

ELB Blogpost 15/2023, 28 March 2023

Tags: Preliminary reference, CILFIT criteria, Case C-561/19 Consorzio, Article 6 ECHR, Article 267 TFEU

Topics: Fundamental Rights, EU Constitutional Law, Courts of Member States

ECtHR finds violation of the right to fair trial when national court does not seek preliminary ruling from the CJEU

By Susanna Lindroos-Hovinheimo

The obligation of national courts to seek preliminary reference from the Court of Justice of the EU (CJEU) is a long-debated topic. In EU law, it is framed as an issue with two players: a national court and Luxembourg. In recent case law, the European Court of Human Rights (ECtHR) has made it clear that it, too, has a say in the matter.

In [Georgiou v. Greece](#) (14 March 2023) the ECtHR found a violation of Article 6 of the European Convention on Human Rights ([the Convention](#)) on the basis that a Greek Court had not referred questions to the CJEU. The facts related to the sovereign debt crisis. The applicant was the president of the Hellenic Statistical Authority (ELSTAT). In 2010, the applicant transmitted data concerning the Greek deficit for the year 2009 to Eurostat. The applicant had not presented the data for approval to the seven-member administrative board of ELSTAT in advance. The applicant claimed that his actions complied with the principle of professional independence in the European Statistics Code of Practice. Nevertheless, criminal proceedings were instituted against the applicant for breach of duty and he was found guilty. In the court of last instance, the applicant had requested that a preliminary ruling be sought from the CJEU.

Two issues were especially important for the ECtHR. First, it was decisive that the national court in question was a court of last instance. Second, the applicant had requested that the national court refer questions to the CJEU and the national court had not done so, nor given any reasons. The judgment is important as a reminder that EU law does not operate in a bubble. The preliminary reference procedure has significance for the right of fair trial.

The judgment leaves one thing open, though. If all the EU rules and practices are followed, can the ECtHR find a violation of Article 6 of the Convention? This case does not necessitate an answer to this question, even though it almost touches upon it. What the reasoning of the ECtHR makes clear for an EU lawyer is, however, that the considerations of this court are very different from those of the CJEU. The ECtHR focuses on the rights of the parties in the preliminary ruling mechanism, whereas the CJEU tends to sidestep them.

Main points in the judgment

The applicant argued that the national court had failed to address his request for a preliminary reference to the CJEU. Not only had the national court not examined the relevant criteria or provided any reasons for its refusal to seek a preliminary ruling but it had not even mentioned the applicant's request in its judgment.

The Greek Government held that it was evident from the wording of the applicant's request for a preliminary reference that the applicant had raised an issue to be dealt with only if the national court had any doubt as to the interpretation of the relevant EU law. In this case, the court had no doubt. It had hence not been necessary for the national court to give a detailed answer on why it did not refer questions to the CJEU. It had included in its judgment detailed considerations dealing with the merits of the case. The Government therefore argued that court had indeed taken all the applicant's allegations into account and assessed them and provided adequate reasoning.

The ECtHR ruled for the applicant. In line with its previous case law in [Dhahbi v. Italy](#) (8 April 2014), it held that a court of last instance must give reasons for not seeking a preliminary ruling from the CJEU if a party in the case requests it. Already in the case *Vergauwen and Others v. Belgium* (10 April 2012), the ECtHR has established criteria for these situations. According to the ECtHR, Article 6 § 1 imposes on the domestic courts an obligation to give reasons, in the light of the applicable law, for decisions by which they refuse to refer a question for a preliminary ruling. The ECtHR refers here to Article 267 of the Treaty on the Functioning of the European Union (TFEU) and holds that domestic courts against whose decisions there is no judicial remedy are required to justify a refusal to refer a question to the CJEU for a preliminary ruling on the interpretation of EU law in the light of the exceptions provided for by the case-law of the CJEU. The ECtHR held that Article 6 § 1 of the convention includes the obligation to state the reasons why they consider that the question is not relevant, or that the provision of EU law in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious that it leaves no room for reasonable doubt.

In the present case, the ECtHR ruled that the national court's judgment included neither a reference to the request made by the applicant nor any reasons why the question raised

by him did not merit reference to the CJEU. Hence there had been a violation of Article 6 § 1 of the Convention. The ruling therefore solidifies the ECtHR case law on these matters.

Commentary

The ECtHR's ruling is in itself not surprising because it corresponds with its previous case law. What is noteworthy is rather the EU law implications that have usually been ignored in the debates about preliminary references. A major analysis of these matters was undertaken by the CJEU in the [Conorzio](#) case. Here, the Grand Chamber revisited its CILFIT doctrine on the obligation of last instance courts to refer questions to the CJEU. In this judgment, the argumentation of the EU court follows very common paths touching on the importance of cooperation between Member States' courts and the EU Court. The focus is strongly on the uniform interpretation of EU law in all Member States. The CJEU states, among other things, that the preliminary ruling mechanism aims to ensure that, in all circumstances, EU law has the same effect in all Member States. The CJEU explicitly states that national last instance courts should independently decide whether or not to refer questions to the CJEU. However, the CJEU does argue that the national court has an obligation to state reasons for its decision. For these parts, the CJEU and the ECtHR agree.

What the CJEU does not grant, however, is that a party's request for a preliminary reference would play a role in the national court's decision. On the contrary, the CEJU emphasises that the parties have no say in the matter.

"[I]t should be borne in mind that the system of direct cooperation between the Court of Justice and the national courts, established by Article 267 TFEU, is completely independent of any initiative by the parties" (para 53).

A similar line of reasoning can be discerned in the discussion of the [CJEU reform](#), which seeks to give the General Court jurisdiction to rule on preliminary reference cases. Also here, the point of view of the parties and their right to fair trial is largely ignored.

In its case law, the CJEU has not framed the obligation to seek preliminary reference and to give reasons for doing so as a question of the parties' rights. The reasons for seeking preliminary reference or not depend on the interpretation of Article 267 TFEU, including the CILFIT criteria. There is little room to argue even Article 47 of the Charter, even though Advocate General Bobek suggested its importance in [his opinion on Cosorzio](#). It is interesting, though, that neither he, nor the CJEU, afforded ECtHR case law any significance in the matter.

Hence, the CJEU has not explicitly stated that the preliminary reference procedure had any relevance for considerations of Article 47 of the Charter from the point of view of the parties. It may be helpful if it did so on some occasion. What possibly stands in the way

is the principle of procedural autonomy. It is perhaps understandable that the CJEU is not willing to go into this discussion in order to respect the autonomy of the Member State courts.

Georgiou v. Greece is an important ruling for domestic courts if they happen to be courts of last instance. Regardless of what EU law says about their independence in preliminary reference matters, the parties have a role to play in accordance with the Strasbourg court's interpretation of the right to fair trial.

The judgment also points towards the ECtHR being an important player when it comes to EU procedural law. There is little that the CJEU can do if a Member State court decides not to refer questions to it and refuses to give reasons for this. In these instances, the ECtHR provides the missing piece of the puzzle because it can consider such cases. It functions in this context, too, as an important guardian for the right to fair trial.