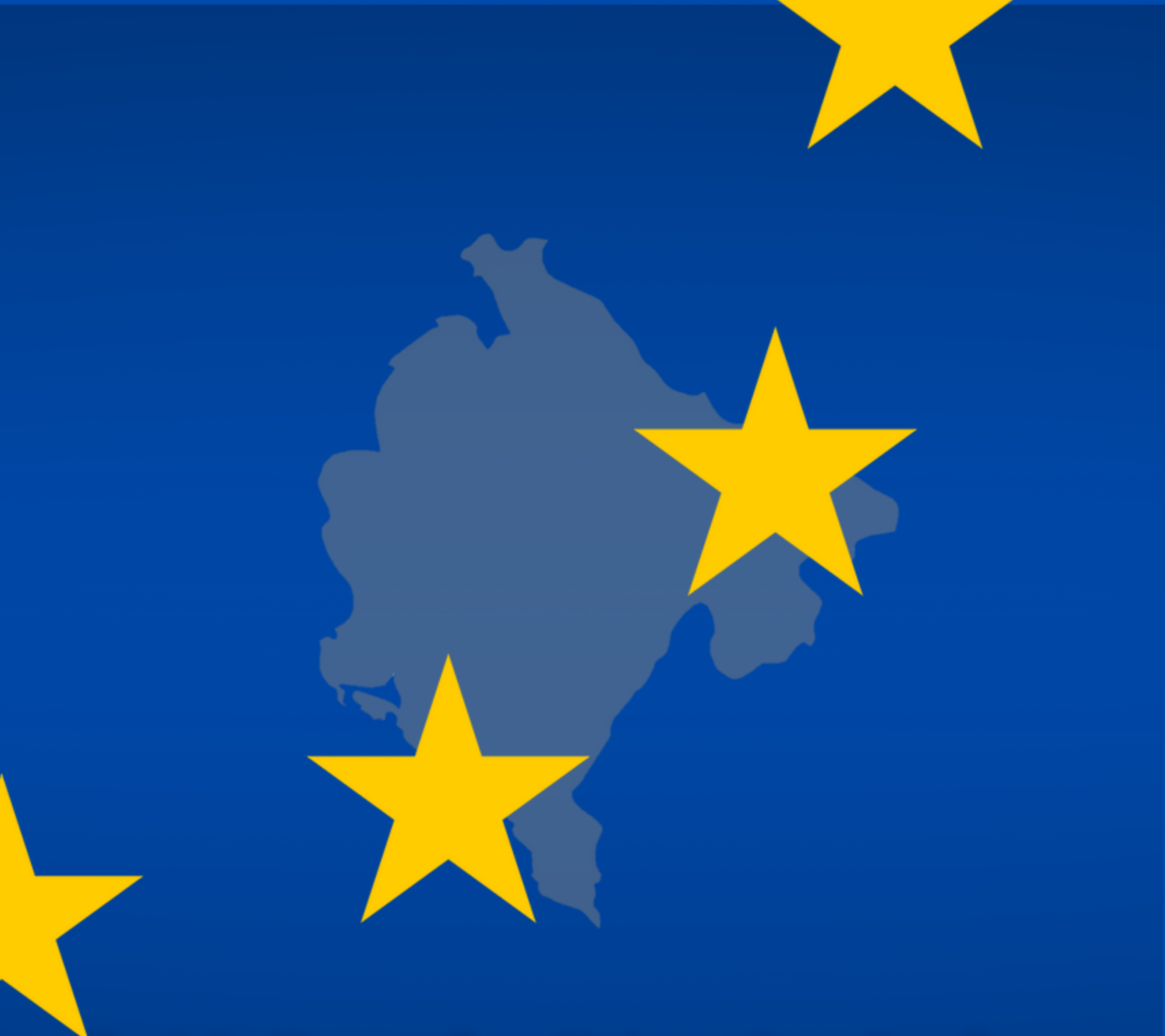

Guidelines for litigation before THE COURT OF JUSTICE OF THE EUROPEAN UNION

The case of MONTENEGRO

Kingdom of the Netherlands

ЦЕНТАР ЗА ПРАВНИ ИСТРАЖУВАЊА И АНАЛИЗИ
CENTER FOR LEGAL RESEARCH AND ANALYSIS

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GUIDELINES FOR LITIGATION BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION
FOR THE NEW EU MEMBER STATES

THE CASE OF MONTENEGRO
AS A CANDIDATE COUNTRY

This guideline has been prepared within the framework of the project "Strengthening regional judicial cooperation in the Western Balkans for effective litigation before the Court of Justice of the European Union and the implementation of the EU Charter of Fundamental Rights", with the support of the Government of the Kingdom of the Netherlands.

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1. INTRODUCTION

The Guide to proceedings before the Court of Justice of the EU is of great importance for the state of Montenegro, even though Montenegro is not an EU Member State, nor are its courts obliged to apply the EU law. The reason is manifestly clear. EU membership is currently the goal of all European countries that are still outside the Union. Montenegro took the first step in this direction by signing the Stabilisation and Association Agreement (SAA) and opening accession negotiations. Montenegro shall have to meet additional requirements, one of which is the acceptance of the entire legal system in force in the EU at the time of accession, i.e., the acceptance of the *acquis communautaire*. The acquis, of course, includes the case law of the Court of Justice of the European Union. EU law is already now, in the pre-accession phase, gradually becoming part of the national legal order of Montenegro. EU law is currently relevant and is applied partly on the basis of the Stabilisation and Association Agreement, partly through harmonised Montenegrin legislation, and partly through the reception of the laws of the Member States with which Montenegro shares a legal heritage.

The Guide analyses three groups of issues: the application of EU law, the position and role of the Court of Justice within the EU legal system, and the issues most comprehensively covered concerning the conduct of procedures before the Court of Justice of the EU. By clearly and thoroughly explaining the basic principles of EU law (the principle of direct effect and supremacy), as well as presenting the case law (Van Gend en Loos, Marshall, Francovich, etc.) upon which the foundations of the EU legal order are laid, this Guide can be useful not only to law students, but also to judges, lawyers, legal advisors, state administration bodies, as well as to all citizens and the entire public of Montenegro. The following text will explain how the Court of Justice, through the fundamental principles of EU law that it has established, transformed the national courts of the Member States into courts of the European Union.[2] Namely, by establishing the principles of direct effect and supremacy of EU law over national law, the Court of Justice transformed every national judge of a Member State into a protector of the EU legal order. National courts are

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[2] J.T. Lang: "The duties of national authorities under Community constitutional law", EL Rev. 23 (2), 1998, pp. 109-131.

obliged to apply EU law and when they do so, they play the role of European courts.[3] By virtue of the principles of direct and indirect effect of EU law, as well as the principle of primacy, the Court of Justice has obliged national courts to provide legal protection to private individuals who claim that they have been prevented from exercising the subjective rights granted to them by EU law.

The Guide presents the most important legal remedies that can be used for bringing an action and conducting the proceedings before the Court of Justice of the EU. The legal remedies are presented in the following order: action for annulment of an EU act, action for failure to act, reference for a preliminary ruling, plea of illegality and action for damages. The mechanism that receives the most attention is the one that enables dialogue and ongoing cooperation between the Court of Justice and national courts — the preliminary ruling procedure.

The research methodology is based on the analysis of primary and secondary legal sources (Treaty on the Functioning of the EU, Treaty on the European Union, Statute of the Court of Justice of the EU, Rules of Procedure of the Court of Justice of the EU, case law), as well as on a normative-analytical approach that assesses the compliance of the domestic legal framework and practice of Montenegrin courts with the EU *acquis* and the case law of the Court of Justice of the EU. In addition, a descriptive method was used to present the content and scope of the proceedings before the Court of Justice of the EU and its practice, as well as a comparative method to contrast between the EU standards and the situation in Montenegro.

By providing insight into the scope and importance of the preparation of the Montenegrin legal system for EU membership, this Guide makes a significant contribution to the Montenegrin doctrine of comparative and international procedural law. The expert analysis of the issues addressed in the Guide, which the EU has already encountered and partially resolved, is of great importance for Montenegro and prepares it for the future challenges it will have to face. In this regard, it is essential that the national courts of the states aspiring to become full EU members become familiar

[3] J.T. Lang: "The duties of cooperation of national authorities and Courts under Article 10 EC: two more reflections", EL Rev. 26 (1), 2001, p. 3.

with the comprehensive case law of the Court of Justice of the EU, although Union law does not, and cannot, impose on them an obligation to harmonise. Upon Montenegro's accession to the EU, judges in Montenegro also become European judges. They will be expected to apply Union law in the same way as judges of the current Member States. This European role of national courts is not enshrined in any Union act. It has been explained through dialogue between national courts and the Court of Justice of the EU and remains enshrined in the judgments of the Court of Justice. Therefore, the Guide will attempt to point out why, starting today, it is very important for judges in Montenegro not only to study the case law of the Court of Justice of the EU, but also to take EU law into account when applying and interpreting national law – and to understand the reasons for embracing the idea of harmonised interpretation with Union law.

2. COURT OF JUSTICE OF THE EU – COMPOSITION, ORGANISATION AND JURISDICTION

The entry into force of the Lisbon Treaty also brought about a change in the name of the EU judicial institution.[4] The Court, which had previously been called the Court of Justice of the European Communities, was officially renamed the Court of Justice of the European Union. The change in the Court's name can be explained by the fact that after the Lisbon Treaty, the European Community ceased to exist, and the EU acquired the status of an international legal entity, inheriting the rights and obligations of the Community. The EU Court of Justice was established as far back as 1951, when the Treaty establishing the Community for Coal and Steel provided for the existence of a court that would oversee the application and interpretation of that Treaty. The Treaties of Rome of 1958 also provided that each community (the European Economic Community and the European Atomic Energy Community) would have its own court. In order to avoid unnecessary duplication of institutions, a single court was established whose jurisdiction was determined by all three treaties, and it applied to all three communities. This is where the name Court of the

[4] Treaty on European Union (consolidated text as amended by the Treaty of Lisbon), Article 13

European Communities came from, which it kept until the entry into force of the Treaty of Lisbon, i.e. the termination of the Communities.[5]

The Court of Justice is composed of one judge from each Member State (twenty-seven judges) and eleven advocates general (independent legal experts) jointly appointed by the governments of the Member States for a renewable term of six years. The judges are selected from among persons whose independence is beyond doubt and who meet the requirements in their respective countries for appointment to the highest judicial offices or who are recognised legal experts. The Court of Justice of the EU is assisted by eleven advocates general. The advocates general have the same status as judges and are subject to the same provisions of the Treaties and the Statute as judges concerning appointment, qualifications and termination of their duties. They receive the same salaries as judges. The role of the advocate general is to present publicly, independently and impartially, conclusions on cases which, in accordance with the Statute of the Court of Justice, require his or her intervention.[6] In other words, their task is to submit to the Court of Justice a reasoned and independent opinion, thereby assisting it in carrying out its tasks under Article 252 of the Treaty on the Functioning of the EU. The advocate general offers a legally reasoned opinion on a case before the Court of Justice, giving a detailed analysis of the case, referring to Union law but also taking into account the law of the Member States. This opinion is not binding on the Court of Justice, but the judge takes it into account when giving his or her judgment. The advocate general's opinion is published together with the judgment in the official court reports.

The Court of Justice of the EU consists of two judicial instances:

- higher, represented by Court of Justice
- lower, made up by General Court.

The constant increase in cases, particularly in employment law, and the increasingly complex factual background of disputes, particularly in the

[5] A. Arnull: The *European Union and its Courts of Justice*, 2nd edition, Oxford, 2006, p. 6.
[6] Treaty on the Functioning of the EU, Article 252 (2). The idea for introducing the function of the Attorney General was taken from French law, i.e. from the *commissaire du gouvernement* (government commissioner) who acts before the French Council of State. Cited according to V. Trstenjak, op. cit., p. 64.

field of market competition and state subsidies, led to the creation of a new court – the Court of First Instance.[7] The Court of First Instance was established in 1988 by a decision of the Council of Ministers and constituted in the same year by a decision of the President of the Court of Justice. The Treaty of Nice expressly mentioned this Court in the Treaty itself, together with the Protocol on the Statute of the Court of Justice annexed to the Treaty. Finally, with the entry into force of the Treaty of Lisbon, the name of the court was changed, becoming the General Court, which, together with the Court of Justice, ensures respect for the law in the interpretation and application of the Treaties. The establishment of the General Court helped relieve the Court of Justice, which could then focus on cases of greater interest to the Union. By providing for the right to appeal decisions made by the General Court, the Court of Justice retained authority over final rulings. The General Court has a total of 54 judges (two from each Member State) who are selected by agreement between the governments of the Member States from among persons who can guarantee full independence and possess the capacities necessary for the highest judicial offices.

The jurisdiction of the General Court includes:

- actions for annulment brought by individuals against acts of the institutions of the Union pursuant to Article 263(4) of the Treaty on the Functioning of the European Union,
- actions for failure to act brought by natural or legal persons against the institutions of the Union for failure to act pursuant to Article 265,
- actions by Member States against the Commission,
- actions for damages pursuant to Article 268,
- actions by Member States against the Council of Ministers concerning decisions taken in the field of State aid, anti-dumping measures and external trade,
- actions brought pursuant to a provision of a contract, whether private or public law, which provides for the jurisdiction of the

[7] Vesterdorf: "The Court of First Instance of the European Communities After Two Full Years in Operation", 1992, 29 CML Rev. p. 897; Kennedy: "The Essential Minimum: The Establishment of the Court of First instance", 1989 14 EL Rev. 7.

General Court in the event of a dispute – Article 272 of the Treaty,

- appeals against decisions given by specialised courts – Article 256(2),
- proposals for initiating preliminary ruling procedures in accordance with Article 267 of the Treaty and the Statute of the Court of Justice.

On the other hand, the Court of Justice ensures that the law is respected in the interpretation and application of the Treaties. This means that, on the one hand, this court reviews the legality of the actions of the institutions and the Member States and their compliance with the Union law, and on the other hand, it ensures the protection of the rights of all subjects falling within the competence of the EU.[8] In other words, it protects the rights of the Union institutions, the Member States and private individuals, guaranteed by the provisions of Union law.

The jurisdiction of the Court of Justice of the EU includes:

- review of the legality of acts – i.e. the procedure for assessing the legality of acts within the meaning of Article 263 of the Treaty on the Functioning of the EU (ex Article 230),
- supervision of the work of the institutions of the European Union – the so-called procedure for failure to act or failure to take a certain measure and action or to adopt an act by the institutions of the Union within the meaning of Article 265 (ex Article 232) of the Treaty, initiated by the Member States or the institutions of the Union, against the European Parliament, the Council or the Commission,
- control of the Member States compliance with obligations, i.e. proceedings for failure to fulfil obligations or breaches of the Treaty within the meaning of Article 260 (ex Article 228) of the Treaty initiated by the Commission or a Member State,
- compensation for non-contractual damage caused by the institutions of the Union or by its servants in the performance of their duties –proceedings for damages within the meaning of

[8] A.G.Toth: *Legal protection of Individuals in the European Communities*, Oxford, 1978, p. 3.

Article 268 (ex Article 235) of the Treaty on the Functioning of the European Union,

- jurisdiction at second instance – adjudicating on appeals against judgments of the General Court, an appeal procedure within the meaning of Article 256 in which the Court of Justice acts on an appeal brought by a party aggrieved by a decision of the General Court,
- interpretation of Union law – preliminary ruling procedure under Article 267 (ex Article 234) of the Treaty brought by national courts,
- employment or civil service disputes within the meaning of Article 270 (ex Article 236) of the Treaty,
- arbitration procedure within the meaning of Article 272 (ex Article 238) of the Treaty in which the jurisdiction of the Court of Justice is established by public or private agreement concluded by the Union,
- the settlement of disputes between Member States, i.e. the international arbitration procedure within the meaning of Article 273 (ex Article 239), when two or more Member States by special agreement bring before the Court of Justice a dispute on any matter relating to the Treaty,
- the granting of interim measures in proceedings, whenever this proves necessary,
- the procedure for giving an opinion on the compatibility of a particular agreement concluded by the Union with the Treaty at the request of the Council, the Commission or the Member States.

In the procedure before the Court of Justice of the EU, much greater importance is attached to written submissions and the Court takes a more active role. The procedures before the Court of Justice are strictly formal and are regulated by the Statute and the Rules of Procedure of each court separately. The Rules of Procedure supplement the organisational and procedural framework determined by the Statute of the Court. There are two main procedures: proceedings upon action and proceedings for a preliminary ruling. The following text will first discuss the proceedings upon action and will analyse each of its stages separately, and then discuss some particularities of the deciding on a preliminary ruling procedure.

PROCEEDINGS BEFORE THE COURT OF JUSTICE OF THE EU

Proceedings upon action

The proceedings upon action can be divided into four stages. The first stage is the written procedure. This is followed by the preparatory or evidentiary procedure, during which evidence is presented. The third stage is the oral hearing, and the fourth, final, stage is the decision-making procedure.[9]

An action for annulment is one of the so-called direct actions directly challenging the legality of Union acts. This action seeks the annulment of an act adopted by one of the Union institutions. An action for annulment was and remains a key element of judicial control of the work of the Union institutions in the legal order of the European Union.[10] It was originally provided for in Articles 33 and 38 of the ECSC Treaty, Article 146 of the EAEC Treaty, and Article 230 (ex Article 173) of the EC Treaty, which was renamed Article 263 of the Treaty on the Functioning of the EU after the entry into force of the Treaty of Lisbon.

Article 263 reads:

"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.
It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

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[9] See: Rules of Procedure of the Court of Justice of the EU.
[10] B. Košutić, *Fundamentals of European Union Law*, Belgrade, 2010, p. 386.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.
Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.
The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.''

The novelties introduced by the Lisbon Treaty in the former Article 230, now Article 263, are shown in bold. The Lisbon Treaty extended the jurisdiction of the Court of Justice to acts of the European Council, as well as acts of other Union bodies and offices. By removing the term Treaty on the Functioning of the EU, more precisely – Article 263 places the jurisdiction of the Court of Justice over the legality of the actions of the EU institutions.[11] The action of the Court of Justice under the mentioned article could, from the perspective of national legal systems, be compared, on the one hand, to a procedure for assessing the constitutionality of laws, and, on the other hand, to an administrative dispute, depending on whether the question of the legality of a general or individual Union act is raised. In other words, Article 263 of the Treaty provides for judicial review of the constitutionality and legality of the work of the legislative and administrative bodies of the Union. Accordingly, in addition to the Member States, the European Parliament, the Council of Ministers, the Commission, the Civil Service Tribunal, the European Central Bank and the Committee of the Regions, an action for annulment may be brought by a natural or legal person in order to protect their personal interests. There are usually three groups of initiators. The group of privileged initiators

[11] A. Arnull, *op. cit.*, p. 53.

includes the Member States, the Parliament, the Council and the Commission. These applicants always have legal standing (*locus standi*), and do not have to prove that they have a legal interest in bringing an action, nor do they have to meet any other requirement. Privileged applicants can bring an action for annulment and initiate proceedings against acts that are not addressed directly to them, but to another person or body. In most cases, the privileged applicant is a Member State, and the defendant is the Commission. A Member State can request the annulment of an act that concerns it, but also another Member State.

The European Parliament, the Commission, the Council and the Committee of the Regions are much less likely to act as privileged applicants. The European Parliament was granted the status of privileged applicant only after the Court of Justice's decision in the Chernobyl case[12] in 1990, when the Treaty establishing the EC was amended. The Parliament was also granted standing in actions for the review of the legality of Community acts.[13] The group of so-called semi-privileged applicants includes those Union institutions that can only act in this role when they are protecting their competences through this procedure. These are the European Central Bank, the Court of Auditors and the Committee of the Regions that obtained procedural standing through subsequent amendments to the Treaty establishing the European Community. Finally, legal and natural persons constitute a group of non-privileged applicants, who, unlike privileged and semi-privileged applicants, must prove the existence of a legal interest in bringing an action for annulment. The existence of standing (*locus standi*) is presumed when the applicant is the addressee of an individual decision. The situation is much more difficult when the applicant needs to prove the existence of a direct and individual concern in bringing an action against a decision or regulation addressed to another party. In that case, the applicant needs to prove that the contested regulation is not of a general, legislative nature, but that it is an individual administrative act, which specifically applies to him. When it comes to the procedural standing of non-privileged applicants, the Court of Justice has often changed its positions in its case law and delivered inconsistent

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[12] Case 70/88, *European Parliament v. Council of the European Communities. Radioactive contamination of foodstuffs,* (1991) ECR 1-2041.
[13] See cases C-316/91 *European Parliament v. Council*, (1994) ECR I-653, Brown/Kennedy, *op. cit.*, 2000, p. 45.

decisions. The main reason for this behaviour of the Court is, on one hand, its desire to grant natural and legal persons the opportunity to seek the annulment of an act of a Union institution in the interests of justice and legality, but on the other hand, its fear that by relaxing the criteria it will soon be overwhelmed by actions brought by individual applicants challenging the legality of Union acts. Article 263 (paragraph 2) provides for four grounds on which annulment of a Union act may be sought:

1. lack of competence,
2. infringement of an essential procedural requirement,
3. infringement of the Treaties or of any rule of law relating to their application,
4. misuse of powers.

The deadline for filing an action for annulment is two months from the date of publication of an act or from the date of notification to the applicant, or from the date on which the specific act became known to him.

Actions for failure to act are governed by the provisions of Article 265 of the Treaty on the Functioning of the EU. Any natural or legal person may bring an action before the Court of Justice on the grounds that an institution, body, office or agency has failed to communicate to him an act, other than a recommendation or opinion. In addition to individuals, Member States and EU institutions have the right to bring an action for failure to act. In all cases where the Union institutions have failed to act in breach of the provisions of the Treaty, Member States, Union institutions not responsible for the failure to act, and private individuals may bring an action for failure to act. However, such an action is only admissible if the institution, body, office or agency in question has previously been called upon to act. If the institution fails to act within two months of the notice, the action may be brought within a further period of two months. If the judgment finds that there a failure to act contrary to the provisions of the Treaty has occurred, the defendant institution must take measures to comply with the decision of the Court of Justice of the EU.[14] The institutions that can be sued are the European Parliament, the Council of Ministers, the Commission, the European Central Bank, and since the entry

[14] Article 266(1) of the Treaty on the Functioning of the European Union (TFEU).

into force of the Lisbon Treaty, actions can also be brought against acts of the European Council, as well as other bodies and offices of the Union. As in the procedure regulated by Article 263 of the Treaty on the Functioning of the EU (action for annulment), applicants are divided into privileged and non-privileged. Privileged applicants are Member States and Union institutions, who do not have to prove the existence of *locus standi*. Non-privileged applicants are legal and natural persons, who must prove that the act that the institution had failed to adopt would have been addressed to them specifically or that it was of direct and individual concern to them. From the abovementioned, it can be concluded that an action for failure to act has many similarities with an action for annulment. In both actions, the aim is the same – to sanction the unlawful conduct of the Union institutions. In an action for annulment, the unlawful conduct of the institution is reflected in the adoption of an act contrary to the provisions of the Treaty, while in an action for failure to act, the institution infringes Union law by failing to adopt an act that it is obliged to adopt under the provisions of the Treaty. Therefore, in both cases, the institution breaches its contractual obligations. In the first, by adopting an unlawful act, in the second, by failing to adopt an act. Also, in both actions, the time limit for bringing an action is the same – two months. When the above arguments are taken into account, it is not surprising that the Court of Justice stated in the *Chevalley* case[15] that both actions constitute two aspects of the same legal remedy. The similarity of these two procedural remedies is reflected in particular in the position of non-privileged applicants, who must meet similar conditions provided for in Article 263(3) in order to be able to bring actions. In addition to the similarities, it is necessary to emphasize that there are also differences. The biggest difference is that in the procedure provided for in Article 265, the applicant must first request the institution to perform the action in question (adopt an act), and only then, if the institution fails to act on the request, does the applicant acquire the right to bring an action. In the annulment procedure, the applicant can file a lawsuit immediately after the institution adopts an unlawful act.

For all those private individuals who are unable to prove *locus standi* and who therefore cannot use an action for annulment, the EU legal order provides another legal remedy that they can use to indirectly challenge the legality of a Union act and protect their subjective rights based on it. This

[15] Case 15/70 *Clievalle y v. Commission,* (1970) ECR-975.

is the plea of illegality or the objection of illegality provided for in Article 277 of the Treaty on the Functioning of the EU, which reads:

"Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act."

Therefore, the Court of Justice of the EU can review the legality of acts of the Union institutions not only on the basis of Article 263 of the Treaty on the Functioning of the EU (direct action brought before the Court of Justice by authorised applicants), but also on the basis of Article 277. The plea of illegality is not a separate action, but an incidental claim to proceedings for the annulment of a specific act brought on another basis (as a rule, on the basis of Article 263 of the TFEU). Namely, the party initiates proceedings for the annulment of a decision adopted on the basis of a regulation against which the action of illegality is raised. In the event that the Court of Justice upholds the objection, the regulation becomes "inapplicable", it cannot form the basis of the contested decision and which therefore becomes invalid.

In order to understand the nature and scope of the plea of illegality, one must first start from the former Article 241 of the EC Treaty, which was renamed the current Article 277 of the Treaty on the Functioning of the EU after the entry into force of the Lisbon Treaty. The Reform Treaty has somewhat amended the aforementioned article, primarily taking into account the positions of the Court of Justice developed in previous case law, as well as the opinions of certain legal experts.

The Union's liability can be divided into contractual and non-contractual liability. The national courts will have jurisdiction over the Union's contractual liability, unless the parties to the contract have agreed that the Court of Justice will have jurisdiction over any disputes. On the other hand, the Court of Justice has exclusive jurisdiction over the Union's non-contractual liability. According to Article 340 of the Treaty on the Functioning of the EU (ex Article 288 of the EC Treaty), in the area of non-contractual liability, the Union shall compensate any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. The Court of Justice of the EU shall have exclusive jurisdiction to settle disputes concerning the Union's non-contractual liability for damage caused, pursuant to Article 268 of the Treaty on the Functioning of the EU. The procedure is initiated by an **action for damages**, which is another in a series of procedural means that can be used before the Court of Justice of the EU. The right to compensation for damages caused by the institutions and officials of the Union in the performance of their duties is a fundamental right guaranteed by the EU Charter of Fundamental Rights.[16] Private individuals shall file a lawsuit before the General Court.

Unlike an action for annulment (Article 263), the filing of which is conditional on proving the legal standing (*locus standi*) of the private applicant, an action for damages can be filed by all natural and legal persons without having to prove the existence of legal standing. If we also take into account the fact that there is no restriction regarding the nationality of the applicant and that the time limit for filing it is five years, then it is clear that access to this procedural remedy is significantly easier compared to an action for annulment. The largest number of actions for damages are filed against acts of the Council and the Commission adopted in the field of agricultural policy, external trade and public procurement. Since Article 340 states that "*the Union shall make good any damage caused by its institutions and servants*", it could be concluded that the action is filed against the Union as the defendant. However, as Hartley says, "*the Community (now the Union) can act only through its institutions*".[17]

In cases of non-contractual liability, the Court of Justice is obliged to give its judgment in accordance with "*general principles common to the laws of the Member States*." It is important to note that the Treaty does not use the term "legal rules" but "general principles," which means that the said court is not obliged to be familiar with the diverse legal rules of the Member States on compensation for damages. It should take into account only those principles that are common to all the laws of the Member States, such as the concepts of damage, the cause of the damage, the causal link between the act and the damage, but build its own system of legal rules on

[16] Article 41 paragraph 3 of the EU Chapter of Fundamental rights.
[17] T. Hartley, *op. cit.*, p. 429.

the basis of which the liability of the Union will be determined in accordance with these principles. The rules on compensation for damages thus established would apply at the level of the Union and would have a basis in the legal orders of the majority of the Member States. The national legal systems of the Member States represent the starting point for the judges of the Court of Justice of the EU who, if the specific nature of Union law so requires, may also apply legal rules that cannot be found in the national legal systems of the Member States. Of course, the judges must respect the general legal tradition of the Member States, but they are in no way bound by their national legal rules. The Court of Justice of the EU has, through numerous cases from its case law, relying on the content of the national law of the Member States, determined the conditions for the existence of non-contractual liability of the Union. The Union's liability will exist when:

- the unlawful act or omission can be attributed to the institutions of the Union or their officials,
- the applicant has actually suffered damage,
- there is a causal link between the act or omission and the damages.

Preliminary ruling (Article 267 of TFEU)

The preliminary ruling procedure is an original characteristic of the European Union law. This mechanism, regulated by Article 267 of the Treaty on the Functioning of the EU, provides, in addition to direct protection, an indirect means of protecting the rights of private individuals. Article 267 reads:

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

(a) the interpretation of the Treaties;

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

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

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

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

All courts of the Member States are authorised to ask the Court of Justice to interpret and assess the validity of provisions of Union law when such a question is raised before them and if they consider that the answer to such a question is necessary for them to give a decision. The courts against whose decisions there is a right of appeal under national law have the authority, but not the obligation, to submit a proposal for a preliminary ruling.[18] Courts of last instance whose decisions are final and not subject to ordinary legal remedies are obliged to refer an issue for a preliminary ruling if such an issue appears necessary for the delivery of a judgment. The preliminary ruling procedure gives natural and legal persons the opportunity to indirectly challenge the legality of a regulation of a Member State adopted in breach of Union law[19], thereby ensuring a uniform system of implementation and application of Union law on a private initiative.[20]

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[18] It should not be wrongly concluded that only courts whose decisions are final and not subject to appeal have the authority to refer preliminary questions. In other words, the power to initiate the preliminary ruling procedure cannot be limited solely to courts of last instance whose decisions are not subject to appeal. There are several arguments against such a limitation: the uniform application of Union law, effective judicial protection of private individuals, and the contribution of lower national courts to the development of Union law. See more on this in J. Komarek: "In the Court (s) We Trust? On the need for hierarchy and differentiation in the preliminary ruling procedure", EL Rev. 2007; P. Craig: "The jurisdiction of the Community Courts reconsidered", in De Burca, G. Weiler J.H.H.: The European Court of Justice, Oxford, 2001, p. 196.

[19] In the *Van Gend en Loos* case, a Dutch trader (the applicant) argued that a national law was contrary to Community law. The Dutch government maintained that the Court of Justice did not have jurisdiction to decide whether a provision of the Treaty establishing the Community was consistent with national legislation, asserting that this was the competence of the national courts. However, the Court of Justice of the EC held that limiting the remedies available in the event of a breach of the Treaty to actions which could be brought against Member States for failure to fulfil obligations under Articles 226 and 227 would deprive nationals of the Member States of the possibility of directly protecting their private rights. See Case 26/62 Van Gend en Loos, (1963) ECR 1.

[20] M. Stanivuković: An Individual before the Court of Justice of the European Communities, Official Gazette, Belgrade, 2009, p. 80

In this way, many more cases of disobedience of Member States will be brought to light than would be the case in proceedings based on a direct action against a Member State, which can be initiated by the Commission. In addition to providing individuals and legal entities with the additional opportunity to challenge the legality of a Union act before the Court of Justice, this procedure ensures a uniform interpretation and application of Union law by national courts in all Member States. Through this procedure, the fundamental principles of EU law were developed – the principle of direct effect and the principle of supremacy of Union law, which enabled the individual to become an equally valuable subject of the new legal order as the Member States.

More than any other provision of the Treaty, this article reflects the *sui generis* (unique) nature of the EU legal order. The EU judicial system is based on cooperation between the Court of Justice and national courts, not on a formal hierarchy.[21] This is confirmed by the words of the Court of Justice in the *Firma* case:[22]

“Article 234 establishes a special form of cooperation between a national court and the Court of Justice of the European Communities, in which each court retains its jurisdiction with a view to ensuring that Union law is applied uniformly...”

Until the entry into force of the Treaty of Nice (2004), the Court of Justice had exclusive jurisdiction to rule on a preliminary ruling. Article 225 (now Article 256) of the EC Treaty also gave the Court of First Instance (now the General Court) jurisdiction to hear and determine issues which are subject to a preliminary ruling procedure under Article 267, in specific areas provided for by the Statute. If the General Court considers that a particular case requires a decision of principle on the grounds of a possible breach of the unity and consistency of Union law, it may refer the case to the Court of Justice.[23] Furthermore, where there is a serious risk of breach of the unity and consistency of Union law, judgments of the General Court delivered in the preliminary ruling procedure may, under the conditions

[21] H.G. Schermers, D.F.Waelbroeck: *Judicial Protection in the European union*, Sixth Edition, The Hague, London, New York, 2001, p. 219.
[22] Case 16/65 *Firma Schwarze v. Einfuhr-und Vorratstelle fur Getreide und Futtermittel*, (1965) ECR-877.
[23] EC Treaty, Article 225, paragraph 3.

laid down in the Statute, be subject to review and, to that extent, reviewed by the Court of Justice.[24] Until the entry into force of the Lisbon Treaty, there were several different preliminary ruling procedures. The substantive procedure was governed by Article 234 of the EC Treaty. In addition, the interpretation of the law in the field of asylum, immigration and judicial cooperation in civil matters (previously Title IV) was regulated by Article 68 of the EC Treaty. The preliminary ruling procedure applicable in the third pillar was regulated by Article 35 of the EU Treaty. Both of these procedures were different from the main procedure. Thus, in Title IV, lower courts could not initiate preliminary ruling proceedings. As regards the third pillar – Article 35, the jurisdiction of the Court of Justice depended on the prior consent of each individual Member State, which, when making such a declaration, could choose whether to authorise all courts or only courts of last instance to initiate preliminary proceedings. Since the entry into force of the Lisbon Treaty, the preliminary procedure has been regulated by a single Article 267 of the Treaty on the Functioning of the EU.

The Lisbon Treaty has also introduced a new fourth paragraph in the text of Article 267, which requires urgency if the request for a preliminary ruling comes from a national court in proceedings concerning a person deprived of his liberty. The urgent preliminary ruling procedure, as well as the amendments introduced by the Lisbon Treaty, will be discussed in more detail below. From October 2024, the Court of Justice of the EU will share jurisdiction with the General Court to rule on preliminary rulings. Thus, the General Court has jurisdiction to rule on preliminary rulings in the following areas:

- Common system of value added tax
- Excise duties
- Customs law and classification of goods in the customs tariff based on the nomenclature
- Compensation and assistance to passengers in the event of boarding or flight delay or cancellation
- Greenhouse gas emission allowance trading system

[24] *Ibidem.*

However, the Court of Justice of the EU has jurisdiction to rule on a preliminary ruling raised in the following areas:

- Primary law, including the EU Charter of Fundamental Rights
- Public international law
- General principles of Union law.

It is important to note that the Court of Justice of the EU reserves the right to decide on a preliminary ruling even in cases falling within the jurisdiction (area) of the General Court, if those issues also concern other areas of jurisdiction of the Court of Justice of the EU. Any proposal for a preliminary ruling is first submitted to the Court of Justice of the EU, which decides whether the conditions for its referral to the General Court are met.

Power of a national court to refer a proposal for interpretation/assessment of validity to the Court of Justice

The national court itself decides whether to refer an issue, but it is only empowered to do so if the interpretation of Union law is necessary for the national court to give judgment in the proceedings before it. The parties to the proceedings cannot themselves refer an issue to the Court of Justice for interpretation, nor can they change the form of an issue referred by the national court, thereby broadening the subject-matter of the proceedings.[25] Nor is it necessary for one of the parties to raise a question of Union law for the need for its interpretation to arise as an issue before the national court. The parties may raise an issue of Union law as relevant to the resolution of the dispute, but the final word nevertheless belongs to the national court. Although it is a matter of national law to what extent the parties can influence the court's decision to refer an issue, neither national law nor the parties to the proceedings can limit the court's discretion in deciding whether to make a request for a preliminary ruling. The best example that confirms this position is the *Doego* case[26], in which the Court of Justice stated that the submission of a request for a preliminary ruling cannot be restricted by:

[25] Case 5/72 *Grassi*, (1972) ECR-443.
[26] Case 93/78 *Doego*, (1978) ECR-2203.

“Agreements between private persons tending to compel the courts of the member states to request a preliminary ruling by depriving them of the independent exercise of the discretion which they are given by the second paragraph of Article 177 (now Article 267).”

Also, in the case of *Rheinmuhlen*[27] the Court of Justice declared:

“Article 177 (now Article 267) give national courts the power and, where appropriate, imposes on them the obligation to refer a case for a preliminary ruling, as soon as the judge perceives either of his own motion or at the request of the parties that the litigation depends on a point referred to in the first paragraph of Article 177.”

It must not be wrongly concluded that the words “*the judge perceives either of his own motion or at the request of the parties*” imply that Article 267 requires national courts to examine questions of interpretation or validity of Union law ex officio. Whether a national court will examine *ex officio* the application of Union law depends on the circumstances of the proceedings before that court.[28] Therefore, the power to determine whether an issue of the Union law exists and whether it should be referred to the Court of Justice lies with the national court before which the proceedings are being brought. National rules on the procedure and organisation of the courts cannot prevent a national court from referring the question. In the *Rheinmuhlen* case, already mentioned, the higher and lower courts of Germany disagreed on the meaning of EU law. Under German national rules, lower courts are bound by the interpretation of higher courts. In other words, a lower court is obliged to apply the interpretation of Union law given by a higher court. The Court of Justice held that the aforementioned rule does not prevent a lower court from submitting a request for interpretation of Union law to the Court of Justice. If the interpretation of the Court of Justice were different from that of the higher national court, the lower court would not only be authorised but even obliged to act contrary to the interpretation of the higher court. As it has already been said, a national court may refer an issue for a preliminary ruling only if a decision on the issue is necessary to enable it to give judgment. However, the decision as to whether an issue needs to be addressed is no longer

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[27] Case 166/73 *Rheinmuhlen*, (1974) ECR-33.

[28] See more about this in the Opinion of Advocate General Jacobs in the case C-312/93 *Peterbroeck*, (1995) ECR I-4599.

exclusively in the hands of the national court. The Court of Justice considers this question to be part of its jurisdiction. Judicial review of whether a national court is required to refer a question became even more pronounced in the 1980s, and especially intensified during the 1990s.[29] In addition to dismissing a request because, in its opinion, the question raised was not relevant to the resolution of the dispute[30], the Court of Justice began to deny its jurisdiction when the national court did not provide sufficient information on the factual or legal background of the dispute before it.[31] The lack of information prevents the Court of Justice from verifying whether the question of Union law is even relevant to the resolution of the domestic case, or it hinders the Court from providing a useful answer to the national court. This judicial practice, which remains controversial to this day, has nevertheless resulted in a requirement for the national court to explain to the Court of Justice why an answer to the question is necessary.[32]

Obligation to refer proposals for interpretation/assessment of validity to the Court of Justice

The courts of the Member States whose decisions are not subject to a legal remedy under national law are obliged to submit a request for interpretation to the Court of Justice when such a question arises in a case before them and when the answer is necessary for the decision to be made.[33] The first dilemma to be resolved is which courts are those whose decisions are not subject to legal remedy. Are they the highest courts in the hierarchy? In theory, there are two possible answers. According to the abstract theory, only the highest courts in the hierarchy, whose decisions are final and not subject to appeal, are obliged to refer a preliminary ruling. According to the concrete theory, the obligation to submit a request applies to any court whose decisions are final and not subject to appeal in a particular case.[34] The Court of Justice has opted for the concrete theory. In the case of *Costa v. E.N.E.L.*[35], the request for interpretation was submitted

[29] Cited from T. Ćapeta, S. Rodin, op. cit., p. 118.
[30] Case C-343/90 *Lourenco Dias*, (1992) ECR I-4673.
[31] Case C-307/95 *Max Mara*, (1995) ECR I-0000.
[32] T. Ćapeta, S. Rodin: Fundamentals of European Union Law, Zagreb, 2010, p. 118.
[33] Treaty on the Functioning of the EU, Article 267.
[34] T. Hartley: *The Foundations of European Community Law*, Oxford, 2007, p. 272.
[35] Case 6/64 *Costa v. E.N.E.L.*, (1964) ECR-585.

by the *Giudice conciliatore*, whose judgments are generally subject to appeal. However, in this specific case, the dispute was of low value, and under Italian procedural law, it was not possible to appeal the judgment. The Court of Justice accepted the proposal, stating that national courts whose decisions are not subject to judicial remedy, as in this case, must refer questions to the Court of Justice. The Court emphasized that the obligation to refer applies to all courts whose decisions are not subject to judicial remedy under national law, and not only to the highest courts in the hierarchy. In practice, difficulties have arisen in applying the concrete theory, particularly in those Member States' legal systems where the right of appeal depends, in addition to the parties' consent, on the approval of the courts.[36] However, courts of last instance are not always obliged to refer a question for a preliminary ruling to the Court of Justice. National courts are not obliged to refer a question for a preliminary ruling if that question has already been submitted to the Court of Justice and answered by it. In the *Da Costa* case[37], the Court of Justice first confirmed the obligation of courts of the Member States, whose decisions are not subject to judicial remedy under national law, to refer questions of interpretation of Union law to the Court of Justice, and then went on to state:

> *"The authority of an interpretation under article 177 (now Article 267) already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case."*

[36] Thus, for example, in England, an appeal against a judgment of the Court of Appeal depends on leave to appeal granted by both that court and the House of Lords, which ultimately decide on the appeal. If the Court of Appeal grants leave to appeal, it is clear that it has the authority—but not the obligation—to submit a request for a preliminary ruling. However, if the Court of Appeal neither submits a request nor grants leave to appeal, and the House of Lords also refuses the appeal, then the Court of Appeal effectively becomes a court of last instance. By failing to submit a request, it would be in breach of Article 267(3) of the Treaty. Consequently, some authors argue that the only viable solution is to consider the Court of Appeal as a court whose decisions are final and not subject to appeal. See more on this in L.N. Kennedy, T. Brown, op. cit. p. 215. Hartley offers an alternative solution: according to the first approach, if the Court of Appeal does not submit a request, it should be deemed obliged to grant leave to appeal. According to the second, if the Court of Appeal refuses leave and no request is made, the House of Lords would then be obliged to grant the appeal. See more on this in T. Hartley, op. cit. pp. 273-275.

[37] Joined cases28-30/62 *Da Costa*, (1963) ECR-31.

Also, courts of last instance may be exempted from the obligation to submit a proposal by invoking the doctrine of clear act (*acte claire*).[38] This doctrine emerged from the case law of French courts of last instance, which for 70 years have increasingly refused to refer preliminary questions to the Court of Justice.[39] According to this doctrine, a sufficiently clear provision of Community law requires no interpretation, only application. In other words, when the application of Union law is so clear and obvious that there is no doubt about how a particular question should be resolved, a national court whose decisions are not subject to judicial review is not obliged to refer that question to the Court of Justice for a preliminary ruling. This position was affirmed by the Court in the landmark *CILFIT* case,[40] where it reiterated the conclusion from the *Da Costa* case that a national court of last instance is not obliged to refer a question for a preliminary ruling if the Court of Justice has already ruled on a substantively identical issue. Subsequently, the Court added another possibility, stating that courts of last instance may be exempted from the obligation under Article 234 (now Article 267) if the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.[41] If the doctrine of clear act were applied without limitation to Article 267, national courts of last instance would have complete discretion to decide whether or not to submit a request for interpretation to the Court of Justice. If courts were to make frequent use of this possibility, Article 267(3) would lose its purpose and meaning. Therefore, the Court of Justice has significantly restricted the application of the doctrine of *acte clair* by prescribing the conditions under which it may be applied, thereby limiting the possibility for national courts to evade their obligation under Article 267. Before concluding that a legal question is so clear that there is no room for doubt as to its correct application, a national court must be convinced that the matter is equally obvious to the courts of the other Member States. The existence of such a possibility must be assessed on the basis of the characteristic features of community law and the particular difficulties to which its interpretation

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[38] See: G. Bebr: "The Rambling Ghost of "Cohn-Bendit: Acte Clair and the Court of Justice", CML Rev. 20, 1983, p. 439-472; H. Rasmussen: "The European Courts Acte Clair Strategy in C.I.L.F.I.T.", 9 EL Rev. 242, 1984.
[39] H. Rassmussen, *op. cit*., p. 252-253.
[40] Case 283/81 *CILFIT*, (1982) ECR-3415.
[41] *Ibid*., paragraph 16.

gives rise. National courts must take into account that Union legislation is written in several languages and that the different language versions are equally authentic. The interpretation of a provision of community law thus involves a comparison of the different language versions. In that regard, it must also be taken into account that Community law uses terminology which is peculiar to it. Finally, every provision of Community law must be placed in its context and 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.[42] The *CILFIT* judgment definitively made it impossible to apply the doctrine of *acte claire* as a means to circumvent the obligations under Article 267.[43] For many authors, the doctrine of *acte clair* represents an act of capitulation by the Court of Justice in the face of the disobedience of the supreme courts of certain countries (notably France and Germany) and their persistent refusal to refer questions, even when there were clear grounds for doing so. However, Rasmussen concluded that the Court acted wisely in the *CILFIT* case. Recognizing that it could not compel national courts to accept its jurisdiction, the Court granted them a small concession—the right for a national court not to refer a question if the answer was clear. At the same time, it so narrowly defined the circumstances under which an answer could be deemed clear that the Court's authority remained effectively intact.[44] The criteria established in the *CILFIT* case have been criticized by many authors, including Advocates General Jacobs, Tizzani and Colomer, who argued that these criteria should be amended as they do not grant sufficient discretion to national courts.[45] Thus, Advocate Jasobs in the *Wiener* case[46] questioned whether it was necessary for the Court of Justice to rule in every case where a question of interpretation of Community law may arise. Jacobs proposed a solution according to which national courts of last instance would be obliged to refer a preliminary question to the Court of Justice only when it concerns a question of general interest, rather than in every case. However, this solution raises a new problem: if national courts of last instance are required to refer a preliminary question only when it is of general interest

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[42] *Ibid*., paragraph 16-20.
[43] Shaw, *op. cit*., p. 242; Hartley, *op. cit*., p. 284.
[44] Cited from M. Stanivuković, op. cit., p. 98.
[45] See more: M. Broberg: "Acte Clair Revisited: Adapting the Acte Clair Criteria to the Demands of the Times", CML Rev. 45, 2008.
[46] Case C-338/95 *Wiener*, (1997) ECR I-6495.

and there is a need for uniform interpretation, on what basis and how will they determine whether these criteria are met? In other words, how and on what grounds will national courts assess whether a question is of general interest and requires uniform interpretation? Some form of supervision over national courts to ensure compliance with the procedure should be introduced in that case, i.e., to verify whether the question is sufficiently clear so as not to require a referral to the Court of Justice. The Commission's proposal to introduce the so-called "Swedish model" at the Union level is an interesting approach in this regard.[47] The Swedish model was established through proceedings initiated by the Commission against Sweden under Article 226 (now Article 258) of the EC Treaty. In its reasoning, the Commission argued that Swedish courts of last instance do not comply with the obligation to refer preliminary questions to the Court of Justice, as they frequently fail to make such referrals.[48] In response to the Commission's claims, the Swedish Parliament adopted a resolution requiring courts of last instance to provide an explanation whenever they decide not to refer a preliminary question to the Court of Justice. In the case mentioned, the Commission linked then Article 234 (now Article 267 of the Treaty on the Functioning of the EU) with Article 10 of the EC Treaty (now Article 4) to propose applying this model across the entire Union.

On this basis, we can conclude that through the doctrine of *acte clair*, the Court of Justice has neither conceded nor confirmed an inability to exercise authority over national courts akin to that of a Constitutional Court. Instead, it has encouraged supreme courts to willingly engage with the judicial cooperation mechanism provided by the Treaty. Based on its judgment in the *CILFIT* case, as well as the extensive case law that followed, three situations can be identified in which a court of last instance may be exempted from the obligation to submit a request for interpretation of Union law to the Court of Justice when such a question arises in a case before it:

- When the national court finds that the issue of Union law is not relevant to resolving the claim,

[47] M. Broberg: "Acte Clair Revisited: Adapting the Acte Clair Criteria to the Demands of the Times", CML Rev. 45, 2008, p. 1394-1395.
[48] For more details see: Schmauch: "Lack of preliminary rulings as an infringement of Article 234 EC", 11 EL Rev. 445, 2005.

- When the Court of Justice has already provided an answer to an identical question,
- When the answer to the question is so clear and obvious that it leaves no room for doubt. In this third situation, the decision not to refer the question must be made in light of the specific characteristics of Union law and the particular difficulties involved in its interpretation, while also considering the possibility of differing judicial applications of Union law.

Finally, it is important to emphasize that the *acte clair* doctrine applies only to preliminary proceedings concerning the interpretation of EU law, not to those concerning the assessment of validity. If there is any possibility that an EU act is invalid, only the Court of Justice has the authority to declare it so—not national courts. Therefore, all national courts are obliged to submit a request for a validity review to the Court of Justice, even if it is quite clear that the EU act in question is invalid.[49]

- **Drafting the question for a preliminary ruling**

The decision of a national court to refer a question to the Court of Justice for a preliminary ruling may be made in any form permitted by national law. The national court has full discretion in formulating the question to be referred,[50] but the question must relate to Union law. However, it should be borne in mind that this document serves as the basis for proceedings before the Court of Justice and must therefore contain such information to enable the Court to provide an answer that will assist the national court. In most cases, the Court of Justice will not declare a lack of jurisdiction simply because the national court has formulated the question incorrectly; rather, it will usually reformulate the question.[51] In its case law, the Court of Justice has not strictly scrutinized the manner in which national courts formulate their questions. It has often occurred that national courts phrase their questions to ask the Court of Justice whether a provision of national legislation is compatible with a provision of Union law. The Court of Justice is not empowered to answer such questions. In proceedings concerning these matters, the Court cannot assess the compatibility of

[49] See case C-461/03 *Gaston Schul*, (2004).
[50] L. N. Brown, T. Kennedy: *The Court of Justice of the European Communities*, Sweet-Maxwell, London, 2000, p. 204.
[51] Case 83/78 *Pigs Marketing Board v. Raymond Redmond*, (1978) ECR-2347.

national legislation with Union law, but it can clarify for the court of a Member State the relevant elements of EU law necessary to determine whether the national legislation is compatible.

Therefore, when national courts formulate questions improperly—asking the Court of Justice to provide an answer it is not empowered to give—the Court will not simply declare a lack of jurisdiction on that basis but will, if possible, reformulate the question. In the *Redmond* case[52], where the national court referred a question on whether the pig marketing scheme in Northern Ireland was contrary to Union law, the Court of Justice stated:

"...in the event of questions having been improperly formulated or going beyond the scope of the powers conferred on the Court of Justice by Article 177 (now Article 267), the court is free to extract from all the factors provided by the national court and in particular from the statement of grounds contained in the reference, the elements of Community law which, having regard to the subject-matter of the dispute, require an interpretation or, as the case may be, an assessment of validity."

After repeating the aforementioned statement, in the case *Tissier*,[53] the Court of Justice continued:

"In order to provide a satisfactory answer to a national court which has referred a question to it, the Court of Justice may deem it necessary to consider provisions of Community law to which the national court has not referred in the text of its question."

When a national court improperly frames the question as one of interpreting an EU act rather than assessing its validity, the Court of Justice is sometimes willing to reformulate the question and decide on the validity of the act instead of its interpretation.[54]

[52] *Ibidem.*
[53] Case 35/85 *Tissier*, (1986) ECR-1207.
[54] However, the Court of Justice does not often do this because it deprives the parties to the proceedings of the opportunity to express their views on the matter, since they only

Based on the cases presented, it can be concluded that the Court of Justice is empowered not only to reformulate but also to broaden the question referred by the national court on its own initiative. In practice, the Court has sometimes answered questions that the national court did not explicitly ask, considering this necessary to provide a useful response to the national court.[55] As a rule, most requests for a preliminary ruling contain one or two questions addressed to the Court of Justice. British and Italian courts typically submit four or more questions, whereas such practice is uncommon in France and Germany.[56] Courts should avoid asking a large number of questions, as this may divert the Court of Justice's attention from the crucial question whose answer is essential for the judgment to be delivered.[57] The parties to the proceedings before the national court cannot formulate or modify the preliminary question themselves, thereby expanding the scope of the Court of Justice's ruling. However, by broad interpretation of provisions of Article 41 of the Treaty establishing the European Coal and Steel Community (ECSC Treaty), the parties involved in proceedings before the national court were granted the right to refer a preliminary question themselves. The two current Treaties clearly specify that the authority to formulate and refer a preliminary question lies solely with the national court. The degree to which private parties can influence the formulation of the questions depends on the specific legal system in which the main proceedings take place. For example, before an English court, the parties actively participate in formulating the questions, whereas in most continental legal systems, their influence is very limited.[58] Unless the parties persuade the national court to frame the question in a specific way, stating the question in their written submissions is likely to be of little benefit to them. Generally, the Court does not consider supplementary questions from the parties that the national court has not raised. However,

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have access to the question raised by the national court. See more on this in H. G. Schermers, D. F. Waelbroeck, op. cit., pp. 229-233.

[55] Joined cases C-171 and 172 /94 *Merckx*, (1996) ECR I-1253.

[56] Cited from David W.K., Anderson Q.C., op. cit., p. 200.

[57] In the case of *Adoui and Cornuaille v. Belgian State*, the national court submitted as many as 29 questions, which was criticized by several judges of the Court of Justice. See joined cases 115-116/81 *Adoui and Cornuaille v. Belgian*, (1982) ECR-01665, as well as T. Koopmans: "The Technique of the preliminary Questions – a view from the Court of Justice in Article 177 EEC Experiences and Problems", TMC Asser Instituut, 1987, p. 328.

[58] Cited from M. Stanivuković, op. cit., p. 91.

in certain cases where the national court has formulated a question on the validity of a Union act in broad terms without specifying the grounds for invalidity, the Court of Justice has taken into account the parties' submissions that precisely set out those grounds. Additionally, in cases where the national court has received supplementary questions from the parties and forwarded them to the Court of Justice due to uncertainty about their admissibility, the Court has also responded to those supplementary questions.[59]

In order to facilitate national courts in formulating preliminary rulings, the Court of Justice has drawn up an informative guide on how to draft requests for preliminary rulings.[60] As its title suggests, these Recommendations are provided for informational purposes only and have no binding effect. They contain practical guidance based on experience gained in applying the preliminary ruling procedure, aimed at helping to avoid difficulties sometimes encountered by the Court of Justice. According to these Recommendations, a decision by a national court referring a question for a preliminary ruling must include a brief explanation (maximum ten pages) of the reasons for the referral. This explanation should be sufficient to enable the Court of Justice and other relevant authorities (the Member States, the Commission, and, in certain cases, the Council and the European Parliament) to clearly understand the factual and legal context of the main proceedings. Specifically, it must include the facts necessary to grasp the full legal significance of the case, a summary of the legal positions applied, the reasons why the national court referred the question(s) to the Court of Justice, and, where appropriate, a summary of the parties' arguments. The aim is to enable the Court of Justice to provide a response that will assist the national court. The referral decision must be accompanied by copies of documents essential for a proper understanding of the case, particularly the relevant legal provisions. Since the case files or supporting documents are not always fully translated into an official language of the Union, the national court must ensure that all necessary information is included in the referral decision. The paragraphs of the decision should be numbered. The preliminary ruling request must be stated either at the beginning or the end of the decision. If the national court has a view on the likely answer, it may

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[59] *Ibid*., p. 92.
[60] Recommendations to national courts in relation to initiating preliminary ruling proceedings, Official Journal of the EU C/2024/6008 of 09 October 2024.

express it in its decision. The Court of Justice would appreciate being informed whether its judgment has been applied in the national proceedings and receiving a copy of the final decision. The procedure for obtaining a preliminary ruling is free of charge. The Court does not rule on costs.[61]

- **The stage of the national proceedings at which the preliminary question is referred**

In addition to deciding whether to refer a preliminary ruling at all, the national court also has discretion over the stage of the proceedings at which to make the referral.[62] The national court is best placed to determine the appropriate moment to refer a preliminary ruling. However, its discretion is not unlimited. Limitations arise from recent practice, where the Court of Justice of the EU has often declared itself lacking jurisdiction if the national court has failed to provide factual information relevant to resolving the case. If the national court refers a preliminary ruling at the very beginning—before hearing the parties' arguments—the Court of Justice may find that it lacks the necessary information to determine whether EU law is applicable at all in that case, leading it to declare the question hypothetical and thus declare itself lacking jurisdiction. Alternatively, it may conclude that due to insufficient information, it cannot provide a useful answer to the national court. At times, the interpretation of EU law is necessary for the national court to identify which facts are relevant. Consequently, considerations of procedural economy may indicate the need to submit the request to the Court of Justice before gathering all evidence on the facts.[63]

The informative guide on submitting proposals for a preliminary ruling[64] also contains guidelines on the timing when it is desirable for a national court to refer a preliminary question. It is preferable for a national court to refer a question to the Court of Justice as soon as it determines that a ruling on the interpretation or validity of Union law is necessary to deliver its judgment. t should be emphasized that the Court of Justice is not

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[61] *Ibidem.*
[62] Joined cases 36 and 71/80 *Irish Cremery*, (1981) ECR-735.
[63] Hartley, *op. cit*., p. 285.
[64] Recommendations to national courts in relation to initiating preliminary ruling proceedings, Official Journal of the EU C/2024/6008 of 09 October 2024.

responsible for ruling on factual matters or resolving disputes related to the interpretation or application of national law. It is desirable that the decision to refer a question should be made only after the national proceedings have advanced to a stage where the national court can clearly define the factual and legal context of the question. In any case, it is recommended that the question not be referred before the court has heard both parties.[65]
A preliminary ruling may only be referred from proceedings pending before a national court. This was the position adopted by the Court of Justice in the *Pardini* case,[66] where it stated:

"...the right to refer a question for a preliminary ruling is limited to a court or tribunal which considers that a case pending before it raises questions of Community law requiring a decision on its part.
A national court or tribunal is not empowered to bring a matter before the court by way of a reference for a preliminary ruling unless a dispute is pending before it in the context of which it is called upon to give a decision capable of taking into account the preliminary ruling. Conversely, the Court of Justice has no jurisdiction to hear a reference for a preliminary ruling when at the time it is made the procedure before the court making it has already been terminated."

Therefore, if the national court has concluded the proceedings and issued a decision before the Court of Justice has answered the referred question, the Court of Justice will declare itself to lack jurisdiction. Only if procedural rules empower the national court to reconsider its decision after obtaining a preliminary ruling will the Court of Justice have jurisdiction to respond to the question the national court. In any case, the Court of Justice is deemed to have jurisdiction to verify whether the proceedings are still pending before the referring court, for which it must obtain precise information from that court or from the other parties involved regarding the progress of the national proceedings.

Consequently, the decision on when to submit a request depends on the specific circumstances of each case. As the national court is best placed to assess this, it is for that court to decide, taking into account that it has all the information necessary to ensure obtaining a useful answer.

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[65] *Ibidem.*
[66] Case 338/85 *Pardini*, (1988) ECR-2041.

- **Obligation of the Court of Justice of the European Union to/not respond to the request submitted**

Initially, the Court of Justice did not investigate the reasons behind the preliminary ruling request or assess whether the question was relevant to resolving the dispute, considering that such decisions were exclusively within the competence of the national courts. The Court of Justice lacks jurisdiction to examine the factual circumstances or to challenge the reasons or purpose underlying the request for interpretation.[67]

Later, as the number of cases grew significantly, the Court of Justice began to pay attention to the reasons for referring questions and occasionally declined to act if it found the reasons unjustified.[68] The Court thus started to treat the preliminary ruling procedure with greater seriousness, recognizing it as an essential part of the judicial process. Every judge aims to deliver a binding decision for the parties involved, and no judge can be satisfied with issuing a judgment without fully understanding the key facts and the significance of the case. The preliminary ruling procedure is primarily a judicial process that culminates in a binding judicial decision, not merely a non-binding interpretation of Union law. This more restrictive approach by the Court led to an increasing number of cases where it refused to answer the referred questions. The most common circumstances in which the Court justified its refusal include:[69]

- When the question raised is not related to Union law[70],
- When the question is posed in overly general terms[71],
- When the question is not relevant to the decision in the proceedings before the national court[72],
- When the question does not have a judicial nature[73],

[67] Case 6/64 *Costa v. E.N.E.L.*, (1964) ECR-585.
[68] M. Stanivuković, *op. cit.*, p. 99.
[69] Cited from H. G. Schermers, D. F. Waelbroeck, *op. cit.*, p. 242.
[70] See Case 105/79 *Independence of the Judiciary*, (1979) ECR-2257; Case 68/80 *Denial of Justice* 1980, (1980) ECR-771.
[71] Case 14/86 *Pretore de Salo*,(1987) ECR-2454. In this case, the Italian court referred a question the Court of Justice of the EU, asking whether the Italian legislation was in conformity with a Community Directive. However, the court did not specify why or in which part it believed there was a justified doubt regarding compliance.
[72] Case *Salonia* 126/80, (1981) ECR I-1563.
[73] Case *Mattheus* 93/78, (1978) ECR-2210.

- When the legal context necessary for understanding the issue is not clearly defined or settled[74],
- When there is no genuine legal dispute between the parties, i.e. when the parties abuse the preliminary ruling procedure.[75]

Apart from the cases mentioned above, the Court of Justice may also refuse to answer a question if the parties have reached a settlement after the preliminary question was referred, or if the defendant has complied with the applicant's request. Furthermore, where the national court has not clearly defined the factual situation or the legal context in which the question arises, the Court of Justice may address such deficiencies by requesting the national court—after consulting the Advocate General—to clarify the unclear aspects of the decision referring the preliminary question.[76] Article 267 empowers the Court of Justice of the European Union to interpret acts adopted by the institutions of the European Union. As previously stated, the Court has jurisdiction to interpret both binding and non-binding secondary acts. Binding acts do not need to produce direct effect to be subject to interpretation by the Court of Justice. Moreover, Article 267 of the Treaty does not impose any specific conditions that acts of the institutions must meet to be subject to interpretation. The objection that the Court of Justice cannot interpret acts which do not have direct effect is unfounded[77], as such acts may nonetheless produce indirect effect—namely, they oblige national courts to interpret national law in accordance with their provisions, within the limits set by both national and EU law. For instance, a directive may be subject to interpretation even if its implementation deadline has not yet expired. This can be concluded from the *Haaga* case[78], where the German Supreme Court referred a question concerning the interpretation of a Council directive that did not have direct effect in the German legal order but was relevant for the interpretation and application of domestic legislation enacted to implement that directive. The Court of Justice agreed to interpret the directive, taking the view that its guidance could assist the national court in interpreting national law in the spirit of that directive. Moreover, since judgments of

[74] Case *Meilicke* C-83/91, (1992) ECR I-4871.
[75] Case *Phytheron International* C-352/95, (1997) ECR I-1729.
[76] Rules of Procedure of the Court of Justice of the European Union, Article 104, paragraph 5.
[77] Case 111/75 *Mazalai*, (1976) ECR-657.
[78] Case 32/74 *Haaga*, (1974) ECR 1202-1209.

the Court of Justice themselves are also considered acts of EU law, there is no valid reason why a national court should not be able to request their interpretation as well. The Court of Justice has taken a relatively broad and flexible approach, accepting to interpret its own judgments[79], when such interpretation is necessary for resolving the case before the national court. However, decisions of the Court of Justice ruled in the preliminary proceedings cannot be subject to interpretation.[80]

When it comes to international agreements concluded by the Union with third countries, the situation is somewhat different. Although such agreements are not explicitly mentioned in Article 267, they constitute a source of Union law. The Court of Justice, through a broad interpretation, classified international agreements as acts of the Union institutions, thereby establishing its jurisdiction under Article 267 of the EC Treaty.[81] In the *Haegemann* case[82], the Court of First Instance in Brussels referred a question to the Court of Justice concerning the interpretation of certain provisions of the Association Agreement between Greece and the EEC. In order to establish its jurisdiction, the Court of Justice classified such an agreement as a Community institutions' act referred to in Article 234 (now Article 267). Namely, this is justified by the fact that international agreements are concluded on behalf of the Union by the Council, which adopts an act declaring the conclusion of the agreement, and the text of the agreement is annexed to that act. In the *Sevince* case[83], the Court of Justice went further, considering an act adopted by a body established by an international agreement to be an act of an institution within the meaning of Article 234 (now Article 267). Specifically, the act concerned was that of

[79] Case 135/77 *Bosch*, (1978) ECR-859.
[80] Case 69/85 *Wunsche*, (1986) ECR-947, paragraph 16.
[81] This position of the EC Court of Justice was criticized by T. Hartley. Although an international agreement is ratified by the Council of Ministers, it is not an act of the Council itself, but rather an act of a Community. Moreover, the Court of Justice does not interpret the act by which the agreement was adopted, but the text of the agreement itself. Hartley particularly questions how the Court of Justice could claim jurisdiction to interpret acts of bodies established by an international agreement. Even if Community agreements with third countries could be considered acts of Community institutions, acts of bodies established by such agreements should certainly not be regarded as acts of Community institutions. For a more detailed discussion, see T. Hartley: "International Agreements and Community legal System: Some Recent Developments", 1983, EL Rev. 383.
[82] Case 181/73 *Haegeman*, (1974) ECR-449.
[83] Case 192/89 *Sevince*, (1990) ECR I-3461.

the Association Council—an authority established by the Association Agreement concluded between Turkey and the EC. The Court also held that it had jurisdiction to *"give rulings on the interpretation of the decisions adopted by the authority established by the Agreement and entrusted with responsibility for its implementation."*[84]

General principles of Union law cannot themselves be the subject of interpretation by the Court of Justice, as Article 267 does not explicitly refer to them. However, national courts may request interpretation of other provisions of EU law in light of these EU legal order general principles.[85]

Certainly, the preliminary ruling procedure represents the cornerstone of the judicial system of the European Union.[86] Through this mechanism, some of the fundamental principles of Union law have been developed, such as the principles of supremacy[87], direct effect[88], indirect effect[89], the Member States' obligation to ensure the protection of rights derived from the Union legal order[90] and the liability of Member States for damages.[91] Furthermore, the four fundamental freedoms—the free movement of

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[84] *Ibid*, paragraph 10.
[85] Shaw: Law of the European Union, op. cit., p. 237. Take human rights as an example. Although they are not explicitly enumerated in the Treaty, the Court of Justice is prepared to interpret acts of the Union institutions in light of human rights, recognized as general principles of the EU legal order. This jurisdiction is provided for under Article 46 of the Treaty on European Union, which states that, with regard to Article 6 of the TEU, the Court of Justice of the European Communities shall have the same jurisdiction as under the EC Treaty. Article 6 reads as follows: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, as general principles of Community law. The Union shall respect the national identities of the Member States. The Union shall provide the means necessary to attain its objectives and to carry through its policies."
[86] *Jacobs and Durand*, cited from David W.K., Anderson Q.C., Marie Demetriou: *References to the European court*, London, Sweet & Maxwell, 2002, p. 24.
[87] Case 6/64, *Costa v. E.N.E.L.*, (1964) ECR-585; case 106/77 *Simmenthal*, (1978) ECR-629.
[88] Case 26/62 *Vane Gend en Loos*, (1963) ECR 1; case 148/78 *Ratti*, (1979) ECR-1629.
[89] Case 14/83 *Von Colson*, (1984) ECR-1891.
[90] Case 45/76 *Comet* (1976), ECR-2043.
[91] Joined cases C-6/90 and C-9/90 *Francovich*, (1991) ECR I-5357.

goods, persons, services, and capital—have been firmly established within the framework of the preliminary ruling procedure. Article 267 proceedings have also been instrumental in shaping key principles of EU law, such as: the principles of proportionality[92], legal certainty[93], legitimate expectations[94] and effective judicial protection[95]. It is therefore unsurprising that some scholars have dubbed the preliminary ruling procedure "jewel in the crown" of the Court of Justice's jurisdiction[96]. The purpose of the preliminary ruling procedure extends beyond ensuring the uniform interpretation and application of Union law; it also serves as a form of indirect judicial review of Union acts. This review is considered indirect because the question of the legality of a Union act arises as a subsidiary (procedural) matter within proceedings before a national court, rather than as the main issue.[97] Direct judicial review of acts adopted by Union institutions is governed by Articles 263 and 264 of the Treaty on the Functioning of the European Union. Although direct and indirect judicial review are distinct procedures, each with their own procedural rules, their ultimate objective remains the same: to examine the legality of acts adopted by the institutions of the Union.[98]

FUNDAMENTAL PRINCIPLES ESTABLISHED BY THE CASE LAW OF THE COURT OF JUSTICE

- **Principle of direct effect of EU law**

Direct effect refers to the capacity of a Union legal norm to be directly applied within the national legal systems of the Member States without the need for specific implementing measures. In other words, a Union law provision that meets the criteria for direct effect must be enforced by

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[92] Case 66/82 *Fromancais SA*, (1983) CMLR-453.
[93] Case 169/80 *Gondrand and Garancin*, (1981) ECR-1931.
[94] Case 120/86 *Mulder*, (1988) ECR-2321.
[95] Joined cases C-46/93 and C-48/93 *Factortame*, (1996) ECR I-1029.
[96] P. Craig, G. de Burca: *EU Law, Text, Cases and Materials*, fourth edition, Oxford, 2008, p. 460.
[97] The review of the legality of a national regulation constitutes the main issue in the proceedings before the national court.
[98] Case 294/83 *Les Verts v. Parliament*, (1986) ECR-1339.

national courts when adjudicating disputes before them. This is especially significant for the individual, who, by virtue of the principle of direct effect, is enabled to invoke and seek protection of their subjective right before the national court, as provided for by the relevant Union norm. Moreover, by accepting the direct effect of Union law, the Court of Justice has placed individuals and the protection of their rights at the very heart of EU law.[99]

The principle of direct effect was developed by the Court of Justice itself, beginning with the landmark case *Van Gend en Loos*,[100] in which the Court was called upon to determine whether the provisions of what was then Article 12 of the EEC Treaty had direct effect. By recognising the direct effect of that article and requiring the national court of the Netherlands to grant *Van Gend en Loos* full protection of its subjective rights, the Court of Justice delivered one of the most important rulings in its history. The principle of direct effect remains one of the Court's greatest achievements and has since been widely discussed by legal scholars and academics. However, it is important to note that the Court has not recognised direct effect for all EU legal norms. The conditions that a norm must satisfy to produce direct effect were first set out by the Court in its first case, *Van Gend en Loos*, when it stated:

"The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of States which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.
The implementation of Article 12 does not require any legislative intervention on the part of the States."

Therefore, in order to produce direct effect, a Union legal norm must be:

- Clear and precise,
- Unconditional, i.e. must not be dependent on any implementing measure either by the Community or by the Member States,

[99] P. Craig, G. de Burea: *The Evolution of EU Law*, Oxford University press, 1999, p. 205.
[100] Case 26/62, (1963) ECR 1.

- Capable of producing legal effects, i.e. substantially and procedurally suitable for enforcement.

A norm is considered clear when it enables the determination of who holds the right and who bears the duty, as well as the precise content of the right or obligation itself. In the *Francovich* case[101], the Court of Justice did not recognize the direct effect of certain provisions of a directive because the text failed to specify the duty bearer. Although the directive clearly identified the right holder and the content of the right, it left the duty bearer undefined. The Court cannot apply norms whose provisions are so vague that it is impossible to establish, even via judicial interpretation, who the right holders and duty bearers are or to clarify the exact content of their rights and obligations. Over the years, the Court of Justice has generally adopted a broad interpretation of Union norms to extend as many rights as possible to individuals. However, the Court has consistently refrained from recognizing one category of norms as having direct effect: directives that produce direct effect only vertically—that is, between individuals and the state—but not horizontally between private parties. In other words, an individual can invoke a directive to assert subjective rights only against the state, not against another private individual. When a legal norm establishes a legal relationship solely between an individual and the state, it is said to produce direct vertical effect. Unlike other sources of Union law that confer both vertical and horizontal direct effect (individual-to-individual), the Court of Justice has, in the view of many—including the author of this guide—unjustifiably refused to recognize the direct horizontal effect of directives.

- **Principle of supremacy of EU law**

The principle of supremacy[102] of Union law means that, in the event of a conflict between a Union legal rule and a rule of a Member State's internal

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[101] Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic,* (1991) ECR 1-5357.

[102] See articles P. Cramer: "Does the Codification of the Principle of Supremacy Matter?", 7 Cam- bridge Y.B. Eur. Legal Studies 57, 2004-05; M. Dougan: "When Words Collide! Competing Visions on the Relationship Between Direct Effect and Supremacy", Common Market Law Review 44, 2007, pages 931-963; M. Hoskins: "Tilting the Balance supremacy and national procedural

law, the Union rule prevails. In other words, when a national legal provision conflicts with a Union regulation governing the same social relationship, it is the duty of the national courts to disapply the conflicting national law and ensure the full application of EU law. This principle of supremacy applies not only to the judiciary but also to the national legislator, who must refrain from enacting laws contrary to legally binding acts of the Union. Notably, neither the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), nor any secondary legislation explicitly include provisions on the supremacy of Union law. After the unsuccessful attempt to adopt the European Constitution—which included a supremacy clause in Article I-6—the drafters of the Lisbon Treaty chose to omit any explicit reference to supremacy. This omission was foreseeable, given that no constitutional or highest court of the Member States was willing to accept the Court of Justice's doctrine that Union law takes precedence even over national constitutions. The inclusion of the supremacy clause in the European Constitution, followed by its exclusion from the Lisbon Treaty, created somewhat legally uncertain situation. To address this, a Declaration on Primacy was annexed to the Final Act of the Intergovernmental Conference in Lisbon in 2007. This declaration reaffirms the validity of the Court of Justice's case law on the supremacy of Union law over national law:

"The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law."

The primacy of Union law was recognized by none other than the Court of Justice itself, which, in the absence of a principle to resolve the issue of the supremacy of Union law over national law, was given the opportunity to address this problem in cases where provisions of Union law and national law regulated the same procedural matter differently. Given the autonomous nature of the Union's legal order, courts could not apply solutions characteristic of international law in such cases.[103] Two years

rules", EL Rev. 21, 1996, p. 365-377.

[103] B. Košutić, op.cit. p. 218.

after the judgment in the *Van Gend en Loos* case, the Court of Justice definitively ruled on the supremacy of Union law over the national laws of the Member States in the Costa case[104]. Namely, in 1962, Italy nationalised its electricity production and distribution. Flaminio Costa, a lawyer and a shareholder in Edison Volta—a company affected by this nationalisation—refused to pay his electricity bill, arguing that the nationalisation law violated the Community law. He brought an action before the court in Milan, arguing that the Italian nationalisation law was contrary to certain provisions of the Treaty establishing the EEC. The Italian Government, in its defence, argued that the nationalization law was enacted after the law ratifying the Treaty establishing the EEC, and that this later law must be applied in accordance with the principle of *lex posterior derogat legi priori* (later law repeals earlier law). The Milan court, pursuant to the then Article 177 (now Article 267) of the Treaty establishing the EEC, referred a preliminary question to the Court of Justice and the Italian Constitutional Court concerning the issue of primacy. Thus, the Court of Justice was asked to give a direct ruling on which should take precedence (supremacy): the provisions of the international EEC Treaty or the Italian nationalisation law. The Court clearly ruled in favour of the founding treaties and rejected the arguments of the Italian Government, which claimed that the Court of Justice did not have jurisdiction to decide the case, as national legislation was relevant and the Court did not have jurisdiction to rule on the validity of national law. In its reasoning, the Court of Justice referred to the *Van Gend en Loos* case, expanding the number of arguments supporting the supremacy of Community law. In its judgment, the Court pointed out that, unlike traditional international treaties, the EEC Treaty established its own legal system, which, after the Treaty came into force, became an integral part of the legal systems of the Member States and which their courts are obliged to apply. In this case, the Court of Justice drew several conclusions. First, that a right arising from the EEC Treaty, due to its special and *sui generis* nature, cannot be overridden by provisions of national law. Second, that by transferring certain sovereign rights from the Member States to the Community, a permanent limitation on those rights was established, and therefore, in that area, Community law takes precedence (supremacy) over national law.

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[104] Case 6/64 *Flaminio Costa v. E.N.E.L.*, (1964) ECR-585, 593.

CONCLUSION

Unlike the courts of Member States, the courts of non-EU countries are not obligated to apply EU law. However, this does not mean that there are no reasons to respect Union law when applying domestic law outside the EU, particularly in candidate countries seeking EU membership. Montenegro is currently in this position, having a special contractual relationship with the EU through the Stabilisation and Association Agreement (SAA). This raises the question of whether Montenegrin courts should already, during the accession phase, "take into account" EU law when interpreting domestic regulations, or even commit to achieving outcomes consistent with EU law through harmonised interpretation. Other candidate countries such as Serbia, North Macedonia, and Albania face similar situations.

EU membership requires the harmonisation of national law with EU law. A country aspiring to become a full member must, prior to accession, align its legal order with the EU legal framework. In other words, Montenegro must adopt the entire *acquis communautaire* before becoming a member. This process strengthens Montenegro's political credibility and sends a clear signal that the country is committed to taking all necessary measures to harmonise its legal system with that of the EU. Beyond this political obligation of harmonising the legislation, Montenegro is also legally bound under the Stabilisation and Association Agreement (SAA) to harmonise its existing and future laws with Union law. Specifically, Article 72 of the SAA obliges Montenegro to strive for the gradual alignment of its current and forthcoming legislation with the EU *acquis communautaire*. One of the reasons for accepting the indirect effect of Union law is to avoid breaching the provisions of the SAA. Typically, harmonisation involves adopting regulations that often transpose EU legal provisions word for word. This approach to harmonisation is common not only in Montenegro but also in all other candidate and potential candidate countries. However, harmonisation goes beyond merely adopting legislation; it also requires the harmonised application of those laws. It is not enough for a regulation to be adopted—it is equally important that it be correctly implemented, as the ultimate goal of adoption is effective application. In practice, it often happens that regulations are adopted in line with EU law but are incorrectly applied by state authorities and courts. This may occur because these bodies are overwhelmed by the volume of new legislation and continue to apply it as if it were the old, nonharmonised regulations. Consequently, this will in practice cause absence of harmonisation between the regulation and its application: regulation is of European origin but its application is not. To avoid such divergences in the interpretation and application of legal rules, it is essential to consider EU law when applying domestic regulations. Thus, another important reason for taking Union law into account in the interpretation of national laws is to prevent the development of unharmonized practices, which are often much harder to correct than the texts of the regulations themselves.

Courts in Montenegro should be motivated to accept the obligation of harmonised interpretation of national regulations, even before membership. The indirect effect of EU law makes the position of the courts stronger in relation to other branches of government in the state – legislative and executive. They gain greater power, because through the indirect application of EU law they can discipline the legislative and executive authorities in their own state. In other words, the autonomy of the courts becomes stronger in society and they acquire an important role in the Europeanization of various public policies. However, in order for the principle of harmonised interpretation to truly take root in Montenegro, certain obstacles to its introduction must first be eliminated. Possible obstacles to the introduction of the obligation of harmonised interpretation may include:

- insufficient motivation of judges,
- rigid application of law without the possibility of creative interpretation,
- language barrier, i.e., insufficient knowledge of English and other official EU languages
- lack of education on EU law,
- inability to use the preliminary ruling procedure under Article 267 of the Treaty.

Whether a judge will take Union law into account when applying national law depends solely on him or her. In other words, it is the courts that will ultimately decide whether Article 72 of the SAA contains an obligation of harmonised interpretation or not. Therefore, the first obstacle to harmonised interpretation may be insufficient motivation on the part of the courts. Earlier in the text it was pointed out that one of the motives may be to strengthen the position of the courts in relation to other state institutions, primarily parliament and government. However, on the other hand, the workload and responsibility of the courts would increase due to the acceptance of the principle of indirect effect of Union law. Judges would have to spend more time resolving cases due to deviations from usual working methods and the need to familiarize themselves with additional legal provisions. Also, harmonised interpretation creates additional responsibility for judges, because they are actually rewriting legal norms, taking on the role of legislators. All this affects judges to not be too motivated to interpret national law in accordance with EU law.

Unlike the legal systems of EU Member States, which acknowledge the role of judges in shaping the law through its interpretation for the purpose of resolving specific disputes, in Montenegro law is perceived as objective and mechanically applicable. Judicial interpretation is not viewed as a central element of the adjudicative process. Judges are strictly bound by the letter of the law, and the legal culture is marked by strict legal positivism and formalism. One of the key obstacles to the adoption of the obligation of harmonised interpretation of EU law is linguistic in nature—namely, the insufficient knowledge of English and other official EU languages. Only a limited portion of EU legislation has been translated into Montenegrin, and systematic translation of the case law of the Court of Justice of the European Union (CJEU) has yet to begin. Additionally, a significant number of Montenegrin judges have not received formal education in EU law. Specifically, the subject *Fundamentals of EU Law* has only recently been introduced as a mandatory course at law faculties, whereas it was previously offered only as an elective at some faculties. Another substantial barrier to the indirect effect of EU law in Montenegro is the inability of its courts to make use of the preliminary ruling procedure provided for in Article 267 of the Treaty on the Functioning of the European Union. In interpreting a national provision, the judge begins with the relevant norm of Union law. However, in order to ensure proper interpretation, the norm of Union must be sufficiently clear and understandable. Unlike judges in Member States—who, when faced with ambiguity, have the possibility, and in some cases the obligation, to request an interpretation from the CJEU under Article 267 TFEU —judges in candidate countries do not have this opportunity at their disposal. Although a certain number of European norms have already been interpreted by the Court of Justice, which a judge can learn about from previous court decisions, some norms have still not been subject to interpretation. If a judge in Montenegro wishes to resort to a harmonised interpretation, they will have to interpret the EU norm independently. It may happen that the judge assigns a different meaning to the norm than the one the Court of Justice of the EU will give when such a question is eventually brought before it. Accordingly, the inability to access the preliminary ruling procedure has adverse consequences not only for the harmonised interpretation of national law but also for the lack of coherency of EU law. This will be remedied upon Montenegro's accession to full EU membership.

In the practice of Montenegrin courts, there are also positive examples where courts have taken into account, and even applied, EU law.[105]

EU Member States are obligated to apply EU law and to interpret their domestic regulations in accordance with EU law, thereby implementing the process of harmonised interpretation (indirect effect of EU law). Courts should interpret domestic legal norms within the context of Montenegro's current status—namely, its advanced negotiation process with the EU—and should not operate independently of this process. Rather, they should be an integral part of it by interpreting domestic norms in conformity with EU regulations, particularly those domestic provisions that are fully or partially harmonised with EU law. In the author's view, the duty to harmonise national regulations with EU law lies not only with the legislative and executive branches but also with the judiciary. Consequently, the judiciary must remain attuned to the temporal and contextual realities in which Montenegro finds itself. Upon Montenegro's

[105] Thus, in its judgment Rev. No. 253 from 2015, the Supreme Court, acting on a revision, referred to EU Directive 1999 on electronic signatures, which was implemented into Montenegrin law through the Law on Electronic Signature. Accordingly, when interpreting the legal provisions concerning electronic documents and electronic signatures, the Court took into account EU law—the Directive on Electronic Signatures—and concluded that delivery by e-mail does not require a certified electronic signature. In its judgment No. 73 from 2017, the Supreme Court went further by affirming that the application of the relevant sectoral collective agreement, the general collective agreement, and the Labour Law is not in conflict with Article 3, paragraph 1, of Council Directive 2001/23. This provision stipulates that the collective agreements assumed in the event of a change in status remain valid until their termination, expiration, or the entry into force of a new collective agreement by the employer. See also: Judgment of the Court of Appeal Už. Pž. No. 3/17 of 02.11.2017; Judgment of the Court of Appeal Pž. 593/2017 of 26.10.2017; Judgment of the Supreme Court of Montenegro Už. Rev. No. 30/18 of 24.12.2018; and Judgments of the Basic Court in Podgorica Case P.°No. 4303/21 of 18.11.2022 and Case P. No. 709/20 of 14.01.2021.

accession to the EU, its legal system will become part of the EU legal order, and its courts will become courts of the Union. Therefore, it is necessary that Montenegrin courts utilize the accession period to acquire knowledge of EU law and regulations, thereby better preparing for their future role as European judges, when they will be obligated to apply EU law. In this regard, examples from domestic judicial practice, where courts have "taken into account EU law" in their reasoning, are encouraging. Specifically, such references relate to EU regulations and demonstrate that Montenegrin courts have interpreted domestic provisions in accordance with European and that these provisions are not in conflict with them. However, an interesting question arises: what would occur if a domestic court determined that the application of domestic regulations conflicted with EU law? Would the court, by employing the method of harmonised interpretation, prioritize EU law and set aside the conflicting domestic regulation? For instance, what if the Supreme Court of Montenegro found that the application of domestic regulations—such as the Collective Agreement or Labour Law—was inconsistent with a Council of the EU Directive. Would the Court then reach a different conclusion, namely, to disapply the domestic regulations and instead refer directly to the EU Council Directive? Given that Montenegro is not yet an EU member state, its courts cannot directly apply EU law. However, this does not preclude them from "taking it into account" as a supplementary source of law, especially when interpreting or clarifying domestic legal norms that have emerged through the harmonisation process with the EU acquis.