

The ECtHR's Interference in the Dialogue between National Courts and the Court of Justice of the EU: Implications for the Preliminary Reference Procedure

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Abstract

The European Court of Human Rights (ECtHR) recognises that the refusal of national judges of last instance to ask the Court of Justice of the European Union (CJEU) for a preliminary ruling might violate Article 6(1) ECHR. In April 2014 and in July 2015, it indeed determined the existence of an infringement. The ECtHR imposes on national courts of last instance a duty to give reasons as regards their refusal to refer the request of the parties to the CJEU. The article discusses whether this case law is consistent with the case law of the CJEU. Moreover, it explores its potential effects on the functioning of preliminary references and its implications in relation to Köbler, the interpretation of Article 47 of the Charter and the autonomy of the EU legal order. Finally, the article claims that, despite the interference of the ECtHR with the jurisdiction of the CJEU, its review enhances the judicial protection of individuals.

I Introduction

On several occasions, the European Court of Human Rights (ECtHR) has been called upon to examine whether Article 6(1) of the European Convention on Human Rights (ECHR) is infringed by the decision of a domestic court not to refer a preliminary question to the Court of Justice of the European Union (CJEU).¹ In the recent judgments *Dhahbi v. Italy* of April 2014 and *Schipani and others v. Italy* of July 2015, the ECtHR held for the first time the existence of a violation of Article 6(1) ECHR due to the failure of the Italian Court of Cassation to make a reference for a preliminary ruling to the CJEU

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¹ Cf. P. Leanza & O. Pridal, *The right to a fair trial: Article 6 of the European Convention on Human Rights* (Alphen aan den Rijn: Kluwer Law International 2014), pp. 154-166; J. Malenovský, 'Le renvoi préjudiciel perçu par trois Cours "souveraines"' [6/2013, n° 200], *Journal de droit européen*, pp. 220-223; M. Broberg & N. Fenger, *Preliminary References to the European Court of Justice* (Oxford University Press 2010), pp. 271-272. See, *inter alia*, ECtHR, 7 September 1999, *Dotta v. Italy*, Application No. 38399/97; ECtHR, 23 February 2001, *Matheis v. Germany*, Application No. 15073/03; ECtHR, 13 June 2002, *Bakker v. Austria*, Application No. 43454/98; ECtHR, 13 February 2007, *John v. Germany*, Application No. 15073/03; ECtHR, 20 September 2011, *Ullens de Schooten and Rezabek v. Belgium*, Application No. 3989/07 and 38353/07.

without stating the reasons for its refusal.² This is a confirmation of a line of case law established since the nineties.

Individuals who consider their right to a fair trial violated by the refusal to refer to the CJEU may invoke the liability of their State, party to the ECHR, before the ECtHR.³ In particular, the ECtHR verifies if the conditions imposed by Article 6(1) ECHR to the judicial decision not to refer are satisfied in a specific case. It interprets whether the refusal to make a reference for a preliminary ruling under Article 267 TFEU is compatible with the rights enshrined in the ECHR. It follows that the ECtHR assesses the compliance of the decisions of national courts with the obligation to make a preliminary reference to the CJEU. Thus, this practice may undermine the autonomy of the European Union (hereinafter, EU) legal order.

Unsurprisingly, the CJEU has expressed concerns in this respect.⁴ This is easily understandable by bearing in mind that when the ECtHR interprets the ECHR, it solely aims to guarantee the observance of the ECHR and it is not obliged to ensure the primacy of EU law.⁵ Moreover, although the judgments of the ECtHR are compulsory only for those States, which are parties to the proceedings, the ECtHR influences the practice of national courts.⁶ The ECtHR's case law, which will be analysed in the article, deals with and has implications for crucial questions related to the preliminary references to the CJEU, namely the margin of appreciation of national courts under Article 267 TFEU and the protection which is offered to individuals when those courts fail to comply with the obligation to refer.⁷

² ECtHR, 8 April 2014, *Dhahbi v. Italy*, Application No. 17120/09; ECtHR, 21 July 2015, *Schipani v. Italy*, Application No. 38369/09. The Italian Court of Cassation is a domestic court ruling at last instance within the meaning of Article 267(3) TFEU.

³ Article 34 ECHR.

⁴ J.-P. Costa, 'The Relationship between the ECHR and European Union Law – A Jurisprudential Dialogue between the ECHR and the European Court of Justice – Lecture of Jean-Paul Costa' (King's College 7 October 2008), p. 8. Available at: www.echr.coe.int/Documents/Speech_20081007_OV_Costa_London_ENG.pdf.

⁵ J. Malenovsky, *supra*, p. 220.

⁶ *Id.* It is probable that Member States' courts will tend to fulfill the conditions imposed by the ECtHR when deciding not to refer. In this regard, it is interesting to note that the Slovenian Constitutional Court, in requiring that the refusals to refer to the ECJ are appropriately substantiated, refers to the case law of the ECtHR concerning the violation of Article 6(1) ECHR due to an arbitrary refusal to refer. It is also worth observing that the Czech and the Slovenian Constitutional Courts adopted a higher requirement to give reasons concerning the decision not to refer to the ECJ under Article 267(3) TFEU than the one imposed by the ECtHR.

⁷ Cf. for instance: L. Coutron and J.-C. Bonichot (eds), *L'obligation de renvoi préjudiciel à la Cour de justice: une obligation sanctionnée?* (Bruylant 2014); D. Sarmiento, 'CILFIT and Foto-Frost: Constructing and Deconstructing Judicial Authority in Europe', in: M. Poiares Maduro & L. Azoulay (eds), *The past and the Future of EU law* (Hart Publishing 2010), pp. 192-196; J. Baquero Cruz, 'La procédure préjudicielle suffit-elle à garantir l'efficacité et l'uniformité du droit de l'Union européenne?', in: L. Azoulay & L. Burgorgue-Larsen (eds), *L'autorité de l'Union européenne* (Bruylant 2006), pp. 241-266; S. Drake, 'State Liability under Community Law for Judicial

Before addressing the core of the article, it is worth recalling that the CJEU pointed out in Opinion 2/13 that preliminary references are the keystone of the EU judicial system.⁸ They are indeed essential in order to ensure the full application, the consistency and the uniformity in the interpretation of EU law and the judicial protection of individuals' rights under EU law.⁹ This procedure establishes collaboration between the CJEU and national courts as regards issues concerning the interpretation of the Treaties or the validity and interpretation of acts of the EU institutions. It enshrines a 'dialogue des juges' insofar as domestic judges shall be able to ask the CJEU for a preliminary ruling wherever they consider it necessary in order to solve the dispute before them.¹⁰ This also implies that national procedural rules cannot undermine the right of national judges to refer to the CJEU.¹¹

A reference to the CJEU is mandatory for national courts of last instance under Article 267(3) TFEU within the limits of *CILFIT*¹² and for any court that has doubts concerning the validity of EU acts.¹³ That being said, what does happen when a national court fails to submit a preliminary reference to the CJEU despite its obligation? Under EU law individuals do not have remedies in order to obtain a ruling from the CJEU.¹⁴ They may, however, engage the fi-

Error: A false Dawn for the Effective Protection of the Individual's Community Rights' (11/2004) *Irish Journal of European Law*, pp. 34-51; P.J. Wattel, 'Köbler, CILFIT and Welthgrove: We can't go on meeting like this' (41/2004), *CMLR*, pp. 177-190.

⁸ Opinion 2/13, 18 December 2014, EU:C:2014:2454, para. 176.

⁹ See, *inter alia*, Opinion 1/09, EU:C:2011:123, para. 68.

¹⁰ H. Kanninen, 'La marge de manœuvre de la juridiction suprême nationale pour procéder à un renvoi préjudiciel à la Cour de justice des Communautés européennes', in: N. Colneric, J.-P. Puissechot, D. Ruiz-Jarabo y Colomer, D.V. Edwards (eds), *Une communauté de droit: Festschrift für Gil Carlos Rodríguez Iglesias*, 2003, p. 620.

¹¹ See, for instance: Case C-166/73, *Rheinmühlen*, EU:C:1974:3; Joined Cases C-188/10 and C-189/10, *Melki and Abdeli*, EU:C:2010:363; Case C-210/06, *CARTESIO Oktató és Szolgáltató bt.*, EU:C:2008:723; Case C-416/10, *Križan and Others*, EU:C:2013:8; Case C-112/13, *A v. B and Others*, EU:C:2014:2195.

¹² Case C-283/81, *CILFIT v. Ministero della Sanità*, C:1982:335; See also Joined Cases C-28-30/62, *Da Costa en Schaake NV and Others v. Administratie der Belastingen*, EU:C:1963:6. 'National courts of last instance' refers to 'courts or tribunals against whose decisions there is no judicial remedy under national law'. In particular, a reference is not necessary according to CILFIT in the following cases. Firstly, when the interpretation of EU law is so obvious as to leave no scope for any reasonable doubt concerning the manner in which the question raised is to be resolved (*acte clair*). Secondly, when a question is materially identical to a question of interpretation rose before another court and the ECJ already gave a preliminary ruling on that matter (*acte éclairé*). Thirdly, where the question is not relevant for deciding the main proceeding.

¹³ Case 314/85, *Foto-Frost*, EU:C:1987:452. See *infra* 3.1.3.

¹⁴ By way of example, see Order of 6 November 2014, C-243/14, *Krikorian*, EU:C:2014:2357. In this case, the applicant introduced directly before the CJEU a preliminary reference. Clearly, the CJEU dismissed the application. The case shows the frustration of individuals before the refusal to refer of national judges.

nancial liability of their Member State for judicial decisions. In *Köbler*, the CJEU ruled that Member States are obliged to make good damage caused to individuals by infringements of EU law for which they are responsible, including where the alleged infringement stems from a decision not to refer of a court of last instance.¹⁵ At national level, individuals are entitled to introduce a constitutional complaint before the Constitutional Courts of some Member States for a violation of the constitution due to the decision of a court of last instance which has refused to refer to the CJEU. This is the case in Germany, Austria,¹⁶ Spain, the Czech Republic, Slovakia and Slovenia. Moreover, in France the supreme administrative court pointed out that the omission to refer under Article 267(3) TFEU might constitute a denial of justice,¹⁷ while in Sweden, national legislation reinforces the obligation to refer in that a statement of reasons is compulsory.¹⁸

Taking this background into account, the article focuses on the possibilities that private parties have before the ECtHR on the basis of Article 6(1) ECHR. It points out two different, albeit complementary, aspects relating to the ECtHR's review of a breach of Article 6(1) ECHR due to a domestic court's refusal to refer to the CJEU. On the one hand, the interpretation by the ECtHR as regards preliminary references to the CJEU is not entirely consistent with the relevant case law of the latter court. On the other hand, as a matter of principle, this practice tends to enhance the compliance of national judges with the preliminary reference procedure and the judicial protection of individuals. The article first analyses the case law of the ECtHR related to the failure to make preliminary references to the CJEU (2). Then, it discusses the potential impli-

¹⁵ Case C-224/01, *Gerhard Köbler v. Republik Österreich*, EU:C:2003:513. In this regard, it should be pointed out that judicial liability is not linked to the decision not to refer but to the damages produced by that decision. Member States could be liable to pay for infringements of EU law concerning the decision of a national judge of last instance where the rule of EU law infringed is intended to confer rights on individuals, the breach is sufficiently serious (in the meaning of a manifest infringement, taking into account the specific nature of the judicial function) and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. This was then confirmed in *Traghetti del Mediterraneo*, *Commission v. Italy* and recently *Ferreira da Silva*. Cf. Case C-173/03, *Traghetti del Mediterraneo*, EU:C:2006:391; Case C-379/10, *Commission v. Italy*, EU:C:2011:775; Case C-160/14, *Ferreira da Silva e Brito and others*, EU:C:2015:565. See also Opinion of the Advocate General Léger, Case C-173/03, *Traghetti del Mediterraneo* EU:C:2005:602; L. Coutron, 'L'irénisme des cours européennes', in: L. Coutron and J.-C. Bonichot (eds), *L'obligation de renvoi préjudiciel à la Cour de justice: une obligation sanctionnée?* (Bruylant 2014), p. 13.

¹⁶ Review by the Austrian Constitutional Court is confined to administrative decisions and this excludes the judgments of administrative or ordinary courts. However, it exerts its review on decisions of administrative bodies that may be regarded as courts of last instance within the meaning of Article 267(3) TFEU.

¹⁷ Judgment No. 1002, 26 October 2011 (10-24.250) – *Cour de cassation – Première chambre civile*.

¹⁸ *Lag* (2006:502) *med vissa bestämmelser om förhandsavgörande från Europeiska unionens domstol*, 24 May 2006.

cations of this case law for the functioning of the preliminary reference procedure to the CJEU and the judicial protection of individuals (3).

2 The Refusal to Refer for a Preliminary Ruling as a Violation of Article 6(1) ECHR

According to the ECtHR, the refusal to make a preliminary reference to the CJEU might violate the right to a fair trial provided for in Article 6(1) ECHR insofar as that decision is arbitrary, *i.e.* it is not based on reasons with regard to the applicable law.¹⁹ The ECtHR seems to be inspired by the case law of the German Federal Constitutional Court, which first recognised that an arbitrary refusal to refer to the CJEU might violate the right to a lawful judge within the meaning of Article 101, §1, sentence 2 of the Basic Law (*i.e.*, the German Constitution).²⁰ This section of the article seeks to explore the conditions that Article 6(1) ECHR imposes on domestic courts when refusing to refer. Emphasis is given to the duty of national judges to give reasons as regards the refusal to submit the applicant's request to the CJEU, the procedural requirements for the parties to the proceedings and the scope of the ECtHR's assessment in this regard. For this purpose, some of the decisions of the ECtHR have been selected and are examined with a particular focus on those aspects.

The article distinguishes between the approach of the ECtHR in the early decisions, which was more intrusive as regards EU law, yet more vague as regards the conditions under which the decision not to refer might infringe Article 6(1) ECHR (2.1),²¹ and its more consolidated approach, which ultimately led the ECtHR to find a breach of Article 6(1) ECHR (2.2).

2.1 The ECtHR's Approach in the Early Decisions

In *Golder*, the ECtHR recognised that Article 6(1) ECHR includes the right to access to a court as a crucial component of the right to a fair trial.²² In the light of this right, the ECtHR ruled that there exists a connection between preliminary references and Article 6(1) ECHR. The ECtHR stressed that, although Article 6(1) ECHR might be violated by the decision not to refer, the right to a court, of which the right of access is one aspect, is not absolute

¹⁹ P. Leanza & O. Pridal, *supra*, p. 158.

²⁰ J. Malenovsky, *supra*, p. 222.

²¹ In all those decisions the ECtHR held that the complaints were manifestly ill-founded.

²² ECtHR, 21 February 1975, *Golder v. The United Kingdom*, Application No. 4451/70.

but subject to limitations related to the regulation by the State.²³ Therefore, the right to bring a case before a court through a preliminary reference cannot be absolute either. It is part of the functioning of such a mechanism that a court must ascertain whether it can or must submit a preliminary question in order to settle the dispute before it.²⁴ In this regard, it is worthy of note that the ECtHR extended the margin of appreciation doctrine to procedural rights and, in particular, to Article 6(1) ECHR as regards the refusal of a domestic court to submit a preliminary reference.²⁵

It is in this context that the ECtHR stated that Article 6(1) ECHR might be infringed due to the arbitrary refusal to the request of the party to the national proceedings seeking the domestic court of last instance to refer to the CJEU.²⁶ The ECtHR confirmed, in essence, the interpretation of the European Commission of Human Rights in *Société Divagosa v. Spain*.²⁷

In the most of the cases, the ECtHR's assessment of the arbitrariness of the refusal focused on whether the latter consisted of a reasoned decision in relation with the arguments of the parties and the circumstances of the cases, including the examination of EU law provisions.²⁸ By way of example, in *Canela*

²³ ECtHR, 15 July 2003, *Ernst and Others v. Belgium*, Application No. 33400/96. See also ECtHR, 17 July 2003, *Luordo v. Italy*, Application No. 32190/96, para. 85.

²⁴ ECtHR, *Ernst and Others v. Belgium*, *supra*.

²⁵ D. Spielmann, 'Allowing the right margin: The ECHR and the national margin of appreciation doctrine: waiver or subsidiarity of European review' [February 2012], University of Cambridge, CELS Working Paper, available at www.cels.law.cam.ac.uk/publications/working_papers.php.

²⁶ ECtHR, *Desmots v. France*, 23 March 1999, Application No. 41358/98; *Schweighofer and others v. Austria*, 29 August 1999, Applications Nos. 35673/97, 35674/97, 36082/97 and 37379/97. The approach of the ECtHR has also been transposed to national reference procedures. For instance, the ECtHR admitted the possibility that Article 6(1) ECHR might be infringed by a national court of last instance's refusal to refer in *Coëme* as regards the question whether the Belgian Court of Cassation had violated Article 6(1) ECHR by its refusal to make a preliminary reference to the Belgium Administrative Jurisdiction and Procedure Court, notwithstanding an obligation to refer set out by law. See, ECtHR, 22 June 2000, *Coëme and others v. Belgium*, Applications Nos. 332492/96, 32547/96, 32548/96, 33209/96 and 33210/96, paras 113-114.

²⁷ The latter held that, although there is not an absolute right to have a case referred to the CJEU for a preliminary ruling, in certain circumstances, the arbitrary refusal of a national court of last instance might infringe the principle of the fairness of judicial proceedings as set out in Article 6(1) ECHR. However, the refusal was not arbitrary in that case since the supreme court provided at length the reasons for the refusal and based its ruling on the case law established by the CJEU. EComHR, 12 May 1993, *Société Divagosa v. Spain*, Application No. 20631/92.

²⁸ L. Donnay, 'L'obligation incombant au juge de poser une question préjudicielle à la Cour de justice, élément vaporeux du procès équitable' [96/2013], *Revue trimestrielle des droits de l'homme*, p. 896; R. Valutyte, 'State Liability for the infringement of the obligation to refer for a preliminary ruling under the European Convention on Human Rights' [2012, 19/1], *Jurisprudencia*, p. 11; J. Malenovský, *supra*, p. 221. The right to have a reasoned decision is indeed enshrined in the ECHR which protects individuals from arbitrariness and is linked to the rights laid down in Article 6(1) ECHR. Cf. ECtHR, *Ruiz Torija v. Spain*, 9 December 1994, Application No. 18390/91, paras 29-30. See D. Vitkauskas and G. Dikov, 'Protecting the Right to a Fair Trial under the European Convention on Human Rights' [2012], Strasbourg, Council of Europe, available at: www.coe.int/t/dgi/hr-natimplement/Source/documentation/hb12_fairtrial_en.pdf.

Santiago v. Spain, the ECtHR observed that the Spanish Supreme Court's decision not to refer to the CJEU did not breach Article 6(1) ECHR since the national court set out the reasons for its refusal and examined the applicant's argument. Thus, that decision was not arbitrary, notwithstanding the existence of an obligation to refer.²⁹ In *Dotta v. Italy*, the ECtHR ruled that the refusal to refer to the CJEU was not arbitrary inasmuch as the reasons put forward by the national judge could show that the issues of EU law raised by the applicant were not relevant to the case or they did not raise problems of interpretation.³⁰ In *Herma v. Germany*, the ECtHR stated that there was no arbitrariness since the national judge examined the applicants' arguments at length and gave detailed reasons for finding that the present case was consistent with the recent case law of the CJEU.³¹

However, in a number of other cases, the ECtHR did not hold that a decision was arbitrary despite the omission of the national judge to deal with the questions of EU law that were raised in the proceedings and to state the reasons for its refusal. For instance, in *Bakker v. Austria* the ECtHR observed that the domestic court's refusal did not appear to be arbitrary due to the lack of prospect of success of the applicant and since the applicant's requests did not concern the interpretation of a specific provision of EU law but rather challenged the implementation of national law exercised by Austrian authorities.³² In *Matheis v. Germany*, the ECtHR pointed out that the refusal was not arbitrary in that the applicant did not establish that the constitutional complaint was related to any relevant question of EU law.³³ Similarly, in *Grifhors v. France* the ECtHR stressed that the refusal by the Montpellier's Court of Appeal was not arbitrary, since the subsidiarity nature of the request of the party and the fact that the applicant did not repeat the request also before the Court of Cassation.³⁴ In *John v. Germany*, the ECtHR held that the national courts were not obliged to give reasons for their refusal, since the motion to request a preliminary ruling was not sufficiently substantiated by the party to the main proceedings. In particular, the party's motion did not contain 'an express request' for a preliminary reference nor the applicant gave 'any express and precise reasons for the necessity of a preliminary ruling'.³⁵

²⁹ ECtHR, *Canela Santiago v. Spain*, 4 October 2001, Application No. 60350/00.

³⁰ ECtHR, *Dotta v. Italy*, *supra*.

³¹ ECtHR, *Herma v. Germany*, Application No. 54193/07.

³² ECtHR, *Bakker v. Austria*, *supra*.

³³ ECtHR, *Matheis v. Germany*, *supra*.

³⁴ ECtHR, *Grifhorst v. France*, 7 September 2006, Application No. 28336/02.

³⁵ ECtHR, *John v. Germany*, *supra*.

It follows that in its first decisions the ECtHR established the following points. Article 6(1) ECHR might be infringed by an arbitrary refusal to refer a preliminary question to the CJEU. It seems that there is such an arbitrary refusal where the national judge did not give reasons for it. However, the ECtHR did not provide indications as to the content of the reasons. Besides, in some cases, the refusal was not deemed arbitrary despite the national court's omission to give reasons. Thus, the assessment of the ECtHR appears to be on a case-by-case basis. Finally, in order for the ECtHR to find a violation of Article 6(1) ECHR, the parties to the proceedings must have submitted a request seeking the national court to refer to the CJEU, by specifying the express and precise reasons in this regard.

2.2 The ECtHR's Deeper Involvement in the Dialogue Between EU Courts: Instructing National Judges as Regards the Guarantees Imposed by Article 6(1) ECHR to the Refusal to Refer to the CJEU

The ECtHR clarified some of the questions that the previous case law had left open in *Ullens de Schooten and Rezabek v. Belgium*.³⁶ This judgment was then validated in *Vergauwen v. Belgium*³⁷ and in *Ferreira Santos Pardal v. Portugal*.³⁸ Moreover, in *Dhahbi v. Italy*, as mentioned above, the ECtHR found for the first time a violation of Article 6(1) ECHR. The ECtHR quickly showed that this was not an isolated case. In fact, in *Schipani and others v. Italy* it concluded again that there was a breach of Article 6(1) ECHR.

In *Ullens de Schooten and Rezabek*, the ECtHR specified the national court's duty to provide reasons for its refusal to refer to the CJEU.³⁹ In particular, it focused on under which conditions the refusal by the domestic courts to respond to the applicant's request to refer to the CJEU could entail a breach of Article 6(1) ECHR.⁴⁰ First, the ECtHR confirmed that Article 6(1) ECHR does not guarantee an absolute right to have a case referred by a domestic court to another national or international authority. In fact, where such a procedure exists, the court, which is called to respond to the party's request for a preliminary reference, enjoys a margin of appreciation in verifying the relevance of a preliminary ruling in order to settle the dispute.⁴¹ Second, the decision not to refer falls within the scope of Article 6(1) ECHR which requires that the competent court

³⁶ *Ullens de Schooten and Rezabek v. Belgium*, *supra*, paras 59 to 62.

³⁷ ECtHR, 10 April 2012, *Vergauwen and others v. Belgium*, Application No. 4832/04.

³⁸ ECtHR, 4 September 2012, *Ferreira Santos Pardal v. Portugal*, Application No. 30123/10.

³⁹ L. Donnay, *supra*, p. 896.

⁴⁰ *Ullens de Schooten and Rezabek*, *supra*, para. 55.

⁴¹ *Id.*, para. 57.

in accordance with the applicable law has the task of hearing any legal question in the course of proceedings.⁴² The ECtHR further pointed out that this takes on 'particular significance' in the EU judicial system and in relation with Article 267(3) TFEU.⁴³ Therefore, the refusal to refer may infringe the fairness of the proceedings. This is so even if the court refusing to refer is not adjudicating at last instance and without distinguishing whether the preliminary ruling would be given by a domestic court or by the CJEU.⁴⁴

Third, the ECtHR stressed that Article 6(1) ECHR might be violated where the refusal proves arbitrary. What is more important is that it indicates when this happens, namely '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'.⁴⁵ It follows that, according to the ECtHR, Article 6(1) ECHR imposes on domestic courts an obligation to indicate the reasons in relation with the applicable law for any decisions in which they fail to refer a preliminary question. This obligation is particularly important when the pertinent law allows for a refusal to refer only on an exceptional basis.⁴⁶

In the context of Article 267(3) TFEU, this means that when national courts of last instance refuse to refer to the CJEU a preliminary question on the interpretation of EU law, they are obliged to justify their refusal in the light of the exceptions provided for in the CJEU's case law, notably in accordance with *CILFIT*.⁴⁷ In that regard, the task of the ECtHR consists in ensuring that the impugned refusal has been duly accompanied by such a reasoning. In fact, it does not examine any error that might have been committed by the domestic courts in interpreting or applying EU law.⁴⁸

The ECtHR came to the conclusion that this obligation was fulfilled in *Ullens de Schooten and Rezabek* since the Belgian Court of Cassation and the *Conseil d'État* had rejected the applicant's request on the ground that one of the exceptions provided for in the *CILFIT* case law 'came into play'.⁴⁹ In the ECtHR's view, those courts with 'demonstrative reasoning' found that there

⁴² The ECtHR specified that if Article 6 ECHR is applicable, there is no need to assess whether Article 13 ECHR has been infringed since the latter provision is subsidiary to and is absorbed by the former.

⁴³ *Ullens de Schooten and Rezabek*, *supra*, para. 58.

⁴⁴ *Id.*, para. 59.

⁴⁵ *Ibid.*

⁴⁶ *Id.*, para. 60.

⁴⁷ *Id.*, para. 62.

⁴⁸ *Id.*, para. 61.

⁴⁹ *Id.*, para. 64.

was no reasonable doubt and that an answer by the CJEU as to the interpretation of the other provisions of the Treaty ‘could not affect the outcome of the present dispute’.⁵⁰ This was so even though the applicants had claimed that the interpretation of EU law adopted by the Court of Cassation and the *Conseil d’État* was erroneous, by setting out ‘detailed arguments’ in this connection.⁵¹ In fact, the question whether the arguments of the applicants were well founded falls outside the ECtHR’s jurisdiction.⁵² It emerges that the ECtHR’s assessment in this regard is narrow. Indeed, a reference to the *CILFIT* criteria appears to be sufficient.⁵³ The clarifications provided by this judgment were then confirmed in *Vergauwen and others* and *Luís Ferreira Santos Pardal*.⁵⁴ However, none of these decisions recognised the existence of a breach of Article 6(1) ECHR. This happened for the first time in *Dhahbi v. Italy*.^{55,56}

Arguably, once having specified that Article 6(1) ECHR imposes a duty to give reasons for the refusal to refer to the CJEU, the ECtHR showed a less tolerant attitude towards national courts. In *Dhahbi*, the ECtHR started by recalling that Article 6(1) ECHR requires national courts of last instance, which are in principle obliged to refer under Article 267(3) TFEU, to give reasons for any decision refusing to make a preliminary reference. More specifically, those reasons should be provided according to the exceptions set out in *CILFIT*. The ECtHR further pointed out that it solely assesses that the impugned refusal is duly substantiated.⁵⁷ The ECtHR then applied those principles to the present case. By scrutinising the judgment of the Italian Court of Cassation, the ECtHR observed that, on the one hand, no references were made to the applicant’s request to obtain a preliminary ruling from the CJEU. On the other hand, the judgment did not contain the reasons why that court ascertained it was not obliged to refer under Article 267(3) TFEU within the limits of *CILFIT*. Hence, the ECtHR stressed that the Italian Court of Cassation, as domestic court of last instance, was under a duty to give reasons for its refusal to seek a preliminary

⁵⁰ *Id.*, para. 63.

⁵¹ *Id.*, para. 66.

⁵² *Id.*, para. 66. It is interesting to note that in *Ullens de Schooten and Rezabek* the Commission sent a reasoned opinion under Article 258 TFEU to Belgium for incompatibility of the national measure in question with EU law.

⁵³ *Id.*, paras 64 and 65. L. Coutron, *supra*, pp. 17-20.

⁵⁴ *Vergauwen and others v. Belgium*, *supra*, para. 89.

⁵⁵ ECtHR, *Dhahbi v. Italy*, *supra*, paras 31 to 34.

⁵⁶ ECtHR, *Dhahbi v. Italy*, *supra*, paras 31 to 34.

⁵⁷ It should be also stressed that in *Dhahbi* the ECtHR did not mention the word ‘arbitrary’ as regards the refusal. One may speculate from that on whether the ECtHR aimed to draw attention to the requirements that national judges must respect under Article 6(1) ECHR when they refuse to refer, by taking some distances from the early decisions insofar as the conditions under which a refusal to make a preliminary reference could violate the right to a fair trial were not clear.

ruling from the CJEU. Accordingly, it concluded that there was a violation of Article 6(1) ECHR.

The refusal to refer of the Italian Court of Cassation was again examined by the ECtHR in *Schipani and others*.⁵⁸ The ECtHR held that from the grounds of the Court of Cassation's judgment, it did not emerge whether the parties' motion concerning the preliminary question was deemed not relevant, or whether the *acte clair* doctrine applied, or whether the national court had simply ignored the request.⁵⁹ This led the ECtHR to find a violation of Article 6(1) ECHR.⁶⁰ It is worth mentioning that, in his concurring opinion to *Schipani and others*, Judge Wojtyczek argued against the automatic recognition of a breach of Article 6(1) ECHR where there is an unreasoned refusal to refer to the CJEU. He pointed out that the ECtHR should take into account the severity of the interference in the sphere of human rights.

These developments highlight that, according to the ECtHR, Article 6(1) ECHR requires national judges to give reasons in line with the case law of the CJEU when they do not refer under Article 267 TFEU. As regards courts of last instance, they must justify their refusal according to *CILFIT*. This obligation, however, is linked to the refusal to submit the applicant's request for a preliminary ruling to the CJEU. In this regard, the task of the ECtHR consists only in ensuring that the refusal has been accompanied by such reasons. Besides, the ECtHR seems to have shifted its focus from the arbitrariness of the refusals to whether the national court provides reasons. Therefore, an unreasoned refusal constitutes in itself a violation of Article 6(1) ECHR.

3 Implications for the Preliminary References to the CJEU

The review by the ECtHR of a violation of Article 6(1) ECHR caused by the refusal of national judges to refer to the CJEU might reinforce the collaboration of national judges with the CJEU by means of preliminary references. As scholars pointed out, it provides '*ultima ratio*' implementation in order to enforce the obligation to refer preliminary questions to the CJEU.⁶¹

⁵⁸ *Schipani and others v. Italy*, *supra*.

⁵⁹ *Id.*, para. 72.

⁶⁰ *Id.*, para. 73.

⁶¹ I. Pernice, 'The right to Effective Judicial Protection and Remedies in the EU', in: A. Rosas, E. Levits & Y. Bots (eds), *The Court of Justice and The Construction of Europe: Analysis and Perspective on Sixty Years of Case law* (The Hague: Asser Press/Berlin: Springer Verlag 2013), p. 393.

In this regard, the case law of the ECtHR should be evaluated by bearing in mind the absence of control from the CJEU and of the possibility for the parties to the main proceedings to obtain a preliminary ruling from the CJEU where a national court refuses to make a preliminary reference. Nevertheless, one should also observe that the ECtHR interferes with the autonomy of the EU legal order and affects the specificity of the collaboration of national courts and the CJEU *via* preliminary references.⁶² Indeed, the ECtHR indirectly interprets Article 267 TFEU and, by doing so, proposes an interpretation which differs to some extent from that established by the CJEU's case law.⁶³ In fact, it is true that the judgment of the ECtHR is addressed to a State, which is party to the ECHR and to the proceedings before the ECtHR, and deals with a specific decision of a national court. Nevertheless, when an issue of EU law is raised before national judges, they assume the role of EU judges and 'guardians' of the EU legal order and judicial system.⁶⁴ One may claim that to permit the ECtHR to rule on the obligation to refer to the CJEU confers on it the power to interpret the preliminary reference procedure and the task of national judges when they act under the EU mandate.

In Opinion 2/13, the CJEU made it clear that it does not accept that the ECtHR interferes with the interpretation of its case law and its exclusive jurisdiction.⁶⁵ However, it must be noted that Advocate General Wahl validated that the ECtHR assesses whether national courts comply with Article 267(3) TFEU.⁶⁶ He did not look at the criteria developed by the ECtHR. Rather, he stressed that the review by the ECtHR of the obligation to refer under Article 267(3) TFEU enhances the system of control provided for by EU law.⁶⁷

The analysis of the case law points out that various implications for preliminary references to the CJEU may appear in relation with two main issues. On the one hand, this case law underlines a diverging interpretation of the characteristics of preliminary references between the CJEU and the ECtHR, which

⁶² N. Cariat & L. Leboeuf, 'Renvoi préjudiciel à la Cour de justice de l'Union européenne et droit à un procès équitable' [33/2012 n° 6492], *Journal des tribunaux*, p. 676.

⁶³ M. Broberg & N. Fenger, *supra*, p. 281.

⁶⁴ Opinion 1/09, *supra*, para. 66. Cf. S. Adam, 'Le mécanisme préjudiciel, limite fonctionnelle à la compétence externe de l'Union. Note sur l'avis 1/09 de la Cour de justice' [2011/1] *CDE*, pp. 277-302; R. Baratta, 'National courts as 'Guardians' and 'Ordinary Courts' of EU Law: Opinion 1/09 of the ECJ' [38/2011 no. 4] *LIEI*, pp. 297-320; A. Rosas, 'The National Judge as EU Judge: Opinion 1/09', in: P. Cardonnel, A. Rosas, N. Wahl (eds), *Constitutionalising the EU judicial system: essays in honour of Pernilla Lindh* (Hart Publishing 2012), pp. 105-121.

⁶⁵ Opinion 2/13, *supra*.

⁶⁶ Opinion of the Advocate General Wahl in Joined Cases C-72/14 and C-197/14, *X and T.A. van Dijk*, EU:C:2015:319. It is also interesting to note that Advocate General Léger in its Opinion in Köbler referred to the case law of the ECtHR in question. Opinion in Case C-224/01, *Köbler* EU:C:2003:207, para. 147.

⁶⁷ Opinion of the Advocate General Wahl, *supra*, para. 63.

could also affect the functioning of this procedure (3.1). On the other hand, the article further discusses the potential effects that this case law could have on State liability in line with *Köbler* and in terms of judicial protection (3.2).

3.1 Preliminary References and the Right to a Fair Trial: The Conditions Imposed by the ECtHR

Arguably, the case law inaugurated in *Ullens de Schooten and Rezabek* preserves more than the previous judgments the autonomy of the EU legal order.⁶⁸ In fact, the ECtHR specifies that its review as regards the assessment of the refusal to refer does not include any mistake the national court might have made in interpreting or applying EU law. Furthermore, the ECtHR points out that the decision not to refer should be based entirely on the CJEU's case law and, particularly, on the *CILFIT* criteria.

Nevertheless, despite the efforts in order to respect the specific characteristics of preliminary references under Article 267 TFEU, the interpretation by the ECtHR differs from that by the CJEU.⁶⁹ In this regard, this section distinguishes three aspects related to the national judge's duty to refer to the CJEU (3.1.1), the role of the parties to the main proceedings (3.1.2) and the situations which might fall within the scope of Article 6(1) ECHR (3.1.3).

3.1.1 Assessment by the ECtHR of a Breach of Article 6(1) ECHR: Implications for the National Judge's Duty to Refer to the CJEU

In light of Article 6(1) ECHR, the ECtHR requires national courts within the meaning of Article 267(3) TFEU to give reasons for their refusal according to *CILFIT*. However, it limits its assessment and accepts a mere reference to them. It is sufficient, in fact, that the national judge justifies its refusal by stating that the exceptions set out in the case law of the CJEU 'come into play'.⁷⁰ In terms of division of competences, the ECtHR is clearly right in considering and pointing out that it does not have jurisdiction to assess whether the national court did not apply the correct interpretation or application of EU law. Arguably, this has been established in order to limit the intrusion

⁶⁸ In this regard, scholars have stressed that this judgment was delivered during the negotiation of the Draft Agreement on the EU Accession to the ECHR. Hence, the ECtHR might want to reensure the CJEU as to its intention not to interfere with the powers of the latter court concerning the interpretation of EU law. Cf. L. Donnay, *supra*, p. 901; F. Fines, 'Le renvoi préjudiciel de l'article 267 TFUE dans le système de la convention européenne des droits de l'homme', in: *Europe(s), droit(s) européen(s): liber amicorum en l'honneur du professeur Vlad Constantinesco* (Bruylant 2015), p. 182.

⁶⁹ J. Malenovský, *supra*, p. 221.

⁷⁰ *Ullens de Schooten and Rezabek*, *supra*, para. 64.

of the ECtHR *vis-à-vis* the jurisdiction of the CJEU and the autonomy of the EU legal order.⁷¹

Nevertheless, in practice, this is not consistent with *CILFIT*, namely with the *acte éclairé* and *acte clair* doctrines. Pursuant to the latter, national courts of last instance may abstain to refer under Article 267(3) TFEU where they are convinced that the interpretation of EU law is so obvious as to leave no room for any reasonable doubts or where the CJEU gave a judgment on a previously referred question that is materially identically to the new question or makes the interpretation of the law unambiguous.⁷² On the contrary, the case law of the ECtHR may imply that national courts of last instance are allowed to skip the examination required by the CJEU and a deep analysis of the case law related to EU legal issues by declaring that they took it into account and that they are not required to refer in the light of *CILFIT*. Their refusal to refer a preliminary question to the CJEU complies with Article 6(1) ECHR insofar as they include a reference to *CILFIT* and to the request of the parties. In this connection, the ECtHR's assessment has also been criticised for lack of effectiveness.⁷³ The problem is that it might happen that although a national court did not give reasons for its refusal, it complied with the *CILFIT* criteria, or *vice versa*. In as much as it is limited to the mere presence of reasons, the review by the ECtHR could potentially deprive the exceptions laid down in *CILFIT* from any significance.

Moreover, under EU law, national courts are not explicitly required to give reasons when they decide not to refer under Article 267(3) TFEU.⁷⁴ In fact, national judges are solely responsible to assess whether a preliminary ruling could be required in order to decide the case before them. In this regard, it is interesting to recall the Opinions of Advocates General Wahl and Bot in two recent cases. In his Opinion in *X and T.A. van Dijk* Advocate General Wahl appears to favour a broad reading of the *acte clair* doctrine.⁷⁵ Thus, he stressed that 'if a national court of last instance is sure enough of its own interpretation

⁷¹ N. Cariat & L. Leboeuf, *supra*, pp. 676 and 677.

⁷² For a comment on the *acte clair* doctrine, see, *inter alia*: M. Broberg, 'Acte clair revisited: Adapting the acte clair criteria to the demands of the times' [2008/45 Issue 5], *CMLR*, pp. 1383-1397. N. Fenger & M. Broberg, 'Finding Light in the Darkness: On the Actual Application No. of the acte clair Doctrine' [2011/30], *Yearbook of European law*, pp. 203-204.

⁷³ L. Donnay, *supra*, pp. 897-898. Moreover, the author underlines a tension between the way the ECtHR exercises its review and the wording of the judgment which seems to seek to a stricter control.

⁷⁴ N. Cariat & L. Leboeuf, *supra*, p. 676.

⁷⁵ Opinion of the Advocate General Wahl in Joined Cases C-72/14 and C-197/14, *X and T.A. van Dijk*, *supra*, para. 62. The Advocate General Wahl points out that determining a situation which might be seen *acte clair* according to a rigid reading of this doctrine would be as likely as 'encountering a unicorn'.

to take upon itself the responsibility (and possibly the blame) for resolving a point of EU law', the *CILFIT* criteria are met. This is so due to the system of 'checks and balances' concerning Article 267(3) TFUE, according to which proceedings relating to an alleged failure to refer to the CJEU may be brought before, *inter alia*, the ECtHR. On the contrary, in *Ferreira da Silva* Advocate General Bot pointed out that *CILFIT* imposes on national courts of last instance an increased duty to provide reasons when they fail to refer a preliminary question to the CJEU.⁷⁶ In particular, they have to state reasons according to which they do not have any reasonable doubt.⁷⁷

In the light of the foregoing considerations, I take the view that, if established at EU level and reviewed by a court competent to assess its content, such an obligation to give reasons might enhance the application of the *CILFIT* criteria, and thereby the functioning of preliminary references.⁷⁸ One may also note that the ECtHR's judgments in question affect the margin of discretion of national judges. In fact, although the obligation to secure the right to a fair trial enshrined in Article 6(1) ECHR is upon the contracting States,⁷⁹ the latter may be liable for acts and omissions of a supreme court. As a result, the ECtHR creates a duty on the basis of Article 6(1) ECHR upon domestic courts to fulfil the requirements of a fair hearing.⁸⁰

⁷⁶ Opinion of the Advocate General Bot in Case C-160/14, *Ferreira da Silva and Brito and others v. Portugal*, EU:C:2015:390.99, para. 90.

⁷⁷ *Id.*, para. 94. One may ask whether Advocate General Bot implicitly took into account the relevant case law of the ECtHR.

⁷⁸ This argument is further explained in section 3.2.2, *infra*.

⁷⁹ Cf. Article 1 ECHR.

⁸⁰ These requirements include the duty to comply with the obligation to make a preliminary reference to the CJEU and to provide a reasoned refusal according to the exceptions laid down in *CILFIT*. On a broader perspective, it is challenging to speculate in this context on the meaning of Article 19(1), second sentence, TEU which refers to the obligation for Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. Article 19(1), second sentence, TEU is also linked to the 'role' of national judges as EU judges that, pursuant to the principle of loyal cooperation established in Article 4(3) TEU, shall ensure the full Application No. of EU law and the judicial protection of individual's rights under EU law. By analogy with the reasoning of the ECtHR, one may query whether and to what extent the CJEU could establish a duty on the basis of Article 19(1) TEU upon Member States to guarantee that national judges ensure the proper functioning of the preliminary reference procedure. Concerning the interpretation of Article 19(1) TEU, see: E. Nefframi, 'Quelques réflexions sur l'article 19, paragraphe 1, alinéa 2, TUE et l'obligation de l'Etat membre d'assurer la protection juridictionnelle effective', in: C. Boutayeb (ed.), *La Constitution, l'Europe et le droit, Mélanges en l'honneur de Jean-Claude Masclet* (Publications de l'Université Paris-Sorbonne 2013) pp. 805-816.

3.1.2 Taking the Requests of the Parties to the Proceedings into Account

Arguably, another incoherent aspect with *CILFIT* is that the ECtHR requires national courts of last instance to give reasons for their refusal to refer under Article 267(3) TFEU as regards the request of the parties to the main proceedings to submit a preliminary reference. Instead, the CJEU attaches importance to whether the national court deems a specific question necessary in order to settle the dispute before it and does not require national court's decisions to be justified *vis-à-vis* the parties to the proceedings.⁸¹ Under EU law, since the national judge can, and in some cases must, refer *ex officio* and since the parties are not required to submit a request for a preliminary reference, the fairness of the procedure could not depend on the parties' application.⁸² Therefore, as scholars have observed, this condition differs from the CJEU's interpretation as regards the nature of the preliminary reference procedure.⁸³ It should be also borne in mind that preliminary references establish collaboration between the national judge and the CJEU in order to provide the former with guidelines as regards the correct interpretation and application of EU law. Thus, they are not another level of jurisdiction which rules on the result of the proceedings before the referring courts. According to the CJEU, preliminary references do not constitute a means of redress available to the parties to the main proceedings.⁸⁴

One may argue that the duty to state reasons as regards the refusal to submit the applicant's requests to the CJEU is not coherent with the case law of the CJEU concerning preliminary references in that it is based on the wrong premise that the initiative of preliminary references should involve considerations concerning the motions of the parties.⁸⁵ An argument that can explain the practice

⁸¹ However, national practice before domestic courts shows that the parties to the proceedings are often involved. Cf. *Colloque de l'association des Conseils d'États et juridictions administratives suprêmes de l'Union européenne*, Helsinki May 2002, available at: www.aca-europe.eu/index.php/fr/colloques-fr.

⁸² Cf. *inter alia* Case C-136/12, *Consiglio nazionale dei geologi*, EU:C:2013:489, paras 21-31. For a comment on the Application No. of EU law by national judges *ex officio*, see: J. Engström, 'National Courts' Obligation to apply Community Law *ex officio* – The Court showing new Respect for party autonomy and National procedural autonomy?' [2008/1] *REALaw*, pp. 67-89.

⁸³ J. Malenovský, *supra*, p. 221; M. Broberg & N. Fenger, *supra*, p. 281.

⁸⁴ See, *inter alia*, Joined Cases C-28-30/62, *Da Costa*, *supra*; Case C-364/92, *SAT Fluggesellschaft / Eurocontrol*, EU:C:1994:7, paras 8-9; Case 40/70, *Sirena v. Eda*, EU:C:1979:236; Case C-402/98, *ATB e.a.*, EU:C:2000:366, para. 29; Case C-2/06, *Kempter*, EU:C:2007:245, paras 40-41; Case C-136/12, *Consiglio nazionale dei geologi et Autorità garante della concorrenza e del mercato*, EU:C:2013:489, paras 21-31. Cf. also J.-C. Bonichot, 'Le rôle des parties au principal dans le traitement des questions préjudicielles' [2013/16], *Gazette du Palais*, pp. 227-228.

⁸⁵ M. Broberg & N. Fenger, *supra*, p. 239. As Advocate General Bot pointed out in *Kempter*, to require the parties to the main proceeding to have relied on EU law before the national court of last instance 'would (...) have the major drawback of creating indirectly a new exemption

in question of the ECtHR may be that, since the purpose of that court is that the rights under the ECHR are ensured, it aims to protect the parties from the arbitrary decisions of national judges that can undermine their right to a fair trial. Hence, it looks at preliminary references within the context of the national proceedings and interprets them in light of the guarantees provided for in Article 6(1) ECHR. In other words, the parties to the main proceedings have a right, yet not absolute, to obtain access to the CJEU through a preliminary reference. Since such a right is not absolute in that the national courts enjoy a margin of appreciation in this regard, the applicants are protected only against arbitrary refusals to refer a preliminary question to the CJEU. Thus, they enjoy a right to obtain a reasoned decision on the basis of the applicable law as element of the right to a fair trial. Besides, the ECtHR asks the parties to the main proceedings to have complied with a procedural obligation, *i.e.* a request for a preliminary reference, in order to be entitled to invoke their right under Article 6(1) ECHR.⁸⁶ Therefore, the decision not to refer to the CJEU can infringe the right to a fair trial due to the lack of reasons in replying to the request of the parties. In this connection, it is interesting to note, for instance, that in the ECtHR's view the 'main question' in *Ullens de Schooten and Rezabek* was whether the refusal of the Belgian courts had violated Article 6(1) ECHR as regards the applicants' request to refer under Article 267(3) TFEU.⁸⁷

It emerges from the foregoing considerations that the ECtHR perceives preliminary references to the CJEU as an autonomous subjective right of the parties to the national proceedings. It also appears that the evaluation of whether or not a refusal to refer could be deemed arbitrary depends mainly on the motion of the parties to the proceedings before the national courts.⁸⁸

3.1.3 The Scope of Article 6(1) ECHR as Regards Preliminary References by Ordinary Courts and Preliminary References on Validity

It is not clear if the accountability of Member States for a violation of Article 6(1) ECHR due to the national court's refusal to refer to the CJEU may be extended to preliminary references by ordinary courts (*i.e.*, courts that are not adjudicating at last instance) and preliminary references on validity.

from the obligation, under the third paragraph of Article (267 TFEU)'. Opinion in Case C-2/06, *Kempter*, EU:C:2007:245, para. 97.

⁸⁶ ECtHR, *John v. Germany*, *supra*.

⁸⁷ Malenovský, *supra*, p. 222; N. Cariat & L. Leboeuf, *supra*, p. 676. *Ullens de Schooten and Rezabek*, *supra*, para. 55.

⁸⁸ J. Malenovský, *supra*, p. 221.

The first open question is whether this line of case law concerns the decisions of both ordinary and last instance courts.⁸⁹ In *Ullens de Schooten and Rezabek*, it seems that in the ECtHR's view Article 6(1) ECHR may be infringed by an arbitrary decision of any court, without a distinction between ordinary and last instance courts.⁹⁰ The obligation to give reasons is enhanced where the national judge can refuse only in exceptional circumstances. Nevertheless, this obligation is upon any national court. On the contrary, in the previous judgments the ECtHR mentioned solely the courts of last instance.⁹¹ In this regard, it is convincing that the exclusion of courts not adjudicating at last instance would imply 'à tort' that, where there is not an obligation to refer to the CJEU according to the Article 267(3) TFEU, the arbitrariness in the procedure is automatically excluded.⁹² However, an extension of the analysis of Article 6(1) ECHR to the refusals of domestic courts, which are not of last instance, raises the question whether the duty to give reasons is in conflict with the role of national judges and their autonomous jurisdiction under EU law. In fact, EU law gives a right to ordinary courts in order to decide whether or not to refer, which should not be undermined by procedural rules preventing it. In this regard, one may query whether in light of increased effectiveness of EU law such an obligation could be justified. Indeed, when the CJEU points out the autonomous jurisdiction of national judges, it refers to situations where a domestic court could be deprived from its right to refer.⁹³ Instead, a duty to give reasons tends to reinforce the functioning of preliminary references.

In this context, it is interesting to draw attention to the fact that the EFTA Court affirms that the case law of the ECtHR in question might apply to the refusal to ask for an advisory opinion under Article 34 of the Surveillance and Court Agreement (SCA). Therefore, even though there is no procedural obligation to refer to the EFTA Court for the courts of the EEA EFTA States, Article 6(1) ECHR might be breached by a refusal to refer.⁹⁴

⁸⁹ N. Cariat & L. Leboeuf, *supra*, p. 675.

⁹⁰ *Ullens de Schooten and Rezabek*, *supra*, para. 59.

⁹¹ For instance, in *John v. Germany*, the ECtHR excluded a violation of Article 6(1) ECHR due to the refusal of one of the courts in question since the latter was not a court of last instance. Cf. also F. Fines, *supra*, p. 181.

⁹² J. Malenovský, *supra*, p. 221.

⁹³ Cf. *inter alia*: Joined Cases C-188/10 and C-189/10, *Melki and Abdeli*, *supra*; Case C-210/06, *CARTESIO Oktató és Szolgáltató bt.*, *supra*; Case C-416/10, *Križan and Others*, *supra*; Case C-112/13, *A v. B and Others*, *supra*. Cf. N. Cariat & A. Hoc, 'Arrêt « Križan »: dans quelle mesure le juge national est-il tenu de poser une question préjudicielle? [2013] *Journal de droit européen*, pp. 97-98; M. Broberg & N. Fenger, 'Preliminary references as a right: But for Whom?' [2011/36], *ELR*, pp. 276-288; D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Springer 2010), in particular pp. 81-100.

⁹⁴ Case E-18/11, *Irish Bank* [2012], para. 64. H. Haukeland Fredriksen, 'The Truble Relationship between the Supreme Court of Norway and the EFTA Court – Recent Developments', in: P.-C. Müller-Graff, O. Mestad (eds), *The Rising Complexity of European Law* (BWV Verlag 2014), pp. 16-17.

The second open question deals with preliminary references on validity. Although the ECtHR's case law has not covered issues related to preliminary references on validity, it seems that it can be transposed to them and Article 6(1) ECHR may be violated by a national court's refusal to refer to the CJEU. In fact, the CJEU enjoys exclusive jurisdiction to declare an EU act void or invalid.⁹⁵ As a consequence, domestic courts are always required to submit a preliminary reference when a question concerning the validity of EU law arises before them. The extension of the analysis of Article 6(1) ECHR to national court's refusal to refer preliminary questions on validity is even more crucial by reason of their role in granting access to the CJEU. Indeed, as regards the review of validity of EU acts, individuals can accede directly to the CJEU through an action for annulment within the limits of Article 263(4) TFEU. The CJEU interpreted the conditions provided for in the latter article narrowly.⁹⁶ It pointed out, however, that the right of effective judicial protection is ensured within the EU judicial system by the possibility of obtaining a preliminary ruling from the CJEU where the implementation of EU acts is a matter for the Member States. From this perspective, preliminary references under Article 267 TFEU are complementary to the remedies laid down in Articles 263 and 277 TFEU.⁹⁷ Therefore, in those cases the collaboration between the CJEU and domestic judges *via* preliminary references gains crucial importance as for the right to access to a court.

It must be stressed, however, that the exceptions laid down in *CILFIT* do not apply insofar as national courts cannot declare the invalidity of an EU act. It follows that the reasons of national judges, which might justify the refusal to make a preliminary reference to the CJEU as required by Article 6(1) ECHR, should demonstrate that the concerned domestic court did not have doubts regarding the validity of an EU act. Therefore, they cannot merely refer to *CILFIT* and to the submissions of the parties. This could raise concerns related to a

⁹⁵ Case 314/85, *Foto-Frost*, *supra*.

⁹⁶ See, *inter alia*: A. Creus, 'Commentaire des décisions du tribunal dans les affaires T-18/10 Inuit et T-262/10 Microban' [2011/3], *CDE*, pp. 659-678; M. Wathelet & J. Wildemeersch, 'Recours en annulation: une première interprétation restrictive du droit d'action élargi des particuliers?' [2012/3, n. 187], *Journal de droit européen*, pp. 75-79; J. Wildemeersch, 'La condition de l'article 263, alinéa 4, TFUE relative à l'absence de mesures d'exécution et l'arrêt *Telefónica*: de l'inutilité d'une réforme: CJUE, gde ch., 19 décembre 2013, *Telefónica/Commission*, aff. C-274/12 P' [2013/4], *Revue des affaires européennes*, pp. 861-871. Cf. Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v. Parliament and Council*, EU:C:2013:625; Case C-133/12 P, *Stichting Woonlinie and Others v. Commission*, EU:C:2014:105; Case C-274/12, *Telefónica v. Commission* EU:C:2013:852; Case C-456/13 P, *T & L Sugars Ltd and Sidul Açúcares Unipessoal Lda v. Commission*, EU:C:2015:284.

⁹⁷ Cf. Case C-583/11 P, *Inuit*, *supra*, para. 92; Case C-50/00 P, *Unión de Pequeños Agricultores v. Conseil*, EU:C:2002:462, para. 40.

deeper intrusion of the ECtHR, which would be forced to interpret EU law in order to evaluate whether the validity of an EU act should be questioned. Should, instead, the ECtHR follow the approach it adopted for preliminary references on interpretation and accept that it is sufficient that the national court argues that it does not have any doubt, its assessment on the basis of Article 6(1) ECHR would not have any *effet utile*.⁹⁸

3.2 Which are the Potential Implications for the EU System of Judicial Protection?

The following considerations deal with the potential impact that this case law might have on the EU judicial system. After having compared the proceedings relating to an alleged failure to refer before the ECtHR with those before national courts in line with *Köbler* (3.2.1), the article addresses the question whether and to what extent the analysed case law relating to Article 6(1) ECHR might affect the interpretation of Article 47 of the Charter of Fundamental Rights of the EU (hereinafter, Charter) (3.2.2). This also leads to the question whether there might be implications for the EU criteria on State liability for judicial decisions. Finally, the article investigates the possibilities of broader control by the ECtHR on the preliminary reference procedure and whether the guarantees offered under EU law comply with the rights enshrined under the ECHR, notably Articles 6(1) and 13 ECHR (3.2.3).

3.2.1 Refusal to Submit a Preliminary Reference and State Liability for Breaches of EU Law and for Breaches of Article 6(1) ECHR

It is interesting to note some elements of comparison between the procedure before the ECtHR in order to engage State liability for a violation of Article 6(1) ECHR due to a national judge's refusal to refer to the CJEU and national procedures brought by individuals for breaches of EU law due to a judicial decision not to refer to the CJEU in line with *Köbler*.⁹⁹

Firstly, both procedures aim to assess the liability of the State as well as they are based on individuals' complaints. Secondly, those procedures do not seek to reopen the case and overrule the relevant national judicial decision. Thirdly, pursuant to *Köbler*, in the procedures seeking State liability, national courts may award damages. Similarly, where the ECtHR holds Member States liable for

⁹⁸ D. Waelbroeck & T. Bombois, 'Des requérants 'privilégiés' et des autres... À propos de l'arrêt Inuit et de l'exigence de protection juridictionnelle effective' [2014/2], *CDE*, p. 67.

⁹⁹ J. Malenovský, *supra*, p. 222.

breaches of the ECHR, it can decide to afford compensation under the conditions provided for in Article 41 ECHR.

However, particular focus should be drawn on certain divergences. First, under EU law and in line with *Köbler*, individuals can engage State liability due to a judicial decision, including the decision not to refer to the CJEU, where the latter has produced a breach of substantive EU law. That is to say, since there is not a right to obtain a preliminary ruling, State liability does not follow from the refusal itself. The CJEU, in fact, asks that the rule of EU law violated is intended to confer rights on individuals under EU law, that there has been a manifest infringement of the CJEU's case law on the matter (a sufficiently serious breach of EU law) and that there is a causal link between that breach and the damage sustained by the injured party. The situation is different as far as State liability under the ECHR is concerned. In this case, the ECtHR looks at whether there is a violation of Article 6(1) ECHR since the obligation under Article 267 TFEU forms part of the ECtHR's analysis of Article 6(1) ECHR. Therefore, it is the decision not to refer in itself insofar as it is arbitrary, *i.e.* it is not accompanied by reasons, which might violate the right to a fair trial under Article 6(1) ECHR and, by consequence, lead to the accountability of the State for such a violation. In this regard, the latter practice may be considered more favourable to individuals since they are not required to demonstrate that the conditions laid down in the *Köbler* case law are satisfied.

Secondly, in line with *Köbler*, an action for State liability shall be brought before national courts. Individuals might feel more comfortable where the decision is taken by an external court.¹⁰⁰ Moreover, it is unlikely that a lower court, which is called to decide whether a higher court's refusal under Article 267(3) TFEU infringed EU law in a manifest or sufficiently serious way, will determine the liability of the superior court.¹⁰¹ Likewise, if the same supreme court that refused to make a reference is required to assess its judicial error, it is probable that that court will deny it.¹⁰²

Another difference is that State liability under EU law may be engaged for damages caused to individuals by breaches of EU law attributable to a refusal to refer of a national court of last instance. In fact, decisions of ordinary courts

¹⁰⁰ M. Schmauch, 'The preliminary Ruling Procedure and the Right to a Fair Trial – Strasbourg Demands Reasoned Decisions from National Courts when They Refuse to Refer a Case to the ECJ' [2011/12], *European Law Reporter*, p. 366.

¹⁰¹ C.D. Classen, 'Case C-224/01, *Gerhard Köbler v. Republik Österreich*, Judgment of 30 September 2003, Full Court' [2004/41], *CMLR*, pp. 813-818.

¹⁰² M. Broberg & N. Fenger, *Preliminary References to the European Court of Justice* (Oxford University Press 2014), pp. 269-270.

can be overruled by a superior court, preventing the production of damages. On the contrary, the relevant case law of the ECtHR could be theoretically extended to the refusals to refer of ordinary courts since the ECtHR does not look at the existence of a damage but rather at a violation of Article 6(1) ECHR due to lack of reasons which justify such a refusal.

Finally, the ECtHR adds a further condition to the requirements set out by the CJEU: the parties to the national proceedings must have asked the national judge to submit a reference for a preliminary ruling. It seems that only when this happens, the ECtHR will assess whether the judicial decision provides reasons in a way that is compatible with the ECHR. This condition, which, as has been argued, does not comply with the nature of the preliminary reference procedure under EU law, does not appear compatible with *Köbler* either. In this regard, it is worth recalling that the CJEU pointed out that Member States might establish a higher level of protection of individuals' rights. However, they cannot impose higher requirements to the conditions laid down in *Köbler*.¹⁰³ Accordingly, the obligation upon the applicant to request the national judge to submit a preliminary reference to the CJEU does not comply with the case law of the latter court inasmuch as it establishes an additional condition to those set out by the CJEU.

3.2.2 To What Extent May the Interpretation by the ECtHR of Article 6(1) ECHR Influence That by the CJEU of Article 47 of the Charter?

One may query whether the interpretation of Article 6(1) ECHR given by the ECtHR should apply to Article 47 of the Charter. Pursuant to Article 52(3) of the Charter, the rights under the Charter, which correspond to the rights guaranteed by the ECHR are to receive their same interpretation as those set out in the ECHR.¹⁰⁴ Moreover, in line with Article 52(7) of the Charter, their interpretation must have due regard to the Explanation relating to the Charter.¹⁰⁵ According to the latter, Article 47(2) of the Charter corresponds to Article 6(1) ECHR and the guarantees afforded by the ECHR apply in a similar way to the EU. It is convincing that these guarantees also include the relevant case law of the ECtHR as it is also stated in the Explanations relating to Article 52(3) of the Charter.¹⁰⁶

¹⁰³ Case C-224/01, *Köbler*, *supra*, para. 57.

¹⁰⁴ J. Malenovsky, *supra*, p. 220.

¹⁰⁵ OJ 2007/C 303/17.

¹⁰⁶ M. Safjan & D. Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU' [2014], *Yearbook of European Law*, p. 30; M. Schmauch, *supra*, p. 365.

Does this imply that a refusal to refer to the CJEU without stating reasons may infringe Article 47(2) of the Charter? Notwithstanding the autonomy of Article 47 of the Charter, pursuant to Articles 52(3) and 53 of the Charter the protection ensured by the Charter cannot be lower than the protection under the ECHR.¹⁰⁷ Instead, the rights enshrined by the Charter can receive guarantees higher than those under the ECHR. Judicial protection of individuals is indeed guaranteed in a more extensive way by asking national judges to give reasons where they refuse to refer under Article 267 TFEU. Thus, a positive answer seems convincing.

Scholars may claim that the case law of the ECtHR is not legally binding for the CJEU when interpreting the rights laid down by the Charter.¹⁰⁸ However, a combined reading of Articles 52(3) and 52(7) and 53 of the Charter, supported by the fact that the ECtHR's case law constitutes a crucial part of the meaning and the scope of the rights established in the ECHR, tends to give authority to the case law of the ECtHR.¹⁰⁹ A different interpretation of Article 47(2) of the Charter, which does not cover the national judges' refusals to refer under Article 267 TFEU, would risk contradicting Articles 52(3) and 53 of the Charter.

Could this further imply that State liability under EU law may be engaged due to an infringement of Article 47(2) of the Charter where a national judge did not indicate the reasons for its refusal to refer, if the other conditions established in *Köbler* are also met? More specifically, may the lack of reasoning in itself constitute a manifest violation of EU law, notably Article 47(2) of the Charter?¹¹⁰ It may be interesting to explore this scenario also bearing in mind the difficulties in proving the existence of a manifest violation of EU law.¹¹¹ In

¹⁰⁷ M. Safjan & D. Düsterhaus, *supra*, pp. 30–31.

¹⁰⁸ T. Lock, 'The ECJ and the ECtHR: the future relationship between the two courts' [2009/8], *The Law and Practice of International Courts and Tribunals*, pp. 383–387. Lock argues, in essence, that the autonomy of the EU and the ECJ might be undermined by a legally binding reading of the case law of the ECHR. Moreover, he points out that there are not explicit provisions pursuant to which the CJEU is bound by the ECHR's case law. Lock, however, recognises that the case law of the ECtHR is of 'great relevance' for the CJEU when interpreting the corresponding rights under the Charter.

¹⁰⁹ In this regard, see K. Lenaerts & E. de Smijter, 'The Charter and the Role of the European Courts' [2001/8], *Maastricht J. Eur. & Comp. L.*, p. 99; S. Morano-Foadi & S. Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights' [September 2011, Vol. 17, No 5], *European Law Journal*, p. 597. Cf. also S. Prechal & R. Widdershoven, 'Redefining the Relationship Between "Rewe-Effectiveness" and Effective Judicial Protection' [2011/2], *REALaw*, p. 38.

¹¹⁰ M. Schmauch, *supra*, p. 366.

¹¹¹ In order to prove the existence of a manifest infringement, attention must be paid to the specific nature of the judicial function and to the legitimate requirements of legal certainty, taking into account 'the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken (...) by a Community institution and non-compliance by the court in question with its obligation

this regard, it is worth recalling that in September 2015, the CJEU held for the first time, in *Ferreira da Silva*, that a national court's refusal to refer has infringed its obligation under Article 267(3) TFEU insofar as there were conflicting decisions of lower courts regarding the interpretation of an EU legal issue.¹¹² Furthermore, the latter has frequently given rise to difficulties of interpretation by the courts of the Member States.¹¹³ Advocate General Bot in his Opinion in the present case stressed that there is a sufficiently serious breach of EU law when, although the dispute before the domestic court raises an issue of EU law and there is a case law of the CJEU on that matter, the domestic court of last instance applies a different interpretation of EU law from that of the CJEU.¹¹⁴ The Advocate General also suggested to the CJEU to adopt a strict position as regards the obligation to refer under Article 267(3) TFEU.¹¹⁵ He pointed out that, according to *CILFIT*, national courts within the meaning of Article 267(3) TFEU must give reasons when failing to refer.¹¹⁶ However, he did not make an explicit reference to the case law of the ECtHR.

By analogy with Article 6(1) ECHR, one may suppose that the obligation to make a reference forms part of the analysis of Article 47 of the Charter. In this context, Article 47 of the Charter applies to Member States, within the meaning of Article 51(1) of the Charter,¹¹⁷ since it is linked to the national courts' right or obligation to refer under Article 267 TFEU. Moreover, if preliminary references gain such a particular significance in connection with Article 47(2) of the Charter and the latter contains a duty to give reasons when refusing to refer to the CJEU, the unreasoned refusal could be in itself a manifest violation of EU law. This would mean that the compliance of preliminary references with Article 47(2)

to make a reference for a preliminary ruling under the third paragraph of Article 234 EC'. Cf. Case C-224/01, *Köbler*, *supra*, paras 53-55.

¹¹² Case C-160/14, *Ferreira da Silva*, *supra*, paras 41-45.

¹¹³ *Id.*, para. 45.

¹¹⁴ Opinion of the Advocate General Bot in Case C-160/14, *Ferreira da Silva and Brito and others v. Portugal*, *supra*.

¹¹⁵ *Id.*, para. 101.

¹¹⁶ *Id.*, paras 90-94.

¹¹⁷ Cf. Case C-617/10, *Åkerberg Fransson*, EU:C:2013:280; C-206/13, *Siragusa*, EU:C:2014:126. M. Safjan, 'Fields of Application No. of the Charter of Fundamental Rights and constitutional dialogues in the European Union' [2014/02], *European University Institute, Centre for Judicial Cooperation, Distinguished Lecture*; A. Epiney, 'Le champ d'application de la Charte des droits fondamentaux: l'arrêt Fransson et ses implications' [2014/2], *CDE*, pp. 283-303; V. Kronenberger, 'Quand "mise en oeuvre" rime avec "champ d'application": la Cour précise les situations qui relèvent de la Charte des droits fondamentaux de l'Union européenne dans le contexte de l'Application No. du ne bis in idem: CJUE, 26 février 2013, Hans Åkerberg Fransson, aff. C-617/10' [2013/1] *Revue des affaires européennes*, pp. 147-159; H. Kaila, 'The scope of Application of the Charter of Fundamental Rights of the European Union in the Member States', in: P. Cardonnel, A. Rosas, N. Wahl (eds), *Constitutionalising the EU judicial system: essays in honour of Pernilla Lindh* (Hart Publishing 2012), pp. 281-315.

of the Charter creates an obligation upon national courts to justify the refusal to refer. In addition, Article 47(2) of the Charter is intended to confer a right on individuals. Thus, the first two conditions laid down in the case law of the CJEU are satisfied. The assessment of the causality link could be less clear. It is noteworthy that CJEU held that the ascertainment of the existence of a direct causal link between the alleged breach of EU law and the damage is a matter of national courts.¹¹⁸ This means that the absence of reasons would not entail in itself State liability in line with *Köbler*. Yet, when a violation of Article 47(2) of the Charter has occurred according to the criteria enshrined in Article 6(1) ECHR by the ECtHR, the national court called to assess State liability has the duty to verify the existence of a direct causal link between a breach of Article 47(2) of the Charter due to an unreasoned refusal to refer and the damage sustained by the individuals, according to the indications provided for by the CJEU.

By adopting this reading, however, at least two questions remain open. Firstly, if the refusal to refer falls within the scope of Article 47 of the Charter, should it be for the CJEU to interpret Article 47 of the Charter and assess whether there is a violation? In that case, the CJEU might also verify whether a national judge committed a mistake in the interpretation or application of EU law. Indeed, its review can be extended to the grounds of the reasoning and does not have to be limited to the mere existence of a statement of reasons. This was confirmed in *Ferreira da Silva* where the CJEU was called to examine whether a national court of last instance was obliged to refer under Article 267(3) TFEU.¹¹⁹ However, individuals cannot bring a direct action before the CJEU for a violation of Article 47 of the Charter. Actions for State liability have to be filed before national courts and should arrive to the CJEU through a preliminary reference. In this regard, the importance of a preliminary reference is also shown in light of *A v. B*. In the latter, the CJEU ruled that if national courts take the view that a national statute is contrary to Article 47 of the Charter and, more generally, where a right under the national Constitution has the same scope of a right under the Charter, EU law precludes a national procedural rule, such as the obligation to apply to the Constitutional Court for that national statute to be struck down, to the extent that it prevents national courts from exercising their right or fulfilling their obligation to refer to the CJEU for a preliminary ruling.¹²⁰ Instead, where the implementation of an act of EU law involves Member States' discretionary measures, national courts can protect the rights under the national constitution, provided that the level of protection

¹¹⁸ Case C-420/11, *Leth*, EU:C:2013:166, paras 46-48.

¹¹⁹ Case C-160/14, *Ferreira da Silva*, *supra*, paras 43-44. Recall that in this case the national court gave reasons for its refusal. Cf. para. 16.

¹²⁰ Case C-112/13, *A v. B and Others*, *supra*, paras 34-46.

set out by the Charter according to the CJEU's case law and the primacy, unity and effectiveness of EU law are not undermined.¹²¹

Secondly, one must address the question whether the condition established by the ECtHR related to the request of a party in order to find a violation of Article 6(1) ECHR due to a refusal to refer should apply when assessing whether there has been a breach of Article 47 of the Charter. It is convincing that in case of conflict of interpretations, concerning, on the one hand, Article 6(1) ECHR and, on the other hand, Article 47 of the Charter, the interpretation more favourable to individuals should prevail according to Article 52(3) of the Charter.¹²² As a consequence, since the case law of the CJEU regarding Article 267 TFEU is supposed to comply with Article 47 of the Charter and it does not require an additional procedural condition upon individuals, State liability for judicial decisions not to refer would not require the prior request of individuals to the national judge for a preliminary reference.

However, it is probable that national courts will adjust their practices to the requirements imposed by the ECtHR, without taking into account whether Article 47 of the Charter should apply or whether those conditions comply with EU law. In fact, although Article 46(1) ECHR imposes solely on the State which is party to the proceedings to follow the judgment, the case law of the ECtHR affects the practices of national courts.¹²³ National courts could be afraid that the ECtHR will engage State liability for their judicial decision not to refer. This is even more plausible after that the ECtHR condemned Italy in *Dhahbi* and in *Schipani and others*. These judgments have showed national courts that they have to take the ECtHR's case law on the requirements that Article 6(1) ECHR imposes on them when refusing to refer under Article 267 TFEU seriously. Moreover, exclusion *a priori* of a violation of Article 6(1) ECHR where the parties do not introduce a request to the national judge to refer to the CJEU is more favourable for domestic courts inasmuch as it limits their responsibility under Article 267 TFEU.¹²⁴ If it may be positive for the effectiveness of preliminary references that national judges give a full reasoning concerning their refusal to refer to the CJEU, the procedural obligations for the parties may undermine the specific nature of this procedure under EU law which gives a crucial responsibility to domestic courts as EU courts. Indeed, the approach of the ECtHR, in essence, places on an equal footing preliminary reference and a remedy for the parties.

¹²¹ *Id.*, para. 44. Case C-399/11, *Melloni*, EU:C:2013:107, para. 60.

¹²² J. Malenovský, *supra*, p. 222.

¹²³ *Id.*, p. 220.

¹²⁴ *Id.*, p. 222.

The ECtHR's approach does not take into account that it is solely for the national courts to assume the responsibility to decide whether or not a preliminary ruling is necessary in order to give their judgment. However, an obligation at EU level to give reasons when failing to refer would be beneficial for an equal level of judicial protection for individuals in Europe.¹²⁵ Such a duty could guarantee a stricter system of control on national court's refusals to refer and make it easier to recognise whether there has been a manifest violation of EU law according to *Köbler*.

3.2.3 A Broader Control by the ECtHR on the EU Judicial System and Preliminary References?

In *Michaud v. France*, referring to its judgment in *Bosphorus v. Ireland*, the ECtHR stressed that the supervisory mechanism provided for in EU law affords protection comparable to that under the ECHR.¹²⁶ Firstly, this is so because individuals are protected under EU law by the actions brought before the CJEU by the Member State and the EU institutions. Secondly, this is so because they have the possibility of applying to the domestic courts to determine whether a Member State has breached EU law. In the latter case, the control exercised by the CJEU takes the form of the preliminary reference procedure.¹²⁷

In this judgment the ECtHR recognised the essential role of domestic courts in collaborating with the CJEU through preliminary references and the specificity of the latter for the EU judicial system.¹²⁸ Particularly, the ECtHR gave emphasis to the fact that the *Conseil d'État's* refusal to submit the applicant's request to the CJEU made that court ruling without the 'full potential of the relevant international machinery (...) for supervising fundamental rights having been deployed'.¹²⁹ By consequence, it concluded that the presumption of equi-

¹²⁵ Concerning the CJEU's case law related to the obligation of national authorities to give reasons, see for instance Case C-75/08, *Mellor*, EU:C:2009:279, para. 59. Cf. S. Prechal & R. Widdershoven, *supra*, p. 36. Furthermore, it is worth remembering that in 2004 the Commission started infringement proceedings against Sweden due to national courts' restrictive attitude in the application of the preliminary ruling procedure. As a result, it has been adopted a legislation that asks Swedish courts to give reasons for their refusal to refer a case to the CJEU. U. Bernitz, 'Preliminary References and Swedish Courts: What Explains the Continuing Restrictive Attitude?', in: P. Cardonnel, A. Rosas, N. Wahl (eds), *Constitutionalising the EU judicial system: essays in honour of Pernilla Lindh* (Hart Publishing 2012), pp. 177-187.

¹²⁶ ECtHR, 6 December 2012, *Michaud v. France*, Application No. 12323/11; Cf. ECtHR, 30 June 2005, *Bosphorus v. Ireland*, Application No. 45036/98.

¹²⁷ *Michaud v. France*, *supra*, para. 111.

¹²⁸ J. Malenovský, *supra*, p. 223.

¹²⁹ *Michaud v. France*, *supra*, para. 115.

valent protection did not apply since the judicial decision was adopted without the relevant procedure having been used.¹³⁰ It seems that the ECHR's approach was more consistent with the case law of the CJEU in that it did not refer to the fact that the national courts dismissed the applicant's request, but to the activation of the preliminary reference procedure itself.

This judgment might further imply that under specific circumstances the refusals to refer to the CJEU may lead to the fact that the *Bosphorus* presumption of equivalent protection does not apply. Therefore, the ECtHR's assessment concerning the evaluation of the proper application of preliminary references to the CJEU could have broader effects for the EU legal order. Moreover, since the ECtHR considers Article 6(1) ECHR implying the application of the same principles to preliminary references to the CJEU and to preliminary references to national Constitutional Courts,¹³¹ could this eventually bring the ECtHR to evaluate the EU judicial system with regards preliminary references? In *Ruiz-Mateos v. Spain* the ECtHR, before assessing whether the refusal to refer to the Spanish Constitutional Court had violated Article 6(1) ECHR, stressed that the guarantees enshrined in the right to a fair trial under the ECHR must apply to the procedure before the Spanish Constitutional Court.¹³² Similarly, as scholars have pointed out, the ECtHR might perhaps go further, although the EU has not acceded to the ECHR. Thus, when assessing if Article 6(1) ECHR is violated by a refusal to refer, it might query whether the procedures before the CJEU meet the requirements provided for in the ECHR.¹³³

In this regard, scholars have expressed concerns as to the ECHR's case law on Article 13 ECHR.¹³⁴ It is true that, in the cases of arbitrary refusals to refer under Article 267(3) TFEU, the ECtHR examined whether there was a breach of Article 6(1) ECHR and did not consider it necessary to rule also on Article 13 ECHR. Yet, it is worth putting this line of case law in the broader context of the ECtHR's assessment of violations of Article 6 ECHR. In *Kudła v. Poland*,

¹³⁰ J. Malenovsky, *supra*, p. 223.

¹³¹ *Ullens de Schooten and Rezabek*, *supra*, para. 58. N. Cariat & L. Leboeuf, *supra*, p. 676.

¹³² ECtHR, *Ruiz-Mateos v. Spain*, 23 June 1993, Application No. 12952/87.

¹³³ N. Cariat & L. Leboeuf, *supra*, p. 677. In this connection, recall that in its speech for the solemn hearing for the opening of the judicial year of the ECtHR on 30 January 2015, President Dean Spielmann, referring to the negative Opinion 2/13 on the EU accession to the ECHR, pointed out that 'the important thing is to ensure that there is no legal vacuum in human rights protection on the Convention's territory, *whether the violation can be imputed to a State or to a supranational institution*. Our Court will thus continue to assess whether State acts, *whatever their origin*, are compliant with the Convention, while the States are and will remain responsible for fulfilling their Convention obligations.' (emphasis added) Available at: www.echr.coe.int/Documents/Speech_20150130_Solemn_Hearing_2015_ENG.pdf.

¹³⁴ R. Baratta, 'Accession of the EU to the ECHR: The Rationale for the ECJ's prior involvement mechanism' [2013/50], *CMLR*, pp. 16-17.

contrary to previous cases, the ECtHR focused on both Articles 6 and 13 ECHR. The ECtHR held that individuals will systematically be forced to submit to the ECtHR complaints that otherwise must be filed before the domestic courts.¹³⁵ Thus, it concluded that there was a breach of Article 13 ECHR and that the latter requires an effective remedy before national authority. In *Lukenda v. Slovenia* the ECtHR examined the applicant's complaint related to the absence of domestic remedies available in length of proceedings cases. Taking the view that this was a 'systemic problem', it stated that Article 13 ECHR requires that the Parties not only have the general obligation to solve the problem that led the ECtHR to find a violation of a right under the ECHR, but they must also provide the procedures within their respective legal system for the effective redress of violation of the ECHR's rights.¹³⁶

Bearing in mind that the review of EU acts through Article 263(4) TFEU is complemented by indirect access to the CJEU through preliminary references and that this makes the EU judicial system compatible with the right to effective judicial protection under EU law, the ECtHR might, for instance, make a step forward and ask Member States to ensure remedies against arbitrary refusals to refer to the CJEU. Arguably, due to the restrictive interpretation of Article 263(4), last sentence, TFEU, the ECtHR might query whether there is a breach of Article 13 ECHR.¹³⁷ Since in some cases individuals do not have the possibility to initiate a proceeding before their national courts,¹³⁸ the ECtHR could deem that the principles laid down in the ECHR are not ensured. Similarly, the ECtHR may find that there are systemic violations of Article 6(1) ECHR due to arbitrary refusals to refer to the CJEU within the meaning of the case law of the ECtHR. Therefore, it might rule that domestic systems do not provide a procedure for the effective redress of the alleged breaches of Article 6(1) ECHR in violation of Article 13 ECHR.

¹³⁵ ECtHR, 26 October 2000, *Kudła v. Poland*, Application No. 30210/96, in particular para. 155. The issue put forward by the applicant was whether there was available to the applicant under domestic law an effective remedy to claim on the ground of the absence of a trial within a reasonable time.

¹³⁶ ECtHR, 6 October 2005, *Lukenda v. Slovenia*, Application No. 23032/02, paras 94-95. A. Galič, 'From Kudła to Lukenda: legal remedies against undue delay in civil proceedings in Slovenia', in: K. Weitz, J. Gudowski (eds), *Aurea praxis, aurea theoria: księga pamiątkowa ku czci profesora Tadeusza Erecińskiego* (LexisNexis 2011), pp. 1453-1476.

¹³⁷ R. Baratta 2013, *supra*, pp. 16-17.

¹³⁸ Cf. J. Wildemeersch, *supra*, pp. 861-871.

4 Conclusion

The ECtHR's case law in question seeks to increase the collaboration between the ECtHR and the CJEU by enhancing the obligation to refer under Article 267 TFEU and, at the same time, by limiting the ECtHR's assessment to the presence of reasons without further analysing whether national courts interpret EU law correctly.¹³⁹ However, as has been argued, one of the results might be an interference with the jurisdiction of the CJEU and the functioning of the preliminary reference procedure, which could undermine the autonomy of the EU legal order.¹⁴⁰

In analysing the approach of the ECtHR, one may note that its reasoning is based, in essence, on an assumption that does not have any explicit confirmation in the case law of the CJEU, *i.e.* preliminary references to the CJEU form part of the procedural guarantees enshrined in Article 6(1) ECHR. As a consequence, in the ECtHR's view, there is an autonomous, yet not absolute, right to a preliminary ruling from the CJEU that might be infringed due to the unreasoned refusal to submit the applicant's request to the CJEU. Nevertheless, the judicial review by the ECtHR should be seen in the broader framework of the case law of the CJEU related to the obligation to refer and to the consequences for the refusal to submit a preliminary question. Indeed, the CJEU's case law in question has been regarded as fragmented or incomplete.¹⁴¹ One may argue, in this respect, that the case law of the ECtHR intervenes in order to prevent this situation from undermining the procedural guarantees of individuals that EU law does not protect.

In the light of the foregoing considerations, further clarifications of the case law of the CJEU as regards the obligation to refer and State liability according to *Köbler* are desirable. It is true that the CJEU leaves these issues to the 'autonomous jurisdiction' of national judges, which have sole responsibility for determining whether they are obliged to refer,¹⁴² and the procedural autonomy of Member States. Besides, it limits national procedural autonomy insofar as

¹³⁹ C. Timmermans, 'Will the Accession of the EU to the European Convention on Human Rights fundamentally change the relationship between the Luxembourg and the Strasbourg Court?' [2014/01], *European University Institute, Centre for Judicial Cooperation, Distinguished Lecture*, available at: <http://cadmus.eui.eu/handle/1814/31932>; D. Spielmann, 'La prise en compte et la promotion du droit communautaire par la Cour de Strasbourg', in: Ant. N. Sakkoulas (ed.), *Les droits de l'homme en évolution, Mélanges en l'honneur du professeur Petros Pararas* (Bruylant 2009), p. 455.

¹⁴⁰ J. Malenovský, *supra*, p. 222.

¹⁴¹ J. Malenovský, *supra*, p. 224; J. Komarek, 'Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order' [2005/42], *CMLR*, pp. 31-33.

¹⁴² Joined Cases C-72/14 & 197/14, *X & Van Dijk*, EU:C:2015:564, paras 57-59; Case C-160/14, *Ferreira da Silva e Brito*, para. 40.

Member States cannot adopt or maintain national rules that prevent national judges from referring when necessary or make it excessively difficult to obtain reparation for the loss caused by an infringement of EU law. However, bearing in mind the guarantees under Article 6(1) ECHR established by the case law of the ECtHR, the CJEU could also instruct the practices of national courts and impose upon Member States an obligation in order to ensure the proper activation of preliminary references.¹⁴³

¹⁴³ This obligation for Member States could be developed from Article 19(1), second sentence, TEU. This provision shall be read in conjunction with Article 4(3) TEU and Article 47 of the Charter. See, *infra*, note 79.