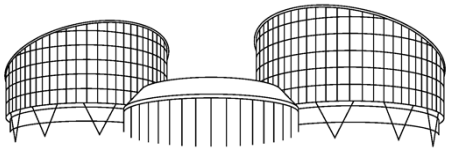

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF HARISCH v. GERMANY

(Application no. 50053/16)

JUDGMENT

STRASBOURG

11 April 2019

FINAL

09/09/2019

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Harisch v. Germany,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Yonko Grozev, *President,*
Angelika Nußberger,
André Potocki,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov,
Lado Chanturia, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 19 March 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 50053/16) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Klaus Harisch ("the applicant"), on 19 August 2016.

2. The applicant was represented by Mr P. Plog, a lawyer practising in Hamburg. The German Government ("the Government") were represented by their Agent, Mr H.-J. Behrens of the Federal Ministry of Justice and Consumer Protection.

3. The applicant alleged that his right to a fair trial under Article 6 § 1 of the Convention had been violated in that the domestic courts had refused to refer questions for a preliminary ruling to the Court of Justice of the European Union ("CJEU") and had not provided adequate reasoning for this refusal.

4. On 6 February 2017 notice of the application was given to the Government.

5. Third-party comments were received from Deutsche Telekom AG ("DTAG"), the defendant in the domestic proceedings, which had been given leave by the Vice-President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1964 and lives in Munich. He and Mr W. founded the T.AG, a directory enquiries service. The T.AG received, for a fee, the required subscriber information from DTAG. In 2007 and 2008 DTAG was ordered to refund the T.AG part of the fees paid, as they had been excessive.

7. In 2005 the applicant brought an action against DTAG, claiming that as a result of the excessive prices paid by the T.AG, he and Mr W. had had to reduce their shares in the company before its stock market launch. For that reason, as well as on account of a lower valuation of the company on the day of the launch, he had sustained damage. On 28 May 2013 the Regional Court dismissed the claim.

8. The applicant appealed against the Regional Court's decision. In the reasons for the appeal, he made comments on, *inter alia*, EU law and the respective interpretation by the CJEU and the Federal Court of Justice. He did not request a referral of a particular question to the CJEU. During an oral hearing before the Court of Appeal the issue of EU law was discussed and the court explained that, in its view, the case-law of the CJEU was clear and that, in contrast to what had been suggested by the applicant, EU law was not applicable to the present case. In the same hearing the applicant called for the proceedings to be suspended and a preliminary ruling from the CJEU to be obtained. In submissions after the hearing he repeated his request and suggested the following wording for a possible preliminary question:

> "Does Article 86 TEC in the version of the Maastricht Treaty (Article 102 TFEU) preclude the interpretation and application of domestic legislation enacted by a member State which categorically excludes, for legal reasons, the liability of a dominant undertaking that damages a competing joint-stock company through its abusive prices in violation of Article 86 TEC (Article 102 TFEU), thus putting it at risk of bankruptcy, also for damage sustained by the founding shareholders of the damaged joint-stock company resulting from the fact that they take on new shareholders in order to avert bankruptcy, thereby reducing their own shares in the company?"

9. On 2 July 2014 the Court of Appeal dismissed the applicant's appeal. In its reasoning the court stated, in particular, that his claim could not be based on EU law, as the applicant was not covered by the protective purpose of any of its provisions. In that regard, the court gave a detailed account of why the applicant's legal opinion was not supported by the CJEU's case-law, to which it referred extensively. It also referred to the relevant case-law of the Federal Court of Justice. As regards the question of whether

the applicant should be granted leave to appeal on points of law, the Court of Appeal stated:

> "There is no reason to grant leave to appeal on points of law pursuant to Article 543 § 2 of the Code of Civil Procedure (*Zivilprozessordnung*). The chamber's reasoning on the legal question as to who is covered by the protective purpose of Article 86 TEC, Article 82 § 2 EC and Article 102 TFEU and who is consequently eligible for compensation within the meaning of Article 823 § 2 of the Civil Code (*Bürgerliches Gesetzbuch*) or section 33(1) of the Prevention of Restrictions on Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*), have no significance in terms of legal principle (no fundamental significance). There is no need to clarify the legal question raised, since there are no doubts concerning the scope and interpretation of those legal provisions. The plaintiff's opinion that anyone suffering damage on account of a violation of competition law should be entitled to damages, regardless of the law's protective purpose, is not shared by anyone in academic writing or case-law."

10. The applicant filed a complaint against the refusal of leave to appeal on points of law. In his complaint he repeated his request for a referral to the CJEU and suggested the wording for two questions, one of them being a slightly modified version of the previously suggested question:

> "Does Article 86 TEC in the version of the Maastricht Treaty (Article 102 TFEU) preclude the interpretation and application of domestic legislation enacted by a member State which categorically excludes, for legal reasons, the liability of a dominant undertaking that damages a competing joint-stock company in violation of Article 86 TEC (Article 102 TFEU), thus putting it at risk of bankruptcy, also for damage sustained by the shareholders of the competing joint-stock company resulting from the fact that they take on new shareholders in order to avert bankruptcy, thereby reducing their own share of the company?
>
> ...
>
> Does Article 86 TEC (Article 102 TFEU) preclude the interpretation and application of domestic legislation enacted by a member State as laid out in the first question for referral if the damaged shareholders are founding shareholders (investors) who, at the time of the damaging event, have a significant shareholding and, as members of the company's executive board, decisively shape the company's competitive conduct?"

11. On 14 April 2015 the Federal Court of Justice rejected the applicant's complaint:

> "... because the legal matter [had] not [been] of fundamental significance, because the complaints based on violations of procedural rights [had] failed to convince and because neither the further development of the law nor the interests in ensuring uniform adjudication [had required] a decision to be issued by the court hearing the appeal on points of law (Article 543 § 1 of the Code of Civil Procedure). More detailed reasoning can be dispensed with pursuant to the second clause of the second sentence of Article 544 § 4 of the Code of Civil Procedure."

12. The applicant filed a complaint concerning a violation of his right to be heard (*Anhörungsrüge*) and argued that the Federal Court of Justice had not provided adequate reasoning for the refusal of a referral to the CJEU. On 18 May 2015 the Federal Court of Justice rejected the applicant's complaint, stating that it had examined his submissions but had not

considered them sufficiently convincing and that a decision by a court of last resort had not required more detailed reasoning.

13. On 25 February 2016 the Federal Constitutional Court declined to consider a constitutional complaint (1 BvR 1410/16) lodged by the applicant, without providing reasons.

II. RELEVANT DOMESTIC AND EUROPEAN LAW AND PRACTICE

A. German law and practice

14. Article 543 of the Code of Civil Procedure reads:

> "(1) An appeal on points of law may only be lodged if:
>
> 1. Leave is granted by the appellate court in its judgment, or
>
> 2. The court hearing the appeal on points of law has granted leave upon a complaint against the refusal to grant leave to appeal on points of law.
>
> (2) An appeal on points of law shall be admitted if:
>
> 1. The legal matter is of fundamental significance, or
>
> 2. Further development of the law or the interests in ensuring uniform adjudication require a decision to be issued by the court hearing the appeal on points of law.
>
> The court hearing the appeal on points of law shall be bound by the admission of the appeal by the appellate court."

15. The relevant parts of Article 544 of the Code of Civil Procedure read as follows:

> "(1) Any refusal by the appellate court to grant leave to appeal on points of law may be subject to a complaint (complaint against the refusal of leave to appeal). ...
>
> (4) The court hearing the appeal on points of law shall rule on the complaint in a corresponding court order. The reasons on which the order is based shall be summarised briefly; that reasoning may be dispensed with where it would not contribute to clarifying the requirements for granting leave to appeal, or where the court finds for the party filing the complaint. The decision regarding the complaint is to be served upon the parties.
>
> ..."

16. According to the established case-law of the Federal Court of Justice and the Federal Constitutional Court a legal matter is, amongst other reasons, always of "fundamental significance" if it raises a question that requires a uniform interpretation of EU law, which is relevant for deciding the case, and makes a referral for a preliminary ruling during the appeal proceedings very probable. Therefore, refusal of leave to appeal (on points of law) includes the consideration that a referral to the CJEU is not required in that case (see, for example, Federal Court of Justice, I ZR 130/02, 16 January 2003; Federal Constitutional Court, 2 BvR 557/88, 22 December 1992; 1 BvR 2534/10, 3 March 2014; 1 BvR 1320/14, 8 October 2015). To

provide the Federal Constitutional Court with the possibility to review such decisions for arbitrariness, it is necessary that the court establish the reasons for the decision either from the reasoning of the court of last resort or otherwise (see Federal Constitutional Court, 2 BvR 557/88, 22 December 1992; 1 BvR 2534/10, 3 March 2014; 1 BvR 1320/14, 8 October 2015). In case 2 BvR 557/88, the first-instance court had provided detailed reasoning concerning the relevant EU law and why there were no doubts regarding the correct interpretation of those provisions. It had relied on established case-law of the Federal Financial Court. Under these circumstances, the Constitutional Court found it acceptable that the Federal Financial Court had rejected the subsequent complaint against the refusal of leave to appeal without providing reasons. In case 1 BvR 1320/14, however, the Constitutional Court found a violation of the right to a decision by the legally competent court (*Recht auf den gesetzlichen Richter*) because the Federal Court of Justice had rejected a complaint against the refusal of leave to appeal on points of law and had not provided any reasoning. In that case, the court found that an obligation for a referral to the CJEU during the appeal on points of law proceedings was very likely (*lag nahe*) and that the Federal Court of Justice had not explained why it had rejected leave to appeal on points of law nevertheless. Even though the lower court had provided brief reasoning, there were no indications that the Federal Court of Justice had embraced it, particularly since the applicant in the proceedings had made extensive submissions in its complaint against the refusal of leave to appeal on points of law, disputing the reasoning of the lower court.

B. European Union law and practice

17. Article 267 of the Treaty on the Functioning of the European Union ("TFEU") provides as follows:

> "The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union ...;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."

18. Interpreting this provision, the CJEU held in the case of *S.r.l. CILFIT and Lanificio di Gavardo S.p.a. v. Ministry of Health* (C-283/81, judgment of 6 October 1982, ECLI:EU:C:1982:335, § 21) that:

"... a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court [of Justice], unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community."

19. In the case of *Kenny Roland Lyckeskog* (C-99/00, 4 June 2002, ECLI:EU:C:2002:329) the CJEU decided, among other things, the question of whether a national court which in practice was the court of last resort in a case, because a declaration of admissibility was needed in order for the case to be reviewed by the country's supreme court, was a court within the meaning of the third paragraph of Article 234 EC (current Article 267 of the TFEU). The court held:

"16. Decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of a 'court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' within the meaning of Article [267]. The fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy.

17. That is so under the Swedish system. The parties always have the right to appeal to the Högsta domstol against the judgment of a hovrätt, which cannot therefore be classified as a court delivering a decision against which there is no judicial remedy. Under Paragraph 10 of Chapter 54 of the Rättegångsbalk, the Högsta domstol may issue a declaration of admissibility if it is important for guidance as to the application of the law that the appeal be examined by that court. Thus, uncertainty as to the interpretation of the law applicable, including Community law, may give rise to review, at last instance, by the supreme court.

18. If a question arises as to the interpretation or validity of a rule of Community law, the supreme court will be under an obligation, pursuant to the third paragraph of Article [267], to refer a question to the Court of Justice for a preliminary ruling either at the stage of the examination of admissibility or at a later stage."

20. This judgment was referred to in a later judgment of the CJEU (*Cartesio Oktató és Szolgáltató bt*, C-210/06, 16 December 2008, ECLI:EU:C:2008:723), in which it held:

"76. The Court has already held that decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of 'a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' within the meaning of the third paragraph of Article 267. The fact that the examination of the merits of such challenges is conditional upon a preliminary declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy (*Lyckeskog*, paragraph 16).

77. That is true a fortiori in the case of a procedural system such as that under which the case before the referring court must be decided, since that system makes no provision for a preliminary declaration by the supreme court that the appeal is

admissible and, instead, merely imposes restrictions with regard, in particular, to the nature of the pleas which may be raised before such a court, which must allege a breach of law."

21. As regards the initiation of preliminary ruling proceedings, the CJEU stated in the case of *György Katz v. István Roland Sós* (C-404/07, 9 October 2008, ECLI:EU:C:2008:553):

"37. ... It is for the national court, not the parties to the main proceedings, to bring a matter before the Court of Justice. The right to determine the questions to be put to the Court thus devolves on the national court alone and the parties may not change their tenor ..."

22. In its judgment of 9 November 2010 in the case of *VB Pénzügyi Lízing Zrt. v. Ference Schneider* (C-137/08, ECLI:EU:C:2010:659), the CJEU stated:

"28. ... the system established by Article 267 TFEU with a view to ensuring that European Union law is interpreted uniformly throughout the Member States instituted direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties ..."

23. On 25 November 2016 the CJEU published its (updated) Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2016/C 439/01). The relevant part reads as follows:

"3. The jurisdiction of the Court to give a preliminary ruling on the interpretation or validity of EU law is exercised exclusively on the initiative of the national courts and tribunals, whether or not the parties to the main proceedings have expressed the wish that a question be referred to the Court. In so far as it is called upon to assume responsibility for the subsequent judicial decision, it is for the national court or tribunal before which a dispute has been brought – and for that court or tribunal alone – to determine, in the light of the particular circumstances of each case, both the need for a request for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court."

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

24. The applicant complained that the domestic courts had refused to refer questions to the CJEU for a preliminary ruling and had failed to provide adequate reasoning for this refusal, in breach of his right to a fair trial. He relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

25. The Government contested that argument.

A. Admissibility

26. The Government submitted that if the Court examined each question suggested for referral separately, the application would be partially inadmissible for non-exhaustion of domestic remedies. They argued that in his complaint concerning a violation of his right to be heard and his constitutional complaint, the applicant had neither explicitly complained about the lack of reasoning for refusing the second suggested question nor pointed to the fact that this question had only been suggested for the first time after the judgment of the Court of Appeal. In contrast, during the domestic proceedings the applicant had made no distinction between the two questions and had complained about the refusal to refer them to the CJEU and the lack of reasoning in general.

27. The applicant argued that he had exhausted the available domestic remedies by lodging a complaint concerning a violation of his right to be heard and a constitutional complaint. In both complaints he had included both questions and complained that neither the Court of Appeal nor the Federal Court of Justice had provided adequate reasoning for the refusal to refer them to the CJEU for a preliminary ruling.

28. The Court observes that the second question suggested by the applicant is only a variation of the first question, that both questions concern the same issue and that the applicant did not distinguish between them in the domestic proceedings. In addition, the Court notes that, while the parties in domestic proceedings may suggest questions for referral, the final wording of the question or questions is done by the court referring questions to the CJEU (see paragraphs 22 and 23 above). It concludes that the issues in the present case are the refusal to refer a case to the CJEU and the adequacy of the courts' reasoning, and not whether a particular question suggested by the applicant was referred to the CJEU for a preliminary ruling. Differentiating between the two questions would therefore be artificial. Consequently, the condition under which the Government pleaded partial non-exhaustion of the application is not fulfilled.

29. In sum, the Court notes that the application is neither inadmissible for non-exhaustion of domestic remedies nor manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds and must therefore be declared admissible.

B. Merits

1. The parties' submissions

30. The applicant argued that the dispute before the domestic courts had raised an issue under EU law, which had to date not been decided by the CJEU. By arbitrarily refusing to refer questions to the CJEU for a preliminary ruling, the domestic courts had violated Article 6 of the Convention. In addition, the domestic courts had not provided adequate reasoning for the refusal. The Federal Court of Justice had been the court against whose decisions there had been no judicial remedy under national law within the meaning of Article 267 of the TFEU. It had therefore been obliged, pursuant to the Court's case-law (*Dhahbi v. Italy*, no. 17120/09, 8 April 2014, and *Schipani and Others v. Italy*, no. 38369/09, 21 July 2015), to provide reasons for the refusal, based on the CJEU's judgment in the *CILFIT* case (see paragraph 18 above). However, the Federal Court of Justice had provided no reasons whatsoever and had only repeated the wording of Article 543 of the Code of Civil Procedure. It also had not made any reference to the reasoning of the Court of Appeal. The Court of Appeal, which had not been the court of last resort, had at least considered the question of EU law, but had neither explicitly refused a referral to the CJEU nor referred to the *CILFIT* criteria established in the CJEU case-law. In particular, the Court of Appeal had not explained why the correct application of Community law had been so obvious as to leave no scope for any reasonable doubt.

31. The Government argued that the refusal to refer the case to the CJEU had not been arbitrary, as the correct application of EU law had been so obvious as to leave no scope for any reasonable doubt about it. The Federal Court of Justice and the Court of Appeal had made it sufficiently evident in their decisions that there was no obligation to refer the case to CJEU for that reason. The Court of Appeal, while not a court of last resort and therefore not obliged to refer questions to the CJEU for a preliminary ruling, had discussed EU law and the CJEU's case law in detail and had concluded that the applicant's legal opinion was not reflected in the CJEU's case-law or academic writing. It therefore followed from the Court of Appeal's decision that a referral had not been required. In addition, the Court of Appeal had also had to examine the question of whether a referral was necessary when deciding whether leave to appeal on points of law had to be granted, since if a question had arisen concerning EU law that had been of relevance for the case, the matter would have had "fundamental significance" within the meaning of Article 543 of the Code of Civil Procedure and therefore required leave to appeal on points of law to be granted. Consequently, the decision of the Court of Appeal to refuse leave to appeal on points of law had also stated that a referral to the CJEU was not necessary. For the same reason, the reasoning of the Federal Court of Justice had been sufficient,

because holding that the case had no "fundamental significance" implicitly meant that no referral to the CJEU was necessary. In addition, the Federal Court of Justice had endorsed the reasoning of the Court of Appeal by refusing the applicant's complaint against the refusal of leave to appeal on points of law and dispensing with further reasoning pursuant to Article 544 § 4 of the Code of Civil Procedure.

32. The third party submitted that the Convention did not oblige the national courts to provide detailed answers to any and every argument raised before it. In particular, when decisions only concerned the question of whether leave to appeal should be granted, there was no requirement to give specific reasons.

2. The Court's assessment

33. The Court reiterates that it is for the national courts to interpret and apply domestic law, if applicable in conformity with EU law, and to decide whether it is necessary to seek a preliminary ruling from the CJEU to enable them to give judgment. It reiterates that the Convention does not guarantee, as such, the right to have a case referred by a domestic court to the CJEU for a preliminary ruling. The Court has previously observed that this matter is, however, not unconnected to Article 6 § 1 of the Convention since a domestic court's refusal to grant a referral may, in certain circumstances, infringe the fairness of proceedings where the refusal proves to have been arbitrary. Such a refusal may be deemed arbitrary in cases where the applicable rules allow no exception to the granting of a referral or where the refusal is based on reasons other than those provided for by the rules, or where the refusal was not duly reasoned (see *Ullens de Schooten and Rezabek v. Belgium,* nos. 3989/07 and 38353/07, 20 September 2011, §§ 54-59). The obligation for domestic courts to provide reasons for their judgments and decisions serves to enable the parties to understand the judicial decision that has been given; which is a vital safeguard against arbitrariness. In addition, it serves the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part (see *Taxquet v. Belgium* [GC], no. 926/05, §§ 90 and 91, ECHR 2010, with further references).

34. However, the duty to give reasons cannot be understood to mean that a detailed answer to every argument is required, and the extent of it varies according to the nature of the decision and must be determined in the light of the circumstances of the case (ibid.). It is necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question of whether or not a court has failed to fulfil the obligation to provide reasons − deriving from Article 6 of the Convention − can only be determined in the light of the

circumstances of the case (see *Borovská and Forrai v. Slovakia*, no. 48554/10, § 57, 25 November 2014; *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I; *Kok v. the Netherlands* (dec.), no. 43149/98, 4 July 2000; and *Ruiz Torija v. Spain*, no. 18390/91, § 29, 9 December 1994).

35. It is acceptable under Article 6 § 1 of the Convention for the national superior courts to dismiss a complaint by mere reference to the relevant legal provisions governing such complaints if the matter raises no fundamentally important legal issue (see *Vogl v. Germany* (dec.), no. 65863/01, 5 December 2002; *John v. Germany* (dec.) no. 15073/03, 13 February 2007), particularly in cases concerning applications for leave to appeal (see *Sawoniuk v. The United Kingdom* (dec.), no. 63716/00, 29 May 2001; *Kukkonen v. Finland (no. 2)*, no. 47628/06, § 24, 13 January 2009; and *Bufferne v. France* (dec.), no. 54367/00, ECHR 2002-III (extracts)). In dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I) or the reasons for a decision may be also implied from the circumstances in some cases (see *Sawoniuk*, cited above).

36. These principles are reflected in the Court's case-law, which has been summarised recently in the case of *Baydar v. the Netherlands* (no. 55385/14, §§ 42-44, 24 April 2018), where the issue of due reasoning by the domestic courts when refusing a request for a referral to the CJEU was considered:

> "42. For example, the Court has held that where a request to obtain a preliminary ruling was insufficiently pleaded or where such a request was only formulated in broad or general terms, it is acceptable under Article 6 of the Convention for national superior courts to dismiss the complaint by mere reference to the relevant legal provisions governing such complaints if the matter raises no fundamentally important legal issue (see *John v. Germany* (dec.) no. 15073/03, 13 February 2007) or for lack of prospects of success without dealing explicitly with the request (see *Wallishauser v. Austria (No. 2)*, no. 14497/06, § 85, 20 June 2013; see also *Rutar Marketing D.O.O. v. Slovenia* (dec.), no. 62020/11, § 22, 15 April 2014 and *Moosbrugger v. Austria*, no.44861/98, 25 January 2000).
>
> 43. Furthermore, in the case of *Stichting Mothers of Srebrenica and others v. the Netherlands* (no. 65542/12, § 173, ECHR 2013) the Court found that the summary reasoning used by the Supreme Court to refuse a request for a preliminary ruling was sufficient, pointing out that it followed already from a conclusion reached in another part of the Supreme Court's judgment that a request to the CJEU for a preliminary ruling was redundant. In *Astikos Kai Paratheristikos Oikodomikos Synetairismos Axiomatikon and Karagiorgos v. Greece* ((dec.), nos. 29382/16 and 489/17, § 47, 9 May 2017) the Court observed that the preliminary ruling requested by the applicant in that case would not have changed the conclusion reached by the Council of State of Greece since his appeal had been declared inadmissible due to the non-compliance with statutory requirements for the admissibility of appeal.
>
> 44. In other cases, not concerning a context of domestic accelerated proceedings, the Court has held that national courts against whose decisions there is no remedy under national law are obliged to give reasons for their refusal in the light of the exceptions

provided for in the case-law of the CJEU (*Ullens de Schooten and Rezabek*, cited above, § 62). In *Dhahbi v. Italy* (no. 17120/09, § 31, 8 April 2014; see also *Schipani and others v. Italy*, no. 38369/09, § 42, 21 July 2015), the Court formulated the following principles regarding the domestic courts' duty under Article 6 of the Convention when a request is made for a referral to the CJEU for a preliminary ruling, and where the request was accompanied by a due argumentation:

> '... Article 6 § 1 requires domestic courts to provide reasons, in the light of the applicable law, for any decision refusing to refer a question for a preliminary ruling;
>
> – when the Court hears a complaint alleging a violation of Article 6 § 1 on this basis, its task consists in ensuring that the impugned refusal was duly accompanied by such reasoning;
>
> – whilst this verification has to be carried out in a thorough manner, it is not for the Court to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law; and
>
> – in the specific context of the third paragraph of Article 234 of the Treaty establishing the European Community (current Article 267 of the TFEU), this means that national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of EU law, are required to give reasons for such refusal in the light of the exceptions provided for by the case-law of the CJEU. They must therefore indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.'"

37. Turning to the circumstances of the present case, the Court observes that the Federal Court of Justice was the court of last resort within the meaning of the third paragraph of Article 267 of the TFEU, even though it "only" decided on the applicant's complaint against the refusal of leave to appeal on points of law (see paragraphs 19 and 20 above). It also observes that the Federal Court of Justice only briefly indicated the reasons for refusing leave to appeal on points of law and dispensed with any further reasoning pursuant to Article 544 § 4 of the Code of Civil Procedure, to which it referred in its decision.

38. However, the Court also observes that the applicant requested a referral to the CJEU not only before the Federal Court of Justice but also earlier before the Court of Appeal. The Court of Appeal, while not the court of last resort within the meaning of Article 267 of the TFEU, examined EU law in detail and, in the reasoning of its judgment, referred extensively to the CJEU's case-law. It also stated in the judgment that "[t]here [was] no need to clarify the legal question raised, since there [were] no doubts concerning the scope and interpretation of those legal provisions." Moreover, during the oral hearing the issue of EU law was discussed between the parties and the court explained that, in its view, the case-law of the CJEU was clear and that, in contrast to what had been suggested by the applicant, EU law was not applicable to the case. In sum, the Court

concludes that the Court of Appeal explained why there was no reasonable doubt concerning the correct application of German and EU law and how the question raised had had to be resolved.

39. The Court further observes that the Court of Appeal had to decide, in accordance with Article 543 of the Code of Civil Procedure, whether the case was of "fundamental significance" and whether leave to appeal on points of law should therefore be granted. It notes, as has been pointed out by the Government, that, under the established case-law of the Federal Court of Justice and the Federal Constitutional Court, a legal matter is always of "fundamental significance" if it raises a question that requires a uniform interpretation of EU law, which is relevant for deciding the case, and makes a referral for a preliminary ruling during the appeal proceedings very probable (see paragraph 16 above). It also notes that, based on this case-law, a refusal of leave to appeal on points of law includes the consideration that a referral to the CJEU is not required in the case in question. The Court concludes that the Court of Appeal therefore considered the applicant's referral request and denied it by refusing leave to appeal on points of law.

40. For the same reason, the Court considers that the Federal Court of Justice, which was obliged to decide referrals pursuant to Article 267 of the TFEU, refused to acknowledge the need for a referral to the CJEU by confirming that it did not concern a legal matter of "fundamental significance".

41. Moreover, the Court points out that it has previously accepted that the reasons for a decision by a superior court may be implied from the circumstances in some cases or from endorsement of the reasoning of the lower court (see paragraph 35 above). In that regard, it observes that the Federal Constitutional Court also only requires that the reasons for a refusal be established either from the reasoning of the court of last resort or otherwise, such as the reasoning of a lower court (see paragraph 16 above). Having regard to the fact that the Court of Appeal provided detailed reasoning concerning the refusal of leave to appeal on points of law, after discussing the issue of EU law with the parties in the oral hearing, the Court considers that the circumstances of the present case enabled the applicant to understand the decision of the Federal Court of Justice.

42. Taking into account the purpose of the duty of the domestic courts to provide reasons under Article 6 of the Convention (see paragraph 33 above) and examining the proceedings as a whole, the Court notes that the domestic courts provided the applicant with a detailed explanation why the requested referral to the CJEU had been refused. Notwithstanding the fact that the Federal Court of Justice was the court of last resort within the meaning of Article 267 of the TFEU, the Court considers that in the specific circumstances of the present case it was acceptable that the Federal Court of Justice dispensed with providing more comprehensive reasoning and merely

referred to the relevant legal provisions when deciding the applicant's complaint against the refusal of leave to appeal on points of law.

43. The foregoing considerations are sufficient to enable the Court to conclude that the refusal of the referral, which does not appear arbitrary, was sufficiently reasoned. There has accordingly been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 11 April 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Yonko Grozev
Registrar	President