WHY NATIONAL COURTS MUST EXPLAIN NON-REFERRAL: THE PRELIMINARY RULING PROCEDURE AND THE DUTY TO GIVE REASONS

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The Court of Justice of the European Union (CJEU) portrays the preliminary ruling procedure (PRP) as a dialogue between itself and national courts in which parties play a secondary role. Under this conception, what duty does national judges have to justify when they decide not to request a preliminary ruling? While both the CJEU and the European Court of Human Rights (ECtHR) have case-law on this matter, the expectations placed on national courts remain unclear. This article clarifies what is expected by outlining the purpose, applicability and extent of the duty to give reasons for non-referral. It shows that the duty arises primarily in party-led initiatives before courts of last instance and that the required reasoning depends on the diligence of the party's request. This has constitutional implications: by highlighting the parties, the duty partially transforms the PRP, marking a departure from their traditional exclusion from the procedure. Yet, reliance on party requests leaves gaps in absence of such initiatives. This article argues that the duty should also be understood in the logic of Article 267(3) TFEU, requiring apex courts to justify non-referral on their own motion, in line with their obligation to refer.

1 INTRODUCTION

The Court of Justice of the European Union (CJEU) is still figuring out the role of the duty to give reasons within the preliminary ruling procedure (PRP). Nearly four decades after its seminal *CILFIT* judgment,[1] the Grand Chamber in *Consorzio Italian Management* introduced an obligation for national courts to provide reasons when deciding not to refer questions to the CJEU.[2] While this obligation may appear subtle, it has transformative potential, particularly in redefining the role of the parties in a procedure traditionally framed as a dialogue between courts.

However, this development did not occur in a legal vacuum. The recognition of a duty to give reasons echoes the long-standing case-law of the European Court of Human Rights (ECtHR),[3] as well as national practices in several Member States.[4] Yet, the CJEU's adaptation

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[1] Case 283/81 *CILFIT v Ministry of Health* EU:C:1982:335.

[2] Case C-561/19 *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* EU:C:2021:799. The expectations beforehand were sky high after the far-reaching proposals made by Advocate General (AG) Bobek suggesting amendments to the strict *CILFIT* doctrine. The judgment was thus highly anticipated, but the modifications eventually made to the 'keystone' of the EU legal order, were less of an earthquake than initially expected. Yet, one of the major aspects that came out of the judgment was the reasons-giving for non-referral.

[3] See *Ullens de Schooten and Rezabek v Belgium* Apps no 3989/07 and 38353/07 (ECtHR, 20 September 2011).

[4] Sweden became the first country in 2006 to enact such legislation. Jacques Pertek, *Le renvoi préjudiciel – Droit, liberté ou obligation de coopération des juridicions nationales avec la CJUE* (2nd edn, Bruylant 2021) 285.
The background of that law was the initiation by the Commission of an infringement proceeding.

of this obligation raises questions about how it fits within the distinct logics of judicial dialogue and human rights, and what this means for national courts navigating these overlapping legal frameworks.

The Strasbourg court has consistently examined whether domestic courts have failed to provide sufficient reasons when deciding against referral, viewing such instances as potential violations of the right to a fair trial under Article 6(1) ECHR. At the national level, constitutional courts connect the PRP to fundamental rights, such as access to a lawful judge and effective judicial protection.[5] These individual-centred perspectives contrast with the CJEU's traditional view of the PRP,[6] as a mechanism to ensure the uniform interpretation of EU law – one that operates '[…] by way of a non-contentious procedure excluding any initiative of the parties',[7] and not as a means of redress.[8]

Nevertheless, the introduction of a duty to give reasons, especially when approached from a human rights lens, challenges this conception. In *Consorzio Italian Management*, the CJEU linked Article 267 TFEU with Article 47(2) of the Charter when establishing a duty of reasons-giving for non-referral, and with this it is '[…] without a doubt, the [judgment] that, to date, has pushed the process of subjectivation of the preliminary ruling procedure the furthest' [my translation].[9] Still, the CJEU is yet to elaborate on the details of the duty to give reasons in this context.

This raises several questions: Who is the intended audience for this duty to give reasons? What are the legal requirements for the national courts to follow? Can the duty to give reasons serve both the rights of the parties and at the same time uphold the structure of Article 267(3) TFEU?[10]

The European Commission, Reasoned opinion 2003/2161 C(2004) 3899, October 13, 2004. For an overview of Member States encompassing a duty to give reasons for non-referral, see Seminar Organised by the Supreme Administrative Court of Sweden in Cooperation with ACA-Europe, 9-10 October 2023, 15 <https://aca-europe.eu/seminars/2023_Stockholm/2023_Stockholm_General_Report_en.pdf> accessed 1 December 2025, highlighting, although not limited to specific reasons-giving for the PRP, Bulgaria, Cyprus, Finland, Hungary and Sweden. See also Clelia 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' (2015) 16(6) German Law Journal 1663, 1683 mentioning the case-law of the Czech and the Slovenian Constitutional Courts.

[5] Clelia Lacchi, *Preliminary References to the Court of Justice of the EU and Effective Judicial Protection* (Larcier 2020) 130.

[6] See François-Xavier Millet, 'From the Duty to Refer to the Duty to State Reasons: The Past Present and Future of the Preliminary Ruling Procedure' (2023) 15 European Journal of Legal Studies 26: 'The duty to state reasons however alters the nature of the preliminary ruling procedure. The duty to state reasons is itself classically associated with private parties as a corollary of an individual's right to defense'. See also Jasper Krommendijk, '"Open Sesame!": Improving Access to the CJEU by Obliging National Courts to Reason Their Refusals to Refer' (2017) 42 European Law Review 46: 'These judgments [from the ECtHR] seem to change the nature of the preliminary reference procedure from a mechanism of inter-judicial co-operation to a mechanism safeguarding the individual right to a fair trial'.

[7] Case 44/65 *Hessiche Knappschaft v Maison Singer et Fils* EU:C:1965:122 page 971.

[8] *CILFIT v Ministry of Health* (n 1) para 9.

[9] Dominique Ritleng, 'Un droit au renvoi préjudiciel devant la Cour de justice de l'Union européenne? Éléments de réponse' in Dominique D'Ambra et al (eds), *Mélange en l'honneur de Florence Benoît-Rohmer Les droits de l'homme, du Conseil de l'Europe à l'Union européenne* (Larcier 2023) 433: 'La solution [*Consorzio Italian Management*] est sans aucun doute celle qui, à ce jour, a poussé le plus loin le processus de subjectivisation du renvoi préjudiciel'.

[10] See François-Xavier Millet, 'Cilfit Still Fits CJEU 6 October 2021, Case C-561/19, Consorzio Italian Management' (2022) 18(3) European Constitutional Law Review 533, 553; Compare Pertek (n 4) 285: 'Le control de l'obligation de coopération avec la Cour de justice pesant sur les juridictions statuant en dernier

When these layers of EU law, the ECHR, and national law meet in national courts to be applied, they do not blend seamlessly. It is arguably difficult for national judges to adhere to the rules because the legal framework is not entirely clear.[11] Hence, understanding the scope and extent of the duty in this context is necessary – not only to clarify the state of the law, but also to highlight what is at stake when national courts fail to provide reasons.

Generally, the obligation to provide a statement of reasons exists to serve several purposes,[12] among them the rights of the parties to the case. Accessing the justification for a decision is important for understanding how the legal sources were interpreted and then applied to the facts, to stay clear of arbitrariness.[13] In these ways, the duty to give reasons safeguards that the arguments employed by the parties have been properly considered by the judges, by forcing them to give reasons. Yet, the rationale for the giving of reasons goes beyond the parties[14] and includes the purposes of judicial accountability and control,[15] making it possible for the broader public, the higher courts, and the other branches, to scrutinize the exercise of power by the judiciary. Still, its precise function within the PRP remains unsettled and depends on whether one approaches it from the perspective of human rights law or from the logic of judicial accountability.

This article explores what the duty of reasons-giving for non-referral encompasses and its implications, as it emerges from both the ECHR and EU law. It makes two main contributions. First, it critiques the emphasis on party initiative as a trigger for the duty to apply, which narrows the duty's scope and create gaps, specifically where no reasoning is required in the absence of a party request. Instead, it argues that the duty should reflect the purpose of Article 267(3) TFEU, also applying *ex officio* when a question of EU law is raised in courts of last instance, to safeguard against misuse of *CILFIT*. In doing so, the duty would serve both individual rights and the uniformity of Union law. Second, the article shows that while the duty to give reasons does not transform the PRP into a party-driven remedy, it nonetheless signals a shift in that direction away from a court-driven dialogue.

The structure of the article is as follows: Section 2 examines the duty under the ECHR, including its aim, scope and extent needed for the reasoning. Given the link established by Article 52(3) of the Charter of Fundamental Rights of the European Union, with the ECHR setting the bar, it is both logical and necessary to begin with the Strasbourg framework. Furthermore, the case-law of the ECtHR is significantly more developed on this matter, also being authoritative for the national courts to follow.[16] Section 3 turns to EU law, how

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instance pourrait trouver appui sur l'émergence d'une exigence de motivation d'un refus de saisir la Cour d'une demande de décision préjudicielle'.

[11] Bernitz argues that the Swedish law has played out its role considering the legal development at the ECtHR. Ulf Bernitz, *Förhandsavgöranden av EU-domstolen: Utveckling av svenska domstolars hållning och praxis 2010–2015* (SIEPS 2016) 40.

[12] Gunnar Bergholtz, *Ratio et Auctoritas* (Juridiska föreningen i Lund 1987); Tom Bingham, 'Differences Between a Judgment and a Reasoned Award' (1997) 16 Arbitration International; Mathilde Cohen, 'When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach' (2015) 72 Washington & Lee Law Review 483, 504.

[13] Compare Harold Potter, *The Quest of Justice* (Sweet & Maxwell 1951) 13: 'If there is any truth in the aphorism that justice must not only be done but seen done, then a decision without reasons given must be regarded as undesirable, because it must be suspect since it may be arbitrary'. Cited also in Bingham (n 12).

[14] See Bergholtz (n 12) 363-364.

[15] Compare Bergholtz (n 12) 372; Cohen (n 12) 506-507.

[16] Although lacking *erga omnes* effect, the judgments of the Strasbourg Court become binding on the State party in the specific case under Article 46 ECHR. Nevertheless, national courts should follow the Court's

the duty is currently understood, and analyses the implications of adopting an approach that follows the ECtHR too closely. The article then concludes by reflecting on how the reasons-giving obligation redefines the PRP and the role of the parties within it.

2 ECHR – SETTING THE MINIMUM STANDARD OF REASONS-GIVING FOR THE PRP

2.1 INTRODUCTION

The ECHR has not left the '[…] backbone of the entire judicial system of the Union'[17] untouched. In 1993, the European Commission of Human Rights found that, although there is no absolute right to have questions referred, a refusal may violate Article 6(1) ECHR, especially '[…] when such a refusal appears to be arbitrary'.[18] The European Court of Human Rights (ECtHR) has since developed its case-law on this matter.[19]

In *Ullens de Schooten and Rezabek*, the Court clarified the connection between Article 6(1) ECHR and the PRP. The case concerned whether the French Court of Cassation and the Conseil d'État had breached Article 6(1) ECHR by declining to refer questions to the CJEU. The ECtHR emphasized that a non-referral may be arbitrary if '[…] the applicable rules allow no exception […]; 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'.[20] It is the duty to give reasons that has been at heart of the activities of the Strasbourg Court in this context.

Although the ECtHR may not be the first court that comes to mind when considering the PRP, it plays an important role in ensuring that national courts provide reasons when deciding not to refer. This obligation serves to protect the parties' right to a fair trial. As will become clear in the following section, this important, but rather limited approach to reasons-giving and the PRP, has consequences for the applicability of, and extent to, the duty to provide reasons.

The rationale for a specific duty to give reasons connected to the PRP is phrased similarly to the general duty to provide reasons by a court.[21] It is emphasized that such an obligation '[…] serves to enable the parties to understand the judicial decision that has

interpretation of the Convention generally to prevent violations of the ECHR. See Fiona Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave 2018) 186.

[17] Michal Bobek, 'Preliminary Rulings Before the General Court: What Judicial Architecture for the European Union?' (2023) 60(6) Common Market Law Review 1515, 1517.

[18] *Divagsa v Spain* App no 20631/92 (The European Commission of Human Rights, Decision of 12 May 1993) page 279.

[19] ECtHR, *ECHR-KS Key Theme Article 6 (Civil) The obligation to give reasons for a refusal to make a preliminary reference to the Court of Justice of the European Union* (2025); *Ullens de Schooten and Rezabek v Belgium* (n 3) para 59. For judgments where the ECtHR found a breach of Article 6(1) ECHR for a failure to give reasons for non-referral, see ECtHR, *Bio Farmland Betriebs S.R.L. v Romania* App no 43639/17 (ECtHR, 13 July 2021); *Schipani and others v Italy* App no 38369 (ECtHR, 21 July 2015); *Dhahbi v Italy* App no 17120/09 (ECtHR, 8 April 2014); *Rutar and Rutar Marketing D.O.O. v Slovenia* App no 21164/20 (ECtHR, 15 December 2022); *Sanofi Pasteur v France* App no 25137/16 (ECtHR, 13 February 2020); *Georgiou v Greece* App no 57378/18 (ECtHR, 13 March 2023); *Baltic Master Ltd. v Lithuania* App no 55092/16 (ECtHR, 16 April 2019).

[20] *Ullens de Schooten and Rezabek v Belgium* (n 3) para 59.

[21] Compare *Rutar and Rutar Marketing D.O.O. v Slovenia* (n 19) para 62 that also reference *Taxquet v Belgium* App no 926/05 (ECtHR, 13 January 2009) para 92. Compare David Harris et al, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (Oxford University Press 2023) 434-436.

been given […] [and] the purpose of demonstrating to the parties that they have been heard […]'.[22] It is also highlighted that it fulfils a broader purpose by 'foster[ing] public confidence in an objective and transparent justice system'.[23]

The ECtHR sets the minimum standards for how national judges must give reasons for not asking questions to the CJEU.[24] However, the right of the individual is subjected to certain conditions.

2.2 APPLICABILITY

The parties play an important role in how the duty is constructed within the ECHR, which is unsurprising given the nature of the Convention protecting individuals' human rights. For the duty to give reasons to activate, there must be some engagement from a party seeking a preliminary ruling.[25] Hence, according to the Convention, national judges are not obliged to state reasons for deeming a preliminary ruling unnecessary when no party has raised the issue. Also, the more precise and extensive the parties' requests and argumentation are, the higher the demands on the courts for the adequacy of their reasoning.

The scope of Article 6(1) is further limited to 'any criminal charge' and 'civil rights and obligations'.[26] Thus, the Convention right to have a reasoned decision covers only parts of the issues that fall within the scope of EU law. In addition, despite the wording of 'everyone' in Article 6(1), not all-party classes may initiate an individual application to the ECtHR.[27] While seemingly a trivial point, the duty to give reasons does not apply as a protection for public authorities.[28] Nevertheless, within the Swedish judiciary, public authorities represent the third most common category of parties seeking a preliminary ruling,[29] and under the Convention framework, these non-referral decisions did not have to be substantiated from this lens.

Although it is clear that courts against whose decision there is no judicial remedy under national law must give reasons for non-referral, it is uncertain whether this duty extends to

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[22] *Harisch v Germany* App no 50053/16 (ECtHR, 11 April 2019) para 33.
[23] *Rutar and Rutar Marketing D.O.O. v Slovenia* (n 19) para 62.
[24] For the minimum level of protection provided by the ECHR, see Janneke Gerards, 'Article 53 ECHR and Minimum Protection by the European Court of Human Rights' (2022) 3(4) European Convention on Human Rights Law Review 451.
[25] *John v Germany* App no 15073/03 (ECtHR, 13 February 2007) p. 5. The Court concluded that, although the applicant had specified a question for referral before the national court of appeal, his submissions to the Federal Court of Justice and the Federal Constitutional Court contained neither an explicit request nor any arguments supporting such a referral. Instead, the applicant merely asked those courts to uphold his motion as formulated before the court of appeal. The ECtHR found the complaint to be manifestly ill-founded. See also Anna Wallerman Ghavanini and Clara Rauchegger, 'Effective Judicial Protection before National Courts: Article 47 of the Charter, National Constitutional Remedies and the Preliminary Reference Procedure' in Matteo Bonelli et al (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart 2022) 49: '[…] ECtHR has taken the view that the obligation of the courts to provide reasons is activated by the substantiated request of a party to the proceedings'. See also Morten Broberg and Niels Fenger, 'If You Love Somebody Set Them Free: On the Court of Justice's Revision of the Acte Clair Doctrine' (2022) 59(3) Common Market Law Review 711.
[26] See Harris et al (n 21) 379-401.
[27] Article 34 ECHR excludes 'governmental organisations'. *Assanidze v Georgia* App no 71503/01 (ECtHR, 8 April 2004) para 148.
[28] ibid.
[29] Isak Nilsson, 'A Procedure for the Powerful? – Party Imbalances and the Decision Whether or Not to Refer' (draft).

lower courts. In *Ullens de Schooten and Rezabek v Belgium*, the Court stated that '[…] refusal by a domestic court to grant a request for such a referral may, in certain circumstances, infringe the fairness of proceedings – even if that court is not ruling in last instance […] [t]he same is true where the refusal proves arbitrary'.[30] This section of the judgment arguably extend the duty to give reasons to lower courts.[31] Yet, the statements should not be interpreted too extensively, as the Court attached 'in this context', implicitly referring to the obligation to refer for courts of last instance and the exceptions in *CILFIT*.[32] It is important to remember that almost all ECtHR judgments concerning the duty to give reasons and the PRP deal with courts of last instance. This is a natural consequence of the system's construction, as an applicant must exhaust all domestic remedies to bring a case before the ECtHR.[33] Therefore, if the issue has not been resolved at the national level, the complaint will typically be directed against the courts of last resort, having an obligation to refer.

Yet, some scholars argue that the ECtHR has imposed a duty to give reasons regardless of court level, based on its decision in *Chylinski v the Netherlands*.[34] However, that decision alone does not provide conclusive evidence for extending the obligation to state reasons to lower courts, but it may leave room for an interpretation in that direction. This is because the ECtHR does not make it fully clear whether the national courts involved were treated as courts falling under Article 267(3) TFEU or not. In that case, the applicants complained that the refusal to request a preliminary ruling from the CJEU violated Article 5(4) ECHR. Relying on *Ullens de Schooten and Rezabek v Belgium,* which encapsulates the duty to give reasons under Article 6 (1) ECHR, the applicants argued that this obligation also extends to detention proceedings. The Dutch courts involved were lower and intermediate courts, and it was specified that no appeal lay against their decisions, save for one exception. The decision of the ECtHR appears to omit the only lower court (the Rechtbank) whose decision could be appealed.[35] This suggests that the Strasbourg Court addresses the matter solely in respect of courts adjudicating at final instance, and not under Article 267(2) TFEU.

The ECtHR held that 'Article 6 § 1 requires that domestic courts give reasons, in the light of the applicable law, for any decision refusing to refer a question for a preliminary

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[30] *Ullens de Schooten and Rezabek v Belgium* (n 3) para 59.

[31] See Bernitz (n 11) at note 8, 35.

[32] *Ullens de Schooten and Rezabek v Belgium* (n 3) para 59. See *OTP BANKA d.d. and others v Croatia* App no 38541/21 (ECtHR, 8 November 2022) para 12 where the Court specifies that the 'gist of those principles [formulated in *Ullens de Schooten and Rezabek*] is that the domestic courts against whose decision there is no remedy are obliged […] to state the reasons why they have considered it unnecessary to seek a preliminary ruling […]'.

[33] For example, *Lawyers' association for protection of Human Rights v Italy* App no 7494/12 (ECtHR, 22 February).

[34] See Wallerman Ghavanini and Rauchegger (n 25) 49. Compare Krommendijk (n 6) 51: 'The ECtHR is stricter with respect to courts or tribunals of a Member State against whose decisions there is no judicial remedy. […] However, the case law of the ECtHR is not entirely clear yet, since the ECtHR has not ruled out the possibility that lower courts could infringe Article 6 ECHR when refusing to refer in *Ullens de Schooten* and indeed seemed to apply the *Dhahbi* reasoning to such lower courts in *Chylinski*'.

[35] See *Chylinski and Others v The Netherlands* App no 38044/12 (ECtHR, 21 April 2015) para 36: 'All three complained of the refusal of the Netherlands courts to put a preliminary question to the CJEU under Article 267 of the TFEU'. This sentence seems to include all of the national courts involved. See however para 41 that is more specific and seems to leave out the only court that allowed for appeal: 'All three applicants complained about the refusal of the Regional Court (applicant 1, applicant 3,) and the Court of Appeal (applicant 2)', implying that applicant 2 did not complain against the regional court, that in his case, allowed for leave to appeal. To add confusion, para 47 refers to 'The Court of Appeal in all three cases', while it was only applicant 2 that seemingly had his case at the court of appeal (Gerechtshof).

ruling' and then explicitly pointing out '[…] the specific context of the third paragraph of [Article 267 TFEU]', and the obligation to provide reasons deriving from the *CILFIT* exceptions. This case was ultimately declared manifestly ill-founded as the delivery of a preliminary ruling could not have been made in time and hence not affect the lawfulness of the applicant's detention. I can neither subscribe to, nor reject the view that *Chylinski v the Netherlands* strengthens the argument that the duty to give reasons for non-referral applies to all courts, and not only courts of last instance. It remains ambiguous whether *Chylinski* discusses only courts falling under Article 267(3) TFEU or whether it also extends to courts covered by Article 267(2) TFEU.[36]

Having said that, the rationale advanced by the ECtHR for why an individual has the right to a statement of reasons, namely, to know that the decision was not made on arbitrary grounds, should not be limited to courts of last instance. In addition, the general obligation to provide reasons for judgments is not specific to courts of last instance,[37] and it is difficult to envisage why the case would be different here.

Hence, I conclude that while courts of last instance are definitely subject to the duty to give reasons, this arguably applies to lower courts as well. What is expected in adequacy of the reasoning will however differ between courts under Article 267(2) and 267(3) TFEU, with the latter having higher demands.[38]

2.3 ADEQUACY OF THE REASONS

It should be noted that the ECtHR takes a formalistic approach to reasons-giving and does not focus on whether the domestic judges have correctly understood the EU law at hand.[39] Thus, the ECtHR's role is limited to checking if the underlying statement for the decision not to refer is arbitrary. This implies that a national court may fail to understand the relevant EU law, such as a provision being *acte clair* or not, but still follow the formal standards set by the ECHR.[40]

The requirement for a statement of reasons means that the complete absence of a national court's reasoning on the matter constitutes a violation of Article 6(1) ECHR.[41]

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[36] See also *Chylinski and Others v The Netherlands* (n 35) para 42: 'The question is, therefore, whether an obligation to put a preliminary question to the CJEU can arise under Article 5 § 4 of the Convention. For its part, the Court sees no reason to give a ruling on this point, since the applications are in any event inadmissible for the reasons given below'.

[37] Harris et al (n 21) 432: 'The right to a reasoned judgment applies to appellate, as well as lower court, decisions, although an appellate judgment may not have to be so fully reasoned'.

[38] Compare the difference to the general obligation to give reasons putting less emphasis on higher courts, ibid 432.

[39] *Georgiou v Greece* (n 19) para 23: 'although it is for the Court to carry out this check rigorously, it is not for it to examine any errors that the domestic courts may have made in the interpretation or the application of the relevant law'.

[40] This formalistic approach may risk translating into national courts approaching the duty to give reasons as a tick in the box exercise. Yet, this does not mean that they can escape responsibility within EU law, and national law.

[41] *Dhahbi v Italy* (n 19) para 33; *Georgiou v Greece* (n 19) para 25; *Rutar and Rutar Marketing D.O.O. v Slovenia* (n 19) para 63; *Schipani and others v Italy* (n 19) para 42. For criticism of this position by the ECtHR, see the Concurring Opinion of Judge Wojtyczek to the case of *Schipani and others v Italy* para 5 highlighting that the reasons-giving in the context of EU law is treated more favourably within the ECHR compared to other areas including criminal law and that this is not sufficiently justified. In addition, he is not convinced that the absence of a statement of reasons for refusing to refer automatically results in a violation of Article 6(1) ECHR, even concerning courts of last instance.

However, this requires that a party is advocating for a preliminary ruling. The fact that dismissing a party's request without any stated reasons would be arbitrary can be explained by the aims of the duty. Accordingly, '[…] it is […] not clear from the reasoning of the impugned judgment whether that question was considered not to be relevant or to relate a provision which was clear or had already been interpreted by the CJEU, or whether it was simply ignored […]'.[42]

The ECtHR's approach is not binary; not just any justification for rejecting a request to refer is sufficient. The Strasbourg court has clarified the adequacy needed for a statement of reasons to avoid arbitrariness. However, the bar is not set very high.

The ECtHR takes its point of departure for assessing the alleged violation of Article 6(1) ECHR by stating that '[t]he extent to which the duty to provide reasons applies may vary according to the nature of the decision. […] That is why the question of whether or not a court has failed to fulfil the obligation to provide reasons […] can only be determined in the light of the circumstances of the case […]'.[43] This means that there is no absolute duty for the national courts to respond in detail, point by point, to all the arguments that a party may put forward, but that it depends on the context of the case at hand.[44]

The main rule is that courts of last instance must engage with the *CILFIT*-criteria when rejecting a request for referral. This means national courts must at least mention which *CILFIT* exception is at hand, such as whether the questions are irrelevant to the outcome of the case,[45] *acte éclairé*, or *acte clair*.[46] National courts should also assume that they need to explain how these exceptions come into play, especially if the party's request is well substantiated. In *Dhahbi*, the ECtHR specified that the courts must '[…] indicate the reasons why […]' the *CILFIT* exceptions can be activated.[47] This implies describing for *acte éclairé* the case-law from the CJEU that is relied upon and how these relate to the present case. Additionally for *acte clair,* it needs to be explained why no reasonable doubt exists by going through the demanding test set out in *CILFIT* and amended in *Consorzio Italian management*.[48] In other situations, however, the ECtHR has found it acceptable for the national court of last instance to only mention an exception to the duty to refer, especially when party engagement is lacking. Indeed, a request with formulated questions, rather than just broadly stating that a preliminary ruling is needed, demands more from the national court, while the latter requires less engagement.

Yet, the dynamic between how substantiated the party claim is and whether the apex court must engage and explain how the *CILFIT* criteria comes into play, rather than just mentioning an exception, is not always easy to deduce. Hence, national courts should arguably stay on the safe side and not only pay lip service to *CILFIT*, but also clearly explain how they are exempted from referring. This is already expected under Article 267(3) TFEU, where they must correctly apply the exceptions from *CILFIT* and *Consorzio Italian management*, although the ECtHR does not control this.

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[42] *Dhahbi v Italy* (n 19) para 33.
[43] *Baydar v the Netherlands* App no 55385/14 (ECtHR, 24 April 2018) para 40.
[44] *Harisch v Germany* (n 22) para 34.
[45] See for example *Jesus Pinhal v Portugal* App no 48047/15 (ECtHR, 8 October 2024) [2025, referral to the GC] para. 212.
[46] *Ullens de Schooten and Rezabek v Belgium* (n 3) para 62.
[47] *Dhahbi v Italy* (n 19) para 31.
[48] See Bernitz (n 11) 38.

In *Somorjai v Hungary*, the majority found that the applicant had not requested a preliminary ruling in the petition for review before the national court of last instance, and deemed the case before the ECtHR as manifestly ill-founded.[49] The minority however emphasized that the majority conclusion was 'formalistic',[50] and determined that although there had not been an explicit claim, the applicant had raised the issue of the proper interpretation of EU law, which was the main issue in the review proceeding, and '[…] the arguable need to give at least some consideration to the *CILFIT* criteria was also raised through the applicant's argument concerning a violation of [Article 267 TFEU])', in respect to the judgment appealed against.[51] The case illustrates how the lack of party engagement requires less from national courts in terms of reasons-giving. However, the Court disagreed on where to draw the line for the threshold when a party has requested a preliminary ruling that subsequently demands more or less attention from national courts.

In *Baltic Master Ltd*, the ECtHR highlighted that 'the applicant's […] request […] was very specific […]' while the court of last instance had rejected the claim by stating *acte clair* without further showing how that was the case. The court found a violation because '[…] it is not clear from the reasoning […] on what specific legal grounds that court considered the application of the EU law to be so obvious that no doubts could arise […]'.[52] It should be noted that *acte clair* in itself is haunted by arbitrariness and is hence in great need to be substantiated when relied upon.

In *Sanofi Pasteur v France*, the court held that '[…] the request for a preliminary ruling […] had been very precisely worded […]',[53] while the national court of last instance rejected the claim with the reasoning that the motion was 'without any need arising to request a preliminary ruling from the [CJEU]'.[54] The ECtHR concluded that the national court had not provided statements in line with the *CILFIT* criteria, not even implicitly through its legal reasoning. Although the national court provided a statement for why it did not ask for a preliminary ruling, that reasoning '[…] does not demonstrate whether those issues were examined in the light of the *CILFIT* criteria, and if so, which of those criteria […] as the basis for deciding not to transmit them to the CJEU'.[55] Consequently, the court found a violation.

Departing from the main rule, Broberg identifies five different scenarios where the ECtHR accept little, or no direct reasoning.[56] For example, the Court has deemed there is no violation when a lower court in the same case provided detailed reasons for non-referral, which can be inferred even if the apex court's reasoning was brief and did not mention or engaging with the *CILFIT* exemptions.[57] This is however not entirely unproblematic since the rules are different for courts adjudicating at last instance compared to lower courts, with

[49] *Somorjai v Hungary* App no 60934/13 (ECtHR, 28 August 2018) para 60. See also *SOL.IN.MUS S.R.L and others v Italy* App no 6656/15 (ECtHR, 13 February 2024).
[50] Joint Separate Opinion of Judges Sajó and Pinto de Albuquerque to the case of ECtHR *Somorjai v Hungary* para 3.
[51] ibid.
[52] *Baltic Master Ltd. v Lithuania* (n 19) paras 41, 43.
[53] *Sanofi Pasteur v France* (n 19) para 71.
[54] ibid para 73.
[55] ibid para 77.
[56] Morten Broberg, 'National EU courts must seek advice in Luxembourg or face reproach in Strasbourg' (2021) 2 European Human Rights Law Review 162. See also ECtHR, *ECHR-KS Key Theme Article 6 (Civil)* (n 19).
[57] *Harisch v Germany* (n 22) para 41.

the former being bound by the *CILFIT* criteria.

Summary reasoning may also be acceptable when it is clear from other parts of the merits why a preliminary ruling was not requested.[58] Although, the ECtHR acknowledges that the national court 'could have explained more explicitly why it refused to make a preliminary reference […] an implicit reasoning can be considered sufficient […]'.[59] Moreover, the ECtHR has found no violation when the party's request is vague or unsubstantiated, and the reasoning then is limited to citing 'the relevant provisions governing such complaints [national law dismissing an appeal in cassation in the context of accelerated procedures]', as long as '[…] the matter raises no fundamentally important legal issue'.[60] Furthermore, stating that the constitutional court had no jurisdiction under national law to review whether a preliminary ruling should be requested was deemed sufficient to avoid violating Article 6(1) ECHR.[61]

In sum, although exceptions exist, it is important to emphasize that courts of last instance must generally make it clear that their decision not to refer follows the *CILFIT* criteria. Also, depending on the strength of the party's argumentation and the clarity of the claims, apex courts may be expected to explain in detail why an exception is applicable to the case at hand.

Courts falling under Article 267(2) TFEU are not expected to reference the *CILFIT* criteria.[62] Instead, it is unclear what is demanded of them, and whether a complaint to the ECtHR would be admissible or declared manifestly ill-founded.[63] However, it is reasonable, falling back on the purposes of the ECtHR's approach to the duty to give reasons for non-referral, that they make it clear that the national court have taken the views of the parties into account, responded to the request, by stating the reasons for not referring. In the words of Wallerman Ghavanini and Rauchegger, '[…] indeed a discretion must not be confused with a freedom to act arbitrarily'.[64] By giving reasons for why a preliminary ruling is unnecessary, the lower courts should stay clear of arbitrariness in the lens of Article 6(1) ECHR.

2.4 TAKEAWAYS

Under the Convention framework, the individual is placed at the centre of the matter. The duty to provide reasons for non-referral arises when a party requests a preliminary ruling, and the level of diligence required from the national court depends on how well the request is substantiated. This reflects a narrow approach, which distinguishes itself from the broader aims underpinning the PRP for several reasons. First, while courts of last instance are under

[58] *Baydar v the Netherlands* (n 43) para 43.
[59] *Repcevirág Szövetkezet v Hungary* App no 70750/14 (ECtHR, 30 April 2019) para 58.
[60] *Baydar v the Netherlands* (n 43) para 42.
[61] *Repcevirág Szövetkezet v Hungary* (n 59) para 61. See also the fifth exception identified by Broberg (n 56) 58 that '[…] in a case of appeal in cassation in which "is declared inadmissible with a summary reasoning where it is clear from the circumstances of the case that the decision is not arbitrary or otherwise manifestly unreasonable" there will be no infringement of Article 6(1) of the ECHR'.
[62] See an *e contrario* interpretation of the statement 'for the specific context of the third paragraph of [Article 267]'. *Dhahbi v Italy* (n 19) para 31.
[63] This was the case in *John v Germany* (n 25). In addition, applicants need to exhaust all domestic remedies under Article 35 ECHR. See the discussion following footnote 34.
[64] Wallerman Ghavanini and Rauchegger (n 25) 49-50.

an obligation to refer *ex officio,* they are not required to provide reasons for non-referral on their own initiative. Second, the duty to provide reasons does not extend to requests made by public authorities, which is logical from a human rights perspective, but does not serve the purpose of transparency for how the judges handle the PRP. Third, when courts of last instance decide not to refer, they are expected to justify their decision by invoking one of the recognized exceptions – *irrelevancy*, *acte éclairé*, or *acte clair* – and explain how it applies. However, under certain situations, a brief justification may suffice, for example when the reasoning can be inferred from the decision of a lower instance. Yet, lower courts are not expected to apply or reference the *CILFIT* criteria, which are specifically designed for Article 267(3) TFEU. Fourth, the ECtHR has not excluded the possibility that the duty to give reasons could also apply to lower courts. While this aligns with the rationale of Article 6(1) ECHR offering protection against arbitrariness, it appears inconsistent with the structure of Article 267 TFEU. Overall, the human rights-based approach leaves potential gaps: national courts of last instance may avoid providing reasons for not referring in several situations, thereby limiting the possibility of external scrutiny for how they handle their obligation to refer under Article 267(3) TFEU. EU law has the potential to fill these gaps.

3 EU LAW – A CLASH OF INTERESTS

3.1 INTRODUCTION

The ECtHR sets the minimum requirements on the national courts while the CJEU can raise the bar even higher. There is a bridge connecting the Convention and the EU Charter through Article 52(3) of the Charter.[65] This provision entails that, since Article 47(2) of the Charter corresponds to Article (1) ECHR, while having a broader scope,[66] 'the meaning […] shall be the same […]', although Article 47(2) can set a higher standard.[67] In this way, the ECHR lays out the foundation for which the EU Charter can build upon, while using the case-law of the ECtHR as '[…] a source of interpretation of Charter rights based on the ECHR'.[68] The legal standards set out in the former section thus travel through to the EU legal system,[69] but come out on the other side with a wider scope, covering the entirety of EU law, rather than being limited to civil rights and criminal proceedings.[70] This Section

[65] Compare Bobek (n 17) 1524.
[66] Explanations relating to Article 52(3) of the Charter of Fundamental Rights [2007] OJ C303/17.
[67] Article 52(3) of the Charter.
[68] Steve Peers and Sacha Prechal, 'Article 52 – Scope and Interpretation of Rights and Principles' in Steve Peers et al (eds), *EU Charter of Fundamental Rights A Commentary* (Bloomsbury 2021) 1651. See also Clelia Lacchi, 'Multilevel judicial protection in the EU and preliminary references' (2016) 53 Common Market Law Review 702.
[69] Bernitz (n 11) 37: 'That entails that EU law as a whole ought to be subjected to the duty to give reasons, as formulated by the ECtHR' [my translation]. Morten Broberg and Niels Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (3rd edn, Oxford University Press 2021) 245 '[…] we submit that the latter provision [Article 47(2)] must be construed so as to prohibit Member State courts of last instance from arbitrarily refusing to make a preliminary reference […] to reflect the same meaning as constructed by the European Court of Human Rights […]', referencing Lacchi, 'Multilevel judicial protection in the EU' (n 68).
[70] Clara Rauchegger, 'Sources and Content of Article 47' in Steve Peers et al (eds), *EU Charter of Fundamental Rights A Commentary* (Bloomsbury 2021) 1254. See also Explanations relating to Article 52(3) of the Charter of Fundamental Rights.

argues that the CJEU does not have to copy the position of the ECtHR, but should articulate the duty to give reasons in a manner also consistent with the objectives of Article 267 TFEU. This would bring a higher standard for reasons-giving in the context of the PRP, bridging both the human rights and uniformity approaches.

In *Consorzio Italian management*, the CJEU held that

> […] it follows from the system established by Article 267 TFEU, read in the light of the second paragraph of Article 47 of the Charter, that, if a national court or tribunal against whose decision there is no judicial remedy under national law takes the view because the case before it involves one of the three situations [referencing *CILFIT*] […], that it is relieved of its obligation to make a reference […], the statement of reasons for its decision must show [that one of the three exceptions is present] […].[71]

Yet, this paragraph of the judgment should not be understood in isolation. It is followed by a statement that the courts must 'independently and with all the requisite attention', decide whether any exceptions to the duty to refer are present concerning 'the interpretation of EU law that has been raised before them'.[72] The Court also highlighted that the PRP 'does not constitute a means of redress available to the parties'.[73]

Even though the CJEU does not explicitly reference the ECtHR in *Consorzio Italian management*, it is evident that the Court has drawn inspiration from the Convention system.[74] At the same time, the CJEU is careful not to do away with the PRP as a 'dialogue between judges' stressing the independence of the national judges deciding whether any of the *CILFIT* exceptions are applicable to the case, and that the procedure constitutes no remedy for the parties.

The Court specifies that the obligation to give reasons 'follows' from the PRP '[…] read in the light of the second paragraph of Article 47 of the Charter […]'. Arguably, 'read in the light' does not equal a direct application of Article 47(2),[75] but rather as attributing the addition of a duty to give reasons in the context of the PRP to that Charter provision, flowing in turn from Article 6(1) ECHR.[76] This framework, reading Article 267 TFEU in light of Article 47(2) of the Charter in conjunction with the substantive EU law in question, forces national judges at last instance to provide reasons for the decision of non-referral.[77]

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[71] *Consorzio Italian Management* (n 2) para 51.

[72] ibid para 54. See also para 53: '[…] the system […] is completely independent of any initiative by the parties […]'.

[73] ibid para 54.

[74] Millet, 'Cilfit Still Fits CJEU' (n 10) 548. See citations in the Opinion of Advocate General Bobek in Case C-561/19 *Consorzio Italian Management* EU:C:2021:291 para 108.

[75] Compare Opinion of AG Bobek in *Consorzio Italian Management* (n 74) para 171: '[…] in my view, the duty to state adequate reasons, although it is likely to already flow from relevant national rules, is also an obligation imposed by EU law under Article 47 of the Charter'.

[76] This opens up the world of ECtHR jurisprudence. Compare Clelia Lacchi, 'The ECrtHR's Interference in the Dialogue between National Courts and the Court of Justice of the EU: Implications for the Preliminary Reference Procedure' (2015) 8 Review of European Administrative Law 177: 'A different interpretation of Article 47(2) of the charter, which does not cover the national judges' refusals to refer under Article 267 TFEU, would risk contradicting Articles 52(3) and 53 of the Charter'.

[77] Millet, 'Cilfit Still Fits CJEU' (n 10) 555: '[…] there is arguably now an enforceable right under EU law to receive a statement of reasons in reply to their specific arguments'; Bobek (n 17) 1518 at 9. See also the potential implications for the doctrine of state liability, Millet, 'Cilfit Still Fits CJEU' (n 10) 552. There might

The focus on the individual brings a set of underlying aims surrounding the reasons-giving, which can also be located within other corners of EU law. The Union is not foreign to a duty to give reasons,[78] for understanding the reasoning behind a decision,[79] which also becomes important when considering the option for appeal.[80] Still, something happens when it is located within the context of the PRP. The 'keystone' of the EU legal system has notoriously been described as a dialogue between judges and as establishing no remedy for the parties. It is in this setting that the CJEU in *Consorzio Italian management* brings the parties into the picture, having the duty to provide reasons for the protection of the parties' rights to a fair trial, although they simultaneously have no right to a preliminary ruling.[81] In this regard, Gentile and Bonelli express that '[…] fundamental rights have colonized [bold font omitted] yet another aspect of the EU constitutional order'.[82] A difference to the ECtHR however, is that the CJEU does not necessarily condition the activation of the duty to give reasons on a request from the parties. I argue that within the context of the PRP, the human rights dimension to reasons-giving must be complemented by the main objective of the PRP: securing the uniform interpretation of EU law.

3.2 APPLICABILITY

So far, questions arriving at the CJEU regarding the duty to give reasons for non-referral have involved a party requesting a preliminary ruling,[83] but the duty to state reasons for non-referral is not expressly limited to a party claim.[84] While it is clear that the duty activates with a party request, it arguably also applies when questions about the interpretation of EU law is raised before national courts of last instance, in tandem with the obligation to refer. The prerequisite in Article 267 TFEU of questions 'raised' encompasses both issues identified by the parties and those raised *ex officio* by the judges.[85] This brings up the question:

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also be potential personal liability consequences under national law for individual judges flouting their obligation to refer, or the obligation to give reasons. Compare Fabio Ferraro, 'Les Conséquences de la Violation de l'Obligation d'Introduire une Demande de Décision Préjudicielle' in Fabio Ferraro and Celestina Iannone (eds), *Le Renvoi Préjudiciel* (Bruylant 2023) 236-237; Opinion of AG Szpunar in Case C-83/21 *Airbnb Ireland and Airbnb Payments UK* EU:C:2022:545 para 85.

[78] Article 296 TFEU; Article 47(2) of the Charter. See also Jane Reichel, *God Förvaltning i EU och i Sverige* (Jure 2006) 531–537; Case C-619/10 *Trade Agency Ltd v. Seramico Investments Ltd* EU:C:2012:531 para 60.

[79] Debbie Sayers, 'Article 47(2) A Fair and Public Hearing within a Reasonable Time' in Steve Peers et al (eds), *EU Charter of Fundamental Rights A Commentary* (Bloomsbury 2021) 1367.

[80] Compare Case 222/86 *Unectef v Heylens* EU:C:1987:442 para 15. For the context of the PRP and the possibility of appealing the decision not to refer, see Case C-210/06 *Cartesio* EU:C:2008:723 para 93: '[…] the outcome of such an appeal cannot limit the jurisdiction conferred by [Article 267 TFEU] on that court to make a reference to the [CJEU]'.

[81] This is also the position by the ECtHR. *Ullens de Schooten and Rezabek v. Belgium* (n 3) para 57.

[82] Giulia Gentile and Matteo Bonelli, 'La Jurisprudence des Petits Pas: C-561/19, Consorzio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA' (*REALaw.blog*, 30 November 2021) <https://realaw.blog/2021/11/30/la-jurisprudence-des-petits-pas-c-561-19-consorzio-italian-management-e-catania-multiservizi-and-catania-multiservizi-by-giulia-gentile-and-matteo-bonelli/> accessed 1 December 2025.

[83] *Consorzio Italian Management* (n 2); Case C-144/23 *Kubera* EU:C:2024:881; Case C-767/23 *Remling* [forthcoming].

[84] *Consorzio Italian Management* (n 2) para 51; Broberg and Fenger, 'If You Love Somebody Set Them Free' (n 25) 725; Wallerman Ghavanini and Rauchegger (n 25) 49.

[85] See Article 267 TFEU; Case C-126/80 *Salonia v. Poidomani* EU:C:1981:77 para. 7: '[…] the second and third paragraphs of Article [267] of the Treaty are not intended to restrict this procedure exclusively to cases where

does the duty to give reasons apply even in the absence of an explicit party request?

Apart from *Consorzio Italian management,* two additional cases are of importance: *Kubera,*[86] and the pending case *Remling.*[87] *Kubera* addresses the duty to refer, as well as the obligation to provide reasons for non-referral in the context of filtering procedures for granting leave to appeal. *Remling*, in turn, concerns whether summary reasoning can suffice when declining to refer.

The judgment in *Kubera* did not add much to the duty to give reasons. The CJEU confirmed that the obligation applies also in filtering procedures, but apart from this, it essentially reiterated what was said in *Consorzio Italian management*. The Advocates General in the post-*Consorzio* cases provide more developed analysis on this matter, even if their views are not binding on the CJEU.

AG Ćapeta in *Remling* takes the position that the duty to give reasons is not dependent on a party request,[88] while AG Emiliou's view in *Kubera* is less consistent.[89] On the one hand, he argues that the *duty to refer* in filtering procedures only arises when the parties have properly raised a genuine issue of EU law, substantiated its arguments, and expressly invited the court to make a reference, highlighting the principle of *vigilantibus non dormientibus iura succurrunt*.[90] On the other hand, when discussing the *duty to give reasons*, Emiliou argues that it applies when 'an appellant has properly raised an issue of interpretation of EU law'.[91] The Court did not follow his suggestion in *Kubera*, concluding that also the stage of leave to appeal encapsulates the same duty to refer, existing generally for apex courts.[92] For the duty to provide reasons, the CJEU stated that 'Article 267 TFEU, read in light of the second paragraph of Article 47 of the Charter […] [a national court of last instance] must set out, in its decision refusing an application for leave to appeal on a point of law *containing a request* […] the reasons why that reference was not made […] [italics added]'.[93] This should not, however, be read as foreclosing the possibility that courts of last instance must give reasons on their own motion. There are compelling arguments in favour of such an obligation.

Under Article 267 TFEU, national judges have a monopoly to decide whether or not to refer, under the banner of securing the uniform interpretation of EU law.[94] In this sense,

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one or other of the parties to the main action has taken the initiative of raising a point concerning the interpretation or the validity of [EU] law, but also extend to cases where a question of this kind is raised by the national court or tribunal itself […]'; David Anderson and Marie Demetriou, *References to the European Court* (2nd edn, Sweet & Maxwell 2002) 87. See also *Consorzio Italian Management* (n 2) para 54.

[86] *Kubera* (n 83). This case is a reminder of the issues highlighted by the Commission when initiating an infringement proceeding against Sweden in 2004. The Commission alleged that Sweden violated Article 267(3) TFEU with the courts of last instance hiding behind the national filtering procedure to avoid their obligation to refer questions to Luxembourg. The situation was resolved with the Swedish parliament imposing a duty on these courts to give reasons when deciding against referral through para 1 lagen (2006:502) med vissa bestämmelser om förhandsavgörande från Europeiska unionens domstol.

[87] *Remling* [forthcoming] (n 83).

[88] Opinion of AG Ćapeta in Case C-767/23 *Remling* EU:C:2025:486 para 58.

[89] Opinion of AG Emiliou in Case C-144/23 *Kubera* EU:C:2024:522.

[90] 'The law assists those who are vigilant with their rights and not those that sleep thereupon'. See ibid paras 107-108. In this connection he highlights that 'Nor can they expect those courts to engage with requests to seise the Court of Justice which are vague, confusing or unsubstantiated'.

[91] ibid para 134.

[92] *Kubera* (n 83) para 66.

[93] ibid para 65.

[94] A uniform interpretation of Union law may also serve the rights of individuals at large. See Fabio Spitaleri, 'La Faculté et l'obligation de renvoi préjudiciel' in Fabio Ferraro and Celestina Iannone (eds), *Le Renvoi Préjudiciel* (Bruylant 2023) 168.

the duty to give reasons *ex officio* safeguards against the obligation to refer disappearing into the abyss in national courts. The exception of *acte clair* has particularly caused problems with courts of last instance flouting their obligation to refer.[95] Relying solely on the parties for reasons-giving to apply, would arguably not serve the purpose of Article 267 TFEU. Here, the statement of reasons can safeguard against the abuse of *CILFIT*.[96] Parties may very well be uninterested in a preliminary ruling, and lacking such requests, it still makes it possible for others,[97] and especially the Commission, to scrutinize the decision not to refer.[98]

Yet, this approach comes with far-reaching implications. The CJEU highlights that national courts adjudicating at last instance, deciding not to refer, must show which of the three exceptions is at hand.[99] This includes the requirement for national judges to give reasons for not referring also when irrelevant.[100] Hence, the obligation to give reasons covers situations in which a referral would potentially have resulted in inadmissibility at the CJEU.[101] Since the duty to give reasons also arguably applies *ex officio* and in situations where the EU law in question would not affect the outcome of the case, national judges must explicitly address the decision *not* to refer, even when irrelevant in the first place. It is fully possible that national courts make a correct assessment regarding whether any of the exceptions in *CILFIT* are applicable and thus not risking the uniform interpretation of EU law, without mentioning their decision against referring and which of the *CILFIT* criteria were relied upon.[102] Such implicit practice seems now forbidden under the approach adopted in *Consorzio Italian Management*.

When judges are required to give reasons for the decision of non-referral, even without any party initiative, they might realize that the reasons for invoking *irrelevancy, acte éclairé* or *acte clair* do not hold, prompting them to ask questions when initially hesitant.[103] It should

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[95] See Julio Baquero Cruz, 'Francovich and Imperfect Law' in Maguel Poiares Maduro and Loïc Azoulai (eds), *The past and future of EU law: the classics of EU law revisited on the 50th anniversary of the Rome Treaty* (Hart 2010) 420.
[96] See Millet, 'From the Duty to Refer to the Duty to State Reasons' (n 6) 14.
[97] This could be national constitutional courts, but also the general public. Compare Lacchi, *Preliminary References to the Court of Justice of the EU* (n 5) 133: 'The Slovenian Constitutional Court further points out that the reasoning of national courts of last instance must be adequate to enable the Constitutional Court to determine whether the conditions setting out the duty under Article 267(3) TFEU have been respected'.
[98] See the infringement proceeding against Sweden, where the lack of reasoning for the non-referral, when declaring the case inadmissible, made it 'impossible for the individual to verify whether the obligation under [Article 267(3)] has been complied with', and '[…] not possible for the Commission as guardian of the Treaty to control that Article [267(3)] is complied with'. The European Commission, Reasoned opinion 2003/2161 C(2004) 3899, October 13, at [37, 51]. Yet, it will be notoriously difficult for the Commission to identify omissions to the duty to refer and the duty to give reasons for non-referral in situations with no party activity on the matter.
[99] *Consorzio Italian Management* (n 2) para 51.
[100] See Lorenzo Cecchetti, 'CILFIT "Motionless Titan" Has Moved, albeit Softly and with Circumspection: Consorzio Italian Management II' (*REALaw.blog*, 21 January 2022) <https://realaw.blog/2022/01/21/cilfit-motionless-titan-has-moved-albeit-softly-and-with-circumspection-consorzio-italian-management-ii-by-lorenzo-cecchetti/> accessed 1 December 2025. Cecchetti highlights differences between the proposed solutions by A.G Bobek and the final judgment by the Court. For example, that the duty also encompasses 'irrelevant questions […] and stems not from Article 47 of the Charter only'.
[101] See Broberg and Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (n 69) 141-194 concerning the relevancy criteria.
[102] Compare Lacchi, 'Multilevel judicial protection in the EU' (n 68) 702. See also Opinion of AG Ćapeta in *Remling* (n 88) para 67, making a similar point in reference to summary reasonings.
[103] Compare Cohen (n 12) 511-512: 'In attempting to reason her decision, a judge discovers that she cannot find an appropriate legal justification, leading her to reconsider her initial ruling and make a more accurate determination'. See also Opinion of AG Ćapeta in *Remling* (n 88) para 49.

not be too demanding to state why a preliminary ruling would be irrelevant, or which judgments the national court relies upon for *acte éclairé*. The challenge instead lies with the *acte clair* criteria, where the duty to give reasons can increase transparency in how that exception is applied, both for individuals to the case and for the Commission as the guardian of the treaties.

A limited approach of conditioning the activation of reasons-giving on party requests fails to consider that parties are entitled to due process, even when they are themselves uninterested or unaware of the obligation for courts of last instance to refer questions. In this vein, Lacchi argues that the ECHR requirement for parties to request a referral, '[…] does not ensure a higher level of protection in favour of individuals' and hence the reading of Article 47(2) of the Charter does not have to mirror such a position,[104] but rather not be below the level of protection afforded by the Strasbourg Court. Moreover, '[u]nder EU law […] since the parties are not required to submit a request for a preliminary reference, the fairness of the procedure could not depend on the parties' application".[105] AG Ćapeta also acknowledges that the case-law of the ECtHR is relevant even without party requests.[106]

In sum, the threshold within EU law for the application of a duty to provide reasons for non-referral clearly includes party requests, and, with less certainty, situations where questions about the interpretation or validity of EU law is raised before the national court. A difference from the ECHR is that the PRP brings its own logic, and hence the human rights dimension cannot be the only rationale guiding the duty to give reasons in this context.[107]

There are divergences between the two Courts' approaches to the reasons-giving within the context of the PRP, which affect the scope and extent of the duty to give reasons. Apart from the obligation likely existing regardless of party requests within EU law, the CJEU only takes stock on courts subjected to Article 267(3) TFEU, namely those against whose decision there is no judicial remedy under national law.[108] Yet, with the floor provided by the ECHR, it could potentially be argued that this obligation applies to all national courts, at least when a party requested a referral.[109] This reflects one of the benefits of the CJEU incorporating a duty to provide reasons for non-referral by reading Article 267 TFEU *in the light of* Article 47(2) of the Charter, thereby anchoring the rationale in both the logic of the PRP and the human rights dimension.

3.3 ADEQUACY OF THE REASONS

Regarding the expected adequacy of the reasoning,[110] *Consorzio Italian management* clearly states that a reference to the *CILFIT* criteria is necessary. In this vein, the national courts must 'show' how these apply,[111] explaining 'why' one of the three exceptions are applicable in

[104] Lacchi, 'Multilevel judicial protection in the EU' (n 68) 703 at 150.
[105] ibid 110.
[106] Opinion of AG Ćapeta in *Remling* (n 88) para 57.
[107] ibid paras 46–47.
[108] See Case C-99/00 *Lyckeskog* EU:C:2002:329.
[109] See Wallerman Ghavanini and Rauchegger (n 25) 55-56.
[110] Note that the CJEU did not incorporate the suggestion by AG Bobek for 'adequate reasons'. Cecchetti (n 100).
[111] See the language versions of *Consorzio Italian Management* (n 2) para 51: 'for its decision must show either that', 'doivent faire apparaître soit que', and 'måste det framgå av skälen till detta beslut'.

the given case.[112] The *e contrario* reading suggests that national courts may not depart from the obligation to refer based on other reasons than those listed in *CILFIT*. Similar to the ECtHR's point of departure, the adequacy of the statement is related to '[…] the nature of the case, its complexity, and above all the arguments brought before the deciding court and those contained in the case file'.[113]

Although the CJEU had the chance to elaborate on the details regarding the obligation to give reasons in *Kubera,* it has not gone beyond what was originally stated in *Consorzio Italian management*. Further clarification may come in future rulings, such as the upcoming case *Remling*.[114] In the meantime, national courts are expected to meet certain standards. As a general rule, a national court of last instance must clearly indicate which *CILFIT* exception it relies on and explain why. However, similar to the ECHR, there may be circumstances that justify a less detailed approach. AG Emiliou appears to draw inspiration from ECtHR case-law, which links what is expected of the court reasoning to the diligence of the parties. He notes that there are situations where implicit reasoning may be acceptable,[115] for example when the request is vague, but also scenarios that raises the bar for what is needed. This is the case when the request includes 'diverging lines of case-law across the [EU] […] or […] meaningful differences in the various language versions […]'.[116]

Focusing on the activities and quality of the parties as a benchmark for judicial diligence is problematic in this context. Parties deserve an explanation for why no questions were sent to the CJEU, regardless of their ability to argue their case. It is not a given that parties who submit extensive and persuasive requests are more deserving of attention than those who lack expertise in EU law and are typically 'weaker' parties. While the principle of *vigilantibus non dormientibus iura succurrunt* aligns well with procedural law, it translates poorly into human rights law, which aims to protect all individuals, including the vulnerable, from arbitrariness. Although AG Emiliou explicitly refers to this principle in the context of filtering procedures and the duty to refer,[117] the same strand of reasoning can unfortunately be located, between the lines, in the part concerning the duty to provide reasons for non-referral.

Also, it should be reminded that to safeguard the uniform interpretation of Union law, transparency is necessary even when no party has the knowledge or motivation to provide arguments for referral.

One form of a potential exception is the use of summary reasons. This issue is at the heart of the questions posed to the CJEU in *Remling*, but also whether they are permissible 'whether or not in conjunction with an explicit request for a preliminary ruling?'. Hopefully, the Court will provide guidance regarding both summary reasons, and settling whether the duty to give reasons also applies *ex officio*.

Both AG Emiliou and AG Ćapeta deem that summary reasons may be in line with the obligation to give reasons, referencing ECtHR case-law, but not without some qualifications. The former argues that, apart from lacklustre requests described above,

[112] See Opinion of AG Ćapeta in *Remling* (n 88) para 40; Opinion of AG Emiliou in *Kubera* (n 89) para 128.
[113] Opinion of AG Bobek in *Consorzio Italian Management* (n 74) para 168; See also the Opinion of AG Emiliou in *Kubera* (n 89) para 127.
[114] *Remling*, [forthcoming] (n 83).
[115] Opinion of AG Emiliou in *Kubera* (n 89) para 129.
[116] ibid para 130.
[117] ibid para 107.

implicit reasoning may be sufficient also 'where the party's appeal is inadmissible or manifestly unfounded' or 'the grounds for refusal can be clearly inferred from the reasons given in the remainder of the decision or from the decisions by the lower courts'.[118] AG Ćapeta, meanwhile, emphasizes that what matters most is whether the applicant can understand which *CILFIT* exception was relied upon and why it was applicable to the case at hand. In her view, this level of understanding may sometimes be achieved through summary reasons, such as when last instance courts adopt the reasoning of a lower court that had adequately give reasons in line with the *CILFIT* criteria.[119]

Still, courts operating under Article 267(2) TFEU are not subject to a duty to refer and the exceptions set out in *CILFIT*. Hence, last instance courts must be cautious when using summary reasons and relying on the reasoning provided by lower courts.[120]

The main difference between the two AGs is that AG Emiliou focuses on whether appellants can grasp the reasons for why their questions were not sent,[121] while AG Ćapeta stresses the importance of the parties understanding the decision of non-referral, also without any party requests. However, both approaches share a common shortcoming: they assume that parties are generally interested in preliminary rulings. This overlooks the broader public interest in ensuring that courts of last instance offer transparent and reasoned decisions when they deviate from their obligation to refer.[122]

Apart from these developments, Wallerman Ghavanini and Rauchegger point out that 'it remains to be seen whether the CJEU will construe the duty […] to provide reasons for their refusal to refer as a formal or substantive duty […]'.[123] The ECtHR only formally checks whether the reasoning reflects the acceptable exceptions to Article 267(3), and does not inquire whether the reasoning actually translates to the correct application of Article 267 TFEU, or if the understanding of EU law is erroneous at large. In contrast, the CJEU is in a position to examine substantially whether the national courts of last instance have followed the duty to refer and interpreted the EU law correctly.

3.4 TAKEAWAYS

So far, the positioning of the CJEU is closely related to the ECtHR, but with the setup of the PRP, the Luxembourg court could impose higher demands on national courts to mirror the expectations already existing under Article 267(3) TFEU. This entails that national courts of last instance should reason their non-referral decisions when EU law is raised, by themselves or by a party, and not be conditional on a party request. The core objective of

[118] Opinion of AG Emiliou in *Kubera* (n 89) para 129.
[119] Opinion of AG Ćapeta in *Remling* (n 88) paras 79–80.
[120] See also ibid para 81.
[121] Opinion of AG Emiliou in *Kubera* (n 89) para 131 also stating that: '[…] whether the courts which may be seised by those appellants can effectively rule on their complaints'.
[122] It should be noted that AG Ćapeta in her opinion in *Remling* discusses the rationale for a duty to give reasons both in light of Article 267 TFEU and Article 47 of the Charter. Yet, her view is rather narrow regarding what the obligation in light of Article 267 TFEU entails. It is stated that '[…] the public interest in ensuring the uniformity of EU law […] might be satisfied if the national court of last instance takes into consideration the *CILFIT* situations, but has not given its reasons for the decision not to refer', concluding that summary reasons do not *per se* contravene such a purpose, see Opinion of AG Ćapeta in *Remling* (n 88) para 67. Hence, her examination of the compatibility of summary reasons is limited to the rationale of the parties.
[123] See Wallerman Ghavanini and Rauchegger (n 25) 60.

the PRP, securing a uniform interpretation of EU law, requires transparency even in the absence of well-argued party requests. Although the rights based-approach to reasons-giving is welcomed to avoid arbitrariness, it should arguably be accompanied by the logics inherent to the PRP making the duty extend even further.

4 CONCLUSION

The duty to give reasons for non-referral did not originate in Luxembourg. It was developed by the ECtHR and within certain Member States before being transplanted over to the EU legal system in *Consorzio Italian Management*. The *raison d'être* for the obligation to give reasons for non-referral resembles the general duty to give reasons, but takes slightly different expressions in the two regional courts. Within the ECHR, the duty to give reasons for non-referral exist for the sake of the parties if they have raised the matter, while the PRP classically has had little regard for the parties within Union law.[124] The main argument of this article has been that the focus on the human rights dimension to reasons-giving, although important, should not be the sole guiding factor, because it is too party-dependent. The suggested path is a duty to provide reasons for the PRP that is underpinned both by the right of the individual, and safeguarding the uniform interpretation of EU law.

With the introduction of a duty to give reasons, the horizontal dialogue between judges has been expanded to include the vertical power dimension between the rights of individuals against the State. The intended audiences for the duty to exist in the first place seems to be mainly the parties, but it should also encompass the Commission and the public at large, allowing for scrutiny and fostering legitimacy in the decision-making. Viewed in this light, the dual function of the duty to give reasons echoes the two overarching purposes of the PRP, namely securing uniformity and safeguarding individual's EU rights.

With the invitation of the parties to the PRP, in the sense of a duty to give reasons for non-referral, it might better reflect the role of the parties that has previously been largely neglected in the law in the books. The parties and their counsel have practical importance at the national level in convincing the domestic courts asking questions to the CJEU.[125] Nevertheless, what the parties arguably wish for is not primarily being provided with reasons for non-referral, but a preliminary ruling in itself. Still, what the parties seek should not matter within the PRP since it provides no remedy.[126] Nevertheless, by bringing Article 47 (2) of the Charter into the picture as the CJEU did in *Consorzio Italian Management*, it opened a door that might be difficult for the Court to shut,[127] partly welcoming the parties into the warmth,[128] and thus parting ways from their traditional exclusion from the PRP. It should at the same

[124] See however the opportunity for the parties to submit observations in Article 96(1) Rules of Procedure of the Court of Justice. See also point 13 in the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling procedure, 2024, highlighting: 'In the interests of the proper administration of justice, it may also be appropriate for the reference to be made only after both sides have been heard'.
[125] Tommaso Pavone, *The Ghostwriters – Lawyers and the Politics Behind the Judicial Construction of Europe* (Cambridge University Press 2022); Broberg and Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (n 69) 255.
[126] *Consorzio Italian Management* (n 2) paras 53, 54.
[127] See Gentile and Bonelli (n 82): '[…] one may wonder whether this judgment could be the first move towards establishing an individual right to trigger a preliminary ruling', but concludes that '[…] we should be cautious and not put the chariot before the horses […]'.
[128] See Millet, 'Cilfit Still Fits CJEU' (n 10) 554; Krommendijk (n 6) 62.

time be noted that the CJEU has refrained from adopting the positions of different constitutional courts, which takes it a step further with a right to a lawful judge and establish even stronger ties to effective judicial protection.[129]

The duty to give reasons is derived in parts from the common tradition of the Member States.[130] By analogy, it follows that the CJEU should consider national constitutional courts' view of the PRP and possibly adopt it.[131]

It also remains to be seen how the giving of reasons plays out in practice. The answers from the 27 administrative courts of last instance in the Member States, witness that only five out of these deem that 'the reasons for rejecting a party's claim to request a preliminary ruling are more extensive since the rulings of the [CJEU in *Consorzio Italian Management*] and the ECtHR [in *Sanofi Pasteur v. France* and *Rutar and Rutar Marketing d.o.o. v. Slovenia*]'.[132] Whether the actual practice of giving reasons by the national courts adheres to the legal requirement is for future studies to tell. It is clear however that the PRP as a dialogue between judges is expanding to also encompass a dialogue between national judges and the parties, broadening the category of actors involved in the forging of the 'jewel in the crown'[133] of the EU legal order. This makes *Consorzio Italian Management* deserving of the name *CILFIT 2*.[134]

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[129] For how this plays out in certain national constitutional courts, see Lacchi, *Preliminary References to the Court of Justice of the EU* (n 5). See also the Opinion of AG Bobek in Case C-683/19 *Viesgo Infraestructuras Energéticas* EU:C:2021:300 para 34. See also Julio Baquero Cruz, *What's Left of the Law of Integration?* (Oxford University Press 2018) 53-86: 'Following the case law of some national constitutional courts and of the Strasbourg Court, the Court of Justice should flesh out the position of the individual in the preliminary reference procedure on the basis of Article 47 of the Charter. As already suggested, the obligation to refer could give rise to direct effect and deserves as much protection as any substantive provision of Union law, especially if it is part of the effective judicial protection granted by Article 47 of the Charter'.

[130] Compare the Opinion of AG Emiliou in *Kubera* (n 89) para 125.

[131] See Lacchi, *Preliminary References to the Court of Justice of the EU* (n 5) 275: 'All these courts [Constitutional Courts of Germany, Austria, Croatia, the Czech Republic, Spain, Slovenia, and Slovakia] interpret the right to effective judicial protection (in the broad sense) under their constitution as including the preliminary reference procedure. Therefore, this practice could contribute to the adoption of a similar interpretation of Article 47(2) of the Charter. The latter, in fact, is inspired by the constitutional practices of the Member States and by its counterpart under the ECHR, i.e. Article 6'.

[132] Seminar Organised by the Supreme Administrative Court of Sweden in Cooperation with ACA-Europe (n 4) 15, 17. These are the supreme administrative courts of Spain, Romania, the Netherlands, Malta and Austria. The French Conseil d'État is coded as unclear while the rest answered 'no'.

[133] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (8th edn, Oxford University Press 2024) 493.

[134] 'CILFIT due', see Davor Petrić, 'How to Make a Unicorn or "There Never Was an Acte Clair" in EU Law: Some Remarks About Case C-561/19 Consorzio Italian Management' (2021) 17 Croatian Yearbook of European Law and Policy 307.

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