that it is “not clear from the reasoning of the impugned judgment whether that question was considered not to be relevant or to relate to a provision which was clear or had already been interpreted by the CJEU, or whether it was simply ignored.”¹⁴⁹ The ECtHR thus ruled that “[t]hat finding is sufficient for the Court to conclude, that there has been a violation of Article 6 § 1 of the Convention.”¹⁵⁰

3.3.3. Developments after Dhahbi

Having first decided a refusals to make a reference for a preliminary ruling on the merits and having first found a violation of Article 6 of the Convention, the ECtHR delivered two more such judgements.

*Schipani and Others v Italy*¹⁵¹ concerned late transposition of an EU directive, which had deprived the applicants, all of them trainee doctors, from remuneration that was provided in that directive. The applicants sought to obtain compensation for damage sustained, which was dismissed by the Rome Court of First Instance and Rome Court of Appeal. The applicants appealed to the Court of Cassation and *inter alia* requested to refer two questions to the CJEU. It must be noted that the applicants made the request in alternative to the immediate satisfaction

¹⁴⁶ Judgment of *Dhahbi v. Italy* *supra* note 46, § 32.

¹⁴⁷ Judgment of *Dhahbi v. Italy* *supra* note 46, § 27.

¹⁴⁸ Judgment of *Dhahbi v. Italy* *supra* note 46, § 33.

¹⁴⁹ Judgment of *Dhahbi v. Italy* *supra* note 46, § 28.

¹⁵⁰ Judgment of *Dhahbi v. Italy* *supra* note 46, § 34.

¹⁵¹ Judgment on merits and just satisfaction delivered by a Chamber *Schipani and Others v. Italy*, no. 38369/09, ECHR 2015.

of their claims. The Court of Cassation upheld the judgement of the Rome Court of Appeal and made no reference whatsoever to the request to refer a question to the CJEU of the applicants.¹⁵²

The ECtHR found that the Court of Cassation did not refer to the applicants request or state any reasons why the questions should not be submitted to the CJEU in its judgment. Although the government had argued that its argumentation in the substance of its judgement implicitly provided reasoning for the first question of the applicants, it was enough for the ECtHR that the second question was left unaddressed.¹⁵³ The ECtHR thus found that “the statement of reasons for the judgment at issue does not therefore make it possible whether this last branch of the question was considered irrelevant or as relating to a clear provision or as already interpreted by the ECJ, or if it has simply been ignored (..)”¹⁵⁴ thereby finding a violation of Article 6 of the Convention. The ECtHR dismissed the argument of the Government that the reasons for the refusal are indirectly apparent from the material solution of the case and did not address such possibility in principle.¹⁵⁵

Notably the alternative nature of the request was not considered by the ECtHR, unlike in *Krikorian v France*. Considering that the ECtHR did the same in *John v Germany* it may be safely assumed that after *Schipani* this circumstance is not relevant for the ECtHR and its consideration in *Krikorian v France* was rather a one-time exception with authority (or absence of it) of *obiter dicta*.

Moreover, it can be concluded that the ECtHR requires national courts to provide reasoning for refusal for all and each question mentioned in the request of the applicants. However, this conclusion still requires confirmation in further case-law. The Government alleged that motivation for refusing the first question was implicitly provided in the discussion on material questions of the case. The ECtHR continued the examination on this premise only “supposing that this is the case”¹⁵⁶. It is arguable whether this kind of reasoning even met the requirement to provide reasons when taken separately.

More light is shed on this question in the judgement *Wind Telecomunicazioni SPA. v Italy*¹⁵⁷. This case concerned a particularly fascinating situation. The applicant, a limited liability company *Wind Telecomunicazioni SPA* had been imposed a fine of 2 00 000 for a breach of EU competition rules. The applicant challenged the respective administrative decision in the Regional Administrative Court which rejected the appeal. *Wind Telecomunicazioni SPA* then brought the case to the Council of State and *inter alia* requested that a reference for a preliminary ruling on the interpretation of EU competition rules be made to the CJEU. The Council of State rejected the appeal and provided an answer to the question referring to the case-law of CJEU. The applicant appealed against this decision in the Court of Cassation alleging that the Council of State had provided its own interpretation of EU competition rules thereby acting outside its jurisdiction and had an obligation according to Article 267 TFEU to make a reference for a preliminary ruling to the CJEU.¹⁵⁸ The Court of Cassation rejected the appeal as manifestly ill-founded and the applicant brought the question to the Supreme Court and requested to refer the following questions to the CJEU, first, if Article 267 TFEU must

¹⁵² Judgment of *Schipani and Others v. Italy*, *supra* note 151, § 27.

¹⁵³ Judgment of *Schipani and Others v. Italy*, *supra* note 151, § 71.

¹⁵⁴ Judgment of *Schipani and Others v. Italy*, *supra* note 151, § 71.

¹⁵⁵ Bromberg and Fenger, *supra* note 75, p. 603.

¹⁵⁶ Judgment of *Schipani and Others v. Italy*, *supra* note 151, § 71.

¹⁵⁷ Decision on admissibility delivered by a Chamber *Wind Telecomunicazioni SPA. v. Italy*, no. 5159/14, ECHR 2015.

¹⁵⁸ Decision of *Wind Telecomunicazioni SPA. v. Italy*, *supra* note 157, § 4-21.

be interpreted in the sense to attribute to the CJEU exclusive jurisdiction in matters of interpretation of EU law and, second, if a national court of last instance exceeded the limits of their jurisdiction refusing to make a refer a question to the CJEU and giving its own interpretation of EU law.¹⁵⁹ The Supreme Court rejected the complaint. The applicant formulated its complaint to the ECtHR in a broad manner, that “the procedure for its appeal against the decision [imposing the fine] has not been fair”¹⁶⁰ without identifying the precise stage of proceedings.

The ECtHR thereby was in the unenviable situation where it had to rule on the fairness of proceedings that concerned a rejection to make a reference for a preliminary ruling to the CJEU which was itself on the obligation to make a reference for a preliminary ruling procedure and even more the delimitation of competences of national courts and the CJEU in EU law. The ECtHR declared the complaint in the part of the rejection of the Council of State inadmissible as being lodged out of time. As for the Court of Cassation, the ECtHR reiterated the requirement to provide reasoning in the light of exceptions of Article 267(3) TFEU. It then observed that no the requests of the applicant had not been addressed in any way in the judgement of the Court of Cassation. Despite this fact the ECtHR then stated that “it appears from a reading of the reasoning in that judgment that the question was manifestly irrelevant in this case”¹⁶¹ agreeing with the findings of the Supreme Court.¹⁶² The ECtHR stated that “[a]dmittedly, it would have been preferable for the Court of Cassation to explain the lines of its reasoning”¹⁶³ but accepted that the court’s reasoning could be sufficiently implied¹⁶⁴ and found no violation of Article 6 of the Convention.

It can be safely argued that the ECtHR failed to refrain from interpretation of EU law. Although it did so by agreeing to the interpretation of the Supreme Court, in effect the ECtHR concluded that the first exception of Article 267(3) TFEU applied in the case. From the examined case-law, *Wind Telecomunicazioni SPA. v Italy* demonstrates an occasion where the fine line that divides the jurisdictions of ECtHR and CJEU has been overstepped.

Moreover, in *Wind Telecomunicazioni SPA. v Italy* the ECtHR accepted that reasoning for a rejection can also be implicitly provided in the examination of the material questions of the judgement. Criticism has been raised that by this approach the ECtHR itself searched for the excuse to rule that sufficient reasoning had been provided.¹⁶⁵

Whereas the ECtHR seemed not to accept such an option in *Schipani and Others v Italy*, it confidently did so in *Wind Telecomunicazioni SPA. v Italy*. It should be noted that the material issue and the argumentation provided in both cases differed considerably. It is very questionable if the argumentation of the Court of Cassation in *Schipani and Others v Italy* could be sufficiently linked to the question of the applicants. By contrast, in *Wind Telecomunicazioni SPA. v Italy* the argumentation of the Court of Cassation and the applicant’s questions undoubtedly concerned the same underlying legal issue. It can be concluded that it is not entirely impossible that the ECtHR finds that although reasoning for a refusal is not provided explicitly, it can be implied from the examination of material issues of the case, therefore not violating Article 6 of the Convention. However, such situation requires a very close connection

¹⁵⁹ Decision of *Wind Telecomunicazioni SPA. v Italy*, *supra* note 157, § 23.

¹⁶⁰ Decision of *Wind Telecomunicazioni SPA. v Italy*, *supra* note 157, § 23.

¹⁶¹ Decision of *Wind Telecomunicazioni SPA. v Italy*, *supra* note 157, § 36.

¹⁶² Decision of *Wind Telecomunicazioni SPA. v Italy*, *supra* note 157, § 36.

¹⁶³ Decision of *Wind Telecomunicazioni SPA. v Italy*, *supra* note 157, § 37.

¹⁶⁴ Decision of *Wind Telecomunicazioni SPA. v Italy*, *supra* note 157, § 37.

¹⁶⁵ Sedlova, *supra* note 37, p. 198.

between the explanation of the material issues and the question that the applicants requested to refer to the CJEU.

3.3.4. Softening of the requirement to provide reasoning

The requirement to provide reasoning that had been applied and specified in the case-law of the ECtHR was nevertheless limited in the recent judgment *Baydar v The Netherlands*¹⁶⁶ of 24 July 2018. In this case the applicant had not included a request to make a reference for a preliminary ruling in the written submissions to the Supreme Court of the Netherlands but only in reply to the Advocate's General advisory opinion during the domestic proceedings. The Supreme Court dismissed the request by a summary reasoning within its judgement, which was limited to a recognition that the "[c]ounsel [for the applicant] have submitted a written reply" and the following passage:

The grievances cannot lead to cassation [of the impugned judgement]. Based on Section 81(1) of the Judiciary Act this requires no further reasoning as the remaining grievances do not give rise to the need for a determination of legal issues in the interests of legal uniformity or legal development.¹⁶⁷

The applicant complained that the refusal was insufficiently substantiated, thus arbitrary and in violation of Article 6 of the Convention. Unlike in previous judgements and decisions where the ECtHR had expanded or specified the requirement to provide reasons, the ECtHR in *Baydar* did the opposite. After the ECtHR reiterated that a refusal may be deemed arbitrary if not examined in the light of the exceptions of Article 267(3) TFEU it continued that it, however, the obligation to provide reasoning does not mean that a court must provide a "detailed answer to every argument"¹⁶⁸ The submissions that can be brought before the court are diverse and therefore the extent of the duty to provide reasons may vary and can be determined only in the light of the circumstances of the case.¹⁶⁹ Such circumstances that allow exceptions to the requirement to provide reasoning were, for instance, established in *John v Germany*¹⁷⁰ (see chapters on fundamental legal issue and sufficient substantiation). Thereby the ECtHR has "softened the obligation to give reasons"¹⁷¹ if the decision makes a reference for a preliminary ruling unnecessary.¹⁷²

As for the summary reasoning, the ECtHR recalled that it had accepted that a request may be dismissed by mere reference to the relevant legal provisions if matter raises no fundamentally important legal issue and to dismiss an appeal on points of law as having no prospects of success without further explanation.¹⁷³ In these circumstances, as the case was decided in accelerated proceedings¹⁷⁴ and the applicant's grounds for appeal and Advocate General's advisory opinion¹⁷⁵ had been properly examined, the ECtHR accepted that the summary reasoning implied that "a referral to the CJEU could not lead to a different outcome of the case" and thus demonstrated the irrelevance of the question, the first CILFIT criterion.¹⁷⁶ Having limited but

¹⁶⁶ Judgement of *Baydar v. the Netherlands*, *supra* note 109.

¹⁶⁷ Judgement of *Baydar v. the Netherlands*, *supra* note 109, § 14-15.

¹⁶⁸ Judgement of *Baydar v. the Netherlands*, *supra* note 109, § 39.

¹⁶⁹ Judgement of *Baydar v. the Netherlands*, *supra* note 109, § 40.

¹⁷⁰ Judgement of *Baydar v. the Netherlands*, *supra* note 109, § 42.

¹⁷¹ Bromberg and Fenger, *supra* note 75, p. 602.

¹⁷² Bromberg and Fenger, *supra* note 75, p. 602.

¹⁷³ Judgement of *Baydar v. the Netherlands*, *supra* note 109, § 46.

¹⁷⁴ Judgement of *Baydar v. the Netherlands*, *supra* note 109, § 49.

¹⁷⁵ Judgement of *Baydar v. the Netherlands*, *supra* note 109, § 51.

¹⁷⁶ Laffranque, *supra* note 27, p. 23.

not jeopardized its strict rules on the duty to provide reasoning¹⁷⁷ the ECtHR found no violation of Article 6 § of the Convention by the Supreme Court's refusal.

Although the Baydar judgement might seem like a sudden departure from the established case-law on the requirement to provide reasoning in the context of the CILFIT exceptions, such a path had been advocated for and explained by such authorities as Morten Bromberg and Niels Fenger approximately two years earlier.¹⁷⁸ The authors had pointed at the faulty assumption that in all cases when national courts reject the applicants requests to refer a question to the CJEU they automatically do not live up to the requirements of the Convention. Morten Bromberg and Niels Fenger argued that “the fact that a party generally and imprecisely asks for the relevant provisions of EU law to be put before the Court of Justice can hardly mean that the national court must give an extensive statement of reasons for refusing to make a reference.”¹⁷⁹ Moreover the authors suggested that existence of sufficient reasoning should be assessed in context of the whole judgement, that is the refusal and the judgement should “together [be] clear about the circumstances to which the court has given weight for refusing to make a reference” which may or may not include examination of the applicability of the CILFIT exceptions.¹⁸⁰

4. CASE- LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

To put the case- law of the ECtHR in the context of the jurisprudence of the CJEU two separate perspectives need to be distinguished. First, from the perspective of State liability and the obligation of a Member State to provide remedy to an individual for breach of EU rights, in particular by the judiciary. Second, from the perspective of infringement proceedings against the Member State brought by the Commission due to the conduct of the judiciary and particularly, failure to fulfil the obligation of Article 267(3) TFEU.

4.1 State liability

The EU is an independent legal system whose subjects are not only its Member States but also the citizens of the Union. EU law confers rights to individuals. The Member States are required to take all appropriate measures to fulfil the obligations arising out of the Treaties¹⁸¹ which include the obligation to “nullify the unlawful consequences”¹⁸² of a breach of EU law. In order to protect these rights and to ensure overall enforcement of EU law, individuals are given a possibility to bring a legal action against a Member State to seek remedy for a failure to implement, or correctly apply EU law.¹⁸³ It has been recognized as inherent in the system of Treaties that Member States must provide individual remedy for loss and damage sustained due to a violation of EU law that the Member State can be held liable for it.¹⁸⁴ The national courts

¹⁷⁷ Laffranque, *supra* note 27, p. 24.

¹⁷⁸ Bromberg and Fenger, *supra* note 75, p. 606.

¹⁷⁹ Bromberg and Fenger, *supra* note 75, p. 606.

¹⁸⁰ Bromberg and Fenger, *supra* note 75, pp. 606-607.

¹⁸¹ Consolidated version of the Treaty on European Union *OJ C 326, 26.10.2012, p. 13–390 Article 3, para. 2.*

¹⁸² Judgement of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, C-6/90 and 9/90, ECR 1991 I-05357 para. 36.

¹⁸³ Lorna Woods and Philipa Watson, *EU Law* (Oxford: Oxford University Press, 2012), p. 208.

¹⁸⁴ Judgement of *Francovich*, *supra* note 182, para. 37.

in particular must ensure that EU law takes full effect and the rights of individuals conferred by it are protected.

Despite national procedural autonomy,¹⁸⁵ the principle of effectiveness and the principle of equivalence need to be respected. According to the principle of equivalence national procedural rules must not make enforcement of EU law rights more difficult than national law rights.¹⁸⁶ Nor, according to the principle of effectiveness, may the procedural rules make it excessively difficult or virtually impossible to enforce EU law rights.¹⁸⁷ The Court of Justice has held that it is for the Member States to designate within their internal legal order the competent courts and procedural rules for deciding on individual remedy for loss and damage due to violations of their rights in EU law rights by the state.¹⁸⁸ Assigning a competent court to rule on State liability has been difficult.¹⁸⁹ Possible solutions depend on the judicial architecture of each Member State but generally require setting up a separate court for this purpose or designating a court within the existing system.¹⁹⁰ The latter might lead to the situation where the same higher court is supposed to decide a case where it is a judge and a party at the same time or where a lower court should be a judge for a higher court's work, which is "unfortunate from the point of view of the hierarchy of the court system".¹⁹¹ Nonetheless the CJEU has not given any further guidance and the case-law examined further leads to the conclusion that it is the lower courts who usually are left to decide on the Member State arising from a higher court's judgement.

The principle of State liability in is not established in the founding Treaties nor any other EU legal acts, but has rather been developed in the case-law of the CJEU based on the basis of the principles of effectiveness and sincere cooperation.¹⁹² Over the years, State liability has evolved to be able to originate from the conduct of all branches of power, first, the legislature, second, the executive and most recently – the judiciary. Only then, the case-law had evolved to accepting that a failure to make a preliminary reference by courts of last instance could invoke State liability. However as further demonstrated, the established case-law on State liability seems to be unsuited for providing a remedy to individuals for breaches of Article 267(3) TFEU and thus very limited for analysis in context of Article 6 of the Convention.

4.1.2 Criteria for State liability

In 1991 the CJEU first established the principle of State liability in the *Francovich*¹⁹³ judgement thereby providing a possibility for an individual to claim loss or damage resulting from failure of a Member State to comply with EU obligations. Accommodation of State liability completed

¹⁸⁵ Alina Kaczorowska, *European Union Law, Second Edition* (Routledge: Oxon, 2011): pp. 378-379.

¹⁸⁶ Henry H. Schreimers and Denis F. Waelbroeck, *Judicial Protection in the European Union. Sixth Edition* (The Hague: Kluwer Law International, 2001), p. 200-201.

¹⁸⁷ *Ibid.*

¹⁸⁸ See Judgement of 4 April 1968, g, C-34/67, EU:C:1968:24, p. 251, later elaborated for example in Judgement of 22 January 1976 *Russo v AIMA*, C-60/75, EU:C:1976:9; Judgement of 16 December 1976, *Rewe v Landeswirtschaftskammer Saarland*, C-33/76, EU:C:1976:188, para. 5; Judgement of 7 July 1981, *Rewe v Hauptzollamt Kiel*, C-158/80, EU:C:1981:163.

¹⁸⁹ Adrienne de Moor- van Vugt, "Case C-224/01 Gerhard Kobler and Republik Österreich, Case law," *Tilburg Foreign Law Review* (2003): p. 790.

¹⁹⁰ Mark Wissink, "EuGH, 30.9.2003, C-224/01, Gerhard Köbler v. Republik Österreich – Liability of a Member State for Damage Caused to Individuals by Infringements of Community Law for Which It Is Responsible," *European Review of Private Law* 3 (2005): p. 425.

¹⁹¹ de Moor- van Vugt, *supra* note 189.

¹⁹² Sedlova, *supra* note 37, p. 209.

¹⁹³ Judgement of *Francovich*, *supra* note 182.

the regime of protection of individual rights under EU law.¹⁹⁴ It complemented the existing principles of direct and indirect effect for that end¹⁹⁵ by solving the difficulties generated by the lack of horizontal effect of EU law.¹⁹⁶

In *Francovich* the CJEU set three criteria to determine whether reparation should be awarded to an individual for loss or damage in case of breach of Community law: (a) the rule of law infringed must be intended to confer rights upon individuals; (b) the breach must be sufficiently serious; and (c) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.¹⁹⁷ If these three criteria are fulfilled an individual may seek compensation directly from the Member State.¹⁹⁸

Year 1996 brought considerable developments to the principle of State liability. In the Joint *Brasserie* and *Factorame* cases¹⁹⁹ the CJEU set the following factors that should be considered when determining whether a breach of EU law has been sufficiently serious²⁰⁰ that is : (1) the clarity and precision of the rule that has been breached; (2) the measure of discretion left to the national authorities; (3) whether the infringement was intentional or voluntary; (4) whether the error was excusable; and (5) the position taken by the EU authorities.²⁰¹ Upon setting these criteria, the Court rejected the possibility to make reparation conditional on the existence of intentional or negligent fault which is often a prerequisite at the national level. The Court rejected this because the concept of fault “does not have the same content in various legal systems” and it may be relevant only in determining whether the breach of Community law is sufficiently serious.²⁰²

The criteria established in *Francovich* and elaborated in *Brasserie* and *Factorame* have been universally applied when the breach is attributable to the legislative branch as well as the executive branch, which was first found in 1996 in the *Hedley Lomas*²⁰³ case. The criteria, with a slight variance, also allowed to establish State liability where the breach was attributable to the judicial branch as provided further on. The two landmark judgements- *Köbler* and *Ferreira da Silva* judgements, where the breach originated from the judicial branch, will be further analyzed in detail.

4.1.3 The Köbler judgement

State liability for a breach attributable to the judiciary was established in 2003 in the *Köbler*²⁰⁴ judgement which was called “revolutionary”²⁰⁵ and “a turning point (..) for the European

¹⁹⁴ Woods and Watson, *supra* note 183, p. 219.

¹⁹⁵ *Ibid*, p. 208.

¹⁹⁶ Nigel Foster, *Foster on EU law. Sixth Edition* (Oxford: Oxford University Press, 2017), p. 187.

¹⁹⁷ Judgement of *Francovich*, *supra* note 182, para. 40.

¹⁹⁸ Woods and Watson, *supra* note 183, p. 209.

¹⁹⁹ Judgement of 5 March 1996, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport, ex parte: Factorame Ltd and others*, C-46/93 and C-48/93, ECR 1996 I-01029.

²⁰⁰ Foster, *supra* note 196, p. 189.

²⁰¹ Judgement of *Brasserie*, *supra* note 199, para. 56.

²⁰² Judgement of *Brasserie*, *supra* note 199, paras. 76-80.

²⁰³ Judgement of 29 April 1999, *Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.*, C-293/97, EU:C:1999:215 or the *Hedley Lomas* case concerned an export license, an individual administrative decision, which contradicted Article 34 EEC prohibiting quantitative restrictions on exports. The CJEU ruled that the United Kingdom had an obligation to make reparation to the individual for the refusal to issue the export licence, thus expanding the principle of State liability to the executive branch.

²⁰⁴ Judgement of 30 September 2003, *Gerhard Köbler v Republik Österreich*, C-224/01, ECR 2003 I-10239.

²⁰⁵ Giulia Bertolino, “The Traghetti case: a new ECJ decision on State liability for judicial acts - national legislations under examination,” *Civil Justice Quarterly* 27(4) (2008): p. 448.

dimension of state liability”.²⁰⁶ Following the Opinion of Advocate General Philippe Léger²⁰⁷ the CJEU established for the first time that also the courts of Member States can in principle create liability for the Member State for infringements of Community law.²⁰⁸

Mr. Köbler who had been employed as a university professor under a public law contract in Innsbruck, Austria applied for the special length-of-service increment to his remuneration, which was available to university professors employed by an Austrian state university for more than 15 years. Mr. Köbler argued that he would meet the 15-year pre-requisite if his service in universities in other Member States were considered and limiting the 15-year pre-requisite solely to Austrian state universities would constitute an indirect discrimination and interfere with the free movement of persons.

The *Verwaltungsgerichtshof* (Supreme Administrative Court) made a request for a preliminary reference to the CJEU but later withdrew it on the basis of *acte éclairé*, which was later declared to be a misinterpretation. Mr. Köbler then brought an action before the *Landesgericht für Zivilrechtssachen Wien* (Regional Civil Court, Vienna) to declare liability of the Republic of Austria for a breach of Community law by the judgement of the *Verwaltungsgerichtshof*. The *Landesgericht für Zivilrechtssachen Wien* made a preliminary reference to the CJEU asking *inter alia* whether State liability can be invoked by a decision of a national court of last instance.

Having established criteria for State liability and further clarified the standard of “sufficiently serious” breach in *Brasserie* and *Factorame*²⁰⁹, the Court in adjusted its reasoning to the judicial branch. The CJEU indicated that State liability due to a decision of a national court of last instance can be incurred “only in the exceptional case where the court has manifestly infringed the applicable law.”²¹⁰ Whether the criteria of a “manifest infringement” are met depends on “all the factors which characterize the situation put before [the court of last instance]”.²¹¹

Notably, this reflection did not mention an infringement in the form of a failure to request a preliminary reference. The fact that the national court had failed to make a reference for a preliminary ruling under Article 267(3) TFEU was not found by the Court to be “sufficiently serious” that is a “manifest infringement” in context of the judicial branch.

Rather, the compliance (or non-compliance) with the obligation to make a reference for a preliminary ruling was mentioned as one of the factors for determining whether the infringement of the national court of last instance is “manifest”.²¹² The CJEU assessed the misinterpretation of Community law²¹³ rather than the failure to make a reference for a preliminary ruling which caused the misinterpretation. Nonetheless, the wording of this conclusion undoubtedly left such a possibility open for future cases, as it did not rule out such a possibility but made such a conclusion “in the present case”.²¹⁴

²⁰⁶ Wissink, *supra* note 190, p. 421.

²⁰⁷ Opinion of Mr. Advocate General Léger delivered on 8 April 2003 for Judgement of 30 September 2003, *Gerhard Köbler v Republik Österreich*, C-224/01, ECR 2003 I-10239.

²⁰⁸ Judgement of *Köbler*, *supra* note 204, para. 52.

²⁰⁹ Judgement of *Brasserie*, *supra* note 199.

²¹⁰ Judgement of *Köbler*, *supra* note 204, para. 53.

²¹¹ Judgement of *Köbler*, *supra* note 204, para. 54.

²¹² Judgement of *Köbler*, *supra* note 204, para. 55.

²¹³ Judgement of *Köbler*, *supra* note 204, para. 123.

²¹⁴ Judgement of *Köbler*, *supra* note 204, para. 123.

4.1.4 The Ferreira da Silva judgement

In the *Ferreira da Silva* judgment²¹⁵ João Filipe Ferreira da Silva and ninety-six other Portuguese citizens were dismissed by their employer, Air Atlantis SA (hereinafter “AIA”), an air transport company, which was subject to liquidation while the business in fact was transferred to its largest shareholder TAP. Ferreira da Silva and others claimed that their dismissal violated EU law, which provides that in case of a transfer of business the transferors rights and obligations including those of employment relationships must be transferred to the transferee.

After lower instance courts had issued conflicting judgements the matter came before the *Supremo Tribunal de Justica* (Supreme Court). The applicants requested to make a preliminary reference to the CJEU but was refused by the *Supremo Tribunal de Justica*, which held that according to the settled case-law of the CJEU no scope was left for reasonable doubt.²¹⁶ Unsatisfied, the applicants brought an action in *Varas Civeis de Lisboa* (Court of first instance of Lisbon) against the Portuguese state claiming damages and material loss sustained, submitting *inter alia* that the refusal to make a request for a preliminary reference breached Article 267(3) TFEU. In this situation the *Varas Civeis de Lisboa* submitted a question to the CJEU asking *inter alia* whether the *Supremo Tribunal de Justica* had an obligation to make a preliminary reference.

The Court easily found that the matter gave rise to a “great deal of uncertainty”, leaving no possibility to apply the *acte clair* doctrine and declared that in these circumstances the *Supremo Tribunal de Justica* had an obligation under Article 267(3) TFEU to make a reference for a preliminary ruling. The Court for the first time declared that a supreme court or any type of court adjudicating in last instance had not complied with the obligation to make a reference for a preliminary ruling.

4.1.5 State liability for a breach of Article 267(3) TFEU

Although these criteria have been employed to establish State liability for a breach by the judicial branch, they are unsuitable for finding a breach of Article 267(3) TFEU.²¹⁷ The first criterion is not met-according to its wording, the addressee of Article 267(3) TFEU is the national court adjudicating in last instance not the individual.²¹⁸

It has been argued that the CJEU in *Köbler* acknowledged “a subjective dimension within the preliminary ruling mechanism”²¹⁹ and an essential tool for the judicial protection of rights of individuals granted by EU law which was confirmed in *Ferreira da Silva*.²²⁰ The latter however relates to the preliminary ruling mechanism as such²²¹ and not Article 267(3) TFEU.

The preliminary ruling procedure certainly has a positive impact for individuals before national courts when encountered a problem of EU law. It allows to receive a judgement from the

²¹⁵ Judgement of 9 September 2015, *João Filipe Ferreira da Silva e Brito and Others v Estado português*, C-160/14, EU:C:2015:565, pp. 4-14.

²¹⁶ *Ibid*, pp. 16-17.

²¹⁷ Bromberg, *supra* note 49, p. 249.

²¹⁸ Sedlova, *supra* note 37, p. 212.

²¹⁹ Alessandra Silveira Sophie Perez Fernandez, “Preliminary References, Effective Judicial Protection and State Liability. What if the *Ferreira da Silva* Judgment Had not Been Delivered?” *Revista de Derecho Comunitario Europeo* 54 (2016): p. 649.

²²⁰ *Ibid*, p. 652.

²²¹ Siegbert Gatawis, Edmunds Broks, Zane Bule, *Eiropas Tiesības* (Rīga: Latvijas Universitāte, 2002), p.148.

national court that is correct from the point of view of EU law which is definitely desirable for the individual²²² thereby providing an opportunity to get around the strict requirements of *locus standi* for direct actions before the CJEU.²²³ However the subjective dimension as developed to date does not reach as far as a basis for individual remedy. The main aim of the preliminary ruling procedure remains to facilitate judicial dialogue. The relationship between the CJEU and the national courts is cooperative not hierarchical, making the preliminary ruling procedure a form of conversation between the courts and not a possibility for an appeal to the individual.²²⁴ The decision to make a reference for a preliminary ruling should be independent from any initiative from the parties.²²⁵ Moreover Article 267(3) TFEU is a procedural norm, which is not able to create State liability by definition as argued by Claus Dieter Classen.²²⁶ All of these arguments are supported by the fact that no situation has been identified where a failure to make a reference for a preliminary ruling to the CJEU has resulted in a reparation being paid to a private party under EU law.²²⁷ For these reasons, unless substantial changes are made by the CJEU to the existing preliminary ruling mechanism, a breach of Article 267(3) TFEU cannot result in State liability.

4.1.6 Parallels

Analysis of the parallels between the *Köbler* and *Ferreira da Silva* cases lead to the aspect of State liability that can be viewed in the context of Article 6 of the Convention. As established in *Köbler*, whether a question had been addressed to the CJEU is a decisive factor for finding a “manifest infringement” by the judicial branch and thus invoking State liability and the obligation to pay reparation.²²⁸ A parallel examination of both cases suggests that the manner and motivation in which the national court decided not to make a reference for a preliminary ruling is decisive in this matter and furthermore corresponds to the standard of non-arbitrariness and the requirement to provide reasoning as required under Article 6 of the Convention.

In *Ferreira da Silva* the *Varas Civeis de Lisboa* found itself in a similar situation to the *Landesgericht für Zivilrechtssachen Wien* in *Köbler*. In both cases the lower national courts were to decide whether a national supreme court had infringed EU law. *Varas Civeis de Lisboa* followed the example of *Landesgericht für Zivilrechtssachen Wien* to avoid the risk of erroneous application of EU law and made a reference for a preliminary ruling to the CJEU.²²⁹ The parallels do not end here. In both cases the *Verwaltungsgerichtshof* and the *Supremo Tribunal de Justica* were under an obligation to make a reference for a preliminary ruling as courts adjudicating in last instance but in both cases they failed to do so. What differed was the ability of such a failure to contribute to invoking State liability. The *Verwaltungsgerichtshof* initially submitted a reference but later withdrew it due to misreading of a previous judgement of the Court. The *Supremo Tribunal de Justica*, however, ruled out such option by rejecting a request to do so by the applicants without much consideration. This crucial difference led to

²²² Sedlova, *supra* note 37, p. 212.

²²³ Foster, *supra* note 196, p. 192.

²²⁴ Arnall, *supra* note 2, p. 98.

²²⁵ Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings 2018/C 257/01 OJ para. 3.

²²⁶ Claus Dieter Classen, “Case C-224/01, Gerhard Kobler v. Republik Ostrich,” *Common Market Law Review* 41(3) (2004): p. 820.

²²⁷ Bromberg, *supra* note 49, p. 255.

²²⁸ Bromberg, *supra* note 49, p. 249.

²²⁹ Perez Fernandez, *supra* note 219, p. 641.

different outcomes as well. Following the criteria, it had established, the Court found that the failure of the *Supremo Tribunal de Justicia* to request a preliminary reference could not be characterized as “manifest” and thus “sufficiently serious”. There was no intention of the *Verwaltungsgerichtshof* to evade its obligation. That seems to have played a decisive role in this outcome.²³⁰ It was the opposite for the *Supremo Tribunal de Justicia*, in case of which the intention to evade its obligation was undoubtedly “manifest” and thus “sufficiently serious”. Indeed, according to the opinion of Advocate General Jacobs the *Köbler* case a Member State will be held liable in case of bad faith²³¹ and it has been suggested that an explanation why the national court considered a reference for a preliminary ruling superfluous reduces the risk of finding State liability.²³²

This conclusion allows an examination from the point of view of Article 6 of the Convention. Consideration of the subjective attitude of the national court suggests again a complementary relationship with the standard of non- arbitrariness. If the CJEU evaluates the subjective attitude of the national court that had failed to make a reference for a preliminary ruling when contemplating the manifest nature of the breach, the presence of reasoning, especially such based on the CILFIT exceptions obviously is also considered. A thorough examination of the applicability of the CILFIT criteria is decisive both for finding a refusal not arbitrary and a breach of Article 267(3) TFEU not “manifest”. The existence of a complementary relationship has been supported also by Morten Bromberg, who has concluded that “the fact that a national court (..) may be held to be in breach of Article 6(1) of the ECHR if [it] fails to make a preliminary reference without giving sufficient grounds, may form an important impetus towards better compliance”²³³

4.2 An action by the European Commission against a Member State

An action brought by the Commission against a Member State is one of the procedural actions available before the CJEU²³⁴ whereby the Commission acting in the general interest of the EU²³⁵ ensures compliance by Member States with EU law. Unlike for State liability, an action against the Member State under Articles 258-260 TFEU can be initiated by the European Commission for any infringement of EU law or failure to act²³⁶ and eventually bring the matter to the CJEU which determines whether the Member State is in breach or not²³⁷ and may impose a financial penalty.²³⁸ Controversially, that applies also to breaches committed by national courts including supreme courts. A failure to make a reference for a preliminary ruling under Article 267(3) TFEU is also an infringement that may cause an action against a Member State.²³⁹

The first infringement proceedings that found a failure to fulfil EU law obligations involving the judiciary was the *Commission v Italy*²⁴⁰ judgement. The infringement proceedings were

²³⁰ Perez Fernandez, *supra* note 219, pp. 650- 651.

²³¹ Richard Crowe, “Colloquium Report- The Preliminary Reference Procedure: Reflections Based on Practical Experiences of the Highest National Courts in Administrative Matters,” *ERA Forum* 435 (2004): p.444.

²³² Bromberg, *supra* note 49, p. 250.

²³³ Bromberg, *supra* note 49, p. 256.

²³⁴ Foster, *supra* note 196, p. 215.

²³⁵ Arnall, *supra* note 2, p. 34.

²³⁶ Foster, *supra* note 196, p. 215.

²³⁷ Foster, *supra* note 196, p. 219.

²³⁸ Foster, *supra* note 196, p. 214.

²³⁹ Bromberg, *supra* note 49, p. 251.

²⁴⁰ Judgement of 9 September 2003, *Commission v Italy*, C-129/00, ECR I-14637.

initiated regarding Italian legislation on repayment of taxes that are levied contrary to Community law, a practice that had been approved by the Italian courts following a doctrine upheld by the *Corte suprema di cassazione* (Supreme Court of Cassation). Although the decision of the Court recognizes the contribution of the *Corte suprema di cassazione* to the failure to fill obligations of Community law, it is not a judgement or procedural error of that court that gave rise to the case.

A purely judicial infringement²⁴¹ followed six years later in *Commission v Spain*²⁴². Even more, it was committed by decision of a national supreme court and an overall doctrine confirmed by a number of decisions.²⁴³ The Court agreed with the Commission and found an erroneous interpretation of a Directive²⁴⁴ by judgement of *Tribunal Supremo* (Supreme Court of Spain) which resulted in breach by Spain of the Sixth VAT Directive²⁴⁵. Notably, the *Tribunal Supremo* had decided made the impugned decision without making a preliminary reference, clearly failing to meet its obligation set in Article 267 TFEU. The Commission initially included this aspect in the complaint against Spain but abandoned it later before the Court.²⁴⁶ Standing on the established jurisprudence of *Commission v Italy* and *Commission v Spain*, the CJEU in late 2018 found the first judicial infringement specifically in the form of breach of Article 267(3) TFEU in the *Commission v France*²⁴⁷ judgement.

5. THE COMMISSION V FRANCE JUDGEMENT

The *Commission v France* judgment was delivered contrary to the observation that the practice of the Commission has been “reluctant”²⁴⁸ and shown “very considerable constraint”²⁴⁹ for prosecuting Member States for infringements of Article 267(3) TFEU. Uneasy predictions, that the Commission would thereafter be allowed to “police the judgements of national courts”²⁵⁰ had been expressed after the first judicial infringement was found in *Commission v Spain*²⁵¹ judgement while an infringement proceedings for the failure to fulfil obligations under Article 267(3) TFEU were considered only hypothetical,²⁵² due to being not only legally but also politically difficult.²⁵³ Increasing competences of the EU have been recognized to increase the risk of “jurisdictional and normative overlaps”²⁵⁴ that might result in an EU Member State becoming a defendant in Strasbourg when the issue arises from EU law.²⁵⁵ Although the

²⁴¹ Manuel López Escudero “Case C-154/08, *Commission v. Spain*, Judgment of the Court (Third Chamber) of 12 November 2009, not yet reported,” *Common Market Law Review* 48 (2011): p. 237.

²⁴² *Ibid.*

²⁴³ Alina Kaczorowska- Ireland, *European Union Law. Fourth Edition* (London, New York: Routledge, 2016), p. 438.

²⁴⁴ Nigel Foster, *EU Law Directions. 6th Edition* (Oxford: Oxford University Press, 2018), p. 188-189.

²⁴⁵ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes, OJ L 145, 13.6.1977, p. 1–40.

²⁴⁶ Escudero, *supra* note 241, p. 238.

²⁴⁷ Judgement of *Commission v France*, *supra* note 4.

²⁴⁸ Broberg and Fenger, *supra* note 17, p. 270.

²⁴⁹ Bromberg, *supra* note 49, pp. 255-256.

²⁵⁰ Foster, *supra* note 244, p. 189.

²⁵¹ Judgement of *Commission v Spain*, *supra* note 241.

²⁵² Bromberg, *supra* note 49, p. 251.

²⁵³ David W.K. Anderson and Marie Demetriou, *References to the European Court, Second Edition* (London: Sweet & Maxwell, 2002), p. 184.

²⁵⁴ Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003), p. 69.

²⁵⁵ Douglas-Scott, “A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis,” *Common Market Law Review* 43 (2006): p. 639.

Commission v France judgement arguably does not mark an increase of competences of the EU rather the enforcement of the existing Treaty provisions, it is relevant to examine it in this context due to the sensitivity of the situation when the ECtHR must adjudicate on the fairness of the proceedings which allegedly breach of Article 267(3) TFEU.

The *Commission v France* case arose from the Commission's action to for failure to fulfil obligations against the French Republic due to a series of judgements of the Conseil d'État (Council of State). On substance the case concerned French legislation that was intended to eliminate double taxation of dividends. According to the French rules a parent company was able to set off against the advance payment of tax applicable to the dividends distributed by subsidiaries to their parent companies. The *Accor*²⁵⁶ judgement in 2011, arising from a preliminary reference of the Conseil d'État, ruled that limiting the rules to dividends distributed by subsidiaries established in France was contrary to Articles 49 and 63 TFEU. The matter returned to the Conseil d'État which delivered two judgements *Rhodia*²⁵⁷ and *Accor*²⁵⁸ based on the preliminary ruling. However, in these judgements the *Conseil d'État* ruled on an aspect that was not addressed by the Court of Justice, that is, the applicability of the rules to dividends distributed by sub-subsidiaries established in other Member States.

At the time when Conseil d'État issued these judgements the Court of Justice had just ruled on the same aspect of rules on taxation in relation to the United Kingdom in the *Test Claimants*²⁵⁹ case. Nonetheless, considering the differences in the British and French systems of corporate taxation, the Conseil d'État decided not to follow the approach of the *Test Claimants*. After the Conseil d'État had issued the judgements, the Commission received a number of complaints from French undertakings receiving dividends from their subsidiaries in other Member States which, according to *Rhodia* and *Accor* judgements, were unable to benefit from the rules on taxation of dividends.²⁶⁰ The Commission brought an action for failure to fulfil obligations, raising a number of complaints, inter alia, for an infringement of Article 267(3) TFEU.

The Court rather easily, with a short analysis in only ten paragraphs, agreed with the Commission and found that Conseil d'État “failed to make a reference to the Court in accordance with the procedure provided for in the third paragraph of Article 267 TFEU.”²⁶¹ The Court of Justice found for the first time that by failure to make a reference for a preliminary ruling of a national court adjudicating in last instance a Member State had failed to fulfil its obligations under Article 267(3) TFEU.²⁶² In the context of the development of case-law previously analyzed, the result of *Commission v France* is not a revolution but rather a logical continuation.

Nonetheless, the supporting argumentation may be considered more controversial than the outcome of the case itself. The Court found that the Conseil d'État had wrongly relied on the *acte clair* doctrine. The supporting argumentation is twofold. First, the Conseil d'État had insufficiently explained the precise differences between the tax systems of France and the United Kingdom. Consequently, it could not be certain that its choice to rule contrary to *Test*

²⁵⁶ Judgement of 15 September 2011, *Ministre du Budget, des Comptes publics et de la Fonction publique v Accor SA*, C-310/09, EU:C:2011:581.

²⁵⁷ La décision du Conseil d'État, N° 317074, lundi 10 décembre 2012, ECLI:FR:XX:2012:317074.20121210.

²⁵⁸ La décision du Conseil d'État, N° 317075, lundi 10 décembre 2012, ECLI:FR:CESSR:2012:317075.20121210.

²⁵⁹ Judgement of 13 November 2013, *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue and The Commissioners for Her Majesty's Revenue & Customs*, C-35/11, ECLI:EU:C:2012:707.

²⁶⁰ Judgement of *Commission v France*, *supra* note 4, para. 114.

²⁶¹ Judgement of *Commission v France*, *supra* note 4, para. 114.

²⁶² Sweet Maxwell and its contributors, “France’s interpretation of *Accor* judgement on taxation of dividends contrary to EU law,” *EU Focus* 373 (2018), pp. 23-24.

Claimants would be equally obvious to the Court²⁶³ and thus could not rely on the *acte clair* doctrine and avoid making a request for a preliminary ruling.²⁶⁴ Second and controversially, the Court argued that the fact that the Conseil d'État, by adopting a solution in *Rhodia* and *Accor* judgements that was “at variance with that of the present judgement” had implied the existence of a reasonable doubt.²⁶⁵

As identified by Vincent Delhomme and Lucie Larripa,²⁶⁶ such argumentation is problematic. It suggests that Conseil d'État, at the time when its judgements were delivered, should have foreseen the difference in outcome with the judgement of the Court of Justice, which had not yet been delivered. Recalling the CILFIT criteria, it would allow to disprove that a matter “leaves no scope for reasonable doubt” and is “equally obvious”²⁶⁷ to the Court of Justice by merely a contrary judgement of the Court. On one hand such reasoning it is logical. The question whether the Court of Justice finds a solution equally obvious is best proved by the Court of Justice itself, and, by only option, a contrary judgement. On the other hand, in effect this argumentation requires the national courts adjudicating in the last instance to compare their solution to one that has not yet been expressed by the Court of Justice. Not only logically impossible, it dismantles the very limited discretion that national courts have when deciding whether to apply the *acte clair* doctrine. It can never be entirely ruled out that the Court might choose a contrary solution to that in mind of the national courts adjudicating in last instance. To prove that the matter is “equally obvious” the national court would have no other choice than to make a reference for a preliminary ruling, rendering the *acte clair* doctrine meaningless, at least from purely logical standpoint. In much more delicate wording, as identified by Frederik Behre,²⁶⁸ this reasoning could be translated as emphasizing the importance of the obligation of Article 267(3) TFEU. According to Daniel Sarmiento,²⁶⁹ it is a “clear signal” that departure from the case-law of the Court of Justice by national courts adjudicating in last instance will result in an infringement proceedings brought by the Commission. The middle ground is offered by Delhomme and Larripa who see this reasoning as a “powerful incentive for supreme courts to systematically refer questions [to the Court of Justice]”.²⁷⁰ Such scenario might be the most realistic consequence of the *acte clair* doctrine becoming meaningless to apply in theory or posing a considerably higher risk of committing a breach of Article 276(3) TFEU in practice.

²⁶³ Judgement of *Commission v France*, *supra* note 4, paras. 110-111.

²⁶⁴ Judgement of *Commission v France*, *supra* note 4, paras. 101-102.

²⁶⁵ Delhomme and Larripa, *supra* note 31.

²⁶⁶ Delhomme and Larripa, *supra* note 31.

²⁶⁷ Judgement of *Ferreira da Silva*, *supra* note 215, para. 40.

²⁶⁸ Frederik Behre, “For the sake of effectiveness: a tightened approach to preliminary reference obligations of the CJEU,” Leiden Law Blog, November 6, 2018. Available on: <https://leidenlawblog.nl/articles/for-the-sake-of-effectiveness-a-tightened-approach-to-preliminary-reference> Accessed March 18, 2019.

²⁶⁹ Daniel Sarmiento, “Judicial Infringements at the Court of Justice- A brief comment on the phenomenal Commission/ France (C-416/17)”, *Despite Our Differences* (blog), October 9, 2018. Available at: <https://despiteourdifferencesblog.wordpress.com/2018/10/09/judicial-infringements-at-the-court-of-justice-a-brief-comment-on-the-phenomenal-commission-france-c-416-17/> Accessed March 18, 2019.

²⁷⁰ Delhomme and Larripa, *supra* note 31.

6. CONCLUSIONS

The ECtHR has only recently admitted an application concerning the refusal to make a reference for preliminary ruling to the CJEU and decided it on the merits. *Ullens de Schooten and Rezabek v Belgium*, the first such judgement, and the subsequent development of case-law demonstrates that the ECtHR distinguishes the preliminary ruling procedure of Article 267 (3) TFEU from preliminary questions to other national or international courts and tribunals and respects the particularities of the EU legal regime.

When an alleged violation of Article 267(3) of the Treaty on the Functioning of the European Union comes before the European Court of Human Rights it faces three difficulties. First, it must not to overstep the dividing line of jurisdiction between itself and the Court of Justice of the European Union, both of which are entitled to rule on different but not entirely delimited aspects of the situation. Second, it ought to maintain consistency or at least compatibility with the applicable rules of European Union law. Thirdly, it should not compromise the strict regime for protection of the right to a fair trial. These difficulties are reflected in the requirements and attitude found in the case-law of the European Court of Human Rights.

The division of competences between the ECtHR and CJEU when a national court is in breach Article 267(3) TFEU *prima facie* seems clear. The ECtHR examines the interaction between the parties and the national court. EU law rules on the preliminary ruling procedure are completely detached from this matter and concern the interaction between different actors, the national court and the CJEU and specifically exclude the individual from the equation. It concerns an interaction between actors from which EU law deliberately disassociates itself. The CJEU views the preliminary ruling procedure as an instrument for dialogue between the CJEU and national courts for the purpose of ensuring proper application and uniform interpretation of EU law. The CJEU has repeatedly reiterated that it is entirely up to the national courts to decide whether to make a reference for a preliminary ruling and should distance this decision from any initiative of the parties. This allows to conclude that not only the actors concerned by the law applied by both courts are different, but the CJEU further emphasizes the irrelevance of the matter that lies in the jurisdiction of the ECtHR.

Despite this theoretically clear division of competences, in reality it is hard to sustain, as demonstrated in the case-law of ECtHR. Perhaps also due to this reason as well the ECtHR has occasionally struggled to maintain consistency. It has been so with the requirement of the applicant to make a self-standing not alternative request (see the *Krikorian v France* and the subsequent *John v Germany* and *Schipani*) or the lack of clarity when the applicant's substantiation of a request is deemed sufficient to require the court to provide reasons for a refusal (see chapter 3.2.2).

On one hand, one might find the requirements for the applicant in making a request to the national court of last instance inherently contradictory to the spirit of the preliminary ruling procedure. The obligation under Article 267(3) TFEU applies only to the national court and should in no way be dependent on the initiative of the parties. On the other hand, such contradiction is inevitable- as already mentioned, in order not to overstep its jurisdiction, the ECtHR must occupy itself with the relationship between the national court and the individual which is irrelevant under Article 267(3) TFEU. A logical outcome of concern for different actors in the situation, this phenomenon appears to have no harmful effect.

The ECtHR has successfully maneuvered not to overstep the dividing line between its jurisdiction and that of the CJEU and has restrained itself from evaluating the substance of a

refusal to make a reference for a preliminary ruling with the only notable exception being the *Wind Telecomunicazioni SPA. v Italy* judgement.

A mutually benefiting and complementary relationship can rather be identified between the requirements of both courts. A decision that is required not to be arbitrary by the ECtHR is also more likely to be sufficiently weighed out in context of the CILFIT criteria as well contemplated as leave out any ambiguity and to be in line with the hypothetical opinion of courts of other Member States and the Court of Justice. Also *vice versa*, examination of the applicability of CILFIT criteria *a priori* means that the decision is most likely not arbitrary. Thus, the CILFIT criteria and requirement for the decision not to be arbitrary supplement and endorse each other, promoting compliance both with Article 267(3) TFEU and Article 6 of the Convention.

A “symbiotic” relationship exists also in the context of State liability, which otherwise cannot arise from a breach of Article 267(3) TFEU. A breach committed by the judiciary must be “sufficiently serious” and particularly “manifest” to create State liability. *Ferreira da Silva* and *Köbler* cases suggest that a decisive factor for the CJEU is the attitude of the national court, which is at large determined by the thoroughness of the explanation. That corresponds to the approach of the ECtHR, particularly the standard of non- arbitrariness.

Despite the controversial argumentation in the *Commission v France* judgement it seems not to risk disrupting the fine balance between the jurisdictions of both courts. Irrespective whether the judgement just significantly strengthens the obligation of Article 267(3) TFEU or makes the exceptions to the CILFIT criteria logically impossible to apply, the balance, which stands with regard to the different actors concerned by both courts, remains untouched.

Nonetheless, a negative effect can be identified. The *Commission v France* judgment rather diminishes the “symbiotic” relationship between the requirements of Strasbourg and Luxembourg courts, that have the effect of positively complementing each other. *Commission v France* has significantly diminished if not dismantled the margin of appreciation for national courts adjudicating in last instance and thus the importance or reasoning and careful consideration on the side of the CJEU. In the situation when the applicability of *act éclairé*, *acte clair* doctrines or a motivated irrelevance can be rendered useless when presented with a contrary solution by the CJEU, the reasoning behind the latter losses usefulness as well. The preliminary ruling procedure of the CJEU does not benefit as much from the non- arbitrariness standard set by the ECtHR. However, nothing changes on the side of the individual who benefits both from the standard of non-arbitrariness and the stricter enforcement of Article 267(3) TFEU. Most likely outcome will be an increase of the references for a preliminary ruling made to the CJEU and therefore a decrease in the number of violations of Article 6 of the Convention.

BIBLIOGRAPHY

Primary sources

Legislation

1. Belgium. Special Act of 6 January 1989 on the Constitutional Court (January 6, 1989, last amended January 15, 2017). Available on: <http://www.const-court.be/en/common/home.html> Accessed March 25, 2019.
2. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Rome, 4 November 1950. Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf Accessed May 9, 2019.
3. Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes, OJ L 145, 13.6.1977
4. Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> Accessed April 30, 2019.

Cases of the European Court of Human Rights

1. Judgement on Merits and Just Satisfaction *Baydar v. the Netherlands*, no.55385/14, 24 April 2018.
2. Judgment on merits and just satisfaction delivered by a Chamber *Schipani and Others v. Italy*, no. 38369/09, ECHR 2015.
3. Decision on admissibility delivered by a Chamber *Wind Telecomuazioni SPA. v. Italy*, no. 5159/14, ECHR 2015.
4. Judgment on merits and just satisfaction delivered by a Chamber *Dhahbi v. Italy*, no. 17120/09, § 33, ECHR 2014.
5. Decision on admissibility delivered by a Chamber *Philippe Krikorian v France*, no. 6459/07, 26 November 2013.
6. Decision on admissibility delivered by a Chamber *Ryon v France*, no. 33014/08, 15 October 2013.
7. Judgment on merits and just satisfaction delivered by a Chamber *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, ECHR 2011 Decision on admissibility delivered by a Chamber *Claus and Heike Herma v. Germany*, no. 54193/07, 8 December 2009.
8. Decision on admissibility delivered by a Chamber *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v the Netherlands* no. 13645/05, ECHR 2009.
9. Decision on admissibility *Lutz John v. Germany*, no. 15073/03, § 8, 13 February 2007.
10. Judgement on merits *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, no. 45036/98, §153, ECR 2005-VI.
11. Judgment on the merits and just satisfaction delivered by a Chamber *Ernst and Others v. Belgium*, no. 33400/96, 15 July 2003.
12. Judgment on the merits and just satisfaction delivered by a Chamber *Wynen and Centre Hospitalier Interregional Edith- Cavell v. Belgium*, no. 32576/96, ECHR 2002-VIII.
13. Judgment on the merits and just satisfaction delivered by a Chamber *Wynen and Centre Hospitalier Interregional Edith- Cavell v. Belgium*, no. 32576/96, ECHR 2002-VIII.
14. Decision on admissibility delivered by a Chamber *Canela Santiago v. Spain*, no. 60350/00, 4 October, 2001.
15. Decision on admissibility delivered by a Chamber *Erna Matheis v. Germany*, no. 73711/01, 1 February 2001.
16. Opinion of Judge Lemmens on *Coëme and others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, ECHR 2000-VII.
17. Judgment on the merits and just satisfaction delivered by a Chamber *Coëme and others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, ECHR 2000-VII.
18. Decision on admissibility delivered by a Chamber *Peter Mossbrugger v. Austria*, no. 44861/98, 25 January 2000.

19. Partial admissibility decision *Schweigenhofer, Rauch, Heinemann and Mach v Austria*, nos. 35673/97, 35674/97, 36082/97 and 37579/9724 August 1999.
20. Partial decision delivered by a Chamber *Preidl Anstalt S.A. v. Italy*, no. 31993/96, 8 June 1999.
21. Decision on admissibility delivered by a Chamber *Dotta v Italy*, no. 38399/97, 7 September 1999.
22. Decision on admissibility delivered by a Chamber *J.J.W.M. Mens and P.P.M. Mens- Hoeck v. the Netherlands*, no. 34325/96, 20 May 1998.
23. Decision on admissibility delivered by a Chamber *Willem Arend Spiele v. the Netherlands*, no.31467/96, 22 October 1997.
24. Decision on admissibility *Divagsa Company v Spain*, no. 20631/92, 12 May 1993.
25. Decision on admissibility delivered by a Chamber *X v. Germany*, no. 235/56, decision of the Commission of 10 June 1958, Yearbook 2, p. 256.

Cases of the Court of Justice of the European Union

1. Judgement of 4 October 2018, *Commission v France*, C-416/17, EU:C:2018:811.
2. Judgement of 9 September 2015, *João Filipe Ferreira da Silva e Brito and Others v Estado português*, C-160/14, EU:C:2015:565.
3. Judgement of 13 November 2013, *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue and The Commissioners for Her Majesty's Revenue & Customs*, C-35/11, ECLI:EU:C:2012:707.
4. Judgement of 15 September 2011, *Ministre du Budget, des Comptes publics et de la Fonction publique v Accor SA*, C-310/09, EU:C:2011:581.
5. Judgement of 9 November 2010, *VB Penzügyi Lízing Zrt. v. Ference Schneider*, C-137/08, EU:C:2010:659.
6. Judgement of 12 November 2009, *Commission of the European Communities v Kingdom of Spain*, C-154/08, ECR 2009 I-00187.
7. Opinion of Mr. Advocate General Léger delivered on 8 April 2003 for *Gerhard Köbler v Republik Österreich*, C-224/01, ECR 2003 I-10239.
8. Judgement of 30 September 2003, *Gerhard Köbler v Republik Österreich*, C-224/01, ECR 2003 I-10239.
9. Judgement of 9 September 2003, *Commission v Italy*, C-129/00, ECR I-14637.
10. Judgement of 22 February 2001, *Ministério Público and António Gomes Valente v Fazenda Pública*, C-393/98, ECR I-1327.
11. Judgement of 23 May 1996, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.*, C-5/94, ECR 1996 I-02553.
12. Judgement of 5 March 1996, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, C-46/93 and C-48/93, ECR 1996 I-01029.
13. Judgement of 19 November 1991, *Russo v AIMA*, C-60/75, ECLI:EU:C:1991:428.
14. Judgement of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, C-6/90 and 9/90, ECR 1991 I-05357.
15. Judgement of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, C-6/90 and 9/90, ECR 1991 I-05357.
16. Judgement of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, C-283/81, ECR 1982-03415.
17. Judgement of 7 July 1981, *Rewe v Hauptzollamt Kiel*, C-158/80, ECR- 1981- 01805.
18. Judgement of 16 December 1976, *Rewe v Landeswirtschaftskammer Saarland*, C-33/76, ECR 1976-01989.
19. Judgement of 4 April 1968, *Lück*, C- 36/67, English Special Edition 1968 00359.

Other cases

1. La décision du Conseil d'État, N° 317074, lundi 10 décembre 2012, ECLI:FR:XX:2012:317074.20121210.
2. La décision du Conseil d'État, N° 317075, lundi 10 décembre 2012, ECLI:FR:CESSR:2012:317075.20121210.

Secondary sources

Books

1. Arnall, Anthony, *The European Union and its Court of Justice*. Oxford: Oxford University Press, 2006.
2. Anderson, David W.K. and Demetriou, Marie, *References to the European Court, Second Edition*. London: Sweet & Maxwell, 2002.
3. Broberg, Morten and Fenger, Niels, *Preliminary references to the European Court of Justice. Second Edition*. Oxford: Oxford University Press, 2014.
4. Craig, Paul, "Community Court Jurisdiction Revisited" In *The European Court of Justice* edited by de Burca, Grainne and Weiler, J.H.H. Oxford: Oxford University Press, 2001.
5. Foster, Nigel, *EU Law Directions. 6th Edition*. Oxford: Oxford University Press, 2018.
6. Foster, Nigel, *Foster on EU law. 6th Edition*. Oxford: Oxford University Press, 2017.
7. Gatawis, Siegbert, Broks, Edmunds and Bule, Zane, *Eiropas Tiesības (European Law)*. Rīga: Latvijas Universitāte, 2002.
8. Kaczorowska, Alina, *European Union Law. Second Edition*. Routledge: Oxon, 2011.
9. Kaczorowska- Ireland, Alina, *European Union Law. Fourth Edition*. London, New York: Routledge, 2016.
10. Schreimers, Henry H. and Waelbroeck, Denis F., *Judicial Protection in the European Union. Sixth Edition*. The Hague: Kluwer Law International, 2001.
11. Sedlova, Zane, *Tiesību aizsardzības mehānismi, ja tiesa neuzdod prejudiciālo jautājumu (Mechanisms for protection of rights if the court does not make a reference for a preliminary ruling- a dissertation)*. Rīga: Publication of Zane Sedlova with the support of sworn advocates' office of Romualds Vosnovičs, 2017.
12. Settem, Ola Johan, *Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings*. Cham, Heidelberg, New York, Dordrecht, London: Springer, 2016.
13. Shany, Yuval, *The Competing Jurisdictions of International Courts and Tribunals*. Oxford: Oxford University Press, 2003.
14. Van Dijk, Peter, Van Hoof, Fried, Van Rijn, Arjen and Zwaak, Leo, *Theory and Practice of the European Convention on Human Rights. Fifth Edition*. Mortsel: Intersentia, 2018.
15. Woods, Lorna and Watson, Philipa, *EU Law*. Oxford: Oxford University Press, 2012.

Journal articles

1. Bertolino, Giulia. "The Traghetti case: a new ECJ decision on State liability for judicial acts - national legislations under examination." *Civil Justice Quarterly* 27(4) (2008): pp. 448-453.
2. Bromberg, Morten and Fenger, Niels. "Preliminary references as a right- but for whom? The extent to which preliminary reference decisions can be subject to appeal." *European Law Review* 36(2) (2011): pp. 276-288.
3. Bromberg, Morten. "National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom." *European Public Law*, 22(2) (2016): pp. 243-256.
4. Bromberg, Morten, "National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom." *European Public Law* 22(2) 2016, pp. 243-256.
5. Claus Dieter Classen, "Case C-224/01, Gerhard Köbler v. Republik Österreich." *Common Market Law Review* 41(3) (2004): pp. 813-824.
6. Crowe, Richard. "Colloquium Report- The Preliminary Reference Procedure: Reflections Based on Practical Experiences of the Highest National Courts in Administrative Matters." *ERA Forum* 435 (2004).

7. de Moor- van Vugt, Adrienne. "Case C-224/01 Gerhard Kobler and Republik Österreich, Case law." *Tilburg Foreign Law Review* (2003): p. 782-794.
8. Douglas-Scott, Sionaidh, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis." *Common Market Law Review* 43 (2006): pp. 629-666.
9. English, Rosalind. "Lutz v Germany." *Human Rights and Public Law Update*, February 2007. Available at: http://www.preview2.lcor.enstar.net/1315/?form_1155.replyids=1081 Accessed 14 April 2019.
10. Escudero, Manuel López. "Case C-154/08, Commission v. Spain, Judgment of the Court (Third Chamber) of 12 November 2009, not yet reported." *Common Market Law Review* 48 (2011): pp. 227-242.
11. Julia Laffranque, "(Just) Give Me a Reason." *Juridica International Law review*, 27 (2018): pp. 12-35.
12. Morten Bromberg and Niels Fenger. "Preliminary references to the Court of Justice of the European Union and the right to a fair trial under Article 6 ECHR." *European Law Review* 41(4) (2016): pp. 599-607.
13. Perez Fernandez, Alessandra Silveira Sophie. "Preliminary References, Effective Judicial Protection and State Liability. What if the Ferreira da Silva Judgment Had not Been Delivered?" *Revista de Derecho Comunitario Europeo* 54 (2016): pp. 631-666.
14. Sweet Maxwell and its contributors. "France's interpretation of Accor judgement on taxation of dividends contrary to EU law." *EU Focus* 373 (2018): pp. 23-24.
15. Valutyte, Regina. "State Liability for the Infringement of the Obligation to Refer for a Preliminary Ruling under the European Convention on Human Rights" *Jurisprudencija* 19(1) (2012): pp. 7-20.
16. Wissink, Mark. "EuGH, 30.9.2003, C-224/01, Gerhard Köbler v. Republik Österreich – Liability of a Member State for Damage Caused to Individuals by Infringements of Community Law for Which It Is Responsible." *European Review of Private Law* 3 (2005): pp. 421-428.

Other

1. Behre, Frederik, "For the sake of effectiveness: a tightened approach to preliminary reference obligations of the CJEU." *Leiden Law Blog*, November 6, 2018. Available on: <https://leidenlawblog.nl/articles/for-the-sake-of-effectiveness-a-tightened-approach-to-preliminary-reference> Accessed March 18, 2019.
2. Court of Justice of the European Union. "The Proceedings of the Court of Justice and Court of First Instance of the European Communities" a report of 22 to 26 May 1995 No. 15/95, para. 11. Available on: <https://publications.europa.eu/en/publication-detail/-/publication/cf9e5ef4-c498-4699-aaa7-449c04dce3e3> Accessed April 24, 2019.
3. Court of Justice of the European Union. Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings 2018/C 257/01 OJ
4. Court of Justice of the European Union. Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 2018/C 257/01
5. Delhomme, Vincent and Larripa, Lucie, "C-416/17 Commission v France : Failure of a Member State to fulfil its obligations under Article 267(3) TFEU." *European Law Blog*, November 22, 2018. Available on: <http://europeanlawblog.eu/2018/11/22/c-416-17-commission-v-france-failure-of-a-member-state-to-fulfil-its-obligations-under-article-2673-tfeu/> Accessed March 18, 2018.
6. Ginter, Carri, "Legal implications of not asking a for preliminary rulings by the highest courts", presentation in the Erasmus+ Jean Monet Conference Constitutional Law and Fundamental Rights, Riga Graduate School of Law, April 26, 2019.

7. Sarmiento, Daniel, “Judicial Infringements at the Court of Justice- A brief comment on the phenomenal Commission/ France (C-416/17)”, Despite Our Differences (blog), October 9, 2018. Available at <https://despiteourdifferencesblog.wordpress.com/2018/10/09/judicial-infringements-at-the-court-of-justice-a-brief-comment-on-the-phenomenal-commission-france-c-416-17/> Accessed March 18, 2019.