

# Speakers' Contributions

## LITIGATING EUROPEAN UNION LAW

### SEMINAR FOR LAWYERS IN PRIVATE PRACTICE



422DT33

Trier, 7-9 September 2022



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# The enforcement mechanisms of EU law and the relationship between EU and national law – supremacy, direct and indirect effect

Richard Himmer,  
Legal secretary,  
General Court of the EU

7 September 2022



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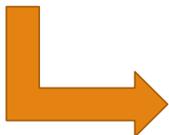
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## Outline

Supremacy, Primacy, Precedence

Direct vs. indirect effect



Enforcement

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## Primacy (principles)

- ECJ, Costa/ENEL, 6/64

„By contrast with ordinary international treaties, the EEC Treaty has created its **own legal system** which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.”

„By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity (...), the Member States have limited their sovereign rights and have thus created a **body of law which binds both their nationals and themselves.**“

„[...] the law stemming from the **Treaty [...] could not [...] be overridden by domestic legal provisions**, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.“

- Declaration number 17 to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon (13 December 2007)

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## Primacy (effects)

- Member States law is not void (not a problem of constitutionality)
- ECJ, Simmenthal, 106/77: **Inapplicability** of national law, which does not comply to EU law = national judge must refuse application of a domestic legal provision contrary to EU law
- Obligation by MS courts to:
  - interpret all forms of national law, **including constitutional law**, in conformity with EU law
  - not only the national law, which implements EU law but all MS law
  - **Q 1**: how about taxation, military matters, social welfare?
  - **Q 2**: view of the national constitutional courts?

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## Direct effect

### Primary law

- CJ, 26/62, Van Gend en Loos: “self-executing” provision
  - intended to confer rights to individuals
  - sufficiently clear and precise
  - unconditional
  
- CJ, 57/76, Lütticke: **vertical** direct effect - individual against MS
  
- CJ, 43/75, Defrenne II: **horizontal** direct effect - private parties (Article 157 TFEU)

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## Direct effect

### Secondary law

- Regulations, Article 288(2) TFEU – always! – CJ, 43/71, Politi
- Decisions, Article 288(4) TFEU – may have direct effect when they refer to a Member State as the addressee – C-156/91, Hansa Fleisch
- International agreements CJ, 12/86, Demirel - direct effect of certain agreements in conformity with the same criteria identified in the Van Gend en Loos case.
- Opinions and recommendations – no direct effect, since no binding force

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## Direct effect – Directives

### “Time”

- Direct effect *prior* to the end of the implementation period?

C-129/96 Inter-Environ. Wallonie: during the period of transposition, the MS and its administration are barred from taking measures contrary to the aim of the dir.

- Direct effect *after* the end of the implementation period? ECJ, 41/74, Van Duyn: (+) if „the nature, general scheme and wording of the provision in question are capable of having direct effects”...

ECJ, 8/81 Becker: if the provisions in the directive appear to be „unconditional and sufficiently precise“

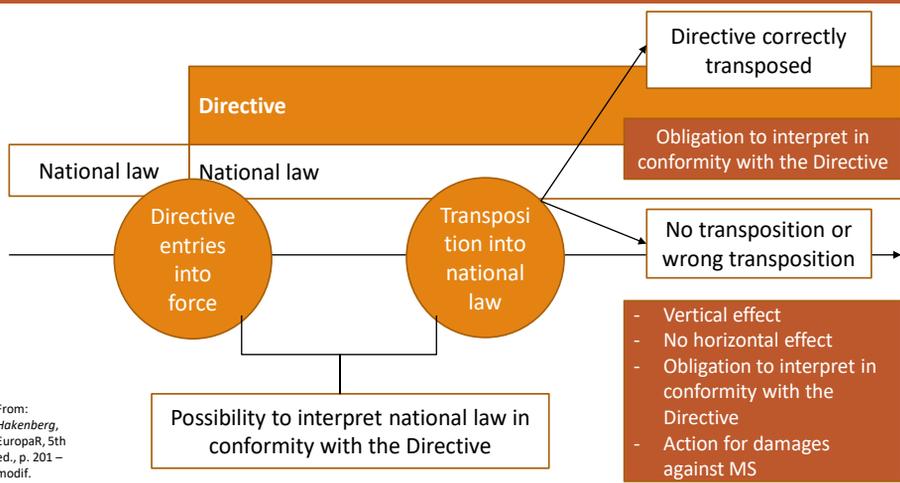
### “Action mode”

- Vertical direct effect (+): ECJ, 148/78, Ratti
- Horizontal direct effect (-): C-91/92, Faccini Dori; C-397-403/01, Pfeiffer
- Horizontal indirect effect (+): C-106/89, Marleasing [interpretation of national (civil) company law in conformity with EU company law directives]

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## Directives – direct/indirect effect



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## Enforcement

- **Public/ centralised (EU/MS)**
  - 2008-2017: EU Pilot System = platform to avoid infringement actions
  - Enforcement light: preliminary rulings, Article 267 TFEU
  - Action for failure to fulfil an obligation („infringement procedure“) – Articles 258-260 TFEU
  - Action for damages against MS
- **(Private)/decentralised (MS)**
  - National courts as „the common EU law courts“ (Cooperation with ECJ – Article 267 TFEU)
  - Administrative cooperation between MS (EU border control etc.)
  - Private enforcement: “Damages Directive” (2014/104): infringement of competition law

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## Preliminary rulings, Article 267 TFEU

- **Interpretation of primary and secondary EU law**
  - Any provision of the Treaties, Protocols
  - EU Fundamental Rights - „implementation of EU law“ (article 51 ChFR)
  - Q: How about (General) Court’s judgments?
- **Validity of secondary EU law**
  - EU regulations, directives; decisions, recommendations, opinions of EU institutions, bodies...
  - Presumption of validity of secondary EU law...

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## Infringement procedure, Art. 258-260 TFEU

- Preliminary procedure initiated by the Commission - MS can reply to the complaints addressed to it (*letter of formal notice*). A *reasoned opinion* might follow. If the MS does not terminate the failure, an action for infringement of EU law *may* be brought before the Court (based on the reasoned opinion).
- Action brought before the Court by the Commission or a MS. If the applicant (Comm/MS) is right, the MS must take the necessary measures to comply with the judgement without delay (Art.260 TFEU)
- If the MS does not comply with the judgment – (1st referral)
  - the Commission brings the case before the Court (2nd referral)
  - the Court finds that the MS has not complied with its judgment and imposes a: lump sum and/or penalty payment (Art. 260 TFEU)

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## Action for damages against MS, Art. 4(3) TEU

- Non-transposition of Directives, Article 288(3) TFEU  
C-6/90 Francovich: a MS may be liable to damages in the case of non-transposition of a directive which does not qualify as having direct effect;
- Conditions:
- the result prescribed by the directive should entail the grant of rights to individuals
  - it should be possible to identify the content of those rights on the basis of the provisions of the directive
  - the existence of a causal link between the breach of the State's obligation and the loss and damage suffered
  - Violation of primary law
- C-46 and 48/93 Brasserie du pêcheur: "sufficiently serious" breach of the rule of law which confers rights on individuals

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# Composition, organisation and competences of the Court of Justice of the European Union – an introduction

Richard Himmer,  
Legal secretary,  
General Court of the EU

7 September 2022

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## Introduction

- **Established 1952 as a multilingual\* institution**
  - Court of Justice
  - General Court (since 1989)
  - Civil Service Tribunal (2004-2016)
  - Seat: Luxembourg

\* The Court is required to observe the principle of multilingualism in full, because of the need to communicate with the parties in the language of the proceedings and to ensure that its case-law is disseminated throughout the MS

- **Article 19 TEU, Article 281 TFEU, Protocol N.3; the Court of Justice:**
  - reviews the legality of the acts of EU institutions
  - ensures that the MS comply with obligations under the Treaties
  - interprets EU law at the request of the national courts

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## Composition

### The Members – 265 members (since 1952)

- Court of Justice: 162 members
  - General Court: 111 members (since 1989)
  - Civil Service Tribunal: 15 members (2005 - 2016)
- 
- Court of Justice
    - 27 Judges
    - 11 Advocates General
    - 1 Registrar
  - General Court
    - 54 Judges
    - 1 Registrar

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## Composition

### The staff (*figures as of 31.12.2021*)

6 164 officials and temporary agents (since 1952)

- in 2021: 2 247 posts = 1 355 women and 892 men (officials, temporary agents and contract staff)
- 60% women, 40% men
- average age: 46 years

### The linguistic services: legal translation and interpretation

In 2021 : 981 posts (= 43,65% of the institution's staff)

- 616 lawyer linguists + 71 interpreters
- 24 official Union languages
- 552 linguistic combinations
- 1 257 000 pages produced by the legal translation service
- + 423 hearings and meetings interpreted

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## Departments

- Directorate-General of Administration
  - Directorate for Human Resources and Personnel Administration
  - Directorate for the Budget and Financial Affairs
  - Directorate for Buildings and Security
- Directorate-General for Multilingualism
  - Interpretation Directorate
  - Directorates A and B for Legal Translation
- Directorate-General for Information
  - Information Technology Directorate
  - Library Directorate
  - Communications Directorate
- Research and Documentation Directorate
- Projects and Terminological Coordination Unit
- Protocol and Visits Directorate
- Legal Adviser on Administrative Matters
- Data Protection Officer
- Internal Auditor

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## Decision panels

- Court of Justice
  - Full Court (27 judges)
  - Grand Chamber (15 judges): above 80 cases in 2021
  - 10 Chambers of 5 judges
  - Chambers of 3 judges
- General Court
  - Grand Chamber (15 judges): 1 case in 2022
  - 10 Chambers of 5 judges
  - Chambers of 3 judges
  - Single judge

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## Jurisdiction

- **Court of Justice**
  - *References for preliminary rulings, Article 267 TFEU*
  - **Actions for failure to fulfil obligations**
  - **Actions for annulment**
  - **Actions for failure to act**
  - **Appeals against judgements of the GC**
- **General Court**
  - **Actions for annulment, Article 253 TFEU**
  - **Actions seeking compensation for damage**
  - **Actions based on contracts of the EU - jurisdiction to the GC**
  - **Actions relating to intellectual property**
  - **Disputes between the European Union and its staff**

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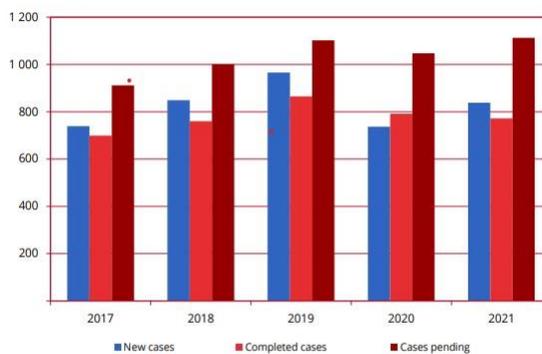
## Procedure before the Court of Justice

Direct actions and appeals		References for a preliminary ruling
Written procedure		
Application Service of the application on the defendant by the Registry Notice of the action in the Official Journal of the EU (C Series) [Interim measures] [Intervention] Defence/Response [Objection to admissibility] [Reply and Rejoinder]	[Application for legal aid] Designation of Judge-Rapporteur and Advocate General	National court's decision to make a reference Translation into the other official languages of the European Union Notice of the questions referred for a preliminary ruling in the Official Journal of the EU (C Series) Notification to the parties to the proceedings, the Member States, the institutions of the European Union, the EEA States and the EFTA Surveillance Authority Written observations of the parties, the States and the institutions
The Judge-Rapporteur draws up the preliminary report General meeting of the Judges and the Advocates General Assignment of the case to a formation [Measures of inquiry]		
Oral stage		
[Opinion of the Advocate General]		
Deliberation by the Judges		
Judgment		

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## The Court in figures

### I. General activity of the Court of Justice – New cases, completed cases, cases pending (2017-2021)



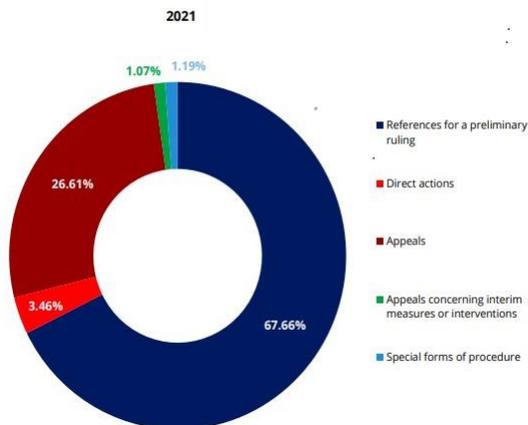
	2017	2018	2019	2020	2021
New cases	739	849	966	737	838
Completed cases	699	760	865	792	772
Cases pending	912	1 001	1 102	1 047	1 113

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## The Court in figures

### II. New cases – Nature of proceedings (2017-2021)



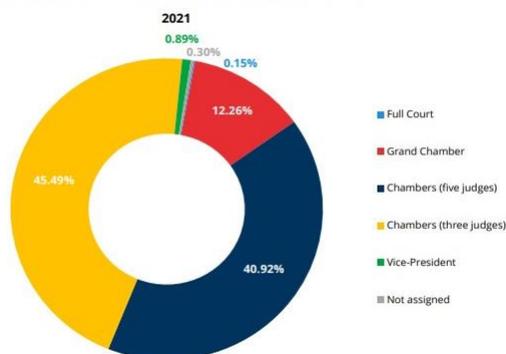
	2017	2018	2019	2020	2021
References for a preliminary ruling	533	568	641	557	567
Direct actions	46	63	41	38	29
Appeals	141	193	256	125	223
Appeals concerning interim measures or interventions	6	6	10	6	9
Requests for an opinion	1		1	1	
Special forms of procedure <sup>1</sup>	12	19	17	10	10
<b>Total</b>	<b>739</b>	<b>849</b>	<b>966</b>	<b>737</b>	<b>838</b>
Applications for interim measures	3	6	6	3	8

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## The Court in figures

IX. Cases completed by judgments, by opinions or by orders involving a judicial determination – Bench hearing action (2017-2021) <sup>1</sup>

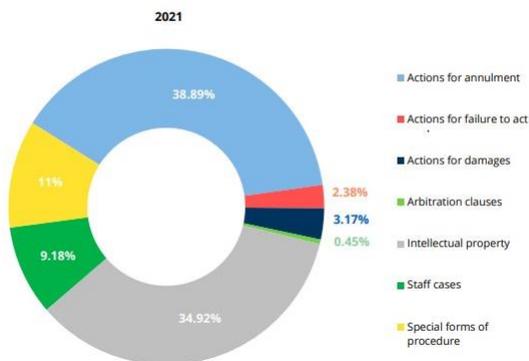


	2017			2018			2019			2020			2021		
	Judgments/opinions	Orders <sup>2</sup>	Total												
Full Court	1		1	1		1	1		1				1		1
Grand Chamber	46	46	76	76	77	76	77	70	77	70	70	83	70	83	83
Chambers (five judges)	312	10	322	300	15	315	317	21	338	237	4	241	271	6	277
Chambers (three judges)	151	105	256	153	93	246	163	176	339	191	142	333	154	154	308
Vice-President		3	3	7	7	7	6	6	6	10	10	10	6	6	6
Not assigned							2	2	2	3	3	3	2	2	2
<b>Total</b>	<b>510</b>	<b>118</b>	<b>628</b>	<b>530</b>	<b>115</b>	<b>645</b>	<b>558</b>	<b>205</b>	<b>763</b>	<b>498</b>	<b>159</b>	<b>657</b>	<b>509</b>	<b>168</b>	<b>677</b>

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## The Court in figures

III. New cases – Type of action (2017-2021)



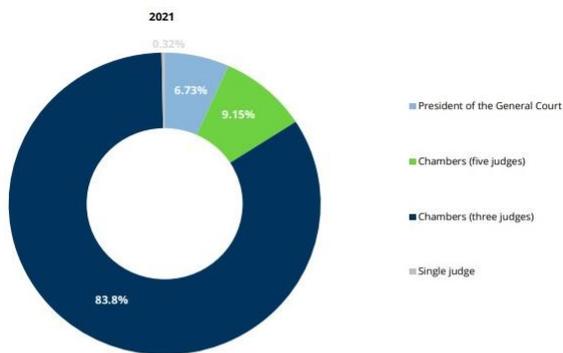
	2017	2018	2019	2020	2021
Actions for annulment	371	288	445	284	343
Actions for failure to act	8	14	14	15	21
Actions for damages	23	29	24	17	28
Arbitration clauses	21	7	8	13	4
Intellectual property	298	301	270	282	308
Staff cases	86	93	87	118	81
Appeals				2	
Special forms of procedure	110	102	91	116	97
<b>Total</b>	<b>917</b>	<b>834</b>	<b>939</b>	<b>847</b>	<b>882</b>

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# The Court in figures

VIII. Completed cases – Bench hearing action (2017-2021)



	2017			2018			2019			2020			2021	
	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders
Grand Chamber									1		1			
Appeal Chamber	29	17	46	9	2	11		2	2					
President of the General Court		80	80	43		43	47		47	73		73		64
Chambers (five judges)	13	5	18	84	3	87	50	9	59	104	7	111	73	14
Chambers (three judges)	450	301	751	546	317	863	499	261	760	309	254	563	489	308
Single judge				5		5	5		5	1		1	3	
<b>Total</b>	<b>492</b>	<b>403</b>	<b>895</b>	<b>644</b>	<b>365</b>	<b>1 009</b>	<b>554</b>	<b>320</b>	<b>874</b>	<b>414</b>	<b>334</b>	<b>748</b>	<b>565</b>	<b>386</b>

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# Impressions



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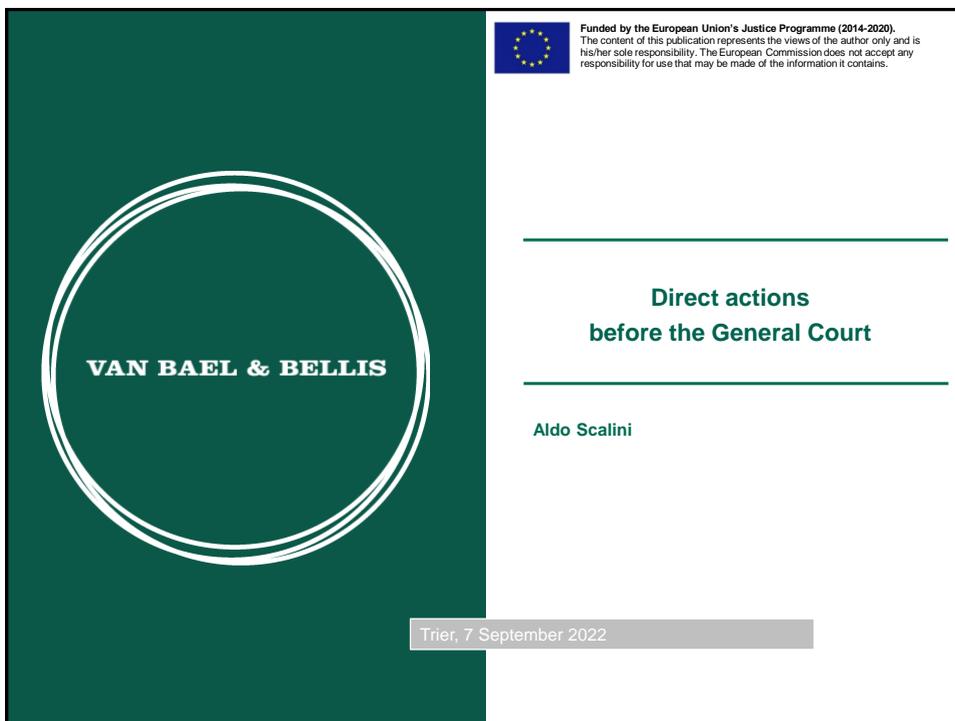
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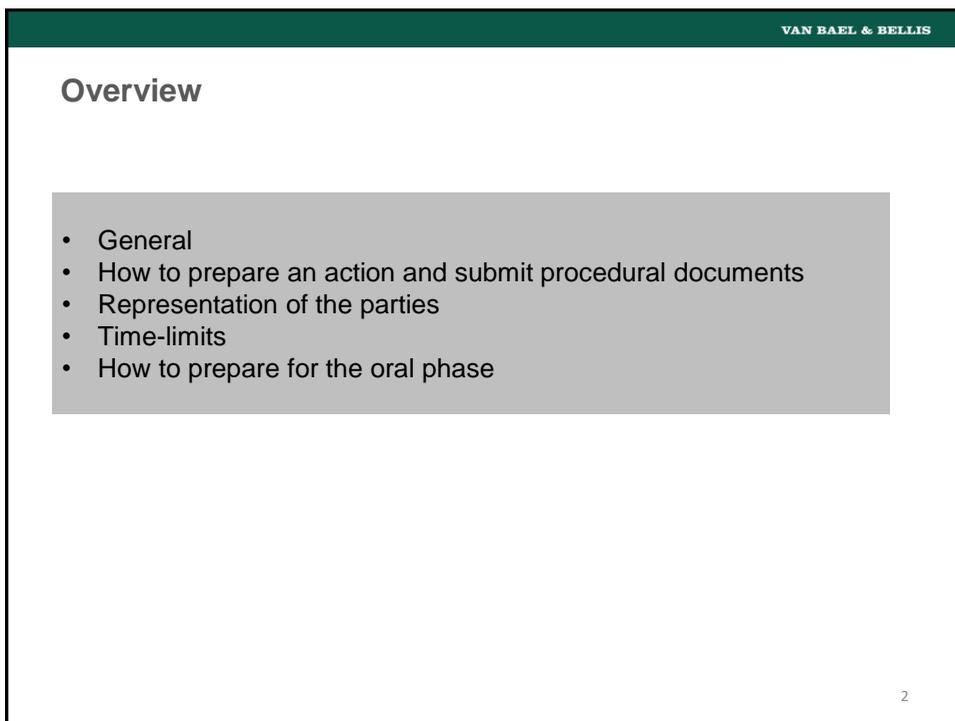
## Direct actions before the General Court

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Aldo Scalini

Trier, 7 September 2022

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## Overview

- General
- How to prepare an action and submit procedural documents
- Representation of the parties
- Time-limits
- How to prepare for the oral phase

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## Action for annulment | What is a direct action?



**Direct**

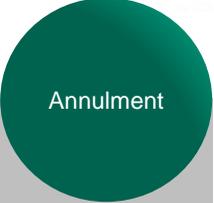
This remedy can be relied upon directly before the General Court

Key action in the system of EU judicial protection



**Interplay**

There is interplay between the action for annulment and other types of actions allowed under EU law (e.g., indirect action or action for damage)



**Annulment**

The CJEU has exclusive jurisdiction to declare an EU act void

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## Action for annulment | What is a direct action?



*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.*

*What is the aim of the direct action?*

To enable applicants to protect themselves against **unlawful binding acts of EU institutions**

*What does the CJEU do following an action for annulment?*

It **reviews** the validity of the contested act in the light of EU law ► If the action is successful, the contested act is **annulled**

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## Action for annulment | What acts can be challenged?

### Reviewable act:

- Act of an EU institution, body, office, or agency (outcome of the institution, body, office, or agency's decision-making power)
- Existing act (non-existent acts may not be declared void – exception: withdrawn acts)
- Binding act

### What is a *binding act*?

**Content** determines whether an EU act is binding or not

Silence is not implied refusal except where such result is provided for by a provision of EU law

The act should reflect the **definitive position** of an EU institution, body, office, or agency

**Intended to have legal effects, i.e.**, "capable of affecting the interests of the applicant by bringing about a **distinct change** in his legal position"

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## Action for annulment | Who can challenge an EU act?

### Privileged applicants, Semi-privileged applicants, Natural and legal persons

#### Privileged applicants:

- European Parliament
- Council
- Commission
- Member States

Article 263(2) TFEU

#### Semi-privileged applicants:

- European Central Bank
- Court of Auditors
- Committee of the Regions

Must clearly show which of their prerogatives should have been respected and in what way the prerogative in question has been infringed

Article 263(3) TFEU

#### Natural and legal persons:

Any natural or legal person may 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**

Article 263(4) TFEU

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## How to prepare an action | Application

Mandatory information	Structure	Practical instructions
<ul style="list-style-type: none"> <li>• Name and address of the applicant</li> <li>• Identity, status and address of the applicant's representatives</li> <li>• Name of the defendants</li> <li>• Subject matter of the proceedings, the pleas in law and arguments relied on (<u>no new plea in law</u> may be introduced later on unless it is based on matters which come to light in the course of the procedure) and a summary of the pleas in law</li> <li>• The form of order sought by the applicant</li> <li>• Date</li> </ul>	<ul style="list-style-type: none"> <li>• Title of the pleading</li> <li>• Subject matter of the dispute: type of action, basis, brief account of the facts and legal context</li> <li>• Legal arguments set out and grouped by reference to the pleas in law to which they relate (admissibility and substance) with a heading for each plea in law put forward</li> <li>• Form of order sought: precise wording thereof (to be included at the beginning or at the end of the application)</li> <li>• Schedule of annexes</li> </ul>	<ul style="list-style-type: none"> <li>• Maximum 50 pages (numbered consecutively)</li> <li>• Text in commonly-used fonts (e.g., Arial, New Times Roman) of at least 12 points (10 points for the footnotes)</li> <li>• Each paragraph should be numbered in ascending order</li> <li>• Divide the text in sections (e.g., facts, pleas in law, conclusions, etc.)</li> <li>• The application should be submitted via e-Curia in PDF together with the annexes</li> </ul>

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## How to prepare an action | Annexes to the application

What to include	Practical instructions
<ul style="list-style-type: none"> <li>• Be rigorous in the selection of relevant documents for the purposes of the proceedings</li> <li>• It is mandatory to include a copy of the act the annulment of which is sought</li> <li>• Do not include case-law of the CJEU and other EU acts quoted in the application</li> </ul>	<ul style="list-style-type: none"> <li>• Consecutive numbering of the annexes, with a blank title page for each annex</li> <li>• Schedule of annexes (at the end of the application)             <ul style="list-style-type: none"> <li>• the number of the annex (e.g., A.1, A.2)</li> <li>• a short description of the annex</li> <li>• the page numbers of the first and last pages of the annex, according to the consecutive page numbering</li> <li>• the number of the paragraph in which the item is mentioned for the first time</li> </ul> </li> </ul>

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## How to prepare an action | Written pleadings

Written phase

- Defence
  - Mandatory information is the same as for the application (Article 81(1) of the Rules of Procedure)
  - Indication of the case number (e.g., T-49/22)
  - Facts in the application which are contested must be specified in the defence
- Reply and rejoinder
  - The main parties may supplement their legal arguments
  - They may make clear their position or to refine their arguments on an important issue, and to respond to new matters raised in the defence and in the reply

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## How to prepare an action | Written pleadings

Written phase

- (possible) Plea of inadmissibility submitted by the defendant with a separate act
  - Observation of the applicant on that plea
  - Hearing on the admissibility
- (possible) Replies to questions of the General Court
  - Observation on the replies on the counterparty
- (possible) Intervention by third parties in support of one of the main parties
  - Application to intervene
  - Observations on the application to intervene
  - Statement in intervention

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## How to prepare an action | Representation

**Representation of the parties**

- A party must be represented by an agent or a lawyer (or a university teacher)
- Agents shall produce an official document issued by the party for whom they act, who shall immediately serve a copy thereof on the Registrar

- Mandatory documents to be submitted by lawyers
  - PoA
  - Certificate that she/he is authorized to practice before a courts of a Member State or EEA country
  - If she/he represents a legal person, proof that the person signing the PoA is authorized to do so (e.g., excerpt of the articles of association or statute)

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## How to prepare an action | Regularization

**Regularization of the application**

- The application or the annexes does not comply with the requirements laid down in the rules of procedure or the practical rules
- Accompanying documents (e.g., PoA) are not attached to the application

- The Registrar prescribes a reasonable period within which the applicant must comply with the requirements (e.g., by putting the application in order or by producing any documents missing)
- In case of failure to comply, the General Court decides whether this renders the application formally inadmissible

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## Action for annulment | Time limits

Application	Defence	General rules
<ul style="list-style-type: none"> <li>• <b>Two months</b> 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</li> <li>• In case of measures adopted by an institution and <b>published in the OJEU</b>, the time limit shall be calculated from the <b>end of the fourteenth day after such publication</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Two months</b> of the notification of the application</li> </ul>	<ul style="list-style-type: none"> <li>• The procedural time limits shall be extended on account of distance by a single period of <b>ten days</b></li> <li>• Any time limit may be <b>extended</b> by whoever prescribed it (requests for extensions of time limits must be duly reasoned) – <u>not</u> applicable to the application</li> </ul>

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## Action for annulment | Time limits

### How to calculate time limits

- The time limit is to be calculated from the moment at which an event occurs or an action takes place
- The day during which that event occurs or that action takes place shall not be counted as falling within the time limit
- The time limit shall end with the expiry of whichever day in the last month falls on the same date (e.g., two months from 7 September ► 7 November)
- Where a time limit is expressed in months and days, it shall first be calculated in whole months, then in days (e.g., two months and ten days from 7 September ► 17 November)
- Saturdays, Sundays and official holidays are included in the calculation (no suspension during judicial vacation)
- If a time limit falls on a Saturday or Sunday or an official holiday, it is automatically extended until the next working day

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## How to prepare an action | e-Curia

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## How to prepare for an action | Oral phase

Hearing

- The procedure before the General Court shall include a **hearing** arranged either of the General Court's own motion or at the request of a main party
- Any request for a hearing must:
  - state the reasons for which that party wishes to be heard
  - be submitted within three weeks after notification of the close of the written part of the procedure (an extension is possible)
- In the absence of any request, the General Court may decide to rule without a hearing (always possible for the General Court to organize a hearing at a later stage of the proceeding)

- Purpose:
  - Reiterate in summary the arguments put forward in the written submissions
  - Clarify certain arguments and submit any new material arising from events occurring after the close of the written part
  - Reply orally to any questions put by the General Court
- The date of the hearing is fixed by the President
- If a representative of a party is absent without excuse, the hearing will take place in the absence of that party
- All parties indicate they will not be present at the hearing ► the President shall decide whether the oral part of the procedure may be closed

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## How to prepare for an action | Oral phase

**Conduct of the hearing**

- Each party will be assigned a specific time to plead (normally 15 minutes for the main parties, 10 minutes for interveners)
- Parties may address to the General Court only through their representatives
- The judges may address questions to the representatives of the parties

- Recommended to prepare a pleading note
  - Anticipate the structure of the pleading (at the beginning)
  - Focus on specific key arguments
  - Use short sentences
  - Avoid any repetition
- In case of questions, answer the question (straight to the point)

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## Action for annulment | Resources

- Treaty on the Functioning of the European Union
- [Statute](#) of the Court of Justice of the European Union
- [Rules](#) of procedure of the General Court
- [Practice rules](#) for the implementation of the rules of procedure of the General Court
- Aide-mémoire – [Application](#)
- Aide-mémoire – [Hearing](#) of oral argument

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# **Case study**

## **Litigating European Union Law**

### **BASIC TRAINING FOR LAWYERS IN PRIVATE PRACTICE**

By

Fabrice Picod

Professor at the University of Paris 2 Panthéon-Assas

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, *Artogodan 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.



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# Reference for a preliminary ruling: practical advice for lawyers

Maarja Pild  
Trier, 2022



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# How to convince a national judge to make a preliminary reference to the CJEU?

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The legal need to convince a national judge (see also TFEU Article 267 and TEU Article 19)

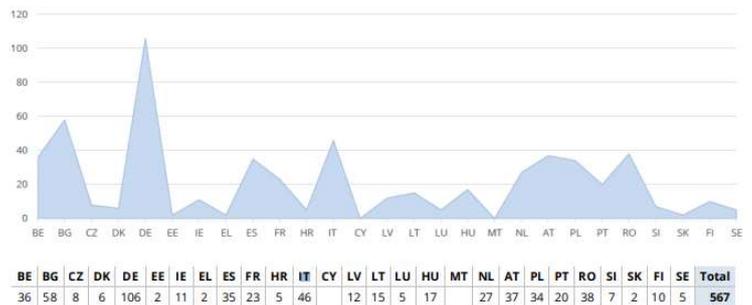
- Pursuant to Article 267 (2) TFEU (Treaty on the Functioning of the European Union), only a "court or tribunal" of a Member State has the right to make a reference for preliminary ruling
- The CJEU interprets the terms "court or tribunal" as independent terms of Union law, irrespective of how they are construed on a national level



# How active are your courts with references?

As regards references for a preliminary ruling, the number of cases brought in 2021 increased slightly (567 in 2021 compared to 556 in 2020). Those questions, which are referred from national courts of all the Member States of the European Union, show the excellent cooperation between those courts and the Court of Justice so that the Court of Justice may ensure, in particular, the uniform interpretation and consistent application of EU law throughout the European Union. In 2021, the highest number of requests for a preliminary ruling to the Court of Justice were made, respectively, by the German (106), Bulgarian (58), Italian (46), Romanian (38), Austrian (37), Belgian (36), Spanish (35) and Polish (34) courts. In particular, the increase in the number of references for a preliminary ruling from the courts and tribunals of Bulgaria (58 in 2021 compared to 28 in 2020) and of Romania (38 in 2021 compared to 20 in 2020) was particularly significant.

References for a preliminary ruling to the Court of Justice from the courts of the Member States (2021)



# States with a small number of references



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Home > Search form > List of results

Note of criteria selected:  
Source of a question referred for a preliminary ruling = "Estonia"

List of results by case List of documents

Search result: 38 case(s)

1/38 C-437/22 - Eesti Vabariik (Põllumajanduse Registre ja Informatsiooni Amet)

Main proceedings

Eesti Vabariik (Põllumajanduse Registre ja Informatsiooni Amet)  
Case C-437/22

Reports of Cases  
Information not available



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Note of criteria selected:  
Source of a question referred for a preliminary ruling = "Cyprus"

List of results by case List of documents

Search result: 9 case(s)

1/9 C-154/19 - Kyriaki Kentriki Archi

Main proceedings

Order of the President of the Court of 7 October 2019  
Kyriaki Kentriki Archi v GA  
Request for a preliminary ruling from the Eparchiako Dikastirio Larnakas  
Case C-154/19

Reports of Cases  
Information not available

Links to the texts

	Curia	EUR-Lex
Order ECLI:EU:C:2019:888		

## What are the main convincing points?

In line with Article 267 TFEU, a preliminary reference may be submitted if two premises are met jointly:

- (1) a question of EU law is raised before a national court; and
- (2) a decision on that question is necessary for the national court to give judgment on the case at hand

## What may motivate a national judge?

Bringing up the issue by a representative of one of the parties

## What may motivate a national judge?

- Quality help to enforce the:  
*„Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01)“*

The referral must be drafted simply, clearly and precisely given that it will need to be translated to allow other Member States to submit their observations

## What may motivate a national judge?

- Encouragement.

C-210/06: CARTESIO:

*„the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.“*

# The urgent preliminary ruling procedure (PPU)

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## Urgent preliminary ruling procedure (Rules of Procedure the court art 107-114)

- A procedure applying only in cases involving questions relating to freedom, security and justice
- In particular, it limits the number of parties permitted to submit written observations and allows, in cases of extreme urgency, for the written stage of the procedure to be omitted before the CJEU

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## Urgent preliminary ruling procedure (Rules of Procedure the court art 107-114)

Reasons for the application of the urgent preliminary ruling procedure:

- Risk of deterioration of the parent/child relationship ((Aguirre Zarraga (C-491/10 PPU, EU:C:2010:828); Mercredi (C-497/10 PPU, EU:C:2010:829))
- Deprivation of liberty (Kadzoev (C-357/09 PPU, EU:C:2009:741); Bob-Dogi (C-241/15, EU:C:2016:385))
- Risk of interference with fundamental rights (C. K. and Others (C-578/16 PPU, EU:C:2017:127))

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## Do not forget about expedited procedure (Rules of Procedure the court art 105-106)

- A procedure where the nature and exceptional circumstances of the case require it to be handled quickly
- An expedited procedure must be sought only when particular circumstances create an emergency that warrants a quick CJEU ruling on the questions referred
- This could arise, for example, if there is a serious and immediate danger to public health or to the environment, which a prompt decision by the CJEU might help to avert, or if particular circumstances require uncertainties concerning fundamental issues of national constitutional law and of EU law to be resolved within a very short time

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## Expedited procedure (Rules of Procedure the court art 105-106)

Reasons for the application of  
the expedited preliminary  
ruling procedure:

- Particular severity of the  
legal uncertainty to which  
the reference for a  
preliminary ruling relates  
(Wightman and Others (C-  
621/18, EU:C:2018:851))
- Risk of serious environmental  
damage

*Photo from Pixabay*

## The written observations

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## Written observations

- Rules of Procedure of the Court of Justice, Chapter V
- STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION
- PRACTICE DIRECTIONS TO PARTIES CONCERNING CASES BROUGHT BEFORE THE COURT
- DECISION OF THE COURT OF JUSTICE of 16 October 2018 on the lodging and service of procedural documents by means of e-Curia



*Photo from Pixabay*

## Written observations: E-Curia

- The Court's recommended method of lodging a procedural document is via the e-Curia application. This allows the lodging and service of procedural documents by exclusively electronic means, without it being necessary to provide certified copies of the document transmitted to the Court or to duplicate that transmission by sending the document by post. (see DECISION OF THE COURT OF JUSTICE of 16 October 2018 on the lodging and service of procedural documents by means of e-Curia)



*Photo from Pixabay*

## Written observations

- Article 23 within two months of a notification from the Court, the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court
- Where a request for a preliminary ruling is served on them by the Court, those persons may thus submit, if they wish, written observations in which they set out their point of view on the request made by the referring court or tribunal

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## Written observations

- Although the statement must be complete and include, in particular, the arguments on which the Court may base its answer to the questions referred, it is not necessary, on the other hand, to repeat the factual and legal background of the dispute set out in the order for reference, unless it requires further comment
- Subject to special circumstances or specific provisions of the Rules of Procedure providing for a restriction of the length of the documents because of the urgency of the case, written observations lodged in a preliminary ruling should not exceed 20 pages

Photo from Pixabay

# The oral phase

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## Logistics

- Be there early!
- Security check may take some time
- Not all security personnel may speak English



*Photo from Court of Justice of the European Union [Linked](#)*

# Clothing

## What do you have to wear?

The parties' representatives are required to present oral argument in court dress, standing behind the lectern provided for that purpose

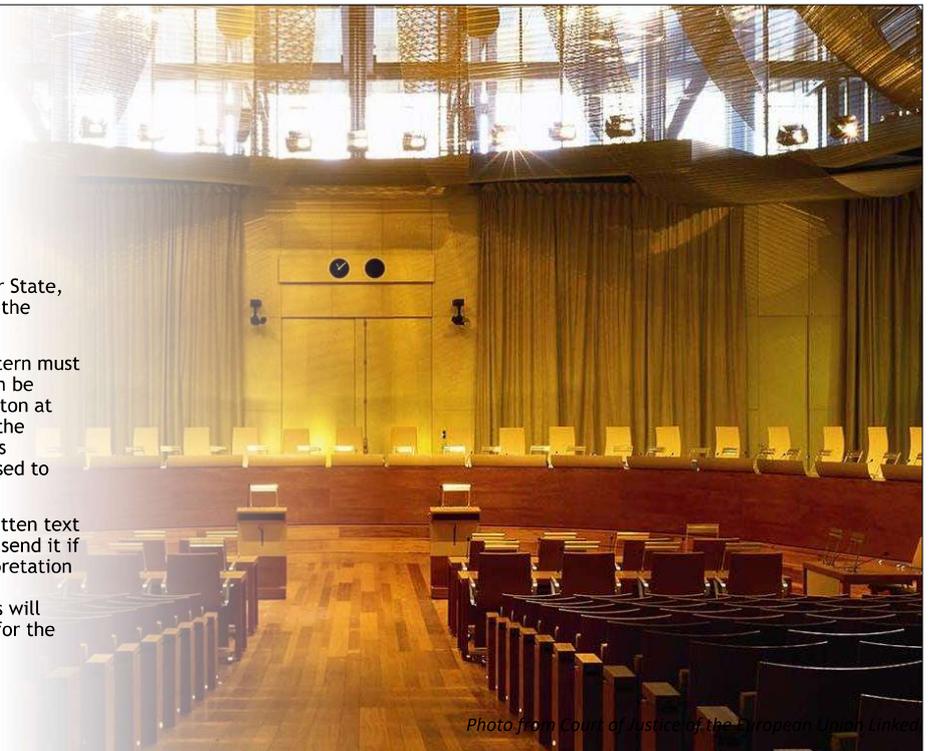
Each representative must bring his or her own gown



*Photo from Court of Justice of the European Union linked*

# Hearing and the pleading

- Where the defendant is a Member State, the language of the case shall be the official language of that State
- Speakers standing behind the lectern must always use the microphone; it can be switched on and off using the button at the base of the microphone. For the purpose of providing simultaneous interpretation, speakers are advised to speak slowly
- If you do decide to read out a written text which you have prepared, please send it if possible, in advance to the Interpretation Directorate by email ([interpret@curia.europa.eu](mailto:interpret@curia.europa.eu)). This will help the interpreters to prepare for the hearing



*Photo from Court of Justice of the European Union linked*

## Hearing and the pleading

Do not exceed the time allowed for opening argument as indicated in the letter of notice to attend the hearing

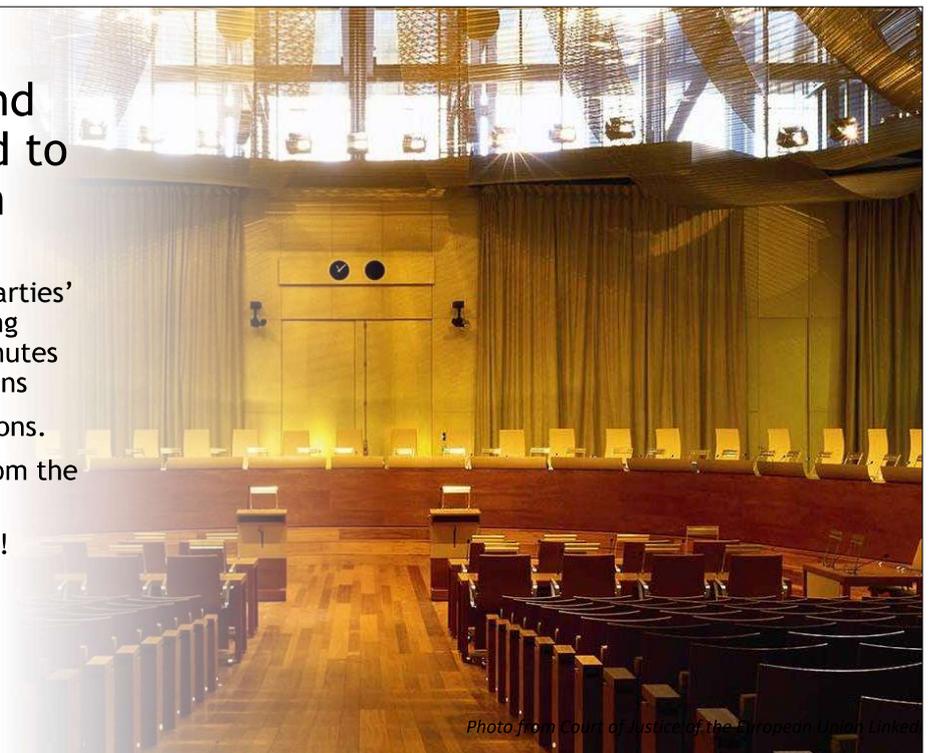
As a general rule, the speaking time is fixed at 15 minutes. However, that time may be made longer or shorter depending on the nature or the specific complexity of the case



*Photo from Court of Justice of the European Union, linked*

## Other advice and remarks related to the preparation

- The Judges meet the parties' representatives, wearing court dress, 5 to 10 minutes before the hearing begins
- Be ready for the questions.
- Additional questions from the members of the Court
- Get to know the judges!



*Photo from Court of Justice of the European Union, linked*


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## PRACTICAL GUIDANCE FOR ADVOCATES BEFORE THE COURT OF JUSTICE IN PRELIMINARY REFERENCE CASES

This practical guidance is addressed principally to those appearing for the first time at the Court of Justice of the EU or who appear infrequently. It has been drafted by the Permanent Delegation to the Court of Justice of the Council of Bars and Law Societies of Europe (CCBE) in order to enhance the efficiency of the preliminary reference procedure. The consolidated version of the Court of Justice's 2012 Rules of Procedure, as amended in 2013, and the other texts governing the procedure before the Court are available online at the address: <http://www.court-justice.eu/procureur/2012>.

Do the same page, see in particular also:

- Advice to Counsel appearing before the Court
- Recommendations to national courts and tribunals: in relation to the initiation of preliminary ruling proceedings.
- Practice directions to parties concerning cases brought before the Court.

Note that written pleadings can be filed on-line using the e-Curia system. This guidance addresses three areas:

1. Written pleadings
2. Oral proceedings
3. Practical issues

**Written Pleadings in Preliminary Reference cases**

**General**

- Keep pleadings as short as reasonably possible (the Court recommends that they do not exceed 20 pages)
- Do not repeat material which is already in the judgment or order of the referring court (the Court has this in translation already)
- If your client has the same interest as other parties pleading before the Court (including Member States), discuss in advance who is going to focus on which points
- Before starting, consider writing out your opponent's main points in order to focus your own arguments
- It is vital to note that extensions of the deadline of two months and 10 days cannot be granted – late pleadings are returned
- Bear in mind that the Court may decide not to grant an oral hearing and therefore the written pleading may be the sole opportunity to influence the result of the case

## See CCBE practical guidance

[https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/PD\\_LUX/PDL\\_Guides\\_recommendations/EN\\_PD\\_L\\_20150909\\_Practical-Guidance-for-Advocates-before-the-Court-of-Justice-in-Preliminary-Reference-cases.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PD_LUX/PDL_Guides_recommendations/EN_PD_L_20150909_Practical-Guidance-for-Advocates-before-the-Court-of-Justice-in-Preliminary-Reference-cases.pdf)

## Admissibility issues

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# Inadmissibility

Rules of Procedure of the Court of Justice Article 53(2) state that where it is clear that:

- 1) the Court has no jurisdiction to hear and determine a case or
- 2) where a request or an application is manifestly inadmissible,

the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings

# Application is manifestly inadmissible

- Significant proportion of requests are rejected by the Court of Justice
- The main reasons for inadmissibility - ill-drafting, basing preliminary reference on misconceptions about EU law

# Application is manifestly inadmissible

- Case C-321/17

reference for preliminary ruling was missing a summary statement of the subject-matter of the dispute and of the relevant facts (demanded under Article 94 of the rules of procedure of the court of justice)

- Case C-520/19

reference for preliminary ruling was missing explanations on the reasons for the choice of the provisions of EU law whose interpretation the member state court seeks as well as on the link that it establishes between these provisions and the national legislation applicable to the dispute submitted to it



## Thank you!

Contact:

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[LinkedIn](#)

## CASE STUDY 1

### FACTS OF THE CASE

On 1<sup>st</sup> January 2022 John posted several intimate photographs of Peter to a closed Facebook group called "Nature fans". This closed group and its content can be accessed by 100 Facebook users. Peter is severely disturbed by John's act, and he filed a claim to an EU member state court with a request of erasure of the photographs from the Facebook group under General Data Protection Regulation (2016/679) (GDPR) article 17 (Right to erasure ('right to be forgotten')).

John states that Peter's claims have no basis as GDPR is not applicable in this case as his activities are not regulated under GDPR. GDPR recital 18 states that personal or household activities include social networking and online activity. Article 2 of the GDPR states that GDPR does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity.

Peter states that giving access to his personal data to 100 strangers does not constitute purely household activity and Court of Justice has stated in the Lindquist case (case C-101/01, 6 November 2003) that when something has been posted on the internet and made accessible to an indefinite number of people then this activity does not fall under the household exemption.

John points out that he did not make the photos available to indefinite number of people but only to 100 people and Lindquist decision was made before GDPR was applicable. Moreover, the directive 95/46/EC, that the Court of Justice interpreted in the Lindquist case, did not stipulate that "*activities include social networking and online activity*" would constitute household exemption. Thus, John is sure that EU lawmakers' intent with changes in the GDPR has been to allow communication in closed Facebook groups under the household exception.

Peter states the legal situation is not clear and domestic court should apply to the Court of Justice for a preliminary ruling.

### RELEVANT EU LAW

***Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (no longer in force)***

(12) Whereas the protection principles must apply to all processing of personal data by any person whose activities are governed by Community law; whereas there should be excluded the processing of data carried out by a natural person in the exercise of activities which are exclusively personal or domestic, such as correspondence and the holding of records of addresses;

Article 3 Scope

2. This Directive shall not apply to the processing of personal data:

- by a natural person in the course of a purely personal or household activity.

**Court of Justice has stated in the Lindquist case (c-101/01, 6 November 2003):**

46. As regards the exception provided for in the second indent of Article 3(2) of Directive 95/46, the 12th recital in the preamble to that directive, which concerns that exception, cites, as examples of the processing of data carried out by a natural person in the exercise of activities which are exclusively personal or domestic, correspondence and the holding of records of addresses.

47. That exception must therefore be interpreted as relating only to activities which are carried out in the course of private or family life of individuals, which is clearly not the case

with the processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people.

48. The answer to the third question must therefore be that processing of personal data such as that described in the reply to the first question is not covered by any of the exceptions in Article 3(2) of Directive 95/46.

**REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)**

(18) This Regulation does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity and thus with no connection to a professional or commercial activity. Personal or household activities could include correspondence and the holding of addresses, or social networking and online activity undertaken within the context of such activities. However, this Regulation applies to controllers or processors which provide the means for processing personal data for such personal or household activities.

Article 2 Material scope

2. This Regulation does not apply to the processing of personal data:

(c) by a natural person in the course of a purely personal or household activity

Article 17 Right to erasure ('right to be forgotten')

1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

(d) the personal data have been unlawfully processed.

Firstly, read the facts of the case and relevant EU law.

Then discuss with your group and:

- a. Decide if a member state court has the need and basis to file with the Court of Justice for a preliminary ruling. Provide argumentation.
- b. In any event, if the member state court would turn to Court of Justice for a preliminary ruling how would you suggest the question(s) should be worded to meet the criteria of *"drafting the questions simply, clearly and precisely given that it will need to be translated to allow other Member States to submit their observations"*.

Decide whether there should be one question or several.

## CASE STUDY 2

### FACTS OF THE CASE

Robert has been a member of the management board of ZZZ Ltd for 20 years. Due to Roberts criminal actions and gross negligence ZZZ Ltd decides to terminate the contract with him. Roberts is not pleased with the situation and with an intent to generate costs to the ZZZ Ltd he submits a General Data Protection Regulation (2016/679) (GDPR) article 15 access request. Pursuant to GDPR article 15 Robert is demanding all the personal data that ZZZ Ltd has gathered and is still processing about Robert. Robert does not even make it a secret that he does not care much about his data, but his intent is to “*make things as uncomfortable as possible*” for ZZZ Ltd.

ZZZ Ltd is incorporated in an EU member state.

ZZZ Ltd argues that Robert is abusing his rights as Robert’s intent is not even exercising his right to access the data but to “*make things as uncomfortable as possible*” and in any event the company should not be forced to act for free. Taking into account that Robert has been in the company for 20 years it takes enormous effort to fulfill the request.

Robert states that it does not matter what his intent is, ZZZ Ltd is obliged, pursuant to the GDPR, to give him access to all of his personal data and the GDPR art 12(5) states that a first copy must be free of charge. He stresses that he has not made a repetitive request.

ZZZ Ltd states that the legal situation is not clear, and the domestic court should apply to the Court of Justice for a preliminary ruling with questions about using access right while abusing his rights and whether ZZZ Ltd is allowed to charge for the activities related to the access request.

### RELEVANT EU LAW

***REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)***

#### Article 12

5. Information provided under Articles 13 and 14 and any communication and any actions taken under Articles 15 to 22 and 34 shall be provided free of charge. Where requests from a data subject are manifestly unfounded or excessive, in particular because of their repetitive character, the controller may either:

- (a) charge a reasonable fee taking into account the administrative costs of providing the information or communication or taking the action requested; or
- (b) refuse to act on the request.

The controller shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

#### Article 15

##### Right of access by the data subject

1. The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information:

- (a) the purposes of the processing;
- (b) the categories of personal data concerned;
- (c) the recipients or categories of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organization;
- (d) where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period;
- (e) the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing;
- (f) the right to lodge a complaint with a supervisory authority;
- (g) where the personal data are not collected from the data subject, any available information as to their source;
- (h) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

2. Where personal data are transferred to a third country or to an international organisation, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 46 relating to the transfer.

3. The controller shall provide a copy of the personal data undergoing processing. For any further copies requested by the data subject, the controller may charge a reasonable fee based on administrative costs. Where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form.

4. The right to obtain a copy referred to in paragraph 3 shall not adversely affect the rights and freedoms of others.

## **Charter of Fundamental Rights of the European Union**

### **Article 54**

Prohibition of abuse of rights Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

**Firstly, read the facts of the case and relevant EU law.**

**Then discuss with your group and:**

- a. **Decide if a member state court has the need and basis to file with the Court of Justice for a preliminary ruling. Provide argumentation.**
- b. **In any event, if the member state court would turn to Court of Justice for a preliminary ruling how would you suggest the question(s) should be worded to meet the criteria of “drafting the questions simply, clearly and precisely given that it will need to be translated to allow other Member States to submit their observations”.**  
**Decide whether there should be one question or several.**