HELSINKI FOUNDATION FOR HUMAN RIGHTS

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PRELIMINARY REFERENCES IN THE AREA OF HUMAN RIGHTS

A Practical Handbook for Judges

The handbook was published thanks to financial support of the Clifford Chance Foundation

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A Practical Handbook for Judges

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Note on the author

Robert Grzeszczak – a Professor of European Law at the School of Law of the University of Warsaw; Member of the Committee of Legal Sciences of the Polish Academy of Sciences for the term 2016-2020, Member of the Programming Board of the Strategic Litigation Program of the Helsinki Foundation for Human Rights. He lectured European and international law, among others, at the University of Wrocław, the University of Warsaw, and – as a guest professor – the University of Philips in Marburg (Germany) and in Potsdam (Germany). Professor Grzeszczak's research background is the constitutional analysis of European Union - more specifically: European Public Law (in particular Comparative Constitutional Law, EU Law and the EU political system); Common Market Law. He is the author of monographs, academic textbooks and scientific articles.

Helsinki Foundation for Human Rights

The Helsinki Foundation for Human Rights ("HFHR") is a non-governmental organisation established in 1989 by members of the Helsinki Committee in Poland. Its mission is to develop standards and the culture of human rights in Poland and abroad. Since 2007, the HFHR has had consultative status with the UN Economic and Social Council (ECOSOC). The HFHR promotes the development of human rights through educational activities, legal programmes and its participation in the development of international research projects.

Since 2004 the HFHR has been operating the **Strategic Litigation Programme**. As part of this Programme, the Helsinki Foundation for Human Rights joins or initiates court and administrative proceedings of strategic importance. International human rights bodies are a key focus of the Programme's activities. Through its participation in strategic litigation cases, the Programme aims to obtain ground-breaking judgments, which change practices or laws on specific legal issues that raise serious human rights concerns.

The Programme's activities include the following:

- submitting amicus curiae briefs on behalf of the HFHR, in which we present specific human rights issues that are relevant from the perspective of constitutional and comparative law but do not directly refer to the facts of a case;
- taking part in court proceedings as a third party intervener, which means that representatives of the Foundation have the right to express their opinions and submit motions and statements during a trial;
- representing victims of human rights violations in proceedings before international bodies;
- working with law firms and individual lawyers to procure their pro bono representation and legal assistance for the HFHR's clients.

The main area of the Programme's operations is proceedings before the European Court of Human Rights. Recently, one of the objectives pursued by the Programme has been to encourage national courts to refer questions for a preliminary ruling to the Court of Justice of the European Union.

We would like to thank the **Clifford Chance Foundation**, whose financial and professional support enabled us to successfully implement this project.

Clifford Chance

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Preface

This Handbook is intended to be a practical guide for legal practitioners, in particular judges. It may also be useful for collaborators working with bodies of the justice system, including non-governmental organisations involved in handling litigation. This Handbook is principally designed to describe, in practical terms, the nature of the preliminary reference (also known as "a reference for a preliminary ruling") as a legal measure. It also attempts to explain the objectives and stages of the preliminary reference proceedings before the Luxembourg Court, describe substantive requirements for a correctly drafted preliminary reference (a question referred for a preliminary ruling) and present the consequences of a preliminary ruling issued by the Luxembourg Court of Justice ("CJ" or "CJEU"): both those immediately impacting a referring court and those to be faced by other courts in future. The context for these deliberations is provided by various aspects of the European Union human rights system.

The Handbook includes five basic parts: Part I: *Human Rights and their Protection within the European Union*; Part II: *Jurisdiction of National Courts to apply EU Law*; Part III: *Legal Characteristics of the Preliminary Reference*; Part IV: *Procedural Aspects of Making a Preliminary Reference by a National Court*; Part V: *Practical Aspects of the Preparation and Submission of a Preliminary Reference to the CJEU*. The Handbook concludes with bibliography and the wording of provisions of EU law that are relevant to the preliminary references and the Rules of Procedure of the Court of Justice. The last part of the Handbook may be particularly helpful for judges drafting the national court's reference for a preliminary ruling.

The composition of the Handbook is a derivative of its fundamental purpose, which is to deliver practical information on the legal nature of references for a preliminary ruling. In consequence, this publication constitutes, to a certain extent, a "user's manual" for Polish judges, which explains the following issues:

- How to properly assess if a situation mandates (or requires) the submission of a reference for a preliminary ruling to the Court of Justice of the European Union ("CJEU")?
- How to appropriately prepare the material and formulate a question (or questions)?
- What are the relevant CJEU rules of procedure? How may referring courts and the CJEU interact with each other during preliminary ruling proceedings? What are the specific procedural technicalities of this procedure?
- What are the legal consequences of a preliminary reference (a preliminary ruling issued in response to the matter submitted) for the referring court? What is a preliminary ruling's future impact on other courts?

We hope that by addressing these questions, this Handbook will describe to the readers through the meaning of relations between relevant provisions originating from a plethora of different legal instruments. This is because references – both general and case-specific – to the preliminary reference procedure appear in the **EU founding treaties** (the Treaty on European Union, TEU, and, especially in Article 267 the Treaty on the Functioning of the European Union, TFEU), but also by provisions of the **Statute of the CJEU** (Articles 23 and 23a) and of the **Rules of Procedure of the CJEU** (Articles 93-118). The Court drafted **recommendations to national courts and tribunals setting out the rules on the initiation of preliminary ruling proceedings**, which were published in the EU Official Journal. Appropriate legal citations and excerpts from the above instruments are included in the final part of this Handbook.[1]

The **Rules of Procedure of the CJEU** set out provisions that implement and supplement the Statute of the Court of Justice detailed in Protocol No. 3 annexed to the Treaties. The Rules aim to make the Court's procedures simpler and clearer for litigants and national courts and tribunals.

Indispensable assistance is provided by the 2012 **Recommendations to national courts** (as updated and amended in 2016 and 2018[2]) (OJ C 338 of 6.11.2012, p. 1, last updated: 2018/C 257/01) adopted after the entry into force of the new CJEU Rules of Procedure on 1 November 2012. **The Recommendations provide practical guidance to judges in the process of drafting requests for a preliminary ruling**. According to the introduction to the Recommendations, they are based on experience gained in implementing the Rules of Court, and on the latest case-law. The Recommendations present the basic characteristics of the preliminary ruling procedure and practical guidelines on the process of drafting questions referred for a preliminary ruling. If followed, this guidance will allow the Court of Justice to better address questions and answer them in a way useful to the referring courts (i.e. those who ask the questions). **The last two parts of the Handbook present a summary of these practical instructions.**

The Recommendations can be accessed on the CJEU's website (in Polish):

- https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=celex:32012Q0929(01)
- https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=celex:32016H1125(01)

1 The recommendations were drafted following the adoption of the new Rules of Procedure of the Court of Justice on 25 September 2012 (OJ L 265, 29.9.2012). The recommendation replaced the information note on references from national courts for a preliminary ruling (OJ C 160, 28.5.2011), incorporating the newly introduced changes affecting the substance of preliminary references submitted to the Court of Justice and the rules governing such proceedings.

2 The 2018 version of the Recommendations recalls the basic characteristics of the preliminary ruling procedure and the elements that national courts and tribunals should take into account before they refer a question for a preliminary ruling of the Court of Justice, while giving those courts and tribunals a number of practical guidelines as to the form and content of the request for a preliminary ruling. Since that a translated request is served on all the entities referred to in Article 23 of Protocol No 3 on the Statute of the Court of Justice of the European Union, and the decision of the Court of Justice concluding the proceedings in a given case is published in all official languages of the European Union, **particular attention should be paid to the way in which the request for a preliminary ruling is drafted and, in particular, to ensuring that personal data of the natural persons named in the request are properly protected**.

THE SURVEY

The commencement of preparation of this Handbook was preceded by a survey of Polish judges, who were asked about the basic problems they perceive associated with the preliminary ruling procedure. I have included an abbreviated version of the survey in the final part of the Handbook. In short, the survey may be considered to show that judges do not feel fully prepared to make decisions whether or not to make a request for a preliminary ruling. They recognise, however, the significance and nature of that measure. Judges are also discouraged from resorting to the preliminary ruling procedure because of the time they would need to spend to formulate a question, which is obviously a reasonable argument given their daily caseloads.

There are **two levels of judicial protection** within the EU: the **centralised** level, embodied in the Court of Justice, and the decentralised level, comprising **national courts**. This formula is by no means an expression of courtesy or superficial. **National courts are put at the forefront and are playing a fundamental role**. The CJEU has limited jurisdiction, as defined by the **principle of delegated jurisdiction**, which means that the jurisdiction of the CJEU is special rather than general. The general jurisdiction as to the application of EU law is exercised by national courts. In effect, the system of EU courts operates according to a **rule-and-exception** principle. The rule is that national courts are competent, whereas the jurisdiction of the CJEU is an exception from that rule. In the EU legal dimension, national courts play the fundamental role in ensuring the effective protection of legal rights afforded to individuals under EU law. These courts, working together with the CJEU, are obliged to enforce EU laws in order to provide effective remedies against any Member States that violate Treaties and/or the Charter of Fundamental Rights.

National courts apply, directly or indirectly, EU laws in a multitude of cases, in accordance with the principles governing the application of EU law in national legal systems. In "EU cases", or cases with an EU dimension, national courts may (or are obliged to) ask questions about the interpretation – and, possibly, validity – of EU law. The aforementioned **preliminary reference** is provided for in Article 19(3)(b) of the Treaty on European Union and Article 267 of the Treaty on the Functioning of the European Union. This measure is designed to enable national courts to bring before the Court of Justice **questions concerning the interpretation of EU law or the validity** of acts adopted by the institutions, bodies, offices or agencies of the Union. **The preliminary ruling procedure is used whenever a national court hearing an EU case has doubts regarding the interpretation (or validity) of EU law** and a ruling of the CJEU is necessary for the rendering of the national court's decision. Pursuant to Article 267 TFEU, in such a situation national courts may (or, in certain circumstances, have to) submit a request for a preliminary ruling to the Court of Justice. This procedure should be used when a new question of interpretation is raised before the national court that is of general interest for the uniform application of EU law, or where the existing case-law does not appear to provide the necessary guidance in a new legal context or set of facts.

CJEU Opinion 2/13 (accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms) of 18 December 2014, EU:C:2014:2454, p. 176.

[T]he judicial system [in the EU] has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the [CJEU] and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law.

Only the national court before which a dispute has been brought that is exclusively authorised to determine if a request for a preliminary ruling is necessary and if the questions which it submits to the CJEU are relevant. 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 above does not exclude the right to formulate motions for the submission of a preliminary reference by parties to the proceedings or their representatives**. In the Polish system of procedural law, the court is by no means obliged to admit such motions and there is no appellate measure against a denial of these motions.

ECJ judgment of 5 July 2016, Case C-614/14 *Ognyanov*, EU:C:2016:514, para. 17:

In accordance with … settled case-law, Article 267 TFEU gives national courts the widest discretion in referring matters to the Court [under the Article 267 TFEU procedure – author's note] if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them. In addition, national courts are free to exercise that right at any stage of the proceedings which they consider appropriate (see the ECJ judgments: Elchinov, *5 October 2010, C-173/09, EU:C:2010:581, para. 26 and the case-law cited, and A., 11 September 2014, C-112/13, EU:C:2014:2195, paragraph 39 and the case-law cited). It is therefore exclusively for the national courts to choose the most appropriate moment to refer a question to the Court of Justice for a preliminary ruling (see the ECJ judgments:* Sibilio*, 15 March 2012, C-157/11, unpublished, EU:C:2012:148, para. 31 and the case-law cited, and* Degano Trasporti*, 7 April 2016, C-546/14, EU:C:2016:206, paragraph 16).*

It should be added that **during the pendency of preliminary reference proceedings national courts may also grant an interim relief** in order to ensure the protection of rights claimed under EU law, in accordance with rules of national law and that such **relief may remain valid** until the CJEU resolves the preliminary matter.[3] With the legal European integration gathering pace and EU law expanding in size and scope, there is a rise in the number of cases in which national courts may enter into formal interactions with the CJEU.

3 An interim relief against a national measure, cf. e.g. CJEU judgment of 19 June 1990, *Factortame* and Others, C-213/89, EU:C:1990:257; but especially CJEU judgment of 13 March 2007, *Unibet*, C-423/05, EU:C:2007:163, which constitutes the basic source of the Court's reasoning and interpretation in this respect. On the other hand, for a discussion on EU measures, see CJEU judgment of 21 February 1991, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, C-143/88 i C-92/89, EU:C:1991:65.

Example:

Decision of the Supreme Court of 2 August 2018, case no. III UZP 4/18:

I. Pursuant to Article 267 TFEU, [the court has decided] to refer the following questions of law to the Court of Justice of the European Union for a preliminary ruling:

(...)

III. Pursuant to Article 732 the Code of Civil Procedure (CCivP) read in conjunction with Article 755(1) CCivP and in conjunction with Article 267(3) TFEU and Article 4(3) TEU, [the court has decided] to suspend the application of the Article 111(1)-(1a), Article 37 and Article 39 of the Supreme Court Act of 8 December 2017 (Journal of Laws 2018, item 5, as amended) until the preliminary question is resolved upon the provision of answers to the questions of law numbered 1-5 by the Court of Justice of the European Union.[4]

The reference for a preliminary ruling provided for in Article 19(3)(b) TEU and Article 267 TFEU is a fundamental mechanism of EU law. It is designed to ensure the uniform interpretation and application of that law in the territory of EU Member States, by offering the courts and tribunals of the Member States a means of bringing before the Court for a preliminary ruling questions concerning the interpretation of EU law or the validity of acts adopted by the institutions, bodies, offices or agencies of the Union. As this will be recalled on many occasions below, **national courts may request the CJEU to make a preliminary ruling in respect of questions concerning any of the issues covered by the *ratione materiae* scope of EU law**, also in cases related to the Area of Freedom, Security and Justice (AFSJ).[5] Apart from the development of AFSJ, also the entry into force of the EU Charter of Fundamental Rights (CFR) and the fact that EU law has been tied to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) by virtue of Article 6(3) TEU has substantively increased the number of possible interactions between national courts and the CJEU, including those involving conflicts of norms originating from both systems (national and EU law).

Article 6(3) TEU:

Fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

The main focus of this Handbook is the application of EU fundamental rights by a national judge (here: a Polish judge). Human rights have been selected for a purpose. Human rights issues are one of the most frequently raised arguments in litigation because they appear in virtually all branches of law, be it civil, criminal or administrative law. Due to the nature of specific human (fundamental) rights, which, as the authors of the handbook *Judicial*

4 In the statement of grounds of its decision to make the preliminary references, the Supreme Court correctly noted that "According to the case-law of the CJEU, national courts must be able to take interim measures to ensure the judicial protection of individuals' rights under EU law (CJEU judgments of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, para. 41; 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257, paragraph 19). The rule expressed in sentences 2 and 3 of Article 734 CCivP, which stipulate that only the court of first instance has jurisdiction to grant interim relief in the proceedings pending before the Supreme Court, is inconsistent with the EU law. Since this rule prevents the application of an interim measure by the Supreme Court (which is the court making a request for a preliminary ruling), the rule in question needed to be disregarded in accordance with the Simmenthal rule."

5 A temporary restriction on the possibility of requesting a preliminary ruling of the CJEU in matters related to police and judicial co-operation has been abolished in Polish law, effective from 1 December 2014.

Interaction Techniques – their Potential and Use in European Fundamental Rights Adjudication aptly note, cross the borders of individual states, following individuals or communities, one may conclude that controversies regarding these specific rights result from their nature and their application poses a challenge for national judges across all national jurisdictions.[6]

Initially, there was a period when a defensive application of fundamental rights prevailed within the EU and these rights were invoked only to challenge the EU authority. However, nowadays fundamental rights are frequently used in an offensive manner, that is to challenge the authority of Member States.

In this context, one should note the significance of a recent, yet already well-publicised, CJEU judgment in the case ***Associação Sindical dos Juízes Portugueses***, in which the Court ruled that **EU law protects the independence of national courts**, because it constitutes a basic condition of the judicial dialogue between these courts and the CJEU.[7] In *Associação*, the Court emphasised the capacity of EU law to consolidate and defend the rule of law frameworks in Member States. The Court found that Article 19(1) TEU provides specific guidance on the rule expressed in Article 2 TEU. the provision establishing the principle of effective judicial protection. These issues gain in significance in the context of the crisis of the rule of law in Poland and the questions referred for a preliminary ruling by Polish courts and complaints made in the Article 258 TFEU procedure by the European Commission against Poland in connection with the changes to the Polish judicial system. These topics will be discussed in more detail in later sections of this Handbook.

The importance of the preliminary reference procedure – both for the national justice system and for the creation and operation of a "complete system of legal remedies" – cannot be overestimated. The Court ensures that the law is observed "in the interpretation and application of the Treaties" (Article 19 TEU).

Polish courts are increasingly more willing to ask the CJEU – more than 130 references have been submitted so far.[8]

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6 As argued by F. Cafaggi in F. Casaro, F. Fontanell, N. Lazzerin, G. Martinic, M. Mataij, M. Moraru, C. Pitea, K. Podstawa, A. Torres Perez, *Judicial Interaction Techniques - their Potential and Use in European Fundamental Rights Adjudication*, Florence 2012 (Polish version of the handbook was prepared by a team of Department of European Law of the Judicial Decisions Bureau of the Polish Supreme Administrative Court, led by N. Półtorak: P. Florjanowicz-Błachut, M. Kulikowska, P. Wróbel, *Metody interakcji sądowych w sprawach dotyczących europejskich praw podstawowych*, Warszawa 2014, p. 9 et seq.)

7 CJEU judgment of 27 February 2018, ***Associação Sindical dos Juízes Portugueses***, C-64/16, EU:C:2018:117.

8 Below are the examples of proceedings in which Polish courts submitted preliminary references given during HFHR training conducted by K. Pleśniak and K. Szychowska: C-658/17 – a refusal to issue the deed of a certificate of succession (Regulation No 650/2012); C-512/17 – the recognition of decisions in family matters; C-490/17 – rights of airline passengers; C-421/17 – transactions subject to VAT; C-337/17 – jurisdiction over a Pauline action; C-176/17 – an action for the enforcement of a promissory note vs. Directive 93/13; C-140/17 – VAT – a change in the allocation of capital goods; C-106/17 – an assignee's action against third party liability carrier providing coverage of a traffic accident in another Member State; C-66/17 – an enforceable decision for an uncontested claim – Regulation No 805/2004; C-35/17 – a bidder's exclusion from proceedings for the award of a public procurement contract; C-30/17 – excise duty on alcohol – taxable base; C-19/17 – costs of activities financed from structural funds; C-517/16 – Qualification of a bridging pension – Regulation No 883/2004 on the coordination of social security systems (a question concerning validity); C-429/16 – ruled of group redundancies; C-403/16 – EU Visa Code vs. the right to a judicial appeal; C-330/16 – a residential lease vs. Directive 2011/7 on combating late payment in commercial transactions; C-294/16 – European Arrest Warrant; C-390/15 – VAT on e-books (a question

Part I

Human Rights and Their Protection within the European Union

This part of the Handbook presents a general introduction to the European Union human rights system. Given the Handbook's thematic scope, this introduction focuses on certain key elements of that system. The legal structure of EU fundamental rights is complex.

In the Union's legal order, fundamental rights are protected within the framework of a two-level system, comprising the provisions of the Charter (i.e. the fundamental rights defined in the Charter) and the general principles of EU law (i.e. the fundamental rights defined in these general principles). Detailed regulation of specific issues may also appear in acts of secondary law, primarily directives (harmonisation of the standard of protection).

There is a separate classification of fundamental rights within the CFR. The most general division of the Charter's provisions allows for distinguishing "rights and freedoms" and "principles". Rights and freedoms are those of the Charter's provisions that may be relied on directly before courts and serve as a basis for the creation of effective legal norms. Principles, on the other hand, are those of the Charter's provisions that only designate general values which the EU promises to uphold. Differently from rights and freedoms, the principles may not be invoked directly in a court action. They are generally designed to serve as guidance for legislators who should give them a normative meaning. The above means that the Charter's provisions have different normative power. Those that are directly applicable resemble typical rights and freedoms present in constitutions of Member States.[9]

Let me start with a short introduction and remind the readers that the history of EU protection of fundamental rights is linked to the works of the Court of Justice, which started to actively pursue the matter in the 1960s. Although at the time the Communities were purely economic institutions and the Treaties lacked any human rights provisions, the Court did not refrain from addressing themes of fundamental rights. Moreover, despite the fact that EU fundamental rights have developed on the basis of the internal market, it is the expansion of EU powers, also onto the abovementioned Area of Freedom, Security and Justice that gave rise to the serious and urgent need to create a uniform, EU-specific human rights standard.

about validity) and many questions about the independence of the courts against the background of changes in the courts system in Poland, asked since August 2018.

9 As in: A Wróbel, "O niektórych aspektach koncepcji praw podstawowych UE jako zasad", *Europejski Przegląd Sądowy* 2014(1), p. 104 et seq.

Judgment in Case 29/69 *Stauder v City of Ulm*

A decision issued in the consequence of a question referred for a preliminary ruling by a German court became a starting point for perceiving fundamental rights as a part of the Community legal system. Judgment 29/69 Stauder concerned the identification of an individual through their name in the context of a purchase of butter on preferential terms. Erich Stauder brought an action to a German court, alleging that the duty to be identified by name constituted a violation of rights guaranteed by the German constitution. Since the possibility of a preferential purchase of butter was regulated by acts of Community law, the German court decided to make a request for a preliminary ruling in this case. The Court held that the provision in question had to be interpreted as neither requiring nor prohibiting the identification of purchasers. At the same time, the judgment explicitly stated that **fundamental rights were protected as general principles of Community law** [presently, EU law – author's note].

At the current stage of development of integration processes, **the rights, freedoms and principles of the CFR constitute the basic standard for courts adjudicating cases that involve the application of EU law** ("EU cases" and internal/national cases – see, *in extenso*, the following part of the Handbook). Polish courts (and, more generally, national courts of Member States) have been applying the Charter since 2009, namely the moment it entered into force as an act of EU primary law (pursuant to Article 6(1) TEU). A court may or is obliged to apply Charter provisions depending on various factors. Above all, a reference should be made to the general principles of EU law, namely the principle of direct effect, primacy and effectiveness of EU law. The way in which the CFR is applied is influenced by the above-mentioned characteristics of specific provisions of substantive law that are to be applied: different rules will apply depending on whether a given provision is a right, freedom or principle.

The scope of application of the Charter of Fundamental Rights

- Article 51(1) CFR: The provisions of this Charter are addressed to the … the Member States only when they are implementing Union law.
- Article 51(2) CFR: The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.
- Protocol No 30: CJEU judgment in joined cases C-411/10 *N.S.* and C-493/10 *M.E. and Others* (in which the CJEU rebutted the presumption present in the EU asylum system that the EU Member State complies with fundamental rights), paragraph 120 (grounds): "Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions." This ruling is extremely important for the status of the CFR in the Polish legal system as it unequivocally establishes that the Charter of Fundamental Rights is a fully effective legal instrument.

Articles 51-54 include material provisions on the application and interpretation of the CFR that are relevant for the above issue. In accordance with those Articles, **courts of Member States have the authority to review the conformity of Member States' actions (omissions) with the Charter insofar as the States apply Union law**. This is because Member States

are bound to comply with the Charter in this regard (Article 51(1) CFR). This is the obligation resulting from the above-mentioned "**jurisdiction of national courts to apply EU law**", which is expressed in a court's duty to review the conformity of national law with EU law. Similarly, courts of Member States are obliged to interpret national provisions in accordance with the CFR, which is, in turn, a manifestation of the more general duty of conforming interpretation. Courts of Member States may apply a Charter provision directly whenever the EU requirements of direct effect are satisfied. It should be added that the Court of Justice explained the issue of Member States being bound to comply with CFR provisions in *Fransson*,[10] concluding that in actuality there was no "issue" of the Charter's provisions having a binding effect; the real problem, the Court argued, is to find a connection with another provision of EU law in order to open an avenue to the application of EU fundamental rights.[11]

> **Case study:**
>
> **Distric Court in Konin – C-50/16 Halina Grodecka and an intervening party Józef Konieczka** (CJ Order – no jurisdiction)
>
> **Court's question:**
>
> *Must Articles 2 TFEU and 8 TFEU, Article 1 of Protocol No 1, Article 14 of the ECHR, Article 17(1) of the Charter enshrining the principles of the primacy of law, equality, non-discrimination and the protection of property be interpreted as precluding national provisions limiting the transfer on succession of agricultural holdings where the inheritor, of Polish nationality or a foreign national, does not satisfy certain substantive criteria laid down by the law and explained in an implementing act?*
>
> **Answer of the Court:**
>
> *The main proceedings are in relation to a request for a declaration of succession, on the basis of material and procedural provisions of Polish law, without any element of the decision to refer permitting the conclusion that those provisions implement EU law within the meaning of Article 51(1) of the Charter, or even that they concern an 'activity' of the European Union within the meaning of Article 8 TFEU.*

Treaty rights (resulting from the prohibition of discrimination, market freedoms and many other, including rights conferred by the implementation of individual EU policies) and – most crucially, given the subject of this Handbook – the rights and freedoms under the CFR **are afforded to those individuals who aim at exercising their rights principally in national judicial proceedings**. Apart from certain exceptions, the EU system has not created procedures for the enforcement of individuals' rights under EU law. Rights conferred under EU law are asserted according to the principle of procedural autonomy of Member States. This conclusion is confirmed by the third sentence of **Article 19(1) TEU, which obligates Member States to "provide remedies sufficient to ensure effective legal protection in the fields covered by EU law"**. What is more, Member States must ensure that the right to an effective judicial remedy under Article 47 CFR is respected as this provision – quite unsurprisingly – is the Charter's right most often invoked in preliminary references. This means, as it was mentioned above, that courts of Member States are functionally a part of the EU judicial system: they

10 Decision of the Court (Grand Chamber) of 7 May 2013 C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, ECLI:EU:C:2013:105. A request for a preliminary ruling from Haparanda tingsrätt, Sweden.

11 R. Grzeszczak, A. Szmigielski, "Sądowe stosowanie Karty Praw Podstawowych UE w odniesieniu do państw członkowskich – refleksje na podstawie orzecznictwa Trybunału Sprawiedliwości i praktyki sądów krajowych", *Europejski Przegląd Sądowy*, 10/2015, p. 12.

adjudicate cases whose subject-matter falls within the scope of application of EU law (EU cases). Furthermore, national courts become even more relevant given a modest number of procedural options for an individual intending to bring an action directly before a "proper" Union court and, more importantly, the restrictive requirements that must be satisfied to effect the invalidation of an act of EU law.[12]

Judgment of the Court (Grand Chamber) of 28 March 2017, Case C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, ECLI:EU:C:2017:236, paragraph 73:

... Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection, requires, in its first paragraph, that any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. It must be recalled that the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law (see judgments of 18 December 2014, Abdida*, C-562/13, EU:C:2014:2453, paragraph 45, and of 6 October 2015,* Schrems*, C-362/14, EU:C:2015:650, paragraph 95).*

As the Court has repeatedly noted, in the absence of EU legislation [in a given area – author's note], it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from EU law (judgment of 30 September 2003, C-224/01 *Köbler*, EU:C:2003:513, paragraph 46 and the case-law cited).

CJEU as an active creator of standards of human rights protection:

CJEU judgment of 13 May 2014 in Case C-131/12 *Google Spain SL and Google Inc v Agencia Española de Protección de Datos and Mario Costeja González*

This case was initiated by court proceedings resulting from a complaint lodged by a Spanish national. The complaint was based on the fact that a search of the complainant's name in Google Search resulted in obtaining a link to websites with information about a real-estate auction connected with attachment proceedings for the recovery of unpaid debts. The Court held that the search engine's operations that involved a user's personal data constitute the processing of personal data. Consequently, the ECJ ruled, a person whose data are processed may request that a given piece of information no longer be made available to the general public. In this way, the Court caused the coining of the expression *the right to be forgotten*. CJEU's recognition of the general primacy of this right over a search engine operator's economic interests or the interests of persons performing an online search is an example of the Court's potent articulation of high standards of human rights protection in the age of new technologies and innovative approach to law. The *Google Spain* judgment also shows that the Court's response to a reference for a preliminary ruling, apart from referring to a concrete matter, frequently affects the further development of law applicable in a given thematic area. The General Data Protection Regulation (GDPR),[13] whose adoption follows the CJEU judgment in *Google Spain*, comprises a regulation of *the right to be forgotten*.

12 *Ibid*., p. 11 et seq.

13 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ EU L 119 2016, p. 1.

Case study:

Prohibition of discrimination in EU law: judgment in Case 43/75, *Defrenne v Sabena*

The judgment entered in the case *Defrenne v Sabena* contains an answer to a question referred for a preliminary ruling that is materially significant for fundamental rights protection within the EU. The question concerned the application of then Article 119 (currently, Article 157 TFEU) in connection with discrimination of women in employment. Gabrielle Defrenne worked as an "air hostess" (female flight attendant) for the Sabena airlines. Sabena operated a policy, under which female flight attendants (as opposed to their male counterparts) were dismissed from job upon attaining the age of 40. This resulted in female flight attendants having lower pension benefits, which, according to Ms Defrenne, violated the principle that men and women should receive equal pay for equal work. She decided to take a legal action against the airline, which led to the submission of several preliminary references regarding a possible interpretation of the former Article 119 TEC as a provision introducing the above principle of equal pay directly to national legal systems of all Member States. Another question referred for a preliminary ruling was whether Article 119 entitles "workers to institute proceedings before national courts in order to ensure its observance". The Court concluded that the principle of equal pay applies also to horizontal relations and that Article 119 should be considered invokable before national courts:

... the principle of equal pay contained in Article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.

Defrenne constitutes an example of a ruling whose effects are subject to a temporal restriction: T*he direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim*. The *Defrenne* case shows the impact that the Court exerted in developing the evolving interpretation of applicability of EU fundamental rights provisions.[14]

Discrimination test: too young to work?

References for a preliminary ruling may elicit an explanation of problematic issues related to the understanding of concepts associated with human rights protection. The judgment discussed directly below is an excellent example of such a mechanism.

The *Kücükdeveci* case revolved around the provisions of German law that failed to recognise the period of employment completed before an employee's 25th birthday for the purposes of designation of a statutory dismissal notice period. Because of the above legislative arrangement, an employee (Seda Kücükdeveci) received a shorter period of notice that the one she would have received if the years she had worked after attaining the age of 18 had been included in the calculation of her period of employment (one month instead of four). Ms

14 For a discussion on the possibility of submitting a request for limitation of the temporal effects of the judgment, see A. Frąckowiak-Adamska, *Nie tylko Strasburg? Alternatywne międzynarodowe instrumenty ochrony praw człowieka*, Educational materials for the Helsinki Foundation for Human Rights, Helsińska Fundacja Praw Człowieka, Warszawa 2018, http://www.hfhr.pl/wp-content/uploads/2017/11/nie-tylko-strasburg-materia%C5%82y-szkoleniowe-cz%C4%99%C5%9B%C4%87-I-FIN.pdf, p. 18 et seq.

Kücükdeveci argued that this legislative solution constituted discrimination on the grounds of age in violation of laws of the European Union. The Landesarbeitsgericht Düsseldorf stepped outside the traditional thinking that the prohibition of age-related discrimination applies exclusively to cases of discrimination of old-age people and referred the following question for a preliminary ruling:

Does a national provision under which the periods of notice to be observed by employers are extended incrementally as the length of employment increases, but the employee's periods of employment before the age of 25 are disregarded, infringe the Community law prohibition of discrimination on grounds of age, in particular primary Community law or Directive 2000/78 ...?

In the judgment, the Court answered this question in a way that contributes to better understanding of the very essence of the prohibition of age related discrimination, and that extended the application of this prohibition beyond the cases of discrimination based on old age. The ***Kücükdeveci*** decision led to the development of a line of judicial authority according to which any regulations that result in unequal treatment based on an employee's young age are also inadmissible under EU law. At the same time the Court reminded that the above principle could only be invoked if a given situation of discrimination litigated in national proceedings falls within the scope of application of Union law. In *Kücükdeveci*, such a link between the principle and the subject-matter of proceedings was the failure to timely perform the obligation to transpose an EU directive. In the same way as in the ***Mangold*** case, in *Kücükdeveci* the prohibition of discrimination could be invoked in a horizontal relation.

In *Kücükdeveci* the Court also reminded, in the operative part of the judgment, what obligations are imposed on a national court (as a court applying EU law) that adjudicates a case in which the national provisions applied are contrary to EU law: *It is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with,* ***disapplying*** *if need be any contrary provision of national legislation...* The Court further stressed that this obligation is independent from a national court's entitlement to submit a reference for a preliminary ruling.

Applying the above to fundamental rights and their protection afforded under EU law, **judges (and – to an extent – parties' representatives)** may find it useful to know that one can generally point to the three types of EU secondary legislation that are directly or indirectly related to fundamental rights. First, these are the legal acts designed to "specifically reflect" fundamental rights: e.g. directives applicable to anti-discrimination standards. The human rights that appear in such acts have an autonomous and distinctive nature. The acts in question may specify a general principle of protection of fundamental rights or even provide for a direct horizontal effect of such a principle. Since these acts determine a highly detailed framework of fundamental rights protection, a national court is likely to find it difficult to apply the Charter's provision. Second, there are legal acts in which issues related to human rights appear incidentally. In this case, the EU legislator has harmonised a uniform level of fundamental rights protection in order to give effect to specific aims of integration, e.g. by the creation of the mechanism of the asylum system as part of co-operation in criminal matters. Such areas demonstrate a strong need for human rights protection. If an act from

this category is compatible with the Charter's standard, then the act's provisions cannot be challenged based on a constitutional standard of human rights. Here, national legislation may be applied only if it does not undermine the Charter's standard and the primacy, effectiveness and uniformity of such an act of EU secondary legislation. Third, some acts of secondary legislation do not govern human rights matters but determine "the field of application of Union law" by Member States (in accordance with Article 51(1) of the Charter). Such acts qualify or expand the scope of application of fundamental rights that is described in the Charter by Member States thereby authorising national courts to safeguard these rights within the scope covered by a given act of secondary legislation. A national court should focus on the aim of an act in question and the obligations imposed by the act on the Member State.[15] Those two indicators enable the court to determine whether or not a national provision falls within the scope of application of EU law.

15 R. Grzeszczak, A. Szmigielski, "Sądowe stosowanie Karty Praw Podstawowych UE w odniesieniu do państw członkowskich – refleksje na podstawie orzecznictwa Trybunału Sprawiedliwości i praktyki sądów krajowych", *Europejski Przegląd Sądowy*, 10/2015, p. 12 et seq.

Part II

Jurisdiction of National Courts to apply EU Law

1. The Simmenthal rule

The CJEU has provided a basic summary of the concept of the jurisdiction of national courts to apply EU law in the 1979 *Simmenthal* judgment (entered in the preliminary reference proceedings).

The *Simmenthal* rule (Case 106/77 *Simmenthal II*, pp. 21-22):

National courts are obliged to ensure that EU law is effectively applied in national legal orders. An important element of this obligation is enabling the assertion of claims under EU law. This is because national courts are obliged to protect interests of entities whose rights may be violated by a breach of EU law.

According to the Court, a national court is obliged to

apply [EU] law in its entirety and protect rights which the latter confers on individuals" "in a case within its jurisdiction". The Court emphasised that *"any **legislative, administrative or judicial practice** which might impair the effectiveness of community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent community rules from having full force and effect are incompatible with those requirements which are the very essence of community law.*

The *Simmenthal* rules, complemented and specified by a number of the Court's decision that followed *Simmenthal*, have been constantly valid ever since, as illustrated by the following judgment:

Judgment of the Court (Grand Chamber) of 14 September 2017, Case 628/15, *Trustees of the BT Pension Scheme v Commissioners for Her Majesty's Revenue and Customs*:

... it must be recalled that, according to the settled case-law of the Court, both the administrative authorities and the national courts called upon, within the exercise of their respective jurisdiction, to apply provisions of EU law, are under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and it is not necessary for that court to request or to await the prior setting aside of that provision of national law by legislative or other constitutional means (see, to that effect, in relation to administrative authorities, judgments of 22 June 1989, Costanzo, *103/88, EU:C:1989:256, paragraph 31; of 29 April 1999,* Ciola,*C-224/97, EU:C:1999:212, paras. 26, 30; and, in relation to courts, judgments of 9 March 1978,* Simmenthal, *106/77, EU:C:1978:49, paragraph 24; of 5 July 2016,* Ognyanov, *C-614/14, EU:C:2016:514, paragraph 34).*

Order of the Court of 22 June 2010 in joined cases C-188/10 and C-189/10, *Aziz Melki* (C-188/10) and *Sélim Abdeli* (C-189/10),

paragraphs 43-44: *... a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means (see, inter alia,* Simmenthal, *paragraphs 21 and 24; Case C-187/00* Kutz-Bauer, *paragraph 73; Joined Cases C-387/02, C-391/02 and C-403/02* Berlusconi and Others, *paragraph 72; and Case C-314/08* Filipiak, *paragraph 81).*

Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements which are the very essence of EU law (see Simmenthal, *paragraph 22, and Case C-213/89* Factortame and Others, *paragraph 20).*

This would be the case in the event of a conflict between a provision of EU law and a national law, if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply EU law, even if such an impediment to the full effectiveness of EU law were only temporary (see, to that effect, Simmenthal, *paragraph 23).*

As far as the relevance of the above considerations to fundamental rights is concerned, in applying the CFR, a national judge should, first and foremost, consider the following elements:

- review if a given national measure shows a link to the EU law;
- review if a given right or freedom enshrined in the Charter has been restricted.

Having established the above, a judge should specify the standard of that right and the (direct/indirect) effect of a given Charter provision.

Polish judges perceive their task to apply fundamental rights generally in two perspectives (according to two models):

1. **They review parties' arguments related to the application of fundamental rights** – judges often refrain from assessing issues related to fundamental rights and adjudicate cases based on provisions of substantive law. A judge should be willing to apply fundamental rights: this is the preliminary and basic condition for the fundamental rights law to be effective.

2. Judges should be ready **to consider fundamental rights issues in a situation where the parties do not invoke fundamental rights** and the taking account of such rights would be advantageous to a party and would result in granting that party a remedy.[16]

16 Florjanowicz-Błachut, *Metody interakcji*, p. 12 et seq.

Ensuring the protection of fundamental rights – this applies to the stage of resolving a dispute by a court of first instance. **The role of a court of first instance**: it is especially crucial that a court of first instance should take into consideration fundamental rights, at its own initiative. This is even more visible in cases in which individuals invoking EU law request legal aid – in particular in cases concerning immigration/ free movement of persons or those involving discrimination.

In summary, fundamental rights may be invoked ex officio or at the request of a party. Consequently, fundamental rights (in a fashion similar to other norms of EU law) may directly constitute a substantive-law basis for claims of individuals who infer certain legal rights from a Union norm. Alternatively, fundamental rights may impact on the ultimate basis of an adjudication based on national law – this happens if the applicability of national law is challenged or if it is necessary to modify the results of interpretation of national law by applying a pro-European, or "sympathetic", interpretation. Illustratively speaking, an individual may use fundamental rights in two ways: as a "sword" wielded in a struggle for a claim or a "shield" held in defence against unfavourable consequences of individual provisions, which if applied by state authorities, may lead to a violation of a particular fundamental right.[17]

2. Union and domestic cases

A national court competent to hear a case pending before it should always assess the nature of the case in question (the same rule applies to a public administration body which is to issue an administrative decision). This assessment is necessary for the proper application of legal provisions and the entering of a lawful ruling. If it is determined that a case is a Union case, a national court must take into account in its deliberations, among other things, the principles governing the application of EU laws in national law (primacy, direct and indirect effect, etc.) and check whether EU fundamental rights standards have been complied with. "Purely domestic" cases are processed "in the old way" with the use of known conflict of law rules, thus differently from **the Simmenthal rule**.

It is worth adding that **national courts find it most problematic to interpret EU law and resolve the discrepancies that appear in the result of Union provisions being confronted with national provisions**. However, in such a case, a national court should follow the principle of the primacy of EU law and refuse to apply national law. According to the Simmenthal rule, the rights and responsibilities of national courts include the ensuring of effectiveness of EU law while the powers of the Court include the obligation to support national courts in discharging their duty.

National courts must apply **the principle of primacy of EU law** if they identify a conflict between Union norms and national norms. However, this principle may be adhered to without the need of making a reference for a preliminary ruling to the CJEU. On the other hand, if

17 R. Grzeszczak, "Sądowe stosowanie", p. 15.

a national court is unsure of its interpretation of EU law, the court should submit a preliminary reference to the CJEU in accordance with Article 267 TFEU.

Case study:

A refusal to apply provisions of national law incompatible with EU law in the case-law of the CJEU (the implementation of the Simmenthal rule):

The Supreme Court has many times spoken on the refusal to apply a provision of national law that is incompatible with EU law. In the judgment entered in case no. III SK 3/12,[18] the Supreme Court noted that national courts have the authority to independently assess whether the provisions of national law applicable to the resolution of a given case are in compliance with a directive. If it is established that there is a discrepancy between provisions of national law and provisions of a directive, the national court must, first of all, attempt to interpret a provision of national law in a way that is "sympathetic" to EU law. The obligation of sympathetic interpretation is so extensive that a national court may refuse to apply an incompatible provision of national law and apply another domestic provision that is compatible with the directive or may be interpreted in a way "sympathetic" to EU law instead of the incompatible provision.[19] The possibility of non-application of a provision of national law may only be considered in a situation where national court determines that it is impossible to interpret national law in a way that is compliant with the directive or when the court is unable to find another provision of national law capable of serving as a replacement legal basis for the resolution of the case that would be compatible with EU law. Importantly, according to the settled case-law of the Court of Justice of the European Union, a national court may refuse to apply a provision of national law due to this provision's incompatibility with a provision of a directive only if the provision of a directive is directly effective.[20] A national court may not refuse to apply a provision of national law solely on the basis of a determination that this provision is at variance with EU law or a conclusion that the provision is incapable of being interpreted in a "sympathetic" manner. What else must be determined is that the provision of a directive contradicted by provisions of national law is directly effective. If a national court is uncertain whether a provision of a directive has direct effect, the court should arguably consider submitting a relevant question for the preliminary ruling of the CJEU. Consequently, even if the CJEU rules that a Member State has breached its Treaty obligations following the proceedings under Article 258 TFEU initiated by the European Commission, this does not have to mean that, in a situation where the process of the Member State's implementation of a directive is reviewed by a national court, determination of such a conflict between provisions of a statute and those of a directive would always lead to the refusal of application of a provision of national law.

In the decisions issued in cases III SK 23/12[21] and III SK 32/12,[22] the Supreme Court affirmed a view expressed in judgment III SK 3/12 by ruling that in a case where a party bringing a complaint in cassation ["appellant"] invokes an issue of EU law of material relevance, this party is obliged to show that the provision of a directive that was applied by the second instance court and that the appellant considers contrary to EU law may be considered a directly effective provision. Only in such a situation, the Supreme Court ruled, it is possible to refuse to apply a provision of national law.

18 Judgment of the Supreme Court of 19 October 2012, III SK 3/12, OSNP 2013, nos. 21-22, item 269.

19 CJEU judgment of 24 January 2012, Case-282/10, *Dominguez*, EU:C:2012:33, paragraphs. 26-32.

20 CJEU judgments of: 5 October 2004 in Joined Cases C-397/01 to C-403/01, *Pfeiffer and Others*, EU:C:2004:584, paragraph 103; 11 October 2007, Case C-241/06, *Lammerzahl*, EU:C:2007:597, paragraph 63; 17 July 2008 in Joined Cases C-152/07 to C-154/07, *Arcor and Others*, EU:C:2008:426, paragraph 40; 24 January 2012, Case C-282/10, *Dominguez*, EU:C:2012:33, paragraph 33; 12 July 2012 in Joined Cases C-55, 57 and 58/11, *Vodafone Espana and Others*, EU:C:2012:446, paragraph 37.

21 Decision of the Supreme Court of 13 December 2012, III SK 23/12, LEX no. 1238116.

22 Decision of the Supreme Court of 6 March 2013, III SK 32/12, LEX no. 1331341.

Case study:

Another Supreme Court's ruling, the judgment entered in case III CSK 112/05,[23] provides valuable insight into the subject of the refusal to apply a provision of national law that is incompatible with EU law.

This ruling discusses the possibility of applying Article 4(6) of the Act on the amendment of the Inventions Act[24] ["Amending Act"] after Poland's accession to the European Union. The Supreme Court decided that the third parties' right to sell patent-protected products exercisable before the commencement of the patent holder's production in Poland, afforded under Article 4(6) of the Amending Act, constitutes, in light of the case-law of the CJEU,[25] a measure having equivalent effect to a quantitative import restriction prohibited under Article 28 TEC and as such cannot be considered an admissible exception under Article 30 TEC. In consequence of considering Article 4(6) of the Amending Act an inadmissible measure having equivalent effect to a quantitative import restriction, in accordance with the principle of direct effectiveness and primacy of Community law over national law, Polish courts must refuse to apply this provision following Poland's accession to the European Union.

Case study:

In another case, **I UK 182/07**,[26] the **Supreme Court** considered the procedural rules applicable to cases in which a national provision contravenes the directly applicable provisions of Community law that comprise the prohibition of discrimination on grounds of sex. If a national court finds that a national provision violates the prohibition of discrimination under EU law, the court is obliged to apply provisions governing the status of a favoured category vis-a-vis the entities who have been discriminated against.

In this case, the Supreme Court held that the scope of application of Directive 79/7[27] extends to the situation in which a national legislator applies the criterion of sex as grounds for the acquisition of the right to early retirement by a person practising the profession of conductor. Article 4(1) of Directive 79/7 is a directly effective provision: it is sufficiently precise and unconditional to be relied on by an individual before a national court in order to preclude the application of any national provision inconsistent with that article.[28] The Supreme Court ruled that the fact that provisions of national law excluded male conductors from the statutory early retirement system based solely on their sex was contrary to the principle of equal treatment under Article 4 of Directive 79/7 and constituted an example of direct discrimination on grounds of sex, unless the different treatment of female and male conductors was objectively justified by a criterion, value or good other than sex. The Supreme Court also noted that, according to settled CJEU case-law on discrimination contrary to Community law, until measures designed to ensure equal treatment are adopted, it is necessary to grant to persons within the disadvantaged group the same advantages as those enjoyed by persons within the favoured group. In such a situation, a national

23 Judgment of the Supreme Court of 10 February 2006, III CSK 112/05, OSNC 2007, no. 5, item 73.

24 The Act of 30 October 1992 on the amendment of the Inventions Act and the Act on the Patent Office of the Republic of Poland (Journal of Laws of 1993, No. 4, item 14 as amended).

25 See CJEU judgments of: 11 July 1974, Case 8/74, *Dassonville*, EU:C:1974:82; 18 February 1992, Case C-235/89, *Commission v Italy*, EU:C:1992:73; 18 February 1992, Case C-30/90, *Commission v the United Kingdom*, EU:C:1992:74.

26 Judgment of the Supreme Court of 4 January 2008, I UK 182/07, OSNP 2009, nos. 3-4, item 49.

27 Council Directive 79/7 of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ EC L of 1979 No 6, p. 24).

28 CJEU judgments of: 4 December 1986, Case 71/85, *The Netherlands v Federatie Nederlandse Vakbeweging*, EU:C:1986:465, paragraph 21; 24 March 1987, Case 286/85, *McDermott and Cotter v Minister for Social Welfare and Attorney-General*, EU:C:1987:154, paragraph 14; 1 July 1993, Case C-154/92, *Remi van Cant v Rijksdienst voor pensioenen*, EU:C:1993:282, paragraph 18.

court must refuse to apply any discriminatory provision of national law and must apply to members of the disadvantaged group the same provisions as those enjoyed by the persons in the favoured group.[29]

Case study:

A discussion on the case-law of the Supreme Court relevant to the refusal to apply provisions of national law due to their inconsistency with EU law cannot ignore the judgment in case IV KK 316/15.[30]

In this judgment, the Supreme Court decided that the authority of national courts to set aside a statute inconsistent with EU law does not include the power to automatically and unconditionally set aside a statutory provision that has not been notified to the European Commission. In this case, the Supreme Court argued, there was no "content-related" inconsistency of national law with EU law; what transpired was a merely "formal and procedural" infraction. In the Court's opinion, a procedural defect may not, in itself, determine if the content of a non-notified provision violates EU law. Finally, the Supreme Court held that the imposition of any absolute obligation to set aside non-notified statutory provisions on national courts would contravene the principle of legal certainty.

The discussed judgment of the Supreme Court was a consequence of a legal dispute concerning the possibility of setting aside provisions of the Act on games of chance,[31] which was critically assessed by the CJEU in the CJEU judgment in Joined Cases C-213, 214 and 217/11 *Fortuna*.[32] The Supreme Court ruled that, according to the judgment of the Constitutional Tribunal in case P 4/14,[33] the *Fortuna* judgment was binding on the Provincial Administrative Court in Gdańsk who submitted the preliminary reference to the CJEU. However, the binding effect of the CJEU judgment was limited to the interpretation of EU law (Article 1(11) of Directive 98/34.[34] In *Fortuna*, the CJEU ruled that national provisions, such as those of the Act on games of chance, "which could have the effect of limiting, or even gradually rendering impossible, the running of gaming on low-prize machines anywhere other than in casinos and gaming arcades constitute 'technical regulations'," within the meaning of Article 1(11) of Directive 98/34. At the same time, in the operative part of the above judgment, the CJEU stated it is the national court that must determine if potentially technical provisions actually "constitute conditions which can significantly influence the nature or the marketing of the product". In the judgment's statement of grounds, the CJEU provided a set of guidelines designed to assist the national court in determining whether applicable provisions of the Act on games of chance have the characteristics of technical provisions within the meaning of Directive 98/34. While deciding the Fortuna case, the CJEU could not determine if the national provisions of the Act on games of chance are technical provisions as the authority to do so rests with national courts. This means that the CJEU judgment in this case cannot be considered a resolution whether certain provisions of the Act on games of chance are (or are not) of the technical character that would be binding on all national courts and other public authorities in Poland. The Fortuna judgment's impact on national case-law is limited as the CJEU only indicated that some provisions of the Act on games of chance may be "technical" for the purposes of Article 1(11) of Directive 98/34.

29 CJEU judgments of 28 September 1994, Case C-408/92, *Avdel Systems*, EU:C:1994:349, paragraphs 16 and 17; 12 December 2002, Case C-442/00, *Rodriguez Caballero*, EU:C:2002:752, paragraphs 42 and 43; 7 September 2006, Case C-81/05, *Cordero Alonso*, EU:C:2006:529, paragraphs 45 and 46; 21 June 2007 in Joined Cases C-231/06 to C-233/06, *Yonkman*, EU:C:2007:373, paragraph 39.

30 Judgment of the Supreme Court of 1 March 2016, IV KK 316/15, LEX no. 1994403.

31 Act of 19 November 2012 on games of chance (uniform text in the 2018 Journal of Laws, item 165, as amended).

32 CJEU judgment of 19 July 2012 in Joined Cases C-213, 214 and 217/11, *Fortuna and Others*, EU:C:2012:495.

33 Judgment of the Constitutional Tribunal of 11 March 2015, P 4/14, OTK-A 2015 no. 3, item 30.

34 Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations (OJ EU L 1998 No 217, p. 18).

> However, the matter at hand may only be determined by a national court adjudicating a given case and applying national provisions of the Act on games of chance. Given the above, the Supreme Court refused to automatically set aside the provisions of the Act on games of chance, holding that it is the role of an adjudicating court to verify, on a case-by-case basis, if there are grounds for the refusal to apply a concrete provision of that Act, which the court considers a technical provision.

A national court's determination of the "purely domestic" nature of a case thereby means that no provisions of EU law (including the CFR) apply to this case. This, in turn, effectively prevents national courts from requesting the CJEU to interpret such law. On the other hand, it is admissible – from the perspective of EU law – to treat the Polish nationals who pursue claims based solely on provisions of Polish law in a less favourable manner (also procedurally) than those Polish nationals and nationals of other EU Member States who pursue claims based on EU law ("*à rebours* discrimination").[35]

It is evident from the jurisprudential practice of Polish courts (as well as of courts from other Member States) that most problems arise in cases in which provisions of national law implement EU law and, *at the same time*, apply to "situations covered by the directive". Here, a truly problematic issue is in particular to define the actual degree of connection between a national provision and a given directive, especially where a directive's provisions impose very general obligations on Member States, which leads to a situation of many national provisions potentially falling within the scope of EU law.

The scope of the *ratione materiae* application of EU law by authorities of a Member State (courts, but also public administration bodies) is determined by the wording of the founding Treaties of the European Union and also by their interpretation by the Court of Justice of the European Union, especially the interpretation given in response to preliminary references submitted by national courts. **In essence, this means that national courts frequently rule on the compatibility of national provisions and practices of national authorities with EU law.**

> **Case study:**
>
> It is worth noting that Provincial Administrative Court (PAC) resolved, citing the existent case-law of the CJEU, that there was no need to submit a reference for a preliminary ruling because the issues related to the application of directives by national authorities of Member States have been already explained in sufficient detail.
>
> In its jurisprudential practice, the CJEU follows what is known as "**the spirit of the Treaty**" (and interprets EU law dynamically and purposively) and aims at strengthening the integration process, in particular in respect of ensuring the respect of fundamental rights "**within the scope of application of EU law**" and reinforcing and protecting rights of EU citizens.[36]
>
> The **Internal market** as an area where the free movement of goods, persons, services and capital is guaranteed alone **generates multidimensional and extensive impact on the functioning of areas that exclusively or to a significant degree constitute competences of Member States** such as family law, direct taxes, systems of property ownership, intellectual property protection or the organisation of healthcare systems.

35 *Ibid*., p. 13.

36 See, e.g., cases C-438/05, *Viking Line*, C-341/05, *Laval un Partneri*, C-346/06, *Dirk Rüffert and Commission v. Luksemburg*.

> The Court of Justice, while addressing doubts presented by Member States (in the forms of preliminary references submitted by national courts), most frequently uses a formula that refers to the necessity of exercising national powers in line with EU law: "**as EU law now stands [these areas] are coming within the competence of the Member States ...**". However, Member States "**must none the less, when exercising that competence, comply with [EU] law unless what is involved is an internal situation which has no link with [EU] law.**"

In summary, a national court's jurisdiction to apply Union law is triggered in EU cases, or the cases in which EU law is applied. **It is a judge who determines** (possibly, at a request of a legal representative made through a proper procedural measure) **if a matter at hand is a domestic (national) case or an EU case**. Next, the judge finds **relevant provisions with a direct effect** and identifies the mutual relation between provisions of EU law and those of Polish law (**conformity or non-conformity**). If non-conformity is identified, the judge should try to provide a sympathetic (pro-Union) interpretation of the national provision to secure conformity. This may lead to a **substitution** or an **exclusion**, with the necessity to remove the inconsistency by way of the above-mentioned **interpretation conforming to EU law**. If the meaning of EU law in given factual circumstances is uncertain, the judge should consider if it is possible and purposive to refer **a question of law (question for a preliminary ruling)** to the CJEU (Article 267 TFEU).[37]

The above sequence of a national court's actions in an EU case will be explained in detail further in this Handbook.

2.1. Does a provision/principle of EU law apply to a case? Types of links

The key consequences of court proceedings being classified as an EU case are the necessity to find a proper method of interpretation and the impact of this classification on the legal basis of adjudication.

> **A link to EU law**
>
> This concept may be explained as a relation of the situation that is to be adjudicated by the court (administrative body) with EU law in respect of cases with a reference to Treaty provisions, especially those introducing market freedoms, or competition law. Broadly defined **cross-border** nature of such cases is such a link.

Other examples of EU cases:

1. cases with **a reference to the directly effective provisions of directly applicable acts of EU law** (regulations, decisions, international agreements concluded by the EU or the EU primary legislation, in particular TEU and TFEU);
2. cases relating to national provisions adopted in order to **implement a Directive**;

37 As in Grzeszczak, "Sądowe stosowanie", p. 13.

3. cases in which a regulation of **a national law "overlaps" with EU law**, i.e. concerns national provisions that de facto implement a directive but have not been adopted as such; in other words, in such cases EU law is applied through national law, which was adopted to regulate purely domestic situations;
4. **cases relating to national provisions adopted in order to implement** a directive or enforce an EU regulation/ decision or primary law of the EU (TEU/TFEU) or an international agreement concluded by the EU;
5. **cases concerning national provisions adopted to perform obligation of Member States**, even if such provisions precede the entry into force of an EU provision that imposes a given obligation (e.g. the obligation to impose sanctions designed to ensure the effective collection of VAT (see CJEU judgment in Case C-617/10 *Fransson*);
6. (more difficult) cases concerning national provisions covered by the ***ratione materiae*** **and** ***ratione personae*** **scope of a directive after the expiry of the deadline for its transposition**;
7. (more difficult and extremely important, yet often unnoticed) **cases concerning national provisions that introduce an exception from principles established in the primary or secondary Union legislation** on grounds of a public interest, such as Article 36 TFEU/ overriding (imperative) requirements, Article 45(3) TFEU, Article 4 of the EAW Framework Decision, the restrictions on the free movement of EU citizens and their family members established in Directive 2004/38/EC (see e.g. judgment of Provincial Administrative Court in Warsaw, case no. 2093/12), and also CJEU judgment in Case C-208/09, *Sayn-Wittgenstein*, etc.);
8. cases in which **national law refers to EU law**;
9. cases relating to those of **national procedural provisions that govern the exercise of rights afforded under EU law** (e.g. the right to be compensated by a Member State for damage inflicted upon legal or natural persons due to the Member State's failure to timely implement a directive);
10. sometimes provisions of EU law may be applied through national law in a direct and unconditional manner, in order to ensure the identical treatment of national situations and those regulated by EU law, also in purely national situations, provided there are grounds for such an application.

Two of the items listed above require a commentary and explanation.

Re. 3: there is a line of judicial authority present in the case-law of the Luxembourg Court, originating from *Thomasdünger* (judgment of 26 September 1985, Case 166/84) and confirmed in, among other cases, *Allianz Hungária Biztosító and Others*, according to which the Court is competent to give preliminary rulings on questions relating to European Union law in situations where the facts of the main proceedings are outside the scope of EU law, but where the provisions of EU law are applicable through national law adopted in relation to situations that are purely internal but incorporate measures laid down by EU law.

Re. 10: this is because it follows from the Court's case-law that, even in a purely internal situation, the Court's answer may be useful for the national court, and – consequently – admissible. This occurs, in particular, in cases where national law would require the national court

to allow a national of another Member State to exercise the same rights that the national of another Member State would enjoy under EU law in the same situation (as, specifically, per CJEU judgments of: 5 December 2000, Case C-448/98 *Guimont*, paragraph 23; of 30 March 2006, Case C-451/03 *Servizi Ausiliari Dottori Commercialisti*, paragraph 29; 5 December 2006, Joined Cases C-94/04 and C-202/04 *Cipolla and Others*, paragraph 30; and 1 June 2010, Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez*, paragraph 36). However, this problem is complicated as the referring court may be confused about the approach and answer of the CJEU.

Case study:

Judgment of the Court (Third Chamber) of 21 December 2011, Case C-482/10 *Teresa Cicala v Regione Siciliana*, ECLI:EU:C:2011:868.

National administrative procedure – Administrative acts - Obligation to state reasons – Possibility of failure to state reasons being remedied during legal proceedings against an administrative act – Interpretation of the second paragraph of Article 296 TFEU and Article 41(2)(c) of the Charter of Fundamental Rights of the European Union – Lack of jurisdiction of the Court

The Court's interpretation of provisions of EU law in purely internal situations is warranted on the ground that they have been made applicable by national law directly and unconditionally in order to ensure that internal situations and situations governed by EU law are treated in the same way.

On the other hand, if a national provision makes a general reference to "principles derived from the Community legal order", and not specifically to the provisions of EU law referred to in the request for a preliminary ruling, it cannot be considered that such provisions have been made applicable directly by a given provision of national law. Likewise, it cannot be considered, in those circumstances, that the reference to EU law as a means of regulating purely internal situations is unconditional so that the provisions referred to by those questions are applicable without limitation to the situation at issue in the main proceedings.

Therefore, the Court has no jurisdiction to answer the questions about the interpretation of specific provisions of EU law referred for a preliminary ruling by a national court where it cannot be inferred that, by referring to principles based on EU law, the national legislator intended, with regard to the obligation to give reasons, to refer to the content of those specific provisions in order to apply identical treatment to both internal situations and those falling within the scope of EU law.

Case study:

A critical assessment of the way in which requests for a preliminary ruling are formulated – case XXV C 1255/17 (Swiss Franc credits)

This was action for payment proceedings related to the repayment of monies paid by claimants (borrowers) to a bank as part of their performance of a mortgage loan agreement, whose amount was indexed to a foreign currency. The claimants argued that the repayment had been made without a valid legal basis because their mortgage loan agreement was either invalid in full or partially ineffective due to the fact some of its provisions were unlawful abusive clauses. As an alternative to their claim for payment, the claimants moved for the determination of invalidity of the loan agreement.

The national court hearing this case decided to refer four questions for a preliminary ruling. All these questions may generally be considered redundant:

> **Question 1:**
>
> *In a situation where a consequence of declaring specific contractual provisions, which define a manner of a party's delivery of a contractual performance (its amount), 'unfair terms in contracts' within the meaning of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ EU L 1993.95.29) would be the invalidation of the entire contract that is disadvantageous for a consumer, is it possible to complete the gaps in the contract not on the basis of a supplementary provision which simultaneously replaces the unfair clause, but rather on the basis of the provisions of national law that allow to supplement effects of an act in law expressed in this act in law also with the effects resulting from principles of equity (principles of public policy) or settled customs?*

Asking this question is an example of a failure to apply the doctrine of *acte éclairé* (described in detail in chapter 3.3.2). The Court has already adjudicated in the same (substantively identical) situation and has resolved the issue at hand.

In the judgment of 30 April 2014 in Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábaihe v OTP Jelzálogbank Zrt*, the CJEU held that Article 6(1) of Directive 93/13 expressly precluded a modification of an unfair contractual provision, also by way of a reference to the principles of equity.

As paragraph 77 of that judgment reads:

> *In that connection, the Court has held that Article 6(1) of Directive 93/13 must be interpreted as precluding a rule of national law which allows a national court, if it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to adjust that contract by revising the content of that term (Banco Español de Crédito EU:C:2012:349, paragraph 73).*

However, this above conclusion does not preclude the application of a supplementary provision, as such a provision is not, as a rule, unfair by virtue of being an element of the public order. Also, in the *Kásler* judgment's paragraphs 83-84 the CJEU ruled that the annulment of the entire contract might expose the consumer to particularly unfavourable consequences, which meant that the dissuasive effect resulting from the annulment of the contract could be jeopardised. In general, the consequence of an annulment is that the outstanding balance of the loan becomes due forthwith, which is likely to be in excess of the consumer's financial capacities and, as a result, tends to penalise the consumer rather than the lender who, as a consequence, might not be dissuaded from inserting such terms in its contracts.

> **Question 2:**
>
> *Should the potential assessment of effects of invalidation of the entire contract for the consumer consider the circumstances that existed at the moment of the contract's conclusion or those existing at the moment when there appeared a dispute between the parties regarding the effectiveness of a given clause (when the consumer alleged that the clause was abusive)? What is the significance of the consumer's arguments presented in such a dispute?*

The second question is another example of non-application of the doctrine of *acte éclairé*: the above paragraphs the *Kásler* judgment (83-84) clearly explain that the effect (immediate enforceability of the outstanding balance of the loan) is assessed as of the date of adjudication.

Moreover, the referring court should take into account the CJEU judgment of 15 March 2012 in Case *Jana Pereničová, Vladislav Perenič v SOS financ, spol. s r. o.* (C-453/10). In the *Pereničová* judgment the Court pointed to an objective criterion used to assess consequences of the decision. As The Court of Justice ruled in paragraph 32 of this judgment, "both the wording of Article 6(1) of Directive 93/13 and the requirements concerning the legal certainty of economic activities plead in favour of an objective approach in interpreting that provision, so that ... the situation of one of the parties to the contract, in this case the consumer, cannot be regarded as the decisive criterion determining the fate of the contract".

At the same time, it follows from paragraph 36 of *Pereničová* that even if the annulment of the contract is favourable for the consumer, this does not mean that such an effect is required by the Directive. It is thus a national court who needs to assess whether or not it is possible to keep the contract in force without the unfair clause; the argument presented by the consumer should have no bearing on such an assessment.

> **Question 3:**
>
> *Is it possible to maintain the validity of provisions constituting 'unfair terms in contracts' pursuant to norms of Directive 93/13/EEC if doing so was favourable for a consumer at the moment of the dispute's resolution?*

In this case, the doctrine of *acte éclairé* has been violated in an explicit manner (for a more extensive discussion, see chapter 3.3.1). This is because an answer to the above question is obvious in light of the language of Article 6(1) of Directive 93/13/EEC:

> *Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law,* **not be binding on the consumer** *and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.*

To emphasise how unequivocal this issue is, one should point to its has been extensively discussed in the case-law of the CJEU, including the judgment of 14 June 2012, *Banco Español de Crédito SA v Joaquín Calderón Camino* (C-618/10). In paragraphs 62-63 of *Banco Español* the Court ruled as follows: *With regard to the wording of Article 6(1), it must be held, firstly, that* ***the first part of the sentence in that provision, while granting the Member States a certain degree of autonomy*** *so far as concerns the definition of the legal arrangements applicable to unfair terms, nevertheless* ***expressly requires them to provide that those terms "shall ... not be binding on the consumer"***.

In that context, follows the CJEU's reasoning, *the Court has already had the opportunity to interpret that provision as meaning that it is a matter for national courts, when they find that contract terms are unfair, to draw all the consequences that follow under national law,*

in order that the consumer will not be bound by those terms (see Asturcom Telecomunicaciones*, paragraph 58; order of 16 November 2010, Case C-76/10* Pohotovosť *[2010] ECR I-11557, paragraph 62; and* Pereničová and Perenič*, paragraph 30). As has been pointed out in paragraph 40 of [the* Banco Español*] judgment, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.*

Question 4:

If the contractual provisions that define the amount and manner of delivering a performance by a party are declared unfair, may this lead to a situation where the shape of the legal relationship, determined on the basis of the language of the contract modified by the severance the effects of the unfair terms, deviates from that derived from the intention of the parties in respect of key performances of parties? Specifically, if a contractual provision is considered unfair, does it mean that it is possible to apply other contractual provisions defining the key performance of a consumer which are not covered by the allegations of abusiveness but whose shape arranged by the parties (and their introduction to the contract) has been inextricably connected with the provision challenged by the consumer?

This question concerns the possibility of affirming the validity of a contract whose key provisions – those defining the key performance of a party – have been challenged as abusive.

Given how uniform and well-settled the relevant line of reasoning of the CJEU is, there are no reasonable doubts as to the interpretation of the Directive in this context: The assessment of a contract's survivability following the severance of unfair contractual provisions lies within the exclusive purview of a national court.

In paragraph 44 of the aforementioned judgment of 15 March 2012, *Pereničová and Perenič* (C-453/10), the CJEU explicitly ruled: "It is for the referring [national] court to decide on the application of the general criteria set out in Articles 3 and 4 of Directive 93/13 to a specific term, which must be considered in relation to all the circumstances of the particular case (see, to that effect, Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraphs 19 to 22; *Pannon GSM*, paragraphs 37 to 43; *VB Pénzügyi Lízing*, paragraphs 42 and 43; and order in *Pohotovosť*, paragraphs 56 to 60)."

The above line of reasoning leads to the assumption that the test of fairness of contractual provisions may also be applied to provisions defining parties' key performances under a contract. Such provisions will be eliminated if their wording is unintelligible, especially in respect of financial consequences for a consumer. On the other hand, the Court of Justice has no jurisdiction to determine if a contract should survive following the severance of a specific provision (itself being a consequence of the application of the fairness test) that is connected with provisions defining key performances of parties.

The conclusion of the above case study is as follows: a request for a preliminary ruling should be made for the purpose of obtaining interpretation of EU law, which is material for the adjudication of a specific case, but only if the existing case-law of the CJEU offers **no clear interpretation** in this respect. Finally, the CJEU has no authority to interpret national law.

For an example of a correctly formulated request for a preliminary ruling

see e.g. the request (with a statement of grounds) submitted by a Court of Appeal in Case C-119/15, *Biuro Podróży Partner / Prezes UOKiK*, https://www.iws.org.pl/pliki/files/ACa%20_165_2014_1.pdf.

2.2. The model sequence of a national court's actions in an EU case

If a court/administrative authority determines that a case is of a purely domestic nature, no provisions of (substantive) EU law will apply to the case. In effect:

- it is inadmissible to refer a question of law to the CJEU;
- it is admissible – from the perspective of EU law – that the Polish nationals who pursue claims based solely on provisions of Polish law receive less favourable treatment (also during legal proceedings) than the treatment received by Polish nationals and nationals of other EU Member States who pursue claims based on EU law ("*à rebours* discrimination").[38]

Finding a proper link and classifying a given situation as an EU case, although crucial, are only the first steps in the complex and problem-ridden process that involves the application of EU and national law.

It follows from the very nature of the European Union that the EU legal system is not a self-existent one and cannot operate without (or, in isolation from) the legal systems of Member States. This in turn, is the source of so many problems related to the judicial (and administrative) application of EU law.

The following is a model (and somewhat simplified) sequence of actions:

1. **Validation** – is a case a domestic case or an EU case? If the case is an EU case, the following question should be asked:
2. **What are the important (relevant) provisions** with a direct effect?
3. If those **provisions originate from different systems**, they should be **compared** for **consistency/inconsistency** with EU law.
4. If there is an **inconsistency** (e.g. between a provision of a statute and one of a directive), an attempt to give a national provision sympathetic **interpretation** should be made.
5. If it is impossible to obtain a reasonable effect through sympathetic **(pro-Union) interpretation** of national law (such interpretation may not result in unlawfulness of a measure), a national court **may refuse to apply national provisions that are inconsistent with EU law**.
6. The court has the right (or duty) to submit a **preliminary reference** to the CJEU (Article 267 TFEU).

38 See e.g. CJEU judgments in cases C-175/78 *The Queen v Saunders*; C-35 and 36/82 *Morson & Jhanjhan*; C-64 i 65/96 *Uecker and Jacquet*; C-97/98 *Jägerskiöld*; C-34/09 *Ruiz Zambrano*.

The above process may involve different types of conflicts, including those between norms, interpretations (in the system of multi-centric law different courts have jurisdiction over a given matter) or meanings of law (e.g. specific fundamental rights in individual systems), etc.

3. The principle of procedural autonomy of Member States and its limits – practical comments

The principle of procedural autonomy is of crucial importance for judges of national courts and parties' representatives. Since the law of the EU contains no (general or special) procedural principles that would ensure the enforcement of claims afforded under EU legislation, **it is necessary to refer to national procedural rules, in accordance with the principle of procedural autonomy of Member States**. The above is a consequence of the general principle of EU law according to which national courts apply Union law with the use of national procedural rules and national remedies. In other words, it is the national law that determines how claims are enforced. This manner of proceeding is defined as the principle of procedural autonomy; the corresponding principle, developed by the European Court of Human Rights, is known as the **principle of subsidiarity**.

Given the above, the Court of Justice has no jurisdiction to decide:

- on the facts or law of the case to which a preliminary reference relates,
- on the interpretation or validity of national law, including international agreements concluded by Member States, especially the ECHR),
- on the failure to act by an EU institution or EU liability in tort,
- on the interpretation of judgments issued by EU courts (this function is governed by a separate procedure),
- on the costs in national proceedings.

The CJEU does not have the jurisdiction to review the compatibility of national law with EU law but gives useful interpretation of EU law.

Example:

A model preliminary reference:

"**Should [usually, a given provision of EU law] be interpreted in a way that precludes (does not preclude) a provision such as that applied in the proceedings before the national court, in accordance with which...**" (for more details, see the practical comments in the last part of the Handbook).[39]

39 For a discussion on a number of practical aspects of the preliminary ruling procedure, see the following educational publications developed by the Helsinki Foundation for Human Rights: A.K. Pleśniak, K. Szychowska, *Nie tylko Strasburg? Alternatywne międzynarodowe instrumenty ochrony praw człowieka część II: Postępowanie w sprawie odesłań prejudycjalnych przed Trybunałem Sprawiedliwości UE*, Helsińska Fundacja Praw Człowieka, Warszawa 2017, http://www.hfhr.pl/wp-content/uploads/2017/11/nie-tylko-strasburg-materialy-szkoleniowe-cz-II.pdf and A. Frąckowiak-Adamska, *Nie tylko Strasburg? Alternatywne międzynarodowe instrumenty ochrony praw człowieka*, Helsińska Fundacja Praw Człowieka, Warszawa 2017, http://www.hfhr.pl/wp-content/uploads/2017/11/nie-tylko-strasburg-materia%C5%82y-szkoleniowe-cz%C4%99%C5%9B%C4%87-I-FIN.pdf.

In its case-law, the CJEU has established restrictions of national judges' discretion to resolve disputes solely based on national procedural rules in situations where EU law applies. These restrictions comprise the **principle of equivalence** (also known as the principle of non-discrimination) and the **principle of effectiveness of Union law**. According to the **principle of equivalence**, the procedural rules governing enforcement of claims based on EU law **may not be less favourable** than those related to similar claims under national law. The **principle of effectiveness** prevents national rules of procedure from rendering rights of individuals based on EU law **impossible or excessively difficult to enforce in practice**. Those principles require that national judges must refrain from applying national rules of procedure that are discriminatory towards claims based on EU law or that prevent or make it excessively difficult to obtain a remedy based on EU law.[40]

CJEU judgment of 20 October 2016, Case C-429/15 *Evelyn Danqua v Minister for Justice and Equality and Others*, ECLI:EU:C:2016:789

As regards the **principle of equivalence**, it should be recalled that respect for this principle requires that a national provision should be applied uniformly to both proceedings based on EU law and those based on national law (see the similar reasoning in the judgment of 28 January 2015, C-417/13 *ÖBB Personenverkehr*, EU:C:2015:38, paragraph 74). According to **the principle of effectiveness of EU law**, national rules of procedure should render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (see the judgments of 15 March 2017, C-3/16 *Aquino*, EU:C:2017:209, paragraph 52 and the case-law cited).

CJEU Judgment in Case C-312/93 *Peterbroeck*:

... under the principle of cooperation laid down in Article 5 of the Treaty [Article 4(3) TFEU], it is for the Member States to ensure the legal protection which individuals derive from the direct effect of Community law. In the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

Notably, common (cross-border) procedural rules for the entire Union are increasingly often laid down in some areas, especially in consumer law and public procurement law. What also should be noted is that in the wake of changes under the Treaty of Amsterdam EU institutions adopt acts governing the civil procedure such as Regulation No 1215/12 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I bis"),

40 See CJEU judgment of 9 November 1983, Case 199/82 *San Giorgio*, European Court reports 1983 p. 3595. In the judgment of 15 October 1987, Case 222/86 *Heylens*, European Court reports 1987 p. 4097, the Court of the European Union held that "the existence of a remedy of a judicial nature ... is essential in order to secure for the individual effective protection for his right" (paragraph 14). The Court also emphasised that EU rights would be violated if there was no legal remedy preventing the appellant from enforcing a claim for damages for a loss or damage incurred (such a measure must be equivalent to the national claim applicable to similar entitlements asserted under national law.

Regulation No 2201/2003/WE concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility or Regulation No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure.

4. The scope of application of EU law (in a case with an EU element) – a case study based on the latest case-law of the CJEU

In several of its decisions, the Court of Justice has refused to hear a reference for a preliminary ruling submitted by a Polish court due to the absence of a link to EU law. In such cases, the CJEU issues an order which indicates that the Court manifestly lacks jurisdiction to reply to the question referred.

> **Article 53 of the Rules of Procedure of the Court of Justice – Decisions**
>
> *§ 2. Where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.*

At this point let me draw readers' attention to three cases that aptly illustrate the issue of giving a proper justification of the existence of an EU element in a case in a request for a preliminary ruling.

> **Case study:**
>
> The ***Stylinart*** case (resolved by an **order of the CJEU in 2014**) is a typical example of a preliminary reference that concerns a legal question unconnected with EU law.
>
> In this case, the Regional Governor of Podkarpacie issued the decision to complete the construction of the Przemyśl ring-road, which resulted in Stylinart, a Polish company carrying out the business of shipping and delivery of furniture to stores in Germany, having been expropriated from a part of its land property. The compensation the company received has been calculated based on the value of the expropriated property. In a civil-law action, Stylinart alleged that the compensation was too low considering the fact that the expropriation deprived the company of the most useful section of a lorry unloading area. This forced Stylinart to obtain leases of additional service yards, which, in turn, generated extra operating costs. However, since the Polish Act on the special principles of awards and implementation of public highways contracts[41] *does not provide a basis for the award of a compensation in an amount exceeding the value of the expropriated property, the national court dismissed the company's claim for damages based on the general principles of law. At the same time, the court submitted a reference for a preliminary ruling, asking the CJEU if Articles 16 and 17 CFR prevent national provisions, which limit the value of awarded compensation to the value of an expropriated property, from denying full compensation for a loss.*

41 The Act of 10 April 2003 on the special principles of awards and implementation of public highways contracts (2003 Journal of Laws, No. 80, item 721).

The Court of Justice refused to answer the above question, arguing that the fact that Stylinart exercised freedoms of the internal market while delivering furniture to another Member State was insufficient for identifying an EU element in the case at hand. As the Court observed, the statement of grounds of the request for a preliminary ruling had not contained explanations that would have sufficiently shown a link between the case and EU law. In consequence, the CJEU ruled that it manifestly lacked jurisdiction to reply to the question referred.[42]

The facts of the ***Teisseyre*** case (resolved by a 2014 order of the CJEU) were somewhat more nuanced. The matter involved the dispute between a Finish national, a legal heir of the owner or a real property located in an area of "territories beyond the Bug River" ceded by Poland to the Soviet Union in 1944, and the State Treasury. The dispute resulted from the Minister of State Treasury's refusal to pay compensation based on the Act on the exercise of the right to be compensated for real property left beyond the current borders of the Republic of Poland.[43]

Order of the Court of Justice of the European Union of 19 June 2014 in Case *Teisseyre*

Pursuant to the aforementioned Act, certain rights provided for by the Act were available only for Polish citizens or residents of Poland. The applicant has the Finnish citizenship and never resided in Poland. A court hearing an appeal brought in national proceedings has expressed its doubts regarding the compatibility of the Act's requirements of citizenship and residence with Article 18 TFEU, which prohibits discrimination on grounds of nationality.

The Court of Justice refused to answer the question referred for a preliminary ruling, pointing to the absence of an EU element in the case. The Supreme Administrative Court, which submitted the request for a preliminary ruling, failed to indicate any circumstances that would enable the Court to notice a link between the case and EU law, especially that the produced records showed that the applicant did not exercise his right to free movement. Given the above, it must be considered that the CJEU manifestly lacked jurisdiction to reply to the question referred for a preliminary ruling.[44]

The *Grodecka* case (resolved by a 2014 order of the CJEU) concerned important aspects of the temporal application of EU law.

This case involved claims that the provisions of the Polish Civil Code that restrict the possibility of inheritance of agricultural holdings and making the exercise of the right to inheritance dependable on the satisfaction of certain professional criteria were incompatible with provisions on the freedoms of the internal market. A national court referred a question to the Court of Justice for a preliminary ruling, inquiring if Articles 2 TFEU and 8 TFEU, Article 1 of Protocol No 1, Article 14 of the ECHR, Article 17(1) CFR preclude national provisions limiting the transfer on succession of agricultural holdings such as the relevant provisions of the Civil Code.

42 Order of the Court of Justice of the European Union of 11 December 2014 in Case *Stylinart*, C-282/14, EU:C:2014:2486, paras. 20-21.

43 Act on the exercise of the right to be compensated for real property left beyond the current borders of the Republic of Poland, version applicable to the facts relevant to the main proceedings (Journal of Laws No. 169, item 1418).

44 Order of the Court of Justice of the European Union of 19 June 2014 in Case *Teisseyre*, C-370/13, EU:C:2014:2033.

The Court of Justice refused to reply to the question referred for a preliminary ruling, first and foremost noting that the facts in the case predate the accession of Poland to the European Union as the disputed inheritance passed to the inheritor in 2000. The Luxembourg Court has jurisdiction to interpret EU law, so far as concerns the application of EU law in a new Member State, only as from the date of that Member State's accession to the EU. Second, the Court observed that no element of the justification of the request for a preliminary ruling permitted the conclusion that those provisions implemented EU law within the meaning of Article 51(1) CFR or concern an "activity" of the European Union within the meaning of Article 8 TFEU.[45]

45 Order of the Court of Justice of the European Union of 2 June 2016, Case C-50/16 *Grodecka*, EU:C:2016:406, paragraphs 14-17.

Part III

Legal Characteristics of the Preliminary Reference

1. The mechanism of preliminary rulings

Under Article 267 TFEU, the Court gives preliminary rulings concerning:

- the **interpretation of the Treaties**, i.e. EU founding Treaties (TEU and TFEU), the Treaty establishing the European Atomic Energy Community, revision treaties, accession treaties or the CFR,
- **the validity and interpretation of acts of secondary legislation**, or the acts adopted by the institutions, bodies, offices or agencies of the Union,
- The CJEU may also give preliminary rulings concerning the interpretation of provisions of **international agreements concluded by the European Union**.

The mechanism of preliminary rulings is based on the primary (Treaty) law of the EU, namely **Article 19(3)(b) TEU and Article 267 TFEU**. It ensures the uniform and relatively effective application of EU law in all Member States. As a manifestation of mutual cooperation between national courts and the Court, this mechanism is designed to "assist in the administration of justice in the Member States". This is because national courts are functionally EU courts: they are tasked to apply EU law in domestic legal orders of Member States. As part of the performance of their function, adjudicating judges are obliged to apply and interpret two distinct legal systems – EU and national (obviously, in addition to the third system, namely that of international law). In order to avoid differences of interpretation, it is necessary to establish a procedure that would guarantee the uniform application of EU law, which the CJEU is obliged to uphold under the Treaty. What also should be noted is that the relationship between national courts and the Court, as a rule, is not a hierarchical one. A national court, using the interpretation of EU law presented by the CJEU in a preliminary ruling, is, at the end of the day, the court that ultimately decides a pending case.

CJEU judgment (Grand Chamber) of 27 October 2009, Case C-115/08 *Land Oberösterreich v ČEZ as.*, ECLI:EU:C:2009:660

The fact that the national court has, formally speaking, worded the question referred for a preliminary ruling with reference to certain provisions of Community law does not preclude the Court from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions (see, inter alia, Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 20 and case-law cited, and Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 29 and case-law cited). It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of Community law which require interpretation, having regard to the subject-matter of the dispute (see, inter alia, Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9).

2. Entities authorised to submit requests for a preliminary ruling

This section of the Handbook is devoted to address the question about who can submit a question for a preliminary ruling. Article 267 TFEU authorises "a national court or tribunal" to do so.

As the EU primary legislation does not define such a "court or tribunal", the Court of Justice has interpreted this term as **an autonomous concept of the law of the European Union**. Following with the principle of autonomous and uniform interpretation of EU law, the Court has identified in its case-law a number of substantive characteristics that a national body should have in order to be able to make use of the preliminary ruling procedure. Only those resolutions concerning the rights and duties of a given entity that are made after conducting proceedings before a court, namely a special body that is characterised by guarantees of independence and impartiality and that issues final decisions in the name of the state and is subject only to law, may ensure the effective protection of the legal situation of an individual.

The CJEU case-law above all describes the **constitutional features of judicial bodies, and in particular their position as an authority external to a body that issued a contested decision.**[46] This is an aspect of the general principle of the independence of the judiciary from the legislative and executive branches of government. Other features include the **independence of members of the judicial body, its permanent character, at least a statutory basis of its establishment, compulsory jurisdiction, application of an *inter partes* procedure, application of rules of law, the binding nature of decisions, ability to issue judicial decisions or to perform judicial functions.**[47]

The requirements that a judicial body must satisfy that have been identified in the case-law of the Court of Justice can be divided into two categories, namely the constitutional and functional characteristics of a judicial body. The constitutional characteristics include the **independence of the body and its members, permanence and at least a statutory basis for its creation**. Consequently, the constitutional requirements describe the institutional features that each a judicial body should have. On the other hand, the functional requirements are a collection of characteristics that may be identified as "issuing judicial decisions" or "performing judicial functions". The above may also be described as the "administration of justice". The **functional requirements** include: the **making of a determination regarding the legal situation of an individual; compulsory jurisdiction, the application of an *inter partes* procedure, application of rules of law, binding force of the ruling and the relative finality of the ruling**. Those characteristics are assessed on the case-by-case basis. The above attributes are the elements of the substantive definition of a court of tribunal within the meaning of Article 267 TFEU that functions in EU law.

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46 CJEU judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 23.

47 Judgments of 30 June 1966, Case 61/65 *G. Vassen-Göbbels* and of 6 July 2000, Case C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, paragraph 29. See also, e.g. CJEU judgments of: 30 June 1966, *Vaassen-Göbbels*, 61/65, EU:C:1966:39; 10 December 2009, *Umweltanwalt von Kärnten*, C-205/08, EU:C:2009:767, paragraph 35; 6 October 2015, *Consorci Sanitari del Maresme*, C-203/14, EU:C:2015:664, paragraph 17; and 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 23.

As CJEU President Professor Lenaerts pointed out in his speech at the Polish Supreme Administrative Court on 19 March 2018, **the concept of judicial independence**, explained in the landmark *Wilson* judgment,[48] **has both an external and internal dimension. In its internal dimension, judicial independence is intended to ensure "a level playing field" for the parties to the proceedings and for their conflicting interests. In other words, in order to be independent, courts need to be impartial.**

Externally, judicial independence establishes the dividing line between the political process and the courts. Courts must be shielded from any external influence or pressure that might jeopardise the independent judgement of their members as regards proceedings before them. Such protection must be granted to the members of the judiciary, by, for example, laying down guarantees against removal from office. The external aspect of judicial independence also necessitates the absence of "hierarchical constraint or subordination to any other body that could give … orders or instructions" to the body making the reference.[49]

As a rule, the Court accepts references from bodies of national judicial systems. However, in many cases the CJEU has accepted preliminary references from bodies that are not formally recognised as courts within the meaning of law of a Member State. To illustrate this, the judgment entered in the case ***Forposta*** *S.A., ABC Direct Connect sp. z o.o. v Poczta Polska S.A.* should be considered an exception to the principle of independence. In this case, the **Polish National Board of Appeal**, a body that cannot be considered independent from the executive, has been given leave to submit a request for a preliminary ruling.[50]

Following the decision in the *Job Centre* case,[51] the Court of Justice sometimes refuse to answer questions referred for a preliminary ruling by national judicial bodies due to the nature of main proceedings. The Court ruled that the role of an Italian court conducting registration proceedings was not to issue a decision of a judicial nature. In registration proceedings, the Court argued, the national court "is exercising administrative authority without being … called upon to settle any dispute".[52]

According to the Court, in registration proceedings no dispute appears until an appeal is filed against the first instance decision, even if such a decision is made by a court. However, the proceedings in question do not have the *inter partes* nature – they are not adversarial in the strict sense of the term. Under EU law, there is a difference between the litigious and adversarial nature of proceedings.[53]

48 CJEU judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraphs 49-52.

49 Cf. CJEU judgments of 22 October 1998, Jokela and Pitkäranta, C-9/97 and C-118/97, EU:C:1998:497, para. 20, and of 4 February 1999, Köllensperger and Atzwanger, C-103/97, EU:C:1999:52, paragraph 21.

50 See CJEU judgment of 13 December 2013, Case C-465/11 *Forposta S.A., ABC Direct Connect sp. z o.o. v Poczta Polska S.A.*

51 CJEU judgment of 19 October 1995, Case C-111/94 *Job Centre Coop. ARL.*

52 *Ibid.* paragraph 11 (grounds). See CJEU judgment of 27 April 2006, Case C-96/04 *Standesamt Stadt Niebüll*, especially paragraph 14.

53 CJEU judgment of 17 September 1997, Case C-54/96 *Dorsch Consult*, paragraph 31; for a more extensive discussion, see R. Grzeszczak, M. Krajewski, "Pojęcie „sąd" w świetle przepisów art. 47 KPP oraz art. 267 TFUE", *Europejski Przegląd Sądowy* 2014(6), pp. 3-16.

For instance, the German Federal Supervisory Board, a body tasked with reviewing public procurement awards, has been considered an independent body. The Board was required to independently discharge its responsibilities but remained a part of the public administration system. Consequently, the Board's members did not have a status equal to that afforded to independent judges. The Court followed the reasoning adopted in Case C-54/96 *Dorsch Consult* and held that the independence requirement will be satisfied if a body is independent in performing its adjudicative role. However, the above conclusion should be regarded merely as an exception to the principle of independence of a judicial body.

The criterion of the exercise of a judicial function has been discussed in the cases *ANAS*[54] and *RAI*.[55] In those cases, the Court ruled that this criterion was the ability to determine the legal situation of an external entity. The Court ruled that the Italian Court of Auditors ("CA") was not a court or tribunal for the purposes of Article 267 TFEU because the CA did not exercise judicial functions. In the proceedings in which the CA made requests for a preliminary ruling, its role consisted in the evaluation and verification of the correctness of financial operations of administrative authorities. The Italian Court of Auditors did not have a power to determine the legal situation of an entity. In the opinion of the Court of Justice, the presentation of results of an audit did not constitute such a determination. A referring body will be considered to have judicial characteristics if its decision issued in a given case is binding and the determination based on such a binding decision is, for practical purposes, final. The above finality is relative and cannot be understood as preventing the decision from being challenged in judicial appellate proceedings. In ***Garofalo***,[56] the Court of Justice held that the Italian Council of State was a judicial body authorised to submit a request for a preliminary ruling. The key argument for classifying this body as a court or tribunal under Article 267 TFEU was the fact that the Council had the power to make final decisions.

Considering and summing up the above, the following bodies may submit a reference for a preliminary ruling:

1. **Common courts:**
   except when such courts exercise registration functions. Preliminary references can be submitted in payment order and summary proceedings and – exceptionally – also when a court adjudicates on the basis of equity.
2. **Administrative courts:**
   the CJEU accepts references from bodies that are not administrative courts *par excellence* provided that such bodies are tasked with the hearing of a dispute; neither *the inter partes* character nor the independence of the body is a necessary condition for such acceptance.
3. **Arbitration tribunals:**
   provided that such tribunals exercise a state-sanctioned function, their jurisdiction is

54 Order of the Court of 26 November 1999, Case C-192/98 *ANAS*, paragraph 24.

55 Order of the Court of 26 November 1999, Case C-440/98 *RAI*, paragraph 15.

56 CJEU judgment of 16 October 1997, Cases C-69/96 to C-79/96, *Garofalo*.

not based on a contractual arbitration clause, they adjudicate based on rules of law and the state is engaged in supervising the implementation of their rulings.[57]

4. **Disciplinary bodies:**
   provided that such bodies exercise a state-sanctioned function, and in particular if they determine a person's right to practice a profession.[58]
5. **Constitutional courts:**
   as a rule, they have the standing to submit preliminary references; however, problems may arise in connection with formulating questions for a preliminary ruling separately from the factual context of a dispute.

In several of its judgments, the Court has summarised the criteria a requesting authority must satisfy to be considered a court, for example:

Judgment of the Court of 19 December 2012, Case C-363/11 *Epitropos tou Elegktikou Synedriou*, ECLI:EU:C:2012:825.

According to settled case-law, in order to determine whether a body making a reference is a "court or tribunal" within the meaning of Article 267 TFEU, which is a question governed by European Union law alone, the **Court takes account of a number of factors, such as whether the body is established by law**, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, inter alia, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; Case C-53/03 *Syfait and Others* [2005] ECR I-4609, paragraph 29; Case C-246/05 *Häupl* [2007] ECR I-4673, paragraph 16; and the order of 14 May 2008 in Case C-109/07 *Pilato* [2008] ECR I-3503, paragraph 22). In addition, a national court or tribunal may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see, inter alia, Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14; Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, paragraph 25, and *Syfait and Others*, paragraph 35). Further, according to settled case-law, the concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision (Case C-24/92 *Corbiau* [1993] ECR I-1277, paragraph 15, and Case C-506/04 *Wilson* [2006] ECR I-8613, paragraph 49). Lastly, the question whether a body is entitled to refer a question to the Court … falls to be determined on the basis of **criteria relating both to the constitution of that body and to its function**. In that regard, a national body may be classified as 'a court or tribunal' within the meaning of that article when it is performing judicial functions, whereas when it is exercising other functions, of an administrative nature, for example, it may not be so classified (see, as regards the Italian Court of Auditors, orders of 26 November 1999 in Case C-192/98 *ANAS* [1999] ECR I-8583, paragraph 22, and in Case C-440/98 *RAI* [1999] ECR I-8597, paragraph 13). The authority before which an appeal can be brought against a decision adopted by a department of an administrative authority cannot be regarded as a third party in relation to that department and, accordingly, as a court or tribunal within the meaning of Article 267 TFEU, where that authority has an organisational link with the administrative authority concerned (see, to that effect, *Corbiau*, paragraph 16, and Case C-516/99 Schmid [2002] ECR I-4573, paragraph 37) (paragraphs 18-22).

57 For a more extensive discussion on arbitration tribunals as courts within the meaning of Article 267 TFEU, see the judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158.

58 Judgment of the Court in Case 246/80 *Broekmeulen v Huisarts Registratie Commissie*.

In effect, in Poland, preliminary references can be submitted by: common courts (apart from situations, in which such courts perform registration functions) the Supreme Court (cf. e.g. the preliminary reference of the Supreme Court of 15 May 2014, case no. III SK 28/13), administrative courts: Provincial Administrative Courts and the Supreme Administrative Court (the latter most frequently in practice), the Tribunal of State (in exceptional situations due to limited powers of this Court), the Constitutional Tribunal, the Patent Office acting in litigious proceedings, Maritime Chambers, National Board of Appeal, disciplinary bodies (those determining the right to practice a profession: medical tribunals, veterinary tribunals, nurses and midwifes tribunals, pharmacy tribunals, disciplinary tribunals for attorneys, legal advisers, patent attorneys, tax advisers, statutory auditors).

Case study:

A preliminary reference from a district court – the question concerned a provision of the EAW Framework Decision interpreted in conjunction of the Polish Criminal Code ("CC") and Code of Criminal Procedure ("CCP") – an example of reliance on a CJEU judgment in a similar case.

Judgment of the Court (Fourth Chamber) of 28 July 2016, C-294/16 PPU (ECLI:EU:C:2016:610)

Polish judges frequently face the challenge of interpreting norms from directly applicable acts of EU law. For example, the terms used in Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24), must be given an autonomous and uniform interpretation throughout the Union. According to settled case-law of the Court, such interpretation must take into account the terms of that provision, its context and the objective laid down in the Framework Decision. A post-conviction enforcement division of the District Court for Łódź-Śródmieście (Central Łódź) in Łódź has faced such a challenge in the case of J.Z.

Polish courts have struggled with the interpretation of the term "detention" within the meaning of Article 26(1) of the Framework Decision, implemented in Article 607f CCP by the expression "de facto deprivation of liberty for the purpose of the surrender": the problematic issue was whether this expression should be interpreted in light of Article 63(1) CC (as referring to the "actual deprivation of liberty" or it should rather be given a broader interpretation, taking into account fundamental rights enshrined in Article 6 TEU and the EU Charter of Fundamental Rights. Polish courts more often adopted the broader interpretation of Article 607f CCP and applied this provision to credit penalties other than deprivation of liberty towards the period of detention. Addressing the issue, the CJEU emphasised that an answer given in a particular case depends on the assessment if the conditions related to the enforcement of a measure allow the classification of such a measure as actual deprivation of liberty.

In 2007, J.Z. was sentenced to a prison term of three years and two months. Instead of reporting to prison, he left Poland. A competent court issued a European Arrest Warrant for him. On 18 June 2014 Z. was arrested by the United Kingdom authorities under the EAW. From 19 June 2014 to 14 May 2015, he was placed under a curfew and electronic monitoring. Z. was then surrendered to Poland. In a submission to a Polish court, he requested that the period during which he was subject to a curfew in the United Kingdom and to electronic monitoring be credited towards his custodial sentence.

In this context, the District Court for Łódź-Śródmieście in Łódź filed a request for a preliminary ruling of 25 May 2016 (C-294/16) and referred the following question to the Court of Justice: "Must Article 26(1) of [Framework Decision 2002/584], in conjunction with Article 6(1) and (3) [TEU] and Article 49(3) of the [Charter], be interpreted as meaning that the term 'detention' also covers measures applied by the executing Member State consisting in the electronic

> monitoring of the place of residence of the person to whom the arrest warrant applies, in conjunction with a curfew?". This question has appeared to be too abstractive And the Court rephrased it in the following manner: "Must Article 26(1) of Framework Decision 2002/584 be interpreted as meaning that measures such as a nine-hour night-time curfew, in conjunction with the monitoring of the person concerned by means of an electronic tag, an obligation to report to a police station at fixed times on a daily basis or several times a week, and a ban on applying for foreign travel documents, may be classified as 'detention' within the meaning of Article 26(1)?".
>
> The Court held that the principle of conforming interpretation "requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the framework decision in question is fully effective and to achieving an outcome consistent with the objective pursued by it" (paragraph 33 of the judgment). However, the application of measures of national law should be guided by the need for a uniform application of EU law and the principle of equality so that a given provision may be given an autonomous and uniform interpretation throughout the European Union.
>
> The principle of crediting the period of "detention" originates directly from Article 1(3) and Recital 12 of the Framework Decision "... is designed to meet the general objective of respecting fundamental rights ... by preserving the right to liberty of the person concerned, enshrined in Article 6 [CFR], and the practical effect of the principle of proportionality in the application of penalties, as provided for in Article 49(3) [CFR]". In this context, the CJEU referred to the case-law of ECtHR.

In summary, the Court answered the (rephrased) question as follows: *Article 26(1) of Framework Decision 2002/584 must be interpreted as meaning that measures such as a nine-hour night-time curfew, in conjunction with the monitoring of the person concerned by means of an electronic tag, an obligation to report to a police station at fixed times on a daily basis or several times a week, and a ban on applying for foreign travel documents, are not, in principle, having regard to the type, duration, effects and manner of implementation of all those measures, so restrictive as to give rise to a deprivation of liberty comparable to that arising from imprisonment and thus to be classified as 'detention' within the meaning of that provision, which it is nevertheless for the referring court to ascertain.*

In the same month in which the judgment in Case C-294/16 PPU was pronounced, the Supreme Court issued a decision, in which it interpreted Article 607f CCP. The SC interpretation was not only linguistic but also systemic and purposive. On the other hand, differently from the CJEU, the Supreme Court invoked exclusively the standards of protection of liberty enshrined in Article 41 of the Polish Constitution and in Article 5 of the Convention for the protection of Human rights and Fundamental Freedoms.

As a side note, one needs to mention with satisfaction that it was the Prosecutor General (in 2015) who filed the complaint in cassation for the benefit of G.D. (the defendant whose case was reviewed in the SC decision). Upon hearing the complaint, the Supreme Court found a flagrant violation of Article 607f CCP that resulted from the provision's defective interpretation by a trial court, which, in turn, has materially affected the contents of the issued ruling (decision of the Criminal Chamber of the Supreme Court of 31 May 2016, case no. IV KK 414/15).

The judgment has become a recognised authority in Polish law. In a statement of reasons appended to a decision, a Court of Appeal judge noted that *Article 607f CCP implements the Framework Decision on the European Arrest Warrant and must be interpreted in accordance with EU law, and in particular with the implemented provision, that is Article 26 of the Framework Decision (cf. CJEU judgment of 16 June 2005 in Case C-105/03* Pupino*). Such pro-European interpretation must take into account the holding of the CJEU in the aforementioned judgment of 28 July 2016, Case C-294/16,* JZ v Prokuratura Rejonowa w Ł. *in context of Article 26(1) of the Framework Decision, which is binding on the national courts of individual Member States* (decision of 14 December 2017 of the Second Criminal Division of the Court of Appeal in Kraków, case no. II AKz 472/17).

- **The Court of Justice does not rule on the validity of national law in the preliminary reference procedure** – this remains within the jurisdiction of national courts.
- **Formally, the Court does not interpret national law**, either. In practice, however, such interpretation is often given in consequence of the interlocking of both systems in a given set of facts.

Some time ago, there emerged a category of preliminary references made by Polish courts that has become crucial from the perspective of rights of individuals: the questions seeking to determine if specific provisions of national law are **technical regulations** within the meaning of Directive 2015/1535.[59]

> Simply put, **technical regulations** are those norms of national law that determine specifications concerning goods and provision of services. Member States are strictly obliged to notify designed technical regulations to the European Commission. If they fail to perform this obligation, regulations in question may not be applied.[60]

Given the complex and highly technical nature of the Directive's subject matter and the absence of uniform case-law, a key practical problem is to determine whether a given national provision, which is material for deciding a case at hand, should be considered a technical regulation and whether a national court is obliged to set aside this provision due to the absence of its notification. Any such concerns may be addressed through the preliminary ruling procedure. Because of the complexity and specialist nature of technical regulations, the cases involving such regulations provide an excellent illustration of how important is for the dialogue between national courts and the CJEU to correctly describe a case in a reference for a preliminary ruling. Without a proper presentation of the law and facts of a dispute, the Court of Justice may be unable to resolve the legal problem it was requested to explain.

In this context, the case ***Ziemski and Kozak*** is a good example of an ineffective reference for a preliminary ruling. In *Ziemski and Kozak*, the referring court was hearing a criminal case brought against individuals charged with a breach of duties imposed by the Act on games of chance (the national court has not specified what duties had specifically been violated).

59 Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ EU L 241, 17.9.2015, p. 1).

60 Judgment of the Court of Justice of the European Union of 20 April 1996 in Case *CIA Security Agency*, C-194/14, EU:C:1996:172.

As the referring court was uncertain of the nature of non-notified provisions of this Act, and given the fact that if those provisions had been determined to be technical regulations, this would have resulted in the inadmissibility of the defendant's conviction, the national court asked the CJEU the following question:

> *Must Article 1.11 of [then-applicable Directive 98/34] ... be interpreted as meaning that the technical regulations, the draft of which must be communicated to the Commission pursuant to Article 8(1) of that directive, also include a legislative provision which defines the statutory concepts and prohibitions which are described and set out in Article 29 of the [Act on games of chance] of 19 November 2009...?*

Since the statement of grounds of the request contained no reference to the actual wording of national provisions or a description of the facts of the dispute, the Court of Justice refused to answer the question presented, arguing that the reference was manifestly inadmissible.[61] The national court did not submit another reference for a preliminary ruling.

Judgment of the Court in Case C-210/06 *Cartesio*

(paragraph 67): *According to settled case-law, **there is a presumption of relevance** in favour of questions on the interpretation of Community law referred by a national court, and it is a matter for the national court to define, and not for the Court to verify, in which factual and legislative context they operate.*

***The Court declines to rule on a reference for a preliminary ruling** from a national court only where **it is quite obvious that the interpretation of Community law that is sought is unrelated to the actual facts of the main action or to its purpose, where the problem is hypothetical**, or where **the Court does not have before it the factual or legal material** necessary to give a useful answer to the questions submitted to it.*

Judgment of 2 March 2017, Case C-97/16, *Pérez Retamero*

(paragraph 22): *(...) [T]he Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted to it.*

Clearly, Article 267 TFEU always allows a national court, if it considers it desirable, to refer questions of interpretation to the Court (judgment of 26 May 2011, C165/09 to C167/09 *Stichting Natuur en Milieu and Others*, EU:C:2011:348, paragraph 52 and the case-law cited therein). Thus the relevance and scope of that judgment must be examined in the course of the analysis of the substance of the questions referred.

A different situation has appeared in the ***Fortuna*** case, where a national court asked the following question:

61 Order of the Court of Justice of the European Union of 10 October 2012 in Case *Ziemski and Kozak*, C-31/12, EU:C:2012:627.

> *Must Article 1(11) of Directive [98/34] be interpreted as meaning that a 'technical regulation', the draft of which must be communicated to the Commission pursuant to Article 8(1) of that directive, includes a legislative provision which prohibits the amendment of authorisations for activity relating to gaming on low-prize machines in respect of a change in the place at which that gaming is organised?*

This question referred for a preliminary ruling was in itself formulated in a manner similar to the question quoted above. However, a crucial element that resulted in this reference having been accepted for the Court's consideration was its exhaustive statement of grounds, in which the referring court presented a comprehensive summary of the legal and factual framework of the dispute. This, in consequence, enabled the parties and interveners to present observations and make it possible for the Court of Justice to issue a judgment[62] following the hearing of their arguments.

3. The right/obligation to submit a request for a preliminary ruling

3.1. A national court's right to submit a request for a preliminary ruling

National courts have the right to submit preliminary references. They can submit a request for a preliminary ruling to the Court of Justice whenever they consider that a decision on the proper interpretation of EU law in main proceedings is necessary to give a judgment. Parties to the proceedings may not authoritatively influence the national court's decision whether or not to submit such a reference.

According to the Court (see, e.g. judgment in Case 44/65 *Hessische Knappschaft v Maison Singer et Fils*), Article 267 TFEU does not prevent the use of the legal remedies against a decision to submit a request for a preliminary ruling that are available in the national law of a Member State in which court the main proceedings are pending. As a rule, a challenge brought against a decision to submit a request to the Court for a preliminary ruling does not suspend the hearing of the request before the CJEU.

3.2. A national court's obligation to submit a request for a preliminary ruling

The making of a preliminary reference is obligatory in two situations. First, this obligation is imposed on a national court against whose decisions there is no judicial remedy under national law, in a situation where this court hears a case related to EU law. There are two

62 Judgment of the Court of Justice of the European Union of 10 October 2012 in joined cases *Fortuna and Others*, C-213/11, C-214/11 and C-217/11, EU:C:2012:495.

theories that explain the concept of a "national court against whose decisions there is no judicial remedy": the concrete and abstractive one. According to the **abstractive theory**, the obligation to make a preliminary reference is imposed on a court of general jurisdiction that occupies the highest position in the national judicial hierarchy. According to the **concrete theory**, this obligation is imposed on a court who issued an unappealable ruling in a given case. The Court of Justice has not specifically embraced any of these theories, but, as the most recent case-law suggests, it leans towards the concrete theory. **In the case of Poland**, the Supreme Court was considered the court of last resort in proceedings concerning cassation complaint (in other cases, the second instance court is the court of last resort).[63]

The problem with the obligation to make a preliminary reference imposed on a court against whose decisions there is no judicial remedy under national law is that this obligation is not unconditional; in other words, it is not absolute. If a national court concludes that the existing case-law of the CJEU is sufficiently clear, the court may obviously independently interpret EU law and apply results of this interpretation to a given set of facts.

Judgment in Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*

... 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 [EU] provision in question has already been interpreted by the Court of Justice or that the correct application of Community [EU] 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 [EU] law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community...

[Domestic] courts may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. By taking that action they are not calling into question the existence of the Community measure. On the other hand, those courts do not have the power to declare acts of the Community institutions invalid.

Judgment of the Court (Grand Chamber) of 28 March 2017, Case C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, ECLI:EU:C:2017:236

(paragraph 68): *Accordingly, requests for preliminary rulings which seek to ascertain the validity of a measure constitute, like actions for annulment, a means for reviewing the legality of European Union acts (see judgments of 22 October 1987,* Foto-Frost*, 314/85, EU:C:1987:452, paragraph 16; of 21 February 1991,* Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, C-143/88 and C-92/89, EU:C:1991:65, paragraph 18; of 6 December 2005,* ABNA and Others*, C-453/03, C-11/04, C-12/04 and C-194/04, EU:C:2005:741, paragraph 103, and of 3 October 2013,* Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 95).*

(paragraphs 78-80): *... in accordance with settled case-law, that when the validity of acts of the European Union institutions is raised before a national court or tribunal, the power to declare such*

63 Judgment of 21 December 2016, *Biuro podróży "Partner"*, C-119/15, EU:C:2016:987, paragraph 52.

acts invalid should be reserved to the Court under Article 267 TFEU (see, to that effect, judgments of 22 October 1987, Foto-Frost*, 314/85, EU:C:1987:452, paragraph 17; and of 6 October 2015,* Schrems*, C-362/14, EU:C:2015:650, paragraph 62).*

Moreover, the Court is best placed to give a ruling on the validity of acts of the Union, given that it is open to the Court, within the preliminary ruling procedure, on the one hand, to obtain the observations of Member States and the institutions of the Union whose acts are challenged and, on the other, to request that Member States and the institutions, bodies or agencies of the Union which are not parties to the proceedings provide all the information that the Court considers necessary for the purposes of the case before it (see, to that effect, judgment of 22 October 1987, Foto-Frost*, 314/85, EU:C:1987:452, paragraph 18).*

That conclusion is confirmed by the essential objective of Article 267 TFEU, which is to ensure that EU law is applied uniformly by the national courts and tribunals, that objective being equally vital both for the review of legality of decisions prescribing the adoption of restrictive measures against natural or legal persons and for other European Union acts. With respect to such decisions, differences between courts or tribunals of the Member States as to the validity of a European Union act would be liable to jeopardise the very unity of the European Union legal order and to undermine the fundamental requirement of legal certainty (see, by analogy, judgments of 22 February 1990, Busseni*, C-221/88, EU:C:1990:84, paragraph 15; of 6 December 2005,* Gaston Schul Douane-expediteur*, C-461/03, EU:C:2005:742, paragraph 21; and of 21 December 2011,* Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 47).*

The above ruling was based on three arguments: the principle of uniform application of EU law, the coherence of the Union legal system and the Court's position within the institutional structure of the European Union.

An important message for courts of last resort has been formulated in the Judgment of 4 October 2018 given in Case C416/17 (ECLI:EU:C:2018:811).

> In this case, the Commission raised a defence based on the failure on part of the last instance court (i.e. the French Council of State, *Conseil d'État*) to refer a question for a preliminary ruling despite the ambiguity of a legal situation linked to EU law. In other words, the Conseil d'État could not interpret EU law, as follows from the judgments of 10 December 2012, *Rhodia* (FR:CESSR:2012:317074.20121210) and of 10 December 2012, *Accor* (FR:CESSR:317075.20121210), without first referring questions to the Court for a preliminary ruling. That judgment therefore clarifies the scope of the obligation of the court of last resort to refer a question for a preliminary ruling in a given case. The Court of Justice reminded that, where there is no judicial remedy against the decision of a national court, the national court is in principle obliged to make a reference to the Court within the meaning of the third paragraph of Article 267 TFEU where a question of the interpretation of the FEU Treaty is raised before it (see the judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 42). The Court ruled that the obligation to make a reference laid down in that provision was intended in particular to prevent a body of national case-law that is not in accordance with the rules of EU law from being established in any of the Member States (judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 33 and the case-law cited).

Consequently, the Court held that since the Conseil d'État (Council of State, France) failed to make a reference to the CJEU, in accordance with the procedure provided for in the third paragraph of Article 267 TFEU, the French Republic failed to fulfil its obligations under the third paragraph of Article 267 TFEU.

Second, the CJEU has the **exclusive jurisdiction** to make preliminary rulings on the **validity and interpretation of acts of secondary legislation** adopted by the institutions, bodies, offices or agencies of the European Union (Article 267(1)(b) TFEU).

Although the legality of acts of EU institutions and bodies is reviewed, as a rule, under the procedure laid down in Article 263 TFEU, their validity may be determined also by way of a preliminary reference. This is because the validity of an act of EU law may be raised in proceedings before a national court. A problem appears if a national legal measure is based on EU law. **A national court may not, on its own, declare an act of EU secondary legislation invalid**. When a national court has concerns over the validity of a given EU legal act, it clearly may independently review this act and – if the concerns persist – must make a request for a preliminary ruling. While performing a review of the validity of an act of EU secondary legislation one assesses the validity of a given legal act by applying the legality criteria set out in Article 263 TFEU. The Court of Justice generally reviews only those causes of invalidity that are designated by a national court that submits the request for a preliminary ruling. However, the Court reviews ex officio the correctness of each act's publication. The above obligation may be waived only if the doctrine of ***acte éclairé*** applies.

Articles 263 and 267 TFEU were initially treated by the Court as stand-alone bases for a review of validity. However, the Court of Justice excluded the possibility of challenging the legality of EU acts in the preliminary reference procedure if a party to proceedings before a national court has been able to submit an application under Article 263 TFEU but failed to comply with the deadline fixed in this Article. If the preliminary reference procedure is used to challenge the validity of legal acts of institutions, bodies, offices or agencies of the European Union under Article 267 TFEU, Article 263 is supplementarily applied, which means that the legality of acts is assessed in this procedure based on the requirements laid down in Article 263 TFEU.

> **Case study:**
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> **Judgment in Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland***
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> In *Digital Rights*, the CJEU was asked to review the validity of Directive 2006/24/EC[64] in the light of Articles 7, 8 and 52(1) CFR. The Directive enabled retention of personal data for policing purposes. It allowed competent state authorities to identify the recipient of a phone call as well as the place and time of the call in question. It also provided that data could be retained and processed without a subscriber's knowledge. All these measures created a feeling of surveillance. In effect, the Directive's regulations raised concerns related to the protection of privacy and personal data of individuals, giving rise to a number of preliminary references.
>
> A comparison of the ways in which preliminary references were submitted in the joined cases ***Digital Rights Ireland*** shows how diverse questions can be asked in an attempt to resolve the same problem. An Irish and German national court submitted questions to the CJEU. A question asked by the Irish court was: *1) Is the restriction on the rights of the plaintiff in respect of its use of mobile telephony arising from the requirements of Articles 3, 4 and 6 of Directive 2006/24/EC*

64 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ L 105, 13.4.2006, paragraphs 54-63).

> *incompatible with Article 5(4) TEU in that it is disproportionate and unnecessary or inappropriate to achieve the legitimate aims of: (a) Ensuring that certain data are available for the purposes of investigation, detection and prosecution of serious crime? and/or (b) Ensuring the proper functioning of the internal market of the European Union?* The next questions of the Irish court addressed specific aspects of the matters governed by the Directive and their compatibility with the ECHR and CFR. On the other hand, the German court decided to divide its questions into two categories. The first category focused on the validity of EU acts. Here, the court asked a question about the compatibility of Directive articles with the CFR: *1) Concerning the validity of acts of institutions of the European Union: Are Articles 3 to 9 of Directive 2006/24 compatible with Articles 7, 8 and 11 of the [Charter]?* The second category included five questions about the interpretation of Treaties in connection with the Directive.
>
> In the judgment, the CJEU performed an analysis that addressed the problems related to the incompatibility of Directive's provisions with the Charter's Articles invoked in preliminary references. The Court concluded that *it must be held that, by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter.* Consequently, in the operative part of the judgment, the Court declared Directive 2006/24/EC invalid: *Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC is invalid.*

Since very few preliminary rulings raise the issue of invalidity of acts of EU law, it is necessary to emphasise the consequences of such judgments: first of all, a judgment of the CJEU that declared an act of EU law invalid becomes final and unappealable upon publication. As regards the invalidated act itself, it may not cause any legal consequences. At the same time, an answer to the question referred for a preliminary ruling that concerns the validity of an act of EU law has not impact on the validity of any similar measures that exist (or may exist) in other Union legal acts: the answer applies exclusively to the directive reviewed in the preliminary reference procedure. It should be further noted that such a declaration of invalidity does not automatically sets aside the provisions of national law that implement the directive in question.

Moreover, the practical effects of a preliminary ruling that invalidates a directive are identical to those of a declaration of invalidity made in the Article 263 TFEU judicial review procedure. In consequence, a preliminary ruling of invalidity is considered to have a **universal (*erga omnes*) and retroactive (*ex tunc*) effect**. A preliminary ruling declaring an act of EU law invalid is binding on EU institutions and all bodies of Member States (not only national courts), including legislative bodies and, quite importantly, also national administrative bodies such as law enforcement authorities.

Directives are well known to be a source of EU law that, pursuant to Article 288 TFEU, needs to be implemented by the national legislator. It is thus assumed that acts of national legislation that implement a directive's standards in the national legal systems are the actual sources of applicable law in the Member States. **A preliminary ruling of the CJEU that declares a directive invalid at the EU level has no direct consequences on the validity of an act that implements the directive in national law**. In particular, a judgment of the CJEU does not automatically set aside the implementing act of national law. **However, national authorities should draw all legal consequences from the Court's judgment**, in accordance with the proper regulations of a given Member State (including the relevant regulations

of national constitutional law). Upon the pronouncement of the CJEU judgment, national authorities may not consider an invalidated directive an element of the law applicable to a case; such a directive may not be a legal basis for any action (including the issuance of decisions or judicial rulings). A directive that has been declared invalid no longer must be implemented by national authorities. Although they are not automatically invalidated, the national provisions implementing Directive 2006/24 no longer need to be maintained due to the implementation obligation under EU law.[65]

4. The doctrine of *acte clair*

The Court of Justice significantly relaxed the rule establishing obligation to make a preliminary reference in the judgment issued in Case 283/81 ***CILFIT*** *and Others v Minister della Sanitá*.

In that judgment, the Court defined the CILFIT formula, which reads as follows:

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 of Justice 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.[66]

The Court's judgment serves as a basis for determining a situation in which a court of last resort is not obliged to make a preliminary reference to the CJEU. This is the case where:

- a decision concerning the interpretation of EU law is not necessary for the resolution of a pending matter,
- decisions previously issued by the Court of Justice have already referred to the legal issues raised in the preliminary reference regardless of the type of proceedings that led to the issuance of such decisions, also if relevant issues are not entirely identical,
- the application of EU law is so obvious that it does not raise any doubts.[67]

According to the rules adopted by the Court in its case-law, any act that is clear, obvious and raises no doubts should be considered an *acte clair* (an obvious case). The doctrine of acte clair may be invoked only in respect of interpretation of law – it cannot be used to determine validity of law.

65 As in M. Taborowski, *Skutki wyroku Trybunału Sprawiedliwości Unii Europejskiej stwierdzającego nieważność dyrektywy* (a legal opinion), https://www.senat.gov.pl/gfx/senat/userfiles/_public/k8/komisje/2015/kpcpp/materialy/bilingi/skutki_wyroku_tsue-2_m_taborowski.pdf, p. 6.

66 CJEU judgment in Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministero della Sanità*.

67 See, *in extenso*, in J. Michalska, *Pytania prejudycjalne sądów do TSUE*, http://www.repozytorium.uni.wroc.pl/Content/64533/14_Justyna_Michalska.pdf, p. 292 et seq.

Case C-160/14 *Ferreira da Silva*

In itself, the fact that other national courts or tribunals have given contradictory decisions is not a conclusive factor capable of triggering the obligation set out in the third paragraph of Article 267 TFEU. A court or tribunal adjudicating at last instance may take the view that, although the lower courts have interpreted a provision of EU law in a particular way, the interpretation that it proposes to give of that provision, which is different from the interpretation espoused by the lower courts, is so obvious that there is no reasonable doubt.

In effect, a national court may independently give a unequivocal answer to the question about whether a similar issue has already been addressed by the Court of Justice in a manner that sufficiently explains the meaning of EU law. If such an answer is positive, the national court may refrain from making a preliminary reference to the Court.

On the other hand, it is important to remember that a national court may "repeat" a preliminary reference even if a similar matter has already been explained. In a situation where a national court makes a reference for a preliminary ruling and a preliminary ruling has been given in a matter that is similar to that raised in the reference, President of the Court orders the Registrar to notify the national court of that fact. The national court may then withdraw the reference. Pursuant to Article 104(3) of the Rules of Procedure, the Court may consider a question maintained by a national court on its merits and issue a reasoned order, which may include a reference to the Court's case-law.

5. The doctrine of *acte éclairé*

As mentioned above, it is an obligation of the national court against whose decisions there is no judicial remedy under national law to submit a preliminary reference to the Court. However, if the Court has already ruled on the same (or similar) issue in a similar case and explained it, the national court is relieved of such an obligation. This is the essence of the doctrine of ***acte éclairé*** stemming from the CJEU's judgment issued in *Da Costa* case. In this judgment the Court ruled that:

Joined cases 28-30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration*

The obligation imposed by the third paragraph of Article 177 of the EEC Treaty [currently, Article 267 TFEU – author's note] upon national courts or tribunals of last instance may be deprived of its purpose by reason of the authority of an interpretation already given by the court under Article 177 in those cases in which the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case. ... when giving a ruling within the framework of Article 177, the court limits itself to deducing the meaning of community rules from the wording and the spirit of the Treaty, it being left to the national court to apply in the particular case the rules which are thus interpreted. Article 177 always allows a national court or tribunal, if it considers it appropriate, to refer questions of interpretation to the Court again even if they have already formed the subject of a preliminary ruling in a similar case.

It should be noted that the doctrine of *acte éclairé* **does not require that a prerequisite of a question being materially identical with a question which has already been the subject of a preliminary ruling in a similar case be adequately fulfilled**. The fact that a court is under an obligation to refer a question for a preliminary ruling is justified by the possibility of referring to the established case-law of the CJEU which has already resolved an issue in dispute – regardless of the type of proceedings from which this case-law originated. This is also the case if disputed questions are not completely identical. In other words, under the doctrine of *acte éclairé* national courts are relieved from an obligation to submit a preliminary reference to the Court of Justice, however the doctrine does not remove the right of a court to make such reference.[68]

Article 99 of the Rules of Procedure of the Court of Justice:

Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

Under Article 103(3) of the Rules of Procedure of the Court of Justice where a national court has submitted a preliminary reference in an obvious case, the Court may rule by reasoned order having notified the national court of the fact and having heard any possible observations submitted by the authorised entities and having hear the Advocate General.

The CJEU judgment in Case C-283/81 Srl *CILFIT*, paragraphs 16–20:

The correct application of community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it. However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community Law and the particular difficulties to which its interpretation gives rise. To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States. Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied....

68 See, in extenso, M. Wąsek-Wiaderek, E. Wojtaszek-Mik (Eds.) *Pytanie prejudycjalne do Trybunału Sprawiedliwości Wspólnot Europejskich*, Warszawa 2007, p. 46 et seq.

Despite the fact that the resolution in the *CILFIT* case involved national courts, against whose decisions there is no judicial remedy, courts of lower instance should by analogy treat CLIFIT formula as guidance.

Although the below presented judgment in *Polbud-Wykonawstwo* has effect *inter partes* in accordance with the doctrine of *acte eclairé*, when read in conjunction with the decision of the Supreme Court, it sets the direction of interpretation to be adopted by other Polish courts in similar cases until the provisions of the Code of Commercial Companies ("CCC") are amended.

The case involving a cross-border transfer of the registered office of Polbud-Wykonawstwo

In 2011, the shareholders of **Polbud-Wykonawstwo** decided by a resolution adopted under Article 270(2) of the CCC[69] to transfer the registered office of that company from Łącko in Poland to Luxembourg. On the basis of that resolution Polbud-Wykonawstwo lodged a request that the opening of a liquidation procedure be recorded. In 2013, the meeting of shareholders of Consoil Geotechnik Sàrl, a Luxembourg-based company, adopted a resolution which, implemented the resolution on transferring the registered office of Polbud to Luxembourg, with a view to the application of Luxembourg law to it, without loss of its legal personality. By way of the resolution, on the day of its adoption Polbud's registered office was transferred to Luxembourg and the so far Polish company became "Consoil Geotechnik". In light of the above, Polbud lodged an application at the court responsible for keeping the commercial register ("registry court") for its removal from the Polish commercial register. However, the application for removal was refused on the ground that the documents necessary to close the liquidation procedure had not been submitted by Polbud-Wykonawstwo.

In the course of subsequent appeals, the case landed before the Polish Supreme Court, which noticed that the matter involved an important EU element and submitted a reference to the CJEU for a preliminary ruling. The questions asked in the reference were aimed at determining whether provisions on the freedom of establishment and the free movement of services, as laid down in Articles 49 and 56 TFEU, are not at odds with the requirement to carry out liquidation of a company established under national law, whenever such company decides to transfer its registered office to another Member State.[70]

In the assessment of the Court of Justice, the freedom of establishment covers cases of cross-border transfer of the registered office of a company. At the same time, as in the case of any freedom, its exercise may be restricted by Member States in reliance on Treaty exceptions or the doctrine of mandatory requirements. The justification for the restriction of the freedom of establishment in a situation like the one pending in the case before the Supreme Court may be, for example, the protection of minority shareholders, employees or creditors as described by the Polish government in observations regarding the preliminary ruling. However, for the restriction to be effective, obligations imposed by the states must be proportionate and non-discriminatory. Moreover, the Court of Justice indicated that in the case of a cross-border transfer of a company, a Member State cannot justify the introduction of more restrictive limitations than those existing for a transfer under national law, hence preventing or discouraging a company from making such a cross-border transfer. The above reasoning led the Court of Justice to the finding that the obligation under Article 270(2) read in conjunction with Articles 272 and 526(1) CCC, which imposes a general duty of liquidating the company every time it

69 The Code of Commercial Companies of 15 September 2000, as amended, Journal of Laws. 2000 No. 94 item 1037 as amended. Journal of Laws of 2017, item 1577; of 2018, items 398, 650.

70 See: decision of the Supreme Court of 22 October 2015, case no. IV CSK 664/14 (unpublished).

makes a cross-border transfer of its registered office, is inconsistent with Articles 49 and 56 TFEU, since the limitations that it imposes are disproportionate to the purposes of protection whose achievement was indicated by the Polish government.[71] After the Court of Justice had delivered its judgment, the Supreme Court resolved the case by issuing a decision in which it revoked the decisions of district and regional courts and remanded the case for reconsideration by the district court.[72] In the statement of grounds of the judgment, the Supreme Court noted that in such a situation Polish law was inconsistent with EU law and required to be adjusted by the legislator. This did not mean that these provisions of Polish law could have been lawfully applied, the Supreme Court concluded. **As the Court of Justice provided in its ruling's statement of grounds, the court hearing the case was required to refuse to apply Polish laws stipulating a complete liquidation procedure of a company and interpret the remaining provisions by applying the directive of sympathetic interpretation, rather than the rules of linguistic interpretation**. According to the Supreme Court, the extraordinary circumstances of the case at hand oblige the court to take appropriate action, which includes considering and designating the requirements related to the transfer of a company's registered office that are necessary for its deletion from the register and requesting the applicant to show that those requirements have been met.

In effect, the above judgment resulted in, on the one hand, Poland having been obliged to change provisions of applicable law. On the other hand, until these provisions are amended, the national court is obliged to decline to apply any provisions declared contrary to the provisions governing freedoms.

In summary, a court is not obliged to refer a question for a preliminary ruling if the court is satisfied that the question raised is irrelevant for the case at hand or that the EU provision in question has already been interpreted by the Court of Justice or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt, subject to the proviso that the existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the EU (see, to that effect, the judgments: of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 21; of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraphs 38, 39; and of 28 July 2016, *Association France Nature Environnement*, C-379/15, EU:C:2016:603, paragraph 50).

6. Consequences of a failure to perform the obligation to make a preliminary reference

CJEU judgment in Case C-224/01, *Köbler v Austria*

In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being

71 Judgment of the Court of Justice of the European Union of 25 October 2017 in case *Polbud-Wykonawstwo*, C-106/16, EU:C:2017:804.

72 Decision of the Supreme Court of 25 January 2018, case no. IV CSK 664/14 (unpublished).

able, under certain conditions, to obtain reparation when their rights are affected ***by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance****.*

CJEU judgment in case C-173/03 *Traghetti del Mediteraneo v Italy*

Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court. Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the Köbler *judgment.*

7. Situations, in which the CJEU may decline to issue a preliminary ruling

As a rule, the CJEU does not refuse to issue a preliminary ruling in response to a question referred for a preliminary ruling by a national court.

Case study:

Case C-231/89 ***Krystyna Gmurzynska-Bscher v Oberfinanzdirection Koeln***

[W]here the questions put by national courts concern the interpretation of a provision of Community law, ***the Court is, in principle, bound to give a ruling****. Since the purpose of the Court' s jurisdiction under Article 177 [267] of the Treaty is to ensure the uniform interpretation of Community law in all the Member States, the Court confines itself to inferring from their wording and spirit the meaning of the Community rules at issue. ... Thus in the division of functions in the administration of justice between national courts and the Court of Justice provided for by Article 177 [267] of the Treaty the Court of Justice* ***gives preliminary rulings without, in principle, having to examine the circumstances in which the national courts have been led to refer questions…***

Case C-186/90 ***Giacomo Durighello v Instituto Nazionale Della Providenza Sociale***

A request from a national court may be rejected only if *it is quite obvious that the interpretation of Community law or the examination of the validity of a rule of Community law sought bears no relation to the actual nature of the case or to the subject-matter of the main action [i.e. dispute].*

However, the judicial decision-making of the Court shows that **the Court will** exceptionally **refuse** to issue a preliminary ruling if:

a) The reference is made by a body that is not a national court or tribunal within the meaning of Article 267 TFEU;
b) A national court does not present the factual and legal context of the dispute.

Case study:

Case C-520/13 *Leśniak-Jaworska and Głuchowska-Szmulewicz*

Given that it is the order for reference that serves as the basis for the proceedings before the Court, it is essential that the national court should give, in the order for reference itself, the factual and regulatory context of the case in the main proceedings and at least a minimum amount of explanation of the reasons for the choice of the provisions of EU law it seeks to have interpreted and on the link it establishes between those provisions and the national legislation applicable to the proceedings pending before it.

It should be also emphasised that the information provided in decisions [orders] making references must not only enable the Court to reply usefully but also give the governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 23 of the Statute of the Court of Justice of the European Union. It is the Court's duty to ensure that that opportunity is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the decisions making references are notified to the interested parties.

c) A question is hypothetical and does not satisfy the condition of being necessary for the resolution of a dispute.

Case 244/80 *Pasquale Foglia v Mariella Novello*

The duty assigned to the Court by Article 177 [267 TFEU] is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the court to give its views on certain problems of Community law ***which do not correspond to an objective requirement inherent in the resolution of a dispute***.

d) The CJEU finds that EU law does not apply to a given set of facts, see e.g. Case C-282/14 ***Stylinart***.

Case C-282/14 *Stylinart*

According to the settled case-law of the Court, the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations. Therefore, the Court has already reminded that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures.

In this respect the Court has many times declined jurisdiction in situations where there was no evidence in the order for reference to indicate that the objective of the main proceedings concerns the interpretation or application of a rule of Union law other than those set out in the Charter.

The Court of Justice has repeatedly referred to the formula designed in *Fransson*, according to which "the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations".

For example, the Court invoked this formula, declaring itself manifestly inadmissible, in case C-28/14 ***Pańczyk***, related to the preliminary reference of 20 December 2013 submitted by the Regional Court in Częstochowa. The question concerned the interpretation of a number of provisions of a different origin, including Articles 6 and 14 ECHR, and Articles 1, 17, 20, 21 and 47 CFR. A national court has expressed doubts as to the conformity with EU law of a decision to re-calculate a pension benefit of a former officer of the Communist secret police. However, the order for reference did not include information which would show that the main proceedings concerned national provisions implementing EU law within the meaning of Article 51(1) CFR. Accordingly, in this situation the Court of Justice did not have jurisdiction to give interpretation of the many Charter provisions invoked in the preliminary reference. The national court also referred to the principle of proportionality, which, as a general principle of EU law, should be complied with by national regulations that fall within the scope of EU law or implement this law. However, also in that case, the referring court failed to prove that national law falls within the scope of EU law or implements this law. Consequently, it has not been shown that the Court had jurisdiction to interpret the principle of proportionality.

8. Limitations on the possibility to raise questions of EU law in second instance

Judicial pluralism and dialogue on different levels[73]

All courts have the right to make a preliminary reference: a superior court does not have jurisdiction to set aside a reference made by a lower court (see the judgment of the Court of Justice in *Elchinov*, Case C-173/09). On the other hand, a lower court may make a preliminary reference despite having been instructed by a superior court that had set aside a judgment (see *Križan*, C-416/10). A lower court may make a reference for a preliminary ruling despite the requirement to apply the interpretation of the Constitutional Court (see *Ognyanov*, C-554/14); a lower court may make a preliminary reference despite a prohibition of addressing the case prior to the pronouncement of a superior court's judgment; a superior court is obviously bound by the interpretation obtained in effect of a reference made by a lower court. It is irrelevant if a ruling of a given court may be subject to a constitutional review (see *Križan*, para. 72) or if a given provision has already been subject to a constitutional review (see judgment in *ERG*, C-378/08, paragraph 32). In the Polish judicial system, the above comments apply in particular to the Constitutional Tribunal, Supreme Court and Supreme Administrative Court.

Judgment of the Court of 22 June 2010 in Joined Cases C-188/10 and C-189/10, *Aziz Melki* (C-188/10) and *Sélim Abdeli* (C-189/10), ECLI:EU:C:2010:363

(paragraph 50): *Under settled case-law, it is for the national court to interpret the national law which it has to apply, as far as is at all possible, in a manner which accords with the requirements of EU law (Case C-262/97* Engelbrecht *[2000] ECR I-7321, paragraph 39; Case C-115/08* ČEZ *[2009] ECR I-10265, paragraph 138; and Case C-91/08* Wall *[2010] ECR I-2815, paragraph 70).*

73 Developed on the basis of: A.K. Pleśniak, K. Szychowska, *Nie tylko Strasburg? Alternatywne międzynarodowe instrumenty ochrony praw człowieka część II: Postępowanie w sprawie odesłań prejudycjalnych przed Trybunałem Sprawiedliwości UE*, Helsińska Fundacja Praw Człowieka, Warszawa 2017, http://www.hfhr.pl/wp-content/uploads/2017/11/nie-tylko-strasburg-materialy-szkoleniowe-cz-II.pdf, p. 8.

In effect, summing up the above, the CJEU holds that national law **may not impose any rule that would prevent a court from examining, on its own initiative**, the conformance of national legislation with EU law, especially because the court that has intended to do so was the first judicial authority in the case that was able to request a preliminary ruling. Moreover, **a national court may not be required to raise of their own motion** an issue concerning the breach of provisions of EU law where examination of that issue would oblige it to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties and relying on facts and circumstances other than those on which a party bases his claim.[74] The Court of Justice has been consequently arguing that it is impossible to restrict a national court's right to make references for a preliminary ruling based on binding interpretation of law given by a superior court.

9. A new line of preliminary references from national courts on the rule of law

At the time of writing the Handbook, the CJEU has already established a clear new line of judicial authority on the EU principle of the rule of law with regard to independence of judges and courts. This new line is expressed in three key judgments, C-64/16292, C-216/18 PPU293 and C-284/16294. The landmark CJEU decision in this respect is the judgment of 27 February 2018 pronounced in Case C-64/16 *Associação Sindical dos Juízes Portugueses/ Tribunal de Contas*. Before *Associação*, it was not clear whether a reference for a preliminary ruling could be used to protect the principle of the rule of law as regards the independence of courts and judges.

> **Case study:**
>
> **C-64/16 *Associação Sindical dos Juízes Portugueses***
>
> A Portuguese court asked whether the salary reduction applied to judges of the Tribunal de Contas in Portugal did not infringe the principle of judicial independence. The measures in question, adopted as part of EU financial aid for Portugal, covered, in a general and temporary fashion, a substantial section of the Portuguese public services, including judges of the country's Court of Auditors, the Tribunal de Contas. A professional association of Portuguese judges, the Associação Sindical dos Juízes Portugueses, acting on behalf of members of the Tribunal de Contas, brought a special administrative action against the relevant budgetary measures before the Supremo Tribunal Administrativo (Portuguese Supreme Administrative Court). The Association argued that the salary-reduction measures infringed "the principle of judicial independence" enshrined not only in the Portuguese Constitution but also in EU law. The referring court – the Supremo Tribunal Administrativo – stated that the Portuguese state was bound by the general principles of Union law, including the principle of judicial independence, applicable both to the EU courts and to the national courts. According to the Supremo Tribunal Administrativo, the effective judicial protection of rights arising from the EU legal order is ensured primarily by national courts. National courts should ensure this protection with respect for the principles of independence and impartiality. The Supremo Tribunal Administrativo asked the Court of Justice if the principle of judicial independence

74 CJEU judgment in joined cases C-430/93 and C-431/93 *Jeroen van Schijndel & Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, paras. 17-24.

> precludes the application of general measures to reduce remuneration against members of the judiciary in a Member State where such measures are related to the requirements to eliminate the excessive budget deficit and to the EU financial assistance programme, as it happened in the case the Tribunal was hearing. In *Associação*, the Court emphasised that the principle of the effective judicial protection was a general principle of EU law stemming from the constitutional traditions common to the Member States, and later reaffirmed in the Charter of Fundamental Rights. Member States must thus ensure that their court systems guarantee effective judicial protection in the areas covered by EU law. The very existence of effective judicial review designed to ensure compliance with EU law is of an immanent feature of a state ruled by law. It follows that every Member State must ensure that the bodies which, as "courts or tribunals" within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection. The Court noted that the maintenance of independence of a national court is an inherent element of the adjudication process. Judicial independence must be maintained not only at EU level, but also at the level of the Member States thus as regards national courts. The Court clarified that the concept of independence means, in particular, that *the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions*.

Therefore, the fundamental feature of the judiciary is its independence. Applying the above rationale to the situation of Polish courts, it may reasonably be argued that they are losing their independence in the process of reconstruction of judicial structures that started in 2015. Without going into details, in general, the Polish judiciary is experiencing the cumulative effects of a number of legislative reforms, especially the reorganisation of the Constitutional Tribunal, Supreme Court, National Council of the Judiciary, system of common courts and the National School of Judiciary and Public Prosecution. These changes have undermined confidence of courts in other Member States that an effective remedy and access to an impartial court will always be ensured in Poland. As the Court of Justice clearly indicated in the judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (which was the starting point for the abovementioned line of preliminary references concerning the rule of law and independent judiciary) and later further explored in the judgment of 25 July 2018 in Case C-216/18 *LM*, the concept of independence means, in particular, that the body concerned fulfils its functions wholly autonomously and is neither subject to any hierarchical constraint nor subordinated to any other body and does not take orders or instructions from any external source. In *LM*, Irish High Court asked the CJEU to determine whether, in view of *Aranyosi* and *Căldăraru*, the judicial authority executing a warrant, requested to surrender a prosecuted person, which may result in a violation of this person's fundamental right to a fair trial, must, first, be satisfied that the Polish judicial system is affected by deficiencies which entail that there is a real risk of breach of the fundamental right to a fair trial and, second, that the person concerned is exposed to such risk, or is it sufficient that the executing authority determines that such deficiencies exist in the Polish judicial system without it being necessary to establish that the person concerned is exposed to them. The High Court has also requested clarification as to what information and guarantees it may, in a given case, require from the issuing judicial authority in order to avoid this risk. All these questions were referred to the Court of Justice in the context of changes and reforms of the Polish judiciary.

Case study:

In Case C-216/18, *L.M.*, a Polish national, was requested on the basis of three European Arrest Warrants issued by Polish courts for the purpose of conducting criminal proceedings against him for trafficking in psychotropic substances. L.M., who was arrested in Ireland on 5 May 2017, opposed his surrender to the Polish judicial authorities by submitting that the recent legislative reforms of the system of justice in Poland expose him to a real risk of denial of a fair trial. In *Aranyosi* and *Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), the Court of Justice ruled that if the executing judicial authority determines that a person who is the subject of a European Arrest Warrant is at real risk of inhuman or degrading treatment within the meaning of the Charter of Fundamental Rights, the execution of that EAW should be postponed. However, the postponement decision can only be made after a two-step analysis. The CJEU noted in LM (paragraphs 49-52) that *the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded. ... It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection.*

The Court emphasised that maintaining the independence of judicial authorities is also essential for ensuring the effective judicial protection of individuals, in particular in the context of the European Arrest Warrant mechanism. Consequently, where a person in respect of whom a European Arrest Warrant has been issued, in opposition to their surrender, pleads to the issuing judicial authority that there are systemic (or generalised) deficiencies, which, according to them, may have an impact on the independence of the judiciary in the issuing Member State and thus compromise the essence of their fundamental right to a fair trial, the executing judicial authority is first and foremost required to assess – based on objective, reliable, specific and properly updated information – whether there is a real risk of a breach of that fundamental right in the issuing Member State connected with a lack of independence of the courts of that Member State on account of such deficiencies. As the Court ruled, the information presented in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment. Moreover, the Court recalled that the requirement of judicial independence and impartiality had two aspects: the authority concerned (i) must exercise its functions wholly autonomously, without any external interventions or pressure, and (ii) must be impartial, which requires the keeping of an equal distance from the parties to the proceedings and their respective interests. According to the Court, those guarantees of independence and impartiality require the existence of rules, particularly regarding the composition of judicial bodies and the appointment, length of service and grounds for abstention, rejection and dismissal of its members. The requirement of independence also means that the disciplinary regime for judges should display the necessary guarantees in order to prevent the risk of using such a regime as a system of political control of the content of judicial decisions. If the executing judicial authority, in light of the discussed requirements of independence and impartiality, determines that there is a real risk that the fundamental right to a fair trial may be violated in the issuing Member State, the executing authority must, as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there

are substantial grounds for believing that, following the requested person's surrender to the issuing Member State, that person will run that risk.

According to the case-law of the CJEU (inter alia, Case C-286/88, *Falciola Angelo SpA v Comune di Pavia*), a question about the interpretation of EU law referred for a preliminary ruling must have a real and not merely apparent connection with the case heard before the referring court. This raises the question of the classification of the independence of courts and judges as a general problem. The question is whether the independence problem must be addressed in order to resolve a specific case and thus whether it is suitable for being raised in a question referred for a preliminary ruling. Such a question arose in connection with several questions raised by the Polish Supreme Court and common courts, including, for example, the question from the Regional Court in Łódź in *Miasto Łowicz* (Case C-558/18), the Regional Court in Warsaw (Case C-563/18) and the Regional Court in Gorzów Wielkopolski (Case C-623/18). The questions submitted by the Regional Courts concerned the interpretation of the second subparagraph of Article 19(1) TFEU in connection with the model of disciplinary proceedings against judges adopted in Poland (the Disciplinary Chamber of the Supreme Court). The courts asked whether, on the proper construction of the second subparagraph of Article 19(1) TEU, the resulting obligation for Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law preclude provisions which abolish the guarantees of independent disciplinary proceedings against judges in Poland through allowing the exertion of political influence on the conduct of disciplinary proceedings. This new line of rule of law questions referred for a preliminary ruling by national courts includes references from Polish courts, including, inter alia, the request for a preliminary ruling made by the Supreme Court on 2 August 2018.[75] This request for a preliminary ruling was submitted by an enlarged panel of the Supreme Court in a case on the coordination of social security schemes provided for in Regulation No 883/2004 of the European Parliament and of the Council. The purpose of the main proceedings is to determine the applicable law in the case of a Polish national who simultaneously conducts a non-agricultural business activity in Poland and works as an employed person in Slovakia. The Supreme Court held that, before deciding the case on the merits, it was necessary to clarify issues requiring the interpretation of EU law. The problem raised in the reference for a preliminary ruling concerned primarily the legal status of two judges from the panel adjudicating in this case, who were 65 years of age and, in accordance with the April 2018 amendment to the 2017 Supreme Court Act, were compelled to retire.

In the questions and the appended statement of grounds, the Supreme Court reminded that the independence of a court and the independence of judges sitting on that court are (as it is explained in greater detail in this Handbook) a factor to be taken into account in assessing whether a body of a Member State is a "court or tribunal" within the meaning of EU law (C-64/16, *Associação Sindical dos Juízes Portugueses*, paragraph 38 and C-216/18, LM, paragraphs 48 and 63-65). The irremovability of judges is an element of judicial independence.

75 The wording of the preliminary references may be accessed at: http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=232-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach, see a commentary of R. Grzeszczak, I.P. Karolewski, *The Rule of Law Crisis in Poland: A New Chapter*, *VerfBlog*, 2018/8/08, https://verfassungsblog.de/the-rule-of-law-crisis-in-poland-a-new-chapter/.

The content of this principle and its observance in the national legal system gave rise to the concerns voiced by the Supreme Court in its preliminary reference.

As a result, **five questions were asked. The first question concerns the interpretation of Treaty (Articles 2, 4(3), 19(1) TEU and Article 267 TFEU) and Charter (Article 47) provisions on the principle of irremovability of judges**, which, according to the Supreme Court, will be violated whenever the national legislator decides to lower the retirement age and apply a new lower retirement age to judges, against the will of the judges concerned. **The second question concerned the interpretation of the same provisions of EU law in light of the provisions of the Supreme Court Act that make an extension of a judge's tenure dependent on consent of the executive** (President's decision countersigned by the Prime Minister). In the opinion of the Supreme Court, this solution is incompatible with the understanding of the principle of judicial independence and the independence of judges adopted in the existing case-law of the CJEU and ECtHR. **The third question concerned the interpretation of Council Directive 2000/78 prohibiting discrimination on grounds of age**. The Supreme Court requested confirmation of the interpretation given by the CJEU in Case C-286/12 *European Commission v Hungary*, considering that, in view of the seriousness of the situation and the potential necessity of applying Directive 2000/78 by the Supreme Court to the judges of that Court, it is appropriate to obtain a judgment of the CJEU concerning the interpretation of EU law directly relating to the Supreme Court Act. For the above reasons, the Supreme Court decided not to invoke the doctrine of *acte éclaire*. **The fourth question was asked in relation to the need for the CJEU to clarify how a national court operating in a situation identical to that of the Supreme Court should ensure the effectiveness of the EU prohibition of discrimination on grounds of age**. As the wording of the preliminary question seems to suggest, the Supreme Court seeks to obtain CJEU's response according to which any adjudicating panel that includes a judge aged 65 or more may refuse to apply provisions of the Supreme Court Act which discriminate against judges on grounds of age; such a panel would have the capacity to decide the case regardless of whether the President has given his consent to the extension of the tenure of the judge concerned. The fifth and **final question pertained to the obligations of the Supreme Court as an EU court with regard to the application of interim (protective) measures**. The Supreme Court applied an appropriate measure pursuant to provisions of the Code of Civil Procedure read in conjunction with Article 4(3) TEU and the relevant case-law of CJEU. However, given the limited volume of CJEU case-law and the controversy over the application of interim measures required by EU law but not provided for in national law, the Supreme Court decided to invoke and re-submit for the CJEU's consideration the idea of applying the protective measure of temporarily setting aside national provisions contrary to EU law. Furthermore, since an answer to the questions referred for a preliminary ruling is important for determining the professional capacity of judges aged 65 or more, the Supreme Court requested application of the expedited procedure. The Supreme Court, in accordance with the existing case-law of the CJEU, invoked Article 755 §1 CCivP and decided to suspend the application of Article 111(1)-(1a), Article 37 and Article 39 of the Supreme Court Act. On 3 October 2018, the Supreme Court submitted another four preliminary questions, identical to those asked on 2 August 2018, to the CJEU for a preliminary ruling; in summary, the questions asked concern the principle of the irremovability of judges and the independence and autonomy of courts as principles of EU law,

as well as the prohibition of discrimination on grounds of age. The Supreme Court requested the application of the accelerated procedure and the joining of the presented case with Case C-522/18 pending before the CJEU as a result of the preliminary references made by the Supreme Court on 2 August 2018. The latter submission is related to the fact that the Social Insurance Institution withdrew its complaint, which was the basis for the main proceedings that gave rise to the references made on 2 August. The repeating of the questions is justified given the reasoning presented in the following holding of the Court of Justice:

Judgment of the Court of 27 February 2014, Case C-470/12 *Pohotovosť s.r.o. v Miroslav Vašuta*, ECLI:EU:C:2014:101

[I]t is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court of Justice by way of a reference for a preliminary ruling unless a case is pending before it, in which it is called upon to give a decision which is capable of taking account of the preliminary ruling (see, to that effect, Joined Cases C-422/93 to C-424/93 Zabala Erasun and Others *[1995] ECR I-1567, paragraph 28; Case C-314/96* Djabali *[1998] ECR I-1149, paragraph 18; and Case C-225/02* García Blanco *[2005] ECR I-523, paragraph 27). The justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (see Case 244/80* Foglia *[1981] ECR 3045, paragraph 18; Joined Cases C-480/00 to C-482/00, C-484/00, C-489/00 to C-491/00 and C-497/00 to C-499/00* Azienda Agricola Ettore Ribaldi and Others *[2004] ECR I-2943, paragraph 72; and* García Blanco, *paragraph 28).*

In November 2018, when this Handbook was last updated, the most recent development was the questions referred to the CJEU for a preliminary ruling by the Supreme Administrative Court in proceedings launched by challenges brought by Supreme Court judges against resolutions of the new National Council of the Judiciary. A key aspect of the main proceedings is the concept of a state ruled by law against the background of Supreme Court judicial appointments made under the 2017 Act.

Decisions of the Supreme Administrative Court of 21 November 2018, case no. II GOK 2/18

The Supreme Administrative Court referred the following questions for the CJEU's preliminary ruling:

The first question: *Must Article 2 TEU, in conjunction with the third paragraph of Article 4(3) TEU, Article 6(1) TEU, and Article 19(1) TEU, in conjunction with Article 47 CFR and Article 9(1) of Council Directive 2000/78/EC and the third paragraph of Article 267 TFEU, be interpreted as meaning that* ***a breach of the principle of the rule of law and of the right to an effective remedy and to effective judicial protection occurs*** *when the national legislator, in granting the right of appeal to a court in individual cases concerning the exercise of the office of a judge of the court of last resort of a Member State (Supreme Court), associates the validity and enforceability of a ruling made in the selection procedure preceding the submission of an application to appoint a judge to serve on the court in question with the situation of refraining from challenging a decision taken on the joint examination and evaluation of all the candidates for the Supreme Court by all the participants of the selection procedure, including the candidate who is not interested in challenging the aforementioned decision, i.e. the candidate named in the application for appointment to the judicial office, which, in consequence:*

- *compromises the effectiveness of the remedy and the possibility for the competent court to carry out an effective review of the conduct of the selection procedure?*

- *and, where the scope of that procedure includes the judicial positions on the Supreme Court subject to a new, lower retirement age threshold applied to the judges who have previously held these positions, without leaving the choice to retire in accordance with the lower retirement age threshold exclusively to the judge concerned, in relation to the principle of the irremovability of judges – if it is considered that this principle have been prejudiced in this way - is also without impact on the scope and outcome of judicial review of the aforesaid selection procedure?*

The second question: *Must Article 2 TEU, in conjunction with the third paragraph of Article 4(3) TEU and Article 6(1) TEU, read in conjunction with Articles 15(1) and 20 CFR, in conjunction with Articles 21(1) and 52(1) CFR, in conjunction with Articles 2(1), (2)(a) and 3(1)(a) of Council Directive 2000/78/EC and the third paragraph of Article 267 TFEU, be interpreted as meaning that a breach of the principle of the rule of law and equal treatment and equal access to public service, i.e. holding the office of a judge of the Supreme Court, occurs in a situation where in establishing, in individual cases related to the execution of the judicial office concerned, the right to appeal to a competent court, in consequence of the validity formula described in the first question, an appointment to a vacant office of the Supreme Court judge may take place without a review of the conduct of the aforesaid selection procedure performed by the competent court, if such review is initiated, while the absence of that measure, by violating the right to an effective remedy, infringes the right of equal access to public service thereby failing to meets objectives of general interest, and does the situation in which the composition of a Member State's body created to safeguard the independence of courts and judges (the National Council of the Judiciary), which conducts the proceedings concerning the exercise of the office of the Supreme Court judge, is so designed that the representatives of the judiciary sitting on that body are elected by the legislative interfere with the principle of an institutional balance?*

Additionally, the Supreme Administrative Court made a request for the expedited procedure in accordance with Article 105(1) of the CJEU Rules of Procedure.

In public discussion, voices are raised about the admissibility of preliminary references submitted by courts in main proceedings whose subject-matter is not directly related to the content of the questions asked. The Court has developed certain guidelines in this respect, for instance in:

Judgment of the Court of 22 June 2010 in Joined Cases C-188/10 and C-189/10, *Aziz Melki* (C-188/10) and *Sélim Abdeli* (C-189/10), ECLI:EU:C:2010:363

[A]ccording to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-333/07 Regie Networks *[2008] ECR I-10807, paragraph 46; Case C-478/07* Budejovicky Budvar *[2009] ECR I-0000, paragraph 63; and Case C-56/09* Zanotti *[2010] ECR I-4517, paragraph 15).*

Part IV

The Practical Aspects of the Preparation and Submission of a Preliminary Reference to the CJEU

This part presents the practical aspects of preparing a reference for a preliminary ruling. Such aspects include:

- the form of the referral
- the timing of the referral
- the procedure
- the costs of proceedings
- selected technical and procedural information
- the ordinary, expedited and urgent procedure for the examination of references for a preliminary ruling.

The preliminary reference procedure is so structured that **proceedings are conducted solely between courts** (the national referring court and the CJEU). This procedure has neither the defendant nor claimant that would be entitled to make a request for a preliminary ruling to the CJEU. The parties to the proceedings are only indirectly involved in the procedure designed to secure a preliminary ruling through their participation in a dispute before a national court seeking such a ruling. They also have no right to exert any binding influence on the court seised with of case so that it makes a reference for a preliminary ruling. The parties may only suggest to the adjudicating panel a necessity of consulting the CJEU in a specific case and cite arguments that could persuade the adjudicating panel to make a request for a preliminary reference. The national court, which is seised of the case and is responsible for delivering the judgment, has the exclusive authority to determine, on the facts of a given case, whether a preliminary ruling is necessary for giving the court's own judgment and whether the questions asked are relevant for the case at hand (judgment of 2 March 2017, C97/16 *Pérez Retamero*, EU:C:2017:158, paragraph 20 and the case-law cited).

The actual wording of a reference for a preliminary ruling may take many different forms but needs to lead to a clear question on the interpretation of EU law. Accordingly, a good example of such a reference is the question asked by the Regional Court in Piotrków Trybunalski:

Must Article 2 of Directive ... (Regulation/ Treaty/ Decision, etc.) be interpreted as meaning that...[76]

76 Practical notes and guidelines on this subject can be found in the educational materials prepared for the HFHR by A. Frąckowiak-Adamska, *Nie tylko Strasburg?*, pp. 16-19.

Case study:

Decision of 2 February 2018 of the Regional Court in Piotrków Trybunalski, 4th Criminal Appellate Division, case no. IV Ka 698/17:

On 2 February 2018, the Regional Court in Piotrków Trybunalski, 4th Criminal Appellate Division, having heard the case of B.S., accused under Art. 56(1) of the Tax Offences Code ("TOC") read in connection with Art. 63(1) TOC, Art. 6(2) TOC and Art. 37(1)(1) TOC, **a motion of the accused's defence lawyer regarding** making a request for a preliminary ruling to the Court of Justice of the European Union under Article 267 TFEU, decided to refer to the CJEU the following question on the interpretation of EU law:

Must Article 2 of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages, in conjunction with Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, 2 be interpreted as meaning that beer made from malt, within the meaning of CN code 2203, includes a product in the case of which malt extract, glucose syrup, citric acid and water were used to produce hopped wort, and in which the proportion of non-malt ingredients in the wort is predominant in relation to the malt ingredients and glucose syrup was added to pitched wort before the wort fermentation process, and what criteria should be taken into account when determining the proportions of malt and non-malt ingredients in hopped wort in order for the product obtained to be classified as beer under CN code 2203?

The question in dispute was a proper classification of the product produced by the accused under CN (combined nomenclature) code and, specifically, an answer to the question whether "beverages containing a mixture of beer and non-alcoholic beverages" should be classified as a mixture of beer with code CN 2203 and non-alcoholic beverages or as "beverages containing a mixture of other fermented beverages and non-alcoholic beverages" that should be classified under CN 2206?

B.S. was charged with misleading a tax body by making false statements in excise duty returns. In the judgment of the Regional Court in Piotrków Trybunalski of 21 June 2017, B.S. was found guilty of misleading a tax body, namely the Customs Office in P., by making false statements in excise duty returns and sentenced to a fine of 300 daily rates of PLN 200 each. **The accused's defence lawyer lodged an appeal, which included a motion requesting that the Regional Court make a reference for a preliminary ruling to the CJEU on the interpretation of EU law**, namely the meaning of CN code 2203 of "beer from malt" in respect of proportions of malt and non-malt ingredients in hopped wort during beer production.

The criminal proceedings in the case were commenced in the aftermath of decisions issued by a tax body (Customs Office), which questioned the classification of the product produced by the accused as beer under CN code 2203 and the accused's calculation of excise duty at the rate laid down for beverages with CN code 2203 due to too low, in the opinion of the Customs Office, share of malt ingredients in hopped wort. Polish customs bodies and administrative courts argued that for a product to be classified under CN code 2203 it is necessary that malt ingredients be the basic (predominant, main) essential material used to produce this product. However, in the light of decisions issued in the case of binding customs information issued in the French Republic, the product was classified under CN code 2203 and the proportions of malt and non-malt ingredients were of no significance, because in each and every case – irrespective of whether malt extract constituted at least 7% or 55% of the base extract. Hence, there is a discrepancy between Polish customs bodies and administrative courts and French customs authorities in respect of customs tariff classification of the product, if malt ingredients do not predominate in the intermediate used to produce the product. These interpretative discrepancies between Polish and French bodies justified, in the court's opinion, the need for harmonisation of case-law in order to protect the single market and free movement of goods and capital; similar products from various EU countries should be taxed under the same

> principles – i.e. beer should be defined in a uniform manner in different countries. The available case-law of the CJEU provides no explicit answer to the question on the admissibility (and conformity with EU law) of the practice of restricting the use of tax rate applicable to beer only to such beer, in which the proportion of malt ingredients is predominant and since the motion to refer a question for a preliminary ruling has been filed in a case pending before the national court against whose decisions there is no judicial remedy under national law, the Regional Court in Piotrków Trybunalski found that it had to refer the case for a preliminary ruling under Art. 267 TFEU.

Addressing the need to clarify preliminary ruling procedure and prepare national courts for making preliminary references, the CJEU developed and published, as it was mentioned in the opening section of this Handbook, **Recommendations to National Courts and Tribunals** (OJ C 338, 6.11.2012), which were adopted upon the entry into force (i.e. on 1 November 2012) of the new Rules of Procedure of the Court of Justice. The Recommendations were updated (on 25 November 2016 and in 2018) and based on the experience from the application of the Rules of Procedure and the most recent case-law of the Court of Justice. They are meant to remind the basic elements of the preliminary ruling procedure and offer practical guidance to the courts that make references to the CJEU so that the Court could issue useful rulings regarding the questions referred to it.[77]

1. Rules that apply to all requests for a preliminary ruling

The jurisdiction of the Court to give a preliminary ruling on the interpretation or validity of EU law is exercised, as it has been repeatedly mentioned, exclusively on the initiative of 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.

1. **A request for a preliminary ruling must specify the referring court or tribunal** and, where appropriate, the chamber or formation of the court or tribunal making the reference, and must include full contact details for that court or tribunal, in order to facilitate subsequent contact between that court or tribunal and the Court of Justice.

A request for a preliminary ruling must concern the interpretation or validity of EU law, not the interpretation of rules of national law or issues of fact raised in the main proceedings. The Court can give a preliminary ruling only if EU law applies to the case in the main proceedings. It is essential, in that respect, that the referring court or tribunal set out all the relevant matters of fact and of law that have prompted it to consider that any provisions of EU law may be applicable in the case.

77 Practical aspects of a request for a preliminary ruling were developed on the basis of the Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings.

In order to deliver its decision, the Court necessarily takes into account the legal and factual context of the dispute in the main proceedings, as defined by the referring court or tribunal in its request for a preliminary ruling, it does not itself apply EU law to that dispute. When ruling on the interpretation or validity of EU law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute in the main proceedings, but it is for the referring court or tribunal to draw case-specific conclusions, if necessary, by disapplying the rule of national law held incompatible with EU law.

2. **It is a national court or tribunal which is in fact in the best position to decide at what stage of the proceedings such a request should be made.**

Therefore, the court is required to issue a decision as soon as it finds that a ruling on the interpretation or validity of EU law is necessary to enable it to give judgment. Since, however, that request will serve as the basis of the proceedings before the Court and the Court must therefore have available to it all the information that will enable it both to assess whether it has jurisdiction to give a reply to the questions raised and, if so, to give a useful reply to those questions, it is necessary that a decision to make a reference for a preliminary ruling be taken when the national proceedings have reached a stage at which the referring court or tribunal is able to define, in sufficient detail, the legal and factual context of the case in the main proceedings, and the legal issues which it raises. In the interests of the proper administration of justice, it may also be desirable for the reference to be made only after both sides have been heard.

3. **The request for a preliminary ruling may be in any form allowed by national law in respect of procedural issues.**

But it should be borne in mind that this request serves as the basis of the proceedings before the Court and is served on all the interested persons referred to in Article 23 of the Statute of the Court and, in particular, on all the Member States, with a view to obtaining any observations they may wish to make. Owing to the consequential need to translate it into all the official languages of the European Union, the request for a preliminary ruling should therefore be drafted simply, clearly and precisely by the referring court or tribunal, avoiding superfluous detail. As experience has shown, about 10 pages are often sufficient to set out adequately the legal and factual context of a request for a preliminary ruling.

4. **The parties to the main proceedings and their representatives.**

After specifying the referring court or tribunal, the request for a preliminary ruling should state the names of the parties to the main proceedings and anyone representing them before that court or tribunal. **Where it is necessary for the protection of personal data**, the referring court or tribunal is to anonymise the request for a preliminary ruling and, to that end, must redact the name of natural persons referred to in the request or concerned by the dispute in the main proceedings and all data likely to enable them to be identified. If the referring court or tribunal has them both, the referring court or tribunal should send to the Court both versions of its request for a preliminary ruling, that is to say, the nominal

version of that request, including the names of and full contact details for the parties to the main proceedings, and the anonymised version of the request. It is the latter which will be served, after translation into all the official languages of the European Union, on all the interested persons referred to in Article 23 of the Statute and which will serve as the basis of the dissemination and subsequent publications concerning the case.

The content of any request for a preliminary ruling is prescribed by Article 94 of the Rules of Procedure of the Court. In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling must contain:

- a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at the very least, an account of the facts on which the questions referred are based,
- the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law, and
- a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

In the absence of one or more of the above, the Court may have to decline jurisdiction to give a preliminary ruling on the questions referred or dismiss the request for a preliminary ruling as inadmissible. In its request for a preliminary ruling, the referring court or tribunal must provide precise references for the national provisions applicable to the facts of the dispute in the main proceedings, and accurately identify the provisions of EU law whose interpretation is sought or whose validity is challenged. The request should include, if need be, a brief summary of the relevant arguments of the parties to the main proceedings. It is helpful to bear in mind in that context that it is only the request for a preliminary ruling that will be translated, not any annexes to that request.

Judgment of the Court (Grand Chamber) of 28 March 2017, Case C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, ECLI:EU:C:2017:236, paragraph 50:

The Court may refuse to give a ruling on a question referred by a national court for a preliminary ruling, under Article 267 TFEU, only where, for instance, the requirements concerning the content of a request for a preliminary ruling, set out in Article 94 of the Rules of Procedure, are not satisfied or where it is quite obvious that the interpretation of a provision of European Union law, or the assessment of its validity, which is sought by the national court bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical (see, to that effect, judgments of 10 December 2002, British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 35; of 5 July 2016,* Ognyanov*, C-614/14, EU:C:2016:514, paragraph 19, and of 15 November 2016,* Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 54).*

The subject matter of the dispute in the main proceedings and the relevant facts

The referring court or tribunal must briefly describe the subject matter of the dispute in the main proceedings and the relevant findings of fact, as determined by that court or tribunal.

5. **The relevant legal provisions**

The request for a preliminary ruling must contain precise references to the national provisions applicable to the facts of the dispute in the main proceedings, including any relevant case-law, and the provisions of EU law whose interpretation is sought or whose validity is challenged. Those references must be comprehensive and must include the precise title of and citations for the provisions concerned, as well as their publication references. As far as possible, case-law citations, whether national or European, should also include the ECLI number ("**European Case Law Identifier**"[78]) of the decision concerned.

6. **The referring court or tribunal may also briefly state its view on the answer** to be given to the questions referred for a preliminary ruling.

That information may be useful to the Court, particularly where it is called upon to give a preliminary ruling in an expedited or urgent procedure. Nevertheless, it is important to avoid a situation where an opinion of the referring court about the interpretation or validity of an act of EU law that is the subject-matter of a preliminary reference turns into conditions set by this court for the Court of Justice of the European Union. The request should include, if need be, a brief summary of the relevant arguments of the parties to the main proceedings. It is helpful to bear in mind in that context that it is only the request for a preliminary ruling that will be translated, not any annexes to that request. The referring court or tribunal may also briefly state its view on the answer to be given to the questions referred for a preliminary ruling, in particular in the expedited or urgent procedure.

According to some commentators, that was the issue in the judgment of the Federal Constitutional Court ("FCC") delivered in the case *Outright Monetary Transactions*.

> **Case study:**
>
> **Judgment of 14 January 2014, case no. 2 BvR 2728/13:**
>
> In this judgment, after formulating two questions for a preliminary ruling and presenting provisions of the German constitution applicable in the case in question, the course of proceedings before the FCC and reasons why a request for a preliminary ruling had been made to the CJEU, the FCC expressed very comprehensively its opinion on the validity of the disputed decision of the European Central Bank establishing the *Outright Monetary Transactions* programme and the interpretation of primary law provisions applicable in the case (Articles 123, 125 and 127 TFEU). According to some experts, stating in point 55 that the claims of the claimants "will probably be admitted" the FCC has already made a decision and referred to the CJEU only to have it confirmed.[79] Although the further course of the proceedings in question – the CJEU judgment of 16 June 2015 in the case *Gauweiler* (ECLI:EU:C:2015:400) and the final judgment of the FCC of 21 June 2016 (2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR

78 Council conclusions of 29 April 2011 inviting the introduction of the European Case Law Identifier (ECLI) and a minimum set of uniform metadata for case law (OJ 2011 C 127, p. 1). Further information available at: https://e-justice.europa.eu/content_european_case_law_identifier_ecli-175-pl.do?init=true)

79 M. Kumm, "Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of 'Chicken' and What the CJEU Might do About It", *German Law Journal*, 2014(2) issue 15, p. 206; see also: F. Mayer, "Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference", *German Law Journal,* 2014(2) issue 15, p. 120.

> 2729/13) – shows that FCC judges submitted to the position of the CJEU, despite the fact that it did not take into consideration any suggestions of the FCC, it must be highlighted that judges that make preliminary references to the CJEU should avoid "dictating" expected answers to the Court.

The questions referred to the Court for a preliminary ruling should constitute a separate paragraph, i.e. they should appear in a separate and clearly identified section of the order for reference, preferably at the beginning or the end and be a separate whole, namely it must be possible to understand them on their own terms, without it being necessary to refer to the statement of the grounds for the request.

> **Statement of grounds for a preliminary reference – an EU case**
>
> The Court can rule on a request for a preliminary ruling only if EU law is applicable to the case in the main proceedings. The referring court or tribunal must therefore set out the reasons which prompted it to inquire about the interpretation or validity of provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings. If the referring court or tribunal considers it helpful for the purposes of understanding the case, it may set out the arguments of the parties in that regard.

In order to make the request for a preliminary ruling easier to read, it is essential that the Court receive it in typewritten form and that the pages and paragraphs of the request be numbered.

The request for a preliminary ruling must be dated and signed, then sent, by registered post, to the Court Registry at the following address: *Rue du Fort Niedergrünewald, 2925 Luxembourg, Luxembourg*. The request must be accompanied by any relevant documents and, in particular, precise contact details for the parties to the main proceedings and their representatives, if any, as well as the file of the case in the main proceedings or a copy of it. The file (or copy file) will be retained at the Registry throughout the proceedings where, unless otherwise indicated by the referring court or tribunal, it may be consulted by the interested persons referred to in Article 23 of the Statute.

Under the preliminary ruling procedure, the Court will, as a rule, use the information contained in the order for reference, including nominative or personal data. It is therefore for the referring court or tribunal itself, if it considers it necessary, to redact certain details in its request for a preliminary ruling or to render anonymous one or more persons or entities concerned by the dispute in the main proceedings.

After the request for a preliminary ruling has been lodged, the Court may also render such persons or entities anonymous of its own motion, or at the request of the referring court or tribunal or of a party to the main proceedings. In order to maintain its effectiveness, such a request for anonymity must, however, be made at the earliest possible stage of the proceedings, and in any event prior to publication in the Official Journal of the European Union of the notice relating to the case concerned, and to service of the request for a preliminary ruling on the interested persons referred to in Article 23 of the Statute, which generally takes place about one month after the request for a preliminary ruling has been lodged.

To sum up the above comments in light of the aforementioned recommendations for national courts, the formal requirements of a reference for a preliminary ruling are as follows:

1. A question is referred exclusively on the initiative of 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.
2. A request for a preliminary ruling must concern the interpretation or validity of EU law, not the interpretation of rules of national law or issues of fact raised in a dispute.
3. The request for a preliminary ruling may be in any form allowed by national law in respect of procedural issues.
4. A decision to make a reference for a preliminary ruling should be taken when the national proceedings have reached a stage at which the referring court or tribunal is able to define, in sufficient detail, the legal and factual context of the case in the main proceedings, and – in justified circumstances – after both sides have been heard.
5. A request for a preliminary ruling should be drafted simply, clearly and precisely, without superfluous detail.
   - The questions must appear in a separate and clearly identified section of the order for reference, preferably at the beginning or the end,
   - in typewritten form,
   - the pages and paragraphs of the request be numbered.
6. Apart from the questions, each application should include:
   - precise references for the national provisions applicable to the facts of the dispute in the main proceedings,
   - an accurate identification of the provisions of EU law whose interpretation is sought or whose validity is challenged,
   - if needed, a brief summary of the relevant arguments of the parties to the main proceedings,
   - a summary of the subject matter of the dispute and the relevant findings of fact,
   - a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation.
7. The referring court or tribunal may briefly state its view on the answer to be given to the questions referred for a preliminary ruling.

Given the above, the following excerpts from an order of the Court of Justice may serve as a summary of the CJEU approach to the practical aspects of drafting preliminary references.

> **Case study – Court's guidelines for a referring court**
>
> **Order of the Court of 25 April 2018, Case C-102/17 *Secretaria Regional de Saúde dos Açores***
>
> *A request for a preliminary ruling concerned the interpretation of Article 58(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 (OJ 2015 L 307, p. 5), ("Directive 2014/24"). The request has been made in the context of an appeal brought by the Secretaria Regional de Saúde*

dos Açores (Regional Ministry of Health of the Azores, Portugal) against Decision No 7/2016 of the Secção Regional dos Açores do Tribunal de Contas (Azores Regional Section of the Court of Auditors, Portugal) of 26 September 2016.

(…)

21. Under Article 53(2) of the Rules of Procedure, where a request or an application is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.

22. That provision must be applied in the present case.

23. In accordance with settled case-law of the Court, ***the procedure provided for by Article 267 TFEU is an instrument for cooperation between the Court and national courts by means of which the Court provides national courts with the criteria for the interpretation of EU law*** *which they need in order to decide the disputes before them (see, inter alia, judgment of 27 November 2012,* Pringle*, C-370/12, EU:C:2012:756, paragraph 83, and order of 8 September 2016,* Google Ireland and Google Italy*, C-322/15, EU:C:2016:672, paragraph 14).*

24. It follows that, ***in order to be able to refer a matter to the Court in the context of the preliminary ruling procedure, the referring body must be capable of being classified as a "court or tribunal" within the meaning of Article 267 TFEU****, this being a matter for the Court to verify on the basis of the request for a preliminary ruling.*

25. The requirements concerning the content of a request for a preliminary ruling are expressly set out in Article 94 of the Rules of Procedure, of which the referring court is deemed, in the context of the cooperation instituted by Article 267 TFEU, to be aware and which it is bound to observe scrupulously (see orders of 3 July 2014, Talasca*, C-19/14, EU:C:2014:2049, paragraph 21, and of 8 September 2016,* Google Ireland and Google Italy*, C-322/15, EU:C:2016:672, paragraph 15).*

26. Those requirements are, moreover, noted in paragraphs 13 and 15 of the Recommendations of the Court to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings (OJ 2016 C 439, p. 1).

27. While being intended to enable the governments of the Member States and other interested parties to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union, ***the information which must be included in the order for reference is also intended to enable the Court, first, to verify the admissibility of such a request and, second, to provide useful answers to the questions*** *submitted by the referring court.*

28. Since the request for a preliminary ruling is the basis for the proceedings before the Court, ***it is essential that, in that application, the national court should, in particular, set out the factual and regulatory background to the dispute in the main proceedings****.*

29. That obligation must ***particularly be observed in certain areas characterised by complex factual and legal situations*** *(see, to that effect, judgment of 26 January 1993,* Telemarsicabruzzo and Others*, C-320/90 to C-322/90, EU:C:1993:26, paragraph 7; order of 19 March 1993,* Banchero*, C-157/92, EU:C:1993:107, paragraph 5; and judgment of 12 December 2013,* Ragn-Sells*, C-292/12, EU:C:2013:820, paragraph 39), but also when the body making the reference has been entrusted by law with functions of a different nature.*

30. In the latter case, the admissibility of the request for a preliminary ruling may depend on ***whether a national body can be classified as "a court or tribunal" within the meaning of Article 267 TFEU*** *when it is performing judicial functions, but not when exercising other functions, inter alia functions of an administrative nature (see order of 26 November 1999,* ANAS*, C-192/98, EU:C:1999:589, paragraph 22).*

31. In that regard, it should be recalled that, in accordance with settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by EU law alone, ***the Court takes account of a number***

> ***of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent*** *(see, inter alia, judgments of 17 September 1997,* Dorsch Consult, *C-54/96, EU:C:1997:413, paragraph 23; of 19 December 2012,* Epitropos tou Elegktikou Synedriou, *C-363/11, EU:C:2012:825, paragraph 18; and of 27 February 2018,* Associação Sindical dos Juízes Portugueses, *C-64/16, EU:C:2018:117, paragraph 38).*
>
> *32. Moreover, the notion of a court or tribunal within the meaning of Article 267 TFEU can, by its very nature, designate only an authority acting as a third party in relation to the authority which adopted the decision forming the subject matter of the proceedings (judgments of 30 March 1993,* Corbiau, *C-24/92, EU:C:1993:118, paragraph 15, and of 19 September 2006,* Wilson, *C-506/04, EU:C:2006:587, paragraph 49).*
>
> *33. Lastly,* ***a court or tribunal may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature*** *(see, inter alia, orders of 5 March 1986,* Greis Unterweger, *318/85, EU:C:1986:106, paragraph 4, and of 26 November 1999,* ANAS, *C-192/98, EU:C:1999:589, paragraph 21; and judgment of 19 December 2012,* Epitropos tou Elegktikou Synedriou, *C-363/11, EU:C:2012:825, paragraph 19).*
>
> *(...)*
>
> *39. Furthermore, it should be pointed out that the Tribunal de Contas has not established the findings necessary for the Court to ascertain whether, in the case in the main proceedings, there is certain cross-border interest. As has been pointed out in paragraphs 23 to 25 of the present order, it follows from Article 94 of the Rules of Procedure that the Court must be able to find in a request for a preliminary ruling a summary of the facts on which the questions are based and the connection, inter alia, between those facts and the questions. Therefore, the findings necessary to make possible verification of the existence of certain cross-border interest, and more generally all the findings to be made by the national courts and on which the applicability of an act of secondary and primary legislation of the European Union depends, must be made before the questions are referred to the Court (see judgment of 11 December 2014,* Azienda sanitaria locale n. 5 'Spezzino' and Others, *C-113/13, EU:C:2014:2440, paragraph 47).*
>
> *40. In that regard, a conclusion that there is certain cross-border interest cannot be inferred hypothetically from certain factors which, considered in the abstract, might constitute evidence to that effect, but must be the positive outcome of a specific assessment of the circumstances of the contract at issue (judgment of 6 October 2016,* Tecnoedi Costruzioni, *C-318/15, EU:C:2016:747, paragraph 22).*

2. Interactions between the reference for a preliminary ruling and the national proceedings

The Court's role in the preliminary ruling procedure is to contribute to the effective administration of justice in the Member States and not to give opinions on general or hypothetical questions. Since the preliminary ruling procedure is predicated on there being proceedings actually pending before the referring court or tribunal, it is incumbent on that court or tribunal to inform the Court of any procedural step that may affect the referral and, **in particular, of any discontinuance or withdrawal, amicable settlement or other event leading to the termination of the proceedings**.

The referring court or tribunal must also inform the Court of any decision delivered in the context of an appeal against the order for reference and of the consequences of that decision for the request for a preliminary ruling.

Although the referring court or tribunal may still order protective measures, particularly in connection with a reference on determination of validity, the lodging of a request for a preliminary ruling nevertheless calls for the national proceedings to be stayed until the Court has given its ruling.

The national courts and tribunals should also note that **the withdrawal of a request for a preliminary ruling may have an impact on the management of similar cases** (or of a series of cases) by the referring court or tribunal. Where the outcome of a number of cases pending before the referring court or tribunal depends on the reply to be given by the Court to the questions submitted by that court or tribunal, it may be appropriate for that court or tribunal to join those cases in the request for a preliminary ruling in order to enable the Court to reply to the questions referred notwithstanding any withdrawal of one or more cases.

Costs and legal aid

Preliminary ruling proceedings before the Court are free of charge and the Court does not rule on the costs of the parties to the proceedings pending before the referring court or tribunal; it is for the referring court or tribunal to rule on those costs. Moreover, if a party to the main proceedings has insufficient means and where it is possible under national rules, the referring court or tribunal may grant that party legal aid to cover the costs, including those of lawyers' fees, which it incurs before the Court. The Court itself may also grant legal aid where the party in question is not already in receipt of aid under national rules or to the extent to which that aid does not cover, or covers only partly, costs incurred before the Court.

Communication between the Court and the national court or tribunal

The Court Registry will remain in contact with the referring court or tribunal throughout the proceedings, and will send it copies of all procedural documents and any requests for information or clarification deemed necessary in order for a useful reply to be given to the questions referred by that court or tribunal. At the end of the proceedings, the Registry will send the Court's decision to the referring court or tribunal, which is invited to inform the Court of the action taken upon that decision in the case in the main proceedings and to communicate to the Court its final decision in that case.

The Court Registry will remain in constant contact with the referring court or tribunal throughout the proceedings, and will send it copies of all procedural documents and any requests for information or clarification deemed necessary in order for a useful reply to be

given to the questions referred by that court or tribunal. The Registry will send the Court's decision to the referring court or tribunal, which is invited to inform the Court of the action taken upon that decision in the case in the main proceedings and to communicate to the Court its final decision in that case.

Art. 101 of the Rules of Procedure of the Court of Justice – Request for clarification

§ 1. Without prejudice to the measures of organisation of procedure and measures of inquiry provided for in these Rules, the Court may, after hearing the Advocate General, request clarification from the referring court or tribunal within a time-limit prescribed by the Court..

3. Provisions applicable to requests for a preliminary ruling requiring particularly expeditious handling

As provided in Article 23a of the Statute and Articles 105-114 of the Rules of Procedure, a reference for a preliminary ruling may, in certain circumstances, be determined pursuant to an expedited procedure or an urgent procedure. The Court will decide whether these procedures are to be applied, either on submission by the referring court or tribunal of a duly reasoned request setting out the matters of fact or of law which justify the application of such procedure(s), or, exceptionally, of its own motion, where that appears to be required by the nature or the particular circumstances of the case.

Possible need for specific treatment

Where the referring court or tribunal considers that the request it is submitting to the Court has to be dealt with in a particular way, both as regards the need to preserve the anonymity of the persons concerned by the dispute in the main proceedings and as regards the rapidity with which the request may have to be dealt with by the Court, the reasons for such treatment must be set out in detail in the request for a preliminary ruling and in any covering letter.

Expedited preliminary ruling procedure

Article 105 of the Rules of Procedure provides that a reference for a preliminary ruling may thus be determined pursuant to an **expedited procedure** derogating from the provisions of those rules where the nature of the case requires that it be dealt with within a short time. Since that procedure imposes significant constraints on all those involved in it, and, in particular, on all the Member States called upon to lodge observations, whether written or oral, within much shorter time limits than would ordinarily apply, its application must be sought only in particular circumstances that warrant the Court giving its ruling quickly on the questions referred. According to settled case-law, the large number of persons or legal situations potentially affected by the decision that the referring court or tribunal has to deliver after bringing the matter before the Court for a preliminary ruling does not, in itself, constitute an exceptional circumstance that would justify the use of the expedited procedure. The same

applies a fortiori to the **urgent preliminary ruling procedure**, provided for in Article 107 of the Rules of Procedure.

Urgent preliminary ruling procedure

That procedure, which applies only in the areas covered by Title V of Part Three of the TFEU, relating to the area of freedom, security and justice, imposes even greater constraints on those concerned, since it limits the number of parties authorised to lodge written observations and, in cases of extreme urgency, allows the written part of the procedure before the Court to be omitted altogether. The application of the urgent procedure must therefore be requested only where it is absolutely necessary for the Court to give its ruling very quickly on the questions submitted by the referring court or tribunal.

A reference for a preliminary ruling – urgent procedure Art. 267 TFEU:

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

The urgent procedure (Article 104b of the Rules of Procedure) applies to the Area of Freedom, Security and Justice (in 2016 – 8 proceedings with 12 submitted requests) and the duration of the procedure is ca. 2.7 month, the ordinary procedure takes around 15 months.

Expedited procedure – in 2016, 13 requests were dismissed and 2 admitted.

Example:

A national court or tribunal may, for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation, or in proceedings concerning parental authority or custody of young children, where the identity of the court having jurisdiction under EU law depends on the answer to the question referred for a preliminary ruling.

Case study:

Case C-216/18 PPU

On 12 March 2018 the High Court in Dublin, which, suspended the extradition of a Polish national under an EAW, asked the CJEU if this person can count on having a fair trial in Poland (this particular case is discussed in more detail below). Judge Aileen Donnelly, sitting in the case ***The Minister for Justice and Equality v Celmer*** (many cases heard by the High Court are decided by a one-person panel), has found that to determine whether a refusal to execute an EAW is possible on such a basis, it is necessary to construe the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

The case pending before the Irish court involved the surrender of Artur C. who had been wanted for over 5 years under the suspicion of committing a number of serious offences, including involvement in an organized criminal group and drug trafficking. Between 2012 and

2013, Polish authorities issued three European Arrest Warrants of C. Based on them, C. was apprehended in May 2017 in Ireland.

By asking this question, the Irish High Court challenged the principle of mutual trust, which is of fundamental importance in EU law. The defence lawyer of Artur C. argued that due to violations of the rule of law in Poland and, specifically, the pending reforms of the judiciary made by the Polish government, their client cannot count on a fair trial that would comply with the European standards of justice and integrity and, hence, cannot be surrendered to Poland. Judge Donnelly referred in its question to all the most important documents that review the situation in Poland, namely: The documents issued by the European Commission as part of Article 7 TEU procedure designed to protect the rule of law and Article 7(1) TEU procedure (including a reasoned proposal to the Council) and the opinion of the Venice Commission. As a result, the judge recognised the resemblance between the case being resolved and two other cases, in respect of which preliminary rulings were issued, namely Joined Cases C-411/10 *N.S.* and C-493/10 *M.E. and Others* (in which the CJEU rebutted the presumption present in the EU asylum system that the EU Member State complies with fundamental rights) and in Case C-404/15 *Aranyosi* and C-659/15 PPU *Căldăraru* (in which the Court allowed for the possibility to refuse to surrender a person under an EAW, where such a person, if extradited, would be subjected to a real threat of inhuman or degrading treatment in the meaning of Article 4 of the EU Charter of Fundamental Rights).

The High Court's preliminary reference involved the possibility of refusing to surrender a person under an EAW to the country, in which – in the opinion of the extraditing court – the rule of law is systematically violated and in which a person will not be provided with effective judicial protection.

The request for application of the expedited procedure or the urgent procedure must set out precisely the matters of fact and law which establish the urgency and, in particular, the risks involved in following the ordinary procedure.

In so far as it is possible to do so, the referring court or tribunal must also briefly state its view on the answer to be given to the questions referred. Such a statement makes it easier for the parties to the main proceedings and the other interested persons participating in the procedure to define their positions, and therefore contributes to the rapidity of the procedure. The referring court or tribunal is requested to specify which of the two procedures is required in the particular case, and to mention in its request the relevant article of the Rules of Procedure (Article 105 for the expedited procedure or Article 107 for the urgent procedure). That mention must be included in a clearly identifiable place in its order for reference (for example, at the head of the page or in a separate judicial document). Where appropriate, it may be helpful for a covering letter from the referring court or tribunal to refer to that request.

In order to expedite and facilitate communication with the referring court or tribunal and the parties to the main proceedings, a court or tribunal submitting a request for the expedited procedure or the urgent procedure to be applied is requested to state the email address and any fax number which may be used by the Court, together with the email addresses and any fax numbers of the representatives of the parties to the proceedings. A copy of the signed order for reference together with a request for the expedited procedure or the urgent procedure to be applied can initially be sent to the Court by email (ECJ-Registry@curia.europa.eu) or by fax (+352433766). Processing of the reference and of the request can then

begin upon receipt of the emailed or faxed copy. The originals of those documents must, however, be sent to the Court Registry as soon as possible.

Formal aspects of the request for a preliminary ruling

Requests for a preliminary ruling must be submitted in a form that facilitates electronic processing by the Court and, in particular, that enables them to be scanned and optical character recognition to be applied.

To that end:

- the requests should be typed on white, unlined, A4-size paper,
- the text should be in a commonly used font (such as Times New Roman, Courier or Arial), in at least 12 point in the body of the text and at least 10 point in any footnotes, with 1,5 line spacing and horizontal and vertical margins of at least 2,5 cm (above, below, at the left and at the right of the page), and
- all the pages of the request, and the paragraphs they contain, should be numbered consecutively.

Part V

Procedural Aspects of Making a Preliminary Reference by a National Court

As it has many times been stated it is a national court that takes a decision about making a reference for a preliminary ruling. The Court is consistent in its refusal to examine procedural aspects of national courts making a preliminary reference. The procedure for making a preliminary reference before a national court falls within the domain of national law and is not regulated at the EU level.

1. The moment of making a reference and main proceedings; parties to the proceedings, costs and legal aid before the CJEU and the principles of the participation of agents in preliminary ruling proceedings

As a rule:

- A reference is made at the request of parties.
- Parties in a dispute pending before a national court are in no position to compel a national court to make a reference for a preliminary ruling; they can only suggest taking this step; the parties are also not allowed to change the wording of the referred question or claim that they are not connected to the proceedings.
- However, the issue of a reference for a preliminary ruling being made (or otherwise) may be the subject matter of a complaint, complaint in cassation or an appeal, depending on the circumstances. It is national law that provides whether or not there is a judicial remedy against a decision (order) of a national court on making a reference for a preliminary ruling. It is worth noting that appealing against such a decision does not stay the proceedings before the Court.

A reference for a preliminary ruling can be made at any stage of the proceedings prior to the issuance of the decision closing the proceedings. It is recommended that a reference be made only after the completion of a trial. The rules of equity demand that a reference be made only after both parties have been heard. A national court, in deciding when a preliminary reference is to be made, should be guided by the principle of effectiveness and economics of trials.

- A reference for a preliminary ruling can be made with a court of any instance and, principally, in proceedings of any kind; i.e. civil, criminal or administrative proceedings; it is also of no consequence whether proceedings are litigious, non-litigious, auxiliary (e.g. interim injunction) or insolvency proceedings.

- The form in which a request for a preliminary ruling should be made is governed by national law. This can be, for instance, a decision (order) or a judgement, or a written submission of the president of a court.
- A national court that decides to make a request for a preliminary ruling suspends the pending proceedings. It is usually the national procedural law that stipulates the possibility of proceedings being suspended. This possibility is laid down explicitly in Article 23 of the Statute of the Court. Suspension of proceedings is also mentioned in the information note on references from national courts for a preliminary ruling (2005/C 143/01). As has already been said, national law provides whether or not there is a judicial remedy against the decision on the suspension of proceedings.
- The CJEU is bound by the decision of a national court to make a reference for a preliminary ruling as long as it has not been repealed under appellate measures provided in national law. Consequently, the Court hears a given case until the reference is revoked by a national court. In other words, it does not take a case *ex officio* and does not continue proceedings despite a reference having been revoked.
- Having received a preliminary ruling, the national court should resume the suspended proceedings and adjudicate in a dispute brought before it considering a binding interpretation of EU law contained in the preliminary ruling.

2. References for a preliminary ruling and Polish procedural law

A decision to make a reference for a preliminary ruling will be issued in the form of a postanowienie (decision); the applicable laws provide that a decision to make a preliminary reference in itself may not be challenged by way of a judicial remedy. It should be noted that such a remedy is available in the context of post-conviction proceedings under Article 15 of the Criminal Enforcement Code (CEC) but, as a rule, there are no regulations that would allow for a suspension of the main proceedings due to a preliminary reference being made.

It must be underlined that the making of a reference for a preliminary ruling requires the issuance of two separate procedural decisions – a decision to make a preliminary reference and a decision to suspend proceedings (an interlocutory appeal can be filed against the latter decision).

From the perspective of national law, a legal basis for suspending proceedings could only be Article 22(1) CCP ("an impediment to the conduct of proceedings"), Article 15(2) CEC and Article 177(1)(1) of the Code of Civil Procedure ("CCivP") (*the outcome of a case depends on the outcome of other pending civil proceedings*) and, in cases commended after 8 September 2016, Article 177(1)(31) CCivP (*if the outcome of a case depends on the outcome of proceedings pending before the Constitutional Tribunal or the Court of Justice of the European Union*).

3. Procedure before the CJEU regarding a preliminary ruling

1. A request provided by a judicial body of a Member State.
2. Analysis conducted by the Research and Documentation Directorate – the preliminary and non-binding analysis.
3. The request is translated into all official languages of the European Union and is notified to the **parties**, Member States and the Commission, and to the institution, body, office or agency of the Union which adopted the act the validity or interpretation of which is in dispute or eventually parties to the Agreement on the European Economic Area, third countries, if it involves the interpretation of agreements between third countries (see Article 23 of the CJEU Statute).
4. Notwithstanding the above, a notice is published in the Official Journal of the European Union indicating the request, parties to the proceedings pending before the court of a Member State and its essence.
5. The President of the Court designates a judge-rapporteur, fixes dates on which a preliminary report is to be presented and takes procedural decisions until a case is assigned to a formation.
6. The First Advocate General assigns a case to an Advocate General.
7. The parties, Member States and EU institutions have the right to present written statements within two months and 10 days of their service.
8. The Registrar informs the parties and entities authorised to make observations regarding a preliminary ruling, irrespective of whether they have made written observations, about the close of the written part of the procedure and observations made by the parties and interveners, which are delivered to them in the language of the proceedings and French language. Moreover, the Registrar advises them of the possibility of a hearing being held within three weeks after service of notification of the close of the written part of the procedure.
9. No possibility of producing a reply.
10. A date for the hearing is fixed when the request for a hearing is admitted. If no such request has been made, the date is fixed *ex officio*. The CJEU can bind the participants to the proceedings to give answers to specific questions during their appearance at the hearing.
11. The same entities that can submit their written observations may also appear at the hearing. Submission of written observations or lack thereof does not preclude joining in the oral part of the procedure.
12. The judgment is issued after hearing the Advocate-General, with the proviso that the CJEU may decide not to hear his/her opinion, and after the deliberations.
13. The judgement is sent to the court that requested them same.
14. All judgments are published on the Court's internet sites and made available via the Eur-Lex service.
15. The language of the proceedings is the language of the court that has made a request for a preliminary ruling.

Case study:

Civil procedure and judicial cooperation in the EU

CJEU Judgment in Case C-325/11 *Adler* (ECLI:EU:C:2012:824)

On 5 June 2009, the claimants (Mr and Mrs Alder) were resident in Germany. They lodged a claim for payment of a debt in Koszalin, Poland. They gave oral evidence during a hearing. They were informed by the court about the wording of Article 1135(5) CCivP, i.e. that they were required to communicate to the court the name of a representative (process agent) in Poland who was authorised to accept service of judicial documents or otherwise a legal fiction allowing service to be deemed to have taken place would be used.

As the claimants failed to indicate a representative, the notice addressed to them relating to the time of a hearing scheduled was placed in the case file and a judgment was delivered dismissing their claim. Before the claimants found out about the judgment, it had acquired the force of *res judicata*. Mr and Mrs Adler brought an extraordinary appellate measure, i.e. an application for resumption of the proceedings, arguing that due to an infringement of law hey had been deprived of the opportunity to participate in the proceedings for payment as the rule established in Article 1135(5) CCivP is incompatible with Regulation No. 1393/2007 and an infringement of the principle of non-discrimination on grounds of nationality.

A Polish District Court rejected in first instance the request for resumption of proceedings, ruling that Polish civil procedure was compatible with European Union law. Mr and Mrs Alder brought an interlocutory appeal that was allowed. On appeal, a Regional Court set the decision of the first instance court confirming doubts as to incompatibility of the legal presumption that the service should be deemed to have taken place with Regulation 1393/2007.

While reconsidering the case, the District Court did not share the opinion of the Regional Court and decided to refer the following question to the Court for a preliminary ruling (the difference in the opinion of the District Court is shown, among other things, by the question being in the affirmative):

*Must Article 1(1) of Regulation … No 1393/2007 … and Article 18 TFEU to be interpreted as meaning that **it is permissible** to place in the case file, deeming them to have been effectively served, judicial documents which are addressed to a party whose place of residence or habitual abode is in another Member State, if that party has failed to appoint a representative who is authorised to accept service and is resident in the Member State in which the court proceedings are being conducted?*

This preliminary reference was submitted by the decision of 15 June 2011.

The written procedure lasted nearly a year. The CJEU hearing was held on 6 September 2012 and the opinion of Advocate General was issued on 20 September 2012. On 19 December 2012, the Court issued the judgement and held that Article 1(1) of Regulation (EC) No 1393/2007 of the European Parliament and of the Council must be interpreted as **precluding** legislation of a Member State, such as that at issue in the main proceedings, which provides that **judicial documents addressed to a party whose place of residence or habitual abode is in another Member State are placed in the case file, and deemed to have been effectively served**, if that party has failed to appoint a representative who is authorised to accept service and is resident in the first Member State, in which the judicial proceedings are taking place.

Polish Government defended regulations of the Code, arguing that in Poland a notice of hearing did not need to be always served (cf. the legal presumption of service that applies if there is no information on the change of an address under Article 136 CCivP). As argued by the Government, identification of what documents "have to be" served to another party, should be conducted only by reference to the national law of the Member State.

> Simultaneously, in October 2012 the European Commission that participated in the proceedings before the CJEU delivered its reasoned opinion and called the Polish Government to remedy the infringements, invoking Article 258 TFEU. The actions of the Commission persuaded the Government to draw up draft amendments to the CCivP in respect of the legal presumption of service. The explanatory memorandum to the proposed amendments was prepared following the delivery of the Court's judgment (cf. explanatory memorandum to legislative proposal no. RM_10-125-12). It must be stated that a reply to the question referred for a preliminary ruling has accelerated the removal from the legal system of a legal norm that was at odds with EU law. The amendments were adopted on 13 June 2013 and entered into force on 17 August 2013 restricting the scope of the legal assumption allowing service to be deemed to have taken place to such parties whose place of residence or habitual abode or registered office is outside the Republic of Poland **or in other Member State of the European Union** that have failed to appoint their representatives authorised to accept service of judicial documents.

4. Interpretation and rectification of preliminary rulings

If a reply provided to the question referred for a preliminary ruling gives rise to uncertainties, then, in accordance with Article 154 of the Rules of Procedure of the Court of Justice, a party may request the Court to rectify clerical mistakes, errors in calculation and obvious inaccuracies within two weeks after delivery of the judgment. If the meaning or scope of a judgment of the Court of Justice is in doubt, the Court will construe it on application made under Article 158 of the Rules of Procedure. An application for interpretation must be made within two years after the date of delivery of the judgment or service of the order.

In practice, it happens that a CJEU ruling does not resolve all doubts. In such a case it is necessary to ask another preliminary question. As already mentioned, it is possible to refer a question (or questions) for a preliminary ruling once again in connection with the same case pending before the referring court.

Rectification of judgments and orders

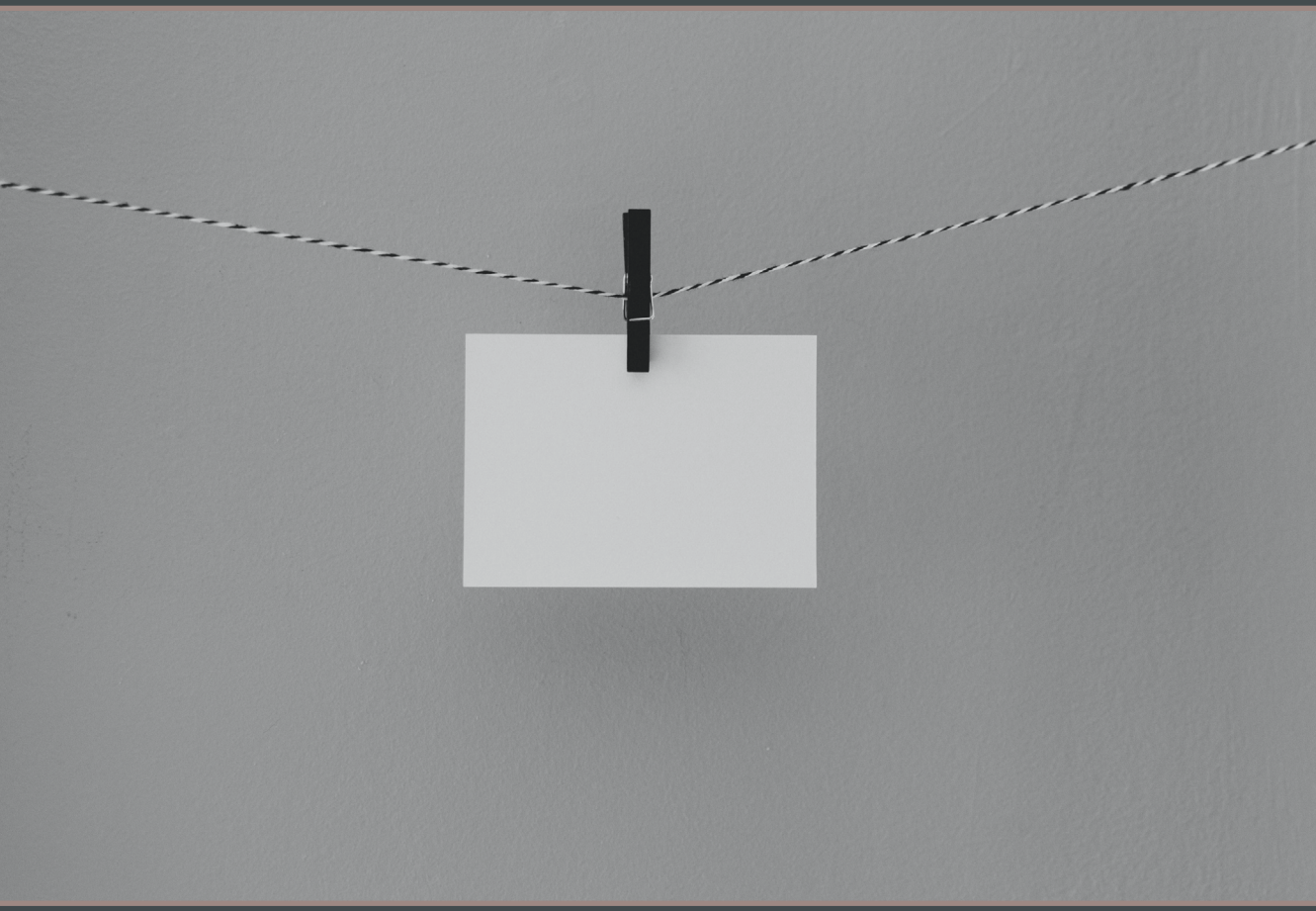
Clerical mistakes, errors in calculation and obvious inaccuracies affecting judgments or orders may be rectified by the Court, of its own motion or at the request of an interested person made within two weeks after delivery of the judgment or service of the order. In accordance with the Rules of Procedure (Article 103) the Court shall take its decision after hearing the Advocate General.

The original of the rectification order shall be annexed to the original of the rectified decision. A note of this order shall be made in the margin of the original of the rectified decision. It shall be for the national courts or tribunals to assess whether they consider that sufficient guidance is given by a preliminary ruling, or whether it appears to them that a further reference to the Court is required.

Legal aid

A party to the main proceedings who is wholly or in part unable to meet the costs of the proceedings before the Court may at any time apply for legal aid. The application shall be accompanied by all information and supporting documents making it possible to assess the applicant's financial situation, such as a certificate issued by a competent national authority attesting to his financial situation. If the applicant has already obtained legal aid before the referring court or tribunal, he shall produce the decision of that court or tribunal and specify what is covered by the sums already granted. The decision to grant legal aid, in whole or in part, or to refuse it shall be taken, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, by the Chamber of three Judges to which the Judge-Rapporteur is assigned.

Where legal aid is granted, the cashier of the Court shall be responsible, where applicable within the limits set by the formation of the Court, for costs involved in the assistance and representation of the applicant before the Court. At the request of the applicant or his representative, an advance on those costs may be paid. The formation of the Court which gave a decision on the application for legal aid may at any time, either of its own motion or on request, withdraw that legal aid if the circumstances which led to its being granted alter during the proceedings.



Attachments

The survey

1. Do you consider yourself an EU Judge?

2. Do you consider the possibility of making a reference for a preliminary ruling to the Court of Justice of the European Union (CJEU)?

3. If you referred a question for a preliminary ruling to the CJEU, would it be for you a matter of obligation or opportunity, i.e. would you be willing to consult the CJEU regarding the interpretation of EU law?

4. In your opinion, does the court you work in have jurisdiction to make a request for a preliminary ruling?

5. Do you have access to practical information about::
   a) National procedure for requesting a preliminary ruling?
   b) implications of such referrals?
   c) the manner in which a reference for a preliminary ruling is processed within the CJEU itself?
   d) formal requirements for a referral?

6. Which issues connected with preliminary references do you consider to be the most difficult and unclear?

7. What would you expect from a handbook on preliminary references for judges, what legal problems and practical guidance would like it to cover?

8. Examples of preliminary references from which legal area would you like to find in the handbook?

Selected provisions of EU law[80]

Art. 267 of the Treaty on the Functioning of the European Union

The Court of Justice of the European Union shall have jurisdiction to give preliminary ruling 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.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Rules of Procedure of the CJEU (in respect of preliminary ruling procedure)

TITLE III. REFERENCES FOR A PRELIMINARY RULING

Chapter 1. GENERAL PROVISIONS

Article 93
Scope

The procedure shall be governed by the provisions of this Title:

a) in the cases covered by Article 23 of the Statute,

b) as regards references for interpretation which may be provided for by agreements to which the European Union or the Member States are parties.

80 **The Statute of the CJEU took the form of Protocol (No 3) on the Statute of the Court of Justice of the European Union**, as amended by the Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 (OJ L 228, 23.8.2012, p. 1), Article 9 of the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community (OJ L 112, 24.4.2012, p. 21), Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council 2015/2422 of 16 December 2015 (OJ 341, 24.12.2015, p. 14) and Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ L 200, 26.7.2016, p. 137).
Rules of Procedure of the Court of Justice (OJ L 265, 29.9.2012, p. 1-42); amendment to the Rules of Procedure before the Court of Justice (OJ L 173, 26.6.2013, p. 65)
Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings 2012/C 338/01 and new recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings (adopted in 2016 and 2018).

Article 94
Content of the request for a preliminary ruling

In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

a) a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at the very least, an account of the facts on which the questions referred are based,

b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

Article 96
Participation in preliminary ruling proceedings

§ 1. Pursuant to Article 23 of the Statute, the following shall be authorised to submit observations to the Court:

a) the parties to the main proceedings,

b) the Member States;

c) the European Commission,

d) the institution which adopted the act the validity or interpretation of which is in dispute,

e) the States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, where a question concerning one of the fields of application of that Agreement is referred to the Court for a preliminary ruling,

f) non-Member States which are parties to an agreement relating to a specific subject-matter, concluded with the Council, where the agreement so provides and where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of that agreement.

§ 2. Non-participation in the written part of the procedure does not preclude participation in the oral part of the procedure.

Article 97
The parties to the main proceedings

§ 1. The parties to the main proceedings are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure.

§ 2. Where the referring court or tribunal informs the Court that a new party has been admitted to the main proceedings, when the proceedings before the Court are already pending, that party must accept the case as he finds it at the time when the Court was so informed. That party shall receive a copy of every procedural document already served on the interested persons referred to in Article 23 of the Statute.

§ 3. As regards the representation and attendance of the parties to the main proceedings, the Court shall take account of the rules of procedure in force before the court or tribunal which made the reference. In the event of any doubt as to whether a person may under national law represent a party to the main proceedings, the Court may obtain information from the referring court or tribunal on the rules of procedure applicable.

Article 98
Translation and service of the request for a preliminary ruling

§ 1. The requests for a preliminary ruling referred to in this Title shall be served on the Member States in the original version, accompanied by a translation into the official language of the State to which they are being addressed. Where appropriate, on account of the length of the request, such translation shall be replaced by the translation into the official language of the State to which it is addressed of a summary of that request, which will serve as a basis for the position to be adopted by that State. The summary shall include the full text of the question or questions referred for a preliminary ruling. That summary shall contain, in particular, in so far as that information appears in the request for a preliminary ruling, the subject-matter of the main proceedings, the essential arguments of the parties to those proceedings, a succinct presentation of the reasons for the reference for a preliminary ruling and the case-law and the provisions of national law and European Union law relied on.

§ 2. In the cases covered by the third paragraph of Article 23 of the Statute, the requests for a preliminary ruling shall be served on the States, other than the Member States, which are parties to the EEA Agreement and also on the EFTA Surveillance Authority in the original version, accompanied by a translation of the request, or where appropriate of a summary, into one of the languages referred to in Article 36, to be chosen by the addressee.

§ 3. Where a non-Member State has the right to take part in preliminary ruling proceedings pursuant to the fourth paragraph of Article 23 of the Statute, the original version of the request for a preliminary ruling shall be served on it accompanied by a translation of the request, or where appropriate of a summary, into one of the languages referred to in Article 36, to be chosen by the non-Member State concerned.

Article 99
Reply by reasoned order

Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

Article 100
Circumstances in which the Court remains seised

§ 1. The Court shall remain seised of a request for a preliminary ruling for as long as it is not withdrawn by the court or tribunal which made that request to the Court. The withdrawal of a request may be taken into account until notice of the date of delivery of the judgment has been served on the interested persons referred to in Article 23 of the Statute.

§ 2. However, the Court may at any time declare that the conditions of its jurisdiction are no longer fulfilled.

Article 101
Request for clarification

§ 1. Without prejudice to the measures of organisation of procedure and measures of inquiry provided for in these Rules, the Court may, after hearing the Advocate General, request clarification from the referring court or tribunal within a time-limit prescribed by the Court.

§ 2. The reply of the referring court or tribunal to that request shall be served on the interested persons referred to in Article 23 of the Statute.

Article 102
Costs of the preliminary ruling proceedings

It shall be for the referring court or tribunal to decide as to the costs of the preliminary ruling proceedings.

Article 103
Rectification of judgments and orders

§ 1. Clerical mistakes, errors in calculation and obvious inaccuracies affecting judgments or orders may be rectified by the Court, of its own motion or at the request of an interested person referred to in Article 23 of the Statute made within two weeks after delivery of the judgment or service of the order.

§ 2. The Court shall take its decision after hearing the Advocate General.

§ 3. The original of the rectification order shall be annexed to the original of the rectified decision. A note of this order shall be made in the margin of the original of the rectified decision.

Article 104
Interpretation of preliminary rulings

§ 1. Article 158 of these Rules relating to the interpretation of judgments and orders shall not apply to decisions given in reply to a request for a preliminary ruling.

§ 2. It shall be for the national courts or tribunals to assess whether they consider that sufficient guidance is given by a preliminary ruling, or whether it appears to them that a further reference to the Court is required.

Chapter 2. EXPEDITED PRELIMINARY RULING PROCEDURE

Article 105
Expedited procedure

§ 1. At the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules.

§ 2. In that event, the President shall immediately fix the date for the hearing, which shall be communicated to the interested persons referred to in Article 23 of the Statute when the request for a preliminary ruling is served.

§ 3. The interested persons referred to in the preceding paragraph may lodge statements of case or written observations within a time-limit prescribed by the President, which shall not be less than 15 days. The President may request those interested persons to restrict the matters addressed in their statement of case or written observations to the essential points of law raised by the request for a preliminary ruling.

§ 4. The statements of case or written observations, if any, shall be communicated to all the interested persons referred to in Article 23 of the Statute prior to the hearing.

§ 5. The Court shall give its ruling after hearing the Advocate General.

Article 106
Transmission of procedural documents

§ 1. The procedural documents referred to in the preceding Article [106] shall be deemed to have been lodged on the transmission to the Registry, by telefax or any other technical means of communication available to the Court, of a copy of the signed original and the items and documents relied on in support of it, together with the schedule referred to in Article 57(4). The original of the document and the annexes referred to above shall be sent to the Registry immediately.

§ 2. Where the preceding Article [106] requires that a document be served on or communicated to a person, such service or communication may be effected by transmission of a copy of the document by telefax or any other technical means of communication available to the Court and the addressee.

Chapter 3. URGENT PRELIMINARY RULING PROCEDURE

Article 107
Scope of the urgent preliminary ruling procedure

§ 1. A reference for a preliminary ruling which raises one or more questions in the areas covered by Title V of Part Three of the Treaty on the Functioning of the European Union may, at the request of the referring court or tribunal or, exceptionally, of the Court's own motion, be dealt with under an urgent procedure derogating from the provisions of these Rules.

§ 2. The referring court or tribunal shall set out the matters of fact and law which establish the urgency and justify the application of that exceptional procedure and shall, in so far as possible, indicate the answer that it proposes to the questions referred.

§ 3. If the referring court or tribunal has not submitted a request for the urgent procedure to be applied, the President of the Court may, if the application of that procedure appears, prima facie, to be required, ask the Chamber referred to in Article 108 to consider whether it is necessary to deal with the reference under that procedure.

Article 108
Decision as to urgency

§ 1. The decision to deal with a reference for a preliminary ruling under the urgent procedure shall be taken by the designated Chamber, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General. The composition of that Chamber shall be determined in accordance with Article 28(2) on the day on which the case is assigned to the Judge-Rapporteur if the application of the urgent procedure is requested by the referring court or tribunal, or, if the application of that procedure is considered at the request of the President of the Court, on the day on which that request is made.

§ 2. If the case is connected with a pending case assigned to a Judge-Rapporteur who is not a member of the designated Chamber, that Chamber may propose to the President of the Court that the case be assigned to that Judge-Rapporteur. Where the case is reassigned to that Judge-Rapporteur, the Chamber of five Judges which includes him shall carry out the duties of the designated Chamber in respect of that case. Article 29(1) shall apply.

Chapter 4. LEGAL AID

Article 115
Application for legal aid

§ 1. A party to the main proceedings who is wholly or in part unable to meet the costs of the proceedings before the Court may at any time apply for legal aid.

§ 2. The application shall be accompanied by all information and supporting documents making it possible to assess the applicant's financial situation, such as a certificate issued by a competent national authority attesting to his financial situation.

§ 3. If the applicant has already obtained legal aid before the referring court or tribunal, he shall produce the decision of that court or tribunal and specify what is covered by the sums already granted.

Article 117
Sums to be advanced as legal aid

Where legal aid is granted, the cashier of the Court shall be responsible, where applicable within the limits set by the formation of the Court, for costs involved in the assistance and representation of the applicant before the Court. At the request of the applicant or his representative, an advance on those costs may be paid.

Article 23 of the CJEU's Statute

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court of Justice shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and to the institution, body, office or agency of the Union which adopted the act the validity or interpretation of which is in dispute.

Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court.

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the national court or tribunal shall, moreover, be notified by the Registrar of the Court to the States, other than the Member States, which are parties to the Agreement on the European Economic Area and also to the EFTA Surveillance Authority referred to in that Agreement which may, within two months of notification, where one of the fields of application of that Agreement is concerned, submit statements of case or written observations to the Court.

Where an agreement relating to a specific subject matter, concluded by the Council and one or more non-member States, provides that those States are to be entitled to submit statements of case or written observations where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of the agreement, the decision of the national court or tribunal containing that question shall also be notified to the non-member States concerned. Within two months from such notification, those States may lodge at the Court statements of case or written observations.

Article 23a of the CJEU's Statute

The Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure.

Those procedures may provide, in respect of the submission of statements of case or written observations, for a shorter period than that provided for by Article 23, and, in derogation from the fourth paragraph of Article 20, for the case to be determined without a submission from the Advocate General.

In addition, the urgent procedure may provide for restriction of the parties and other interested persons mentioned in Article 23, authorised to submit statements of case or written observations and, in cases of extreme urgency, for the written stage of the procedure to be omitted.

A flowchart of the procedure before the CJEU

Direct actions and appeals	References for a preliminary ruling	Approximate duration of individual stages of procedure and time-limits for the performance of actions
Written procedure		
Written statement of claims (the appeal)	Order or judgment of a national court	
Service of statement of claim to the defendant	Translation of a request for a preliminary ruling into all the official languages of the European Union and serving them to the parties, the Member States and EU institutions	Translation takes about a month depending on the volume of a document.
Publication of a statement of claims in the Official Journal of the European Union	Publication of a request for a preliminary ruling in the Official Journal of the European Union	
Defence	Written statements of the parties, Member States and EU institutions	The time-limit for the submission of observations is two months and 10 days calculated from the day the request for a preliminary ruling is served
Reply	Information about the close of the written part of procedure and the possibility of making a request for a hearing	The time-limit for filing a request is three weeks from the day the notification of closure of the written part of procedure is served
Rejoinder	Notice of hearing date	Notice of hearing date is communicated ca. 3 months before the planned hearing date. The time-limit for confirmation of one's participation in a hearing is laid down in the submission and lasts ca. two weeks.

Direct actions and appeals	References for a preliminary ruling	Approximate duration of individual stages of procedure and time-limits for the performance of actions
Oral procedure		
Hearing		Hearings are scheduled at 9:30 and 14:30 and last ca. two hours.
Opinion of the Advocate General		At the hearing the AG informs about the date of delivery of his or her opinion, which varies depending on the case.
Deliberations		
Judgment		Delivery of the judgment takes place ca. six months after the completion of a trial.

Taken from the website: https://curia.europa.eu/jcms/jcms/Jo2_7024/en/

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