Speakers' Contributions

LITIGATING EUROPEAN UNION LAW

SEMINAR FOR LAWYERS IN PRIVATE PRACTICE

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Table of Contents

COUR DE JUSTICE
DE L'UNION EUROPÉENNE

ENFORCEMENT MECHANISMS OF EU LAW - THE RELATIONSHIP BETWEEN EU LAW AND NATIONAL LAW

Alexandre Geulette
Référendaire, Cabinet of Judge Ineta Ziemele

Academy of European Law, 4 May 2022

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1

INTRODUCTION

- The EU is a "Community based on the rule of law" (Les Verts, C-294/83)
- Numerous provisions of primary law provide for enforcement mechanisms
  - Article 4(3) TEU
  - Article 19 TEU
  - Article 47 of the Charter
- Variety of enforcement proceedings and methods for reviewing the acts of Members States and EU institutions, under the control of the Court of Justice

2

1. ESSENTIAL FEATURES OF THE EU LEGAL SYSTEM

- Primacy: EU law prevails over national law in the event of a conflict
- Direct effect: EU law may create rights and duties directly for legal persons
- Indirect effect: legal duty of national courts to interpret and apply national law in conformity with EU law
- State liability for breaches of EU law
- Recently recalled in C-573/17, Popławski; C-261/20, Thelen Technopark Berlin

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3

A. ESSENTIAL FEATURES OF THE EU LEGAL SYSTEM - PRIMACY

- Despite being one of the most fundamental principles of EU law, the principle of primacy is not mentioned in the EU Treaties
  - 6/64, Costa/Enel
  - 11/70, Internationale Handelsgesellschaft
  - 106/77, Simmenthal
- Declaration 17 concerning primacy

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4

B. ESSENTIAL FEATURES OF THE EU LEGAL SYSTEM – DIRECT EFFECT

- Capacity of EU law provisions to create rights and obligations directly for legal persons – makes it possible to directly invoke the application of EU law before a national court, irrespective of transposition measures in national law
- Case 26/62, Van Gend en Loos
- Vertical / Horizontal
- Direct effect to be distinguished from direct applicability (Art. 288 TFEU)

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5

B. ESSENTIAL FEATURES OF THE EU LEGAL SYSTEM – DIRECT EFFECT

- Requirements: Provision must be sufficiently clear, precise and inconditional
- Types of EU provisions
  - Primary law
  - Secondary law: Regulations/Decisions/Directives
  - International agreements
  - Opinions and recommendations

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6

C. ESSENTIAL FEATURES OF THE EU LEGAL SYSTEM – INDIRECT EFFECT

- Member State courts are required to interpret national law in the light of the wording and purpose of EU law
- Case 14/83, Van Colson
- Limits: general principles of law/no basis for interpreting national law *contra legem*
- Role of the Court of Justice in Article 267 TFEU proceedings

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7

D. ESSENTIAL FEATURES OF THE EU LEGAL SYSTEM – STATE LIABILITY

- Joined cases C-6/90 and C-9/90, Francovich: establishes the principle of Member State liability for damage suffered by individuals following a breach of EU law by that Member State
- Conditions for State liability - failure to take all necessary measures to achieve the result prescribed by a directive)

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8

2. ENFORCEMENT OF EU LAW

- The EU is based on the rule of law: not only Member States must fulfil their obligations under EU law; EU institutions must also be respectful of EU norms that enjoy constitutional status
- Enforcement is not an exclusive prerogative of the EU
  - Breach of EU law by a Member State (infringement actions)
  - Breach of EU Treaties and Charter by EU institutions (judicial review of actions of the EU)

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9

A. INFRINGEMENT PROCEEDINGS

- EU law relies on Member States fulfilling their obligations, e.g. by implementing EU directives
- It may occur that Member States are negligent or reluctant to fulfill their obligations
- Art. 258 TFEU empowers the Commission, as the guardian of the Treaties, to monitor compliance and bring an action if necessary
- Art. 259 TFEU empowers Member States to bring the same

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10

A. INFRINGEMENT PROCEEDINGS

- 1 informal stage (discussions) and 3 formal stages: formal notice/reasoned opinion/Court proceedings
- Article 260 § 2 TFEU: second infringement procedure
- Article 260 § 3 TFEU: late transposition of directives (Case C-543/17, Commission/Belgium)

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11

B. ACTIONS FOR ANNULMENT OF EU ACTS

- Article 263 TFEU
- Defendant: EU body that adopted the contested act
- Applicant: EU institution, Member States, natural and legal persons who have standing (addressees of the measure or being directly and individually concerned)
- EU courts have exclusive jurisdiction to review the legality of EU acts that produce legal effects vis-à-vis third parties (Article 267 TFEU)

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12

4. OTHER ACTIONS

- Article 265 TFEU: action for failure to act
- Article 340 TFEU: action for damages

13

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Questions?

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Thank you for your attention

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14

COUR DE JUSTICE
DE L'UNION EUROPÉENNE

COMPOSITION, ORGANISATION AND COMPETENCES OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Alexandre Geulette
Référendaire, Cabinet of Judge Ineta Ziemele

Academy of European Law, 4 May 2022

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1

1. THE INSTITUTION

- The Court of Justice (CJEU) is the judicial authority of the EU. It was the first institution of the EU, set up in 1952
- The CJUE comprises 2 courts (formerly 3):
  - the Court of Justice (1952)
  - the General Court (1989)
  - [the Civil Service Tribunal (2005-2016)]
- More than 40.000 judgments and orders since 1952

2

2. THE MISSION OF THE COURT OF JUSTICE

- The Court of Justice has as its mission to ensure that EU law is interpreted and applied correctly.
- In particular:
  - It reviews the legality of the acts of the EU institutions
  - It ensures that Member States comply with obligations under the EU Treaties
  - It interprets EU law at the request of national courts and tribunals

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3

3. THE COMPOSITION OF THE COURT OF JUSTICE

- 27 judges: appointed by common accord of Member States for a renewable term of 6 years, following opinion of Art. 255 TFEU Committee – Election of President and Vice-President for a renewable term of 3 years
- 11 Advocates General, also appointed by common accord of Member States for a term of 6 years, following opinion of Art. 255 TFEU Committee – Election of the 1st Advocate General
- 1 Registrar, appointed for a renewable term of 6 years by the CJEU (judges/AGs) based on an open competition – In charge of the Registry – Head of the administration
- Staff in chambers of Judges and Advocates General

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4

4. THE ORGANISATION OF THE COURT OF JUSTICE

- Formations: Chambers (3/5), Grand Chamber (15) or full Court (27)
- Assignment of the case.
  - As soon as possible after the document initiating proceedings has been lodged, the President of the Court designates a Judge to act as rapporteur in the case
  - The First Advocate General assigns each case to an Advocate General.
- Deliberations: secret – uneven number of judges participating in deliberations – collegiate decisions
- General meeting of the judges

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5

5. THE COMPOSITION OF THE GENERAL COURT

- 54 judges: as of 1 February 2020, 2 per Member State, appointed by common accord of Member States for a renewable term of 6 years – Election of President and Vice-President for a renewable term of 3 years
- No permanent Advocate General
- 1 Registrar – in charge of the Registry

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6

6. THE ORGANISATION OF THE GENERAL COURT

- Formations: Chambers (3/5) or Grand Chamber (15). The case may also be heard and determined by a single Judge
- Assignment of the case:
  - Assignment to a Chamber of 3 Judges. Cases allocated to the Chambers in turn ('tour de table'), following four separate rotas: (i) actions relating to competition, State aid or trade protection measures; (ii) intellectual property cases; (iii) staff cases; and (iv) all other cases
  - Referral of a case to a larger formation. At the General Court, a case is always initially assigned to a Chamber of three Judges
- Deliberations: secret – uneven number of judges – collegiate decisions
- Plenum

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7

7. THE DIVISION OF COMPETENCES BETWEEN THE GENERAL COURT AND THE COURT OF JUSTICE

- Article 256 TFEU: Flexible framework for dividing competences within the CJEU: no Treaties change is required - changes can be effected by amendments of the Statute within the limits set by the TFEU (ordinary legislative procedure)
- Applications and documents filed with the wrong Court are transmitted
- Cases with similar object before both EU Courts: Article 54(3)–(4) of the Statute

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8

COMPETENCES OF THE COURT OF JUSTICE

- Preliminary rulings (Article 267 TFEU);
- Infringement actions (Article 258 TFEU);
- Appeals brought against decisions of the General Court (Article 256(1) TFEU);
- Actions for annulment (Article 263 TFEU) brought by EU institutions or by Member States in the cases specified in Article 51 of the Statute;
- Actions for failure to act (Article 265 TFEU) brought by EU institutions or by Member States in the cases specified in Article 51 of the Statute;
- Opinions on draft international agreements (Article 218(11) TFEU);
- Other special proceedings (Art. 201-206 RoP).

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9

COMPETENCES OF THE GENERAL COURT

- Actions for annulment (Article 263 TFEU) brought by natural or legal persons or by Member States in the cases specified in Article 51 of the Statute;
- Actions for failure to act (Article 265 TFEU) brought by natural or legal persons or by Member States in the cases specified in Article 51 of the Statute;
- Actions for damages brought under Articles 268 and 340 TFEU;
- Staff cases foreseen in Article 270 TFEU;
- Disputes where the jurisdiction is provided for in an arbitration clause under Article 272 TFEU;
- Intellectual property cases, that is, actions brought against decisions of EUIPO and the Community Plant Variety Office (CPVO).

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10

8. THE PROCEDURE

- Rules laid down in 3 main documents (Statute/Rules of procedure of the Court of Justice/Rules of procedure of the General Court)
- Those rules are complemented in the Practice Directions of the Court of Justice and the Practice Rules of the General Court (explanations, reminders, practical information)
- The e-curia decisions provide the possibility of lodging and receiving documents via a secured electronic platform
- Essential role of the Registry (lodging of procedural documents by the parties; notification to the parties); no direct contact between the judges/AGs and the parties

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11

8. THE PROCEDURE (CONT.)

- Written phase:
  - Preliminary ruling proceedings
    - Request for preliminary ruling from national court or tribunal
    - Translation into all official languages
    - Publication of the questions in the OJ and notification of interested parties
    - Written observations (translation into French)
    - Preliminary report submitted to the general meeting of the judges
  - Direct actions and appeals
    - Lodging of the application (translation into French)
    - Publication of the application in the OJ and notification of the defendant
    - Defense; where applicable joinder and rejoinder
    - Preliminary report submitted to the general meeting of the judges

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12

8. THE PROCEDURE (CONT.)

- Oral phase:
  - Hearing (simultaneous interpretation) – Streaming (test phase)
  - Opinion of the Advocate General
- Deliberation of judges (in French)
- Translation of the judgment/order into the (authentic) language of procedure (and, where applicable, into all other official languages)
- Delivery of judgment

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Questions?

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Thank you for your attention

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Direct actions before the General Court

"Litigating European Union Law" Seminar

Academy of European Law, Trier

4 May 2022

Marianna Rantou

Legal Secretary (Référendaire),

Court of Justice of the European Union (General Court)

1

Table of contents

2

1. The General Court (jurisdiction)

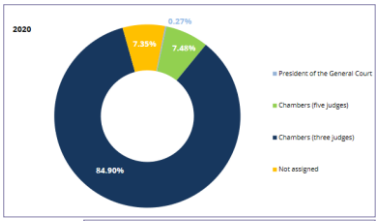
Article 256, paragraph 1 TFEU (& Article 51 of CJEU Statute):

"The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding."

The General Court:

- Previously called "Court of First Instance"
- At least one judge from each Member State
  (54 judges (two from each Member State) - term of office is six years, renewable)
- Unlike the Court of Justice, the General Court does not have permanent Advocates General
  However, that task may, in exceptional circumstances, be carried out by a Judge of the General Court
- Chambers of **five** or **three** Judges or, in some cases, a **single** Judge. It may also sit as a Grand Chamber (fifteen Judges) when justified by legal complexity or importance of case (extremely rare)
- The General Court has its own Registry
  But it uses the administrative and linguistic services of the CJEU for its other requirements
- Applicable Procedural rules:
  - Statute of the Court of Justice (common with the CJEU); but
  - **Rules of Procedure of the General Court**

  and Practice directions.

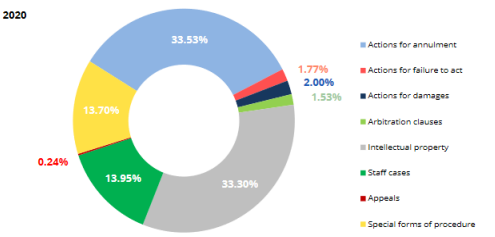


Source: Court of Justice Annual Report 2020 - Judicial Activity / Statistics concerning the judicial activity of the General Court, p. 359

2. Which types of action?

- **Actions for Annulment** (Article 263 TFEU)
  → most common type of action/
  the main subject of this presentation
- Other types of action:
  - **Actions for a Failure to Act** (Article 265 TFEU)
  - **Actions for Damages** (Article 268 and 340 TFEU)
  - **Staff cases** (Article 270 TFEU)
    (previously Civil Service Tribunal, now General Court)
  - **Contractual liability** (Article 272 TFEU)
    (only where there is an arbitration clause in a contract)
  - **Actions relating to intellectual property**
    (brought against the Office for Harmonisation in the Internal Market)

III. **New cases – Type of action (2016-2020)**



	2016	2017	2018	2019	2020
Actions for annulment	297	371	288	445	284
Actions for failure to act	7	8	14	14	15
Actions for damages	19	23	29	24	17
Arbitration clauses	10	21	7	8	13
Intellectual property	336	298	301	270	282
Staff cases	163	86	93	87	118
Appeals	39				2
Special forms of procedure	103	110	102	91	116
Total	**974**	**917**	**834**	**939**	**847**

Source: Court of Justice Annual Report 2020 - Judicial Activity / Statistics concerning the judicial activity of the General Court, p. 349

3. What acts can be challenged?

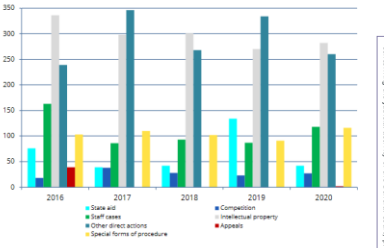
Article 263, paragraph 1 TFEU:

"The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties."

- Binding act (not only form (Article 288 TEFU) but **content**) - Not acts of contractual nature
- Act intended to produce legal effects (*IBM* case law) - Not confirmatory acts

- Some examples of reviewable acts in:
  - Staff cases
  - Intellectual Property
  - Competition (Antitrust, Merger control)
  - State aid
  - Public tendering procedures
  - Access to documents (Regulation 1049/2001)
  - Restrictive measures (external action)
  - Law governing the institutions

II. New cases – Nature of proceedings (2016-2020)



	2016 [1]	2017	2018	2019	2020
State aid	76	39	42	134	42
Competition	18	38	28	23	27
Staff cases	163	86	93	87	118
Intellectual property	336	298	301	270	282
Other direct actions	239	346	268	334	260
Appeals	39				2
Special forms of procedure	103	110	102	91	116
Total	974	917	834	939	847

Source: Court of Justice Annual Report 2020 - Judicial Activity / Statistics concerning the judicial activity of the General Court, p. 36

5

4. Who can bring an action? (*locus standi*)

Article 263, paragraph 4 TFEU:

"Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

A. **Non-privileged** applicants (Article 263, fourth paragraph TFEU): Natural or legal persons

- Individuals, companies, associations, third countries, etc.
- General rule: the contested act is addressed to the applicant **or** it is of "*direct and individual concern*" to them:
  - Must prove separately "*direct*" and "*individual*" concern – case law
    - *Plaumann* (Case 25/62)
    - *Inuit* (C-583/11 P)
- Interest to bring proceedings (personal; vested and present)

B. **Privileged** applicants (Article 263, second paragraph TFEU): *"actions brought by a Member State, the European Parliament, the Council or the Commission"* - no further requirements

C. **Semi-privileged** applicants (Article 263, third paragraph TFEU): *"under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives"* – requirement: protecting their prerogatives

6

5. Grounds for annulment

Article 263, paragraph 2 TFEU:

"[…] on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers."

- Review of the General Court is limited to the legality of the contested act

- Four grounds (but broad interpretation):
  1. Lack of competence (e.g. legal basis, delegations of powers)
  2. Infringement of an essential procedural requirement
     (e.g. requirement to state reasons (Article 296 TFEU), requirement to hear the addressee, requirement to consult)
  3. Infringement of Treaties/ rule of law (e.g. breach of EU law, Charter, fundamental principles)
  4. Misuse of powers

- The General Court can raise on its own motion:
  - Lack of competence
  - Breach of essential procedural requirement

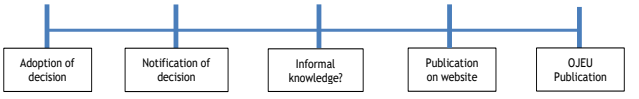
7

6. When to bring an action? (time-limits)

Article 263, sixth paragraph TFEU:

"The 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."

- Two months *(+ ten days on account of distance) (+ 14 days when published in the OJEU)* from:
  - Publication (if applicable); or
  - Notification (if addressee); or
  - Knowledge (subsidiary criterion)



- Court examines also on its own motion

- Calculation of time-limits is key:

–**Check:** start date, end date (*****attention to end date falling on weekends/ official holidays for the Court (not judicial vacations!))

–First calculation of months, then days (weekends, official holidays, judicial vacations are included as part of the calculation)

8

7. How to bring an action (I) - intro

- **Represented by a lawyer**

  Article 19 of the CJEU Statute: Lawyers authorised to practice before courts of EEA countries and University teachers: Irrespective of seniority / ability to appear before highest courts of respective Member State – lawyer cannot represent himself

- **Choice of language**
  - Article 44 et seq of the Rules of Procedure
  - any of the official languages of the EU
  - choice of the client/ lawyer
  - same language throughout the written and oral procedure

  (*but: keep in mind that everything is translated into French for the Court (working language of the Court)– nuances might be lost in translation)

Source: Court of Justice Annual Report 2020 - Judicial Activity

Page 8

9

8. How to bring an action (II) - intro

- **Strict Procedural rules**: CJEU Statute, Rules of procedure, Practice directions

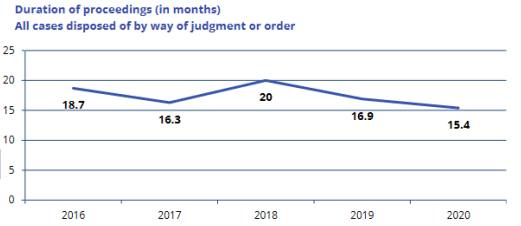
  Everything available on www.curia.europa.eu (Section: *Procedure*) – look out: even rules on numbering of pages and how annexes are presented – case law/ precedent

- **Limited number of pages**
  - 50 pages for direct actions and defence
  - 20/25 pages for other pleadings
  - 40% tolerance according to the Rules
  - Exceptions in cases of complexity

- **Formal documents**: power of attorney, proof of existence in law for legal persons – to be prepared prior to submission

- **Duration** of proceedings: How long does the whole procedure take?
  - almost two years
  - Possibility of damages
  - from excessive length of proceedings

  (*Gascogne* C-138/17 P)



Source: Court of Justice Annual Report 2020 - Judicial Activity / Statistics concerning the judicial activity of the General Court, p. 355

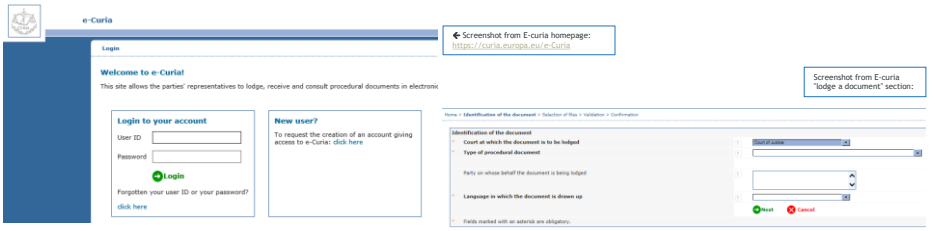
Page 9

10

9. How to bring an action (III) – e-curia

- **E-curia:** application of the Court of Justice of the European Union that enables the representatives of parties in cases brought before the Court of Justice and the General Court, to exchange procedural documents (lodging documents + accepting service) with the Registries by exclusively electronic means.
  - Decision of 11 July 2018:
    As from 1 December 2018, **e-Curia is the only means of exchanging documents** between representatives and the Registry in all proceedings before the General Court

  - everything in electronic form (.pdf format)
  - lawyer requests to set up an account (easy and straightforward) - available in all languages
  - lawyer lodges documents and accepts service via e-curia (also e-mail notification that new document awaits acceptance/ confirmation of lodgement *but: lawyer's responsibility to check account regularly - document deemed to have been served after seven days from e-mail notification)
  - Signatures: electronic signature only - no handwritten signature necessary



11

10. How to bring an action (IV) - content

- **Necessary content of the application:** Article 76 of the Rules of Procedure of the GC

- **Structure of the application:**
  - **First page: Information on applicant and defendant & title of procedural document**
  - **Table of contents**
  - **Introduction - summary:** what is this case about? summarise factual background, underline legal issue
  - **Factual background:** focus on the relevant facts
  - **Admissibility:** always include an admissibility section, even if minimal - if client not the addressee of the contested act, need in this section to justify direct and individual concern and present and vested interest to bring proceedings
  - **Grounds of appeal:** all grounds of appeal/ pleas should be included in the application - new pleas cannot normally be introduced at subsequent stage (Art. 84 of Rules of Procedure) - titles for each ground
  - **Form of order sought:** caution on the wording and what is actually requested by the Court - the Court cannot give something not asked for; include request for costs
  - **Annexes:** include all necessary supporting evidence - delayed submission of evidence in second round of pleadings or oral hearing needs to be justified - no new arguments in the annex
  - **Date** (but e-curia proof of lodgement will suffice)

12

11. How to bring an action (V) – 'technicalities'

- Consult the practice directions and other soft law instruments available on the curia website for up-to-date guidance
- **Annexes:**
  - table of annexes at the end of the submission
  - contested decision as first annex
  - annexes in language of the case (or at least translated extracts - tolerance when in English or French)
  - no need to include case law or EU legislation in annex
  - include a schedule of annexes on the last page of application (attention to the rules on how to prepare the schedule and how to number annexes per pleading)
  - annexes can be rejected if not compliant with the Rules of Procedure
- **Summary for the OJEU publication**

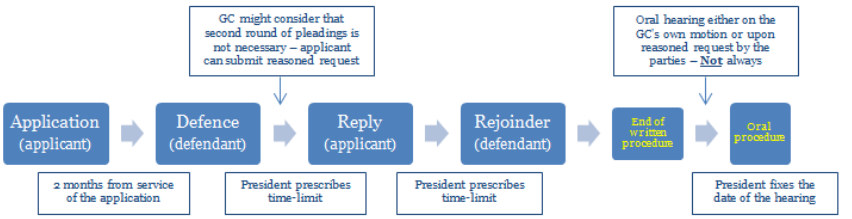
- **Remember**: possibility of **Regularisation** by the Registrar both of application and the annexes (Article 78(6) of Rules of Procedure and Practice Directions) - if not, could be rejected as inadmissible!

13

12. Procedure before the General Court

Written procedure

- Summary notice of action to be published in the OJEU (Art. 79 of the Rules of Procedure)
- The application (and all procedural documents) are served on the defendant by the General Court's Registry
- Timeline of proceedings (possibility to ask for extension to submit a pleading):



- Possibility of intervention (*discussed below*)
- Measures of organisation of procedure or measures of inquiry adopted by the General Court:
  - E.g. questions to the parties; invitation to parties to make written or oral submissions; asking parties to produce information/ documents; oral testimony; commissioning of an expert's report

14

13. Procedure before the General Court

Oral procedure (before the oral hearing)

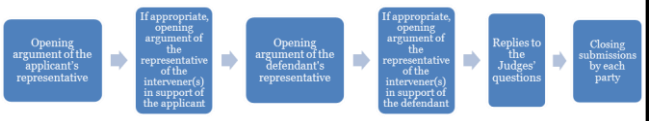
- **Organisation of the hearing** (Articles 106 et seq of the Rules of Procedure):
  - on the General Court's own motion or upon reasoned request by the parties
  - Notice to attend hearing: normally sent to parties at least one month before hearing takes place
  - General Court can invite the parties to focus on specific issues
  - oral pleadings normally 15 minutes per party – time can be extended upon reasoned request
  - inform the General Court of the names of the lawyer(s) that will attend (possibility for more than one lawyer per party to plead/ reply to questions)
  - consideration of Report for the Hearing – check thoroughly for mistakes – gives an indication of the Judge Rapporteur's approach
- Once the hearing is set – **Preparation for the hearing**:
  - preparation of oral pleadings (in the language of the case): simple, short phrases – avoid idioms, remember that everything is translated
  - rehearse so as to remain within the time set by the General Court
  - prepare possible Q&A – be as thorough as possible, questions can be very persistent, both in law and in fact
  - well-ordered file with hard copies of all the main pleadings – laptop is allowed
  - possibility to send the draft oral pleading to the interpreters in advance, to facilitate translation – or hand copy on the same day to be handed to the interpreters

15

14. Procedure before the General Court

Oral procedure (on the day of the hearing)

- **The oral hearing:**
  - necessary to wear robe in order to plead (available at the Court, outside the courtrooms)
  - invited to meet the judges right before the hearing, who may ask the lawyers how long they intend to plead, or invite them to focus on a specific question/ issue
  - The parties are seated as follows, seen from the audience:
    - table on the right: applicant's representative(s);
    - table on the left: defendant's representative(s);
    - representative(s) of the intervener(s) generally seated behind the representative of the party supported by the intervention
  - speak slowly and clearly – note dates and case numbers to facilitate the interpreters and avoid mistakes
  - structure of the hearing:



  - be prepared for multiple questions, important not to evade them – questions probably in French (simultaneous translation is provided)
  - possible to convene with other lawyers/ assistants/ your client before answering questions
  - Registrar draws up minutes of the hearing (very brief) – served upon the parties after the hearing

16

15. Effects of the judgment

Article 264 TFEU:

"If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive. "

- Judgment or Order of the General Court
  - Judgment is binding from the date of delivery
  - Order is binding from the date of its service
  - Notice including date and operative part of judgment/ order is published on the OJEU
- Judgment can only annul the contested act (*ex tunc* and *erga omnes* effect) – cannot make a declaration of law or issue orders, directions or injunctions to Union institutions
  - Exceptionally the General Court can limit the temporal effect of its judgment
- Possibility for partial annulment
- Obligation for the Institutions concerned to comply with judgment (Article 266 TFEU)
- Judgment/ Order of the General Court can be **appealed** before the Court of Justice within 2 months from notification (Article 56 of CJEU Statute).

17

16. Other procedures (I)

- **Intervention** (Articles 142 *et seq.* of Rules of Procedure)
  - Application for leave to intervene by third party in support of one of the main parties
  - Observations by main parties on interest to intervene/ confidentiality
  - Order of the General Court accepting/ rejecting application
  - Statement in Intervention and attendance of oral hearing
  - Time-limits (written/ oral procedure)
- **Appeals**
  - Appeals against judgments of the Civil Service Tribunal (not any longer)
  - How to recognise? → Case T-123/17 **P**
- **Application on taxation of costs**
  - Disputes with regard to the costs
  - How to recognise? → Case 123/17 **DEP**
- Other available procedures (examples): requests for anonymity, request for rectification of judgment

18

17. Other procedures (II)

- **Urgent procedures:**

  (i) Interim measures (Articles 278 & 279 TFEU and Articles 156 *et seq.* of Rules of Procedure)
  - main action is prerequisite – but separate application (at the same time or shortly after main action)
  - conditions to be fulfilled (urgency & "*fumus boni juris*")
  - only granted to maintain the full efficacy of the judgment on substance
  - very short deadlines (even *ex parte*, i.e. before having heard the opposite party!)
  - reasoned Order of the President of the General Court served to the parties
  - How to recognise? → Case T-123/17 **R**

  (ii) Expedited procedure (Articles 151 *et seq.* of Rules of Procedure)
  - separate application (at the same time with main action)
  - condition to be fulfilled: urgency
  - shorter deadlines
  - General Court can also decide on its own motion

19

Thank you
for your attention!

20

Funded by the European Union's Justice Programme (2014-2020).
The content of this publication represents the views of the author only and is his sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

Case study

Litigating European Union Law

BASIC TRAINING FOR LAWYERS IN PRIVATE PRACTICE

By

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Jean Monnet Chair

Director of the European Law Centre

The company Lever, established in Düsseldorf as a company under German law, is active in the fruit import business. The apples it imported from Chile were subject to a countervailing duty imposed by a European Commission regulation published in the Official Journal of the European Union on 2 July 2019.

The company Lever seeks on the one hand the **annulment of** the Commission's regulation and, on the other hand, **compensation for** the damage caused by the regulation due to several mistakes made by the Commission.

It argues that the conclusion, prior to the adoption of the Regulation, of a cooperation agreement between the Community and Chile had created a climate of confidence which made the adoption of unilateral restrictive measures by the EU institutions unlikely.

It also considers that the Commission's regulation did not respect the objectives set out in Article 39 TFEU, such as the respect of "reasonable prices" in supplies to consumers and the general principle of proportionality.

Finally, it argues that it is in a more unfavourable situation than importers of apples which are of the same quality but originate in other countries.

As a lawyer registered at the Milan Bar, you are required to advise the company on the following issues:

Questions:

1. Before which court should these two legal claims, i.e., the claim for annulment and the claim for compensation, be brought?
2. Is the assistance of a lawyer compulsory? Will you be entitled to bring the actions(s) and to plead before the competent court?
3. Will there be two separate actions for each of the claims or one action including both claims?
4. What will be the language of proceedings?
5. What is the deadline for lodging an action or actions?
6. Under what conditions will you be entitled to request the annulment of the Commission's Regulation?
7. What grounds of European Union law can you invoke?
8. What will be the conditions for obtaining compensation for the damage caused by the adoption of the European Commission's regulation?
9. If the court does not grant your claims, under what conditions can you challenge its decision?
10. Will you be able to request the suspension of the operation of the Commission’s Regulation?

Method:

Identify relevant legal issues.

Identify the provisions of the Treaties, the Protocol on the Statute of the Court of Justice of the European Union, and the Rules of Procedure of the competent court which are applicable to the legal issues raised.

Identify the relevant case law of the Court of Justice and the General Court of the European Union.

Propose legally sound and realistic solutions.

Model answers:

1. Insofar as the actions seek to challenge an act of an institution of the European Union, namely a regulation issued by the European Commission, it is the Court of Justice of the European Union which has jurisdiction by virtue of Article 19 TEU and, more specifically, Articles 263 and 268 TFEU, which refer respectively to actions for annulment of acts of the Commission and actions for damages caused by the institutions of the European Union.

   As the Court of Justice of the European Union is composed of several courts under Article 19 TEU, it is necessary to determine precisely which court has jurisdiction to hear these actions. The jurisdiction of the General Court is defined in Article 256 TFEU. The latter has jurisdiction to examine actions brought under Articles 263 and 268 TFEU, except for those actions which the Statute of the Court of Justice of the European Union reserves for the Court of Justice.

   Reference should be made to Article 51 of the Statute, which does not apply to actions under Article 268 TFEU, which means that only the General Court has jurisdiction at first instance for actions for damages. Article 51 of the Statute reserves to the Court of Justice jurisdiction over certain actions for annulment brought by the institutions of the Union and, in certain cases, by the Member States. Actions brought by companies, considered legal persons within the meaning of the TFEU, are never reserved for the Court of Justice, which means that they fall within the jurisdiction of the General Court at first instance. It follows that both actions for annulment and actions for damages fall within the jurisdiction of the General Court of the European Union.

2. The assistance of a lawyer is compulsory for all actions brought before the General Court and the Court of Justice by virtue of Article 19 of the Statute of the Court of Justice of the European Union. The third paragraph of that Article provides that "only a lawyer authorised to practise before a court of a Member State or of another State party to the Agreement on the European Economic Area may represent or assist a party before the Court of Justice", a provision which also applies to the General Court under Article 53 of the Statute. It is not necessary to be a member of the Luxembourg Bar. As a lawyer registered at the Milan Bar, you are in principle, unless you are disbarred because of an ethics violation, entitled to plead before a court of a Member State and therefore entitled to bring the actions envisaged and to plead before the General Court of the European Union.

3. Since the action for annulment and the action for damages have different purposes, two separate actions should be brought. However, it is not impossible to make certain references in the action for damages to the action for annulment insofar as one of the substantive conditions imposed in the action for damages relates to the unlawfulness of the act which caused the damage. However, such a reference cannot fill a gap in the presentation of the pleas in law and arguments in the action for damages, otherwise the latter would be inadmissible.

4. The language of the case is defined by Articles 44 to 49 of the Rules of Procedure of the General Court. In direct actions, including actions for annulment and for damages, the language of the case shall, save where specifically defined and not applicable in the present case, be chosen by the applicant pursuant to Article 45 of the Rules of Procedure. The list of languages which may be chosen is set out in Article 44 of the Rules of Procedure. A lawyer registered at the Milan Bar may choose Italian, which is in principle his usual language, or German, which may be used as the firm was established in Düsseldorf, or any other language referred to in Article 44 of the Rules of Procedure.

5. Actions for annulment and actions for damages have distinct purposes and are subject to different conditions.

   Under Article 263(6) TFEU, actions for annulment must be brought within two months of the publication of the act, of its notification to the applicant or, failing that, of the day on which it came to the applicant's knowledge. As the Regulation in question was published in the OJEU, it is the publication which is decisive for the calculation of the time limit. Reference should be made to Articles 58 to 62 of the Rules of Procedure. Article 59 provides that where the contested act has been published in the OJEU, the time limit is to be calculated from the end of the fourteenth day following the date of that publication. Since the date of publication is 2 July 2019, the period runs from the end of 16 July. To the period of two months must be added a flat-rate period for distance provided for in Article 60 of the Rules of Procedure, which makes a period of two months and ten days from 16 July. The end of the time limit for appeal, according to the method prescribed by Article 58 of the Rules of Procedure, is 26 September 2019. As this is not a Saturday, Sunday or public holiday, the expiry of the period will not be postponed to the end of the following day.

   Actions for damages are not subject to such time limits. Articles 268 and 340(2) TFEU make no mention of time limits for actions. Reference should be made to Article 46 of the Statute of the Court of Justice of the European Union, which provides that actions against

the European Union in matters of non-contractual liability shall be barred after five years from the occurrence of the event giving rise to them. It will then be necessary to determine precisely the event giving rise to the damage which could, in the case of damage attributable to a regulation, be the entry into force of the regulation. The limitation period may be interrupted either by the application made to the General Court or by an application that the victim may make to the competent institution, in this case the European Commission, in which case the application must be made within the two-month period provided for in Article 263 TFEU, plus the ten-day time limit for distance.

6. The conditions for admissibility of an action for annulment are laid down in Article 263 TFEU, the Statute of the Court of Justice of the European Union and the relevant articles of the Rules of Procedure of the General Court.

   In the case of an action brought by a company, the conditions laid down in the fourth paragraph of Article 263 TFEU must be complied with. Since the contested act is not addressed to the company, the company will have to establish a priori that it is directly and individually concerned by the regulation, unless the latter does not contain implementing measures, in which case it would be sufficient for it to establish that it is directly concerned by the regulation. A regulatory act is defined as any act of general application except for legislative acts (CJEU, Grand Chamber, 3 October 2013, Case C-583/11 P, *Inuit Tapiriit Kanatami and a. v European Parliament and Council*, para. 60).

   To assess whether a regulatory act contains implementing measures, it is necessary to focus on the situation of the person invoking the right to bring an action under Article 263 TFEU *(*CJEU, Grand Chamber, 19 December 2013, Case C-274/12 P, *Telefónica v Commission*, para. 30*)*. It is therefore irrelevant to argue that the contested act involves enforcement measures in respect of other litigants *(*CJEU, Grand Chamber, 28 April 2015, Case C-456/13 P, *T & L Sugars and Sidul Açúcares v Commission*, para. 32). Furthermore, in the event of an application for partial annulment, only the implementing measures contained in the parts of the contested act must be taken into consideration (CJEU, 10 December 2015, Case C-553/14 P, *Kyocera Mita Europe v Commission*, para. 45).

   It will thus be necessary to know whether the contested regulation contains implementing measures, which is decisive for the fulfilment of the admissibility requirements imposed, it being noted that the requirement of individuality is very difficult to meet.

   It will also be necessary to ensure compliance with the conditions relating to the representation of a lawyer (see point 2 above), the time limit for bringing an action (see point 5 above), and the conditions relating to the content and form of the application

(Articles 72 to 76 of the Rules of Procedure of the General Court), failing which the action may be declared inadmissible by the General Court by way of an order or a judgment.

7. The legal grounds are not listed in Article 263 TFEU, which merely refers in its second paragraph to lack of competence, infringement of essential procedural requirements, infringement of the Treaties or of any rule of law relating to their application and misuse of powers.

   The failure to comply with the objectives set out in Article 39 TFEU, such as the observance of "reasonable prices" in supplies to consumers, relates to a breach of the Treaties which can be invoked as such, insofar as regulations issued by the institutions of the European Union must comply with the obligations imposed by the EU and TFEU Treaties applicable to them. This is the case of a regulation concerning the import of apples, which, according to Annex I to the TFEU, which sets out the products that are subject to the provisions of Articles 39 to 44 of the TFEU relating to agriculture and fisheries, are referred to as 'fruit'.

   Failure to comply with the general principle of proportionality is also a legal ground of appeal in an action for annulment insofar as the Union institutions, and in particular the Commission, are bound by this principle by virtue of established case law.

   The principle of non-discrimination can also be invoked in an action for annulment insofar as the institutions of the Union must not treat identical or comparable situations differently.

   The argument that the conclusion, prior to the adoption of the Regulation, of a cooperation agreement between the Community and Chile gave rise to a climate of confidence which made it unlikely that the institutions of the European Union would adopt unilateral restrictive measures relates to another general principle of law which protects the legitimate expectations of individuals. Such a general principle of law is, however, not likely to succeed in an action for annulment, which is an action of an objective nature. It may be invoked in an action of a subjective nature, such as an action for damages.

8. An action for damages caused by an EU institution is subject to a set of conditions defined by the case law of the Court of Justice of the European Union.

   In addition to the conditions of admissibility relating to the content and form of the application (Articles 72 to 76 of the Rules of Procedure of the General Court), the provision of legal representation (see No. 2 above) and the time-limit for lodging an appeal (see No. 5 above), the substantive conditions are very demanding.

The substantive conditions correspond to the serious breach of Union law, the damage and the causal link, these three conditions being cumulative (CJEU, 18 April 2013, Case C-103/11 P, *Commission v Systran and Systran Luxembourg*, para. 60). If one of these conditions is missing, the action must be dismissed as a whole (Trib. EU, 18 September 2014, Case T-317/12, *Holcim (Romania) v Commission*, para. 86, confirmed by CJEU, 7 April 2016, Case C-556/14, *Holcim (Romania) v Commission*).

Thus, it must be established that there has been a serious breach of a rule of law intended to confer rights on individuals (see e.g., CJEU, 19 April 2012, Case C-221/10 P, *Artegodan v. Commission*, para. 80). The principle of proportionality and the principle of legitimate expectations meet these requirements according to established case law. The same applies to the principle of non-discrimination, which has been recognised as such in case law.

If the institution in question has only a considerably reduced or even non-existent margin of appreciation, the mere infringement of EU law may be sufficient to establish a sufficiently serious breach of EU law (ECJ, 4 July 2000, Case C-352/98 P, *Bergaderm and Goupil v. Commission*). If, on the other hand, it appears that the institution had a wide margin of discretion, it will be necessary to establish a clear and serious breach of the limits on its discretion *(ibid.)*, which can be established in certain cases (see e.g., General Court, 16 September 2013, Case T-333/10, *ATC et a. v Commission*, paras. 64-133). It would therefore be appropriate to study precisely the text of the adopted regulation and the texts on which its adoption was based in order to decide this question relating to the margin of appreciation within which the institution was operating.

The damage must be real and certain as well as assessable. It is up to the claimant to prove both the existence and the extent of the damage he invokes (ECJ, 16 July 2009, Case C-481/07 P, *SELEX Sistemi Integrati v Commission*, ECR 2009, p. I-127, para. 36).

Another condition for the Union to be liable is that the causal link between the harmful act and the damage claimed must be direct (ECJ, Grand Chamber, 16 July 2009, Case C-440/07 P, *Commission v Schneider Electric*, ECR 2009, p. I-6413, paras. 192 and 205). Where the institutions' contribution to the injury is too remote, the link must be considered insufficient (Trib. EU, 26 September 2014, Case T-91/12 and T-280/12, *Flying Holding and a. v Commission*, para. 118). It is up to the applicant to prove the existence of such a causal link *(*Trib. EU, 25 November 2014, Case T-384/11, *Safa Nicu Sepahan v Council*, para. 71, confirmed by CJEU, 30 May 2017, Case C-45/15, *Safa Nicu Sepahan v Council*).

The claimant must therefore satisfy these three conditions to succeed in his claim for compensation.

9. If the General Court does not grant your claims, a challenge to the judgments or orders of the General Court in both the action for annulment and the action for damages may be considered in the form of an appeal to the Court of Justice, pursuant to the second subparagraph of Article 266(1) TFEU.

   Article 56 of the Statute of the Court of Justice of the European Union provides that an appeal may be brought against decisions of the General Court which bring proceedings to an end, as well as against decisions disposing of the substance of the case in part and decisions disposing of a procedural issue concerning a plea of lack of competence or inadmissibility. Such an appeal may be brought by any party which has been unsuccessful in whole or in part in its submissions, but also by interveners other than Member States and the institutions of the Union, provided that the decision directly affects them, it being noted that Member States and the institutions of the Union are not subject to this condition, which means that they may bring an appeal without restriction. Such an appeal may even be lodged, except for civil service cases, by Member States and institutions of the European Union which have not intervened in the dispute before the General Court, which in the latter case corresponds as it were to an appeal in the interests of the law.

   Under Article 56(1) of the Statute of the Court of Justice of the European Union, an appeal must be lodged within two months of the notification of the contested decision of the General Court, to which must be added a flat-rate period of 10 days for distance.

   The appeal is limited to questions of law (Statute of the Court of Justice, Art. 58(1)) and so excludes disputes concerning the assessment of facts by the General Court. The Court of Justice has no jurisdiction to examine the evidence that the General Court has accepted, except in cases of misrepresentation (ECJ, 19 March 2009, Case C-510/06 P, *Archer Daniels Midland v Commission*, ECR 2009, p. I-1843, para. 105. - CJEU, 4 June 2015, Case C-399/13 P, *Stichting Corporate Europe Observatory v Commission*, para. 26), which would have to be evident from the documents in the file to be examined on appeal (CJEU, 29 October 2015, Case C-78/14 P, *Commission v ANKO*, para. 54).

   It will be necessary to put forward pleas in law which relate to one of the three categories of pleas in law provided for (Statute of the Court of Justice, Art. 58, para. 1), it being observed that the Court of Justice is not very formalistic as regards this classification: lack of jurisdiction of the General Court, procedural irregularities before the General Court which adversely affect the interests of the appellant, which includes the reasoning of the judgments of the General Court (CJEU, 19 Sept. 2019, Case C-358/18 P, *Poland v Commission*, paras. 74-77), and infringements of Union law.

10. Since appeals against acts of the institutions of the European Union do not have suspensive effect, it may be worthwhile for the applicant to request the suspension of the operation, as provided for in Article 278 TFEU. The granting of such a measure, which in principle falls within the competence of the president of the court handling the case, in this case the President of the General Court, is part of an interim procedure which is subject to precise and demanding conditions.

    The application for suspension is subject to the classic conditions of admissibility relating to the content and form of the application and the provision of legal representation. The application is only admissible if the applicant has challenged the regulation whose suspension is sought before the General Court of the European Union (Art. 156 EU Court Regulation). The applicant may not, as a rule, formulate submissions in a broader manner than that in which it formulates submissions in the main case (Trib. EU, Order, 31 January 2020, Case T-627/19 R, *Schindler et a. v Commission*, para. 25). The application for interim measures will be declared inadmissible when it is grafted onto a main action which appears to be manifestly inadmissible (EU General Court, 12 February 2020, Case T-627/19 R, *Schindler et a. v. Commission*, para. 25). EU, Order, 12 February 2020, Case T-326/19 R, *Gerber v European Parliament and Council*, para. 38). The main application must have been lodged beforehand or at the same time, otherwise the application for interim measures, which remains ancillary to the main application, is inadmissible.

    Several cumulative conditions are imposed for the granting of such interim measures. It must be established that there is a prima facie case for granting them in fact and in law (*fumus boni juris*); the measures must be urgent in the sense that it is necessary, to avoid serious and irreparable damage to the applicant's interests, that they be enacted and take effect before the main proceedings are decided. The court hearing the application for interim relief shall also, where appropriate, balance the interests at stake. The court hearing the application for interim relief has a broad discretion and is free to determine, in the light of the particular circumstances of the case, the manner in which these various conditions are to be verified and the order in which this examination is to be carried out (ECJ, order. 3 April 2007, Case C-459/06 P(R), *Vischim v Commission*, para. 25).

    Under the *fumus boni juris,* it *must* be established that the pleas in law are not completely unfounded. This requirement is met if there is a significant legal controversy whose solution is not immediately obvious, so that the action is not prima facie unfounded (Trib. EU, Order, 15 October 2015, Case T-482/15 R, *Ahrend Furniture v Commission*, para. 29), which could be the case here.

For the purposes of urgency, it must be established that there is a risk of serious and irreparable damage to the applicant's interests, irrespective of other factors (ECJ, 13 January 2009, Order C-512/07 P(R) and C-15/08 P(R), *Occhetto and PE v Donnici*, ECR 2009, p. I-1, para. 58). It is up to the party claiming such damage to establish its existence. In the absence of absolute certainty that the damage will occur, the claimant remains obliged to prove the facts which are supposed to give rise to the prospect of such damage (ECJ, judgment of 20 June 2003, case C-156/03 P-R, *Laboratoires Servier v Commission*, ECR 2003, p. I-6575, para. 36). Purely pecuniary damage cannot, in principle, be regarded as irreparable or even difficult to repair, as long as it can be the subject of subsequent financial compensation (ECJ, Order of 24 March 2009, Case C-60/08 P(R), *Cheminova and others v Commission*, ECR 2009, p. I-43, para. 63).

All in all, the chances of obtaining a suspension of the operation of an EU regulation, which by its nature is applicable to multiple economic operators, are very low.

Reference for a preliminary ruling: practical advice for lawyers

Academy of European Law (ERA)
Seminar *Litigating EU Law*
Trier, 6 May 2022

Nicolas Cariat

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1

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2

Statement of purpose

Very concise overview, focusing on key issues and practical aspects

To go further:

- References to case-law
- References to *Background Documentation* (including Rules of Procedures and several documents issued by the Court of Justice)
- K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law,* Oxford, O.U.P., 2015 (1st ed.)
- M. Broger and N. Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice,* Oxford, O.U.P., 2021 (3rd ed.)
- N. Cariat et J.T. Nowak, « 'Passez par la case Luxembourg !' : l'obligation de renvoi préjudiciel à la Cour de justice de l'Union européenne », *Journal des Tribunaux*, 2022, n°11, pp. 165-170

3

Introduction

Judicial proceedings initiated before the Court of justice relate to direct actions brought against the institutions, bodies or offices of the EU (especially Arts 263, 265, 270, 272 TFEU) or against the Member States (Arts 258 and 259 TFEU)

Virtually all other disputes involving EU law or related to the application of EU law by the MS or within the MS are to be dealt with by national judges

Decentralised judicial enforcement of EU law: every national judge is likely and bound to apply EU law

Preliminary reference mechanism designed to allow every national judge to refer any relevant question to the Court of justice

4

Introduction

Court of Justice, Opinion of 18 December 2014, *Accession of the EU to the ECHR*, 2/13

"174. In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law.

175. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law (Opinion 1/09, EU:C:2011:123, paragraph 68 and the case-law cited).

*176. In particular, the judicial system as thus conceived has as its **keystone** the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law (see, to that effect, judgment in van Gend & Loos, EU:C:1963:1, p. 12), thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 67 and 83)".*

5

5

Introduction

Dialogue provided for by Art. 267 TFEU (and by Art. 19, §3, b) TEU) between the **Court of justice** (NOT the Tribunal) …

… and any **court or tribunal** of a **MS**…

> No international court (ECtHR, ICJ, … except the Benelux Court (f.i. C-337/95)), no arbitral tribunal (f.i. C-555/13, C-284/16), and only national bodies meeting the cumulative criteria set out by the Court of justice (f.i. 61/65, C-222/13, C-274/14)

… where necessary for the **effective resolution** of an **actual dispute** (no advisory opinion, no fictitious dispute, only pending cases)

6

6

Introduction

Art. 267, §1 TFEU

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;

Distinction made between

- Preliminary rulings related to the **interpretation** of EU law (primary and secondary)
- Preliminary rulings related to the **validity** of secondary EU law norms, in light of higher-ranked EU law norms (especially the treaties and general principles)

7

Introduction

Art. 267, §§ 2-3 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 to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

Distinction between courts and tribunales allowed or bound to refer to the Court of justice

8

Introduction

Questions related to the interpretation of EU law

Every national judge *may* in *any* instance refer a question to the Court of justice

"Last instance" national courts and tribunals are in principle bound to refer to the Court of justice, unless (i) the question is irrelevant ; or (ii) the EU law provision has already been interpreted by the Court of justice ; or (iii) no reasonable doubt exists as to the correct interpretation of EU law ("*acte clair"*)

Consorzio Italian Management (C-561/19, 6 October 2021) : new leading case, continuity with *CILFIT (*283/81)

Introduction

Art. 267 TFEU, §§ 2-3

Excessive reliance on the "*acte clair"* doctrine?

A detailed analysis of the case-law of supreme national courts by the Court of justice (May 2019, in French, with a summary in English)

Recent case-law refining the notion of *"acte clair"* (C-160/14, C-561/19)

Introduction

Questions related to the validity of EU law

National courts and tribunals have no jurisdiction to declare that acts of EU secondary law are invalid (314/85). Only the Court of justice.

"Ordinary" national courts and tribunals: based on their own preliminary assessment of the validity of an EU secondary law norm, they are allowed (i) to conclude that the EU law measure is valid (and therefore not to refer the case to the Court of justice) or (ii) to make a request for a preliminary ruling to the Court of justice

"Last instance" national courts and tribunals: bound to refer unless (i) question is not relevant or (ii) no reasonable doubt exists as to the validity of the act

11

Reasons why a party may request the national judge to refer a question to the Court of Justice

1/ Effective wish that a reference is made to the Court of justice, to allow the Court to rule on the interpretation or the validity of EU law

A situation is solely governed by an EU law norm

A situation is mainly governed by national norms, the latter being potentially in breach of EU Law

The validity of an EU secondary law norm is dubious or challenged

An action for damages is brought against a public body for breach of EU law

12

Reasons why a party may request the national judge to refer a question to the Court of Justice

2/ Effective wish that a reference is made to the Court of justice, for strategic purposes or as a stalling tactic

3/ Strategic allusion to such preliminary reference before the national judge to reinforce one's argument (and/or lead the national judge to rule on the dispute on his own), without any effective wish for a reference to be made

…

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Preliminary rulings procedure in practice

	Newly enrolled proceedings CJEU	Preliminary rulings references
2015	713	436
2016	692	470
2017	739	533
2018	849	568
2019	966	641
2020	735	556

Very limited number of preliminary rulings references

Another figure: a significant proportion of enrolled cases related to preliminary rulings are rejected on grounds of inadmissibility by the Court of justice (due to non-compliance with the substantial and formal conditions set out by the Rules of procedure, as well as practice and case-law of the Court of justice)

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Preliminary rulings procedure in practice

Explanatory factors

1/ EU law is irrelevant for the vast majority of cases dealt with by national judges

2/ EU law is neither invoked by the parties, neither applied by national judges in all instances where it may be relevant

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Preliminary rulings procedure in practice

Explanatory factors

3/ No request for a preliminary ruling is submitted to the Court of justice in most instances where EU law is invoked by the parties and/or is applied by the national judges

- The necessity of a preliminary ruling is low or inexistent
- The parties who could benefit from a preliminary ruling knowingly refrain to submit a request to the national judge
- The parties who could benefit from a preliminary ruling fail to convince the national judge of the necessity to revert a question to the Court of justice and/or another party convince the national judge of the absence of such necessity

4/ Many requests for a preliminary ruling are ill-drafted and/or ill-documented and/or based on misconceptions about EU law and its relevance for the particular dispute at stake

16

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Preliminary rulings procedure in practice

Relevant roles for a lawyer before the national judge

1/ Decision of the national judge to submit a request to the Court of justice: convince the national judge (i) of the (ir)relevance of EU law and (ii) of the necessity or the absence of necessity to refer questions

2/ Content and modalities of the request for a preliminary ruling: serve one client's interests and contribute to proper administration of justice by providing the national judge with all elements necessary to draft a relevant question for the solution of the dispute, with due regard to the admissibility conditions applicable before the Court of justice

17

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Convince the judge

Convince a national judge

- Dialogue between judges, triggered by (and only by) the national judge
- Inform the national judge (as to the relevance of EU law and the specific issue at stake, as to the necessity of a preliminary reference, as to the specifics of the procedural rules) in order to shape its decision
- Taking into account the « sensitivity » or « culture » of the national judge regarding preliminary ruling procedures (Disparities between MS, disparities within any MS, track-record of the national tribunal or court, availability of domestic remedies against the decision of the national tribunal or Court,…) and the nature of the national dispute (summary procedures, interim relief, …)

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Convince the judge

Convince a national judge to submit a request for a preliminary ruling

Convince the national judge that (i) an actual and specific issue of EU law arises and (ii) that a preliminary ruling is necessary: *« An answer by the Court of justice concerning the interpretation of EU law and/the validity of EU law is **necessary** to rule on the case »*

Additional arguments:

- No relevant precedent in the case-law of the Court of justice, so that the issue should be decided by the Court of justice
- The national judge is a « last instance » national judge and is therefore in principle bound to refer the question to the Court of justice

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Convince the judge

Convince a national judge to submit a request for a preliminary ruling

Remind the national judge that it shall provide motives to justify any refusal to refer a question to the Court of justice, under article 47 CFREU (C-561/19), under article 6 ECHR (ECtHR, *Ullens De Schooten and Rezabek/Belgium* of 20 September 2011; *Sanofi Pasteur/France* of 13 February 2020), and/or under national law.

Remind any last instance national judge that any illegal refusal to refer a question to the Court of justice might result in (i) liability proceedings against the MS for breach of EU law (C-160/14) or in (ii) infringement procedures against the MS for breach of EU law (C-416/17)

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Convince the judge

Convince a national judge <u>not to submit</u> a request for a preliminary ruling

*« A answer by the Court of justice as to the interpretation of EU law and/the validity of EU law is **not necessary** to resolve the dispute »*

The action and/or a plea is inadmissible under national procedural rules

EU law or a specific EU law provision in not applicable to/relevant for the national situation at stake

There is no reasonable doubt concerning the way EU law is to be interpreted and applied in the particular case, so that the national judge may or must resolve the dispute without referring to the Court of justice

EU law (even if interpreted and applied as suggested by another party) is not likely to have a decisive impact on the outcome of the national dispute (especially where the said dispute may be decided on another grounds - related to admissibility or merits)

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Convince the judge

Convince a national judge <u>not to submit</u> a request for a preliminary ruling

Additional arguments:

- The national judge is not a last instance court or tribunal under EU law, and is therefore not bound to submit a request for a preliminary ruling under EU law
- Potential duration of the proceedings before the Court of justice. Mention the average duration of a PR procedure (15-16 months) and argue that the 2 « fast-track » procedures are unlikely to be relevant in the particular case (with references to annual reports of the Court of justice and relevant case-law) (+ *« Imcompatible with the nature of the national proceedings »* ?; *« stalling tactics »* ?)

22

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Assist the judge (if relevant)

Content and modalities of the request for a preliminary ruling

Context (I): Formal and substantial requirements – *Rules of procedures*

> *"Article 94 Content of the request for a preliminary ruling*
>
> *In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:*
>
> *(a) a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;*
>
> *(b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;*
>
> *(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings".*

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Assist the judge (if relevant)

Content and modalities of the request for a preliminary ruling

Context (II) : Formal and substantial requirements – *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*

- **Subject matter of the request**: the interpretation or validity of EU law, not the interpretation of national law or issues of fact raised in the main proceedings
- **Applicability of EU law**: the request shall set out all the relevant matters of fact and of law that have prompted the national judge to consider that any provisions of EU law may be applicable to the case

24

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Assist the judge (if relevant)

Content and modalities of the request for a preliminary ruling

- **Necessity of an answer by the Court of justice to rule on the national dispute**: the request shall set out all the relevant matters of fact and of law that have prompted the national judge to consider that an answer to the suggested questions is necessary or useful for the solution of the domestic dispute
- **Form and content of the request**: simple, clear and precise. Preferably around 10 pages to outline the legal and factual context of a request for a preliminary ruling and the grounds for making the reference to the Court
- **Additional possible elements**: overview of the arguments of the parties; national judge's own view as to the answer to be provided by the Court; overview on the grounds likely to justify the application of a "fast-track procedure", case file,…

Assist the judge (if relevant)

Content and modalities of the request for a preliminary ruling

Context (III) : significant proportion of requests for PR are rejected by the Court of justice on grounds of inadmissability

f.i. C-508/16, C-321/17, C-569/19, C-520/19, C-368/19

Assist the judge (if relevant)

Drafting/crafting of the questions: primary responsability of the national judge, but prominent role as a lawyer

Link with the necessity to convince the national judge

Make sure (if relevant) that the questions are relevant and useful: they must be carefully and properly drafted, (i) to meet the admissibility requirements, (ii) to properly delineate the issues to be dealt with and (iii) to influence the reasoning of the Court

Assist the judge (if relevant)

Compliance with admissibility/formal requirements: primary responsability of the national judge, less immediate influence for lawyers. But room (if relevant) to contribute to the proper administration of justice

Refer to the *« Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings»* and attach them to the case-file

Draw the attention of the national judge to the conditions governing the admissability of requests for preliminary rulings (with references to the Rules of procedure, the Recommandations (…) and/or case-law)

Lodge a written statement before the national judge including all the elements necessary to fulfill the substantial and formal conditions for admissability

Provide the national tribunal or court with a PR « form » (and fill it)

Expedited procedure and urgent preliminary ruling

Expedited preliminary ruling procedure (Art. 105 RP)

Scope and relevance: *"where the nature of the case requires that it be dealt with within a short time"* (casuistic and restrictive case-law, not limited to any policy area). 2014-2018: application of the expedited preliminary ruling procedure granted 20 times and rejected 83 times – See Annual reports of the Court of Justice and Factsheet issued in 2019 by the Court of justice)

At the request of the referring court or tribunal (justification requested in the submission for a preliminary ruling, see §§ 34-39 of the *Recommandations …*) or, exceptionally, of his own motion, by the President of the Court. Decision to be taken by the President of the Court

Effects: (i) immediate fixation of the date for the hearing and of the date for the written submissions (min 15 days but prior to the hearing) ; (ii) the President may request the parties to restrict the matters addressed in their statement of case or written observations to the essential points of law; (iii) the Court of justice rules after hearing the Advocate General

Duration: 2,2 months in 2018 (<> 16 months for "regular" PR)

29

29

Expedited procedure and urgent preliminary ruling

Urgent preliminary ruling (Art. 107 RP)

Scope and relevance: PR related to Title V of Part III TFEU (Area of freedom, security and justice). Between 2014-2018: application of UPR was granted 34 times and rejected 29 times – See Annual reports of the Court of Justice and Factsheet issued in 2019 by the Court of justice)

At the request of the referring court or tribunal (justification requested in the submission for a preliminary ruling, see §§ 34-39 of the *Recommandations …*), or, exceptionally, of his own motion, by the designated Chamber. Decision to be taken by the designated Chamber

Effects: (i) immediate service of the questions and the decision of the Court to the parties; (ii) immediate fixation of the date for the hearing; (iii) the written part of the procedure may be omitted in cases of extreme urgency

Duration: 3,1 months in 2018 (<> 16 months for "regular" PR)

30

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Written phase of the procedure before the Court of justice

See *Practice directions to parties concerning cases brought before the Court*

Professional qualification. Any person empowered to represent a party before the national court or tribunal may also represent him before the Court of Justice. Power of attorney

E-Curia. Use of *E-Curia* platform currently remains optional before the Court of Justice (<> mandatory before the General Court)

Language of the proceedings: language for the written and oral phase is the one applicable before the national tribunal or court (art. 37, §3 RP)

- Use of another language may be authorised by the Court of justice for the oral part of the proceedings (at the duly substantiated request of one parties in the main proceedings – Art. 37 §3 RP)
- Any MS or third-country may use another language for itself in case of an intervention (Art. 37 §§ 4-5-6 RP)

31

31

Written phase of the procedure before the Court of justice

Anonimity shall be granted by the Court of justice where (i) such anonymity was granted by the referring national tribunal or court or (ii) at the request of the referring court or tribunal, of a party to the main proceedings or of its own motion (Art. 95 RP – See also §§ 21-22 of the *Recommendations* and §8 of the *Practice directions*)

Content and format of the written submissions (see §11 + §§ 34-35 of the *Practice Directions)* : clear and comprehensive but (i) should not exceed 20 pages; (ii) not necessary to replicate the factual and legal background mentioned in the documents submitted by the national judge; (iii) "Rules" as to fonts, size fonts, spacing,…

Practical issues to keep in mind: (i) written submissions to be submitted within 2 months from service of the request for a preliminary ruling; (ii) only one written submission and no right or mean to answer in writing to the submission of other parties; (iii) relevant to suggest an answer to the questions; (iv) necessity to request an oral hearing (based on *"on a real assessment of the benefit of a hearing to the party"* – See §46 *Practice directions* – Decision of the Court, no appeal possible)

32

32

Oral phase of the procedure before the Court of justice

See *Practice directions to parties concerning cases brought before the Court* and *Advice to counsel appearing before the Court*

Oral submissions: (i) only the decisive points for the purposes of the Court's decision must be brought to its attention; (ii) duration (as a general rule): 15 minutes for each party; (iii) only one person allowed to present oral arguments (as a general rule); (iv) A set of guidelines with a very practical focus, in order to allow simultaneous interpretation

Questions by the Court if deemed appropriate by the Court

Replies by the parties (*re* oral submissions and/or Q/A) if deemed appropriate by them (max 5 minutes each)

Closing of the oral phase, which may only be reopened under particular circumstances (Art. 83 RP)

33

Preliminary ruling procedure : case study

Academy of European Law (ERA)
Seminar *Litigating EU Law*
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1

Statement of purpose

Mastering the art of drafting / crafting relevant and useful questions to be referred to the CJEU

2

Introduction

Why is proper wording crucial ?

- Convince the national judge that a genuine issue of EU law arises and that it should be reffered to the CJEU (<> Refusal to refer, inadmissibility of the request to refer)
- Allow the CJEU to clearly identify and understand the issue (<> Inadmissibility)
- Properly delineate and comprehensively cover the issue to be dealt with (<> Risk not to obtain the expected result, Risk not to obtain a workable result, Risk of an unexpected adverse outcome)
- Influence the reasoning of the CJEU

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Questions relating to interpretation of EU law

Golden rule 1 : do not draft the reference as a question relating to the interpretation of national law or the compatibility of national law with EU law

" Must [national statute] be interpreted as in breach of Art. 45 TFEU? "

" Is [national statute] compatible with 45 TFEU ? "

" Does [national statute] breach Art. 45 TFEU ? "

Do mention EU law first : *"Must Art. 45 TFEU be interpreted as precluding national legislation, such as that at issue in the main proceedings [XXX], which [imposes, forbids, allows]…"*

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Questions relating to interpretation of EU law

Golden rule 2: do not draft excessively vague/unspecific questions

> *"Is it compatible with EU law to take the view that the award of compensation for non-material damage presupposes the existence of a consequence of the infringement of at least some weight that goes beyond the upset caused by that infringement?"* (C-300/21)

> *"Are Articles 45 and 101 TFEU to be interpreted as precluding the application of the rules on the inclusion on the match sheet and the fielding of locally trained players, as formalised by Articles P335.11 and P.1422 of the URBSFA's federal regulation and reproduced in Articles B4.1[12] of Title 4 and B6.109 of Title 6 of the new URBSFA regulation?"* (C-680/21)

Be specific concerning (i) the identification of the potentially-breached EU law norms, (ii) the norms potentially in breach of EU law and (iii) the specificities of the alleged incompatibility

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Questions relating to interpretation of EU law

Golden rule 3: refer to EU law in its globality in order not to excessively restrict the scope of enquiry

> *"Must EU law, and in particular Art. 45 TFEU be interpreted as precluding national legislation, such as that at issue in the main proceedings [XXX], which [imposes, forbids, allows]…"*

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Questions relating to interpretation of EU law

Golden rule 4: wording is crucial, whether <u>or not</u> you requested the matter to be referred to the CJEU

Short, unspecific, oriented question:

> *"May Article 1, 6° and Article 2 of Directive [2009/81/EC] be interpreted as allowing a boat designed and used by the Belgian Federal Police to be classified as military equipment solely because it contains armour plates? "*

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Questions relating to interpretation of EU law

Specific, detailed, non-oriented questions

> *"(1) Do metal armor plates that comply with the requirements [...] constitute "armor plates" [...] within the meaning of the Common Military List of the European Union adopted by the Council on 6 March 2017 (O.J. C 97 of 28 March 2017), [...]?*
>
> *(2) Do the said metal armor plates that comply with the requirements of class FB 4 of the European standard EN1522/EN1523 constitute, as a result, "military equipment" within the meaning of Article 1, 6°, of Directive 2009/81/EC [...]?*
>
> *(3) Is Article 3(1) of Directive 2009/81/EC [...], read alone or in conjunction with Article 16(4) of Directive 2014/24 [...], to be interpreted as precluding a contract the subject-matter of which includes such armour plates as objectively inseparable components of river patrol vessels from being awarded in accordance with the procurement rules of Directive 2009/81/EC [...] ?*
>
> *(4) Are the answers to the above questions different, if at all, in view of the fact that the patrol boats which are the subject of the contract are not intended for the armed forces but for the Federal Police for river patrol operations?"*

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Questions relating to interpretation of EU law

Suggested template for every question relating to the « compatibility of a national norm » with EU law:

1. Identification of the potentially-breached EU law norms	"Must EU law, and in particular [Treaty, Regulation, Directive] [read alone or in conjunction with XXX] be interpreted as precluding…
2. The norms potentially in breach of EU law	… national [legislation, norm, case law, administrative practice] such as that at issue in the main proceedings [XXX] …
3. The specific depiction of the alleged incompatibility between (1) and (2)	which [imposes, forbids, allows] [YYY] and therefore has the effect of [contradicting, breaching, sundermining the effectiveness] of [provision, case law…] "

9

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Questions relating to interpretation of EU law

Possibility to interconnect questions, with variants and/or hierarchies (f.i. C-142/18)

(1) Must the definition of an electronic communications service laid down in [Article 2(c) of the Framework Directive] be understood to mean that (…) ?

(2) If the answer to Question 1 is yes, does the answer remain the same if account is taken of the fact that the software functionality which makes it possible to make voice calls is merely a feature of the software, which can be used without that feature?

(3) If the answer to Questions 1 and 2 is yes, does the answer to Question 1 remain the same if account is taken of the fact that the service provider provides in its general terms that it does not accept any responsibility to the end-user for the conveyance of signals?

(4) If the answer to Questions 1, 2 and 3 is yes, does the answer to Question 1 remain the same if account is taken of the fact that the service provided also satisfies the definition of "information society service"?'

10

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Questions relating to validity of EU law

Golden rules

1) Be specific as to the identification of the EU norms of which the validity is challenged

2) Be specific as to the identification of the EU norms which are alledgedly violated, but keep an open wording

3) If possible, briefly outline the potential motives for incompatibility between (2) and (1)

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Questions relating to validity of EU law

Example 1: " Is Article XXX of [Regulation, Directive, Decision,...] compatible [with Union law/with the Treaties] and in particular with [general principle principle/ Article X of the Charter]? "

Example 2: Does Article 7(4a) of Directive 91/477/EEC, read in conjunction with points 6 to 9 of category A of Part II of Annex 1 to that directive, infringe Articles 17(1), 20 and 21 of the Charter of Fundamental Rights of the European Union and the principle of the protection of legitimate expectations in that it does not allow Member States to provide for transitional arrangements for firearms covered by category A.9 which were lawfully acquired and registered before 13 June 2017, whereas it allows them to provide for transitional arrangements for firearms covered by categories A.6 to A.8 which were lawfully acquired and registered before 13 June 2017?

Example 3: 'Is Article 14(4) and (6) of [Directive 2011/95] invalid on the grounds that it infringes Article 18 of [the Charter], Article 78(1) [TFEU] and the general principles of EU law under Article 6(3) [TEU]?'

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Questions relating to validity of EU law

Possibility to interconnect the questions, with variants and/or hierarchies (f.i. C-236/09)

"1. Is Article 5(2) of Directive 2004/113 … compatible with Article 6(2) [EU] and, more specifically, with the principle of equality and non-discrimination guaranteed by that provision?

2. If the answer to the first question is negative, is Article 5(2) of the Directive also incompatible with Article 6(2) [EU] if its application is restricted to life assurance contracts?"

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Possibility to combine questions on interpretation and on validity

Validity / Interpretation (f.i. C-93/09)

"1. Are point 8b of Article 42(1) and Article 44a of Council Regulation (EC) No 1290/2005 (…) invalid?

2. Is Commission Regulation (EC) No 259/2008 (…)

(a) invalid, or

(b) valid by reason only of the fact that Directive 2006/24/EC (…) is invalid?

If the provisions mentioned in the first and second questions are valid:

3. Must the second indent of Article 18(2) of Directive 95/46/EC (…) be interpreted"

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Possibility to combine questions on interpretation and on validity

Interpretation/validity (f.i. C-399/11)

"1. Must Article 4a(1) of Framework Decision 2002/584/JHA (…) be interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant?

2. In the event of the first question being answered in the affirmative, is Article 4a(1) of Framework Decision 2002/584/JHA compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter of Fundamental Rights of the European Union, and from the rights of defence guaranteed under Article 48(2) of the Charter?"

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Exercise 1

A new Belgian statute foresees that properties may only be advertised and sold by accredited real estate agents, *i.e.* holders of a specific authorization. The said specific authorization is delivered only after a 2 year-training session, for a cost of 8.000 EUR

You act as an attorney for a Spanish national, authorized to work as an licensed real estate broker in Spain but who recently move to Brussels for personal reasons. You lodge an action for annulment of the statute before the Constitutional court

You request the Court to refer questions to the CJEU

16

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Exercise 1

Your contention (to be elaborated) is that the new statute may infringe

(i) Article 49 TFEU (Right of establishment) and 56 TFEU (Right to provide services) since it prevents accredited real agents from other countries to operate in Belgium without a Belgian license

(ii) Art. 9, § 1 (a), (b) (c) and or 10, §2 ,of the Services Directive, because the modalities of the authorization scheme (duration and cost of the training)

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Exercise 1

You wonder if other EU norms might be relevant to establish that the Belgian statute breaches EU law.

You also want the CJEU to clarify the consequences to be drawn in the national proceedings if the Belgian statute is found incompatible with EU law (annulment? EU law set aside? Action for damages?…) . Do these norms enjoy direct effect?

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Exercise 2

Directive 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime allows / compels Member States to collect PNR (Passengers name record)

The list of data items to be collected is listed under Annex I

Art 1, §2, of Directive 2016/681 holds that: *"2. PNR data collected in accordance with this Directive may be processed only for the purposes of preventing, detecting, investigating and prosecuting terrorist offences and serious crime, as provided for in points (a), (b) and (c) of Article 6(2)."*

19

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Exercise 2

A new Belgian statute foresees

(i) additional information to be collected under PNR-regime (beyond the list under Annex I)

(ii) that the data may also be used and processed by the State to monitor and cap the annual flight mileage of any natural person residing in Belgium (restrictions on flight travel being considered as a key solution to drastically reduce individuals' carbon/environmental footprint)

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Exercise 2

You act as an attorney for private persons and Privacy NGOs. You lodge an action for annulment of the statute before the Constitutional court

You request the Court to refer questions to the CJEU

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Exercise 2

You goal is to establish that the Belgian statute breaches EU law, in one way or another

You want the CJEU to rule at least on the following points:

- Is the list of data items under Annex 1 of Directive 2016/681 exhaustive ?
- Does the purpose for processing identified under Art. 1, §2 of Directive 2016/681 rule out any other legitimate use of the PNR data?
- Therefore, does Directive 2016/681 itself prohibit the Belgian Statute? Does the Belgian Statute (or at at least of of its two core elements) infringe the Said directive?
- Even if the Directive itself does not prohibit such statute, does it infringe other EU law norms, including for instance Articles 7 and 8 of the Charter, the GDPR,…

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