Speakers' Contributions

LITIGATING EUROPEAN UNION LAW

SEMINAR FOR LAWYERS IN PRIVATE PRACTICE

422DT31ef Trier and Online, 26-28 January 2022

Co-funded by the European Union's Justice Programme (2014-2020). For further information please consult:
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The enforcement mechanisms of EU law and the relationship between EU and national law (supremacy, direct and indirect effect)

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Academy of European Law, Trier, 26th January 2022

Funded by the European Union's Justice Programme (2014-2020).
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1

I. EU LAW and its autonomy, primacy and direct effect

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Essential characteristics of EU law

- **AUTONOMY**
  - EU law stems from an independent source of law - the Treaties
- EU law's **PRIMACY** over the laws of the Member States
- **DIRECT EFFECT** of a whole series of provisions which are applicable to Member States' nationals and to the Member States themselves

[Cf. judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, point 52]

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Autonomy of the EU legal order

- As expressed in *Opinion 2/13 (Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454, point 157:

  "[…] the founding treaties of the EU, unlike ordinary international treaties, established a **new legal order**, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and **the subjects of which comprise not only those States but also their nationals** (see, in particular, judgments in *van Gend & Loos*, 26/62, EU:C:1963:1, p. 12, and *Costa*, 6/64, EU:C:1964:66, p. 593[…])."

- The legal system thus created became an **integral part of the legal systems of the Member States** which their courts are bound to apply (cf. judgment *Costa*).

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Therefore …

- EU law is not ordinary international law:
  - EU law has international law origins:
    - The **Treaties**, "albeit **concluded in the form of an international agreement**, constitute nonetheless the constitutional charter of a Union based on the rule of law [see, to that effect, *Opinion 1/91 (First Opinion on the EEA Agreement)* of 14 December 1991, EU:C:1991:490, point 21].
  - EU law is influenced & influences legal orders that surround it
    - Art. 3, § 5 TEU: strict observance and the development of international law, including respect for the principles of the United Nations Charter.
    - When interpreting international agreements to which the EU is a party, the ECJ will interpret those agreements consistently with international law (e.g. judgment of 21 December 2016, *Council v Front Polisario*, C-104/16 P, EU:C:2016:973 – interpretation of the expression "territory of the Kingdom of Morocco" contained in the EU-Morocco Liberalisation Agreement).

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Incorporation of external norms into the EU legal order

- **The Treaties themselves determine whether a norm forms part of the EU legal order**

  →Condition: those norms must comply with fundamental values and structures on which the EU is founded…

  - *Kadi I and II judgments* (joined cases C-402/05 P and C-415/05 P; C-584/10 P and C-593/10 P)
    - An international law obligation, even if imposed by the UN Security Council, may be incorporated into the EU legal order only if that obligation complies with the values of liberty, democracy and respect for fundamental rights as recognized in the Charter.

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EU law and national legal orders

→EU law is autonomous not only from international law but also from the laws of the Member States

→incorporation of EU law into the national legal orders is not conditional upon EU law complying with national law

(x international law)

→Two dimensions of autonomy of EU law with respect to Member States:

→**Transnational**

→**Supranational**

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Transnational dimension of autonomy of EU legal order

- Member States **share the same values** on which the EU is founded:
  - The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. **These values are common to the Member States** in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. [Art. 2 TEU]
  - Thus EU law defines what it means to be a Member State.

→ **Principle of mutual trust**:

→ "[…] the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law […]" [*Opinion 2/13 (Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454, point 191]

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Transnational dimension of autonomy of EU legal order

- Member States are **equal before the Treaties** [Art. 4 § 2 TEU]

  → uniform interpretation and application of EU law guarantees that equality

  → uniform interpretation of EU law is ensured by one court (ECJ)

  → primacy of EU law (ensuring uniform interpretation and application of EU law)

9

Transnational dimension of autonomy of EU legal order

- **Exclusive jurisdiction of the Court of Justice**

  → Fundamental mission: ensure that in the interpretation and application of the Treaties the law is observed. [Art. 19 § 1 TEU]

  → Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. [Art. 344 TFEU]

  → "[…] the obligation of Member States to have recourse to the procedures for settling disputes established by EU law — and, in particular, to respect the jurisdiction of the Court of Justice, which is a fundamental feature of the EU system — must be understood as a specific expression of Member States' **more general duty of loyalty resulting from Article 4(3) TEU** […], it being understood that, under that provision, the obligation is equally applicable to relations between Member States and the EU." [*Opinion 2/13 (Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454, point 202]

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Supranational dimension of autonomy of EU legal order

- EU law indicates how normative conflicts are to be solved
  - Internally: principle of **hierarchy of norms** → secondary law must comply with primary law
  - **Rules of national law that conflict with EU law must be set aside**
    - "Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure." [judgment of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, point 3]
    - **Rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law**. [judgment of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, point 61]
  - In the fields of protection of fundamental rights, where EU law allows room for plurality of national standards,
    - Those standards must comply with the level of protection guaranteed by the Charter; +
    - National standards may only be applied where the EU law has not adopted a uniform level of protection (which itself must comply with the Charter); +
    - A higher level of protection provided by national law cannot jeopardise the objectives pursued by EU law.

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Supranational dimension of autonomy of EU legal order

- **EU law provision itself determines whether it produces direct effect**

"The first question of the Tariefcommissie is whether Article 12 of the Treaty has direct application in national law in the sense that nationals of Member States may on the basis of this Article lay claim to rights which the national court must protect.

To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals. […]"

[judgment of 5 February 1963, *van Gend & Loos*, 26/62, EU:C:1963:1]

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Primary and Secondary EU Law

- **Main sources of Primary Law**
  - The 'founding' treaties: the Treaty on European Union (TEU), the Treaty on the functioning of the EU (TFEU), and the Treaty establishing the European Atomic Energy Community
  - The protocols and annexes to the treaties, the treaties on accession of Member States to the European Union, and other treaties
  - Art. 6 § 1 TEU: The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties

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Primary and Secondary EU Law

- **Secondary Law**
  - Mainly legal acts adopted by the Union's institutions, as listed in Art. 288 TFEU:

    To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

    - A **regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
    - A **directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
    - A **decision** shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

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Primacy of EU law

- The principle of the primacy of EU law establishes the **pre-eminence of EU law** over the law of the Member states
- It requires all Member State bodies to **give full effect to the various EU provisions**, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States
- All EU norms enjoy primacy

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Primacy of EU law

- In order to ensure the effectiveness of all provisions of EU law, the principle of the primacy requires the national courts
  - to interpret, to the greatest extent possible, their national law in conformity with EU law and
  - to afford individuals the possibility of obtaining redress where their rights have been impaired by a breach of EU law attributable to a Member State
    - *Francovich judgment* [judgment of 19 November 1991, *Francovich and Others*, C-6/90 and C-9/90, EU:C:1991:428] – three conditions for State liability – failure to fulfil the obligation to take all the measures necessary to achieve a result prescribed by a directive:
      - The result prescribed by the directive should entail the grant of rights to individuals
      - It should be possible to identify the content of those rights on the basis of the provisions of the directive
      - Causal link between the breach of the State's obligation and the loss and damage suffered by the injured party

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Primacy of EU law

- It is also in the light of the primacy principle that, where it is *unable to interpret national law in compliance with the requirements of EU law*, the 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 that court to request or await the prior setting aside of such provision by legislative or other constitutional means [cf. *Popławski II*, point 58]

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Primacy x Direct Effect

- **BUT** the principle of the primacy of EU law does not have the effect of undermining the *essential distinction between provisions of EU law which have direct effect and those which do not*

→ any national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it. [*Popławski II*, point 61]

→ a provision of EU law which does not have direct effect may not be relied on, as such, in a dispute coming under EU law in order to disapply a provision of national law that conflicts with it. [*Popławski II*, point 62]

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Primacy x Direct Effect

- While **all EU norms enjoy primacy, only some of the EU law provisions produce direct effect**…
- … a national court's obligation to disapply a provision of its national law which is contrary to a provision of EU law, if it stems from the primacy afforded to the latter provision, is nevertheless dependent on the direct effect of that provision in the dispute pending before that court. Therefore, a national court is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to a provision of EU law if the latter provision does not have direct effect.

  [*Popławski II*, point 68]

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Direct effect

- In order to produce direct affect, an EU norm must be **sufficiently clear**, **precise** and **unconditional**.
- BUT, as regards *directives*, even a clear, precise and unconditional provision of a directive does not allow a national court to disapply a provision of its national law which conflicts with it, **if**, in doing so, an additional **obligation** were to be imposed on an **individual**.

  = a directive, as an act addressed to the Member States, may not produce HORIZONTAL DIRECT EFFECT

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Horizontal direct effect and fundamental rights

- A right recognised by the Charter may produce horizontal direct effect, provided that the Charter provision in question is sufficient in itself and does not need to be further specified by other provisions of EU or national law in order to confer on individuals a right which they may rely on as such.
- Such a right is unconditional and mandatory in nature, applying
  - to action taken by public authorities;
  - in disputes between private parties.

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Horizontal direct effect and fundamental rights – CJEU case law

- Provisions of the Charter which may produce horizontal direct effect:
  - Art. 21 (non-discrimination) – cf. judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257
  - Art. 47 (right to an effective remedy and to a fair trial) – *Egenberger*
  - Art. 31 § 2 (right to an annual paid leave) – cf. judgment of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871
- No horizontal direct effect:
  - Art. 27 (workers' right to information and consultation within the undertaking) – cf. judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2

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"Indirect effect" – conform interpretation

- National law must be interpreted in conformity with EU law →full effectiveness of EU law; primacy
- Applicable in the context of litigation between private parties
- Limits:
  - general principles of law
  - cannot serve as the basis for an interpretation of national law *contra legem*
    - obligation for national courts to ***change its established case-law***, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive

Cf. judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, points 29 – 34

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II. Enforcement of EU LAW

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Public and private enforcement

- **Public enforcement**
  - Member States bear primary responsibility for the transposition, application and implementation of EU law
  - The Commission oversees Member States in the exercise of these duties → control of the CJEU through the infringement procedure

- **Private enforcement**
  - National courts apply EU rules and protect individual rights in their legal systems
    → enforcement of EU law in individual cases

  - "Alternative" mechanisms such as SOLVIT or European Consumer Centres Network

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Infringement procedure

- **Art. 258 TFEU**:

  "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

  If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

→ *a priori* no punitive purpose

- Two phases:
  - Administrative / pre-litigation procedure
    - Letter of formal notice; reasoned opinion
      - the question whether a Member State has failed to fulfil its obligations must be determined by reference to the **situation prevailing in the Member State at the end of the period laid down in the reasoned opinion** and the Court cannot take account of any subsequent changes
  - Litigation phase

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Infringement procedure: pre-litigation phase

Example: *Commission v Germany (Transposition of Directives 2009/72 and 2009/73)*, C-718/18; judgment of 2 September 2021, EU:C:2021:662

14 On 20 May 2014, in the course of an *ex officio* investigation into the transposition of Directive 2009/72 and 2009/73 into German law, aimed at determining whether there were any inconsistencies with EU law, the **Commission addressed a series of questions to the Federal Republic of Germany** concerning the transposition of those directives, to which the German authorities replied by letter of 12 September 2014.

15 Taking the view that German law did not comply with those directives in various respects, on 27 February 2015 the Commission sent the Federal Republic of Germany a **letter of formal notice** in infringement proceedings No 2014/2285, to which that Member State replied by letter of 24 June 2015.

16 On 29 April 2016, the Commission sent the Federal Republic of Germany a **reasoned opinion** in which it re-stated that certain provisions of German law did not conform to Directives 2009/72 and 2009/73. The Federal Republic of Germany replied by letter of 29 August 2016, stating that legislative amendments addressing some of the complaints raised in the reasoned opinion were in the process of being adopted. On 19 September 2017, it sent the text of the EnWG, which came into force on 22 July 2017.

17 Taking the view that the legal provisions adopted by the Federal Republic of Germany were still not in conformity with Directives 2009/72 and 2009/73, the **Commission brought the present action**.

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"Second" Infringement procedure

- **Art. 260 § 2 TFEU**:

  "If the Commission considers that the Member State concerned has not taken the necessary **measures to comply with the judgment of the Court**, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

  If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it."

→ No more reasoned opinion in case of a second infringement procedure
→ More time-efficient

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Late transposition of Directives

- **Art. 260 § 3 TFEU**:

  "When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has **failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure**, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

  If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment."

  Judgment of 8 July 2019, *Commission v Belgium* *(Article 260(3) TFEU - High-speed networks)*, C-543/17, EU:C:2019:573

→ Extensive interpretation of the notification obligation

→ Point 3 of dispositive: the Court ordered that "if the failure to fulfil obligations […] has continued until the day of delivery of the present judgment the Kingdom of Belgium must, from that date, pay the European Commission a penalty payment of EUR 5 000 each day until it has complied with its obligations".

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Private enforcement – protection of individual rights by national courts

- **Protection of the rights that private litigants derive from EU law**
  - **National courts**
    - **These courts may, and sometimes must, cooperate with the CJEU by resorting to the preliminary ruling procedure**
      - National courts refer a question on the interpretation or the validity of EU law provisions, whenever they consider that the response to such a question has a bearing on the adjudication of their pending cases
      - A court or tribunal of a Member State against whose decisions there is no judicial remedy under national law **has to bring the matter before the Court**

→ Art. 267 TFEU

→ If the fundamental function of the preliminary ruling procedure is to ensure the uniform interpretation of EU law, it also serves to facilitate the application of EU law

→ Preliminary ruling procedure as an enforcement tool

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Obligation to make a reference to the CJEU - exemptions

- Where there is no judicial remedy under national law against the decisions of a national court or tribunal, that court or tribunal is *in principle* obliged to make a reference to the Court of Justice within the meaning of the third indent of Article 267 TFEU where a question concerning the interpretation of EU law is raised before it.

- Exemptions – **"CILFIT criteria"** (judgment of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335) – that court or tribunal has established that:
  - **the question raised is irrelevant**
  - **the EU law provision in question has already been interpreted by the Court**
  - **the correct application of EU law is so obvious as to leave no scope for any reasonable doubt**

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Failure to the obligation to make a reference to the CJEU

- Infringement procedure under Art. 258 TFEU
  - judgment of 4 October 2018, *Commission v France (Advance payment)*, C-416/17, EU:C:2018:811:
    - Point 114 : "[…] since the **Conseil d'État** (Council of State) **failed to make a reference to the Court, in accordance with the procedure provided for in the third paragraph of Article 267 TFEU**, in order to determine whether it was necessary to refuse to take into account, for the purpose of calculating the reimbursement of the advance payment made by a resident company in respect of the distribution of dividends paid by a non-resident company via a non-resident subsidiary, the tax incurred by that second company on the profits underlying those dividends, **even though its interpretation of the provisions of EU law** in the judgments of 10 December 2012, Rhodia (FR:CESSR:2012:317074.20121210), and of 10 December 2012, Accor (FR:CESSR:2012:317075.20121210), **was not so obvious as to leave no scope for doubt […]** "
    - → the French Republic failed to fulfil its obligations under the third paragraph of Att. 267 TFEU.

- State Liability
  - judgment of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513:
    - Dispositif 1): "The principle that **Member States are obliged to make good damage** caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the **breach is sufficiently serious** and there is a **direct causal link** between that breach and the loss or damage sustained by the injured parties. […] It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation."

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Conclusion

What is the most effective tool for enforcing EU law?

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Questions?

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Thank you for your attention!

Michaela Hájková

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Composition, organisation and competences of the Court of Justice of the European Union

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Academy of European Law, Trier, 26th January 2022

Funded by the European Union's Justice Programme (2014-2020).
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7 institutions of the EU

- European Parliament
- European Council
- Council of the European Union
- European Commission
- **Court of Justice of the European Union**
- European Central Bank
- European Court of Auditors

→ Art. 13 of the Treaty on European Union (order of precedence)

2

Court of Justice of the European Union

- Judicial authority of the EU
- Established in 1952
- Seated in Luxembourg
- Consists of **two courts**…
  - Court of Justice
  - General Court (created in 1988)

… whose primary task is to examine the legality of EU measures and ensure the **uniform interpretation and application of EU law**.

The Civil Service Tribunal, established in 2004, ceased to operate in 2016 (jurisdiction transferred to the General Court)

3

CJEU as a multi-lingual institution

- Language arrangements of the CJEU are unique in the world
  - →each of the official languages of the EU can be the language of a case (depends on the origin of the case)
  - →24 official languages of the EU → 552 language combinations
- Working language at the Court (deliberations…): French
- 42% of the Court's staff: linguistic services
  - Lawyer linguists (translation of written documents)
  - Interpreters (hearings and meetings)

4

Preliminary ruling proceedings:
main Member States from which the requests originate

- **556 requests in 2020**
  - **Germany: 139**
  - **Austria: 50**
  - **Italy: 44**
  - **Poland: 41**
  - **Belgium: 36**

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Composition of the Court of Justice

Court of Justice

- 27 Judges

(one per Member State)

- 11 Advocates General

Renewable 6-yrs mandate

The Judges and Advocates General are appointed by common accord of the **governments of the Member States after consultation of a panel** responsible for giving an opinion on prospective candidates' suitability to perform the duties concerned.

They are chosen from among individuals whose **independence** is beyond doubt and who possess the **qualifications** required for appointment, in their respective countries, to the highest judicial offices, or who are of **recognised competence**.

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Judges of the Court of Justice

- The Judges of the Court of Justice elect from amongst themselves a **President** and a **Vice-President** for a renewable term of three years
  - President: Koen Lenaerts (Belgium)
  - Vice-President: Lars Bay Larsen (Danemark)
- President directs the work of the Court and presides at hearings and deliberations of the full Court or the Grand Chamber.
- The Vice-President assists the President in the exercise of his duties and takes his place when necessary.
- The Presidents of the Chambers of five Judges are elected for three years, and those of the Chambers of three Judges for one year.

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AGs of the Court of Justice

- **11 AGs**
  - Post-Brexit, 5 posts permanently assigned to larger Member States (Germany, France, Italy, Spain, Poland)
  - Remaining six posts currently occupied by AGs from: Greece, Estonia, Latvia, Croatia, Ireland and Cyprus (system of rotation)
  - Advocates General **assist the Court**. They are responsible for presenting, with complete impartiality and independence, an '**opinion**' in the cases assigned to them. The opinion is not binding for the Court.
- 1st AG: Maciej Szpunar (Poland)
  - Art. 62 of the Statute of the ECJ – possibility to trigger a review of a decision of the General Court by the Court of Justice (within 1 month of delivery of the decision)

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Opinions of AGs

- **Art. 252 TFEU (second paragraph)**: the Advocate General, acting with complete impartiality and independence, makes, in open court, ***reasoned submissions on cases*** which, in accordance with the Statute of the Court of Justice, require his or her involvement.

- The ***Court is not bound*** either by the Advocate General's Opinion or by the reasoning on which it is based (judgment of 3 December 2015, *Banif Plus Bank*, C-312/14, EU:C:2015:794, paragraph 33).
- The Court may decide that a case will be decided with an Opinion which does not concern all the points of law set out in the questions referred (see, to that effect, judgment of 21 October 2021, *Beeren-, Wild-, Feinfrucht*, C-825/19, EU:C:2021:869, paragraph 25).

- Neither the Statute of the Court of Justice of the European Union nor the Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion (judgment of 16 December 2010, *Stichting Natuur en Milieu and Others*, C-266/09, EU:C:2010:779, paragraph 28).

  → **An interested party's disagreement with the Opinion of the Advocate General**, irrespective of the questions that he or she examines in his or her Opinion, **cannot in itself constitute grounds justifying the reopening of the oral procedure** (see, to that effect, judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 26).

  - Nevertheless, the Court may, at any time after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information (see, to that effect, judgment of 9 June 2016, *Pesce and Others*, C-78/16 and C-79/16, EU:C:2016:428, paragraph 27).

9

Chambers

- The Court may sit as
  - a **full court**
    - particular cases prescribed by the Statute of the Court (including e.g. proceedings to dismiss a Member of the European Commission who has failed to fulfil his or her obligations)
    - where the Court considers that a case is of exceptional importance
  - in a **Grand Chamber** of 15 Judges
    - when a Member State or an institution which is a party to the proceedings so requests
    - in particularly complex or important cases
  - in a Chamber of **five Judges**: "standard"
  - in a Chamber of **three Judges**
    - "technical" cases; cases with a rather undisputed solution; appeals etc.

10

Jurisdiction of the Court of Justice

The jurisdiction given to the Court of Justice is exercised on references for preliminary rulings and in various categories of proceedings…

The various types of proceedings:

- References for preliminary rulings
- Actions for failure to fulfil obligations
- Actions for annulment
- Actions for failure to act
- Appeals
- Opinions of the Court

11

References for preliminary rulings

- Article 267 TFEU: where a question concerning **interpretation of EU law** or **validity of an act** of EU law…

  … 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.

  … 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.

- In cases calling for a response within a very short time (e.g., in relation to asylum, border control, child abduction, etc.), an **urgent preliminary ruling procedure ('PPU')** may be used.

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References for preliminary rulings

- The **national court stays the proceedings** before it and refers the matter to the Court of Justice, which gives a ruling on the interpretation or the validity of the provisions in question. When the matter has been clarified by the Court of Justice's decision, the national court is then in a position to settle the dispute before it.
  - ***Cooperation between national courts and the Court of Justice***; the latter provides the referring court with an answer which will be of use to it and enable it to determine the case before it (judgment of 25 February 2016, *G. E. Security*, C-143/15, EU:C:2016:115, paragraph 41).
  - 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 (judgments of 17 July 2014, Torresi, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 17, and of 6 October 2015, Consorci Sanitari del Maresme, C-203/14, EU:C:2015:664, paragraph 17).

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References for preliminary rulings

- Questions on the interpretation of EU law referred by a national court enjoy a **presumption of relevance**. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law that is sought bears ***(i)*** no relation to the actual facts of the main action or its purpose, where ***(ii)*** the problem is hypothetical, or where ***(iii)*** 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 28 March 2019, *Idi*, C-101/18, EU:C:2019:267, paragraph 28 and the case-law cited).

- The justification for a request 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 concerning EU law*** (judgment of 26 October 2017, *Balgarska energiyna borsa*, C-347/16, EU:C:2017:816, paragraph 31).

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Appeals

- **Against judgments and orders of the General Court**
- Art. 56 of the Statute of the ECJ
- If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court:
  - Where the state of the proceedings so permits, the Court of Justice may itself decide the case;
  - Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

- In 2020, 131 appeals (out of 735 cases brought)

- 2 months of the notification of the decision appealed against.
- Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. However, interveners other than the Member States and the institutions of the Union may bring such an appeal only where the decision of the General Court directly affects them.

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Actions for for failure to fulfil obligations

- Art. 258 and 259 TFEU

- Actions which enable the Court of Justice to determine whether a Member State has fulfilled its obligations under European Union law.
- Before bringing the case before the Court of Justice, the **Commission** conducts a **preliminary procedure** in which the Member State concerned is given the opportunity to reply to the complaints addressed to it. If that procedure does not result in the Member State terminating the failure, an action for infringement of EU law may be brought before the Court of Justice.
- The action may be brought by the Commission (258) - as, in practice, is usually the case - or by a Member State (259).
- If the Court finds that an obligation has not been fulfilled, the State must bring the failure to an end without delay.
- If, after a further action is brought by the Commission, the Court of Justice finds that the Member State concerned has **not complied with its judgment**, it may impose on it a fixed or periodic financial penalty. However, if measures transposing a directive are not notified to the Commission, it may propose that the Court impose a pecuniary penalty on the Member State concerned, once the initial judgment establishing a failure to fulfil obligations has been delivered.

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Actions for for failure to fulfil obligations - examples

- **Art. 258 TFEU**
  - Judgment of 2 September 2021, *Commission v Germany (Transposition of Directives 2009/72 and 2009/73)*, C-718/18, EU:C:2021:662
    - The European Commission sought declaration from the Court that, by failing to transpose correctly various provisions of Directives 2009/72 and 2009/73, the Federal Republic of Germany has failed to fulfil its obligations under those Directives.
- **Art. 259 TFEU**
  - Pending case : C-121/21, *Czech Republic v Republic of Poland (mining activity in the Turów mine)*
    - Czech Republic claims that the Court should rule that the Republic of Poland has failed to fulfil its obligations under various provisions of Directives 2011/92, 2000/60 and 2003/4.

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Actions for annulment

- Art. 263 TFEU

- The applicant seeks the annulment of a measure (in particular a regulation, directive or decision) adopted by an institution, body, office or agency of the European Union

- The Court of Justice has exclusive jurisdiction over
  - actions brought by a Member State against the European Parliament and/or against the Council (apart from Council measures in respect of State aid, dumping and implementing powers) or
  - brought by one European Union institution against another.

  [The General Court has jurisdiction, at first instance, in all other actions of this type and particularly in actions brought by individuals.]

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Actions for failure to act

- Art. 265 TFEU

- These actions enable the lawfulness of the failure of the institutions, bodies, offices or agencies of the European Union to act to be reviewed.
- Action which may be brought only after the institution concerned has been called on to act.
- Where the failure to act is held to be unlawful, it is for the institution concerned to put an end to the failure by appropriate measures.
- **Jurisdiction** to hear actions for failure to act is **shared between the Court of Justice and the General Court** (same criteria as for actions for annulment).

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Opinions of the Court

- Art. 218, § 11 TFEU

- Member State, the European Parliament, the Council or the Commission
  - may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties.

Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

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Statistics – cases brought to the Court (2020)

- 735 cases brought
  - 556 preliminary ruling proceedings (out of which 9 PPUs)
  - 37 direct actions:
    - 18 actions for failure to fulfil obligations
  - 131 appeals
  - 1 request for an opinion

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Statistics – cases completed (2020)

- 792 cases completed
  - 534 preliminary ruling proceedings (out of which 9 PPUs)
  - 37 direct actions:
    - 26 actions for failure to fulfil obligations
  - 204 appeals
  - 1 request for an opinion

Average length of proceedings = 15,4 months
Urgent preliminary ruling procedures = 3,9 months

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Principal subject-matters

- ***1045 cases pending as of 31/12/2020***

- Area of freedom, security and justice (119)
- State aid and competition (104)
- Freedoms of movement and establishment; internal market (96)
- Taxation (95)
- Transport (86)
- Social law (56)
- Consumer protection (56)
- Environment (48)
- Intellectual and industrial property (27)
- Agriculture (26)
- Customs Union (24)

23

Procedure before the Court of Justice

Direct actions and appeals

Application
Service of the application on the defendant by the Registry
Notice of the action in the Official Journal of the EU (C Series)

[Intervention]
Defence/Response

[Reply and Rejoinder]

Written procedure

Designation of Judge-Rapporteur and Advocate General

References for a preliminary ruling

National court's decision to make a reference
Translation into the other official languages of the European Union
Notice of the questions referred for a preliminary ruling in the Official Journal of the EU (C Series)
Notification to the parties to the proceedings, the Member States, the institutions of the European Union, the EEA States and the EFTA Surveillance Authority
Written observations of the parties, the States and the institutions

The Judge-Rapporteur draws up the preliminary report
General meeting of the Judges and the Advocates General
Assignment of the case to a formation

Oral stage

[**Opinion** of the Advocate General]
Deliberation by the Judges
Judgment

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Composition of the General Court

General Court

- 52 Judges

(2 judges from each Member State)

The judges are appointed by common accord of the governments of the Member States after consultation of a panel responsible for giving an opinion on candidates' suitability to perform the duties of Judge. Their term of office is **six years**, and is **renewable**.

They appoint their President [Marc van der Woude (NL)], for a period of three years, from amongst themselves.

No permanent Advocates General. However, that task may, in exceptional circumstances, be carried out by a Judge.

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Chambers

- Cases before the General Court are heard by Chambers of **five** or **three** Judges or, in some cases, as a single Judge.
- It may also sit as a **Grand Chamber** (15 Judges) when this is justified by the legal complexity or importance of the case.
- The Presidents of the Chambers of five Judges are elected from amongst the Judges for a period of three years.

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Jurisdiction of the General Court

- Actions brought by **natural or legal persons** against
  - acts of the institutions, bodies, offices or agencies of the European Union (which are addressed to them or are of direct and individual concern to them) and
  - against regulatory acts (which concern them directly and which do not entail implementing measures) or
  - against a failure to act on the part of those institutions, bodies, offices or agencies; for example, a case brought by a company against a Commission decision imposing a fine on that company;
- actions brought by the **Member States** against the Commission;
- actions brought by the **Member States** against the Council relating to acts adopted in the field of State aid, trade protection measures (dumping) and acts by which it exercises implementing powers;
- actions seeking **compensation for damage** caused by the institutions or the bodies, offices or agencies of the European Union or their staff;
- actions based on **contracts** made by the European Union which expressly give jurisdiction to the General Court;
- actions relating to intellectual property brought against the European Union Intellectual Property Office and against the Community Plant Variety Office;
- disputes between the institutions of the European Union and their staff concerning employment relations and the social security system.

Frequently cases of economic nature.

The decisions of the General Court may, within two months, be subject to an appeal before the Court of Justice, limited to points of law.

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Statistics – cases before the General Court (2020)

- 847 cases brought
  - 729 direct actions including:
    - 282 Intellectual and industrial property cases
    - 118 EU civil service cases
    - 69 State aid and competition cases
- 748 cases completed

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Conclusion

What is the mission of the Court of Justice of the European Union?

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Questions?

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Thank you for your attention!

Michaela Hájková

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Reference for a Preliminary Ruling: Advice for Lawyers

Funded by the European Union's Justice Programme (2014-2020).
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1

DEFINITION OF THE PRELIMINARY RULING PROCEDURE

- Mechanism of cooperation between National Courts and the CJEU
- « Dialogue » between a National Court and the CJEU
- **The Preliminary Reference procedure is one on the basic pillar of the European Legal Integration Process**

2

OBJECTIVE OF THE PRELIMINARY RULING PROCEDURE

- Interpretation of EU law: in order to have a uniform interpretation in the EU
- Assessment of the validity of a EU act:

- **Centralized control of legality in a decentralized system**

Make it possible for individuals to challenge the legality of an EU piece of legislation

3

TEXTS

- Art. 19 TEU (general provision)
- Art. 267 TFEU (general provision)

…

- EPPO Regulation (Art. 42, par. 2)

NON EU

- Brussels convention (now quite rare)
- Rome convention (now mostly replaced by the Brussels I and Rome I regulations)
- The Brexit withdrawal agreement, where arbiters have to ask for a preliminary ruling in matters of EU law which is binding upon both the EU and the UK

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OTHER RELEVANT TEXTS

STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

PROTOCOL (NO 3) ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION, ANNEX ED TO THE TREATIES, AS AMENDED

CONSOLIDATED VERSION OF THE **RULES OF PROCEDURE OF THE COURT OF JUSTICE** OF 25 SEPTEMBER 2012

Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013, p. 65), on 19 July 2016 (OJ L 217, 12.8.2016, p. 69), on 9 April 2019 (OJ L 111, 25.4.2019, p. 73) and on 26 November 2019 (OJ L 316, 6.12.2019, p. 103).

ARTICLE 19 TEU

- 3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b) **give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;**

(c) rule in other cases provided for in the Treaties.

ARTICLE 267 TFEU

The Court of Justice of the European Union shall have jurisdiction to give **preliminary rulings** concerning:

- **(a) the interpretation of the** [EU]**Treaties;**
- **b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;**

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ARTICLE 267, AL. 2, TFEU

- 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 of Justice to give a ruling thereon.

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POSSIBILITY TO ASK A QUESTION

- May = has the right to, must be allowed to
- Ex: Cartesio, Melki & Abdeli (question prioritaire de constitutionnalité in French law), Chartry (same in Belgian law)

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FOTO-FROST (22.10.87, 314/85)

- A national court may consider the validity of a EU act
- But it does not have the power to declare an act invalid
- Is obliged to ask a question (exception to « may»)

WHY? Coherence with Art. 263 TFUE (the CJEU has exclusive jurisdiction to declare an act void)

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ARTICLE 267, AL. 3, TFEU

- 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 of Justice.

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THE DUTY TO REQUEST PRELIMINARY RULING

- Highest courts
- Courts of last instance (there is no remedy available against their decision, except wholly exceptional judicial remedies)

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EXCEPTIONS TO THE DUTY (CILFIT - 6.10.82, 283/81)

- Irrelevant questions
- Identical or similar questions
- The correct application of EU law is obvious, leaving no scope for any reasonable doubt (« acte clair »)

  However, attention must be paid to the characteristic features of EU law.

  Case law confirmed in 2021 (6.10.21, C-561/19, Consorzio Italiano Management)

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SANCTIONS / CONSEQUENCES FOR NOT REFERRING TO THE CJEU

- To be mentioned in the Report of the Commission about application of EU law; critics of legal doctrine
- Infringement procedure (Art. 258 TFUE)
- Claim for damages
- Sanction in national law (violation of «legal judge » principle)
- Violation of article 6 of ECHR
- Question from another Court

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QUESTIONS DERIVING FROM THE POSSIBLE ACCESSION TO THE ECHR

- Is the preliminary ruling procedure part of the remedies that have to be exhausted before going in front of ECtHR? (No, because it is the national court that refers a question, not the individual)
- What if the EU Court never had the possibility to control the validity of an EU act? (possibility to create a mecanism that would allow the ECJ to take position while the case is pending before the ECourtHR- A *Prior Involvement Procedure*)
- Advisory Opinion of ECtHR. Protocol N. 16 to the ECHR allows the highest courts and tribunals of a State Party to request the Court to give advisory opinions on questions relating to the interpretation or application of the rights and freedoms defined in the Convention.

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ROLE OF THE ACTORS

- National Court
- **Parties in the main action**
- Member states
- European institutions
- Others

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NATIONAL COURT

- Has the **initiative** (If there is no question, there is no answer)
- Remains the master of the case (can withdraw the question)*
- Is absent in the procedure before the ECJ but remains partner of the dialogue
- Will apply the ruling of the CJEU to the facts of the case

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NATIONAL COURT

- Decides who is a party in the main proceedings; can admit a litigant after it has referred a question (what about Amicus Curiae?)
- Has jurisdiction for interim measures
- Decides on the costs

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National Courts <> CJEU

National court:

- Decides which national law is applicable; interprets national law
- Establishes the relevant facts
- Applies EU law to the specific situation

CJEU

- Interprets EU law
- Decides on the validity of a EU act

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PARTIES IN THE MAIN ACTION ART. 97 RP

- Are invited to present observations before the Court (Parties need to be represented by a practising lawyer or by a law professor where national legislation provides for this possibility)
- They cannot change the frame of reference (the facts, the national legislation as described by the national court, the question…).

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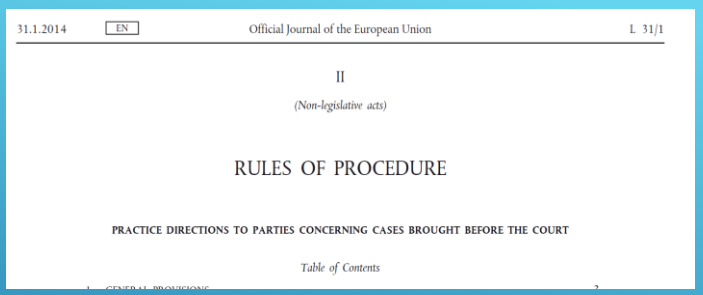

31.1.2014 EN Official Journal of the European Union L 31/1

II

(Non-legislative acts)

RULES OF PROCEDURE

PRACTICE DIRECTIONS TO PARTIES CONCERNING CASES BROUGHT BEFORE THE COURT

Table of Contents

* PARTIES CAN SUBMIT WRITTEN OBSERVATIONS IN 2 MONTHS OF THE NOTIFICATION RECIEVED

* AT THE END OF THE WRITTEN PHASE PARTIES CAN (HAVE TO?) ASK FOR AN ORAL HEARING

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MEMBER STATES

- May be one of the parties in the main action
- Are invited to present observations (Article 23 Statute of the Court)*

- Which Member states ? All, as soon as they are Member states, even in pending proceedings (immediate application of procedural law)
- Also Denmark or Ireland, even if the EC legislation does not apply (opting out/in)

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EU INSTITUTIONS

- **Commission**: always there
- **Council, Parliament or ECB**: if the act the validity or interpretation of which is in dispute originates from one of them (in practice, they present observations only when the validity of an act is in dispute)
- **Bodies, offices or agencies of EU**: same as institutions

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OTHERS

- Member states and institutions of the Agreement on the European Economic Area
- Non-member States concerned by an agreement with the EU (e.g.. Switzerland and Schengen Agreement in C-411/10 NS)

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JURISDICTION OF THE COURT ACCORDING TO ART. 267 TFUE

- The question must be raised by a Court or Tribunal of a Member State
- It must concern the interpretation or validity of EU law
- The national judge must consider that the question is necessary to enable it to give its judgment
- There must be a *real* litigation

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Criteria to recognize a Court or Tribunal of a Member state according to 267 TFUE

The ECJ takes account of a number of factors:

- 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
- Whether it is independent

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NATIONAL COURT ACCORDING TO 267

Were not recognized as such:

- Director of Taxation
- Competition authorities
- Arbitration
- Court while acting in an administrative matter (e.g. registration of companies)

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INTERPRETATION OF APPLICABLE EU LAW

- The CJEU has no jurisdiction to interpret national law (but it has to be able to understand it)
- Fundamental rights are part of EU law, but the Court has jurisdiction to interpret them only in the context of application or implementation of EU law

Fundamental and Human Rights are often the case for ***double preliminary reference***

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THE ANSWER MUST BE NECESSARY FOR THE NATIONAL COURT

- It is for the national court to determine the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions
- However, the ECJ can refuse to answer when it is obvious that the ruling sought by the national court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical

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ADMISSIBILITY

- The ECJ must know enough about the facts and the national legislation in order to give a useful ruling (Telemarsicabruzzo, Case C-320/90 of 26.193)
- The ECJ must know enough in order to control its own jurisdiction
- The Member States must be able to present observations
- There is a presumption of relevance of the questions
- The presumption can be rebutted in exceptional circumstances

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THE PROCEDURE BEFORE THE COURT OF JUSTICE

The different types of procedure:

- Ordinary procedure
- Simplified procedure (order)
- Accelerated procedure
- Urgent procedure

In Preliminary reference (art. 23 bis of the Statute) we have: ordinary, accelerate and urgent (since 2008)

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THE ESSENTIAL CONTENT OF THE ORDER FOR REFERENCE

- Parties
- Procedure
- Facts
- National law
- EU law
- Why the question?
- The proposed answer
- Special wishes

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PROCEDURE

- Appeal against the decision of the national court asking for a preliminary ruling: the appeal should not be only on the decision to refer (Cartesio, C-210/06 of 16.12.2008)
- The ECJ should be informed !!
- The registry will write to the national court
- Has the appeal a suspensive effect ?

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PROCEDURE

- Languages (of the referring Court)
- Priority (53 RP), accelerated procedure (105 RP), urgent procedure (107 RP)
- Stay of proceedings (55 RP)
- Intervention (No Intervention in Preliminary Rulings, just parties mentioned in art. 23 Statute)

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THE URGENT PROCEDURE - «PPU» - ART. 23 BIS STATUTE

- An average reference takes **15 –18 months**
- •But there is an urgent procedure available under Article 267 (4) TFEU [107 RP] which reduces the duration to **circa 8 –10 weeks**
- *Example: even in a complex case like Celmer, the reference was made on 12 March 2018 and the ruling published on 25 July 2018 →four months*
- •The national court must **request**a PPU
- •Typically granted in cases where a person is in **detention** pending the outcome of the proceedings
- →Key to stress this option to national courts who may be reluctant to refer for fear of prolonging the duration of the proceedings

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PROCEDURE

- Costs (national judge)
- Interim measures (national judge)
- Legal aid (art. 115 ff RG)
- Assignment to the Grand chamber (60 RP)
- Composition of a chamber (3, 5, 15 judges)

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PROCEDURE

- Junction of cases (54 RP), common oral procedure, oral procedure on the same day
- Information/documents asked to the national court (« clarification », 101 RP)

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PROCEDURE

- **Reopening of the oral procedure** (83 RP):
  - Lack of quorum
  - Reassignment of the case to a different formation composed of a greater number of judges (44 § 4 RP)
  - Necessity of opinion of AG
  - New elements (documents, opinion…)

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PROCEDURE

- Protection of names of parties in the main proceedings (children, …): should be asked for by the national court
- Starting from the 1st of July 2018 anonimity is the rule

since 1 July, the default position is that, where preliminary references are made in cases to which individuals are party, their names will be replaced by initials which do not correspond to their actual initials (to respect the GDPR 2016/679)

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BEFORE THE COURT OF JUSTICE OF THE EU

•All parties in the domestic proceedings are entitled to make **written submissions** –as well as the EU Member States and Institutions

•An **oral hearing** typically takes place in Luxembourg

•There may be a non-binding "**Advocate General Opinion**" (where the question raises a new point of law)

•The CJEU issues its ruling on the question –**but does not rule on the merits of the case itself**

N.B.

- Preliminary ruling proceedings are **free of charge** and the CJEU may itself grant **legal aid**
- All written and oral submissions can be made in your own language

40

- Persuading the national judge to make a reference to the CJEU (and even that EU law applies in the case at hand)
- Persuading the CJEU to accept the reference (the CJEU is in principle bound to give an answer to a question, but is not obliged to answer hypothetical questions or questions which do not disclose an issue of EU law or questions on the Charter alone)

MAIN DIFFICULTIES

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- ***No standard form set by CJEU but the request must contain:***
- Summary of subject matter of the dispute and facts
- Provisions of applicable national law
- Reasons to enquire about interpretation of EU law
- Questions themselves (which must be self-standing)
- **Maximum 10 pages long**
- In language of the national proceedings (use clear and simple drafting in submissions to the CJEU in order to facilitate translation into French/English)
- The CJEU is not strictly bound by the question(s) as formulated by the referring court (can reformulate) but cannot take the initiative to answer a question of EU law that has not been asked

OFFER ASSISTENCE TO THE NATIONAL COURT FOR DRAFTING THE REFERENCE

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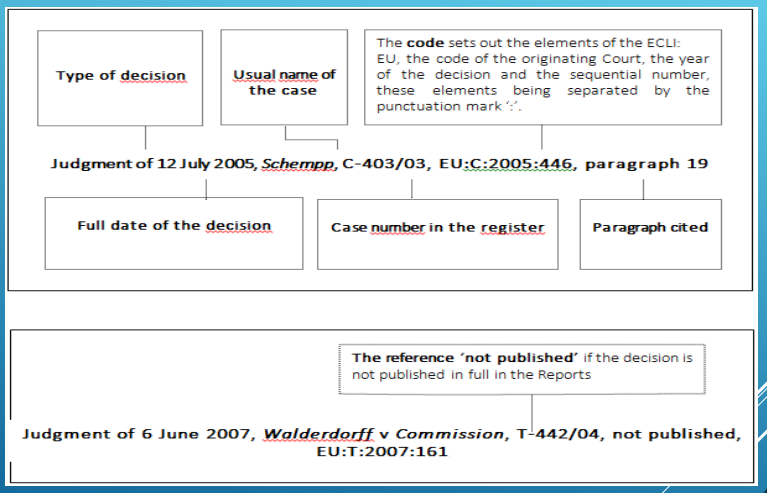
Method of citing the case-law



THANK YOU FOR YOUR ATTENTION !

Baker McKenzie.

Litigating European Union Law

Direct actions before the General Court | Bram Hoorelbeke, 26 January 2022

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1

In 45' "*en direct*" to the General Court

1. "What you want" determines the direct action to bring
2. Basics & practicalities: How to bring an action
3. Written Procedure – Avoiding the pitfalls
5. What to expect in Luxembourg – The oral hearing
6. Judgment & costs (appeal?)

2

1

"*What you want*" determines the direct action to bring

3

What do you want?

Direct actions

- EU-level act to be found illegal? Decision of an EU institution, body or agency (EUIPO, CPVO, etc.)
  → Annulment action, Art. 263 TFEU
- Illegality of inaction by EU institution or body to be confirmed ?
  → Action for failure to act, Art. 265 TFEU
- Damages for illegal EU-level act/action/inaction?
  → Action for non-contractual damages, Art. 268, 340(2), (3) TFEU
- Urgent relief?
  → Interim measures, 278, 279 TFEU
  → Expedited procedure, 23a Statute
- Support an applicant or defendant in a pending case?
  → Intervention Art. 40 Statute

4

1. Annulment action (Art. 263 TFEU)

Direct actions

- Challengeable act?
  Action intended to create legal effects regardless of its nature and form
- Standing of non-privileged applicants
  - Addressees (personal interest to bring action, vested and present)
  - Non-addressees:
    - Plaumann formula for direct & individual concern
      (*Plaumann* 25/62; *Infront* T-33/01 confirmed on appeal C-125/06 P)
    - Regulatory act of direct concern and does not entail implementing measures
      (*Telefonica* C-274/12 P; *Inuit* T-18/10 confirmed on appeal C-583/11 P; *Tate & Lyle* T-279/11 confirmed on appeal C-456/13 P)
- Deadline – careful!
  2 months (plus 10 days on account of distance) from notification if addressee (if not: publication in the OJEU calculation starts 14 days from publication; if not: knowledge)

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2. Action for failure to act (Art. 265 TFEU)

Direct actions

- Inaction?
  Failure to address to the applicant any act other than a recommendation or an opinion
  (*Parliament v Council* 13/83)
- Standing
  "Would be"-addressee or direct and individual concern
  (*ENU* C-107/91)
- Request for action
  Call upon the institution/agency/etc. to act and, within 2 months of being so called upon ("deadline to act") addressee has not defined its position
- Deadline
  2 months from the expiry of deadline to act plus 10 days

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3. Action for non-contractual damages

Direct actions

- Art. 268, 340(2), (3) TFEU

  Non-contractual liability of the EU for damage caused by its institutions or servants in the performance of their duties
- Conditions (*Bergaderm* C-352/98 P)
  1. Sufficiently serious breach of a rule of EU law intended to confer rights on individuals
  2. Existence of damage
  3. Causal link between breach of law (conduct of the institution or servant) and damage
- Deadline

  5 years from the event giving rise to the damage (Art. 46 Statute)

7

4. Urgent procedures (Art. 278, 279 TFEU, 23a Statute)

Direct actions

- Accessory to main action!
- Expedited procedure, Art. 151 et seq. RoP
  - Bring at the same time as main action
  - Demonstrate urgency
  - For simple cases, few pleas, no complex facts or legal questions

  → Priority treatment & shorter deadlines, one round of pleadings
- Suspension or other interim measures, Art. 156 et seq. RoP
  - Bring at the same time or after the main action
  - Must show
    - *Prima facie* case
    - Urgency (where most applications fail)
    - Balance of interest in favour of measure

8

5. Intervention (Art. 40 Statute, Art. 142 et seq. RoP GC)

Direct actions

- Short deadline!
  6 weeks plus 10 days from publication of the application in the OJEU
- Non-privileged interveners
  Must support one of the main parties & show interest in the outcome of the case in request for leave to intervene (application to intervene)
- Statement in intervention (max. 20 pages)
  - Intervener receives non-confidential versions of the parties' submissions; can add new, additional, other arguments
  - Other parties have right to submit observations (max. 15 pages)
- Right to address the Court at the oral hearing
- On appeal: party to the appeal proceedings (≠ intervener)
  - No need to intervene in the appeal
  - Automatically invited to present observations (like successful party)

9

Additional/special procedures …

Direct actions

- Additional direct actions and procedures
  - Staff cases, Art. 270 TFEU
  - Arbitration clauses contained in agreements concluded by or on behalf of the EU, Art. 272 TFEU
  - Intellectual property cases, Art. 171 et seq. RoP
- Special forms of procedure (pt. 17 Practice Rules)
  - Rectification or interpretation
  - Application for the Court to remedy a failure to adjudicate
  - Revision
  - Applications for the Court to set aside judgments by default or initiating third-party proceedings
  - Taxation of costs
  - Legal aid

10

2

Basics & practicalities

11

Sui generis system of legal recourse

Direct actions

- ≠ national systems of the EU Member States
- Note:
  - Language of the case (one of 24) & language of the court (French)
  - Composition of chambers
  - Own strict rules of procedure, including on evidence
  - Highly formalised
- Essentially written procedure
- Oral hearing relatively short, but can be decisive!
- Duration to judgment at first instance varies - 2020 on average: 15.4 months

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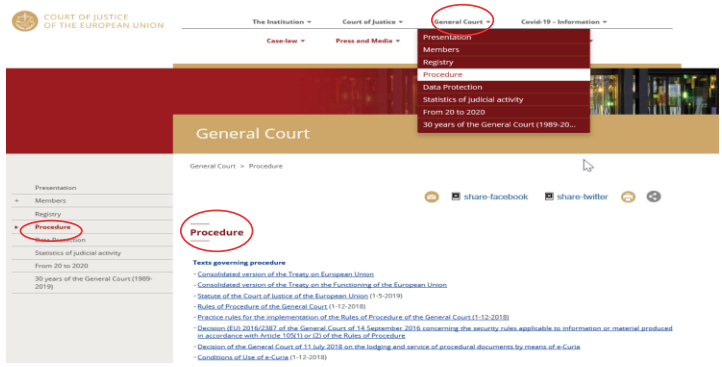
http://curia.europa.eu/jcms/jcms/Jo2_7040/en/

Direct actions

- Texts governing the procedure, notices in the OJEU, other useful information



A word of caution: Always check & confirm guidance against current versions of legal documents! They change frequently.

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Practicalities: need to know basics

Direct actions

- Deadlines
  - Calculate carefully! (Art. 58-62 RoP)
  - Only some may be extended on reasoned written request
  - As of 1 September 2020, no more automatic extension due to COVID-19
- Obligation to be represented (Art. 19 Statute, Art. 51 RoP)
- Method of lodging and service: e-Curia (Art. 56a-57 RoP, pts. 77-79, 89-91 Practice Rules)
  - Advantages: quick, no need for paper copies/signatures, ease of access in all languages (all named lawyers can submit and receive procedural documents, files must be pdf and uploaded separately)
  - Disadvantages: need to register in good time, familiarize yourself with the system & train assistants (who can also receive but not lodge), deemed service seven days from e-mail notification
  - Alternatives only if technically impossible to lodge the application and/or annexes by e-Curia

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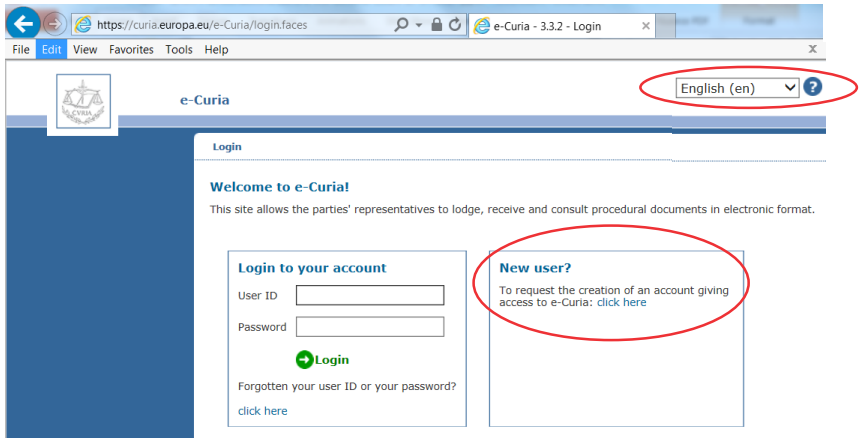
https://curia.europa.eu/e-Curia/login.faces

Direct actions

- e-Curia user login screen:



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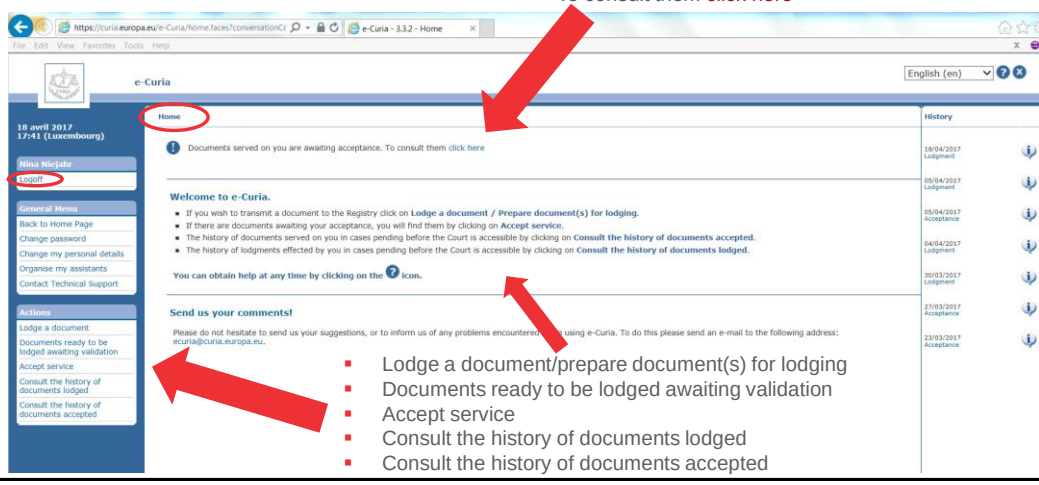
e-Curia home screen view & functionalities

Direct actions

Documents served on you are awaiting acceptance.
To consult them click here



- Lodge a document/prepare document(s) for lodging
- Documents ready to be lodged awaiting validation
- Accept service
- Consult the history of documents lodged
- Consult the history of documents accepted

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Role of the registry

Direct actions

- Organizes written & prepares oral procedure
- Effects service of procedural documents
- Ensures compliance with the very formalistic procedural requirements
  - For instance: page limitations, formatting, schedules and annexes, summary of pleas, PoA, register excerpts, etc. (pts. 105-122 Practice Rules)
  - Generally, failure to comply may hold up service but can be remedied (pts. 101-104 Practice Rules)
  - Persistent failure to comply may lead to refusal of acceptance or inadmissibility (see Art. 21 Statute, Art. 78(6) RoP, pt. 101, 102 and Annex 1 & 2 Practice Rules)

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Basic procedural steps

Direct actions

- Written procedure (Art. 76-105 RoP)
  - Application, defence (max. 50 pages)
  - Reply, rejoinder (max. 25 pages) unless not necessary, but applicant can submit reasoned request
  - Possibly also measures of inquiry and questions
  - Report for the hearing
- Oral procedure (Art. 106-115 RoP) on the Court's motion, on reasoned request or not at all (Art. 106 RoP)
  - Applicant, defendant (15 minutes)
  - Questions & answers
  - Closing statements (2-5 minutes)
- Judgment
  - Operative part delivered, full version online same day (& e-Curia)
- Appeal to the European Court of Justice
  - Limited to points of law, no suspensive effect, deadline: 2 months (plus 10 days on account of distance)

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3

Written procedure – avoiding the pitfalls

19

General tips – before you get started

Direct actions

- Carefully calculate deadline
- Plan timeline backwards from deadline, allow for slippage particularly in the run-up to submission
- Review procedural rules in detail
  - RoP, Practice Rules, consult guidance (aides mémoires, etc.) as well
  - Note all formal requirements and allocate responsibilities
- Request from the client
  - Mandatory documentation (PoA, proof of existence in law)
  - Any supporting evidence
- Remember: Majority of your judges
  - Will not share your legal background
  - Will read the French version of your submissions

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Application (Art. 76-78 RoP, pts. 112-122 Practice Rules)

Direct actions

- Cover page
  (applicant's & representative's information, defendant, subject matter)
- Table of contents
- Introduction, summary
- Facts
- Admissibility
- Grounds of appeal (pleas in law and arguments) (include all evidence, offers and requests for measures of organisation
- Form of order sought
- Date, signature (e-Curia proof of lodgement suffices)
- Annexes and schedule (challenged act = A.1, in language of the case)
- Submit at the same time but separately from the application:
  - Mandatory procedural documents (PoA, practicing certificate, etc.)
  - Summary of pleas

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Legal grounds and arguments

Direct actions

- Infringement of the EU-Treaties or of any rule of law relating to their application
- Lack of competence
- Misuse of power
- Violation of essential procedural requirements
  - Institutional procedures
  - Procedural rights

Note: *ex officio* the Court may raise

- Lack of competence and
- Violation of essential procedural requirements

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Additional tips

Direct actions

- Be complete, include relevant context
  - all legal pleas, consider alternative pleas as well
  - all available evidence
- Be concise, clear, compelling and structured
  - no arguments in footnotes (may be overlooked) or annexes (will be ignored; note: annexes are not translated!)
  - avoid complex sentences, legal jargon, figures of speech, humour, get to the point quickly and make it simple
- Consider the form of order you are seeking (include costs)
- Keep separate files from the start (procedural & precedent files)
- Avoid repetition, address defence arguments in required detail
- Remember the defendant has the last word!

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4

What to expect in Luxembourg – The oral hearing

24

Preparation

Direct actions

- Reserve hotel rooms early, communicate with registry
- Agree timeline with client
- Re-read substantive submissions and identify "lose-ends"
- Review report for the hearing, identify any incompleteness and inaccuracy (minutes of the hearing ≠ transcript of the French simultaneous interpretation)
- Re-read key precedents again
- Update yourself on new legal developments (procedural & substantive) and review guidance for hearings: e-Curia!
- Identify and focus on key arguments/issues
- Prepare for tricky questions and closing statement
- Map out presentation and practice (keep to time, speak freely)
- Bring your gown & "mobile office" to Luxembourg
- Check if you are allowed to travel to Luxembourg due to COVID-19

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On the day

Direct actions

- Get to the Court early (clear security, register, find room)
- Settle in the court room (applicant sits on the right, put on gown, adjust earpieces & stand, organize materials, etc., greet registrar and interpreter (from distance during COVID-19)
- Greet judges behind closed doors (judges may have questions to be addressed or other instructions) – Practice suspended during COVID-19
- Wait for the Court to be announced; rise to receive the Court
- President opens oral hearing, delivery of judgments and opinions if any, then applicant is called upon
- Applicant delivers opening arguments (followed by interveners), then defendant (followed by intervener)
- Questions from the bench & parties' answers/comments
- President invites closing statements (order = opening arguments)
- President closes hearing

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Remember…

Direct actions

1. Get there in good time
2. Calm down, address court (make & keep eye contact)
3. "Judges are human, too!" Make it as interesting as possible
4. Speak slowly (simultaneous interpretation!) and only when you have the word (microphone!) –
   do not interrupt, signal!
5. Keep to time limits (you may be cut off!), avoid repetition
6. Judges ask questions to inform their deliberation and your judgment!
7. Respond always, confer with colleagues/client if necessary, be brief and to the point & respectful of other parties' views
8. Judges go into deliberation straight after the hearing!

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5

Judgment & costs (appeal?)

28

Judgment/Order (Art. 264(2), 266 TFEU)

Direct actions

- Judgment, delivered in open Court, binding from date of delivery (Art. 117, 118, 121(1) RoP)
- Order, binding from date of service (Art. 119, 120, 121(2) RoP)
- Actions and issues determined by order: Art. 126-132 RoP
- Effect is declaratory, can be partial, *ex tunc* and *erga omnes* (exceptionally the Court may limit temporal effect)
- The institution whose act has been declared void (or whose failure to act has been declared to violate EU law) is required to take the necessary measures to comply with the judgment if any
- Can be appealed to the European Court of Justice (Art. 56, 57 Statute)

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Costs (Art. 133-141 RoP)

Direct actions

- General principle: no procedural costs, parties pay their costs unless a request has been made for the Court to decide on costs
- Where costs have been applied for by the successful party the losing party pays own costs and bears the cost of the litigation necessarily incurred by the successful party (Art. 134, 140(b) RoP)
- But the Court can allocate costs particularly if there is more than one unsuccessful party or if parties have won on some and lost on other heads of claim (note: no appeal lies on costs only)
- Costs of interveners: (partly-)privileged interveners pay their own costs, others may be required to bear their own costs
- Note: only notional cost recovery from the institutions!
  See the very restrictive taxation precedents of the EU Courts (T-213/17 DEP and C-657/15 P-DEP)

30

Appeal (Art. 56-61 Statute)

Direct actions

- To the European Court of Justice
- By any (partly-)unsuccessful party – including interveners!
- No suspensive effect
- On legal grounds only (no factual review): lack of competence, breach of procedure, infringement of EU law
- Deadline: Two months (plus ten days on account of distance)
- Only one round of written submissions
- Hearing at the discretion of the Court (less intense)
- Advocate General
- Some 2020 statistics:
  - 23% of GC judgments went on appeal (completed cases)
  - Average duration of proceedings: 13.8 months

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Thank you!

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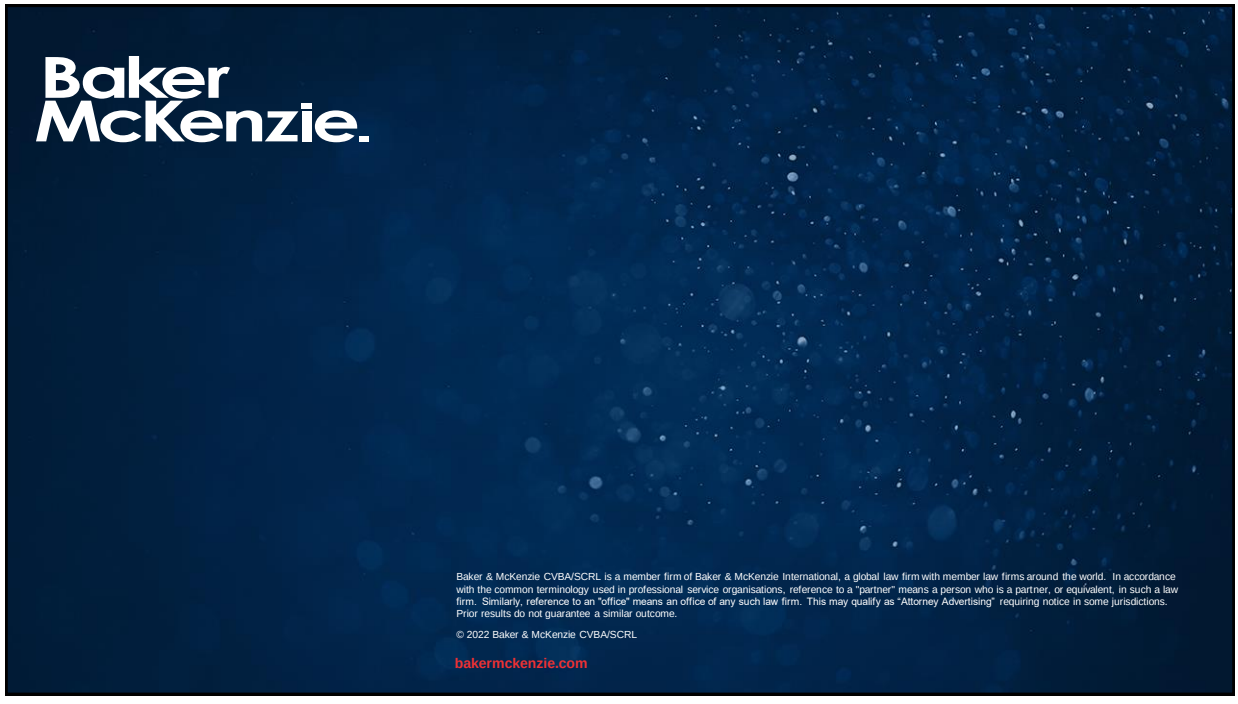
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Case study

Litigating European Union Law

BASIC TRAINING FOR LAWYERS IN PRIVATE PRACTICE

By
Daniel Sarmiento

On 1 February 2022, the Official Journal published a new Regulation, enacted by the European Parliament and the Council, on tobacco manufacture, promoting greater transparency in the production process of tobacco products and higher quality standards to ensure consumer safety. Regulation 100/2022 provides, in Article 99, a delegation empowering the European Commission to enact a Delegated Regulation detailing the necessary information that tobacco labelling must include in retail packages. Regulation 100/2022 enumerates a series of general criteria, but it delegates on the European Commission the details that shall apply to different categories of tobacco products sold in the retail market. Article 99 provides that the European Commission shall enact the Delegated Regulation by 1 September 2022 at the latest.

The European Commission ("EC") launched a public consultation immediately after the entry into force of Regulation 100/2022, following which it received sixty submissions from different industry stakeholders. During the EC's meetings with experts from the Member States, it was obvious that the positions diverged very significantly and it would be difficult to come with a Delegated Regulation satisfying the requests of the industry, consumer associations and Member States. To make things more complicated, the European Parliament announced that it would revoke the delegation granted in Article 99 of Regulation 100/2022 if the EC did not provide strict conditions ensuring the highest levels of consumer protection. The European Parliament's position was in contrast with the aggressive position of the industry, which was threatening with legal action against any initiative that introduced disproportionate regulatory burdens in an already complex, costly and time-consuming production process.

The EC realized that it was not in a position to reach a consensus between all the stakeholders concerned and it decided to postpone the enactment of the Delegated Regulation for an indefinite period of time. In the meantime, the EC issued Guidelines with basic recommendations as to the minimum requirements to be included in all

tobacco labelling in the retail market. However, these Guidelines are not binding and, according to their final provision, full compliance with them does not exempt a producer from incurring in liability in case of breach of binding EU provisions.

Colonial Tobacco is a multinational company with its European headquarters in Portugal. It's production plants are located in three EU Member States and it is directly affected by Regulation 100/2022. As a result of the EC's delays in introducing a Delegated Regulation on labelling information, it has suspended production while awaiting a legal analysis of the Guidelines from its lawyers. After several days of internal discussions, Colonial Tobacco has decided to resume production with new labelling requirements which exclude information on the amounts of certain components per ounce which, in light of the Guidelines, should not necessarily be included. Regulation 100/2022 refers vaguely to the need to indicate "sufficient information so that the consumer can balance the health risks involved". These vague references, together with the Guidelines' explicit exemption to specify specific amounts, have led Colonial Tobacco to resume the production process.

Shortly after the news of Colonial Tobacco's new policy were made public, Health International, an NGO focused on the protection of human health, announced a campaign denouncing Colonial's new labelling policy. The NGO stated that it would be filing complaints immediately in all Member States, as well as in the European Commission and the World Health Organization. As part of Health International's campaign, several renowned experts made statements decrying Colonial Tobacco's policy, arguing that the ambiguity in the legislation should not justify such a questionable labelling policy. Shortly after, Health International, together with a law firm advising on a pro-bono basis, launched an action in Portuguese courts to stop Colonial Tobacco from enforcing its new policy.

While the company was deciding on its policy under the new legal framework, the Kingdom of Sweden filed an action for failure to act against the EC in the General Court. The Swedish government had pressured the EC to enact a robust Delegated Regulation, in line with the European Parliament's demands, but the EC's decision to delay the measures and use extra time to find a consensus has alarmed many health organizations in the country. As a means to exert additional pressure on the EC, the Swedish government requested action prior to the expiration of the deadline, to which the EC replied by referring to the Guidelines and its efforts to find a consensus among all stakeholders. As a result, on 20 September 2022 the Kingdom of Sweden brought an action for failure to act, requesting the General Court that it orders the EC to enact immediately a Delegated Regulation in compliance with Article 99 of Regulation 100/2022.

In light of this development, Colonial Tobacco has decided to change its strategy. Under strong pressure from public opinion as well as shareholders, the company has now announced that it will not pursue any further production until the EC enacts a Delegated Regulation. Only then will the company be in a position to comply, in terms that satisfy its customers, with the regulatory framework. According to the company, the only way to ensure safe and secure production in the EU, is by awaiting the final binding text of

the Delegated Regulation. As a result, as of 1 October 2022 Colonial Tobacco has suspended all production in the EU, a decision with an estimated impact of 150 million EUR per month.

On 15 June 2023, the General Court ruled in the case of Kingdom of Sweden/Commission and upheld all of the applicant's claims. As a result, the General Court ordered the EC to immediately enact a Delegated Regulation pursuant to Article 99 of Regulation 100/2022. Until that time, the EC was still in negotiations with stakeholders, but as a result of the judgment it was compelled to immediately issue the measures. Thus, on 30 June 2023 the EC enacted a Delegated Regulation pursuant to Article 99 of Regulation 100/2022, including labelling conditions which reflected a middle-ground between the interests of all stakeholders, as reflected during the long negotiations.

Immediately after the publication of the Delegated Regulation, Colonial Tobacco announces that, having now, at last, full clarity on the binding legal criteria that it must comply with, it is in a position to resume production and return to the market. However, the halt in production during a period of nine months has created severe harm to Colonial Tobacco's business. In the course of that period of time, losses have amounted to an estimated total of 1350 million EUR.

Questions

1. Is Colonial Tobacco in a position to bring an action for damages?
2. What are the substantive conditions that Colonial Tobacco must comply with to make its application a success?
3. Is there a relationship between the action for failure to act and the breach that is at the base of the damages action?

Answers

1. Is Colonial Tobacco in a position to bring an action for damages?

According to settled case-law, any private person having suffered harm derived from EU action is entitled to bring a damages action against the EU in the General Court. The requirements of interest to bringing an action are rather flexible (in comparison with the standing requirements in an action of annulment), but it is obvious that the breach of enacting a Delegated Regulation has had a direct impact on the position of Colonial Tobacco. It is difficult to challenge the applicant's standing in this case, but there is always a chance of proving that the applicant's injury is not personal and that the reparation will effectively remedy the applicant's harm.[1]

In terms of challenging a specific conduct, the breach of law is not the absence of a Delegated Regulation, but the breach of a specific time-limit as provided in Art. 99 of Regulation 100/2022. The EC has a legal duty to act within a prescribed time-limit, and the failure to comply with such a duty has caused the violation that lies at the heart of the damages action that Colonial Tobacoo could bring against the EU.[2]

The applicant must bring an action for damages within a time-period of five years since the date in which the harm was caused. In this case, 1 September 2022 should act as the dies a quo for the purposes of the damages action. This is a time-limitation, not a time-limit, and thus it is subject to interruption (see Article 46 of the Statute of the Court of Justice). However, the Court of Justice has stated that the start of judicial proceedings related to the harm does not constitute a ground for the interruption of the time-limitation. In other words, if the applicants were to argue that the action for failure to act interrupted their time-limitation to bring a damages action, this argument would be bound to fail.[3]

Another matter is determining who is the defendant in these proceedings. In contrast with actions of annulment, the defendant in an action for damages is the European Union and not an individual institution. In practice, it is the Institution that has presumptively violated the law the one that will assume the representation of the European Union in the proceedings, but the defendant will formally be the European Union.

2. What are the substantive conditions that Colonial Tobacco must comply with to make its application a success?

It is settled case-law in this regard that, in matters relating to the non-contractual liability of the European Union for unlawful conduct on the part of its institutions and

[1] See judgments in Case 353/88 Briantex and Di Domenico v EEC and Commission ([1989] 3623, paragraph 6) and Joined Cases T-481/93 and T-484/93 Exporteurs in Levende Varkens and Others v Commission ([1995] ECR II-2941, paragraph 76).

[2] See judgment of 16 December 2015, Sweden/Commission (T-521/14, EU:T:2015:976).

[3] See Judgment of 19 April 2007, Holcim (Deutschland)/Commission (C-282/05 P, EU:C:2007:226, paragraph 36).

agencies, a right to reparation is recognized where three conditions are met: the rule of law infringed must be intended to confer rights on individuals and the breach must be sufficiently serious, actual damage must have been shown to have occurred and, lastly, there must be a direct causal link between the breach of the obligation attributable to the European Union and the damage sustained by the injured parties.[4]

The Court of Justice has stated that a sufficiently serious breach of a rule of law intended to confer rights on individuals is established "where the breach is one that implies that the institution concerned manifestly and gravely disregarded the limits set on its discretion, the factors to be taken into consideration in that connection being, inter alia, the complexity of the situations to be regulated, the degree of clarity and precision of the rule breached and the measure of discretion left by that rule to the EU institution".[5]

These conditions reflect the need to prove, on the part of the applicant, a certain degree of fault on the part of the EC when it failed to comply with the deadline provided in Art. 99 of Regulation 100/2022. Factors such as "the complexity of the situation", or the "degree of clarity and precision of the rule", inter alia, should be taken closely into account. However, in this specific case, Art. 99 is not a complex rule, nor is it subject to different interpretations or a significant degree of administrative discretion. Quite the contrary, Art. 99 is a rather simple and straight-forward rule that imposes on the EC a clear duty to enact a rule by a certain date. The impossibility of achieving the goal of the rule should only be taken into account when there are objective circumstances that effective impede the EC from taking such a measure (for example, a terrorist attack in the premises of the EC's office the week in which the deadline expired, thus depriving EC staff of access to essential documents to finish pending work and comply with deadlines).

The real and direct harm must refer to an economic loss that is not hypothetical or based on unfounded criteria. The amount of 1350 EUR must be the result of clear and objective criteria amounting to a genuine patrimonial loss. A suspension of production can be calculated in terms of losses. However, it is for the applicant to prove such amount and provide all the necessary evidence in support of its claim.

Finally, the causal link between the economic harm and the "sufficiently serious breach" must evidence that the breach is at the very core of the harm, the absence of which would have avoided the alleged harm. In this case, it is obvious that having enacted the Delegated Regulation on the expected date would have allowed Colonial Tobacco to proceed and continue with its production.

3. Is there a relationship between the action for failure to act and the breach that is at the base of the damages action?

[4] Judgment of 4 July 2000, Bergarderm and Goupil/Commission (C-352/98 P, EU:C:2000:361, paragraphs 41 et seq.).

[5] See, inter alia, judgments of 19 April 2007, Holcim (Deutschland) v Commission, C-282/05 P, EU:C:2007:226, paragraph 50, and of 30 May 2017, Safa Nicu Sepahan v Council, C-45/15 P, EU:C:2017:402, paragraph 30.

In principle, the action of damages is an independent remedy and the Court will focus only on the compliance of the conditions provided for this remedy. Thus, the preexistence of a judgment in an action for failure to act does not automatically entail the fulfilment of the conditions in an action for damages. The fact that the General Court has already declared a breach in the EC's decision not enact a Delegated Regulation in the prescribed time-limit should not automatically constitute a "sufficient serious breach" for the purposes of a damages action.

Therefore, although the ruling in the action for failure to act can certainly reinforce the applicant's argument, the applicant still has the burden of proof and it falls upon him or her to provide persuasive evidence that the EC has incurred in a "sufficiently serious breach".

Funded by the European Union's Justice Programme (2014-2020).
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ADMISSIBILITY ISSUES

Eileen Lagathu, Jones Day
January 28, 2022

1

1

I. ACTIONS FOR ANNULMENT (ART. 263 TFEU)

2

2

JURISDICTION - DIVISION OF POWERS BETWEEN THE COURT OF JUSTICE AND THE GENERAL COURT

- The **Court of Justice** has jurisdiction in
  - actions brought by Member States against the European Parliament or the Council;
  - actions brought by an institution against another institution.
- The **General Court** has jurisdiction to hear and determine at first instance all other types of action, in particular actions brought by individuals.

  Appeals on points of law can then be brought before the CJEU.

3

ADMISSIBILITY ISSUES – OVERVIEW

An action for annulment is admissible if the following three **cumulative** conditions are met :

1. The act is reviewable
2. The applicant has an interest to act (*locus standi*) and to see the act annulled
3. The application is submitted within the prescribed time limits

4

THE ACT MUST BE REVIEWABLE (1/2)

- An EU act may be subject to judicial review by the General Court if it :
  i. is adopted by an EU institution, and
  ii. is intended to produce binding legal effects vis-à-vis third parties.
- Preparatory, confirmative and purely internal acts are not challengeable.
- **Binding act** : broad acception since the *AETR* case: "*all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects*" (*AETR*, Case 22/70, para 42).

5

THE ACT MUST BE REVIEWABLE (2/2)

- Examples of **reviewable acts** include:
  - a Commission decision finding the existence of an infringement and fining a company;
  - compulsory requests for information sent by the Commission to which addressees have to reply as part of competition law administrative proceedings (Article 18(3) of Regulation 1/2003).
- Examples of **non-reviewable acts** include:
  - initiation of proceedings and a statement of objections in competition law proceedings;
  - non-compulsory requests for information sent during competition law administrative proceedings; and
  - a refusal by the Commission to accede to a party's request under investigation to disclose documents in the Commission's file.

6

STANDING AND INTEREST TO SEE THE ACT ANNULLED (1/2)

- Proving sufficient standing (*locus standi*) depends on the type of applicant.
  - **Privileged applicants** have an interest to act without having to prove it. These applicants include EU institutions and Member States (Article 263(2) TFEU)
  - **Semi-privileged applicants** (Court of Auditors, ECB and the Committee of Regions) have an interest to act insofar as the action seeks to safeguard their prerogatives (Article 263(3) TFEU)
  - **Non-privileged applicants** (natural or legal persons) may seek the annulment of (Article 263(4) TFEU):
    - an act addressed to them;
    - an act which is of **direct** and **individual** concern to them; or
    - a regulatory act which is of **direct** concern to them and does not entail implementing measures.
- In addition, the applicant's interest to see the act annulled must exist until the date of the judgment.

ADMISSIBILITY ISSUES – STANDING AND INTEREST TO SEE THE ACT ANNULLED (2/2)

- Examples of **individuals** who are **directly and individually concerned** by EU measures:
  - When a merger is authorized by the European Commission, the parties' competitors have standing to seek the annulment of the merger clearance
  - Final decision of incompatibility of a State aid measure directly and individually affects the beneficiary of the aid.
- Example of individuals that are **directly concerned** by the annulment of **regulatory acts** which do not require implementing measures.
  - A decision of the EU Chemical Agency which identifies a substance as very high concern is a regulatory act which does not require implementing measures as it only gives rise to information obligations for legal persons involved in the manufacturing of such substance.
  - ➢ Note: "implementing measures" are not necessarily those which implement directives at national level. An example of "implementing measures" includes for instance national authorities' decisions granting or refusing import certificates and applying levies set out in the relevant EU act .

COMPLIANCE WITH THE PRESCRIBED LEGAL TIME LIMITS

- Two-month time limit: Mandatory time limit which the General Court can raise of its own motion. Article 263(6) TFEU provides that "[t]*he proceedings provided for in this Article shall be instituted within* ***two months*** *of the* ***publication of the measure***, ***or*** *of its* ***notification to the plaintiff***, ***or***, *in the absence thereof, of the day on which it* ***came to the knowledge of the latter***, *as the case may be*".
- 10-day extension on account of distance: Article 60 of the RP provides that "[t]*he procedural time limits shall be extended on account of distance by a single period of 10 days*."
- 14-day extension for measures published in the Official Journal: Article 59 of the RP provides that "*where the time limit* […] *runs from the publication of* [the] *measure in the* [OJEU], *that time limit shall be calculated* […] *from the end of the fourteenth day after such publication*".
- Calculation of time limits: Article 58 of the RP provides that time limits
  - include Saturdays, Sundays and official holidays; and
  - start at the moment at which an event occurs, bearing in mind that the day on which the event took place is not taken into account.

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II. REFERENCE FOR A PRELIMINARY RULING (ART. 267 TFEU)

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TEXT

Article 267

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State […]

"QUESTION IS RAISED BEFORE ANY COURT OR TRIBUNAL OF A MEMBER STATE"

- Autonomous concept under EU Law
- Structural criteria - The referring body must be :
  - established by law, permanently, with compulsory jurisdiction, its members must be appointed by the State;
  - Independent:
    - impervious to external factors, and
    - neutral with respect to the interests before it
  - The referring body must be linked to a Member State
- Functional criteria - The referring body must :
  - take judicial decisions, apply the rule of law, follow an adversarial procedure and be impartial.

"*PRELIMINARY RULINGS CONCERNING: (A) THE INTERPRETATION OF THE TREATIES; (B) THE VALIDITY AND INTERPRETATION OF ACTS OF THE INSTITUTIONS, BODIES, OFFICES OR AGENCIES OF THE UNION*"

- Questions concerning the interpretation of EU law can concern:
  - Primary law (Treaties; Charter of Fundamental Rights)
  - Secondary law (EU regulations, directives, decisions)
  - International agreements entered into by the EU
  - The caselaw of the Court of Justice
  - Non binding acts of EU institutions, bodies, offices or agencies (recommendations, resolutions)
- Questions concerning the validity of EU acts can concern:
  - All secondary law
  - Non binding acts of EU institutions, bodies, offices or agencies that produce legal effects (recommendations, resolutions)

RELEVANCE OF THE REQUEST FOR A PRELIMINARY RULING

A decision on the question referred must be necessary for the national court to deliver a judgment in the main proceedings pending before it. For the reference to be admissible:

- It should not be hypothetical
- It must related to the main proceedings
- The CJEU must be provided with the requisite elements of fact and law to be in a position to address the question referred
- The applicant in the main proceedings must not have had the possibility to bring an action for annulment (Art. 263 TFEU) (Case C-188/92, *Deggendorf*)

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Funded by the European Union's Justice Programme (2014-2020).
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URGENT PRELIMINARY RULING PROCEDURE AND EXPEDITED PROCEDURE

Eileen Lagathu, Jones Day
January 28, 2022

JONES DAY

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INTRODUCTION

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INTRODUCTION

- **Article 23a Statut of the Court of the Justice of the European Union** :

*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.

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INTRODUCTION - COMPARISON

Expedited procedure	Urgent preliminary ruling procedure
- **Procedures:** • Reference for preliminary ruling • Direct actions - **Cases**: • All areas of EU - **Date of application**: 2000	- **Procedures**: • Reference for preliminary ruling - **Cases**: • Area of freedom security and justice (Titre V of Part three of the TFEU) - **Date of application**: 2008

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COMPLETED CASES DURATION OF PROCEEDINGS IN MONTHS (2016-20)

	2016	2017	2018	2019	2020
References for a preliminary ruling	15	15.7	16	15.5	15.8
Urgent preliminary ruling procedure	2.7	2.9	3.1	3.7	3.9
Expedited procedures	4	8.1	2.2	9.9	-
Direct actions	19.3	20.3	18.8	19.1	19.2
Expedited procedures	-	-	9	10.3	-
Appeals	12.9	17.1	13.4	11.1	13.8
Expedited procedures	10.2	-	-	-	-

Source: 2020 Annual report of the CJEU, p. 220

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I. EXPEDITED PROCEDURE

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EXPEDITED PROCEDURE - TEXTS

Reference for preliminary ruling	Direct actions
• Art. 105 - 106 RP of the CJEU	• Art. 133 - 136 RP of the CJEU • Art. 151-155 RP of the GC

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EXPEDITED PROCEDURES (2016-2020)
REQUESTS FOR AN EXPEDITED PROCEDURE

	2016	2017	2018	2019	2020	Total
References for a preliminary ruling	20	30	33	50	40	173
Direct actions	-	1	3	3	-	7
Appeals	1	-	1	4	2	8
Special forms of procedure	-	-	-	1	-	1
Total	21	31	37	58	42	189

Source: 2020 Annual report of the CJEU, p. 223

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EXPEDITED PROCEDURES (2016-2020)
REQUESTS FOR AN EXPEDITED PROCEDURE – OUTCOME

	2016	2017	2018	2019	2020	Total
Granted	4	4	9	3	3	23
Not granted	12	30	17	56	34	149
Not acted upon	4	1	3	1	3	12
Decision pending	4	-	8	6	8	26
Total	24	35	37	66	48	210

Source: 2020 Annual report of the CJEU, p. 223

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EXPEDITED PROCEDURE - SCOPE

1. Nature and sensitivity of the area of interpretation covered by the reference for a preliminary ruling (Order of 22 February 2008, *Kozłowski*, case C-66/08)
2. Particular severity of the legal uncertainty to which the reference for a preliminary ruling relates (Orders of 26 September 2018, *Zakład Ubezpieczeń Społecznych*, case C-522/18, of 15 November 2018, *Commission v Poland*, case C-619/18; of 19 October 2018, *Wightman and Others*, case C-621/18)
3. Risk of interference with fundamental rights (Orders of 6 May 2014, *G.*, case C-181/14; of 5 June 2014, *Sánchez Morcillo and Abril García*, case C-169/14)
4. Risk of serious environmental damage (Order of 11 October 2017, *Commission v Poland*, case C-441/17)

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INITIATION OF THE PROCEDURE

Reference for preliminary ruling

- The **referring court or tribunal** may request the application of the expedited procedure and must:
  - set out the matters of fact and law which establish the urgency and justify the application of that exceptional procedure; and
  - in so far as possible, indicate the answer that it proposes to the questions referred.
- Exceptionally, the **President of the Court** may, of this own motion, decide to apply the expedited procedure

Direct actions

- The **applicant** or the **defendant** may, in a separate document submitted at the same time as the application initiating the proceedings/defence, request the application of the expedited procedure. The document shall contain a statement of reasons regarding the urgency of the case
- Exceptionally, the **President of the Court** may, of this own motion, decide to apply the expedited procedure

DESCRIPTION OF THE PROCEDURE

Reference for preliminary ruling

- Request for a preliminary ruling is served on interested persons (Art. 23 of the Statute), along with the date of hearing
- Prescribed time limit within which interested persons are to lodge statements of case or written observations (≥15 days) and matters to which they relate may be restricted to essential points of law.
- Statements of case or written observations are communicated to interested parties
- The Court shall rule after hearing the AG

Direct actions

- The GC may prescribe conditions as to the volume and presentation of pleadings; the conduct of proceedings, the pleas in law and arguments on which it will decide
- Before the GC, the period prescribed to lodge the defence is reduced to 1 month in an expedited procedure
- The date of the hearing is communicated to the parties after the submission of the defence
- Reply, rejoinder and statement in intervention are only submitted if the President deems it necessary
- The Court shall rule after hearing the AG

II. URGENT PRELIMINARY RULING PROCEDURE

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URGENT PRELIMINARY RULING PROCEDURE – TEXTS & FIGURES

Texts

- Articles 107-113 of the RP of the CJEU

Figures

	2016	2017	2018	2019	2020	Total
References for a preliminary ruling – Completed cases	453	447	520	601	534	2 555
Request to apply the urgent preliminary ruling procedure for which an outcome was reached	13	15	19	20	19	86

Source: 2020 Annual report of the CJEU, pp. 213 and 224

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URGENT PRELIMINARY-RULING PROCEDURE (2016-2020) REQUESTS FOR THE URGENT PRELIMINARY-RULING PROCEDURE TO BE APPLIED – OUTCOME

	2016	2017	2018	2019	2020	Total
Granted	9	4	12	11	11	47
Not granted	4	11	7	7	8	37
Decision pending	-	-	-	2	-	2
Total	13	15	19	20	19	86

Source: 2020 Annual report of the CJEU, p. 224

URGENT PRELIMINARY RULING PROCEDURE – SCOPE

Areas of freedom security and justice covered by Title V of Part Three of the TFEU

1. Risk of deterioration of the parent / child relationship (Order of 10 April 2018, *CV*, case C-85/18 PPU)
2. Deprivation of liberty (Judgments of 1 June 2016, *Bob-Dogi*, case C-241/15; of 12 February 2019, *TC*, case C-492/18 PPU)
3. Risk of interference with fundamental rights (Judgment of 7 March 2017, *X and X,* case C-638/16 PPU)

URGENT PRELIMINARY RULING PROCEDURE (2016-2020)
REQUESTS FOR THE URGENT PRELIMINARY RULING PROCEDURE TO BE APPLIED – BREAKDOWN BY TYPE OF MATTER

	2016	2017	2018	2019	2020	Total
Judicial cooperation in civil matters	-	5	5	-	2	12
Judicial cooperation in criminal matters	7	6	8	10	8	39
Police cooperation	-	-	-	4	-	4
Borders, asylum and immigration	5	4	5	5	6	25
Others	-	-	1	1	1	3
Total	12	15	19	20	17	83

Source: 2020 Annual report of the CJEU, p. 224

INITIATION OF THE PROCEDURE

- The **referring court or tribunal** may request that a reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure and must:
  - set out the matters of fact and law which establish the urgency and justify the application of that exceptional procedure; and
  - in so far as possible, indicate the answer that it proposes to the questions referred.
- Exceptionally, if the application of the urgent procedure has not been requested, the **President of the Court** may ask the designated **Chamber** to consider whether the Court should apply it of its own motion.

DESCRIPTION OF THE PROCEDURE (1/2)

- The **request for a preliminary ruling** is served on:
  - the parties to the main proceedings
  - the Member State from which the request originates
  - the European Commission
  - the institution which adopted the act the validity or interpretation of which is disputed.
- As soon as this is done, the request (+ translation & summary) is communicated to the other interested persons (Art. 23 of the Statute)
- The **decision of the CJEU** as to whether or not to apply the urgent preliminary ruling procedure is immediately served on:
  - the referring court or tribunal; and
  - the same persons as listed under the first bullet point, above.
- As soon as this is done, the decision is communicated to the other interested persons (Art. 23 of the Statute)
- If the request to apply the urgent procedure is granted, only the persons listed under the first bullet point, above, participate in the written procedure.

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DESCRIPTION OF THE PROCEDURE (2/2)

- The decision of the CJEU:
  - prescribes the time limit within which the persons participating in the written procedure are to lodge statements of case or written observations, and
  - may specify the matters of law to which such statements or observations must relate, as well as a maximum number of pages.
- Statements of case / written observations submitted are served on all interested persons (Art. 23 of the Statute)
- In very exceptional cases of extreme urgency, the designated Chamber may decide to omit the written part of the procedure.
- All interested persons (Art. 23 of the Statute) are informed as soon as possible of the date of the hearing and take part therein.
- The designated Chamber swiftly rules after hearing the AG.

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ERA –CASE STUDY

In January 1999, Pharmatica, the manufacturer of an originator medicine, registered a patent for the active ingredient of a princeps product marketed in Mosia (fictional UE Member State).

In December 2000, the period of 'data exclusivity' in relation to that active ingredient expired. Pharmatica faced competition from manufacturers of generics, including Generica and Genpharma, who were seeking a marketing authorisation in Mosia for their generic version of that drug. Pharmatica entered into two pay-for-delay agreements with these generic manufacturers.

On 12 February 2016, the Market and Competition Commission ("MCC") issued a decision in which it imposed financial penalties of a total of EUR 44.99 million on these undertakings on the grounds that:

- Pharmatica held a dominant position in the market for that medicine and had abused that position, contrary to the prohibition in Chapter II of Part I of the Competition Act 1998 by entering into agreements;
- Pharmatica and Generica had infringed the prohibition in Chapter I of Part I of the Competition Act 1998 and, after 1 May 2004, Article 101 TFEU, by entering into the pay-for-delay agreements; and
- Pharmatica and Genpharma had infringed the prohibition in Chapter I of Part I of the Competition Act 1998 by entering into agreement.

The companies on which penalties were imposed brought an appeal against that decision before the competent Court of Appeal. The question arises as to whether a request for a preliminary reference could be submitted.

Questions:

1. A draft question to be referred was submitted to the MCC which refused to make a reference to the Court of Justice. On what grounds? If you were to represent these companies, would you recommend submitting the same question on appeal ?
2. Assuming the question then goes to the Supreme Court. Can you inform your client that you are very confident that the Court will refer the following question to the Court of Justice for a preliminary ruling?

   "For the purpose of Article 101(1) TFEU, are the holder of a patent for a pharmaceutical drug and a generic company seeking to enter the market with a generic version of the drug to be regarded as potential competitors when the parties are in bona fide dispute as to whether the patent is valid and/or the generic product infringes the patent?" The concept of "*potential competitors*" is the subject of established EU case-law, the constituent elements of the concept having been identified by the Court of Justice. However, the concept has never been applied to

the pharmaceutical sector by the Court of Justice, although it has been by national courts. The French and German courts have different interpretations in this respect.

3. Could the reference for a preliminary ruling include a question regarding the calculation of the penalties imposed on the basis of Chapter I of Part I of the national Competition Act?
4. Your client wants the matter to be quickly settled. Can you think of any way to expedite the proceedings?

Relevant applicable Law:

- *National Competition Act 1998*

Section 2, in Chapter I of Part I:

Agreements … preventing, restricting or distorting competition

(1) agreements between undertakings, decisions by associations of undertakings or concerted practices which:

(a) may affect trade within Mosia, and

(b) have as their object or effect the prevention, restriction or distortion of competition Mosia,

are prohibited unless they are exempt in accordance with the provisions of this part.

(2) Subsection 1 applies, in particular, to agreements, decisions or practices which: …

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply …

Section 18, in Chapter II of Part I:

Abuse of dominant position

(1) …, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within Mosia.

(2) Conduct may, in particular, constitute such an abuse if it consists in: …

(b) limiting production, markets or technical development to the prejudice of consumers;

Section 60 in Chapter V of Part I:

Principles to be applied in determining questions

(1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within Mosia are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law in relation to competition within the European Union.

(2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between:

(a) the principles applied, and decision reached, by the court in determining that question; and

(b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in EU law.

(3) The court must, in addition, have regard to any relevant decision or statement of the Commission.

- *Law 3/2013 establishing the Market and Competition Commission ("MCC") of 4 June 2013*

Article 1(2): The aim of the [MCC] is to guarantee, preserve and promote the proper functioning, transparency and existence of effective competition on all markets and in all production sectors for the benefit of consumers and users.

Article 2(1): The [MCC] shall have independent legal personality and full capacity to act in accordance with public and private law, and when carrying out its functions and performing its duties, it shall operate with organisational and functional autonomy and complete independence from the Government, public administrations and market stakeholders. In addition, it shall be subject to parliamentary and judicial scrutiny.

Article 3: 1. The [MCC], when carrying out its functions and performing its duties, shall act independently of any business or commercial interest.

2. When fulfilling its duties under the legislation, and without prejudice to collaboration with other bodies or the managerial powers of the Government's general policy exercised through its legislative powers, neither the staff nor the members of the bodies of the [MCC] shall seek or accept instructions from any public or private entity.

Article 15: 1. The members of the Board [of the MCC], including the President and the Vice-President, shall be appointed by the Government by decree on a proposal from the Minister for Economic Affairs and Competitiveness, from among individuals of recognised authority and professional expertise in the field of activity of the [MCC] following an examination of the person proposed for the post before the relevant committee of the Congress of Deputies. The Congress, through the relevant committee acting by an absolute majority, may veto the appointment of the proposed candidate within one calendar month from receipt of the relevant communication. In the absence of any express declaration from the Congress once that deadline has expired, the relevant appointments shall be deemed to be accepted.

2. The term of office of the members of the Board shall be six years without the possibility of renewal. The members of the Board shall be renewed on a partial basis every two years so that each member of the Board shall not remain in his or her post for more than six years.

Article 17(1): The plenary session of the Board shall be comprised of the all the members of the Board. It shall be chaired by the President of the [MCA]. If the President is absent or ill or the post is vacant, he or she shall be replaced by the Vice-President or, failing that, by the most senior board member or, where members have the same length of service, by the eldest.

Article 19(1):The role of the President of the [MCC] shall be to: … (f) promote the activities of the [MCA] and the fulfilment of the functions entrusted to it; in particular, to propose the annual or multi-annual action plans which will define its objectives and priorities;

(g) manage the staff of the [MCC] in accordance with the powers conferred on it by the specific legislation;

(h) manage, coordinate, evaluate and supervise the various units of the [MCC], without prejudice to the functions of the Board; in particular coordinate, with the assistance of the Secretary of the Board, the proper functioning of the units of the [MCC].

Article 20: The Board of the [MCC] shall be the decision-making body for the functions of adjudication, consultation and the promotion of competition and arbitration and of the resolution of conflicts provided for in the present law. In particular, it shall be the body responsible for: … 13. appointing and dismissing management staff on a proposal from the President of the Board.

Article 25, entitled 'Management bodies' provides in paragraph 1 that the MCA has four investigation directorates, including the Competition Directorate. That directorate is responsible for examining cases relating to the MCA's functions of preserving and promoting effective competition on all markets and in all sectors.

Article 29, relating to the power to impose penalties:

1. The [MCA] shall exercise the power to carry out inspections and to impose penalties in accordance with the provisions of Chapter II of Title IV of the Law on the protection of competition, Title VI of General Law 7/2010 on audiovisual communication of 31 March 2010, Title VIII of General Law 32/2003 on telecommunications of 3 November 2003, Title X of Law 54/1997 on the electric sector of 27 November 1997, Title VI of Law 34/1998 on the hydrocarbon sector of 7 October 1998, Title VII of Law 43/2010 on the universal postal service, users' rights and the postal market of 30 December 2010 and Title VII of Law 39/2003 on the railway sector of 17 November 2003.

2. For the purposes of exercising the power to impose penalties, there shall be the necessary operational separation between the investigation phase, which falls within the remit of the staff of the directorate responsible for the matter, and the decision-making phase, which falls within the remit of the Board.

3. The procedure for exercising the power to impose penalties shall be governed by the provisions of the present law, the laws referred to in paragraph 1 and, for any matter not covered by the above legislation, Law 30/1992 on the rules governing public authorities and the common administrative procedure of 26 November and its implementing legislation. In particular, the penalty proceedings in relation to the protection of competition shall be governed by the specific provisions of Law 15/2007 of 3 July 2007.

4. The decision shall put an end to the administrative procedure, and an action may be brought against it before the administrative courts.

Section 1, in Chapter I of Part II:

Article 1: Decisions taken by the MCC are subject to appeal before the competent Court of Appeal in accordance with the rules established in the Code of Civil Procedure.

- *Statute of the MCC of 30 August 2013*

Article 4 - Institutional coordination and cooperation: Where it is apparent from European Union or national legislation, the [MCC] shall be considered to be: (a) the national competition authority.

Article 15(2): The President of the [MCC], who is also President of the plenary session of its Board and of the Competition Division, shall exercise the functions of managing and representing [the MCC] in accordance with Article 19 of the [Law establishing the MCC]. When exercising those functions, the President shall be responsible for: … (b) proposing to the plenary session of the [MCC] the appointment and dismissal of the Secretary of the Board, the investigation directors and the other management staff of the [MCC].

- *Code of Civil Procedure*

Article 555: Decision of the Court of Appeal on appeal from decision of the MCC is subject to review by the Supreme Court, whose decision has final authority.

- *EU Law - Treaty on the Functioning of the European Union*

Article 101: 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102: Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.