ECTHR'S PERSPECTIVE ON THE REFUSAL OF A DOMESTIC COURT TO MAKE A PRELIMINARY REFERENCE TO THE CJEU

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Abstract

Nowadays, even if the EU is not yet a party to the ECHR and its acts cannot be subject of applications to the Strasbourg Court, issues relating to EU law have been raised regularly with the Strasbourg Court.

Art. 6 para. (1) ECHR requires that the national courts give reasons for their decisions, therefore in case the respective courts refuse to refer a preliminary question to another national or international court, they are obliged to give reasons for the refusal.

The main aims of this study are to analyse if this obligation under the EU law is absolute, and how the ECtHR has dealt with this problem.

Keywords: *art. 6, CJEU, domestic courts, ECHR, EU law, human rights, Luxembourg, obligation to give reasons, Strasbourg.*

1. Introductory Remarks Regarding the EU's Accession to the ECHR

On the European continent, the most important international jurisdictions related to human rights are the European Court for Human Rights (in the Council of Europe organization, with the seat in Strasbourg – hereinafter the „ECtHR") and the Court of Justice of the European Union (in the European Union organization, with the seat in Luxembourg – hereinafter the „CJEU").

The Strasbourg Court analyses individual or inter-state applications alleging violations of the civil and political rights set out in the European Convention on Human Rights (ECHR)[1] or its additional protocols, thus ensuring that every member state of the Council of Europe (*i.e.*, 46) respects the Convention.

The Luxembourg Court[2] ensures, on one side, that EU law is interpreted and applied the same in every EU member state (*i.e.*, 27), and, on the other side, that member states and EU institutions abide by EU law.

Please note that all 46 member states of the Council of Europe with different values and traditions[3], which include the 27 EU countries, are already bound by the ECHR, therefore the normal step would be that EU itself becomes a party to the ECHR. And, please have in mind that, even if the EU is not yet a party to the ECHR and its acts cannot be subject of applications to the Strasbourg Court (*e.g.*, the actions of the EU's institutions, agencies, bodies), issues relating to EU law have been raised regularly by individuals with the Strasbourg Court, concerning actions taken by EU member states, when implementing the EU law.

We strongly consider that through the EU's accession to the ECHR, made possible with the Lisbon Treaty, the EU will be subject to the same international rules, and together with the member states, will be able to respond to complaints of human rights violations (therefore the individuals under its jurisdiction could bring

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[1] Please see, for instance, C. Bîrsan, *Convenția europeană a drepturilor omului: comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2010, L.-C. Spătaru-Negură, *Protecția internațională a drepturilor omului. Note de curs*, 2nd ed., Hamangiu Publishing House, Bucharest, 2024, R.-M. Popescu, *Theoretical Aspects Regarding the Application of Treaties in Time and Space*, in CKS Journal, 2023, Challenges of the Knowledge Society (CKS) Conference, pp. 321-326, available at *https://cks.univnt.ro/cks_2023.html,* last consulted on 12.04.2025.

[2] For more information about the European Union and the European Court of Justice, please see A. Fuerea, *Dreptul Uniunii Europene - principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016. Additionally, regarding the two international courts and their reasoning, please see M.-C. Cliza, C.-C. Ulariu, *Drept administrativ. Partea generală*, C.H. Beck Publishing House, Bucharest, 2023, p. 188.

[3] For Romania, please see E.-E. Ștefan, *Values and Traditions in the Administrative Code and Other Normative Acts*, in CKS Journal, 2023, Challenges of the Knowledge Society (CKS) Conference, pp. 479-485, available at *https://cks.univnt.ro/cks_2023.html*, last consulted on 12.04.2025, and E. Anghel, *Values and Valorization*, in CKS Journal 2015, Challenges of the Knowledge Society (CKS) Conference, Pro Universitaria Publishing House, Bucharest, pp. 357-363, available at *https://cks.univnt.ro/cks_2015.html*, last consulted on 12.04.2025. Moreover, for an impressive analysis of the constituent power in Romania, please see A. Stanciulescu (Alexe), *Puterea constituantă. Teoria și practica puterii constituante*, C.H. Beck Publishing House, Bucharest, 2019.

complaints against the EU), and to take part in supervising the implementation of the ECtHR judgments. Until the accession will be done, the EU itself cannot be involved in those proceedings.

Another important aspect will be that on the European continent the interpretation of the human rights by both international courts of law will be consistent, therefore it will be created a „level playing field"[4] on human rights across the continent.

2. Art. 6 ECHR, the Domestic Courts and the Preliminary Questions to the CJEU

Art. 6 para. 1 ECHR requires that the national courts give reasons for their decisions, therefore, in case the respective courts refuse to refer a preliminary question to another national or international court, they are obliged to give reasons for the refusal.

The main aims of this study are to analyse if this obligation under the European Union law is absolute, and how the ECtHR has dealt with this problem.

According to the provisions of art. 6 para. 1 ECHR – Right to a fair trial: „In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."[5].

According to the interpretation of the above-mentioned provisions, domestic courts must give reasons for the decisions taken in the cases they judge. Therefore, each domestic court has the obligation to give reasons, based on the domestic applicable law, including for the decisions in which they refuse to refer a preliminary question to an international jurisdiction[6].

Pursuant to the EU Law, when a question is raised in a case pending before a domestic court of a member state, concerning, in particular, the interpretation of the treaties (including the Charter of Fundamental Rights of the European Union), or the measures taken by the EU institutions, the respective court of law may bring the matter before the CJEU for a preliminary ruling.

Moreover, if such question is raised before a domestic court of last instance, according to art. 267 of the Treaty on the Functioning of the European Union (hereinafter the „TFEU"), the respective court should refer the matter to the CJEU for such preliminary ruling.

This obligation is not absolute, taking in view the CILFIT judgment 2, where the CJEU underlined that national courts are not required to refer a question to the CJEU in the following three hypotheses:

- When they have established that the question raised is irrelevant,
- When the provision of EU law in question has already been interpreted by the CJEU, or
- When the correct application of Community/EU law is so obvious as to leave no scope for any reasonable doubt.

3. What Are the Principles Drawn from the Current ECtHR Case-Law on This Matter?

Firstly, please note that the Strasbourg Court has underlined in different judgments that the text of the Convention does not guarantee per se the right to have a case referred by a national court to the CJEU for a preliminary ruling:

- „57. The Court would further point out, firstly, that the Convention does not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling (…)."[7];
- „39. The Court recalls that it is for the national courts to interpret and apply domestic law, if applicable in conformity with EU law, and to decide on whether it is necessary to seek a preliminary ruling from the CJEU to enable them to give judgment. It reiterates that the Convention does not guarantee, as such, the right to have

[4] Please see *https://www.coe.int/en/web/portal/eu-accession-echr-questions-and-answers*.

[5] Please see *https://www.echr.coe.int/documents/d/echr/convention_eng*.

[6] Please see *Case Ullens de Schooten and Rezabek v. Belgium*, app. no. 3989/07 and no. 38353/07, judgment from 20.09.2011, para. 60, available at *https://hudoc.echr.coe.int/eng?i=001-108382*.

[7] *Idem*, para. 57.

a case referred by a domestic court to another national court or to the CJEU for a preliminary ruling. The Court has previously observed that this matter is, however, not unconnected to art. 6 § 1 of the Convention since a domestic court's refusal to grant a referral may, in certain circumstances, infringe the fairness of proceedings where the refusal proves to have been arbitrary. Such a refusal may be deemed arbitrary in cases where the applicable rules allow no exception to the granting of a referral or where the refusal is based on reasons other than those provided for by the rules, or where the refusal was not duly reasoned. Indeed, the right to a reasoned decision serves the general rule enshrined in the Convention which protects the individual from arbitrariness by demonstrating to the parties that they have been heard and obliges the courts to base their decision on objective reasons (see *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, 20 September 2011, §§ 54-59). As the Court has often noted, the rule of law and the avoidance of arbitrary power are principles underlying the Convention (see, among many other authorities, *mutatis mutandis*, *Roche v. the United Kingdom* [GC], no. 32555/96, § 116, ECHR 2005-X). In the judicial sphere, those principles serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society (see *Taxquet v. Belgium* [GC], 16 November 2010, no. 926/05, § 90 and the cases cited therein)."[8];

- „69. The Convention does not guarantee, as such, any right to have a case referred by a domestic court to the CJEU for a preliminary ruling (see *Baydar v. the Netherlands*, no. 55385/14, § 39, 24 April 2018; see also Ullens de Schooten and Rezabek, cited above, § 57). However, art. 6 § 1 requires the domestic courts to give reasons for any decision refusing to refer a request for a preliminary ruling, especially where the applicable law allows for such a refusal only on an exceptional basis. (…)."[9].

Secondly, the Strasbourg Court does not, however, rule out the possibility that a domestic court's refusal to grant a request for such a referral may, in certain circumstances, infringe the fairness of the domestic proceedings.

Therefore, if the refusal proves arbitrary, that signifies that there has been a refusal:

„59. It should further be observed that the Court does not rule out the possibility that, where a preliminary reference mechanism exists, refusal by a domestic court to grant a request for such a referral may, in certain circumstances, infringe the fairness of proceedings – even if that court is not ruling in the last instance [see, among other authorities *Predil Anstalt S.A. v. Italy* (dec.), no. 31993/96, 8 June 1999, and *Herma v. Germany* (dec.), no. 54193/07, 8 December 2009) –, whether the preliminary ruling would be given by a domestic court (see *Coëme and Others, Wynen, and Ernst and Others, cited above*, same references) or a Community court (see, for example, *Société Divagsa v. Spain*, no. 20631/92, Commission decision of the 12 May 1993, Decisions and Reports (DR) 74; *Desmots v. France* (dec.), no. 41358/98, 23 March 1999; *Dotta v. Italy* (dec.), no. 38399/97, 7 September 1999; *Moosbrugger v. Austria* (dec.), no. 44861/98, 25 January 2000; *John v. Germany* (dec.), no. 15073/03, 13 February 2007; and the *Predil Anstalt S.A. and Herma decisions, cited above*). The same is true where the refusal proves arbitrary (ibid.), that is to say 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."[10].

Thirdly, as already underlined above, the Court stressed out that the domestic courts (i) against whose decisions there is no remedy under national law and (ii) which refuse to refer to the CJEU a preliminary question on the interpretation of EU law that has been raised before them, are obliged to motivate their refusal in the light of the exceptions provided for in the case-law of the CJEU[11].

Fourthly, when analysing a complaint alleging the violation of art. 6 para. 1 ECHR on such refusal, the Court's task is to ensure that the respective refusal has been motivated and compatible with the Convention, and not to examine if the national courts have not committed errors in interpreting or in applying the relevant law:

„69. (…) The Court has inferred from this that when it hears a complaint alleging a violation of art. 6 § 1 on this basis, its task consists in ensuring that the impugned refusal has been duly accompanied by such reasoning.

[8] Please see *Case Baydar v. The Netherlands*, app. no. 55385/14, judgment from 24.04.2018, para. 39, available at *https://hudoc.echr.coe.int/eng?i=001-182454*.

[9] Please see *Case Sanofi Pasteur v. France*, app. no. 25137/16, judgment from 13.02.2020, para. 69, available at *https://hudoc.echr.coe.int/eng?i=001-201432*.

[10] See *Case Ullens de Schooten and Rezabek v. Belgium* above cited, para. 59.

[11] See *Case Ullens de Schooten and Rezabek v. Belgium* above cited, para. 62, *Case Sanofi Pasteur v. France*, above cited, para. 70.

That being said, whilst this verification has to be made thoroughly, it is not for the Court to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law (see *Ullens de Schooten and Rezabek, cited above*, §§ 60-61, and *Dhahbi v. Italy*, no. 17120/09, § 31, 8 April 2014). On that latter point, it has also pointed out that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary in conformity with Community law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention (see *Ullens de Schooten and Rezabek*, cited above, § 54)."[12].

Fiftly, the analysis of the Court whether the domestic courts have failed to motivate their decision can be determined only with reference to the case's circumstances, taking into consideration the entire judiciary proceedings:

- „40. The obligation under art. 6 § 1 of the Convention for domestic courts to provide reasons for their judgments and decisions cannot, however, be understood to mean that a detailed answer to every argument is required. The extent to which the duty to provide reasons applies may vary according to the nature of the decision. It is necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question of whether or not a court has failed to fulfil the obligation to provide reasons − deriving from art. 6 of the Convention − can only be determined in the light of the circumstances of the case (see *Borovská and Forrai v. Slovakia*, no. 48554/10, § 57, 25 November 2014; *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I; *Kok v. the Netherlands* (dec.), no. 43149/98, 4 July 2000; and *Ruiz Torija v. Spain*, no. 18390/91, § 29, 9 December 1994)."[13];
- „42. Taking into account the purpose of the duty of the domestic courts to provide reasons under art. 6 of the Convention (see para. 33 above) and examining the proceedings as a whole, the Court notes that the domestic courts provided the applicant with a detailed explanation why the requested referral to the CJEU had been refused. Notwithstanding the fact that the Federal Court of Justice was the court of last resort within the meaning of art. 267 TFEU, the Court considers that in the specific circumstances of the present case it was acceptable that the Federal Court of Justice dispensed with providing more comprehensive reasoning and merely referred to the relevant legal provisions when deciding the applicant's complaint against the refusal of leave to appeal on points of law."[14].

Sixtly, if the Strasbourg judges analyze the rejection of a superior national court, made with summary motivation on the argument that it raised no fundamentally important legal issues or had no prospects of success, they decided that it is acceptable for the respective court to refrain from dealing explicitly with the request for a referral submitted in that context:

- „42. For example, the Court has held that where a request to obtain a preliminary ruling was insufficiently pleaded or where such a request was only formulated in broad or general terms, it is acceptable under art. 6 of the Convention for national superior courts to dismiss the complaint by mere reference to the relevant legal provisions governing such complaints if the matter raises no fundamentally important legal issue [see *John v. Germany* (dec.) no. 15073/03, 13 February 2007] or for lack of prospects of success without dealing explicitly with the request [see *Wallishauser v. Austria* (no. 2), no. 14497/06, § 85, 20 June 2013; see also *Rutar Marketing D.O.O. v. Slovenia* (dec.), no. 62020/11, § 22, 15 April 2014 and *Moosbrugger v. Austria*, no. 44861/98, 25 January 2000]."[15].

This applies also when the application failed to comply with the mandatory admissibility criteria:

- „47. In the present case, the Court notes that the Conseil d'État did not respond to the appellant's request to refer a question to the CJEU for a preliminary ruling. However, it considers that the present case must be distinguished from the Dhahbi case (cited above) because, in that case, the Council of State declared the appeal inadmissible for failure to comply with the conditions of admissibility amended by art. 12 § 1 of Law no. 3900/2010. It observed that a preliminary ruling would not have changed the Council of State's conclusion that

[12] See *Case Sanofi Pasteur v. France*, para. 69.

[13] See *Case Baydar v. The Netherlands* above cited, para. 40.

[14] See *Case Harisch v. Germany*, app. no. 50053/16, judgment from 11.04.2019, para. 42, available at *https://hudoc.echr.coe.int/eng?i=001-192213*.

[15] See *Case Baydar v. The Netherlands* above cited, para. 42.

the appeal was inadmissible."[16].

The same applies when a request to obtain a preliminary ruling is insufficiently pleaded or where such a request is only formulated in broad or general terms, therefore the replies to the questions concerned would have no impact on the outcome of the respective case[17].

4. Relevant ECtHR Case-Law on this Matter

The case-law of the Court is very rich in examples in which this issue was analysed among the years. Without claiming to make an exhaustive analysis of the ECtHR case-law, we aim in this study to present, in a chronological order, the most valuable judgments and decisions, relevant to the evolution of the Strasbourg Court's legal reasoning.

In 2007, in *John v. Germany*, the applicant lodged an appeal on points of law with the Federal Court of Justice on 25 September 2000, requesting the Federal Court of Justice to set aside the judgment of the Hanseatic Court of Appeal of 13 April 2000 and to decide in accordance with his motions lodged in the appeal proceedings with the alternative motion to request a preliminary ruling under art. 234 EC Treaty. Because his submissions to the Federal Court of Justice did not contain an express request for a reference under art. 234 EC Treaty, nor did he give any express reasons for the necessity of a preliminary ruling, the Federal Court of Justice refused to admit his appeal on points of law, finding that the case was neither of fundamental importance, nor that it had reasonable prospects of success. Moreover, on 7 November 2002, the German Federal Constitutional Court also refused to admit his constitutional complaint without giving any reasons. When analyzing the applicant's case, the ECtHR concluded that the applicant violate his obligation to give express and precise reasons for the request for a preliminary reference to the CJEU, reason for which it dismissed the claimant's application for being manifestly ill-founded:

- „Accordingly, the applicant insufficiently pleaded that he considered a decision as to the interpretation of art. 81 EC Treaty as necessary to enable the Federal Court of Justice to give judgment. Even though the applicant had raised the matter before the Hanseatic Court of Appeal, the Court finds that the fact that the Federal Court of Justice did not obtain a preliminary ruling cannot be regarded as arbitrary under these circumstances.

As far as the applicant complained about the decision of the Federal Constitutional Court, (…) The Court further notes that, in order for the Federal Constitutional Court to find such a violation, the request for a preliminary ruling under art. 234 EC Treaty to the ordinary court must be sufficiently substantiated. As the applicant insufficiently pleaded that he considered a decision as to the interpretation of art. 81 EC Treaty as necessary to enable the Federal Court of Justice to give judgment, this had not been the case. Therefore, there is no appearance of arbitrariness in the fact that the Federal Constitutional Court's refused to admit the applicant's constitutional complaint.

As regards the allegedly insufficient reasoning of the decisions of the Federal Court of Justice and the Federal Constitutional Court, the Court reiterates that it is acceptable under art. 6 § 1 of the Convention for national superior courts to dismiss a complaint by mere reference to the relevant legal provisions governing the admissibility of such complaints if the matter raises no fundamentally important legal issue [*Teuschler v. Germany* (dec.), no. 47636/99, 4 October 2001]. Having regard to the above circumstances, the Court finds that neither the Federal Court of Justice nor the Federal Constitutional Court was obliged under the Convention to give reasons for their decisions, including reasons for the refusal of a reference to the European Court of Justice under art. 234 EC Treaty.

This complaint has therefore to be rejected in accordance with art. 34 § 4 as being manifestly ill-founded within the meaning of paragraph 3 of that same provision."[18]

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[16] See *Astikos Kai Paratheristikos Oikodomikos Synetairismos Axiomatikon v. Greece*, app. no. 29382/16 and 489/17, decision, para. 42, unofficial translation from French because it is not available on HUDOC in English: „En l'espèce, la Cour constate que le Conseil d'État n'a pas répondu à la demande du requérant qui le priait de poser une question préjudicielle à la CJUE. Toutefois, elle estime que le cas présent doit être distingué de l'affaire Dhahbi (précitée), car, en l'espèce, le Conseil d'État a déclaré le pourvoi irrecevable pour non-respect des conditions de recevabilité modifiées par l'article 12 § 1 de la loi no 3900/2010. Elle observe qu'une question préjudicielle n'aurait pas changé la conclusion du Conseil d'État quant à l'irrecevabilité du pourvoi.".

[17] *Ibidem*.

[18] See *Lutz John v. Germany*, app. no. 15073/03, Decision as to the admissibility, available at *https://hudoc.echr.coe.int/eng?i=001-79763.*

In 2011, in *Ullens de Schooten and Rezabek v. Belgium*, the ECtHR underlined the obligations of the national courts to give reasons for any decisions they refuse to refer a preliminary question to the CJEU:

- „60. Article 6 § 1 thus imposes, in this context, an obligation on domestic courts to give reasons, in the light of the applicable law, for any decisions in which they refuse to refer a preliminary question, especially where the applicable law allows for such a refusal only on an exceptional basis.
- 61. Consequently, when the Court hears a complaint alleging a violation of art. 6 § 1 on this basis, its task consists in ensuring that the impugned refusal has been duly accompanied by such reasoning. That being said, whilst this verification has to be made thoroughly, it is not for the Court to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law.
- 62. In the specific context of the third paragraph of art. 234 of the Treaty establishing the European Community (art. 267 of the Treaty on the Functioning of the European Union), this means that national courts against whose decisions there is no remedy under national law, which refuse to refer to the Court of Justice a preliminary question on the interpretation of Community law that has been raised before them, are obliged to give reasons for their refusal in the light of the exceptions provided for in the case-law of the Court of Justice. They will thus be required, in accordance with the above-mentioned Cilfit case-law, to indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the Court of Justice, or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt.
- (…) The Conseil d'Etat rejected that request on the ground, like the Court of Cassation, that the exceptions provided for in the Cilfit case-law came into play. With demonstrative reasoning, it found that there was no reasonable doubt as to the inapplicability of art. 86 of the Treaty to the laboratories referred to in art. 3 of Royal Decree no. 143, and that an answer by the Court of Justice as to the interpretation of the other above-mentioned provisions of the Treaty „could not affect the outcome of the present dispute" (see para. 29 above)."[19].

In 2014, in *Dhahbi v. Italy*, besides discrimination, an immigrant worker of Tunisian origin complained that in the procedure to obtain payment from the Italian public authorities of a family allowance under Euro-Mediterranean Agreement, the Supreme Court had ignored his request to have a preliminary question referred to the CJEU. He further submitted that he had been discriminated against on grounds of his nationality regarding an award of the allowance payable under a Law of 1998. Besides acknowledging the violation for discrimination in his private life aspects, the Court also held that there been a violation of art. 6 para. 1 ECHR for the following reasoning:

- „31. The Court points out that in the case of *Vergauwen and Others v. Belgium* [(dec.), no. 4832/04, §§ 89-90, 10 April 2012] it set forth the following principles:
- Article 6 § 1 requires the domestic courts to give reasons, in the light of the applicable law, for any decision refusing to refer a question for a preliminary ruling;
- When the Court hears a complaint alleging a violation of art. 6 § 1 on this basis, its task consists in ensuring that the impugned refusal has been duly accompanied by such reasoning;
- Whilst this verification has to be made thoroughly, it is not for the Court to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law; in the specific context of the third paragraph of art. 234 of the Treaty establishing the European Community (current art. 267 of the Treaty on the Functioning of the European Union (TFEU)), this means that national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of European Union law, are required to give reasons for such refusal in the light of the exceptions provided for by the case-law of the CJEU. They must therefore indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.
- 32. In the present case the applicant requested the Court of Cassation to seek a preliminary ruling from the CJEU as to whether, under art. 65 of the Euro-Mediterranean Agreement, a Tunisian worker could be refused the family allowance provided for by section 65 of Law no. 448 of 1998 (see para. 10 and 12 above). As no judicial

[19] Please see *Ullens de Schooten and Rezabek v. Belgium*, 2011, para. 60-65.

appeal lies against its decisions under domestic law, the Court of Cassation was under a duty to give reasons for its refusal to request a preliminary ruling, in the light of the exceptions provided for by the case-law of the CJEU.

- 33. The Court has examined the Court of Cassation judgment of 15 April 2008 and found no reference to the applicant's request for a preliminary ruling to be sought or to the reasons why the court considered that the question raised did not warrant referral to the CJEU. It is therefore not clear from the reasoning of the impugned judgment whether that question was considered not to be relevant or to relate to a provision which was clear or had already been interpreted by the CJEU, or whether it was simply ignored (see, conversely, *Vergauwen and Others*, cited above, § 91, where the Court found that the Belgian Constitutional Court had duly provided reasons for refusing to refer questions for a preliminary ruling). The Court observes in this connection that the reasoning of the Court of Cassation contains no reference to the case-law of the CJEU.
- 34. That finding is sufficient for the Court to conclude that there has been a violation of art. 6 § 1 of the Convention."[20]

In April 2018, in *Baydar v. the Netherlands*, the applicant (who was convicted in 2011 of transporting heroin and of people trafficking) complained that the Supreme Court had refused to refer a question to the CJEU for a preliminary ruling, by providing summary reasoning, which failed to provide adequate reasons for its refusal, in breach of his right to a fair hearing within the meaning of art. 6 para. 1 ECHR. We underline the relevant reasoning of the ECtHR:

- „50. The Court therefore considers that, in the context of accelerated procedures within the meaning of section 80a or 81 of the Judiciary (Organisation) Act, no issue of principle arises under art. 6 § 1 of the Convention when an appeal in cassation which includes a request for referral is declared inadmissible or dismissed with a summary reasoning where it is clear from the circumstances of the case that the decision is not arbitrary or otherwise manifestly unreasonable (see paragraph 46 above).
- 51. The Court observes that pursuant to section 81(2) of the Judiciary (Organisation) Act (see para. 18 above), an appeal in cassation is considered and decided by three members of the Supreme Court. The Court further observes that, in the case at hand, the applicant's request for a question to be referred to the CJEU, which he raised in his written reply to the Advocate General's advisory opinion, was dismissed by the Supreme Court with summary reasoning on the basis of section 81 of the Judiciary (Organisation) Act, after having taken cognisance of the applicant's written grounds of appeal, and both the Advocate General's advisory opinion and the applicant's written reply thereto (see para. 14 above).
- 52. In these circumstances the Court is satisfied that the Supreme Court has duly examined the grounds of the applicant's appeal on points of law. The Court can thus discern no appearance of unfairness in the proceedings before the Supreme Court.
- 53. There has accordingly been no violation of art. 6 § 1 of the Convention."[21].

In August 2018, in *Somorjai v. Hungary*, the applicant complained that the Supreme Court (Kúria) failed to give reasons for refusing a request for a reference for a preliminary ruling on a pension dispute to the CJEU and for the length of proceedings before domestic courts. The ECtHR declared inadmissible the complaint of a lack of reasoning in connection with the need for a reference for a preliminary ruling, but found a violation of art. 6 para. 1 ECHR (right to a fair trial) owing to the excessive lengths of proceedings at issue:

- „56. (…), the Court reiterates that the Convention does not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling. However, the Court does not rule out the possibility that, where a preliminary reference mechanism exists, refusal by a domestic court to grant a request for such a referral may, in certain circumstances, infringe the fairness of proceedings (…).
- 58. Turning to the facts of the present case, the Court notes at the outset that the applicant's case was heard twice by the supreme domestic judicial instance; first in 2009, then in 2013 (see paragraphs 15 and 24 above). In 2009 the alleged conflict between section 80(1) of the 1997 Pensions Act and art. 94(6) of the Regulation, in respect of which the applicant argued before the Court that a reference for a preliminary ruling would have been necessary, was not yet the subject matter of the litigation. That issue was not raised until after

[20] See Case *Dhahbi v. Italy*, app. no. 17120/09, judgment from 08.04.2014, para. 31-34, available at *https://hudoc.echr.coe.int/eng?i=001-142504*.

[21] See *Case Baydar v. The Netherlands*, app. no. 55385/14, judgment from 24.04.2018, para. 50-53, available at *https://hudoc.echr.coe.int/eng?i=001-182454*.

the decision of 7 July 2010 of the Central Hungary Regional Pensions Board, which limited the actual payment of the applicant's pension (see para. 17 above). The Government argued that, although the applicant had initially requested that a reference for a preliminary ruling be addressed to the CJEU, by that time he had already withdrawn that request (see para. 46 above). The applicant contested this argument and submitted that he had maintained his request for a preliminary ruling throughout the proceedings in case the courts did not share his opinion concerning the correct application of the Regulation (see para. 23 and 48 above).

- 59. The Court considers that it is not necessary to resolve the difference between the parties' assertions, because in any event the applicant was required, as per the relevant domestic legislation and case-law (see para. 28 to 31 above) to formulate his petition for review in a self-contained and comprehensive manner, that is to say, to specify the alleged infringement concretely and to set out all of his petitions complete with reasoning, without reference to any previous submissions. The Kúria's jurisdiction was limited to an examination of the issues raised by the petition for review.
- 60. The Court notes that the applicant did not request, in his petition for review, that the case be referred to the CJEU for a preliminary ruling; nor did he provide any reasons as to why, in his view, the Budapest Labour Court's judgment had violated art. 234 of the EC Treaty (see para. 23 above). Under these circumstances, the lack of reasoning in connection with these aspects seems to be in line with the domestic procedural rules.
- 61. The Court further notes that, as per the CJEU's relevant case-law (see paragraph 41 above), even if the initiative of a party is not necessary for a domestic court against whose decisions there is no judicial remedy under national law to be obliged to bring a question concerning the interpretation or the validity of EU law before the CJEU, it is solely for that court to determine in the light of the particular circumstances of the case the need for a preliminary ruling in order to enable it to deliver judgment. The Court observes that in the present case the Kúria was of the view that the relevant provisions of the 1997 Pensions Act and those of the Regulation did not conflict; it did not consider a preliminary ruling on a question of EU law necessary to give judgment (see paragraph 24 above).
- 62. In such circumstances the Court does not discern any appearance of arbitrariness in the fact that the Kúria did not refer a question to the CJEU for a preliminary ruling or in its manner of giving reasons for the judgment without elaborating on questions related to a potential reference for a preliminary ruling [see also, mutatis mutandis, *Ryon and Others v. France* (dec.), nos. 33014/08, 36748/08, 5187/09, 11793/09, 43329/10 and 66405/10, § 32, 15 October 2013].
- 63. It follows that the second part of the complaint (see para. 52 above) is manifestly ill-founded within the meaning of art. 35 § 3 (a) and must be rejected, pursuant to art. 35 § 4 of the Convention."[22].

In 2019, in *Harisch v. Germany*, when analysing again the German courts' refusal to refer questions to the CJEU for a preliminary ruling and the failure to provide adequate reasoning for that refusal, the ECtHR held that there had been no violation of art. 6 para. 1 ECHR, because the refusal was not deemed arbitrary:

- „33. The Court reiterates that it is for the national courts to interpret and apply domestic law, if applicable in conformity with EU law, and to decide whether it is necessary to seek a preliminary ruling from the CJEU to enable them to give judgment. (…)
- 39. The Court further observes that the Court of Appeal had to decide, in accordance with art. 543 of the Code of Civil Procedure, whether the case was of „fundamental significance" and whether leave to appeal on points of law should therefore be granted. It notes, as has been pointed out by the Government, that, under the established case-law of the Federal Court of Justice and the Federal Constitutional Court, a legal matter is always of „fundamental significance" if it raises a question that requires a uniform interpretation of EU law, which is relevant for deciding the case, and makes a referral for a preliminary ruling during the appeal proceedings very probable (see paragraph 16 above). It also notes that, based on this case-law, a refusal of leave to appeal on points of law includes the consideration that a referral to the CJEU is not required in the case in question. The Court concludes that the Court of Appeal therefore considered the applicant's referral request and denied it by refusing leave to appeal on points of law.
- 40. For the same reason, the Court considers that the Federal Court of Justice, which was obliged to decide referrals pursuant to art. 267 of the TFEU, refused to acknowledge the need for a referral to the CJEU by confirming that it did not concern a legal matter of „fundamental significance".

[22] See *Case Somorjai v. Hungary*, app. no. 60934/13, judgment from 28.08.2018, para. 56-63, available at *https://hudoc.echr.coe.int/eng?i=001-182454*.

- 41. (…) it observes that the Federal Constitutional Court also only requires that the reasons for a refusal be established either from the reasoning of the court of last resort or otherwise, such as the reasoning of a lower court (see para. 16 above). Having regard to the fact that the Court of Appeal provided detailed reasoning concerning the refusal of leave to appeal on points of law, after discussing the issue of EU law with the parties in the oral hearing, the Court considers that the circumstances of the present case enabled the applicant to understand the decision of the Federal Court of Justice.
- 42. Taking into account the purpose of the duty of the domestic courts to provide reasons under art. 6 of the Convention (see para. 33 above) and examining the proceedings as a whole, the Court notes that the domestic courts provided the applicant with a detailed explanation why the requested referral to the CJEU had been refused. Notwithstanding the fact that the Federal Court of Justice was the court of last resort within the meaning of art. 267 of the TFEU, the Court considers that in the specific circumstances of the present case it was acceptable that the Federal Court of Justice dispensed with providing more comprehensive reasoning and merely referred to the relevant legal provisions when deciding the applicant's complaint against the refusal of leave to appeal on points of law.
- 43. The foregoing considerations are sufficient to enable the Court to conclude that the refusal of the referral, which does not appear arbitrary, was sufficiently reasoned. There has accordingly been no violation of art. 6 § 1 of the Convention."[23].

In 2020, in *Sanofi Pasteur v. France*, the ECtHR held that there had been a violation of art. 6 para. 1 ECHR, because the national courts failed to provide reasons for the decision to refuse the applicant company's request for a preliminary ruling:

- „68. (…) It transpires from the Cilfit case-law of the Court of Justice that it is for the national courts against whose decisions there is no judicial remedy under national law, like other national courts, to decide „whether a decision on a question of Community law is necessary to enable them to give judgment". (…)
- 72. In the instant case, the requests for a preliminary ruling which the applicant company had hoped would be referred to the CJEU by the Court of Cassation, and which concerned the interpretation of art. 4 and 6 of Directive 85/374, had been very precisely worded in accordance with the requirements of domestic law (see paragraphs 17-18 above) (cf. *Somorjai v. Hungary*, no. 60934/13, §§ 59-60, 28 August 2018). Moreover, that fact was never in dispute between the parties.
- 73. Furthermore, the Court of Cassation did not declare the applicant company's appeal on points of law inadmissible or lacking arguable grounds of appeal, but rejected it. Thus, the first hypothesis mentioned in paragraph 71 above is not relevant here.
- 74. Secondly, in reply to the applicant company's request for a preliminary ruling from the CJEU, the Court of Cassation merely stated that it had decided to reject the applicant company's appeal „without any need arising to request a preliminary ruling from the Court of Justice of the European Union" (see para. 21 above).
- 75. The Court of Cassation therefore did not explicitly refer to any of the three Cilfit criteria, and there is nothing to suggest that it considered that the relevant provisions of EU law had „already been interpreted" by the CJEU or that „the proper application of EU law was so obvious as to leave no scope for any reasonable doubt"; nor did the Government claim that that had been the case.
- 76. On the other hand, the Government would appear to consider that the phrase „without any need arising to request a preliminary ruling from the Court of Justice of the European Union" indicated that the Court of Cassation had concluded that the requests in question had been „irrelevant". They argued in that regard that no issue of interpretation of Directive 85/374 could arise because the impugned vaccine had been put into circulation before the deadline for transposition of the Directive.
- 77. The Court nevertheless cannot discern in the reasoning of the cassation judgment anything to suggest that that was the approach adopted by the Court of Cassation.
- 78. Clearly the judgment of the Court of Cassation at least comprises a reference to the preliminary rulings requested by the applicant company (in the phrase „without any need arising to request a preliminary ruling from the Court of Justice of the European Union") (contrast *Dhahbi*, cited above). Yet that judgment does not state the reasons for considering that the issues raised were not worth referring to the CJEU (ibid., §§ 32-34; see also *Schipani and Others v. Italy*, no. 38369/09, §§ 70-71, 21 July 2015, and *Baltic Master LTD. v.*

[23] See *Case Harisch v. Germany*, para. 33-43.

Lithuania, no. 55092/16, §§ 41-43, 16 April 2019). The reasoning of the Court of Cassation's judgment therefore does not demonstrate whether those issues were examined in the light of the Cilfit criteria, and if so, which of those criteria the Court of Cassation had used as the basis for deciding not to transmit them to the CJEU.

- 79. Lastly, the Court considers that the circumstances of the present case would have required, in particular, an explicit justification of the decision not to refer to the CJEU the requests for a preliminary ruling submitted by the applicant company.
- 80. It observes that it transpires from the casefile that in his opinion before the Court of Cassation the Advocate-General considered whether Directive 85/374 should be taken into account, whereas, in breach of the deadline laid down in art. 19 of the Directive (which deadline had expired on 30 July 1988), it had not yet been transposed into French law at the material time (it was transposed under Law no. 98-389 of 19 May 1998). He pointed out that in 2003, in a similar case, the Court of Cassation had ruled that the applicable domestic law should be interpreted in the light of that Directive, further noting that that had been the approach adopted by the trial court in the present case. The Court also notes that on the date of delivery of the judgment in the instant case, the Court of Cassation referred similar requests for a preliminary rule to the CJEU concerning the Directive, in a case which could in some respects be compared to the present one and to which the applicant company was a party (see para. 64 and 67 above). In that connection, and in view of what was at stake in the proceedings for the applicant company, it was particularly important to obtain clarification of the reason for the rejection of its request for a referral to the CJEU for a preliminary ruling.
- 81. There has therefore been a violation of art. 6 § 1 of the Convention."[24].

5. Conclusions

In a nutshell, art. 6 para. 1 ECHR requires that the national courts give reasons for their decisions, when they refuse to refer a preliminary question to another national or international court.

Therefore, as a principle, when a question concerning the interpretation of a EU treaty or piece of secondary legislation, is raised in a case, pending before a national court, against whose decisions there is no judicial remedy under national law, that court is required (not an absolute obligation) to bring the matter before the CJEU for a preliminary ruling.

Moreover, if such question is raised before a domestic court of last instance, according to art. 267 TFEU, the respective court should refer the matter to the CJEU for such preliminary ruling.

This obligation on the domestic courts is not absolute, because the CJEU underlined that try are not required to refer a question to the CJEU in the following three hypotheses:

- When they have established that the question raised is irrelevant for the settlement of the case,
- When the provision of EU law in question has already been interpreted by the Court of Justice, or
- When the correct application of the Community/European Union law is so obvious as to leave no scope for any reasonable doubt.

How the case-law of the Strasbourg Court will be improved or interpreted after the EU accession to the ECHR, and how the constitutional[25] and national courts of the member states[26] will be inspired upon, especially when discussing about the responsibility of the EU (even in criminal matters[27]), not only of the EU member states[28], only time will tell, but we are sure that the human rights respect will be strengthened in the whole Council of Europe region.

[24] See *Case Sanofi Pasteur v. France*, para. 68-81.

[25] Please see, for instance, in Romania, the chapter regarding the control of constitutionality exercised by the Constitutional Court of Romania in the light of the Court's jurisprudence, in S.-G. Barbu, A. Muraru, V. Bărbățeanu, *Elemente de contencios constituțional*, C.H. Beck Publishing, Bucharest, 2021, p. 233 *et seq.*, and C. Ene-Dinu, *A Century of Constitutionalism*, in CKS Journal, 2023, Challenges of the Knowledge Society (CKS) Conference, pp. 405-412, available at *https://cks.univnt.ro/cks_2023.html*, last consulted on 12.04.2025.

[26] Please see A.-G. Marin, *Current Justice Laws in Romania*, in CKS Journal, 2023, Challenges of the Knowledge Society (CKS) Conference, 2023, pp. 413-426, available at *https://cks.univnt.ro/cks_2023.html*, last consulted on 12.04.2025.

[27] Please see E.N. Valcu, *Dreptul Uniunii Europene. Instrumente legislative unionale și de transpunere privind cooperarea judiciară unională în materie penală. Comentarii*, C.H. Beck Publishing House, Bucharest, 2023.

[28] Please see O. Dimitriu, *Procedura de infringement. Răspunderea statelor membre UE*, C.H. Beck Publishing House, Bucharest, 2023.

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