

## The preliminary ruling procedure pursuant to Article 267 TFEU<sup>1</sup>

The preliminary ruling procedure pursuant to Article 267 of the Treaty on the Functioning of the European Union ("TFEU") plays an important role among the cases for which the Court of Justice of the European Union ("CJEU") has jurisdiction.

The CJEU recorded a total of 692 cases in 2016, 453 of which were references for preliminary rulings - a previously unsurpassed amount<sup>2</sup>. In 2016, the CJEU completed 704 cases, 453 of which were references for preliminary rulings. Thus, the preliminary ruling procedure has a share of 65% of all submitted and completed actions.

### I. Purposes of the preliminary ruling procedure

The significance of the preliminary ruling procedure exceeds its statistic relevance.

An increased need for judicial control of compliance with Union law goes hand in hand with the extension of the geographical applicability due to the ascension of new Member States, the incremental transfer of national legislative powers to the Union, ongoing legal harmonisation and increasing regulatory density<sup>3</sup>.

Thus, the preliminary ruling procedure serves three particularly important purposes:

#### 1. It is an instrument to **secure legal unity**.

The application of Union law occurs in a decentralised mode through the judges of the individual Member States: The national judge is the ordinary judge of Union law.<sup>4</sup>

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<sup>1</sup> This is an updated and amended version of the essay published in SchIHA 2015, 250-255 (Homepage: [www.justizministerialblatt.schleswig-holstein.de](http://www.justizministerialblatt.schleswig-holstein.de)).

<sup>2</sup> The other proceedings were actions and, in particular, appeals against decisions rendered by the court; Annual Report of the CJEU 2016, available at: [https://curia.europa.eu/jcms/jcms/Jo2\\_7000/en/](https://curia.europa.eu/jcms/jcms/Jo2_7000/en/)

<sup>3</sup> *Rösler*, ZRP 2000, 52, 53 illustrates the extension of the legal areas and the concomitant increase of the caseload.

<sup>4</sup> *Wegener* in Callies/Ruffert, EUV/AEUV, 5th Edition, Article 267 TFEU marginal note 1 with further reference.

This decentralisation entails the risk of divergent rulings.

Pursuant to Article 19 (1) Sentence 2 of the Treaty on European Union ("TEU"), it is the CJEU's duty to ensure compliance with the law when interpreting and applying the Treaties. It performs this duty by deciding in preliminary ruling procedures pursuant to Article 267 (1) TFEU on the

- uniform interpretation

and

- uniform application

of Community law.

2. The preliminary ruling procedure is an instrument to **further develop the law**.

It enables the CJEU - in a similar way to a court hearing an appeal on points of law [Revisionsgericht], cf. § 543 (2) Sentence 1 No. 2 Alternative 1 ZPO [German Code of Civil Procedure] - to further develop the law.

In its recommendations to the national courts with regard to the initiation of preliminary ruling proceedings, the CJEU expressly states that a reference could, inter alia, prove particularly useful when

- a question of interpretation is raised before the national court or tribunal that is new and of general interest for the uniform application of EU law

or

- where the existing case-law does not appear to provide the necessary guidance in a new legal context or set of facts<sup>5</sup>.

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<sup>5</sup> Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 25/11/2016, Official Journal of the European Union 2016, C 439/01 No. 5.

3. The preliminary ruling procedure is an instrument to **protect individual rights**<sup>6</sup>.

Options for the individual to directly seek legal protection through the CJEU are subject to strict limitations. Despite the right for individual natural or legal persons to institute proceedings pursuant to Article 263 (4) TFEU (annulment action), individuals cannot directly institute proceedings at the CJEU against generally applicable legal acts within the meaning of Article 289 TFEU<sup>7</sup>. As a general rule, parties only indirectly affected by legal acts of Union law can only seek recourse with the national courts. With the preliminary ruling procedure it is possible that the referring court submits the decision-relevant issues pertaining to Union law to the CJEU for preliminary ruling. Thus, the preliminary ruling procedure is assigned the role of indirect legal proceedings.

## II. Substantive conditions

Under which conditions can a reference for a preliminary ruling be considered?

The general question arises whether a reference for preliminary ruling is to be considered for each case where Union law was potentially applicable - regardless of which rules of procedure are valid.

The following substantive conditions must be satisfied:

### 1. Pending proceedings

The proceedings must (still) be pending. A referred question can no longer be posed if the proceedings before the national court have been completed<sup>8</sup>. It is at the national

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<sup>6</sup> *Wegener* in Callies/Ruffert, EUV/AEUV, 5th Edition, Article 267 TFEU marginal note 1 with further reference.

<sup>7</sup> CJEU, judgment of 03/10/2013, C-583/11 marginal note 61; annulment actions offer individual legal protection for "non-privileged claimants", in particular for the recipient of Union decisions imposed against him/her. In particular, it reviews the legality of cartel fines, cf. Mächtle, JUS 2015, 28, 32; cf. with regard to the relation to references for preliminary rulings *Gaitanides* in von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7th Edition, Article 267 marginal note 37 f.

<sup>8</sup> Cf. CJEU, judgments of 21/04/1988 - C-338/85 marginal note 11; of 04/10/1991 - C-159/90 marginal note 12 and of 13/04/2000 - C-176/96 marginal note 19.

judge's discretion to decide at what stage of the proceedings such a request should be made<sup>9</sup>.

Firstly, it is to be considered that the reference for a preliminary ruling must make all information available to the CJEU that enables it to assess the applicability of Union law to the initial legal dispute. The CJEU thus expressly deems it desirable that the national judge only decides to make a reference for a preliminary ruling when he/she is able to define, in sufficient detail, the legal and factual context of the case in the main proceedings, and the legal issues which it raises. Furthermore, both sides have to "have been heard"<sup>10</sup>.

Secondly, aspects of procedural economy are to be considered. For example, if a question of European law is at the fore of a legal dispute, it may seem advisable to make a reference for a preliminary ruling at an early stage in order to shorten lengthy proceedings. Even if the referring court derogates from the legal opinion expressed by the CJEU (so far), a reference at the earliest stage possible seems to stand to reason.

Depending on whether the assessment by a national judge concerning the stage at which the reference for a preliminary ruling is made makes sense, a reference can, for example, already be considered in preliminary proceedings, e.g. relating to an application for legal aid<sup>11</sup>. It is also to be taken into consideration in proceedings for interim orders. Neither the urgency, nor the provisional nature of summary proceedings, questions the powers of national courts to call upon the CJEU<sup>12</sup>.

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<sup>9</sup> CJEU, judgment of 17/4/2007, C-470/03 with further reference; Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 25/11/2016, Official Journal of the European Union 2016, C 439/01 No. 12.

<sup>10</sup> CJEU, judgment of 17/4/2007, C-470/03 with further reference; Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 25/11/2016, Official Journal of the European Union 2016, C 439/01 no. 12 f.; CJEU, judgment of 30/3/2000, C-236/98; cf. also *Latzel/Streinzi*, NJOZ 2013, 97, 100.

<sup>11</sup> Cf., for example, CJEU, judgment of 07/11/1996 - C-77/95 marginal note 2 and of 22/12/2010 - C-279/09 marginal note 2.

<sup>12</sup> CJEU, judgments of 24/05/1977 - C-107/76 marginal note 5; of 27/10/1982 - C-35/82 and 36/82 marginal note 9 and of 21/04/1988 - C-338/85 marginal note 12.

## 2. The court or tribunal

Pursuant to Article 267 (2) TFEU, 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<sup>13</sup>. Otherwise, it would be at the discretion of the Member States' legislatures to impose statutory limits on the right to make a reference for a preliminary ruling.

The CJEU has developed the following categories to define the terms "court or tribunal":

It must be a permanent body of a Member State (1) which is established by law (2) and rules independently (3) as the compulsory jurisdiction (4). The proceedings must be conducted in at least one independent trial court (5) where the proceedings must aim at a decision which has the same effects as a judgment handed down by an ordinary court in application of rules of law (6), and is definitive and enforceable (7)<sup>14</sup>.

Therefore, in particular, private arbitral tribunals have no right to make references for preliminary rulings. The public authorities of the Member State concerned are not involved in the decision to opt for arbitration. They cannot intervene in the proceedings before the arbitrator (first criterion). Furthermore, the parties are under no obligation, in law or in fact, to refer their disputes to arbitration (fourth criterion)<sup>15</sup>.

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<sup>13</sup> Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 25/11/2016, Official Journal of the European Union 2016, C 439/01 No. 9.

<sup>14</sup> With regard to the criteria cf. CJEU, judgments of 14/6/2011, C-196/09 marginal note 37 with further reference and of 31/1/2013, C-394/11 marginal note 38 with further reference; summarised by *Shirvani*, ZfBR 2014, 31ff.; for the capacity to proceed of the federal procurement supervisory committees [Vergabekammern des Bundes] at the federal German antitrust office, Bundeskartellamt, cf. CJEU decision of 13 February 2014, C-555/13.

<sup>15</sup> CJEU, judgments of 23/03/1982, C-102/81, ECR [1982] 1095, 1110 f. and of 27/01/2005 - C-125/04 marginal note 13; *Gaitanides* in von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7th Edition, Article 267 marginal note 43.

### 3. Reference for a ruling on interpretation or validity

In accordance with the purpose of the reference for preliminary ruling to secure legal unity of the Union through uniform interpretation and application of Union law, the CJEU rules on

- the interpretation of the Treaties:  
Article 267 (1) Sentence 1 (a) and (b) TFEU

and

- the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union: Article 267 (1) Sentence 1 (b) TFEU.

#### a. Reference for a ruling on interpretation

Article 267 (1) Sentence 1 (a) and (b) Alternative 2 TFEU refers to how a rule of Union law is applied. A reference for a ruling on interpretation is to be considered if the judge has any doubt how a Union-law provision is to be understood, and thus interpreted, in the context of a specific case.

"Treaties" within the meaning of Article 267 (1) Sentence 1 (a) TFEU are (not exhaustively)<sup>16</sup> provisions of

- TFEU and TEU  
(cf. legal definition in Article 1 (2) TFEU),
- their Protocols and Annexes (cf. Article 51 TEU)
- the Charter of Fundamental Rights of the European Union (pursuant to Article 6 (1) half sentence 2 TEU with the same legal value as the Treaties) as well as

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<sup>16</sup> For a detailed description, cf. *Karpenstein* in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 60. EL 2016, Article 267 marginal note 20 ff.

- the legal principles developed by Union case-law , e.g. concerning the issue of primacy over national law <sup>17</sup> , the protection of fundamental rights and procedural rights that approximate the status of fundamental rights<sup>18</sup>.

"Actions of the institutions<sup>19</sup>, bodies, or other offices or agencies of the Union" are all secondary legal acts of the Union<sup>20</sup>. Primarily, they include the typical legislative acts stated in Article 288 (1) TFEU, in particular

- regulations and directives.

Furthermore, this includes

- decisions, recommendations and opinions concerning this.

The assessments on whether CJEU judgments can be subject to a reference for a preliminary ruling differ<sup>21</sup>. The CJEU deems a further reference justified when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law to the Court, or again when it submits new considerations which might lead the Court to give a different answer to a question submitted earlier. However, it is not permissible to use such a reference as a means of contesting the validity of the judgment delivered previously<sup>22</sup>. Thus, parties can (only) litigate to secure an "interpretation judgment". Pursuant to Article 43 CJEU-Statute and on application by

<sup>17</sup> *Latzel/Streinzi*, in NJOZ 2013, 97.

<sup>18</sup> *Wegener* in Callies/Ruffert, EUV/AEUV, 5th Edition, Article 267 TFEU marginal note 9 and Article 19 TEU marginal note 19.

<sup>19</sup> See Art. 13 (1) sub-para 2 TEU.

<sup>20</sup> With the exception of the regulatory areas pursuant to Article 275 Sentence 1 TFEU (foreign and security policy) and Article 276 TFEU (operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order, and the safeguarding of internal security).

<sup>21</sup> See: in favour: *Wegener* in Callies/Ruffert, EUV/AEUV, 5th Edition, Article 267 TFEU marginal note 10; opposed: *Streinz/Ehricke*, TEU/TFEU, 2nd Edition, Article 267 TFEU marginal note 20; cf. also *Latzel/Streinzi*, NJOZ 2013, 97, 99 f.

<sup>22</sup> CJEU, decision of 05 March 1986, C-69/85 marginal note 15.

any party (or any institution of the Union) establishing an interest therein, the CJEU shall construe a judgment if its meaning or scope is in doubt<sup>23</sup>.

Example for a reference for a ruling on interpretation<sup>24</sup>:

*§ X of the W-Act of Member State AU determines that one of the conditions for granting business licences for certain arms trades is that a natural person is a citizen of the state AU. A business licence is not granted to K, who has a different citizenship. He initiated legal proceedings and criticized that the national regulation violates Article 45 TFEU as, pursuant to Article 45 (2) TFEU, the freedom of movement for workers entails the abolition of any discrimination based on nationality as regards employment, and other conditions of work and employment.*

*Is Article 45 TFEU to be construed as stipulating that it is opposed to § X, pursuant to which the nationality of AU is a prerequisite for obtaining the business licence?*

## **b. Reference for a ruling on validity**

Article 267 (1) Sentence 1 (b) Alternative 1 TFEU concerns how a rule of Union law is applied. A reference for a ruling on validity is to be considered if the judge has any doubt about the validity, and thus the legality<sup>25</sup>, of a Union-law provision to be applied by him to a specific case. The doubts can relate to formal or substantive aspects of legality<sup>26</sup>.

"Actions of the institutions, bodies, or other offices or agencies of the Union" are the

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<sup>23</sup> Protocol on the Statute of the Court of Justice of the European Union in the version of 30 March 2010, Official Journal of the European Union C 83/2010, available at [curia.europa.eu/jcms/jcms/Jo2\\_8349/enstatut\\_2008-09-25\\_17-29-58\\_783.pdf](http://curia.europa.eu/jcms/jcms/Jo2_8349/enstatut_2008-09-25_17-29-58_783.pdf); *Streinz/Ehrlicke*, EUV/AEUV, 2nd Edition, Article 267 TFEU marginal note 20.

<sup>24</sup> Example formed according to CJEU, judgment of 4 September 2014, C-474/12.

<sup>25</sup> CJEU, judgments of 17/12/1970, C-25/70 marginal note 4 and of 14/03/1973 - C-57/72 marginal note 2; *Streinz/Ehrlicke*, TEU/TFEU, 2nd Edition, Article 267 TFEU marginal note 23; *Dausen*, Vorabentscheidungsverfahren, 2nd Edition, 74.

<sup>26</sup> *Streinz/Ehrlicke*, TEU/TFEU, 2nd Edition, Article 267 TFEU marginal note 23; *Gaitanides* in von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7th Edition, Article 267 marginal note 34.

object of the reference for a ruling on validity. Thus,

- secondary law, in its entirety,

but not primary Union law, can be subject to a reference for a ruling on validity<sup>27</sup>. As the higher-ranking law, it is rather the standard to test the validity of the provision of secondary Union law upon which doubt has been cast<sup>28</sup>. Therefore, in addition to TEU and TFEU, the sources of law described under No. II.3.a. cannot be the subject of a reference for a ruling on validity. Legal acts of the remaining secondary Union law can be considered as a standard to test if they are higher-ranking than the rules that are to be reviewed<sup>29</sup>. National law is excluded as an assessment criterion<sup>30</sup>.

A clear distinction between references for rulings on validity or interpretation cannot always be made. This results from the fact that a Union-law provision can (only) be in conformity with the Treaty, and thus valid, if it has been interpreted accordingly<sup>31</sup>. According to established CJEU case-law, an interpretation which is compatible with the provision of the Treaty is preferable to such interpretation that entails it being assessed as incompatible with the Treaty<sup>32</sup>.

Example for a reference for a ruling on validity<sup>33</sup>:

*Due to the European regulation X a legal act is imposed against citizen F. F challenges the legal act in court. The court rules that Article Y of the European regulation breaches*

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<sup>27</sup> *Gaitanides* in von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th Edition, Article 267 marginal note 32;

<sup>28</sup> CJEU, judgments of 17/12/1970, C-11/70 marginal note 3f. and of 13/12/1979 - C-44/79 marginal note 14f.; *Gaitanides* in von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th Edition, Article 267 marginal note 35.

<sup>29</sup> For example, basic regulation to implementing regulation; cf. CJEU, judgments of 24/06/1993 - C-90/92 marginal note 11 f. and of 10/09/1996 - C-61/94 marginal note 52, or regulations, on the one hand, and individual judgments on the implementation of regulations, on the other hand, *Gaitanides* in von der Groeben/Schwarze/Hatje, *EUV/AEUUV*, 7. Edition, Article 267 marginal note 35.

<sup>30</sup> CJEU, judgment of 13/12/1979, C-44/79 marginal note 14.

<sup>31</sup> CJEU, judgments of 29/06/1995, C-135/93 marginal note 37 and of 10/09/1996 - C-61/94 marginal note 52.

<sup>32</sup> CJEU, judgment of 29/06/1995, C-135/93 marginal note 37 with further reference.

<sup>33</sup> Example formed according to CJEU, judgment of 22/10/1987, C-474/12, Circular 314/85 "Foto-Frost".

*Article X TFEU.*

*Is Article Y of the regulation void?*

#### **4. Doubts concerning Union law**

A question is only suitable for reference if the doubts of the national judge only concern Union law - not national law.

In detachment from the national main proceedings, the CJEU rules exclusively on the interpretation of Union law. Thus, questions regarding national law are not admissible in references for preliminary ruling<sup>34</sup>. It is the duty of the national judge to apply and interpret national law.

This means: the CJEU makes no statement concerning the question of interpreting a national provision and its application to the specific case<sup>35</sup>. The CJEU does not solve the specific case by interpreting and applying the national provision "correctly". The CJEU has no jurisdiction to decide on the validity or interpretation of national rules<sup>36</sup>.

In other words: The referring court cannot achieve with its question that the CJEU applies the national norm in a "correct Union-law compliant manner" to the specific legal dispute of the main proceedings, thus in fact deciding the legal dispute.

The principle that the point of reference of the question must be Union law - not national law - seems obvious. This is unproblematic if the referring judge directly applies a provision of Union law, e.g. the rule of a regulation. The referring judge must conduct a

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<sup>34</sup> As a fundamental rule CJEU, C-6/64, ECR [1964] 1259 1262 60 "Costa ./ E.N.E.L.", 2; *Streinz/Ehricke*, TEU/TFEU, 2nd Edition, Article 267 marginal note 14.

<sup>35</sup> As a fundamental rule CJEU, C-6/64, ECR [1964] 1259 1268 60 "Costa ./ E.N.E.L.", cf. also judgment of 15 December 1993, C-292/92 marginal note 8; *Streinz/Ehricke*, TEU/TFEU, 2nd Edition, Article 267 marginal note 14.

<sup>36</sup> CJEU, judgment of 01/12/1998, C-410/96 marginal note 19; *Koenig/Pechstein/Sander*, EU-/EG-Prozessrecht, 2nd Edition, marginal note 767.

more precise review whether his/her doubts do indeed concern Union law, if he/she directly applies a rule of national law which is based on Union law. This is the general rule if a rule of national law is based on the implementation of a directive. In this constellation, the primary focus of the referring judge is on the national law which directly decides the legal dispute. Therefore, the judge must make himself/herself aware of the fact that the recurrent, pressing question whether the applicable national rule is compatible with the Union-law provisions, is precisely not suitable for reference to the CJEU.

Example:

*In the specific case presented to her for decision, Judge R asks herself if § 312a (1) BGB [German Civil Code] is compatible with the new EU-directive for consumer rights. She is deliberating on the following question: "Is § 312a (1) BGB to be construed as meaning that ...?"*

*The CJEU cannot directly provide information on the "correct" interpretation of § 312a (1) BGB.*

However, the CJEU will decide how a specific rule of Union law is to be interpreted. The CJEU is endowed with the powers to issue the referring court with all criteria for the interpretation of Community law, which enable it to judge the compatibility of the [national] legal rule with the Community regime<sup>37</sup>. It is then the task of the judge at the national level to apply the interpretation of Union law as rendered by the CJEU to the specific case and, if necessary, to "correctly" construe the national rule in accordance with the interpretation provided by the CJEU.

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<sup>37</sup> CJEU, judgment of 15/12/1993, C-292/92 marginal note 8; *Streinz/Ehricke*, TEU/TFEU, 2nd Edition, Article 267 marginal note 14.

For the above example this means:

*R submits the following question: "Is Article X of the directive contrary to § 312a (1) BGB, which provides that ...?"*

*The CJEU will declare how Article X of the directive is to be interpreted. From this it will follow whether and to which extent it is derogation of the national rule. R herself must decide on the interpretation of § 312a (1) BGB with consideration of this proviso.*

## **5. Relevance**

The question raised in the reference must be relevant for the decision. A question is not relevant if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case<sup>38</sup>.

Whether the question which is to be raised is actually necessary for the outcome of the specific case is solely at the discretion of the national court. The CJEU has repeatedly emphasised that *"it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court"*<sup>39</sup>. On the one hand, the jurisdiction of the referring court to review this question follows from the wording of Article 267 (2) TFEU: *"if it considers that a decision on the question is necessary to enable it to give judgment"*, and on the other hand, from the fact that the question of relevance is an issue of national law, for which - as discussed above under No. II.4 - jurisdiction lies solely with the national court, which ultimately is responsible for the decision in the case

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<sup>38</sup> CJEU, judgment of 06/10/1982, C-283/81 marginal note 10.

<sup>39</sup> CJEU, judgments of 29/11/1978, C-83/78 marginal note 25; of 08/11/1990 - C-231/89 marginal note 19; of 28/11/1991 - C-186/90 marginal note 8; of 23/02/1995 - C-358/93 marginal note 10; of 15/12/1995 - C-415/93 marginal note 59 and of 13/03/2011 - C-379/98 marginal note 38.

at hand<sup>40</sup>. Ultimately, important practical aspects are that the national court is alone in having a direct knowledge of the facts of the case and of the arguments put forward by the parties<sup>41</sup>.

Thus, the extent of discretion enjoyed by the national judge is generally not reviewable. If the judge decides to make a reference for a preliminary ruling, the questions submitted by the national court enjoy a presumption of relevance<sup>42</sup>.

The following examples are the only exemptions from the general rule that the CJEU does not review the relevance of the submitted question:

- it is quite obvious that the interpretation of Community law or the examination of the validity of a rule of Community law sought by a national court bears no relation to the actual nature of the case or to the subject-matter of the main action<sup>43</sup>

or

- it is a purely hypothetical question<sup>44</sup> so that there is no need for legal protection.

It is not the duty of the CJEU to draft opinions on general or hypothetical questions<sup>45</sup>.

Example<sup>46</sup>:

*In reference to some legal dispute, Judge R raises the question to the CJEU whether he*

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<sup>40</sup> CJEU, judgment of 14/12/1996, C-104/95 marginal note 11.

<sup>41</sup> CJEU, judgment of 29/11/1978, C-83/78 marginal note 25.

<sup>42</sup> CJEU, judgments of 15/05/2003, C-300/01 marginal note 31 with further reference and of 19/07/2012 - C-470/11 marginal note 17 with further reference.

<sup>43</sup> CJEU, order of 26/01/1990, C-286/88 marginal note 8.

<sup>44</sup> CJEU, judgments of 15/12/1995, C-415/93 marginal note 60; of 14/12/1996 - C-104/95 marginal note 11; of 17/07/1997 - C-130/95 marginal note 22; for further details see *Wägenbaur*, EuZW 2000, 37, 39 f.

<sup>45</sup> CJEU, judgment of 15/12/1995, C-415/93 marginal note 60 with further reference.

<sup>46</sup> Pursuant to judgment of 26 January 1990, C-283/88.

*is independent within the meaning of Union law despite his statutory liability pursuant to national law.*

In these exceptions, the CJEU will declare that it has no jurisdiction and will reject the reference for preliminary ruling as inadmissible<sup>47</sup>.

## **6. Discretion or duty to make a reference for a preliminary ruling**

The wording of Article 267 (2) and (3) TFEU clearly states that a national court (Article 267 (2) TFEU, "may") can be granted discretion with regard to submitting a reference for a preliminary ruling, but it can also be under the obligation to make a reference for a preliminary ruling (Article 267 (2) TFEU, "shall").

When is a national court under the obligation and when is it at its discretion to bring the question before the CJEU?

Whether the discretion to make a reference consolidates into a duty to make a reference for a preliminary ruling follows from the purpose of the preliminary ruling procedure to avoid divergence of national case-law from Union law.

### **a) Reference for rulings on validity**

Irrespective of whether it is a court of non-final or final instance, the duty to make a reference for a preliminary ruling arises in the following constellations:

#### **aa) No application of Union law due to doubts concerning its validity**

If the national court doubts the validity of a rule of Union law and thus does not want to apply it, then it must make a reference for a preliminary ruling.

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<sup>47</sup> CJEU, judgments of 15/12/1995, C-415/93 marginal note 61; of 16/01/1997 - C-134/95 marginal note 12 and of 09/10/1997 - C-291/96 marginal note 12; cf. also *Karpenstein* in Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, 60. EL 2016, Article 267 TFEU marginal note 26 with further reference.

The CJEU claims for itself a dismissal monopoly for Union law<sup>48</sup>. The exclusive jurisdiction of the CJEU to declare Union law invalid follows from the wording of Article 267 (1) TFEU as well as from the supervisory function with regard to the review of acts by Union institutions<sup>49</sup>. Legal unity and legal certainty in the Union would be put at risk if the Member State courts can determine the invalidity of Union law themselves<sup>50</sup>.

Example:

*Judge R deems Article X of the European regulation invalid and intends to decide the legal dispute without consideration of this provision. Must he make a reference?*

*Yes, he is under the obligation. He is not entitled to deem Union law invalid and to refrain from applying it.*

### **bb) Applicability of national law despite non-compliance with Union law**

Opinions differ on whether the duty to make a reference for a preliminary ruling arises when the national court is convinced that the rule of national law is contrary to Union law, but would like to continue applying the rule of national law on the grounds of legal certainty.

The Higher Regional Court (OVG) Münster presumed that the preferential application of Community law was (until national law is revised) suspended if it was foreseeable that non-application of national law would result in endangering important public interests, this endangerment would obviously be of greater substance than the impairment of the respectively breached legal goods and if ultimately jeopardising important public interests could not be avoided by any other means than the limited continued application

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<sup>48</sup> *Wegener* in Callies/Ruffert, EUV/AEUV, 5th Edition, Article 267 TFEU marginal note 29.

<sup>49</sup> CJEU, judgment of 22/10/1987, C-314/85 marginal note 15 ff.

<sup>50</sup> As a fundamental rule: CJEU, judgment of 22/10/1987, C-314/85 marginal note 15; the decision was made to not expressly include this in the wording of Article 267 TFEU; cf. *Wegener* in Callies/Ruffert, EUV/AEUV, 5th Edition, Article 267 TFEU marginal note 29 footnote 121 with further reference.

of the affected national legal provisions<sup>51</sup>.

Also, in this constellation, the objection is put forth that the validity of Union law is "*consciously being questioned*"<sup>52</sup>. The Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) sees a duty to make a reference for a preliminary ruling on the part of the court, regardless of whether it is a court of non-final or final instance. Referring the law pursuant to Article 100 (1) Sentence 1 GG (Basic Law - German Constitution) was inadmissible due to the constitutional requirement of relevance if the court has not previously resolved by way of a preliminary ruling procedure "*whether the legal provision which it judges to be unconstitutional has been adopted in transposition of latitude left to the national legislature by Union law*"<sup>53</sup>.

### **cc) Presumption of validity of Union law**

If the judge hearing the main action has no doubts concerning the validity of the applicable law, he is under no obligation to raise the question of relevance<sup>54</sup>. The presumption of validity is embedded in Union law<sup>55</sup>. A duty to make a reference for a preliminary ruling does not only arise due to the fact that a party in a legal dispute puts forward the argument that the applicable Union-law provision is invalid and demands that reference for a preliminary ruling is made<sup>56</sup>. The aim of the preliminary ruling procedure to prevent diverging court rulings on issues of Union law is precisely not at risk if the court has no doubts concerning the validity of Union law.

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<sup>51</sup> OVG Münster, judgment of 28/6/2006 - 4 B 961/06, EuR 2006, 821, 826 marginal note 43 ff.

<sup>52</sup> *Wegener* in Callies/Ruffert, EUV/AEUV, 5th Edition, Article 267 TFEU marginal note 30; cf. also in rejection *Kruis*, EuZW 2006, 603, 606 ff.; *Terhechte*, EuR 2006, 828, 841 ff.

<sup>53</sup> BVerfG, Order of 4/10/201 – 1 BvL 3/08, BVerfGE 129, 186, 198 ff.

<sup>54</sup> CJEU, judgments of 22/10/1985, C-314/85 marginal note 14 and of 19/01/2010 - C-555/07 marginal note 51-53.

<sup>55</sup> CJEU, judgments of 06/10/1982, C-283/81 marginal note 9 and of 10/01/2006 - C-344/04 marginal note 28 37 f.

<sup>56</sup> CJEU, judgment of 22/11/1978, C-93/78 marginal note 5; *Streinz/Ehricke*, TEU/TFEU, 2nd Edition, Article 267 marginal note 35; *Broberg/Fenger*, EuR 2010, 835, 841.

Example:

*The authorised counsel of the claimant challenges the validity of the rule of regulation X governing relevance. Judge R does not share the doubts and applies Union law. The legal view taken by the party does not oblige R to make a reference for a preliminary ruling.*

## **b) References for rulings on interpretation**

Concerning a reference for a ruling on interpretation, and pursuant to Article 267 (2) and (3), a differentiation must be made between courts of non-final and final instance with regard to the question of the discretion and respectively the duty to make a reference for a preliminary ruling.

### **aa) Court of non-final instance**

As the risk that a body of national case-law can develop which is not in accordance with Union law is lower if the decision of the court can be revoked and the appellate court can make a decision which is "correct and in conformity with Union law", Article 267 (2) TFEU grants courts whose decisions can be challenged with appeals ("specific perspective")<sup>57</sup> discretion to make references for preliminary rulings.

Whether there is a judicial remedy against a decision is determined by the respective law of the Member State. The term judicial remedy is to be understood in the context of Union law. Therefore, it is not precluded by the fact that an appeal is subject to a preliminary declaration of admissibility by the supreme court<sup>58</sup>, or that the nature of the pleas which may be raised before such a court is restricted<sup>59</sup>.

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<sup>57</sup> CJEU, judgments of 22/02/2001, C-393/98 marginal note 16 f. and of 15/09/2005 - C-495/03 marginal note 29f. with additional citation; the so-called "abstract perspective" according to which in Germany only the highest federal courts, the state constitutional courts and the Federal Constitutional Court are under the obligation to submit, cannot comprehensively secure the purpose of the preliminary ruling procedure; cf. Erfurter Kommentar zum Arbeitsrecht/*Wißmann*, 17th Edition, Article 267 marginal note 27 f.

<sup>58</sup> CJEU, judgment of 04/06/2002, C-99/00 marginal note 16; *Streinz/Ehricke*, TEU/TFEU, 2nd Edition, Article 267 TFEU marginal note 42.

<sup>59</sup> CJEU, judgment of 16/12/2008, C-210/06 marginal note 77.

Appeals include all ordinary judicial remedies which can be used to achieve a review by a higher court<sup>60</sup>, i.e.

- appeal [Berufung]
- appeal on points of law [Revision]
- complaint against denial of leave to appeal on points of law [Nichtzulassungsbeschwerde der Revision]<sup>61</sup>.

As a complaint against denial of leave to appeal is to be understood as a "judicial remedy" in the context of Union law, appellate courts (Berufungsgerichte) are granted discretion to make a reference for preliminary ruling even if they do not grant leave for an appeal on points of law (Revision)<sup>62</sup>. The court hearing an appeal on points of law (Revisionsgericht) must grant leave for the appeal on points of law (Revision) if the Union-law question requires to be answered by the CJEU<sup>63</sup>.

Extraordinary judicial remedies such as the complaint to remedy a violation of the right to be heard in court (Anhörungsrüge), the constitutional complaint or a retrial do not constitute appeals. They can also be considered against decisions of the highest courts and thus cannot exclude the duty to make a reference for a preliminary ruling<sup>64</sup>.

Example:

*In the proceedings, Judge R at the Local Court (Amtsgericht) dismisses the claim brought by K for payment of 30 euros pursuant to § 495a Sentence 1 German Code of*

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<sup>60</sup> Erfurter Kommentar zum Arbeitsrecht/Wißmann, Art. 267 AEUV, 17th Edition, marginal note 27.

<sup>61</sup> *Gaitanides* in von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7th Edition, Article 167 TFEU marginal note 63 with further reference; on the complaint against denial of leave to appeal: BVerfG, Order of 31/5/1990 - 1 BvL 12, 13/88 and 2 BvR 1436/87, BVerfGE 82, 159, 196; BVerwG, Orders of 20/3/1986 - 3 B 3/86, NJW 1987, 601 and of 14/12/1992 - 5 B 72/92, NVwZ 1993, 770.

<sup>62</sup> BVerfG, Inadmissibility Order of 28/8/2014 - 2 BvR 2639/09, juris marginal note 46; *Gaitanides* in von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7th Edition, Article 167 TFEU marginal note 63.

<sup>63</sup> *Gaitanides* in von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7th Edition, Article 167 TFEU marginal note 63; *Latzel/Strein*, in NJOZ 2013, p. 97, 99 with further reference.

<sup>64</sup> Erfurter Kommentar zum Arbeitsrecht/Wißmann, Art. 267 AEUV, 17th Edition, marginal note 30; *Strein*/Ehrlicke, TEU/TFEU, 2nd Edition, Article 267 TFEU marginal note 42.

*Civil Procedure (ZPO). She has doubts concerning the interpretation of the relevant Union law.*

a) R does not grant leave to appeal pursuant to § 511 (2) No. 2 (4) ZPO

*R must make a reference! If applicable, K could lodge a complaint to remedy a violation of the right to be heard in court (Anhörungsrüge) pursuant to § 321a ZPO provided that the denial of appeal violates his right to a hearing in accordance with law pursuant to Article 103 (1) GG; after having conducted proceedings pursuant to § 321a ZPO, a constitutional complaint would be admissible<sup>65</sup>. However, neither the Anhörungsrüge nor the constitutional complaint are "judicial remedies" within the meaning of Article 267 (3) TFEU. Furthermore, Article 267 (3) TFEU makes no distinction regarding the duty to make a reference for a preliminary ruling on the grounds of whether the main proceedings seem to be of legal significance or on the grounds of the dispute value<sup>66</sup>.*

b) R grants leave to appeal pursuant to § 511 (2) No. 2 (4) ZPO.

*R has discretion to make a reference for preliminary ruling! Appeal is available as a judicial remedy of the decision. The appellate court is bound by the leave to appeal<sup>67</sup>.*

## **b) Courts of final instance**

Courts of final instance, i.e. such courts against whose decisions no judicial remedies are available, are generally under the obligation to make a reference for a preliminary ruling pursuant to Article 267 (3) TFEU.

According to the specific perspective, not only the Federal Constitutional Court and the highest federal courts but also - under the given circumstances (cf. above example) -

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<sup>65</sup> MüKo/Deppenkemper, ZPO, 5th Edition, § 495a marginal note 50.

<sup>66</sup> Broberg/Fenger, EuR 2010, 835, 841 and 850.

<sup>67</sup> Zöller/Heßler, ZPO, 31st Edition, § 511 marginal note 41.

Local Courts (Amtsgerichte) are courts of final instance.

A particular rule applies to decisions rendered in proceedings for interim orders. Such (provisional) decisions are also not considered to be "without judicial remedy" when they can no longer be challenged. There is no duty to make a reference for a preliminary ruling, as a party can seek a decision in the main proceedings and can obtain a ruling on the question pertaining to Union law<sup>68</sup>.

## 8. Exceptions for the duty to make a reference for a preliminary ruling

The CJEU started developing exceptions from the principle of the duty to make a reference for a preliminary ruling at an early date. On the one hand, this prevents unnecessary delays of the proceedings before the referring court and, on the other hand, the exceptions also protect the CJEU against congestion. If there is no risk of falsely interpreting Union law and derogating judgments of the Member State courts, the wording of Article 267 (3) TFEU, providing for the "all-encompassing" duty to make a reference for a preliminary ruling, seems inappropriate if

- there is settled case-law of the CJEU which has already dealt with the point in law in question; i.e. the CJEU has already ruled on the point of law in question in a previous case ("acte éclairé")<sup>69</sup>

or

- the question has not yet been interpreted by the Court, but the correct application of EU law is so obvious as to leave no scope for any reasonable doubt ("acte clair")<sup>70</sup>.

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<sup>68</sup> CJEU, judgments of 24/05/1977, C-107/76 marginal note 5 f. and of 27/10/1982, C-35/82 and 36/82 marginal note 8; BVerfG, Orders of 29/11/1991 – 2 BvR 1642/91, NVwZ 1992, 360 and of 19/10/2006 – 2 BvR 2023/06, EuR 2006, 814, 817 f. marginal note 12 f.; *Wegener* in Callies/Ruffert, EUV/AEUV, 5th Edition, Article 267 TFEU marginal note 31.

<sup>69</sup> CJEU, judgments of 27/3/1963, C-28/62, 80 f. "Costa"; of 13/5/1981, C-66/80 marginal note 18; of 06/10/1982 - C-283/81 "CILFIT" marginal note 14; of 4/ 11/1997 C-337/95 marginal note 29 and of 01/10/2015 - C-452/14 marginal note 43.

<sup>70</sup> CJEU, judgment of 06/10/1982, C-283/81 "CILFIT" marginal note 16.

## a) acte éclairé

If a court of last instance wishes to desist from submitting a reference for a preliminary ruling on the grounds of an "acte éclairé", it must be certain that the CJEU had previously ruled on the question and that it does not want to derogate from the answer.

The CJEU deems this condition fulfilled where "*the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case*"<sup>71</sup>. At a later date, it extensively clarified that the legal question at issue need not be strictly identical and that it is irrespective what the nature of the proceedings were in which the CJEU had previously answered the question<sup>72</sup>.

The raised question has been the subject of a preliminary ruling in a "similar case" if the CJEU had previously ruled on the question

- on the basis of comparable issues of fact<sup>73</sup>
- and
- regarding the same or a Union provision that is identical in wording
- and
- regarding the specific question of interpretation to be raised<sup>74</sup>.

If a court is uncertain whether there is settled CJEU case-law on the question submitted for preliminary ruling, or if it is uncertain whether the case at issue is indeed a similar case, it must make a reference for a preliminary ruling. If the national court concludes that it is appropriate, it may also once again submit an identical question of interpretation to the CJEU<sup>75</sup>. If applicable, the CJEU then "only" decides to rule by reasoned order, cf.

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<sup>71</sup> CJEU, judgment of 27 March 1963, C-28/62 "Costa".

<sup>72</sup> CJEU, judgment of 06/10/1982, C-283/81 "CILFIT".

<sup>73</sup> The subject matter of the dispute need not be identical as the issue at hand is the content of the Union-law provision as determined by the CJEU; Erfurter Kommentar zum Arbeitsrecht/*Wißmann*, 17th Edition, Article 267 marginal note 32.

<sup>74</sup> *Karpenstein* in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 60th Edition, Article 267 marginal note 56.

<sup>75</sup> Article 104 (2) Rules of Procedure.

Article 99 Rules of Procedure of the Court of Justice ("Rules of Procedure").

Solely the circumstance that a question specifically raised in the legal dispute awaiting judgment has already been the subject of another pending reference for a preliminary ruling does not release the court from its duty to request a reference. German courts tend to stay the proceedings<sup>76</sup>. Once the CJEU's judgment has been presented, a decision can then be made whether the point of law in question has been answered or whether a reference is nevertheless necessary.

#### **b) acte clair**

The exemption of obviousness (*acte clair*) developed by the CJEU seems more venturesome, as it does claim primacy for the interpretation of Union law. Thus, a national court could avoid a disagreeable reference for a preliminary ruling by invoking that there were no reasonable doubts concerning the correct interpretation of the applicable Union law. Therefore, the CJEU introduced strict criteria in the "C.I.L.F.I.T." decision, according to which courts can invoke obviousness<sup>77</sup>:

The court must be convinced that

- its own interpretation is (the only) correct (one)
- it must also be convinced that it is equally obvious to the courts of the other Member States and to the CJEU;
- the obviousness is also given when a comparison of all binding language versions has been made;
- the peculiarity of Union law terminology does not give rise to a

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<sup>76</sup> With regard to the participatory rights of the parties and potential delays, see *Foerster*, EuZW 2011, 901 ff. for a critical and detailed description.

<sup>77</sup> CJEU, judgment of 06/10/1982, C-283/81 "CILFIT" marginal note 16-20, cf. also judgment of 15/09/2005, C-495/03 marginal note 33.

different comprehension,

- any other interpretation than its own is impossible also when "*interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied*".

One could presume that under these circumstances no court would decide against a submission invoking obviousness, as it is barely possible to reach this degree of certainty. The efforts involved in comparing the own interpretation with, for example, the French and English language versions are most likely considerable for most judges.

However, the *acte clair*-doctrine has assumed great significance in practice. Member State courts often exercise a certain "functional flexibility" in its application<sup>78</sup>, which the CJEU has also countered<sup>79</sup>.

In any case, it is permissible to be guided solely by the judicial conviction. Obviousness does not depend on the arguments put forward by the parties<sup>80</sup>, even if the presented arguments might give rise to a critical review of the concluded interpretation assessment. Also, obviousness does not depend on whether bodies of a non-judicial nature such as administrative authorities arrived at the same conclusion<sup>81</sup>.

Furthermore, it is also held that the court must examine other but not all language versions<sup>82</sup>. In some parts, this condition is only a warning against adopting an

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<sup>78</sup> Cf. for more detail *Broberg/Fenger*, EuR 2010, 825, 839 ff.; *von Danwitz*, NwZ-Beilage 2013, 44, 45 f. und *Latzel/Strein*, NJOZ 2013, 97, 99; for a critical perspective and with extensive citation of German final-instance case-law see *Karpenstein* in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 60th Edition, Article 267 marginal note 57 footnote 2.

<sup>79</sup> Cf., for example, CJEU, judgment of 13/01/2004, C-453/00 marginal note 28.

<sup>80</sup> *Broberg/Fenger*, EuR 2010, 825, 841; cf. elaborations in II.6.a)cc).

<sup>81</sup> CJEU, judgment of 15/09/2005, C-495/03 marginal note 39.

<sup>82</sup> *Karpenstein* in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 60th Edition, Article 267 marginal note 58.

excessively literal approach to the interpretation of Community provisions<sup>83</sup>. A comparison of the language versions will not be required anyway if the interpretation of a provision or a term can be extrapolated from the principles developed in the CJEU'S case-law. Consequently, obviousness does not depend on an interpretation of the provision's wording, but on the application of the CJEU's case-law<sup>84</sup>.

It will have to be considered whether the CJEU may not have to moderate the strict criteria postulated in the C.I.L.F.I.T judgment since only a less stringent interpretation of the judgment would satisfy the requirements of the principle of judicial cooperation between the national courts and the CJEU<sup>85</sup>.

## **9. Urgent procedure and expedited procedure**

In 2016, the average time taken to deal with references for a preliminary ruling was 15 months<sup>86</sup>. That is the lowest figure recorded in the last 30 years<sup>87</sup>.

However, this may also be too long in urgent cases. For this reason, Article 23a of the Statute of the Court of Justice of the European Union<sup>88</sup> provides that the Rules of Procedure may provide for an expedited procedure and an urgent procedure. Corresponding rules on the "urgent preliminary ruling procedure" can be found in the Article 107 to Article 114 Rules of Procedure. Rules on the "expedited preliminary ruling procedure" are included in Article 105 and 106 Rules of Procedure.

With this procedure, individual rights which might be jeopardised by the potential duration of court proceedings are to be harmonised with the right of all parties to a

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<sup>83</sup> Opinions of Advocate General Jacobs in C-338/95 No. 65 and Advocate General Stix-Hackl in C-495/03 No. 99.

<sup>84</sup> Opinions of Advocate General Jacobs in C-338/95 No. 61 with regard to customs and VAT; cf. also *Broberg/Fenger*, EuR 2010, 825, 843.

<sup>85</sup> Opinion of Advocate General Colomer, C-461/03 No. 58 f.; cf. also *Wegener* in Callies/Ruffert, EUV/AEUV, 5. Edition, Article 267 TFEU marginal note 33.

<sup>86</sup> Press Release of the European Union No 17/17, available at: [curia.europa.eu/jcms/jcms/p1\\_283223](http://curia.europa.eu/jcms/jcms/p1_283223)

<sup>87</sup> In 2013, the average duration of a reference for a preliminary ruling was 16.3 months, see CJEU Annual Report 2013.

<sup>88</sup> Available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001enc.pdf>

hearing in accordance with the law and to participation in the proceedings. Additionally, the CJEU is enabled to observe short deadlines which can be the result of Union law<sup>89</sup> and, in particular, the national legal orders<sup>90</sup>.

### **a) Urgent preliminary ruling procedure**

If a judgment is delivered in an urgent preliminary ruling procedure, the duration of the proceedings is reduced from 15 to approximately 2 months<sup>91</sup>. However, in 2016 only 8 of a total of 453 new references were urgent preliminary ruling procedures<sup>92</sup>.

That this figure is so low in relation can be deduced from the fact that this special procedure is only admissible under stringent conditions.

#### **aa) "Area of freedom, security and justice"**

The option to submit a question to the CJEU by way of an urgent preliminary ruling procedure is only given if the - or at least one of several<sup>93</sup> - question(s) are covered by Title V of Part Three of the TFEU (Article 107 (1) Rule of Procedures), which relates to the "area of freedom, security and justice". It comprises the policies on border checks, asylum and immigration, judicial cooperation in civil and criminal matters, and police cooperation. In particular, national proceedings in the areas asylum and immigration, matrimonial matters and parental responsibility can be affected. Questions which do not fall within the "area of freedom, security and justice" - even if the matter seems to be of great urgency - cannot be decided with an urgent preliminary ruling procedure. Only the expedited preliminary ruling procedure may find application in this context.

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<sup>89</sup> Cf. in detailed elaboration *Kühn*, EuZW 2008, 263 footnote 3 with further reference.

<sup>90</sup> *Kühn*, EuZW 2008, 263.

<sup>91</sup> 2013 Annual Report of the CJEU, 10, available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001enc.pdf>; *Middeke* in Rengeling/Middeke/Gellermann, Handbuch des Rechtsschutzes in der Europäischen Union, 3rd Edition, § 10 Das Vorabentscheidungsverfahren marginal note 99.

<sup>92</sup> Annual Report of the CJEU 2016, 27; cf. for an assessment *Hackspiel* in von der Groeben/Schwarze/Hatje, EuGH-Satzg, 7th Edition, Article 23a marginal note 20.

<sup>93</sup> *Hackspiel* in von der Groeben/Schwarze/Hatje, EuGH-Satzg, 7th Edition, Article 23a marginal note 5.

## bb) Particular urgency

Furthermore, particular urgency must justify the application of the urgent preliminary ruling procedure, cf. Article 107 (2) Rules of Procedure. The term "urgency" is neither defined in Article 107 (2) Rules of Procedure nor in Article 23a (2) of the Statute of the Court of Justice of the European Union, which even speaks of "extreme urgency" when the written stage of the procedure is omitted<sup>94</sup>. However, two typical constellations concerning the facts of the case have emerged in the CJEU's case-law:

- custody/deprivation of liberty, where the answer to the question raised is decisive for the duration of the deprivation of liberty<sup>95</sup>:

The CJEU's duty to act "with the minimum of delay" in a pending case with regard to a person in custody already follows from Article 267 (4) TFEU. In particular, an urgent procedure is to be considered for questions concerning the European Arrest Warrant<sup>96</sup> and border checks, asylum and immigration<sup>97</sup>;

and

- the irreparable deterioration of a parent-child-relationship<sup>98</sup>:

In particular, an urgent preliminary ruling procedure is to be considered for international child abduction<sup>99</sup> and for questions concerning the entry and residence of family members<sup>100</sup>.

The CJEU does not deem the fact that the large number of persons or legal situations potentially affected does not, in itself, constitute an exceptional circumstance that would

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<sup>94</sup> *Kühn*, EuZW 2008, 263, 264 with further details in footnote 7.

<sup>95</sup> Cf. more detailed elaboration by *Hackspiel* in von der Groeben/Schwarze/Hatje, EuGH-Satzg, 7th Edition, Article 23a marginal note 11; Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 25/11/2016, Official Journal of the European Union 2016, C 439/01 no. 33.

<sup>96</sup> CJEU, judgment of 12/08/2008, C-296/08 marginal note 32-34 and of 10/09/2013 - C-383/13 marginal note 22-26.

<sup>97</sup> CJEU, of 30/11/2009, C-357/09 marginal note 31-33 and of 10/09/2013 - C-383/13 marginal note 22-26.

<sup>98</sup> CJEU, judgment of 11/07/2008, C-195/08 marginal note 43-46; cf. also parental custody of young children Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 25/11/2016, Official Journal of the European Union 2016, C 439/01 No. 33.

<sup>99</sup> CJEU, judgment of 22/12/2010, C-491/10 marginal note 38-41.

<sup>100</sup> CJEU, order of 10/06/2011, C-155/11 marginal note 11-14.

justify the use of the expedited procedure<sup>101</sup>.

The referring court or tribunal may request that the case be dealt with under an urgent procedure or, exceptionally, it can be requested of the CJEU's own motion. If the referring court or tribunal requests the urgent procedure, it shall set out the matters of fact and law which establish the urgency with reference to Article 107 (2) Rules of Procedure (if necessary in a separate accompanying letter)<sup>102</sup>. In order to facilitate the urgent procedure with as few complications and as quickly as possible, the Rules of Procedure provide special rules<sup>103</sup>. In particular, reducing the duration of the procedure is achieved by concentrating the oral hearing and limiting the procedural involvement of the Advocate General<sup>104</sup>.

## **b. Expedited procedure**

If the reference concerns other rules and if the need for prompt processing arises in the given case, then the expedited procedure pursuant to Article 105-106 Rules of Procedure is to be considered. A reduction of the procedure's duration to under 6 months is possible<sup>105</sup>.

This procedure is also only of minor significance. In 2013, the expedited procedure was applied for in 14 cases, yet granted in none. Priority treatment was granted by the CJEU in 5 cases pursuant to Article 53 (3) Rules of Procedure<sup>106</sup>.

### **aa) Open scope of application**

In contrast to the urgent preliminary ruling procedure the scope of application of the

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<sup>101</sup> Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 25/11/2016, Official Journal of the European Union 2016, C 439/01 No. 31 f.

<sup>102</sup> On the particular formal requirements see *Kühn*, EuZW 2008, 263, 264 f. and *Hackspiel* in von der Groeben/Schwarze/Hatje, EuGH-Statute, 7th Edition, Article 23a marginal note 6.

<sup>103</sup> In detail *Kühn*, EuZW 2008, 263, 264 ff.

<sup>104</sup> *Middeke* in Rengeling/Middeke/Gellermann, Handbuch des Rechtsschutzes in der Europäischen Union, 3rd Edition, § 10 Das Vorabentscheidungsverfahren, marginal note 99.

<sup>105</sup> *Dauses/Wohlfahrt* in Dauses/Ludwigs, EU-Wirtschaftsrecht, 41st Edition, P. IV. Verfahrensrecht, marginal note 47.

<sup>106</sup> Annual Report of the CJEU 2013, 10; with regard to an action with priority *Dauses/Wohlfahrt* in Dauses/Ludwigs, EU-Wirtschaftsrecht, 41st Edition, P. IV. Verfahrensrecht, marginal note 50.

expedited procedure is not limited. It is also applicable if the question raised concerns the "area of freedom, security and justice", but a full written procedure with the possibility of submitting written statements of case for all Member States seems necessary<sup>107</sup>.

#### **bb) Requirement of dealing with a case within a short time**

Pursuant to Article 105 (1) Rules of Procedure, a reference for a preliminary ruling is to be determined pursuant to an expedited procedure where the nature of the case requires that it be dealt with within a short time.

Particular urgency must also be given in the expedited procedure for a preliminary ruling. The motion must expressly state the urgent nature of the case and present reasons explaining why preliminary legal protection does not have sufficient regard to the urgency<sup>108</sup>.

#### **cc) Suitable for the nature of the case**

Finally, the expedited treatment requires that the nature of the case is suitable for a treatment in this abridged procedure. The oral hearing plays a particularly important role<sup>109</sup>.

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<sup>107</sup> *Hackspiel* in von der Groeben/Schwarze/Hatje, EuGH-Satzg, 7th Edition, Article 23a marginal note 22 with further reference.

<sup>108</sup> *Hackspiel* in von der Groeben/Schwarze/Hatje, EuGH-Satzg, 7th Edition, Article 23a marginal note 23.

<sup>109</sup> For more detail see *Hackspiel* in von der Groeben/Schwarze/Hatje, EuGH-Satzg, 7th Edition, Article 23a marginal note 23; *Dauses/Wohlfahrt* in Dauses/Ludwigs, EU-Wirtschaftsrecht, 41st Edition, P. IV. Verfahrensrecht, marginal note 48-49.