

# LEGAL CONSEQUENCES FOR THE INFRINGEMENT OF THE OBLIGATION TO MAKE A REFERENCE FOR A PRELIMINARY RULING UNDER CONSTITUTIONAL LAW

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**Abstract.** *The article deals with the question whether a state might be held liable for the infringement of constitutional law if its national court of last instance violates the obligation to make a reference for a preliminary ruling to the Court of Justice of the European Union under the conditions laid down in Article 267 of the Treaty on the Functioning of the European Union and developed in the case-law of the Court. Relying on the well-established practice of the European Court of Human Rights, which accepts that in theory an arbitrary decision not to refer a question for a preliminary ruling could infringe the right to a fair trial established in the ECHR, the author analyses whether constitutional courts of Germany, Czech Republic, Spain and Lithuania have elaborated the equivalent practice and if so, whether they have established any specific criteria that national courts are required to bring into play in order to substantiate the decision not to refer.*

**Keywords:** *European Union law, preliminary ruling, state liability, national courts, Constitutional courts, right to a fair trial, right to a lawful judge, Cifit.*

## Introduction

Although Article 267(3) of the Treaty on the Functioning of the European Union (hereinafter TFEU) clearly specifies that national courts acting as a final resort, against whose decisions there is no judicial remedy, are obliged to exercise the reference for a preliminary ruling, the Court of Justice of the European Union (hereinafter CJEU) in its practice developed the exceptions to the obligation. In the well-known *Cilfit* judgment and many cases that followed it the CJEU emphasised that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the CJEU, unless it has established that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court (*acte éclairé*) or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (*acte clair*)<sup>1</sup>. The settled case-law also indicates that national courts and tribunals remain, in any event, entirely at liberty to bring a matter before the CJEU if they consider it appropriate to do so<sup>2</sup>.

*Köbler*<sup>3</sup> and *Commission v. Italy*<sup>4</sup> cases seem to have opened the door to infringement proceedings against judicial breaches of EU law - a possibility which has always theoretically existed but has never led to a judgment against a Member State as a consequence of its judicial bodies' failure to fulfil an obligation under EU law<sup>5</sup>. Nevertheless, neither of those decisions guarantees the right to an individual claim for damages in case of infringement of the national court's duty to make a reference for a preliminary ruling. Under *Köbler* case, the infringement of the obligation to make a reference for a preliminary ruling is one of the most important criteria in assessing whether a state has to pay damages for the loss suffered by an individual, but the infringement itself is not sufficient to make a state liable under EU law<sup>6</sup>.

The inability of EU law to effectively defend the implicit right of an individual to have a question referred to the CJEU for a preliminary ruling provoked the discussion whether international human rights law and/or national constitutional law provides for legal protection<sup>7</sup>. The question on the legal consequences for the infringement of

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

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

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

4 Case C-129/00, *Commission v. Italian Republic* [2003] ECR I-14637.

5 Garcia, R. A. Spanish Constitutional Court. Judgement 58/2004, of 19 April 2004. Tax on the use of gambling machines. "Recurso de amparo" (individual appeal for constitutional protection) and EC preliminary ruling. Failure to request an EC ruling considered as a violation of the fundamental right to effective judicial protection. *Common Market Law Review*. 2005, 42: 547.

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

7 Broberg, M.; Fenger, N. *Preliminary reference to the European Court of Justice*. Oxford: Oxford University Press, 2010, p. 271–272; Hofstotter, B. *Non-compliance of National Courts. Remedies in European Community Law and Beyond*. The Hague: T.M.C. Asser Press, 2005, p. 134; Schermers, H. G.; Waelbroeck, D. F. *Judicial protection in the European Union*. The Hague, London, New York: Kluwer Law International,

the obligation to make a reference to the CJEU under the European Convention on Human Rights (hereinafter ECHR) was discussed in the article “State liability for the infringement of the obligation to refer for a preliminary ruling under the European Convention on Human Rights”. After analysing the practice of the European Court of Human Rights (hereinafter ECtHR), which admits that an arbitrary decision not to refer a question for a preliminary ruling could amount to the infringement of the right to a fair trial guaranteed by Article 6 ECHR, the author concluded that the standard of arbitrariness was directly linked to the obligation to motivate decisions, the ambit of which depended on the circumstances of each case and the arguments chosen by national courts in order to substantiate a non-referral. However, the mere reference to the exceptions from the obligation to refer a question for a preliminary ruling formulated in *Cilfit* case is sufficient to escape the arbitrariness of the decision not to initiate preliminary ruling proceedings<sup>8</sup>.

This article focuses on the second point of the discussion, i.e. the possible consequences of a refusal to make a reference to the CJEU for a preliminary ruling under national constitutional law, more specifically the analysis of the case-law of the German Federal Constitutional Court, the Czech Constitutional Court and the Spanish Constitutional Court. Furthermore, as the Lithuanian Constitutional Court has itself made a reference, the Article seeks to establish whether the Constitutional Court has also developed its practice in the field under discussion. This article is the third article from the cycle of the articles on the legal consequences for disregarding the obligation to make a reference for a preliminary ruling to the CJEU under EU, international and national law and aims to establish whether in case of violation of the obligation to make a reference a person can rely on constitutional guarantees and protect his/her rights by employing national legal measures.

## 1. The Approach Taken by the German Federal Constitutional Court

The most extensively elaborated case-law related to the failure to make a reference to the CJEU has been developed by the German Federal Constitutional Court, which has used Article 101 of the Basic Law, establishing the right to a lawful judge, as a way of securing citizens’ access to the CJEU<sup>9</sup>. The CJEU was recognised to be the lawful judge within the meaning of Article 101(1) of the Basic Law<sup>10</sup>. Thus, it constitutes a denial

2001, p. 272; Breuer, M. State liability for judicial wrongs and Community law: the case of Gerhard Köbler v. Austria. *European Law Review*. 2004, 29: 243, 251; Kavalnė, S.; Valančius, V. *Europos Sąjungos teisės įgyvendinimas Lietuvos administracinėje teisėje*. Vilnius: VĮ Registrų centras, 2009, p. 377.

8 Valutytė, R. State Liability for the Infringement of the Obligation to Refer for a Preliminary Ruling under the European Convention on Human Rights. *Jurisprudencija*. 2012, 19(1): 7–21.

9 Derlén, M. *Multilingual Interpretation of European Union Law*. The Netherlands: Kluwer Law International, 2009, p. 87.

10 This wording was for the first time mentioned in the *Solange II* judgment (1986). According to the decision, the CJEU is a sovereign judicial body that renders final judgments independently. Since the CJEU enjoys

of the lawful judge if a German court does not comply with its obligation to make a submission to the CJEU in preliminary ruling proceedings according to Article 267(3) TFEU<sup>11</sup>.

However, it is not the case that all violations of the obligation under Union law to make a submission immediately constitute a breach of Article 101(1)(2) of the Basic Law. The Federal Constitutional Court reviews only whether the interpretation and application of the rule of jurisdiction of Article 267.3 TFEU, on reasonable construction of the concepts determining the Basic Law, no longer appears *to be comprehensible and are manifestly (obviously)<sup>12</sup> untenable<sup>13</sup>*. In the Court's view, which is shared by the author, the EU law does not require the Constitutional Court to fully review the violation of the obligation to make a submission under Union law and to take the case-law on Article 267(3) TFEU of the CJEU as an orientation for the following reasons.

Firstly, a court adjudicating at last instance according to Article 267(3) TFEU is by definition the last judicial body before which individuals may assert the rights conferred on them by Union law<sup>14</sup> and the Federal Constitutional Court apparently does not have this status. The Federal Constitutional Court, who only acts as a guardian over adherence to the boundaries of this latitude, in turn does not become the "supreme court of review for submissions"<sup>15</sup>. The review conducted by the Federal Constitutional Court does not

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a judicial monopoly in the decision-making regarding the interpretation and the validity of EU law in the preliminary ruling, it represents a lawful judge in this sphere. The reasoning is the following: if there is an obligation of the CJEU to participate in certain proceedings and the national court concerned omits this obligation by failure to bring the case before the CJEU, a violation of the right to lawful judge is present. However, a mere procedural defect is not sufficient, the violation of the obligation must be qualified, i. e. arbitrary and non justifiable. Navrátilova, M. The preliminary ruling before the constitutional courts [interactive]. [accessed on 10-05-2012]. <<http://www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/navratilova.pdf>>.

- 11 Order of the Second Senate of the Federal Constitutional Court, BVerfGE 73, 339 2 BvR 197/83 vom 22.10.1986; Order of the Second Senate of the Federal Constitutional Court, BVerfG, 2 BvR 2661/06 vom 6.7.2010, Absatz-Nr. (1-116), para. 88 [interactive]. [accessed on 10-05-2012]. <[http://www.bverfg.de/entscheidungen/rs20100706\\_2bvr266106en.html](http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html)>. The Austrian Constitutional Court also admitted that a violation of the duty to make a preliminary reference under Article 267(3) TFEU induced a violation of the right to a lawful judge envisaged in Article 83(2) B-VG. Similarly to the German Federal Constitutional Court, the Austrian counterpart declared that the CJEU had to be considered the lawful judge in the proceedings where the interpretation of primary and secondary EU law was needed. From the Constitutional Court's point of view, a national court violating its duty to refer a question to the CJEU under Article 267(3) TFEU is breaching the legal system of responsibilities including Article 267 TFEU; this national court is denying the parties their lawful judge insofar as the CJEU cannot decide a question being reserved to its (exclusive) jurisdiction. Such an official failure infringes upon the legal responsibilities and therefrom causes a violation of Article 83 (2) B-VG. Marktler, T. The European Court of Justice as Lawful Judge. Austrian Constitutional Court Judgement from December 11th, 1995 VfSlg. 14.390. 2008, 2(4): 299 [interactive]. [accessed on 10-05-2012]. <<http://www.internationalconstitutionallaw.net/download/5076fae7c6dcfd3418cf83c6de9824ca/Marktler.pdf>>.
- 12 Order of the First Senate of the Federal Constitutional Court, BVerfG, 1 BvR 1631/08 vom 30.8.2010, Absatz-Nr. (1-69), para. 48 [interactive]. [accessed on 10-05-2012]. <[http://www.bverfg.de/entscheidungen/rk20100830\\_1bvr163108en.html](http://www.bverfg.de/entscheidungen/rk20100830_1bvr163108en.html)>.
- 13 Order of the Second Senate of the Federal Constitutional Court, BVerfG, 2 BvR 2661/06 vom 6.7.2010, Absatz-Nr. (1-116), para. 88, *supra* note 11.
- 14 *Ibid.*, para. 89.
- 15 *Ibid.*

protect against misapplications of law due to mistakes or misunderstandings, but only against arbitrariness<sup>16</sup>. Secondly, Article 267(3) TFEU does not demand an additional remedy to review compliance with the obligation to make a submission<sup>17</sup>, thus again the German Constitutional Court does not have any obligation to fully review the violation of the obligation to make a reference to the CJEU.

The German Constitutional Court gives a quite clear and extensive explanation of the criteria of arbitrary conduct of national courts in respect of violation of the obligation to refer a question for preliminary ruling. Under its well-established practice, the obligation to make a submission according to Article 267(3) TFEU is dealt with in a *manifestly untenable manner* particularly if an action of a national court or its failure to act falls into one of the three categories of the situations, distinguished by the German Constitutional Court:

1. *Fundamental disregard of the obligation to make a reference* - a court deciding on the merits does not at all consider making a submission despite the question of EU law being – in its view – material to the ruling, although it itself has doubts as to the correct answer to the question<sup>18</sup>. This situation can be labelled as the ignorance approach since a national court does not even discuss the possibility of a preliminary ruling despite admitting the absence of *acte clair*<sup>19</sup>.

2. *Deliberate deviation without willingness to make a submission* - the court of the principal proceedings deliberately deviates in its final instance ruling from the case-law of the CJEU regarding questions which are material to the ruling and nonetheless does not make a submission or refrains from making a renewed submission<sup>20</sup>. This category can be called as rebellious approach since a national court intentionally departs from the case-law of the CJEU<sup>21</sup>.

3. *Unjustifiable treatment of the obligation to refer due to incompleteness of the case-law*, or “*acte clair* approach<sup>22</sup>” - the court deciding on the merits of the principal proceedings makes an unintentional mistake of interpretation of substantive law which conditions its manifest violation of obligation to refer under Article 267(3) TFEU. In this regard the decisive factor is not primarily the justifiability of the non-constitutional courts’ interpretation of substantive EU law relevant to the case in question, but the justifiability of the courts’ treatment of the obligation to refer under Article 267(3) TFEU<sup>23</sup>. If material case-law of the CJEU is not yet available with regard to a question of EU law that is relevant to the ruling, or if existing case-law has possibly not yet exhaustively

16 Derlén, M., *supra* note 9, p. 88.

17 Order of the Second Senate of the Federal Constitutional Court, BVerfG, 2 BvR 2661/06 vom 6.7.2010, Absatz-Nr. (1-116), para. 89, *supra* note 11.

18 Derlén, M., *supra* note 9, p. 88.

19 *Ibid.*

20 Order of the Second Senate of the Federal Constitutional Court, BVerfG, 2 BvR 2661/06 vom 6.7.2010, Absatz-Nr. (1-116), para. 89, *supra* note 11.

21 Derlén, M., *supra* note 9, p. 88.

22 *Ibid.*

23 Order of the Second Senate of the Federal Constitutional Court, BVerfG, 2 BvR 2661/06 vom 6.7.2010, Absatz-Nr. (1-116), para. 90, *supra* note 11.

answered the question which is material to the ruling, or if a further development of the case-law of the CJEU not only appears as a distant possibility, Article 101(1)(2) of the Basic Law is only violated if the court of the principal proceedings at final instance has unjustifiably transgressed the evaluation framework necessarily available to it in such cases<sup>24</sup>. This may particularly be the case if possible counterviews to the question of EU law that is material to the ruling are to be clearly preferred over the opinion put forward by the court. A breach of Article 101(1)(2) of the Basic Law is therefore already to be negated in such cases if the court has answered the question, which is material to the ruling in a manner that is at least justifiable<sup>25</sup>.

The first two situations are to be seen as clear violations of the duty to request a preliminary ruling. However, the third situation will only be seen as a violation of a preliminary reference procedure, and thereby Article 101 of the Basic Law, if the violation is proved to be clear (obvious)<sup>26</sup>.

The most recent illustration of the violation of the right to a lawful judge falling into the third category is the Order of 30 August 2010. Assessing whether there was an arbitrary violation of the obligation to initiate preliminary ruling proceedings, the Court took into account, firstly, the attitude of the national courts in the principal proceedings towards application of the EU law, and, secondly, the likelihood of counterviews to the interpretation adopted by the court deciding on the merits. As to the attitude of the national courts, the Federal Constitutional Court reminded that the non-constitutional court's reasoning had to demonstrate that it had sufficiently taken EU law into account, and thereby enabled a review by the Federal Constitutional Court under the standard of Article 101(1)(2) of the Basic Law. Unfortunately, in the case at issue there was no indication that the Federal Court of Justice considered the relevant EU law and a reference to the CJEU at all. As to the counterviews, the Federal Constitutional Court noticed that there were strong arguments in favour of an obligation to refer<sup>27</sup>. At the very least defensible opinions different from that held by the Federal Court of Justice certainly did not appear impossible<sup>28</sup>. Besides the text of the Directive, the Federal Constitutional Court also took into account different legal regulation in the Member States and the fact that with regard to the Spanish legislation a reference for a preliminary ruling was already pending at the CJEU<sup>29</sup>.

The opposite example, where the non-referral was found to be justifiable and there was no violation of the complainant's right to its lawful judge, was the Order of 6 July

24 Order of the Second Senate of the Federal Constitutional Court, BVerf, 2 BvR 2661/06 vom 6.7.2010, Absatz-Nr. (1-116), para. 90, *supra* note 11; Order of the First Senate of the Federal Constitutional Court, BVerfG, 1 BvR 230/09 vom 25.2.2010; Order of the First Senate of the Federal Constitutional Court, BVerfG, 1 BvR 1631/08 vom 30.8.2010, Absatz-Nr. (1-69), para. 48, *supra* note 12.

25 Order of the Second Senate of the Federal Constitutional Court, BVerfG, 2 BvR 2661/06 vom 6.7.2010, Absatz-Nr. (1-116), para. 90, *supra* note 11.

26 Derlén, M., *supra* note 9, p. 88.

27 Order of the First Senate of the Federal Constitutional Court, BVerfG, 1 BvR 1631/08 vom 30.8.2010, Absatz-Nr. (1-69), para. 50, *supra* note 12.

28 *Ibid.*, para. 51–53.

29 *Ibid.*, para. 58.

2010<sup>30</sup>. The Federal Constitutional Court took into account the content of the relevant provisions, good faith and willingness of the Federal Labour Court to apply the EU law and came to the conclusion that “the national court could particularly not have had to bring about a preliminary ruling because of the incomplete nature of the case-law of the CJEU”<sup>31</sup>.

After the discussion of the abovementioned issues the Constitutional Court concluded that the duty to refer a question to the CJEU would not arise solely because a party claimed that *acte clair* was not at hand. Rather, the German court in question would have to try, according to objective criteria, whether the EU provision in question could reasonably allow more than one interpretation, as judged from the perspective of an experienced lawyer. The Court would also have to take into consideration the EU law as a whole and its goals and development at the time of the decision<sup>32</sup>.

To sum up, the establishment of the specific groups of arbitrary conduct having specific characteristics clearly shows that the Federal Constitutional Court has developed its own criteria and *Cilfit* exceptions only serve as the first filter. While deciding whether to make a reference or not the German national courts of last instance have to evaluate all circumstances of the case, the goal and content of a relevant EU legal act, the existing practice of the CJEU and its possible development, and besides that, the practice of other states and possible counterexamples.<sup>33</sup>

## 2. The Approach Taken by the Czech Constitutional Court

For a long time the Czech Constitutional Court was unwilling to include the evaluation of acts of national courts concerning the failure to refer to the CJEU for a preliminary ruling. The Constitutional Court repeatedly stressed the obligation of ordinary courts and civil administration to respect the supremacy of EU law over the Czech legal norms and to individually evaluate any (in)compatibilities of the Czech law with an EU norm. There, the Constitutional Court explicitly declared the lack of its own competence to intervene in the decisions of ordinary judiciary to (non-)refer to the CJEU<sup>34</sup>.

30 Order of the Second Senate of the Federal Constitutional Court, BVerfG, 2 BvR 2661/06 vom 6.7.2010, Absatz-Nr. (1-116), para. 87, *supra* note 11.

31 *Ibid.*, para. 92.

32 Derlén, M., *supra* note 9, p. 88.

33 In contrast to its German counterpart, the Austrian Constitutional Court has elaborated no rules specifying the arbitrariness in the failure to refer the matter to Luxembourg but applies the *Cilfit* criteria in a rather modified way – the application of the EU law must not be in the apparent conflict with the stable interpretation provided by the CJEU. Navrátilová, M., *supra* note 10; Marktler, T., *supra* note 11, p. 299–300. A national court only violates its duty to make a preliminary reference to the CJEU under Article 267(3) TFEU if it has doubts about the compatibility of interpretation of the national law and the applicable EU law (and does not refer). Furthermore, different from the German Federal Constitutional Court, the Court has also made it clear that not only a serious violation of the obligation to refer, but rather any such violation leads to the infringement of the right to a lawful judge. Marktler, T., *supra* note 11, p. 299–300; Dourado, A. P.; da Palma Borges, R. (eds). *The Acte Clair in EC Direct Tax Law*. The Netherlands: IBFD, 2008, p. 208.

34 Šlosarčík, I. Czech Republic and the European Union Law in 2004–2006. *European Public Law*. 2007, 13(3): 377.

However, the Court agreed to intervene when the breach of EU law was flagrant, and especially when ordinary courts disregarded a cogent provision of EU law in such a way that the rule of law was endangered<sup>35</sup>. In 2009, the Czech Constitutional Court joined its counterparts in Germany and Austria stating that the violation of the right to one's statutory judge came about in the case where a Czech court (against whose decision there was no longer any further remedy afforded by sub-constitutional law) applied EU law but failed, in an arbitrary manner, that is, in conflict with the principle of the law-based state (Article 1 (1) of the Constitution of the Czech Republic), to refer a preliminary question to the CJEU<sup>36</sup>.

The Czech Constitutional Court created its own rules to safeguard the right to one's statutory judge which were not suitable for evaluation of failure to submit a preliminary ruling as an infringement of the right to one's statutory judge. Therefore, the Constitutional Court has elaborated its own sub-group of the specific criteria within the right to a lawful judge, which are applicable uniquely to the question at issue.<sup>37</sup>

Taking as an example the well-established practice of the German Federal Constitutional court, the Czech Constitutional Court elaborated the standard of arbitrary violation of the obligation to refer for a preliminary ruling. The Constitutional Court asserts that it deems as arbitrary action such conduct by a court of last instance applying a norm of EU law where that court *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 ECJ has elaborated in its jurisprudence<sup>38</sup>.

In the Constitutional Court's view, the bare opinion of a court, that it considers the interpretation of the given problem to be obvious, cannot be considered as due substantiation; such an assertion does not suffice, particularly in a situation where the court's opinion has been contested by a party to the proceeding. The substantiation is insufficient also where it fails to duly explain how and why the solution chosen comports with the purpose of a relevant EU legal norm. This is the case where the court omits to construe the peremptory rule contained in Article 267 TFEU, thereby denying specific

35 Topidi, K.; Morawa, A. H. E. *Constitutional evolution in Central and Eastern Europe – expansion and integration in the EU*. Great Britain: Ashgate Publishing, 2011, p. 100.

36 Judgment of the Constitutional Court of the Czech Republic of 2009/01/08 II. ÚS 1009/08, para. 21 [interactive]. [accessed on 10-05-2012]. <<http://www.concourt.cz/clanek/2-1009-08>>. The Constitutional Court thus implicitly adopted the approach of the Slovak Constitutional Court that at first had declined to take over the obligations of ordinary courts to submit a preliminary question to the CJEU when required by EU law in light of the CJEU's case law on Article 267 TFEU, and then, to rule on conditions which obliged ordinary courts to submit a preliminary question. The Court used the same reasoning as the Slovak Constitutional Court in postulating that in laying down conditions of referral for the ordinary courts, the Constitutional Court would have replaced the CJEU, which was the only court with jurisdiction over this matter. However, and again in accord with its Slovak counterpart, the Czech Constitutional Court felt obliged to intervene when disregard for EU law was perceived to be such scale as to effectively breach the Czech constitutionality. Topidi, K.; Morawa, A. H. E., *supra* note 35, p. 101.

37 Navrátilova, M., *supra* note 10.

38 Judgment of the Constitutional Court of the Czech Republic of 2009/01/08 II. ÚS 1009/08, para. 22, *supra* note 36.

parties the right to their statutory judge guaranteed by Article 38(1) of the Charter<sup>39</sup>. In other words, it is a case where the court *entirely fails* to take into consideration the existence of the peremptory rule contained in Article 267 TFEU, which is binding on it.

The *Pfizer* case, where the petitioner blamed the Czech Supreme Administrative Court for not submitting a preliminary question to the CJEU, exemplifies the application of the criteria in practice. The claimant's objection was based on their right to a fair process under Article 36(1) of the Czech Charter of Fundamental Rights. The violation consisted of the fact that the court declined to join Pfizer as a party to the administrative proceeding on the registration of a medicinal product of its competitors. Pfizer considered the product in hand to copy its own product, which resulted in a breach of property rights. The Supreme Administrative Court confirmed the previous decisions of the administrative institution and the lower court, which declined to join Pfizer as a party in the administrative proceeding, basing its arguments on a rather clear provision of national law<sup>40</sup>.

In the view of the Constitutional Court, the court's fundamental error was the fact that, in interpreting EU law, it shed no light on the jurisprudence of the CJEU<sup>41</sup> and did not deal in a sufficient manner with the interpretation of the aims pursued by the given Directive<sup>42</sup>. In its decision the Supreme Administrative Court considered the interpretation of EU law to be obvious and clear, but did not concern itself in the least with CJEU jurisprudence<sup>43</sup>. Neither it contained a reference to the exceptions which the CJEU had elaborated on the obligation of the courts of last instance to refer preliminary questions<sup>44</sup>, nor it did take into consideration the argument the complainant made before the Prague Municipal Court which drew attention to the fact that the jurisprudence of the Swedish Supreme Court in Stockholm resolving the issue of participation spoke in favour of the complainant's interpretation<sup>45</sup>.

Those findings enabled the Constitutional Court to draw the conclusion that the Supreme Administrative Court violated the right to a statutory judge when it arbitrarily failed to address itself to the CJEU with a preliminary question regarding the complainant's participation in the given proceeding. The national court also failed both to explain and to substantiate, with regard to the existence of the peremptory rule contained in Article 267 TFEU, why its interpretation of the pertinent norms of EU law was quite obvious and why its chosen solution, consisting in the refusal to accord participation in the registration proceeding, comported with the intent of the EU norm<sup>46</sup>.

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39 Judgment of the Constitutional Court of the Czech Republic of 2009/01/08 II. ÚS 1009/08, para. 22, *supra* note 36.

40 Topidi, K.; Morawa, A. H. E., *supra* note 35, p. 100.

41 Judgment of the Constitutional Court of the Czech Republic of 2009/01/08 II. ÚS 1009/08, para. 26, *supra* note 36.

42 *Ibid.*, para. 25.

43 *Ibid.*, para. 26.

44 *Ibid.*, para. 27.

45 *Ibid.*, para. 27.

46 *Ibid.*, para. 30.

The abovementioned legal opinion leads to the conclusion that the Constitutional Court sets a very high standard of substantiation of the decision not to refer a question for a preliminary ruling, differently from the ECtHR, which requires merely the reference to the *Cilfit* criteria. Mentioning the *Cilfit* criteria is just half way of what has to be done to satisfy the Czech Constitutional Court, willing to see a comprehensive report on the decision to opt for *acte clair* or *acte éclairé* arguments.

### 3. The Restrictive Approach of the Spanish Constitutional Court

The Spanish Constitutional Court, unlike its German and similarly to Czech counterparts, was for the long time refusing to interpret a failure to make a preliminary reference as a violation of the right to lawful judge<sup>47</sup>. The Constitutional Court considered that the interpretation and application of the EU law was a question of no constitutional relevance and that it had to be decided by ordinary courts. This jurisprudence led the Constitutional Court not to control the proper application of EU law by national bodies, leaving such application to the ordinary courts. Therefore, the constitutional court neither protected nor revised those situations where national courts failed to refer a question to the CJEU despite the fact that they had to do so<sup>48</sup>.

Nevertheless, in recent years the Spanish Constitutional court has revised its consolidated doctrine on the constitutional relevance of the application of EU law to domestic law. In two cases (Decision 58/2004 of 19 April and Decision 194/2006 of 19 June) the Constitutional Court considered that the non-application of domestic law based on EU law requirements might constitute a breach of due process if it was supported by a wrong interpretation of EU requirements and a preliminary reference had not been previously made<sup>49</sup>.

The decision 58/2004 of 19 April 2004 sheds more light on the application of the set conditions in practice. It concerned a judgment of the Administrative Chamber of the High Court of Justice of Catalonia, which refused to apply a State Act and a Regional Act, without previously requesting a preliminary ruling on interpretation from the CJEU. When assessing the situation the Constitutional Court emphasised that the existence or inexistence of doubt could not be understood in terms of the judge's subjective opinion on a given interpretation of EU law (a subjective consideration), but in terms of an objective, clear and conclusive inexistence of any doubt in its application<sup>50</sup>. Thus, the criteria applied by the Supreme Court, as well as by the other judicial bodies

47 Navrátilova, M., *supra* note 10; Wessels, W.; Maurer, A.; Mittag, J. (eds.). *Fifteen Into One? The European Union and Its Member States*. Manchester: Manchester University Press, 2003, p. 198.

48 Dourado, A. P.; da Palma Borges, R., *supra* note 33, p. 447.

49 *Ibid.*

50 Auto 58/2004 de Tribunal Constitucional de España (Sección Segunda), de 19 de abril de 2004, para. 13. See also: Auto 263/2007 de Tribunal Constitucional de España (Sección Segunda), de 25 de mayo de 2007; Auto 259/2007 de Tribunal Constitucional de España (Sección Primera), de 24 de mayo de 2007. Auto 256/2007 de Tribunal Constitucional de España (Sección Primera), de 23 de mayo de 2007. Auto 219/2007 de Tribunal Constitucional de España (Sección Segunda), de 18 de abril de 2007.

that concurred in finding that the incompatibility did not exist, had to raise sufficient doubts (in whoever might have understood otherwise) to generate the obligation (for the judicial body not agreeing with that view) to request a preliminary ruling laid down in Article 267 TFEU before disapplying the domestic law due to its supposed contradiction with EU law. The Constitutional Court highlighted in this respect that the existence of a prior ruling by the CJEU does not release a judicial body from the need to request a new preliminary ruling when it uses interpretative criteria in a manner that leads to a conclusion different from that expressed by the other judicial bodies<sup>51</sup>.

At this point, different from the practice developed by other constitutional courts, a *recurso de amparo* would be possible not against a breach of the obligation in itself to request a EU preliminary ruling (provided that the conditions for such obligation are met pursuant to Article 267 TFEU, as interpreted by the CJEU), but against the arbitrary or clearly unreasonable, or patently erroneous grounds used in deciding on the merits of the case<sup>52</sup>.

#### 4. Consequences of Non-Referral under the Lithuanian Law

Despite the fact that the Constitutional Court of Lithuania, which exercises abstract control of constitutionality of norms, has repeatedly analysed the content of the right to a fair trial from various angles, possible violation of the right caused by the failure to bring a matter before the CJEU has never been at issue. The most probable reason for the lack of the practice similar to the one developed by the Czech, German or Spanish Constitutional Courts is the absence of individual constitutional complaint the introduction of which has been discussed for a number of times without a success<sup>53</sup>.

On the other hand, even though individuals cannot address the Constitutional Court of Lithuania directly, the right to a fair trial allegedly infringed by the failure to refer to the CJEU for a preliminary ruling theoretically could be defended before courts of general jurisdiction, which under the Constitution have the obligation to guarantee effective defence of constitutional rights and freedoms of a person and award damages, if there was an infringement of the right. The conditions for implementation of the obligation to compensate damage caused by unlawful actions of courts are laid down in Article 6.272 of the Civil Code in the version of 18 July 2000<sup>54</sup>, which is applied along with the general provisions of civil liability provided for in Chapter XIII of Section I of the Code.

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51 Garcia, R. A., *supra* note 5, p. 547.

52 *Ibid.*

53 The Law of the Republic of Lithuania amending and supplementing Article 366(1)(9) of the Code of Civil Procedure. *Official Gazette*. 2002, No. 36-1340 [interactive]. [accessed on 10-05-2012]. <[http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=357980](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=357980)>.

54 Civil Code of the Republic of Lithuania No. VIII-1864 of 18 July 2000. *Official Gazette*. 2000, No. 74-2262.

Furthermore, the standard of substantiation required in such a case could be drawn from the Constitutional Court's decision "*On the applying to the CJEU*" of 8 May 2007, whereby the Court decided to make a reference to the CJEU. Presuming the importance of the preliminary ruling procedure, the Constitutional Court asserted that it had the right to refer a question for a preliminary ruling because its decisions had *erga omnes* impact on the whole practice of the application of laws, they were final and not subject to appeal. Furthermore, what is of the utmost importance to the discussion, it went on to analyse whether Article 20 of Directive 2003/54/EC concerning common rules for the internal market in electricity<sup>55</sup> is clear enough to enable it to interpret the national legal provisions. Assessing the clarity of the provision, the lack of which made the Court to refer to the CJEU, the Constitutional Court took into account the other provisions and the preamble of the Directive, as well as to the position of the representatives of the party concerned, the specialists and the European institutions, namely the European Commission<sup>56</sup>. It is thought that the same standard of substantiation could be employed by the Constitutional Court in case of decision not to initiate a preliminary ruling procedure.

The detailed substantiation provided by the Constitutional Court explaining the missing clarity of the provision at issue as a background for making a reference to the CJEU for a preliminary ruling presupposes that the same requirement could be set for national courts of last instance having the obligation to make a reference under EU law. If this is the case, then obviously individuals would benefit more from making the second round (submitting a claim for damages) in national courts, then referring directly to the ECtHR, which sets a rather low standard of substantiation merely requiring the reference to the *Cilfit* criteria.

## Conclusions

1. Although the constitutions of the abovementioned states do not explicitly guarantee the right to have a question submitted to the CJEU for a preliminary ruling, this right forms a constituent part of the right to a fair trial or the right to a lawful judge, or a statutory judge, which is guaranteed at constitutional level in all of the countries. As the function of the constitutional courts is to observe constitutionality, they do not check whether there has been an infringement of Article 267 TFEU and whether national courts have not erred in applying the *Cilfit* criteria; the guardians of constitutions skip the *Cilfit* rationale in favour of a more specific "lawful" judge reasoning.

2. The analysis of the jurisprudence of the German, Czech and Spanish constitutional courts shows that the basis for the violation of the right to a fair trial (a lawful judge or a statutory judge) in all jurisdictions is an arbitrary infringement attributable to a national court. However, the nature of infringement and the level of

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55 Constitutional Court ruling of 8 May 2007 "*On the applying to the CJEU*" [interactive]. [accessed on 10-05-2012]. <<http://www.lrkt.lt/dokumentai/2007/d070508.htm>>.

56 *Ibid.*, Part III, para. 1-6.

substantiation required from a national court can differ. In the practice of the German and Czech constitutional courts arbitrary conduct is related to unjustifiable treatment of the obligation to refer under Article 267(3) TFEU, in contrast to the case-law of the Spanish Constitutional court, where arbitrary, clearly unreasonable, or patently erroneous interpretation of a substantive legal provision, which conditions a non-referral, forms the basis for infringement of the right to a due process.

3. As the Lithuanian Constitutional Court lacks competence to decide on individual constitutional petitions, it has not had the possibility to rule whether under the Constitution a failure to make a reference to the CJEU constitutes a breach of the right to a fair trial and, if so, under what conditions. However, the possibility of recognition of a non-referral as the background for the infringement of the right is very likely, because of the obligations incumbent on the state to keep in line with the requirements envisaged in the ECHR and the developed practice in the field of the leading counterparts in other countries. This being the case, persons could defend the right before courts of general jurisdiction, which under the Constitution have the obligation to guarantee effective defence of constitutional rights and freedoms of a person and award damages.

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## TEISINĖS PASEKMĖS PAŽEIDUS PAREIGĄ KREIPTIS Į TEISINGUMO TEISMĄ PREJUDICINIO SPRENDIMO PAGAL VALSTYBIŲ KONSTITUCINĘ TEISĘ

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

Nors nei Vokietijos, nei Čekijos, nei Ispanijos konstitucijos tiesiogiai neįtvirtina asmens teisės reikalauti, kad nacionalinis teismas kreiptųsi prejudicinio sprendimo, ši teisė, kuri tiesiogiai siejasi su galutinės instancijos teismo pareiga kreiptis prejudicinio sprendimo, laikoma sudedamąja teisės į teisingą teismą, garantuojamos kiekvienos minėtų valstybių konstitucijos, dalimi. Kadangi konstitucinių teismų funkcija yra konstitucingumo užtikrinimas, jie netikrina, ar nesikreipdamas prejudicinio sprendimo nacionalinis teismas nepažeidė SESV 267(3) straipsnyje įtvirtintos pareigos pagal ETT suformuluotus kriterijus. Priešingai, konstitucijos sergėtojai analizuoja, ar nesikreipdama nacionalinė teisminė institucija nepažeidė asmenų teisės į teisingą teismą, ir taiko specifinius praktikoje suformuluotus kriterijus.

Vokietijos, Čekijos bei Ispanijos konstitucinių teismų praktikos analizė rodo, jog teisės į teisingą teismą pažeidimas galimas tik tuo atveju, jeigu nustatomas savavališkas galutinės instancijos teismo veikimas arba neveikimas. Vis dėlto veikimo ir neveikimo pobūdis, turintis įtakos pažeidimo buvimui, skiriasi. Vokietijoje ir Čekijoje teisė į teisingą teismą bus pažeista tik tuomet, jeigu bus nustatytas savavališkas pareigos kreiptis prejudicinio sprendimo pažeidimas, tuo tarpu Ispanijos konstitucinis teismas teisės į teisingą teismą pažeidimą sieja su savavališku, aiškiai nepateisinamu ar galimai klaidingu materialinės nuostatos išaiškinimu, kuris suponuoja sprendimo nesikreipti prejudicinio sprendimo priėmimą.

Priešingai nei Europos Žmogaus Teisių Teismo praktikoje, kurioje vyrauja tendencija, jog tam, kad Europos Žmogaus Teisių Konvencija nebūtų pažeista, pakanka minimaliai argumentuoto sprendimo, konstitucinių teismų jurisprudencija liudija griežtesnių standartų egzistavimą. Nesikreipti į Teisingumo Teismą nusprendęs nacionalinis teismas privalo įvertinti ne tik visas bylos aplinkybes, bet Teisingumo Teismo praktiką bei jos galimą vystymąsi, taip pat priešingas nuomones bei kitų valstybių praktiką ir tinkamai pagrįsti atsisakymą.

Lietuvos Konstitucinis Teismas neturi kompetencijos nagrinėti individualių konstitucinių skundų, taigi kol kas neturėjo galimybės suformuoti praktikos dėl pareigos kreiptis į Teisingumo Teismą nesilaikymo. Vis dėlto, atsižvelgiant į EŽTT praktiką ir kitų valstybių konstitucinių teismų jurisprudenciją, manytina, kad Konstitucinis Teismas pareigą kreiptis prejudicinio sprendimo traktuos kaip vieną iš teisingo teismo garantijų.

***Reikšminiai žodžiai:*** *Europos Sąjungos teisė, prejudicinis sprendimas, valstybės atsakomybė, nacionalinis teismas, konstitucinis teismas, teisė į teisingą teismą, teisė į teisėtą teisėjų, Cilfit.*

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