

APPLYING EU ANTI-DISCRIMINATION LAW

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The role of the national judge in applying the EU anti-discrimination directives:

- Applying EU law in domestic proceedings
- Practical tips for submitting a preliminary ruling procedure



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Community law and national courts

- .European law is enforced by the Member States, their national courts
- .task of national courts – correct application of EU law – mandatory ***conformal interpretation***
- .the principle of the primacy*** of EU law

Direct effect and consistent interpretation

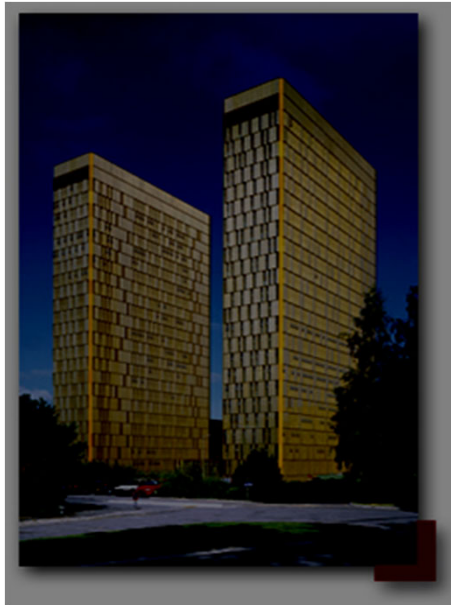
- .National courts are European courts.
 - .ex officio application of EU law
 - .regulations for citizens, directives for the Member States
- .interpretatio Europea*, a consistent or loyal interpretation – of national law!

Potential errors in the application of EU law

- 1 Restrictive interpretation of the parties' arguments
- 2 Terminology
- 3 Breach of the duty to state reasons in the context of EU law
- 4 Breach of the duty to make a reference for a preliminary ruling
- 5 Requests not permitted for a preliminary ruling
- 6 Misinterpretation of the field
- 7 Misapplication of EU law (in terms of time

REMINDER

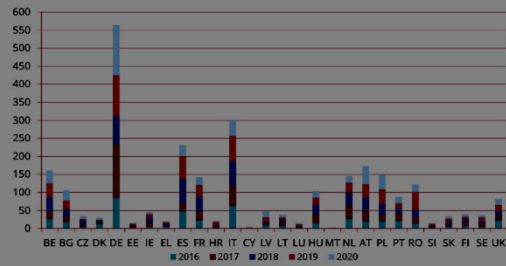
- .actual facts with a transnational (EU) element?
- .what norms are relevant?
- .how to interpret them?
- .a list of potential errors!
- .a request for a preliminary ruling?
- .the application of EU law!



Here are some figures (Facts & Figures)

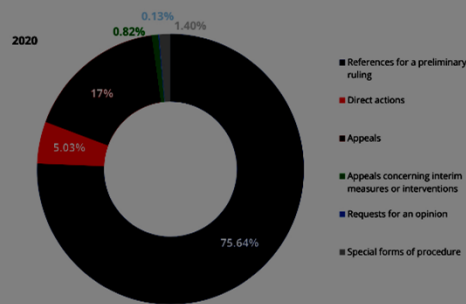
Source: SEU, Letno poročilo, https://curia.europa.eu/jcms/jcms/Jo2_7000/

V. New cases – References for a preliminary ruling by Member State (2016-2020)



	2016	2017	2018	2019	2020	Total
Belgium	26	21	40	38	36	161
Bulgaria	18	16	20	24	28	106
Czech Republic	5	4	12	5	9	35
Denmark	12	8	3	1	6	30
Germany	84	149	78	114	139	564
Estonia	1	7	2	3	3	16
Ireland	6	12	12	10	5	45
Greece	6	4	3	5	2	20
Spain	47	23	67	64	30	231
France	23	25	41	32	21	142
Croatia	2	3	3	10	4	22
Italy	62	57	68	70	44	301
Cyprus			1	1		2
Latvia	9	5	5	12	17	48
Lithuania	8	10	6	7	7	38
Luxembourg	1	1	4	6	3	15
Hungary	15	22	29	20	18	104
Malta	1			1		2
Netherlands	26	38	35	28	18	145
Austria	20	31	35	37	50	173
Poland	19	19	31	39	41	149
Portugal	21	21	15	14	17	88
Romania	14	16	23	49	20	122
Slovenia	3	3	2	5	2	15
Slovakia	6	6	6	10	6	34
Finland	7	13	6	7	7	40
Sweden	5	8	7	11	6	37
United Kingdom	23	11	14	18	17	83
Total	470	533	568	641	556	2 768

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



	2016	2017	2018	2019	2020
References for a preliminary ruling	470	533	568	641	556
Direct actions	35	46	63	41	37
Appeals	168	141	193	256	125
Appeals concerning interim measures or interventions	7	6	6	10	6
Requests for an opinion		1		1	1
Special forms of procedure ¹	12	12	19	17	10
Total	692	739	849	966	735
Applications for interim measures	3	3	6	6	3

¹ The following are considered to be 'special forms of procedure': legal aid; taxation of costs; rectification; failure to adjudicate; application to set aside a judgment delivered by default; third-party proceedings; interpretation; revision; examination of a proposal by the First Advocate General to review a decision of the General Court; attachment procedure; cases concerning immunity.

III. New cases – Subject matter of the action (2016-2020)					
	2016	2017	2018	2019	2020
Access to documents	6	1	10	5	1
Accession of new States		1			
Agriculture	27	14	26	24	15
Approximation of laws	34	41	53	30	35
Arbitration clause		5	2	3	1
Area of freedom, security and justice	76	98	82	107	95
Citizenship of the Union	7	8	6	8	11
Commercial policy	20	8	5	10	8
Common fisheries policy	3	1	1	1	2
Common foreign and security policy	7	6	7	19	1
Company law	7	1	2	3	1
Competition	35	8	25	42	16
Consumer protection	23	36	41	72	37
Customs union and Common Customs Tariff	13	14	13	18	19
Economic and monetary policy	1	7	3	11	12
Economic, social and territorial cohesion		2	1	1	2
Education, vocational training, youth and sport		2			
Employment					1
Energy	3	2	12	6	7
Environment	30	40	50	47	23
External action by the European Union	4	3	4	4	4
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	3	6	6	8	7
Free movement of capital	4	12	9	6	9
Free movement of goods	3	6	4	8	5
Freedom of establishment	16	8	7	8	22
Freedom of movement for persons	28	16	19	40	14
Freedom to provide services	15	18	37	12	11
Industrial policy	3	6	4	7	1
Intellectual and industrial property	66	73	92	74	51
Judicial cooperation in civil matters					1
Law governing the institutions	22	26	34	38	27
Principles of EU law	11	12	29	33	29
Public health	1	1	4	6	4
Public procurement	19	23	28	27	13
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	2	2	1	3	
Research and technological development and space	3	3	1		
Social policy	33	43	46	41	32
Social security for migrant workers	10	7	14	2	6
State aid	39	21	26	59	17
Taxation	70	55	71	73	65
Transport	32	83	39	54	99
TFEU	676	719	814	910	704
Safety control			1	1	
Protection of the general public				2	1
Euratom Treaty				2	1
Principles of EU law			1	1	
EU Treaty			1	1	
Law governing the institutions			2	3	2
Privileges and immunities	2		2		
Procedure	13	12	12	16	10
Staff Regulations	1	8	16	35	19
Others	16	20	32	54	31
OVERALL TOTAL	692	739	849	966	735

IV. New cases – Subject matter of the action (2020)							
	References for a preliminary ruling	Direct actions	Appeals	Appeals concerning interim measures or interventions	Requests for an opinion	Special forms of procedure	Total
Access to documents			1				1
Agriculture	8	1	6				15
Approximation of laws	35						35
Arbitration clause			1				1
Area of freedom, security and justice	95						95
Citizenship of the Union	10		1				11
Commercial policy	2		6				8
Common fisheries policy	2						2
Common foreign and security policy	1						1
Company law	1						1
Competition	12		4				16
Consumer protection	37						37
Customs union and Common Customs Tariff	19						19
Economic and monetary policy	2		8	2			12
Economic, social and territorial cohesion	1		1				2
Employment	1						1
Energy	3	1	3				7
Environment	16	7					23
External action by the European Union	3		1				4
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	3		4				7
Free movement of capital	9						9
Free movement of goods	5						5
Freedom of establishment	22						22
Freedom of movement for persons	13		1				14
Freedom to provide services	11						11
Industrial policy	1						1
Intellectual and industrial property	11		40				51
Judicial cooperation in civil matters	1						1
Law governing the institutions	2	5	15	4	1		27
Principles of EU law	29						29
Public health	2		2				4
Public procurement	13						13
Social policy	32						32
Social security for migrant workers	5	1					6
State aid	4	2	11				17
Taxation	61	4					65
Transport	83	16					99
TFEU	555	37	105	6	1		704
Privileges and immunities	1					1	2
Procedure			1			9	10
Staff Regulations			19				19
Others	1		20			10	31
OVERALL TOTAL	556	37	125	6	1	10	735

Preparation methodology; legal starting points for carrying out the preliminary ruling procedure

- Article 267 of TFEU
- Art. 23 of the Statute of the Court of Justice of the EU
- Articles 93 to 118 of the Rules of Procedure of the Court of Justice of the EU
- Recommendations of the CJEU to national courts and tribunals

Subject-matter of a preliminary ruling

a) primary EU law:

- international treaties setting out the EU legal framework: Treaty on the Functioning of the European Union (TFEU), Treaty on European Union (TEU), Treaty establishing the European Atomic Energy Community, protocols and annexes to international treaties, international treaties of accession of Member States to the EU and other international treaties,

– EU Charter of Fundamental Rights

– basic principles in the light of the case law of the Court of Justice of the EU.

b) secondary EU law:

(b) **regulations, directives, decisions, recommendations and opinions** (acts of the institutions, bodies, offices or agencies of the Union).

The Court of Justice of the European Union shall also have jurisdiction to give preliminary rulings concerning their validity (point b of the first paragraph of Art. 267 of TFEU).

Purpose of the preliminary ruling procedure

To prevent national case law and judicial practice that are not in accordance with the rules of Union law from being established in a Member State.

The *acte clair doctrine* in the *Cilfit* case (C-283/81 of 6 October 1982); the national court of last instance has a duty to refer the case to the CJEU where a question of the interpretation of the FEU Treaty is raised before it and does NOT have this duty only if it assesses that:

- a) the question referred to the Court is not essential/relevant (bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted to it (judgment of *Piscarreta Ricardo*, C-416/16, of 20 July 2017);
- b) the EU law provision in question has already been interpreted by the Court;
- c) the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.

Characteristics of the preliminary ruling procedure

.Incidental nature: the procedure under Art. 267 of TFEU is an interim proceeding that the parties to the main proceedings cannot initiate on their own before the court of a Member State. The court has *locus standi*.

.Precedence: the exegesis of a rule of European Union law and/or substantially complements the above premise of the legal syllogism; decisive for the final decision in the main proceedings.

.The interpretation given is **binding, with the effect of erga omnes and ex tunc**. The national court is bound by the decision of the Court of Justice of the EU, and the **out-of-process effect** is also binding on other courts of Member States that might find themselves in an identical or a similar interpretive dilemma.

REQUEST

Art. 94 of the Rules of Procedure of the CJEU

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;
- c) and, where appropriate, the **relevant national case-law**;
- d) 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;
- e) and the **relationship** between those provisions and the national legislation applicable to the main proceedings.

QUESTION – key part of a request (Recommendations of the CJEU)

- The CJEU only responds to a question: “*Article XY of Regulation Y should be interpreted in a way so as to ...*”

A question must be:

- In the language of a MS** (same as the whole request which is then translated by the CJEU – the working language is French);
- Particularly **highlighted** in the request;
- Unambiguous, direct, clear**, not too long, without abbreviations, acronyms or jargon;
- Self-sufficient** (NO need for further explanations);
- Concrete** with facts (must NOT be abstract or hypothetical);
- Two-part**: part of the regulation + a question;
- There can be several questions**, they can be hierarchical (primary, secondary, etc.)

REQUEST – GENERAL

Indication of the referring **court** and the **state of the proceedings** (chamber and its composition, and the stay)

- **Parties** to the main proceedings (+ representatives for service);
- A description of the **subject matter** of the dispute;
- A statement of **relevant findings of fact**;
- Relevant **national law and national case law**;
- Reasons that **prompted the court to inquire** about the interpretation of EU law;
- **Question** (raised);
- Optional: **view** of the referring court;
- A request for **urgent/expedited** determination of a case.

REQUEST – TECHNICAL (Recommendations of the CJEU)

Scope: 10 pages (Times New Roman, size 12)

- **Clear, concise, only essential for the decision**, avoiding summaries of arguments and all previous procedural steps
- **Pitfalls of more comprehensive requests?** E.g. a 33-page request, 8 longer questions, of which 4 are related, complex language, a proposal to be dealt with under expedited procedure, etc. **In such cases, the CJEU itself produces a summary and translates the summary only – lost in the summary and in the translation?**
- Not handwritten – rejection.
- Form of a request: with no restrictions (a matter for the referring court to decide) – it should be borne in mind that the request is served on all the interested parties (Member States, the Commission, etc.). Preferred: white A4-size paper, Times New Roman (Arial), font size 12, 1.5 line spacing and margins of 2.5 cm
- **Language:** clear, simple, concise, short sentences (due to translations)
- **Transmission channels: physical or electronic**
- **Electronic transmission is preferred**, <https://curia.europa.eu/e-Curia/login.faces>

Thank you for your attention, and kind regards from Ljubljana!

