



**In the light of the unity and development of law and legal protection**

**Does the Dutch Council of State violate EU law if it fails to state the reasons for a rejection  
of a request for a preliminary reference?**

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## **Migration Law Clinic and Migration Law Expertise Centre**

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## 1. Introduction

The preliminary reference procedure is at the heart of the development of European Union law – the ‘jewel in the Crown’ of the jurisdiction of the Court of Justice of the EU (hereinafter: CJEU).<sup>1</sup> Some of the leading concepts of EU law, such as direct effect and EU law supremacy, were developed through preliminary rulings.<sup>2</sup> It is therefore not surprising that the majority of cases brought before the CJEU are requests for preliminary rulings. In 2015, preliminary rulings comprised 61,15% of all the new cases brought before the CJEU.<sup>3</sup>

Under EU law, national courts have the autonomy to decide whether to refer a question to the CJEU. However, Article 267(3) of the Treaty on the Functioning of the European Union (hereinafter: TFEU) obliges national courts of last instance to refer questions to the CJEU when the case gives rise to doubts in the interpretation of EU law. Additionally, all courts of the Member States are obliged to refer a question to the CJEU if they consider that an EU act is invalid.<sup>4</sup> However the CJEU has developed exceptions to the obligation to refer. Through its *CILFIT* criteria, courts of last instance are exempt from the duty to refer when the question is not relevant, when a materially identical question has already been answered by the Court (*acte éclairé*)<sup>5</sup> or when the correct application of EU law is so obvious that it leaves no scope for any reasonable doubt regarding its interpretation (*acte clair*).<sup>6</sup>

In the Netherlands, the Administrative Jurisdiction Division of the Council of State (hereinafter: Council of State) is the highest court in migration law cases.<sup>7</sup> According to Article 91(2) Aliens Act 2000, the Council of State is not obliged to state the reasons of a judgment if it considers that the grounds for the appeal are unfounded. The purpose of this provision is to alleviate the workload of the Council of State.<sup>8</sup> Article 91(2) Aliens Act 2000 is also applied to the situation where the applicant’s request to refer a preliminary question to the CJEU is rejected. An individual who asks the Council of State to make a request for a preliminary reference to the CJEU may therefore receive a standard judgment informing him that ‘because the appeal does not raise questions which should be answered in light of the unity or development of law or legal protection, [the court will] confine [itself] to this judgment’. Other times, the Council of State does provide an explanation as to why it decided against referring a question.<sup>9</sup> It is therefore uncertain whether an individual who requests the Council of State to make a request will be notified of the reasons why it has rejected the request.

This approach of the Council of State could be problematic in light of Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter: CFREU), which provides the right

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<sup>1</sup> P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (6<sup>th</sup> edition, Oxford, Oxford University Press, 2015), p 464.

<sup>2</sup> *ibid*, p 463. F Mancini and D Keeling, ‘From *CILFIT* to *ERT*: The Constitutional Challenge Facing the European Court’ *Yearbook of European Law* (1991), pp 1-13.

<sup>3</sup> CJEU, ‘[Annual Report 2015: Judicial Activity](#)’, p 76.

<sup>4</sup> CJEU Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987], para 14.

<sup>5</sup> CJEU Joined Cases 28-30/62 *Da Costa* [1963].

<sup>6</sup> CJEU Case 283/81 *CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982]. See section 1 for further information.

<sup>7</sup> Article 89(1) Aliens Act 2000.

<sup>8</sup> *Kamerstukken II*, 1998/99, 26 732, no 3, p 85. See section 2.

<sup>9</sup> For instance, see: ABRvS 13 April 2016, 201507952/1/V2, ECLI:NL:RVS:2016:890; ABRvS 13 April 2016, 201506502/1/V2, ECLI:NL:RVS:2016:891.

to an effective remedy and to a fair trial. This is particularly so since the European Court of Human Rights (hereinafter: ECtHR) has developed in its case law under Article 6 of the European Convention on Human Rights (hereinafter: ECHR), entailing the right to a fair trial,<sup>10</sup> an obligation to state reasons for refusing to refer a question to the CJEU. Given that Article 47 CFREU is based on Article 6 and 13 ECHR, the ECtHR judgments are of particular importance for the interpretation of that provision.<sup>11</sup>

Several Member States have already tried to address the issue of under national law. For instance, in Germany, Austria, Spain, the Czech Republic, Slovakia and Slovenia, an individual can lodge a complaint before the Constitutional Court for a violation of the constitution for failure of the court of last instance to refer a question to the CJEU.<sup>12</sup>

The following question therefore arises:

**Is there a violation of Article 47 CFREU when the Council of State refuses to refer a preliminary question to the CJEU without stating reasons for that decision?**

This question is particularly important since a case with a materially similar question is now pending before the CJEU. In a preliminary reference the Belgian Court of Appeals in Brussels asks whether it should be assumed that Article 267(3) TFEU is breached, partly in light of Articles 47(2) and 52(3) CFREU read together, when a court rejects a request for a preliminary ruling with the only reason given being that '[s]ince the grounds of appeal were not admissible for a reason specific to the proceedings before the [court]'.<sup>13</sup>

Furthermore it should be noted that in migration cases it is not possible to complain about a lack of reasons for the rejection of a request for a preliminary reference before the ECtHR under Article 6 ECHR. The ECtHR held in *Maaouia v France* that Article 6 ECHR does not apply to decisions regarding the entry, stay and deportation of aliens.<sup>14</sup> Therefore migrants can only challenge the Council of State's judgment of 5 March 2015 under Article 47 CFREU before the European Commission or via a state liability procedure before the civil court and (if a preliminary reference is made) before the CJEU.

In order to answer the aforementioned research question this expert opinion will provide, in section 2, an overview of the Dutch legislation and case law relating to statement of reasons in court decisions where there is a rejection to refer a question to the CJEU. This is followed by section 3, which will provide an overview of the preliminary reference procedure in EU law. In section 4, the

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<sup>10</sup> See section 5.

<sup>11</sup> Charter of Fundamental Rights of the European Union, [2012] OJ C 326/391.

<sup>12</sup> See: C Lacchi, 'Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question to the Court of Justice of the EU' *German Law Journal* (2015), R Valutyte, 'Legal Consequences for the Infringement of the Obligation to Make a Reference for a Preliminary Ruling Under Constitutional Law' *Jurisprudence* (2012).

<sup>13</sup> CJEU Case C-3/16 *Lucio Cesare Aquino v Belgische Staat* Request for a preliminary ruling from the Hof van beroep te Brussel (Belgium) lodged on 4 January 2016, available at: <http://curia.europa.eu/juris/document/document.jsf?docid=175950&mode=req&pageIndex=1&dir=&occ=first&part=1&text=%2522third%2Bparagraph%2Bof%2Barticle%2B267%2BTFEU%2522&doclang=EN&cid=1269466#ctx1> accessed 17 June 2016.

<sup>14</sup> ECtHR 5 October 2000, *Maaouia v France*, Appl no 39652/98.

duty to state reasons under EU law will be examined, with special attention to the question of whether such an obligation arises from Article 47 CFREU. Section 5 discusses the obligations under Articles 6 and 13 ECHR in light of the case law of the ECtHR. Finally, in section 6 it will be examined whether the unreasoned decision on the basis of Article 91(2) Aliens Act 2000 to reject a request for a preliminary ruling violates Article 47 CFREU.

## **2. Reasoning of the refusal of a preliminary reference by the highest Dutch Courts**

### **2.1 Introduction**

Article 91(2) Aliens Act 2000 allows the Council of State to refrain from stating the reasons for its judgment if the higher appeal in a migration case is unfounded. Article 80a *Wet op de Rechterlijke Organisatie* or 'Law of the Judiciary' (hereinafter: RO) and Article 81(1) RO provide for similar provisions in other fields of law such as civil law, criminal law and tax law.<sup>15</sup> According to the parliamentary history, both Article 91(2) Aliens Act 2000 and Article 81(1) RO were intended to manage the workload of the highest courts.<sup>16</sup>

This section will introduce Article 91(2) Aliens Act 2000 and Articles 80a and 81 RO. Furthermore, it will explain on the basis of which arguments the Council of State ruled in its 5 March 2015 judgment that it is not required to state reasons for its refusal to refer a preliminary question to the CJEU.

### **2.2 Article 91(2) Aliens Act 2000**

Article 91(2) of the Aliens Act 2000 reads: 'If the Administrative Jurisdiction Division of the Council of State finds that the higher appeal is unfounded it may confine itself to this opinion when stating the grounds of its judgment.' It provides that if the Council of State finds that a ground of appeal cannot lead to the quashing of the decision, it may limit its reasons to that finding. This provision is intended to maintain a manageable workload for the Council of State.<sup>17</sup> The standard consideration by the Council of State in cases where it applies Article 91(2) Aliens Act 2000 reads: 'Because the appeal does not raise questions which should be answered in the light of the unity or development of law or legal protection, we confine ourselves to this judgment.'

From the Explanatory Memorandum (*Memorie van Toelichting*) it appears that the possibility of giving limited reasons for the judgment laid down in Article 91(2) Aliens Act 2000 was mainly implemented to prevent the same complaint from being argued at every stage, for instance regarding the situation in a particular country. When there is established case law indicating that this particular complaint is unfounded, the reasoning can from then on be limited.<sup>18</sup>

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<sup>15</sup> *Kamerstukken II* 1998/99, 26 732, 3, p 85.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> TP Spijkerboer, *Het hoger beroep in vreemdelingenzaken* ('s-Gravenhage, Sdu Uitgevers, 2002), p 17.

## 2.3 Article 81 (1) & Article 80a RO

Article 91(2) Aliens Act 2000 was inspired by Article 101a RO, now Article 81 RO.<sup>19</sup> Article 81 RO was first introduced in 1988.<sup>20</sup> It states that if a complaint cannot lead to cassation and does not raise questions which should be answered in the light of the unity or development of law or legal protection, the Supreme Court may confine itself to this opinion.

Article 80a RO is different from Article 81 RO and Article 91(2) Aliens Act 2000 in the sense that the latter two provisions allow the Supreme Court and Council of State to dismiss an appeal, while Article 80a RO allows the Supreme Court to declare the appeal inadmissible. Article 80a RO holds that the Supreme Court may declare a cassation appeal inadmissible if the complaints submitted do not justify an assessment of the appeal. This applies when the party which lodged the appeal has insufficient interest in the appeal or because the complaints clearly cannot lead to cassation.

When Article 80a RO was first introduced and further developed by the Supreme Court, there was a general fear that the legal protection could be compromised if the Supreme Court would focus primarily on legal unity and legal development. However, Attorney General Fokkens held in a conclusion of 5 February 2015<sup>21</sup> that this fear was unjustified, given that it was a wrong interpretation of the goal of Article 80a RO. In his view it follows from legal history that Article 80a RO was not introduced in order to allow the Supreme Court to pick and choose which cases to deal with and which cases not to. He claims that the control mechanism to check if any mistakes have been made by lower courts remains intact. However, if the Supreme Court has come to the conclusion that no such mistake has been made, the decision does not need to be substantiated.

## 2.4 Council of State judgment of 5 March 2015

The Council of State has held in its judgment of 5 March 2015 that it was allowed to use Article 91(2) Aliens Act 2000 in order to refrain from stating the reasons for the refusal of a request for a preliminary reference.<sup>22</sup> It derived from the cases *Ullens de Schooten and Rezabek v Belgium*<sup>23</sup> and *Dhahbi v Italy*<sup>24</sup> that the obligation to give reasons for the refusal to ask a preliminary question is a specific elaboration of the duty to give reasons under Article 6 ECHR. These cases require that national courts state reasons for the refusal of a request to refer a preliminary question to the CJEU.<sup>25</sup>

The Council of State then referred to *Hansen v Norway*, asserting that the ECtHR accepts that a higher court is not required to give detailed reasons in every case when 'it simply applies a specific legal provision to dismiss an appeal on points of law as having no prospects of success,

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<sup>19</sup> *Kamerstukken II* 1998/99, 26 732, 3, p 85.

<sup>20</sup> Wet van 16 juni 1988, Stb. 1988, 286.

<sup>21</sup> HR 3 February 2015, ECLI:NL:HR:2015:96, NJ 2015, 140.

<sup>22</sup> ABRvS 5 March 2015, ECLI:NL:RVS:2015:785, JV 2015/139, annotation CA Groenendijk.

<sup>23</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl nos 3989/07 and 38353/07.

<sup>24</sup> ECtHR 8 April 2014, *Dhahbi v Italy*, Appl no 17120/09.

<sup>25</sup> M Reneman, 'Ongemotiveerde afwijzing van verzoeken om prejudiciële vragen' *Jaarboek Vreemdelingenrecht*, p 5. See section 5.4.2 of this expert opinion



without further explanation.<sup>26</sup> It then held that Article 91(2) Aliens Act 2000 is such a provision, which means that there is no obligation to give detailed reasoning. According to the Council of State, *Hansen v Norway*, which concerns higher courts and cassation courts in general, prevails over *Dhahbi v Italy*.

Moreover, it found that a judgment which refers to Article 91(2) Aliens Act 2000 as its reasoning does contain concise reasoning for the rejection of the request for a preliminary question. The application of Article 91(2) Aliens Act 2000 implies that there are no reasons to ask a preliminary question and therefore that in the particular case one of the *CILFIT* criteria is applicable. However a judgment on the basis of Article 91(2) Aliens Act 2000 does not have to mention explicitly that there was a request for a preliminary question nor give explicit reasoning for the rejection of that request.

## 2.5 Supreme Court's judgments of 26 May 2015 and 25 September 2015

In its judgment of 26 May 2015,<sup>27</sup> the Supreme Court followed the judgment of the Council of State and held that a cassation judgment which makes use of Article 81 RO contains a brief reasoning for the judgment. The Supreme Court asserted that a judgment on the basis of Article 81 RO implies that there is no reason to ask a preliminary question. Preliminary questions within the meaning of Article 267 TFEU concern the application of Union law and are therefore questions of law. According to the Supreme Court, this also implies that one of the *CILFIT* criteria is applicable.

On 25 September 2015, the Supreme Court affirmed its judgment of 26 May. In his Conclusion, Advocate General Wattel disagreed vehemently with the judgment of 26 May and the Council of State's judgment of 5 March.<sup>28</sup> He argued that the Supreme Court had accepted the judgment by the Council of State too easily. In his view the Supreme Court should have referred preliminary questions to the CJEU on this matter. The Supreme Court, however, ignored this conclusion and refused to ask preliminary questions. It referred to Article 81 RO and held that the cassation grounds could not lead to the quashing of the decision.

## 2.6 Conclusion

Article 91(2) Aliens Act 2000 states that if the Council of State finds that the higher appeal is unfounded it may confine itself to this opinion when stating the grounds of its judgment. The Council of State held in its judgment of 5 March 2015 that the application of Article 91(2) Aliens Act 2000 is allowed in cases where one of the parties requested the Council of State to refer a question to the CJEU. In its view it follows from *Hansen v Norway* that higher courts are not required to give detailed reasons in every single case, when it simply applies a specific legal provision to dismiss an appeal on points of law as having no prospects of success. This judgment prevails over the ECtHR's judgments in *Ullens de Schooten and Rezabek v Belgium*<sup>29</sup> and *Dhahbi v Italy*<sup>30</sup> which require that national courts state reasons for the refusal of a request to refer a preliminary question to the CJEU.

<sup>26</sup> ECtHR 2 October 2014, *Hansen v Norway*, Appl no 15319/09, para 80.

<sup>27</sup> HR 26 May 2015, ECLI:NL:HR:2015:1332.

<sup>28</sup> HR 25 September 2015, ECLI:NL:PHR:2015:996.

<sup>29</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl nos 3989/07 and 38353/07.

<sup>30</sup> ECtHR 8 April 2014, *Dhahbi v Italy*, Appl no 17120/09.

Therefore it is the Council of State's view that it does not violate Article 6 ECHR if it rejects a request for a preliminary reference without stating the reasons for it. The Supreme Court followed this judgment of the Council of State.<sup>31</sup>

Moreover, the Council of State finds that the application of Article 91(2) Aliens Act 2000 implies that there are no questions which should be answered in the light of the unity or development of law or legal protection. Therefore, a judgment which makes use of Article 91(2) Aliens Act 2000 does contain a reason for the rejection of the request for a preliminary question. Similarly the Supreme Court held that a judgment on the basis of Article 81 RO implies that there is no reason to ask a preliminary question.<sup>32</sup>

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<sup>31</sup> HR 26 May 2015, ECLI:NL:HR:2015:1332 and HR 25 September 2015, ECLI:NL:PHR:2015:996.

<sup>32</sup> HR 26 May 2015, ECLI:NL:HR:2015:1332.

### 3. The preliminary reference procedure in EU law

#### 3.1 Introduction

Pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU) national courts may (and in some cases are obliged to) refer questions to the CJEU for a preliminary ruling on the interpretation of EU law. The preliminary reference procedure therefore serves as an instrument of cooperation between the CJEU and the courts of the Member States.<sup>33</sup> It is through this procedure that the CJEU has been able to systematise EU law by means of establishing new doctrines and principles, besides revisiting case law in light of the impact of its judgments on the national level.<sup>34</sup>

The CJEU has stressed that the preliminary reference procedure is completely independent of any initiative by the parties and its main purpose is to ensure that EU law is interpreted and applied uniformly throughout the Member States.<sup>35</sup> With the aim to protect that mechanism, and consistent with the principle of the primacy of EU law, the CJEU has repeatedly held that national rules imposed by legislation or jurisprudence cannot interfere with the discretion or the obligation of national courts to refer questions for a preliminary ruling.<sup>36</sup>

This section examines the duty to refer imposed by Article 267(3) TFEU on courts for which no remedy is available at national level. It will explain in which cases those courts are exempted of that obligation and which criteria they have to fulfil in such situations. Special attention will be given to the doctrine of *acte clair*, according to which a court of last instance can justify refusing a preliminary reference because it considers that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.

#### 3.2 The obligation to refer

According to Article 267(2) TFEU, it is possible for any national court to make a preliminary reference if it considers that a decision on the question is necessary to enable it to give a judgment. Article 267(3) TFEU provides that courts against whose decisions there is no judicial remedy under national law must refer questions to the CJEU when doubts regarding the interpretation of EU law arise. For those courts references to the CJEU are not only a possibility, but an obligation. The CJEU explains that this obligation is based on its cooperation with national courts, established with the aim to ensure the proper application and uniform interpretation of EU law throughout the EU.<sup>37</sup>

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<sup>33</sup> See, *inter alia*, CJEU Case C-380/01 *Schneider* [2004], para 20; CJEU Case C-228/05 *Stradasfalti* [2006], para 44 and CJEU Case C-313/07 *Kirtruna and Vigano* [2008], para 25.

<sup>34</sup> D Chalmers, G Davies and G Monti, *European Union Law* (3rd edition, Cambridge: Cambridge University Press), p 175.

<sup>35</sup> See, *inter alia*, the CJEU Case C-136/12 *Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato* [2013], para 28; CJEU Case C-210/06 *Cartesio* [2008], para 90; CJEU Case C-104/10 *Kelly* [2011], para 62 and CJEU Case C-314/85 *Foto-Frost* [1987], para 15.

<sup>36</sup> See to that effect the CJEU Case C-689/13 *Puligienica Facility Esco SpA (PFE)* [2016], paras 32-35; CJEU Case 166/73 *Rheinmühlen-Düsseldorf* [1974], para 4; CJEU Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010], para 42 and CJEU Case C-173/09 *Elchinov* [2010], para 27.

<sup>37</sup> See, *inter alia*: CJEU Case C-495/03 *Intermodal Transports BV v Staatssecretaris van Financiën* [2005], para 38 and the case law cited therein.

Additionally, that obligation particularly intends to prevent that a body of national case law that is not in accordance with the rules of EU law is established in any of the Member States.<sup>38</sup>

Besides the duty imposed by Article 267(3) TFEU, any national court is required to make a preliminary reference if it calls into question the validity of an EU measure. In *Foto-Frost* the CJEU ascertained its exclusive jurisdiction in determining whether an EU act is invalid.<sup>39</sup> When the parties submit grounds in support of invalidity of the act and the domestic court considers them unfounded, it may reject them and conclude that the measure is valid.<sup>40</sup> However, if the national court understands that the EU act in question is invalid, it has no power to declare the measure void and must refer questions for a preliminary ruling.<sup>41</sup> In such situations, even national courts that do not fall under the scope of Article 267(3) TFEU are obliged to bring the matter before the CJEU, also when the CJEU has previously delivered a judgment invalidating a similar act. In this case, an exception based on the *acte clair* doctrine is not applicable. Neither can a court refrain from this obligation to refer when it contemplates straying from the CJEU's interpretation of a EU act.<sup>42</sup>

Courts of last instance have an important role in the preliminary reference procedure which arises from their obligation under Article 267(3) TFEU. This has been confirmed in the landmark case *Ferreira da Silva*, in which the CJEU for the first time<sup>43</sup> decided that a Supreme Court of a Member State had breached Article 267(3) TFEU by not referring a preliminary question to the CJEU.<sup>44</sup> In this judgment the preliminary questions had been brought forward by a court of first instance, which questioned whether the decision by the Supreme Court was manifestly unlawful.

Since the judgment of the CJEU in *Köbler*<sup>45</sup> individuals are able to initiate proceedings for state liability in order to obtain reparation for damages caused by infringements of EU law stemming from a wrongful decision of a court adjudicating at last instance.<sup>46</sup> In *Köbler* the Court stressed that it is in particular to prevent infringement of the rights conferred on individuals by EU law that national courts of last resort are obliged under Article 267(3) TFEU to refer questions for a preliminary ruling.<sup>47</sup> This reasoning underlines the important role of the courts of last instance in the preliminary reference procedure.

In *Ferreira da Silva* the applicants requested the Portuguese Supreme Court to refer questions for a preliminary ruling to the CJEU on the interpretation of the concept of 'transfer of a business'. The Supreme Court refused to bring the matter before the CJEU arguing that there could be no material doubt as to the interpretation of that concept in the meaning of the Transfer of Undertakings Directive 2001/23, therefore considering a reference for a preliminary ruling

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<sup>38</sup> Ibid.

<sup>39</sup> CJEU Case C-314/85 *Foto-Frost* [1987].

<sup>40</sup> Ibid, para 14.

<sup>41</sup> Ibid, para 15.

<sup>42</sup> N Fenger and M P Broberg, 'Finding Light in the Darkness: On the Actual Application of the *acte clair* Doctrine', *Yearbook of European Law* (2011), pp 181-182.

<sup>43</sup> D Sarmiento, 'Final courts' obligations to refer questions: the CJEU clarifies CILFIT', in: *EU Law Analysis*, available at <http://eulawanalysis.blogspot.nl/2015/09/final-courts-obligations-to-refer.html> accessed 1 June 2016, and T Weber, 'Shining in a light on the *acte clair*', *Leiden Law Blog*, available at <http://leidenlawblog.nl/articles/shining-a-light-on-the-acte-clair> accessed 18 June 2016.

<sup>44</sup> CJEU Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others v Estado português* [2015], para 43-44.

<sup>45</sup> CJEU Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003].

<sup>46</sup> Ibid, para 50.

<sup>47</sup> Ibid, para 35.

unnecessary.<sup>48</sup> To the detriment of the applicants, the Supreme Court then decided that the issue in question did not constitute a ‘transfer of a business’.<sup>49</sup>

The applicants subsequently brought an action before the Portuguese Court of First Instance for a declaration of non-contractual civil liability against the Portuguese State. They submitted that the judgment of the Supreme Court was manifestly unlawful because that court of last instance interpreted the relevant EU law provision incorrectly and did not comply with its duty to refer questions for a preliminary ruling.<sup>50</sup> In its judgment the CJEU ruled that the Supreme Court indeed failed to comply with its obligation to refer due to the fact that the interpretation of the concept of ‘transfer of a business’ ‘has given rise to a great deal of uncertainty on the part of many national courts and tribunals which, as a consequence, have found it necessary to make a reference to the Court of Justice.’<sup>51</sup> The CJEU stressed that: ‘[t]hat uncertainty shows not only that there are difficulties of interpretation, but also that there is a risk of divergences in judicial decisions within the European Union.’<sup>52</sup>

From that reasoning it follows that the underlying aim of Article 267(3) TFEU is to ensure uniformity in interpretation of EU law. In the CJEU's judgment in *X and Van Dijk*<sup>53</sup>, published on the same day as *Ferreira da Silva*, the CJEU confirmed that national courts alone retain the responsibility for deciding on the necessity of a preliminary ruling.<sup>54</sup> Furthermore it strengthened the margin of discretion previously conferred to the courts of last instance in the case *CILFIT*. The next subsection delves into the application of the exceptions to the duty to refer and the criteria established by *CILFIT*.

### 3.3 Exceptions to the obligation to refer

In the judgments *Da Costa* and *CILFIT*<sup>55</sup> the CJEU set out the three main exceptions to the duty to refer under Article 267(3) TFEU. First, the case law of the CJEU established that a court of last instance is not obliged to make a preliminary reference if it considers that a question is not relevant, meaning that the answer could in no way affect the outcome of the case.<sup>56</sup> Secondly the CJEU held that no question needs to be referred if it is *acte éclairé* or *acte clair*. These two criteria will be discussed in this section.

#### *Acte éclairé*

Courts of last instance are exempted of the duty to refer when the question raised is materially identical to a question which has already been the subject of a preliminary ruling in a similar case

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<sup>48</sup> Ibid, paras 16-17. Here the Portuguese Supreme Court applied the *acte clair* principle, which will be dealt with in depth in section 3.3 of this expert opinion.

<sup>49</sup> Ibid, para 13.

<sup>50</sup> Ibid, para 19.

<sup>51</sup> Ibid, para 43.

<sup>52</sup> Ibid.

<sup>53</sup> CJEU Joined Cases C72/14 and- C-197/14 *X and Van Dijk* [2015] paras 57-59.

<sup>54</sup> See also CJEU Case C-118/11 *Eon Aset Menidjunt* [2012], para 76.

<sup>55</sup> CJEU Case 283/81 *CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982].

<sup>56</sup> CJEU Case 283/81 *CILFIT* [1982], para 10.

(*acte éclairé*).<sup>57</sup> The *acte éclairé* doctrine does not require that the question at issue is strictly identical, only that 'previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions.'<sup>58</sup> Additionally, it follows from the judgment in *Atlanta* that decisions by the General Court can also be taken into consideration when assessing whether the situation is *acte éclairé*.<sup>59</sup> Even when *acte éclairé* occurs and a court of last instance is therefore not obliged to refer, that court still retains its liberty to bring the matter before the CJEU if it considers appropriate to do so.<sup>60</sup>

#### *Acte clair*

It follows from *CILFIT* that courts of last instance are also released from the duty to refer when they are convinced that 'the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.'<sup>61</sup> (*acte clair*).<sup>61</sup> However, as mentioned above, any national court is obliged to refer a question to the CJEU if it believes that a EU act is invalid, even when the CJEU has already invalidated a similar measure. In these situations, courts cannot invoke *acte clair* to refrain from referring questions for a preliminary ruling.

In *CILFIT* the CJEU has established strict criteria that should be fulfilled by courts of last instance when assessing whether there is a case of *acte clair*, in other words, whether there is no reasonable doubt about the correct application of EU law. Before refraining from submitting the question and taking upon itself the responsibility for resolving it, the national court or tribunal must also be convinced that the matter is equally obvious to the courts of the other Member States as well as to the CJEU.<sup>62</sup> Courts must take into account four factors in their assessment.

Firstly, they must compare the different language versions of a EU law provision.<sup>63</sup> Secondly, even when the different versions are in complete accordance with one another, the national court must beware the fact that EU law has its own peculiar terminology and that the meaning of some legal concepts is not necessarily the same under Union law and under the law of the various Member States.<sup>64</sup> Thirdly, every provision must be interpreted in the light of EU law as a whole, with regard to the 'objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.'<sup>65</sup> Lastly, the court of last instance must assess the possibility of *acte clair* in light of the particular difficulties to which EU law interpretation gives rise and the risk of divergences in judicial decisions within the Union.<sup>66</sup>

It is not difficult to assume that it is a rather hard task for national courts to determine whether the interpretation of an EU law provision is obvious to both the CJEU and other member

<sup>57</sup> CJEU Joined Cases 28-30/62 *Da Costa* [1963].

<sup>58</sup> CJEU Case 283/81 *CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982], para 14.

<sup>59</sup> M P Broger and N Fenger, *Preliminary References to the European Court of Justice*, Oxford, 2014, p 234, citing the CJEU Case C-495 *Atlanta* [1995], para 46.

<sup>60</sup> CJEU Case 283/81 *CILFIT* [1982], para 15.

<sup>61</sup> *Ibid*, para 16.

<sup>62</sup> CJEU Case C-283/81 *CILFIT* [1982], para 16.

<sup>63</sup> *Ibid*, para 18.

<sup>64</sup> *Ibid*, para 19.

<sup>65</sup> *Ibid*, para 20.

<sup>66</sup> CJEU Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others v Estado português* [2015], para 39 and CJEU Case C-495/03 *Intermodal Transports BV v Staatssecretaris van Financiën* [2005], para 33.

states. Broberg and Fenger even argue that this criterion is 'virtually impossible to fulfil'.<sup>67</sup> For this reason, it is not surprising that the interpretation of *CILFIT* can differ substantially throughout the national courts of member states. On the one hand, some interpret the *CILFIT* criteria narrowly and infer that in most situations where EU law is relevant in a case before a court of last instance, questions should be referred. On the other hand, some see that *CILFIT* allows national courts of last instance a certain margin of appreciation.<sup>68</sup>

Despite the margin of appreciation that courts of last resort enjoy on the basis of the *CILFIT* exceptions, those courts must at all times take into account how the courts of other Member States interpret the EU law provision in question and whether they have difficulties in that task. In *Ferreira da Silva* the CJEU confirmed that the obligation under Article 267(3) TFEU is triggered in situations when the interpretation of EU law gives 'rise to a great deal of uncertainty on the part of many national courts and tribunals'.<sup>69</sup>

On the other hand, in that same judgment, the CJEU clarified that national courts of last instance retain alone the responsibility for determining whether they should refer a question for preliminary ruling. The fact that other national courts or tribunals in the same Member State have given contradictory decisions about the same EU law point is not a conclusive factor for obliging a court of last instance to refer questions. The highest court can therefore still determine that, despite the different interpretations by the lower courts, the interpretation it proposes to give is so obvious as to leave no scope for reasonable doubt.<sup>70</sup>

In line with this reasoning, in *X and Van Dijk* the CJEU ruled that the sole fact that a lower court has referred questions for a preliminary ruling on the same legal issue does not impose an obligation on the highest court to also bring the matter before the CJEU.<sup>71</sup> Therefore, the court of last instance is not precluded from examining the case and applying the *CILFIT* exceptions. The fact alone that a preliminary reference was made by a lower court neither precludes the *CILFIT* criteria from being met, therefore the court of last instance can still conclude that the case before it involves an *acte clair*.<sup>72</sup> Additionally, the highest court is not required to wait 'until the Court of Justice has given an answer to the question referred for a preliminary ruling by the lower court'.<sup>73</sup>

In face of all the challenges brought by the *CILFIT* criteria, it is possible to argue that courts of last instance should state reasons for their decision to invoke *acte clair* when refraining from referring questions to the CJEU. Because those criteria require an extensive research on the interpretation of the specific legal issue by other national courts and, among others, a comparison of the different versions of the EU law provision in question, the decision to apply *acte clair* should be accompanied by an equally thorough reasoning. By stating the reasons for considering that the interpretation of a specific EU law issue is obvious, a court can contribute to its counterparts in other

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<sup>67</sup> MP Broberg and N Fenger, *Preliminary References to the European Court of Justice* (Oxford, Oxford University Press, 2014), p 238.

<sup>68</sup> *Ibid*, p 237.

<sup>69</sup> CJEU Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others v Estado português* [2015], para 43.

<sup>70</sup> *Ibid*, para 41-42.

<sup>71</sup> CJEU Joined Cases C-72/14 and C-197/14 *X v Inspecteur van Rijksbelastingdienst and T. A. van Dijk v Staatssecretaris van Financiën* [2015], para 60.

<sup>72</sup> *Ibid*, para 60-61.

<sup>73</sup> *Ibid*, para 61.

member states who in the future may face the same problem and may also assess the application of *acte clair*.

### 3.4 Conclusion

This section explained in which situations courts of last instance are exempted of the obligation imposed by Article 267(3) TFEU to refer questions for a preliminary ruling. There are three exceptions for the duty to refer: 1) when the question is materially identical to a question that was previously answered by the CJEU (*acte éclairé*); 2) when the question is not relevant and 3) when the interpretation of EU law leaves no scope for reasonable doubt (*acte clair*).

When applying *acte clair* courts must ascertain that other courts of the Member States and the CJEU also think that the interpretation of EU law is so clear as to leave no doubt. Courts of last instance must take into account the different language versions of the provision and the particular difficulties to which EU law interpretation gives rise and the risk of divergences in judicial decisions within the Union.

Finally, it has been argued that the complexity of the criteria for applying *acte clair* calls for courts of last instance to state reasons for their decision to invoke that exception. Because of the extensive research that courts must carry out before employing *acte clair*, a decision to apply that principle should be accompanied by an equally thorough reasoning. Additionally, when stating reasons a court can contribute to its counterparts in other Member States that are faced with the same legal issue and also study the possibility of adopting *acte clair*.



## 4. A duty to state reasons for a refusal of a request for a preliminary reference under EU Law?

### 4.1 Introduction

Article 47 CFREU guarantees the right to an effective remedy and to a fair trial. Article 47(1) CFREU provides: ‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article’. Article 47(2) CFREU states: ‘Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented’.

The preliminary ruling procedure is one of the key ways that an individual can ensure his right to an effective judicial protection, as guaranteed by Article 47 CFREU.<sup>74</sup> As Advocate General Ruiz-Jarabo Colomer has stated, ‘a reference is doubly crucial with regard to safeguarding the procedural rights of individuals at both Community and national level[...]. Any barrier preventing a national court from making a reference undermines [the right to effective judicial protection].’<sup>75</sup>

Nevertheless, the CJEU has been silent on whether there is a duty to provide reasons under Article 47 CFREU when a national judge refuses to make a reference for a preliminary ruling. The judgment of *Ferreira da Silva* is the only indication that this may be the case.<sup>76</sup> Therefore, this section will examine whether such a duty can be deduced by the CJEU within the scope of Article 47 CFREU. This section also shows that the case law of the ECtHR on the subject-matter form an important source of inspiration for the interpretation of Article 47 CFREU. Therefore this case law will be discussed in section 5 of this expert opinion.

### 4.2 Sources of inspiration of Article 47 of the Charter

#### 4.2.1 The Constitutional traditions of the Member States

Developments in the constitutional traditions of the Member States are important because ‘the Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the Member States’.<sup>77</sup> This stems from Article 6(3) Treaty on European Union (TEU) which provides that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

In several cases the CJEU itself or its Advocates General have made an effort to interpret Article 47 CFREU under the light of current Member State practices. This was the case, for instance,

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<sup>74</sup> M Safjan and D Düsterhaus, ‘A Union of Effective Judicial Protection: Addressing a Multi-Level Challenge through the Lens of Article 47 CFREU’ *Yearbook of European Law* (2014), p 38.

<sup>75</sup> CJEU Case C-14/08 *Roda Golf & Beach Resort* [2009], Opinion of Advocate General Ruiz-Jarabo Colomer, para 29.

<sup>76</sup> CJEU Case C-160/14 *Ferreira da Silva e Brito and Others* [2015].

<sup>77</sup> CJEU Case T-461/08 *Evropaïki Dynamiki*, para 118, citing CJEU Case 222/84 *Johnston* [1986], para 18, Joined Cases C-23/04 to C-25/04 *Skafianakis* [2006], para 28 and *Philip Morris International v Commission*, para 121.

in *DEB*, in which Advocate General Mengozzi drew from the lack of a common legal practice that the granting of free legal aid to legal persons was not a constitutional tradition common to the Member States<sup>78</sup>

A similar test was adopted by Advocate General Kokott, in *Azko Nobel*, wherein she stated: that:

recourse to common constitutional traditions or legal principles is not necessarily subject to the precondition that the practice in question should constitute a tendency which is uniform or has clear majority support. It depends rather on an *evaluative comparison* of the legal systems which must take due account, in particular, not only of the aims and tasks of the European Union but also of the special nature of European integration and of EU law. Accordingly, it is by no means inconceivable that even a legal principle which is recognised or even firmly established in a minority of national legal systems will be identified by the Courts of the European Union as forming part of EU law. This is the case in particular where, in view of the special characteristics of EU law, the aims and tasks of the Union and the activities of its institutions, such as a legal principle is of particular significance, or where it constitutes a growing trend.<sup>79</sup>

Indeed, the CJEU recognised both the ban on age discrimination and the right of access to the file as drawn from the common constitutional traditions of Member States, despite the lack of a clear tendency or a majority support in the Member States.<sup>80</sup> It may therefore be sufficient for the CJEU to establish that there is a growing trend of national courts establishing a duty to state reasons with regard to Article 267(3) TFEU.

#### 4.2.2 Articles 6 and 13 ECHR

In essence, Article 47 CFREU is a combination of the two rights as found in Articles 6 and 13 ECHR, respectively. According to the explanatory note of the EU Charter, the first paragraph of Article 47 is based on Article 13 ECHR and the second paragraph corresponds to Article 6(1) ECHR.<sup>81</sup> However, the scope of Article 47 CFREU is broader than its equivalents. This is evident, *inter alia*, in two ways. Firstly, Article 47 guarantees the right to an effective remedy *before a court*, a right not guaranteed by the ECHR. Secondly, under Article 47, the right to a fair trial is not limited to disputes relating to civil law rights and obligations.<sup>82</sup> Furthermore, while the scope of Article 6 ECHR does not include immigration cases,<sup>83</sup> Article 47 does not contain such a limitation.

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<sup>78</sup> CJEU Case C-279/09 *DEB* [2010], Opinion of Advocate General Mengozzi, paras 76-80 and para 99, in which he states: 'As I have attempted to show, it is impossible to infer from the respective practices of the Member States any constitutional tradition whatsoever common to the Member States.'

<sup>79</sup> CJEU Case C-550/07 P *Akzo Nobel* [2010], paras 94-95.

<sup>80</sup> *Ibid*, paras 97-98.

<sup>81</sup> Explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17. According to Article 52(7) of the Charter, 'the explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States'.

<sup>82</sup> *Ibid*.

<sup>83</sup> ECtHR (GC) 5 October 2000, *Maaouia v France*, Appl no 39652/98, paras 35-41.

Moreover, the CJEU has started limiting its references to the ECHR case law. According to Advocate General Cruz Villalón in *Samba Diouf* this is because Article 47 CFREU had ‘acquired a separate identity and substance [...] which are not the mere sum of the provisions of Article 6 and 13 of the ECHR. In other words, once it is recognised and guaranteed by the European Union, that fundamental right goes on to acquire a content of its own’.<sup>84</sup> The CJEU itself has also ruled that ‘Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47’.<sup>85</sup> This is also evident in the number of references found to the ECHR, which has sharply dropped since the EU Charter became legally binding.<sup>86</sup>

Nevertheless, the case law of the ECtHR remains crucial for the development of the EU fundamental rights framework. According to Article 52(3) CFREU, ‘in so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention.’ It follows that the rights under the Charter should be interpreted in consistency with the ECHR. The protection ensured by the Charter cannot in any case be lower than the protection under the ECHR.

Therefore, the CJEU may use the ECtHR case law as support or confirmation of its findings, or even as a guidance in its interpretation of Article 47,<sup>87</sup> as the CJEU has already done on several occasions. This following sub-section will examine the duty to provide reasons under Article 47 of the Charter as stemming from Article 6 ECHR.

#### **4.3 A judicial duty to provide reasons for a judgment under Article 47 CFREU?**

The CJEU has referred to the right to a reasoned judgment in its case law. In *Trade Agency Ltd*, the CJEU reiterated that the right to a fair trial as found in Article 47 of the Charter corresponds to Article 6(1) ECHR. It carried on by saying that ‘the observance of the right to a fair trial requires that all judgments be reasoned to enable the defendant to see why a judgment has been pronounced against him and to bring an appropriate and effective appeal against it’.<sup>88</sup> Furthermore, according to the CJEU’s reasoning, ‘the extent of the obligation to give reasons may vary according to the nature of the decision and must be examined, in the light of the proceedings taken as a whole and all the relevant circumstances, taking account of the procedural guarantees surrounding that decision, in order to ascertain whether the latter ensure that the persons concerned have the possibility to bring an appropriate and effective appeal against that decision’.<sup>89</sup>

On a case regarding the right of access to the written submissions filed with the Court of First Instance by the parties to a case, Advocate General Maduro noted that

a primary purpose of the right to a reasoned judgment is to enable the public to understand the reasons for the Court’s decision and the process through which it was reached. [...] Legal

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<sup>84</sup> CJEU Case C-69/10 *Samba Diouf* [2011], Opinion of Advocate General Cruz Villalón, para 39.

<sup>85</sup> CJEU Case C-386/10P *Chalkor v Commission* [2011] para 51; Case C-199/11 *Ottis and Others* [2012], para 47.

<sup>86</sup> G de Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’ (2013).

<sup>87</sup> S Prechal, ‘The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?’ in: Paulussen, C, *et al* (eds), *Fundamental Rights in International and European Law* (The Hague, TMC Asser Press, 2016), p 155.

<sup>88</sup> CJEU Case C-619/10 *Trade Agency Ltd* [2012], para 53.

<sup>89</sup> CJEU Case C-619/10 *Trade Agency Ltd* [2012], para 60.

argumentation performs a justificatory function: not only does the lawyer arguing the case put forward arguments as to why, in the specific circumstances, it is just that his client should prevail, but the judge, too, in providing a reasoned judgment, purports to show that the way he has resolved the dispute is justified. It is that justificatory function that characterises the distinct form of accountability to which courts are subject, one that is related to the quality of their deliberative process and the arguments arising from it.<sup>90</sup>

AG Kokott argued that the duty to give reasons for court decisions has two more purposes: Firstly, it ensures that the right to be heard is respected; in other words, that the court sufficiently addresses the parties' submissions. Secondly, the obligation to give reasons must be able to put the losing party in a position enabling it to effectively take the redress available.<sup>91</sup>

Therefore, there is a general duty to state reasons under Article 47 CFREU. Such duty stems from Article 6(1) ECHR and is of high significance as it allows the court in question to justify the way it resolved the dispute at hand while at the same time respecting the applicant's right to be heard.

#### **4.4 A duty to state reasons for a refusal to refer a preliminary reference**

##### **4.4.1 The constitutional traditions of the Member States**

The past few years have seen the emergence of case law from the Constitutional Courts of several Member States in relation to the obligation to refer. More specifically, the Constitutional Courts have found that there is an obligation to provide reasons for refusing to refer a question to the CJEU under their respective Constitutions.<sup>92</sup> Supreme Courts in Slovenia, the Czech Republic and Germany have argued that the lack of reasoning breaches their respective Constitutions.

Starting with Germany, the Federal Constitutional Court has recognised the CJEU as the lawful judge with regard to preliminary rulings.<sup>93</sup> It has not expressly provided for an obligation to state reasons for a rejection of a request for a preliminary reference. However, such a duty has been adduced from the fact that the Constitutional Court could not adequately review a lower court's refusal to make a reference in the absence of sufficient knowledge of the reasons the lower court used to decline to seek a reference.<sup>94</sup>

In the Czech Republic, the obligation for courts of last instance to state reasons follows from Article 38(1) of the Czech Charter, according to which those courts must explain why they decided that a case falls under the scope of application of *CILFIT*. They are especially required to do so when the parties contested the solution given or when the courts of other member states follow a

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<sup>90</sup> CJEU Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Kingdom of Sweden v API, API v Commission, Commission v API* [2009], Opinion of Advocate General Maduro, para 32.

<sup>91</sup> CJEU Case C-619/10 *Trade Agency Ltd* [2012], Opinion of Advocate General Kokott, paras 84-85.

<sup>92</sup> R Valutytė, 'Legal Consequences for the Infringement of the Obligation to Make a Reference for a Preliminary Ruling under Constitutional Law' *Jurisprudence* (2012).

<sup>93</sup> German Federal Constitutional Court (*Bundesverfassungsgericht*), 22 October 1986, 2 BvR 197/83.

<sup>94</sup> German Federal Constitutional Court (*Bundesverfassungsgericht*), 9 January 2001, 1 BrV 1036/99, [http://www.bverfg.de/e/rk20010109\\_1bvr103699.html](http://www.bverfg.de/e/rk20010109_1bvr103699.html); also reported in English in: Commission, 'Nineteenth Annual Report on Monitoring the Application of Community Law' COM(2002) 324, Annex VI, pp 39-41.

different solution.<sup>95</sup> The Czech Constitutional Court has found that a national court has acted arbitrarily when it has 'entirely omitted to deal with the issue whether it should refer a preliminary question to the [CJEU] and has not duly substantiated its failure to refer, including the assessment of the exceptions which the [CJEU] has elaborated in its jurisprudence'.<sup>96</sup>

In a similar vein, the Slovenian Constitutional Court has held that Slovenian courts of last instance must provide clear reasons and substantiate their decision against referring a question to the CJEU. Pursuant to Article 23(1) of the Slovenian Constitution, which relates to the right to judicial protection, the obligation to state reasons requires that courts must not only make a reference to *CILFIT* but also to the submission of the parties who asked for a preliminary question.<sup>97</sup> The level of clarity of the reasons should be such as to enable the Slovenian Constitutional Court to decide whether their obligation under Article 267(3) TFEU has been complied with.<sup>98</sup> Similarly, whilst not a constitutional supreme court, the French Supreme Administrative Court, has ruled that a failure to refer could be a denial of justice.<sup>99</sup>

As it was previously explained, the constitutional traditions of Member States are of significance in the interpretation of Article 47 CFREU. As such, it could be argued that the judgments of the German, Czech and Slovenian Constitutional Courts could be instrumental in the development of a judicial duty to state reasons for a refusal to refer a preliminary question.

#### 4.4.2 Effectiveness of judicial review

In *Unectef* the CJEU established that administrative authorities have a duty to state reasons for their decisions. This duty enables courts to review administrative decisions effectively and allows for transparency and acceptance of decisions. The obligation to state reasons is directly linked to the effective protection of a fundamental right conferred by the Treaties and one of its aims is to enable individuals to whom the decision is addressed to defend that right under the best possible conditions. Individuals are then able to decide, with a full knowledge of the relevant facts, whether there is any point in appealing against the decision before the courts.<sup>100</sup> 'Consequently, in such circumstance the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request.'<sup>101</sup> Furthermore the statement of reasons in an administrative decision enables a court to effectively exercise its power to review the lawfulness of this decision.<sup>102</sup>

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<sup>95</sup> C Lacchi, 'Multilevel Judicial Protection in the EU and Preliminary References', *Common Market Law Review* (2016), p 694.

<sup>96</sup> Czech Supreme Court (Ústavní Soud), 2009/01/08 – II. Ú.S. 1009/08: Preliminary Question to ECJ, para 22. Available in English: <http://www.usoud.cz/en/decisions/20090108-ii-us-100908-preliminary-question-to-ecj-1/>.

<sup>97</sup> C Lacchi, 'Multilevel Judicial Protection in the EU and Preliminary References' *Common Market Law Review* (2016), p 694.

<sup>98</sup> C Lacchi, 'Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question to the Court of Justice of the EU' *German Law Journal* (2015), p 1683.

<sup>99</sup> French Administrative Court (Cour de Cassation), Judgment n. 1002 of 26 October 2011 (10-24.250) – First civil chamber [https://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_civile\\_568/1002\\_26\\_21334.html](https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/1002_26_21334.html).

<sup>100</sup> CJEU Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987], para 15.

<sup>101</sup> *Ibid.*

<sup>102</sup> General Court Case T-228/02 *Organization des Modjahedines du peuple d'Iran v Council* [2006], para 89.

It follows from *Unectef* that the duty for administrative authorities to state reasons is directly connected to the conditions under which an individual is able to contest, and a court is able to review a decision. There are two reasons for which it can be argued that the same principle applies to courts of last instance that refuse to ask questions for a preliminary ruling. Firstly, as already mentioned in section 3, it follows from *Köbler* that a state can be held liable for damages caused by wrongful decisions of highest courts which amount to an infringement of rights conferred by EU law on individuals. The individual affected by a decision of a highest court must be able to decide, based on the reasons given by that court, whether there is a point in bringing an action against the state on the basis of an infringement of Article 267(3) TFEU. Furthermore when an applicant litigates against the state claiming to be a victim of damages sustained as a result of an infringement of Article 267(3) TFEU, the national court adjudicating on the dispute must be able to effectively review the contested decision issued by the highest court. Again, in order to do that, the national court must know the reasons why the court of last instance refused to make a preliminary reference.

As established in *Köbler*, and confirmed by the CJEU in *Traghetti del Mediterraneo SpA*, state liability 'can be incurred only in the exceptional case where the national court adjudicating at last instance has manifestly infringed the applicable law.'<sup>103</sup> When determining whether that was the case

the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it, which include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, [...] and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article [267 TFEU].<sup>104</sup>

Arguably, when assessing all these criteria the national court reviewing the contested decision must have the opportunity to evaluate the reasons why the court of last instance refrained from its obligation under Article 267(3) TFEU. For the same reasons the CJEU must be able to fully review why the court of last instance refused to refer when it is confronted with questions relating to Article 267(3), such as in *Ferreira da Silva*.

In the judgment that later became the object of preliminary questions in *Ferreira da Silva*, the Portuguese Supreme Court indeed stated the reasons why it refused to refer.<sup>105</sup> It argued that it was not obliged to refer '[g]iven the abundant case law of the [CJEU] regarding the notion of "transfer of a business" and the clarity of the concept in national and Community terms [...].'<sup>106</sup> , adding that national courts 'have shown great foresight and security in this area'.<sup>107</sup> Without this

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<sup>103</sup> CJEU Case C-173/03 *Traghetti del Mediterraneo SpA v Repubblica italiana* [2006], para 32.

<sup>104</sup> *Ibid.*

<sup>105</sup> Supremo Tribunal de Justica, Processo 08S2309, N° Convencional JSTJ000, N° do Documento SJ20090225023094 [2009], available at [www.dgsi.pt/jsti.nsf/954f0ce6ad9dd8b980256b5f003fa814/135fe96cc54f9dda8025757c003ba33e?OpenDocument](http://www.dgsi.pt/jsti.nsf/954f0ce6ad9dd8b980256b5f003fa814/135fe96cc54f9dda8025757c003ba33e?OpenDocument) accessed 29 June 2016.

<sup>106</sup> *Ibid.*, para 10.

<sup>107</sup> *Ibid.*, para 13. An analysis of the statement of reasons in that judgment (paragraphs 7-13) also shows that the Portuguese Supreme Court did not mention any case law of the CJEU on the legal issue in question, rather limiting itself to

reasoning, the CJEU would not have been able to efficiently exercise its judicial review and assess whether the Portuguese Supreme Court should have complied with its obligation to refer questions.

Secondly it can be argued that the duty to state reasons also applies to courts of last instance especially in Member States where decisions by a court of last resort can still be revised by a constitutional court. In these situations, an individual would be better informed about the chances of a successful application to the constitutional court in case he wishes to contest a refusal for a preliminary ruling. As it has been explained in the previous subsection, it follows from the constitutional traditions of several Member States that there is an obligation for highest courts to state reasons for refusing to refer questions to the CJEU. Such obligation also allows the constitutional court to review whether Article 267(3) TFEU has been complied with.

The argument that there is an obligation for courts of last instance to state the reasons of a decision to refuse a request to refer questions to the CJEU is supported by Advocate General Bot in his opinion in *Ferreira da Silva*. There he stated that national courts falling under the obligation imposed by Article 267(3) must 'exercise particular caution before ruling out the existence of any reasonable doubt' and are 'required to set out the reasons why they are certain that EU law is being applied correctly'.<sup>108</sup> According to AG Bot, 'the judgment in *CILFIT and Others* places on national courts and tribunals adjudicating at last instance an *enhanced duty to state reasons* where they refrain from referring questions to the Court'.<sup>109</sup> This is a powerful statement that cannot be ignored, especially because it is completely in line with the case law of the ECtHR in that regard, from which it follows that a national court has a duty to state reasons for its decision of refusing to make a reference for a preliminary ruling. According to that case law, this obligation entails that the judicial authorities must indicate the reasons why they have found that the correspondent *CILFIT* criteria applies.<sup>110</sup>

## 4.5 Conclusion

In *Trade Agency Ltd*, the Court declared there is a general duty to provide reasons as stemming from Article 47 CFREU. Such a duty guarantees that the individual's right to be heard is respected by addressing the parties' submissions. Furthermore it enables the public to understand the judgment and allows the parties to make effective use of the redress available. The CJEU has not elaborated on a duty to state reasons as regards preliminary references. Nevertheless, the CJEU may be able to draw such a duty on the basis of several points.

Firstly, such a duty can be deduced from the constitutional traditions common to the Member States. As it was seen above, there has been a growing trend of case law stemming from the constitutional courts of several Member States in which the courts of last instance are obliged to state reasons for refusing to refer a question. The CJEU has declared that Article 47 CFREU is based on the constitutional traditions of the Member States. Therefore, it would not be unreasonable to

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quoting one AG Opinion (on the interpretation of the concept of 'transfer of a business') and citing some authors in the interpretation of the obligation to refer.

<sup>108</sup> Opinion of Advocate General Bot in Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others v Estado Português* [2015], para 94.

<sup>109</sup> *Ibid*, para 91, emphasis added.

<sup>110</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl no 3989/07 and 38353/07, para 62.

think that these judgments could be used in order to create an obligation to state reasons for the courts of last instance across the EU, including the Netherlands.

Secondly the arguments for obliging administrative authorities to state reasons equally apply to judicial authorities and, in particular, to highest courts. Firstly, a statement of reasons is indispensable in cases when individuals wish to bring an action for damages against the state. National courts hearing a claim for reparation must assess several factors, including whether the highest court violated its obligation under Article 267(3) TFEU. Therefore, it is crucial to know the reasons behind a decision by a court of last resort when it refuses to refer questions for a preliminary ruling. For the individual who wishes to ask for reparation it is equally essential to have that information in order to assess whether there is a point in litigating against the State.

Thirdly, knowing why a highest court refrains from bringing a matter to the CJEU is for the reasons already mentioned also imperative in those Member States where the decision can still be subjected to review by a constitutional court.

Finally, these arguments find support in AG Bot's Opinion in the case *Ferreira da Silva*, in which he stated that *CILFIT* places on national courts of last resort an *enhanced duty to state reasons* when they refuse to refer questions for a preliminary ruling.

The most important source of inspiration for the CJEU is the case law of the ECtHR. It was stated that the ECHR holds an essential place in the interpretation and further development of, not only Article 47, but also the whole EU Charter. In the next session the case law of the ECtHR will be discussed, especially with regard to the obligation to state reasons for a refusal to refer a preliminary question.



## 5. The preliminary reference procedure under Article 6 ECHR

### 5.1 Introduction

The ECtHR does not provide for an absolute right to bring issues of EU law before the CJEU, since it reiterates that domestic courts are better placed to rule on such issues, also in cases concerning international or EU law.<sup>111</sup> Nevertheless, the ECtHR does provide for an indirect way of assessing compatibility of cases concerning the EU preliminary reference procedure with the provisions of the ECHR. It does so by evaluating whether the reasons given in a domestic court's decision not to ask a preliminary question are sufficient or constitute a violation of Article 6 ECHR. The ECtHR does not provide for a correct interpretation of EU law; it only assesses whether proceedings in the specific circumstances of a case were fair.<sup>112</sup> As the ECtHR usually does when it considers whether a breach of Article 6 ECHR has taken place, it takes into account the proceedings as a whole to assess a possible violation of that provision.<sup>113</sup>

As explained before, the Dutch Council of State may only provide for a very brief standard reasoning when rejecting a request for preliminary ruling.<sup>114</sup> In order to assess whether this Dutch practice complies with Article 47 of the Charter read in the light of Article 6 ECHR, a number of aspects with respect to Article 6 ECHR will be discussed in this section.

### 5.2 The general obligation to state reasons for domestic courts under Article 6 ECHR

According to the ECtHR there is a general obligation for courts under Article 6 ECHR to give reasons for their judgments. The landmark case regarding this general obligation to state reasons is *Helle v Finland*. The ECtHR confines itself to a case-by-case assessment of whether Article 6 ECHR has been violated taking into account all relevant circumstances which play a role in the instant case.<sup>115</sup>

Article 6 ECHR does not oblige court to give a 'detailed answer to every argument'.<sup>116</sup> Moreover, the 'extent to which the duty to give reasons applies may vary according to the nature of the decision at issue'.<sup>117</sup> According to the ECtHR, the following factors influence its assessment under Article 6 ECHR: i) 'diversity of the submissions' brought forward before the courts by a litigant and ii) differences between the Contracting States when it comes to 'statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments'.<sup>118</sup> In *Helle v Finland* the ECtHR did not find a violation of Article 6 ECHR. While the ECtHR admitted that the domestic court's reasoning was 'succinct' and 'sparse',<sup>119</sup> it ruled that the Finnish courts did 'in fact address the essential issues

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<sup>111</sup> ECtHR 23 October 2001, *Desmots v France*, Appl no 41358/98, para 2.

<sup>112</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl no 3989/07 and 38353/07, para 55.

<sup>113</sup> ECtHR 12 June 2003, *Pedersen and Pedersen v Denmark*, Appl no 68693/01, para 2.

<sup>114</sup> See section 2.

<sup>115</sup> ECtHR 19 December 1997, *Helle v Finland*, Appl no 20772/92, para 51.

<sup>116</sup> *Ibid*, para 55.

<sup>117</sup> *Ibid*.

<sup>118</sup> *Ibid*.

<sup>119</sup> *Ibid*, paras 51 and 55 respectively.

which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by a lower court.’<sup>120</sup>

### 5.3 The general obligation to state reasons for the highest domestic courts under Article 6 ECHR

In *Hansen v Norway* the ECtHR specifically addressed the obligation to state reasons for the highest domestic courts. In this case, the applicant argued that, since there were significant shortcomings in the procedure before the first instance domestic court, the court of appeal ‘should have given more detailed reasons for its refusal of admission in the instant case’.<sup>121</sup>

In *Hansen v Norway* the ECtHR reiterated in its general principles that there is a general obligation to state reasons where a state has opened up the possibility for an individual to appeal.<sup>122</sup> However, the ECtHR stated that the application of Article 6 ECHR in cases concerning a court of appeal ‘depends on the special features of the proceedings involved’.<sup>123</sup> The Court took into account the ‘entirety of the proceedings in the domestic legal order’ and *the specific role of the court of appeal in that entirety of proceedings*.<sup>124</sup> In its assessment whether a violation of Article 6 has occurred in a specific case, the ECtHR considered four factors:

1. the ‘nature of the filtering procedure’;
2. the significance of that filtering procedure ‘in the context of the civil proceedings as a whole’;
3. ‘the scope of the powers’ of the domestic court of appeal; and
4. ‘the manner in which the applicant’s interests were actually presented and protected’ before the court of appeal.<sup>125</sup>

The ECtHR acknowledged in its judgment that a court of appeal does not have to ‘give more detailed reasoning when it simply applies a specific legal provision to dismiss an appeal on points of law as having no prospects of success, without further explanation’.

In *Hansen v Norway* the ECtHR applied the abovementioned principles and concluded that there was indeed a violation of Article 6 ECHR in the instant case. It referred to the fact that in the instant case the task of the Norwegian High Court (the domestic court of appeal) was not only to assess questions of law and procedure, but also extended to factual questions.<sup>126</sup> The ECtHR considered that the High Court’s reasoning did not ‘address the essence of the issue to be decided by it’ in a way that would reflect the High Court’s position at the relevant procedural stage. This was

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<sup>120</sup> Ibid, para 60. See also ECtHR (GC) 21 January 1999, *García Ruiz v Spain*, Appl No 30544/96, para 26. This case concerned roughly the same principles of the obligation to state reasons for judgments as laid down in the here discussed case of *Helle v Finland*.

<sup>121</sup> ECtHR 2 October 2014, *Hansen v Norway*, Appl no 15319/09, para 75.

<sup>122</sup> Ibid, para 71.

<sup>123</sup> Ibid, para 73.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid, para 82.

especially so, because the High Court had full jurisdiction, and it did not take ‘due regard to the applicant’s interests’.<sup>127</sup>

Lastly, the ECtHR found of importance that the High Court in *Hansen v Norway* was not in fact the highest court of appeal. The ECtHR ruled that the reasons provided for by the High Court were not sufficient to grant the applicant an effective right to appeal against that High Court’s decision before the domestic Supreme Court.<sup>128</sup>

Thus, following *Hansen v Norway*, there seems to exist a duty for courts of appeal to at least address the essence of the issue presented before it, taking into account the jurisdiction of the court of appeal and the applicant’s interests in the case.

#### **5.4 The duty to state reasons for a decision to refuse a request for a preliminary reference under Article 6 ECHR**

The ECtHR has formed a clear legal framework for the duty to state reasons for a decision to refuse a request for a preliminary reference under Article 6(1) ECHR. As will become clear from the case law discussed in this section, the obligation to state reasons under ECHR law entails three major aspects:

1. the duty to mention that a question has been asked;
2. the duty to mention *which CILFIT* criterion applies; and
3. the duty to explain *why* that criterion applies.

First, the general principles set out by the ECtHR will be discussed.

##### **5.4.1 General principles set out by the ECtHR**

In *Ullens de Schooten and Rezabek v Belgium*, the ECtHR first set out the general principles which apply to the whole legal framework for the duty to state reasons for a decision to refuse a request for a preliminary reference under Article 6(1) ECHR.

First, the ECtHR underlined that there is no absolute right to have a case brought by a court or tribunal before the CJEU for a preliminary ruling.<sup>129</sup> It follows from the *CILFIT* case that national courts are not obliged to refer a preliminary question to the CJEU if they determine that the question ‘is irrelevant’, that ‘the Community 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’.<sup>130</sup> Moreover, the right of access to a court, which is a crucial component of the right to a fair trial, is also not absolute under Article 6(1) ECHR.<sup>131</sup> As a consequence, Article 6(1) ECHR does not entail an absolute right to have a case referred by a domestic court to a national or international authority.<sup>132</sup>

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<sup>127</sup> Ibid.

<sup>128</sup> ECtHR 2 October 2014, *Hansen v Norway*, Appl no 15319/09, para 83.

<sup>129</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl nos 3989/07 and 38353/07, para 56.

<sup>130</sup> Ibid.

<sup>131</sup> See also ECtHR 15 July 2003, *Ernst and Others v Belgium*, Appl no 33400/96.

<sup>132</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl nos 3989/07 and 38353/07, para 57.

Second, the ECtHR emphasised that a decision not to refer a preliminary question to the CJEU falls within the scope of Article 6(1) ECHR. Consequently, competent courts should hear any legal questions that may arise in the course of proceedings in accordance with the applicable law.<sup>133</sup> According to the ECtHR, this task of courts has particular significance in the jurisdictional context of the EU and Article 267(3) TFEU, since it is important to prevent that divergences in judicial decisions on questions of EU law occur.<sup>134</sup> Furthermore, the ECtHR underlines that the refusal by a domestic court to refer a question to the CJEU might infringe the fairness of proceedings in certain circumstances, even if the domestic court is not ruling in last instance and irrespective of whether the preliminary ruling would be granted by a domestic court or the CJEU.<sup>135</sup>

Third, the ECtHR specified that there might be an infringement of the fairness of proceedings 'where the refusal proves arbitrary, 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'.<sup>136</sup> Subsequently, Article 6(1) ECHR obliges domestic courts to give reasons, in the light of the applicable law, when they decide to refuse to refer a preliminary question, 'especially where the applicable law allows for such a refusal only on an exceptional basis'.<sup>137</sup>

Finally it may be deduced from the ECtHR's case law that a duty to state the reasons for the rejection of a request for a preliminary reference only exists if the request is sufficiently substantiated. In *John v Germany* the ECtHR found that there was no violation of Article 6 ECHR because of a lack of reasons for the rejection of a request for a preliminary reference. It considered that

the applicant's submissions [...] neither contained an express request for a reference under Article 234 EC Treaty nor express and precise reasons for the alleged necessity of a preliminary ruling. Accordingly, the applicant insufficiently pleaded that he considered a decision as to the interpretation of Article 81 EC Treaty as necessary to enable the Federal Court of Justice to give judgment.<sup>138</sup>

#### **5.4.2 The three aspects of the duty to state reasons**

##### **1) The duty to mention that a question has been asked**

The first specific aspect of the duty to state reasons is the duty to mention that a question has been asked. Thus, a national court refusing to refer a preliminary question to the CJEU must first of all mention in its reasoning for the refusal that the applicant requested to refer a preliminary question to the CJEU.

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<sup>133</sup> Ibid, para 58.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid, para 59.

<sup>136</sup> Ibid, para 59.

<sup>137</sup> Ibid, para 60.

<sup>138</sup> ECtHR 13 February 2008, *John v Germany*, Appl no 15073/03.

This follows from paragraph 33 of the *Dhahbi v Italy* case, where the ECtHR stated that it ‘found no reference to the applicant’s request for a preliminary ruling to be sought [...]’. As a consequence, the ECtHR found that it was ‘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’.<sup>139</sup> On the basis of those findings, the ECtHR concluded that there was a violation of Article 6(1) ECHR.

## 2) The duty to mention which *CILFIT* criterion applies

### *Arbitrariness of a refusal to refer a question*

In several judgments on Article 6 ECHR, the ECtHR focused on the question whether a domestic court’s judgment not to refer a question was arbitrary or not. The ECtHR thereby ruled that a domestic court should at least refer to one of the *CILFIT* exceptions.<sup>140</sup> For example, if a domestic court had assessed a request for a preliminary ruling to be irrelevant, the ECtHR did not find arbitrariness and therefore no violation of Article 6 ECHR would occur.<sup>141</sup> The ECtHR has also accepted non-arbitrariness of a judgment when a domestic court referred to the other two *CILFIT* exceptions.<sup>142</sup> Thus, according to the ECtHR, at least reference to the *CILFIT* criteria is needed in order to escape arbitrariness and, with that, avoid a violation of Article 6 ECHR.

### *The role of the highest national courts*

Moreover, the ECtHR has emphasized the role of the highest national court to refer preliminary questions to the CJEU in the light of Article 267 TFEU as well as the *CILFIT* jurisprudence.<sup>143</sup> Indeed, this fits in the context of the objectives of Article 267 TFEU, namely to ensure a correct and uniform interpretation of the EU law in all Member States.<sup>144</sup> According to the ECtHR, in the context of Article 267(3) TFEU, *national courts against whose decisions there is no remedy under national law*, and who refuse to refer to the CJEU of a preliminary question on the interpretation of EU law that has been raised before them, must give reasons for their refusal in the light of the exceptions provided for in the case law of the CJEU.<sup>145</sup> This means that they must give the reasons: why they think that the question is irrelevant, that the EU law provision concerned has already been interpreted by the CJEU, or that the correct application of EU law is so obvious that it leaves no scope for any reasonable doubt, in accordance with the *CILFIT* judgment.<sup>146</sup>

In the case of *Ullens de Schooten and Rezabek v Belgium*, the ECtHR found no violation of Article 6(1) ECHR, since the Belgian Court of Cassation and the *Conseil d’Etat* had rejected the applicants’ request to refer a preliminary question on the ground of one of the exceptions provided

<sup>139</sup> ECtHR 8 April 2014, *Dhahbi v Italy*, Appl no 17120/09, para 33.

<sup>140</sup> Section 3 of this expert opinion elaborates on the *CILFIT* criteria including *acte clair* and *acte éclairé* in detail.

<sup>141</sup> ECtHR 1 February 2005, *Matheis v Germany*, Appl no 73711/01; ECtHR 13 June 2002, *Bakker v Austria*, Appl no 43454/98.

<sup>142</sup> See ECtHR 23 October 2001, *Desmots v France*, Appl no 41358/98, para 2; ECtHR 13 February 2007, *John v Germany*, Appl no 15073/03.

<sup>143</sup> M Reneman, ‘Ongemotiveerde afwijzing van verzoeken om prejudiciële vragen’ *Jaarboek Vreemdelingenrecht*, p 4.

<sup>144</sup> *Ibid.*

<sup>145</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl nos 3989/07 and 38353/07, para 62.

<sup>146</sup> *Ibid.*, para 62.

for in the above-mentioned *CILFIT* case law.<sup>147</sup> On the one hand, the Court of Cassation found that the question had already been settled by the CJEU (*acte éclairé*), thereby giving comprehensive reasons in this connection with reference to the CJEU's case law.<sup>148</sup> On the other hand, the *Conseil d'Etat* found that the correct application of the EU law at stake was so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised had to be resolved (*acte clair*).<sup>149</sup> Thereby, it also gave demonstrative reasoning.<sup>150</sup>

In *Dhahbi v Italy* of April 2014 the ECtHR for the first time found a violation of Article 6(1) ECHR due to the failure of the Italian Court of Cassation to give reasons for the refusal of a request for a preliminary ruling to the CJEU.<sup>151</sup> According to the ECtHR, 'as no judicial 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'.<sup>152</sup> The ECtHR found that the Court of Cassation did not make any reference to the request for a preliminary ruling or to the reasons why the court reckoned that the question raised did not justify a referral to the CJEU.<sup>153</sup>

Pursuant to the ECtHR, it was therefore not clear whether the question raised was considered irrelevant or related to a provision that had already been interpreted by the CJEU (*acte éclairé*) or which was clear (*acte clair*).<sup>154</sup> The ECtHR even suggested that the question might have been simply ignored.<sup>155</sup> As a consequence, the ECtHR found a violation of Article 6(1) ECHR. Since the ECtHR did no longer refer to the 'arbitrariness' of the refusal in case *Dhahbi v Italy*, it seems that the ECtHR takes some distance from its earlier decisions. According to Lacchi, 'the ECtHR seems to have shifted its focus from the arbitrariness of the refusals to whether the national court provides reasons'.<sup>156</sup>

In sum, it follows from *Ullens de Schooten and Rezabek v Belgium* and *Dhahbi v Italy* that national courts have a duty to mention *which* of the *CILFIT* criteria applies when they refuse to refer a preliminary question to the CJEU under Article 6 ECHR. The ECtHR thereby particularly stresses the role of the highest national courts.

### 3) The duty to give reasons why a *CILFIT* criterion applies

The third aspect of the duty to state reasons for a decision to refuse a request for a preliminary reference under Article 6(1) ECHR is the duty to mention *why* a *CILFIT* criterion applies. This clearly follows from the landmark cases *Ullens de Schooten and Rezabek v Belgium* and *Dhahbi v Italy*, as discussed above.

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<sup>147</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl nos 3989/07 and 38353/07, para 64.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid, paras 65 and 29.

<sup>150</sup> Ibid, para 65.

<sup>151</sup> ECtHR 8 April 2014, *Dhahbi v Italy*, Appl no 17120/09.

<sup>152</sup> ECtHR 8 April 2014, *Dhahbi v Italy*, Appl no 17120/09, para 32, emphasis added.

<sup>153</sup> Ibid, para 33.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> C Lacchi, 'The ECtHR's Interference in the Dialogue between National Courts and the Court of Justice of the EU: Implications for the Preliminary Reference Procedure', *Review of European Administrative Law*, Paris Legal Publishers, 2015, p 105.

In *Ullens de Schooten and Rezabek v Belgium*, the ECtHR made clear that there might be an infringement of the fairness of proceedings

where the refusal proves arbitrary, 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.<sup>157</sup>

According to Lacchi, the ECtHR only obliges national courts to make a reference to a *CILFIT* criterion, without stating the reasons *why* they invoke that criterion. In her view, the ECtHR thus seems to allow that a sole reference to the *CILFIT* criteria and to the requests of the applicants is sufficient for national judges who refuse to refer a preliminary question to the CJEU to comply with Article 6(1) ECHR. She states that the reason for that is that it is not the task of the ECtHR to correctly interpret the law, but only to assess whether proceedings are fair and not arbitrary.<sup>158</sup>

Indeed, in paragraph 66 of *Ullens de Schooten and Rezabek v Belgium*, it is stated that the ECtHR ‘acknowledges that the applicants challenged the interpretation of Community law adopted by the Court of Cassation and the *Conseil d’Etat*, which they regarded as erroneous, and set out detailed arguments in this connection’ and that ‘however, as indicated previously, this is an area that falls outside the Court’s jurisdiction’.<sup>159</sup> For these reasons, Lacchi states that the case law of the ECtHR has been criticised for lack of effectiveness.<sup>160</sup>

However, this appears to be a questionable interpretation of *de Schooten and Rezabek v Belgium*, since the ECtHR explicitly requires in paragraph 59 that national courts state the reasons why they think that one of the *CILFIT* criteria is fulfilled in order to comply with Article 6(1) ECHR. Arguably, the only thing that can be deduced from the limited task of the ECtHR is that the ECtHR will not review whether the reasons given by the national court in support the application of one of the *CILFIT* criteria are *well founded*.

In *Dhahbi v Italy* the ECtHR also made clear that apart from stating whether the question raised was considered irrelevant, *acte éclairé* or *acte clair*, national courts should also make clear *why* they think that a *CILFIT* criteria applies. In paragraph 33, the ECtHR states that it ‘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’. According to Broberg, it is particularly likely that there is a violation of Article 6(1) ECHR ‘where a court of last instance refuses to make a preliminary reference without adequately addressing the applicant’s

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<sup>157</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl nos 3989/07 and 38353/07, para 59, emphasis added.

<sup>158</sup> C Lacchi, ‘The ECtHR’s Interference in the Dialogue between National Courts and the Court of Justice of the EU: Implications for the Preliminary Reference Procedure’, *Review of European Administrative Law* (2015), p 104; ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl no 3989/07 and 38353/07, para 66.

<sup>159</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl nos 3989/07 and 38353/07, para 66.

<sup>160</sup> C Lacchi, ‘The ECtHR’s Interference in the Dialogue between National Courts and the Court of Justice of the EU: Implications for the Preliminary Reference Procedure’, *Review of European Administrative Law* (2015), p 108.

valid arguments in favour of making a reference'.<sup>161</sup> This implies that there is thus a duty for national courts to give reasons *why* a *CILFIT* criteria applies.

The ECtHR has repeated this reasoning in *Schipani and Others v Italy* of July 2015.<sup>162</sup> According to the ECtHR, the Italian Court of Cassation did not reason whether the question was regarded as irrelevant or related to a provision which was clear or had already been interpreted by the CJEU.<sup>163</sup> Therefore, the ECtHR found a violation of Article 6(1) ECHR.<sup>164</sup> It should however be noted that the judgment in *Schipani v Italy* was not unanimous. In his concurring opinion, Judge Wojtyczek argued that an unreasoned refusal to refer a preliminary question to the CJEU should not automatically imply a violation of Article 6(1) ECHR. In his view the ECtHR should rather take into account the gravity of the interference in the sphere of human rights. Whenever an interference is more severe, the reasoning of national judges refusing to refer a preliminary question to the CJEU should be more detailed and supported by strong arguments.

In sum, it follows from the cases of *Ullens*, *Dhahbi* and *Schipani* that national courts have a duty to mention *why* one of the *CILFIT* criteria applies when they refuse to refer a preliminary question to the CJEU. Although this interpretation has been questioned by some authors, it is nevertheless clear from the wording of the case that national courts are obliged to do so.

## 5.5 The duty to state reasons under Article 13 ECHR (general obligation)

Article 6 ECHR and Article 13 ECHR are closely connected. In that respect, it is important to assess the duty to state reasons under Article 13 ECHR as well. Article 13 ECHR entails the right to an effective remedy and states that 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.

In 2011, the ECtHR ruled in *Arvelo Aponte v the Netherlands* that the fact that a higher appeal is declared inadmissible with a brief statement of reasons does not *per se* violate the right to an effective remedy as protected by Article 13 ECHR.<sup>165</sup> The case concerned a Venezuelan national who had arrived in the Netherlands in 2000 as a tourist and had married a Dutch national. The Dutch State however refused to grant her a residence permit on account of a previous conviction for a drugs offence in Germany. Relying on Articles 8 and 13 ECHR, the applicant 'complained of a lack of an effective remedy in relation to her complaint under Article 8 since the Council of State dismissed her further appeal without any reasoning on the merits'.<sup>166</sup> According to the ECtHR, 'the expression "effective remedy" used in Article 13 cannot be interpreted as entailing an obligation to give a detailed answer to every argument raised, but simply an accessible remedy before an authority competent to examine the merits of a complaint' and thus there was no violation of Article 13 ECHR in *Arvelo Aponte*.

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<sup>161</sup> M Broberg, 'National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom', *European Public Law* (2016), p 248.

<sup>162</sup> ECtHR 21 July 2015, *Schipani v Italy*, Appl no 38369/09, paras 72 and 73.

<sup>163</sup> Ibid, para 72.

<sup>164</sup> Ibid, para 73.

<sup>165</sup> ECtHR 3 November 2011, *Arvelo Aponte v the Netherlands*, Appl no 28770/05.

<sup>166</sup> Ibid, para 63.



In sum, it follows from the case of *Arvelo* that when a national court limits itself to a brief statement of reasons, this in itself does not imply that there has not been an effective remedy under Article 13 ECHR.

## **5.6 The duty to state reasons for a decision to refuse a request for a preliminary reference under Article 13 ECHR**

It can be questioned whether national courts have a duty to state reasons for refusing to refer a preliminary question to the CJEU under Article 13 ECHR. This question does not seem to have been addressed by the ECtHR so far. However, in *Ullens de Schooten and Rezabek v Belgium*, the ECtHR assessed that ‘the safeguards of Article 6(1), implying the full panoply of safeguards in any judicial procedure, are in principle stricter than, and absorb, those of Article 13’.<sup>167</sup> The ECtHR thus states that Article 6 ECHR is a *lex specialis* in relation to Article 13 ECHR. This implies that whenever Article 6 ECHR is applicable to a certain case, the applications should be analysed under Article 6 ECHR alone.

## **5.7 Discussion of the Council of State’s judgment in the light of the ECtHR’s case law**

As has become clear from the cases discussed above, Article 6 ECHR provides for a legal framework with regard to the duty to state reasons for domestic courts which refuse to refer a question to the CJEU. In this section, the argumentation of the Council of State in its judgment of 5 March 2015<sup>168</sup> will be analysed based on *Hansen v Norway*. It will be concluded, on the basis of the cases *Ullens de Schooten and Rezabek v Belgium*, *Dhahbi v Italy* and *Schipani v Italy*, that the practice of the domestic higher court in the Netherlands constitutes a violation of Article 6 ECHR.

The Dutch Council of State held in its judgment of 5 March 2015 that it does not violate of Article 6 ECHR if it does not state the reasons for its refusal of a request for a preliminary reference or even mention that such request has been made before it. The Council of State based this ruling on the ECtHR’s judgment in *Hansen v Norway* in which the ECtHR held that an appellate court does not have to ‘give more detailed reasoning when it simply applies a specific legal provision to dismiss an appeal on points of law as having no prospects of success, without further explanation’. According to the Council of State this consideration from *Hansen v Norway* applies to the Article 91(2) Aliens Act 2000 procedure. Furthermore it prevails over the duty to state the reasons for a refusal to refer a preliminary question to the CJEU following from *Ullens de Schooten and Rezabek v Belgium*, *Dhahbi v Italy* and *Schipani v Italy*.<sup>169</sup> The Dutch Supreme Court followed this judgment.<sup>170</sup>

The judgments of the Council of State and the Supreme Court were endorsed by annotators Barkhuysen and Emmerik. They argue that the *Dhahbi v Italy* case did not concern a brief statement of reasons which was allowed by a national legal system comparable to that provided by Article

<sup>167</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl nos 3989/07 and 38353/07, para 52.

<sup>168</sup> ABRvS 5 March 2015, ECLI:NL:RVS:2015:785, JV 2015/139, annotation CA Groenendijk.

<sup>169</sup> For an elaborate discussion of this case, see section 2.4 of this expert opinion.

<sup>170</sup> HR 26 May 2015, ECLI:NL:HR:2015:1332 and HR 25 September 2015, ECLI:NL:PHR:2015:996.

91(2) Aliens Act 2000.<sup>171</sup> They also argue that *Ullens de Schooten and Rezabek v Belgium, Dhahbi v Italy and Schipani v Italy* do not mention that they constitute a *lex specialis* of the general obligation to state reasons for judgments, which allows for a brief statement of reasons by highest national courts.<sup>172</sup>

We hold that the reasoning of the Council of State and the Supreme Court is not valid in the light of Article 6 ECHR. There are several strong arguments that argue in favour of preference of the *Dhahbi v Italy* line of case law over the general *Hansen v Norway* case law, which we will discuss in this section.

### **Applicability of *Hansen v Norway* to Article 91(2) Aliens Act 2000**

As was stated by Groenendijk, it is not clear whether the considerations of the ECtHR in the judgment in *Hansen v Norway* which concerned a filtering procedure<sup>173</sup> can be applied to Article 91(2) Aliens Act 2000.<sup>174</sup> The Council of State performs a complete review on the basis of the grounds of appeal of the judgment of the lower court on points of law and points of fact (with full jurisdiction). Article 91(2) only provides for a possibility to limit the statement of reasons in the judgment to a standard formula. This is different than a preliminary procedure for the examination and admission of appeals, which precedes the complete review by an appellate court.

*Hansen v Norway* did not specifically concern the duty to state the reasons for the rejection of a request for a preliminary ruling. Furthermore the ECtHR found a violation of Article 6 ECHR in *Hansen v Norway* because it was not convinced that the Norwegian High Court addressed ‘the essence of the issue to be decided by it [...] in a manner that adequately reflected its role at the relevant procedural stage as an appellate court entrusted with full jurisdiction and that it did so with due regard to the applicant’s interests’. In the opinion of AG Wattel *Hansen v Norway* ‘could be problematic’ for an appellate court with full jurisdiction which rejects cases limiting its statement of reasons to a standard formula, like the Council of State does in some migration cases on the basis of Article 91(2) Aliens Act 2000.<sup>175</sup>

It should be concluded that *Hansen v Norway* provides a rather weak basis for the Council of State’s ruling that it may reject a (substantiated) request for a preliminary reference with reference to Article 91(2) Aliens Act 2000. It may even be argued that it follows from *Hansen v Norway* that the application of Article 91(2) in migration cases, where the Council of State has full jurisdiction, would not be in conformity with Article 6 ECHR.

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<sup>171</sup> ABRvS 5 March 2015, ECLI:NL:RVS:2015:785 AB 2015/305, annotation T Barkhuysen and ML van Emmerik, para 3.

<sup>172</sup> Ibid, para 3 and 4.

<sup>173</sup> ECtHR 2 October 2014, *Hansen v Norway*, Appl no 15319/09, para 80. The Council of State ruled that para 80 of *Hansen v Norway* is also applicable to the judgment on the basis of Art. 91(2) Aliens Act 2000. See ABRvS 5 March 2015, ECLI:NL:RVS:2015:785, para 1.5.

<sup>174</sup> See his annotation with JV 2015/139.

<sup>175</sup> Opinion of AG Wattel with HR 25 September 2015, ECLI:NL:PHR:2015:996, para 5.20.

## The importance of the preliminary reference system with EU law

The central position of the preliminary procedure within the EU legal system<sup>176</sup> and the development of law requires an explicit – and therefore reasoned – rejection of a request for a preliminary question rather than an implicit or unreasoned one.<sup>177</sup> The importance of the preliminary reference procedure under EU law is emphasised by Van Harten and Beijer. They argue that, due to the incredible importance that a preliminary question could have, the *Dhahbi v Italy* case requires an explicit statement of reasons by the national court for a refusal to refer in the case of an explicit request for a preliminary question. It is not only in the applicant's interest, but in the interest of the EU as a whole to require such an explicit statement of reasons.<sup>178</sup>

## The special role of highest courts within the preliminary reference system

In *Hansen v Norway* the ECtHR has considered that the manner of application of Article 6 ECHR to appellate courts depends on the specific role of the court of appeal in that entirety of proceedings.<sup>179</sup> *Hansen v Norway* did not concern the role of highest national courts in the preliminary reference procedure.<sup>180</sup>

The highest national courts play a particular crucial role in the preliminary ruling system. Since no judicial appeal is possible against the Council of State's decisions under domestic law, it has been given the task to refer questions to the CJEU. In its judgments in *Ullens de Schooten and Rezabek v Belgium* and *Dhahbi v Italy* the ECtHR has made clear that, in the context of Article 267(3) TFEU, national courts *against whose decisions there is no remedy under national law*, and who refuse to refer to the CJEU of a preliminary question on the interpretation of EU law that has been raised before them, must give reasons for their refusal in the light of the exceptions provided for in the case law of the CJEU.<sup>181</sup> In cases where a substantiated request for a preliminary reference is made before a highest national court, the specific line of case law set out in *Ullens de Schooten and Rezabek v Belgium* and *Dhahbi v Italy* applies instead of the general considerations included in *Hansen v Norway*.<sup>182</sup>

## The reference to Article 91(2) Aliens Act 2000 is insufficient

It follows from the ECtHR's judgments in *Ullens de Schooten and Rezabek v Belgium*, *Dhahbi v Italy* and *Schipani v Italy* that highest courts have an obligation to mention in their judgment that a request for a preliminary reference has been made, which *CILFIT* criterion applies and why that

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<sup>176</sup> See for an elaborate analysis of the preliminary reference procedure in EU law section 3 of this expert opinion.

<sup>177</sup> Ibid, para 8.

<sup>178</sup> ECtHR 8 April 2014, *Dhahbi v Italy*, Appl no 17120/09, EHRC 2014/152, annotation HJ van Harten and MP Beijer.

<sup>179</sup> ECtHR 2 October 2014, *Hansen v Norway*, Appl no 15319/09, paras 55 and 73.

<sup>180</sup> AG Wattel states that the Council of State in its judgment of 5 March relies completely on *Hansen v Norway*, while this judgment is not relevant in his view because it does not concern (substantiated) requests for a preliminary reference nor national court which are obliged under EU law to refer such questions. opinion of AG Wattel with HR 25 September 2015, ECLI:NL:PHR:2015:996, para 1.9. See also the annotation of EB Pechler with FED 2015/51.

<sup>181</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl nos 3989/07 and 38353/07, para 62; ECtHR 8 April 2014, *Dhahbi v Italy*, Appl no 17120/09, para 31.

<sup>182</sup> See also the annotation of EB Pechler with FED 2015/51.

*CILFIT* criterion applies. Only referring to Article 91 Aliens Act 2000 does not meet this requirement, because the standard formula used by the Council of State does not mention that a request for a preliminary ruling has been brought before it or explain why this request has been rejected. This was also argued by AG Wattel in his opinion with the judgment of the Supreme Court of 25 September 2015.<sup>183</sup>

### **Prevention of arbitrariness**

Groenendijk points out that the Council of State does not seem to have a systematic approach when it comes to stating the reasons for its refusal of a request for a preliminary ruling. In some cases the Council of State extensively explains why it refuses to refer a preliminary question, while in others the Council of State confines itself to a reference to Article 91(2) Aliens Act 2000. In his view this is typically a situation which the principle that judgments may not be arbitrary seeks to prevent.<sup>184</sup>

The ECtHR has applied the criterion of arbitrariness in its early case law concerning Article 6 ECHR and preliminary questions. Although the most recent judgments on this topic do not refer to arbitrariness anymore, the prevention of arbitrariness should still be considered an important reason for imposing a duty on highest courts to state (at least some) reasons for a refusal to refer a preliminary question. The application of Article 91(2) Aliens Act 2000 in cases in which a request for a preliminary reference may thus be considered arbitrary and therefore lead to a violation of Article 6 ECHR.

### **Protection of human rights has preference over efficiency**

Judge Wojtyczek argued in his concurring opinion with *Schipani v Italy* that the gravity of the interference in the sphere of human rights should be taken into account in the ECtHR's assessment whether an unreasoned refusal to refer a preliminary question to the CJEU violates Article 6 ECHR. In many of the migration cases in which the Council of State refuses to refer a preliminary question to the CJEU, important human rights are at stake. This includes the absolute prohibition of *refoulement* in asylum cases and the right to family life in family reunification cases. Therefore arguably the interest of the migrant and the public to know the reasons of such refusal to refer should be granted more weight than the interest of the Council of State to alleviate its workload by applying Article 91(2) Aliens Act 2000.

In this regard it should be noted that different authors have doubts whether the application of Article 91(2) Aliens Act 2000 will save much time if a request for a preliminary reference is made. The Council of State is always obliged to analyse this request in the light of the *CILFIT*-criteria, which will take most time. After such analysis has been done, it is relatively easy to indicate that a request has been done and which *CILFIT*-criterion applies and why.<sup>185</sup>

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<sup>183</sup> See also the opinion of AG Wattel with HR 25 September 2015, ECLI:NL:PHR:2015:996, para 7.5 and the annotation of Groenendijk with ABRvS 5 March 2015, ECLI:NL:RVS:2015:785 in *JV* 2015/139, para 5.

<sup>184</sup> See the annotation of Groenendijk with ABRvS 5 March 2015, ECLI:NL:RVS:2015:785 in *JV* 2015/139, para 7.

<sup>185</sup> See the annotation of EB Pechler with *FED* 2015/51 and Opinion of AG Wattel with HR 25 September 2015, ECLI:NL:PHR:2015:996, para 7.8.

This implies that the Council of State should support its refusal to refer a preliminary question with regard to for example the Qualification Directive<sup>186</sup> or the Family Reunification Directive<sup>187</sup> with strong and detailed arguments.

## 5.8 Conclusion

The ECtHR has ruled in *Helle v Finland* that there is a general duty for domestic courts to provide reasons for judgments under Article 6 ECHR.<sup>188</sup> Moreover, in *Hansen v Norway*, the ECtHR laid down the scope of the obligation to state reasons for judgments for national appellate and cassation courts.<sup>189</sup>

The ECtHR has developed case law under Article 6 ECHR which specifically concerns the obligation to state reasons in the case of the rejection of a request for a preliminary question by a domestic court. In its early case law the ECtHR ruled on these cases in the light of arbitrariness. It held that a domestic court could escape arbitrariness if it referred to one of the *CILFIT* criteria in its decision to refuse a request for a preliminary reference.<sup>190</sup> The ECtHR made no explicit mention of any specific positive obligations.

This has changed by means of the recent case law concerning non-referral of a preliminary question. In the cases of *Ullens de Schooten and Rezabek v Belgium*<sup>191</sup>, *Dhahbi v Italy*<sup>192</sup> and *Schipani v Italy*<sup>193</sup> the ECtHR has made explicit mention of positive obligations arising from Article 6 ECHR in its general principles. If a domestic court rejects request to refer a preliminary question to the CJEU it has to state the reasons for that decision. This entails that it has to

1. make mention of the fact that a preliminary ruling has been requested;
2. refer to one of the *CILFIT* criteria; and
3. explain why that criterion applies in the instant case.

The Council of State's held in its judgment 5 March 2016 that it may reject a request for a preliminary reference with the standard formula on the basis of Article 91(2) Aliens Act 2000.<sup>194</sup> It based its decision on the ECtHR's consideration in *Hansen v Norway* that appellate courts may apply 'a specific legal provision to dismiss an appeal on points of law as having no prospects of success, without further explanation'. The Council of State found that the judgment in *Hansen v Norway* prevails over the ECtHR's case law in *Ullens de Schooten and Rezabek v Belgium* and *Dhahbi v Italy*.

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<sup>186</sup> Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9.

<sup>187</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

<sup>188</sup> ECtHR 19 December 1997, *Helle v Finland*, Appl no 20772/92.

<sup>189</sup> ECtHR 2 October 2014, *Hansen v Norway*, Appl no 15319/09, para 80.

<sup>190</sup> ECtHR 1 February 2005, *Matheis v Germany*, Appl no 73711/01; ECtHR 13 June 2002, *Bakker v Austria*, Appl no 43454/98; ECtHR 23 October 2001, *Desmots v France*, Appl no 41358/98, para 2; ECtHR 13 February 2007, *John v Germany*, Appl no 15073/03.

<sup>191</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl nos 3989/07 and 38353/07.

<sup>192</sup> ECtHR 8 April 2014, *Dhahbi v Italy*, Appl no 17120/09.

<sup>193</sup> ECtHR 21 July 2015, *Schipani v Italy*, Appl no 38369/09.

<sup>194</sup> ABRvS 5 March 2015, ECLI:NL:RVS:2015:785.

In this section we argued that the Council of State's judgment is not in conformity with the case law under Article 6 ECHR for the following reasons:

- *Hansen v Norway* provides a weak basis for the Council of State's ruling that it may reject a (substantiated) request for a preliminary reference with reference to Article 91(2) Aliens Act 2000. The considerations on which the Council of State relies, apply to a filtering system in which an appeal could be declared inadmissible, while the Council of State performs a complete assessment of the grounds of appeal. *Hansen v Norway* also did not concern the duty to state the reasons for a rejection of a request for a preliminary ruling. Furthermore in *Hansen v Norway* the ECtHR found a violation of Article 6 ECHR because the Norwegian High Court had full jurisdiction but did not address the essence of the issue in its judgment. Arguably the Council of State, which also has full jurisdiction, does not address the essence of the issue where it applies Article 91(2) Aliens Act 2000 in a migration case.
- The Council of State's judgment insufficiently takes into account the importance of the preliminary reference system and of a reasoned rejection of a request for a preliminary reference for the EU as a whole.
- The Council of State's judgment does not have regard to the particular crucial role of highest courts in the preliminary ruling system. These courts have been given the task to refer questions to the CJEU. The ECtHR recognises this in *Ullens de Schooten and Rezabek v Belgium* and *Dhahbi v Italy*, where it held that highest courts have a duty to state the reasons for a rejection of a request for a preliminary reference. Therefore these judgments should get preference over the general considerations in *Hansen v Norway*.
- The mere reference to Article 91(2) Aliens Act 2000 does not meet the requirement to provide reasons for a judgment under Article 6 ECHR. The standard formula used by the Council of State does not mention that a request for a preliminary ruling has been brought before it or explain why this request has been rejected.
- In some cases the Council of State extensively explains why it refuses to refer a preliminary question, while in others the Council of State confines itself to a reference to Article 91(2) Aliens Act 2000. This may lead to arbitrariness, which is prohibited by Article 6 ECHR.
- In many migration cases important human rights are at stake, such as the prohibition of *refoulement* and the right to family life. Therefore arguably the interest of the migrant and the public to know the reasons of a refusal to refer a preliminary question should be granted more weight than the interest of the Council of State to alleviate its workload by applying Article 91(2) Aliens Act 2000 where a substantiated request for a preliminary reference is made.<sup>195</sup> In this regard it is important to note that the required analysis of such request

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<sup>195</sup> Compare the concurring opinion of judge Wojtyczek with ECtHR 21 July 2015, *Schipani v Italy*, Appl no 38369/09.

takes most work and that after that stating the reasons for the rejection of the request is relatively easy.

## 6. Conclusion

On 5 March 2015 the Dutch Council of State ruled that the use of the standard formula based on Article 91(2) Aliens Act 2000 in order to reject a request for a preliminary reference does not violate Article 6 ECHR.<sup>196</sup> The Council of State based its decision on two arguments. First of all it relied on the consideration in *Hansen v Norway* that appellate courts may apply ‘a specific legal provision to dismiss an appeal on points of law as having no prospects of success, without further explanation’.<sup>197</sup> The Council of State found that the judgment in *Hansen v Norway* prevails over the specific requirement to state the reasons for a rejection of a request to refer a preliminary question to the CJEU following from the ECtHR’s judgments in *Ullens de Schooten and Rezabek v Belgium*<sup>198</sup> and *Dhahbi v Italy*<sup>199</sup>. Secondly it held that the standard formula provides sufficient reasoning, because it makes clear that there are no reasons to ask a preliminary question. Therefore it implies that one of the *CILFIT* criteria is applicable in the particular case. The Council of State’s judgment was followed by the Supreme Court of the Netherlands in its judgments of 26 May 2015 and 25 September 2015.<sup>200</sup>

This expert opinion addressed the question whether there is a violation of Article 47 CFREU when the Council of State refuses to refer a preliminary question to the CJEU without stating reasons for that decision. Under Article 267(3) TFEU highest national courts, such as the Council of State, have the obligation to refer a preliminary question to the CJEU when doubts regarding the interpretation of EU law arise. This obligation does not apply when the question is not relevant, when the question raised is materially identical to a question which has already been answered (*acte éclairé*) and when the answer is so obvious as to leave no scope for any reasonable doubt (*acte clair*).

While the CJEU has found that there is a general duty to state reasons<sup>201</sup>, it has not declared that there is a duty to state reasons as regards preliminary rulings under EU law. However it is contended that Article 267(3) TFEU and Article 47 CFREU read in the light of the CJEU’s case law, the constitutional traditions of the Member States and the ECtHR’s case law under Article 6 ECHR require that highest national courts state reasons for the rejection of a substantiated request for a preliminary reference.

According to the CJEU the statement of reasons in an administrative decision enables an individual to contest, and a court to review this decision.<sup>202</sup> In this expert opinion we argued that for similar reasons highest courts should have a duty to state the reasons for a rejection of a request for preliminary reference. Such statement of reasons by the highest national court is indispensable in cases when individuals wish to bring an action for damages against the state. National courts hearing a claim for reparation must assess several factors, including whether the highest court violated its

<sup>196</sup> ABRvS 5 March 2015, ECLI:NL:RVS:2015:785, JV 2015/139, annotation CA Groenendijk.

<sup>197</sup> ECtHR 2 October 2014, *Hansen v Norway*, Appl no 15319/09, para 80.

<sup>198</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl nos 3989/07 and 38353/07.

<sup>199</sup> ECtHR 8 April 2014, *Dhahbi v Italy*, Appl no 17120/09.

<sup>200</sup> HR 26 May 2015, ECLI:NL:HR:2015:1332 and HR 25 September 2015, ECLI:NL:PHR:2015:996.

<sup>201</sup> CJEU Case C-619/10 *Trade Agency Ltd* [2012].

<sup>202</sup> CJEU Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987].



obligation under Article 267(3) TFEU. Therefore, it is crucial to know the reasons of the decision by a court of last resort to refuse to refer questions for a preliminary ruling.<sup>203</sup> Secondly, for the individual who wishes to ask for reparation it is essential to have this information in order to assess whether there is a point in litigating against the State. Additionally, knowing why a highest court refrains from bringing a matter to the CJEU is equally imperative in those Member States where the decision can still be subjected to review by a constitutional court.

Moreover, such a duty to give a reasoned judgment may be inferred from the sources of inspiration of Article 47 CFREU. The Constitutional Courts of several Member States have already declared a breach of their respective constitutions for a failure of a national court of last instance to justify their decision not to refer a question to the CJEU. Secondly, since Article 47 CFREU is based on Articles 6 and 13 ECHR, the case law of the ECtHR is instrumental in the development of Article 47 CFREU.

Under Article 6 ECHR, there is a general obligation to state reasons for domestic courts including courts of appeal.<sup>204</sup> Furthermore, there is a specific obligation for highest courts to state reasons when refusing a request for a preliminary ruling. The recent judgments of *Ullens de Schooten and Rezabek v Belgium*<sup>205</sup>, *Dhahbi v Italy*<sup>206</sup> and *Schipani v Italy*<sup>207</sup> lay down three specific criteria which must be fulfilled when a national court refuses to refer a question to the CJEU. Accordingly, the national court must mention

1. that a preliminary ruling has been requested;
2. which one of the *CILFIT* criteria applies; and
3. why that particular criterion is applicable in the instant case.

It was argued that the application of the standard formula based on Article 91(2) Aliens Act 2000 to (substantiated) requests for a preliminary reference by the Council of State is in violation with Article 6 ECHR and thus with Article 47 CFREU. First, *Hansen v Norway* does not concern cases in which a request for a preliminary references is made before a highest national court which has full jurisdiction. Furthermore, in this judgment the ECtHR found a violation of Article 6 because the essence of the issue had not been addressed. Arguably the Council of State does not address the essence of the issue if it applies Article 91(2) Aliens Act 2000 in a migration case in which a request for a preliminary reference was made.

Secondly when assessing the necessity to state reasons for a judgment the ECtHR takes into account the specific role of an appellate court in the entirety of proceedings.<sup>208</sup> It therefore has regard to the importance of the preliminary reference system and of a reasoned rejection of a request for a preliminary reference for the EU as a whole. Furthermore it takes into account the

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<sup>203</sup> Compare CJEU Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others v Estado português* [2015].

<sup>204</sup> ECtHR 19 December 1997, *Helle v Finland*, Appl no 20772/92; ECtHR 2 October 2014, *Hansen v Norway*, Appl no 15319/09.

<sup>205</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl nos 3989/07 and 38353/07.

<sup>206</sup> ECtHR 8 April 2014, *Dhahbi v Italy*, Appl no 17120/09.

<sup>207</sup> ECtHR 21 July 2015, *Schipani v Italy*, Appl no 38369/09.

<sup>208</sup> ECtHR 2 October 2014, *Hansen v Norway*, Appl no 15319/09, paras 55 and 73.

particular crucial role of highest courts in the preliminary ruling system.<sup>209</sup> This special role of the highest national courts is also underlined by the CJEU.<sup>210</sup> The specific requirement for highest courts to state the reasons for a rejection of a request for a preliminary reference should thus prevail over the general consideration in *Hansen v Norway* that appellate courts are (in some situations) allowed to use a standard formula to reject a case.

From the standard formula used by the Council of State on the basis of Article 91(2) Aliens it cannot be inferred why a request for a preliminary reference has been rejected. It even does not mention that such request has been made. This standard formula therefore does not meet the requirements of Article 6 ECHR. Furthermore the Council of State in some judgments extensively explains why it refuses to refer a preliminary question, while in others it confines itself to a reference to Article 91(2) Aliens Act 2000. This may lead to arbitrariness, which is prohibited by Article 6 ECHR.

Finally it may be argued that the interest of the migrant and the public to know the reasons of a refusal to refer a preliminary question on an important human rights issue, such as the prohibition of *refoulement* or the right to family life, should prevail over the interest of the Council of State to alleviate its workload by applying Article 91(2) Aliens Act 2000.<sup>211</sup>

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<sup>209</sup> ECtHR 20 September 2011, *Ullens de Schooten and Rezabek v Belgium*, Appl nos 3989/07 and 38353/07, para 62; ECtHR 8 April 2014, *Dhahbi v Italy*, Appl no 17120/09, para 31.

<sup>210</sup> CJEU Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others v Estado português* [2015], para 43-44.

<sup>211</sup> Compare the concurring opinion of judge Wojtyczek with ECtHR 21 July 2015, *Schipani v Italy*, Appl no 38369/09.