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

The case of **SERBIA**



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

THE CASE OF SERBIA 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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ACRONYMS AND ABBREVIATIONS

ECtHR – European Court of Human Rights

Commission – European Commission

Charter – Charter of Fundamental Rights of the European Union

CJEU – Court of Justice of the European Union

TEU – Treaty on European Union

TEC – Treaty on the European Community

TECSC – Treaty establishing the European Coal and Steel Community

TFEU – Treaty on the Functioning of the European Union

1. INTRODUCTION

After the Second World War, six European states recognised the need for cooperation to guarantee peace, establishing the European Coal and Steel Community, marking the beginning of the European integration that is still ongoing. With economics and trade as the backbone of cooperation, an increasing number of countries have joined the European Community over the past 70 years, creating, in addition to economic and political cooperation, the common values of the European Union that guide them.

Today, the European Union is founded on values such as respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities.¹ These values are safeguarded by law, the Court of Justice of the EU (CJEU), and the national courts of the Member States. The values mentioned are safeguarded by law, through the collaboration of the CJEU

¹ Article 2 of the EU Treaty.

with the national courts of the Member States. The foundation for the evolution of EU law lies in this cooperation, as the jurisdiction of the Court of Justice of the EU includes the responsibility to issue preliminary rulings in response to questions referred by national courts. Through interpreting and validating EU law based on questions referred from national courts and adjudicating judgments, the CJEU has established legal doctrines regarding direct action, supremacy, and state responsibility. These doctrines have significantly shaped the character of EU law and its relationship with the national legal systems of Member States. Moreover, the protection of human rights has been incorporated into the legal order of the EU through the rulings of the CJEU, thus completing an autonomous legal system that, while overarching, remains interdependent and connected to the national legal systems of the Member States.

The strategic direction of the Republic of Serbia is towards EU membership. However, EU law, which currently exists in the abstract, will eventually become a part of everyday life for judges, prosecutors, legal experts, and decision-makers. In particular, judges will play a critical role in the application of EU law and the preservation of its values. This publication has been created as a support mechanism for legal practitioners in future EU Member States, emphasising the effective application of EU legal mechanisms and the Charter of Fundamental Rights of the EU. Given the significance of the preliminary ruling procedure – one of the jurisdictions of the CJEU – for the evolution of EU law, and its essential role in facilitating communication between Serbian courts and the CJEU, this publication includes a dedicated section that provides a detailed overview of the types of questions that can be referred, the entities entitled to make such referrals, the content of preliminary questions, and the procedural specifics governing preliminary rulings.

Through the analysis of common challenges and legal issues specifically pertaining to the Republic of Serbia, a comprehensive survey of guidelines, procedures, and best practices for litigation before the Court of Justice has been conducted. The following chapters also present an overview of the legal systems and judicial procedures of individual Member States that

have joined the EU in the last 20 years – namely Bulgaria (2007), Romania (2007), and Croatia (2013) – with the aim of identifying both harmonised areas and differences in the regulation of national legal frameworks pertinent to proceedings before the CJEU.

This publication is the result of research and analysis of existing cases and judgments issued by the CJEU concerning proceedings involving new Member States. A dedicated section of the publication provides summaries of a selection of the judgments delivered by the CJEU in relation to these three recently joined Member States. This allows readers to familiarise themselves with the diversity of substantive EU law as applied by the courts of the Member States, along with the reasoning employed by the CJEU.

In the final chapter, recommendations are provided for improving court procedures and administrative practices aimed at enhancing the effectiveness of litigation before the CJEU. These recommendations are particularly relevant for the Republic of Serbia and its existing legal framework, which must be aligned with the most effective mechanisms for litigation before the CJEU in the future.

2. KEY CHARACTERISTICS OF EU LAW

EU law is a dynamic legal system that is continuously developed and improved. It encompasses the founding treaties² and the legal acts applied by the CJEU as well as the courts of the Member States. The EU represents a unified legal order, and EU law is an integral component of the legal systems within each Member State.³ It consists of primary legislation, which is found in the treaties and the Charter of Fundamental Rights of the EU; secondary legislation, including regulations, directives, and decisions; and non-binding legal acts, such as opinions and

² The Treaty on European Union and the Treaty on the Functioning of the European Union.

³ CJEU, C-6/64, *Flaminio Costa v. E.N.E.L.*, 15 July 1964

recommendations.⁴ The relationship between EU law and the national law of the Member States is defined by the principles of direct effect and supremacy. The principle of direct effect allows individuals to invoke specific provisions of EU law before their national courts. Meanwhile, the supremacy of EU law ensures that, in cases of conflict with national law, EU law takes precedence in application.

To ensure uniformity and effectiveness in the application of EU law, its legal system includes rules for both public and the so-called private enforcement mechanisms. Public enforcement refers to the European Commission's mandate to bring action before the CJEU against any Member State that fails to fulfil its obligations under EU law. If the CJEU finds that a Member State has indeed failed to comply, it must take the necessary measures to enforce the court's decision. Should the Member State fail to adhere to this decision, the CJEU may impose a lump-sum payment or a pecuniary penalty. The private enforcement mechanism is linked to the doctrine of state responsibility, allowing individuals who have suffered harm due to a Member State's violation of EU law to file a lawsuit against that state. Additionally, the effective enforcement of EU law is supported by a mechanism of cooperation between the judges of the CJEU and national judges, which is facilitated through the preliminary ruling procedure.⁵

To clarify the jurisdiction of the CJEU and the functioning of national courts as guardians of the *acquis communautaire*, it is essential to outline the obligations of Member States concerning both primary and secondary EU legislation.

Primary legislation sits at the top of the legal hierarchy and encompasses the treaties, along with accompanying protocols, acts of accession, declarations, and the Charter of Fundamental Rights. The treaties serve as

⁴ Treaty on the Functioning of the EU (TFEU), Art. 288

⁵ De Waele, H. (2010). Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment. *Hanse Law Review*, sometimes: 3-28
Retrieved from:

<http://www.heinonline.org/HOL/Page?handle=hein.journals/hanselr6&div=40>.

the primary source of law, with the two treaties currently in force – the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) – holding equal legal value. The protocols attached to these treaties are integral components and possess equivalent status. Additionally, the provisions agreed upon by Member States and an acceding country, which outline the conditions of accession, carry the same legal weight as the original treaties, thereby constituting an essential part of primary legislation. The Charter was adopted to enhance the visibility of human rights protection within the EU, and the Lisbon Treaty granted it the same legal status as the founding treaties.⁶

Secondary legislation includes acts derived from the treaties and adopted by EU institutions to exercise the competences of the EU and implement its policies. This category includes regulations, directives, decisions, recommendations and opinions. Regulations are legal acts that are generally applicable, mandatory, and directly enforceable. They are binding in their entirety; therefore, their selective or partial application is not permitted. When a regulation is adopted and published in the Official Journal of the European Union, it becomes directly applicable, eliminating the need for Member States to enact additional legal acts to transpose it into their legal systems. Directives are binding only on the Member States to which they are addressed and regarding the objectives to be achieved, leaving the choice of form and methods of implementation to the national authorities. Directives do not have an immediate effect; they acquire legislative status only after being implemented through national legislation. However, under specific conditions, directives can have direct legal effect when they stipulate a timeframe within which Member States must adopt measures to execute them to achieve the desired outcome. If these measures are not implemented within the specified period, the directives become directly applicable, provided they contain individual rights and that their provisions are clear and complete. Decisions, on the

⁶ *Handbook on European law relating to access to justice*, European Union Agency for Fundamental Rights, 2016, pp. 21-22, available at:

https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2016-handbook-on-access-to-justice_en.pdf

other hand, are used to regulate specific cases and are binding in their entirety on those to whom they are addressed. The addressees of a decision may include Member States as well as natural and legal persons. In contrast, recommendations and opinions are not binding and do not confer rights or obligations on their recipients. Nevertheless, they carry legal significance, as national courts are required to consider recommendations when interpreting national law in accordance with EU law.⁷

Other sources of law include international agreements, general principles of law and the practices of EU courts. International treaties concluded by the EU with third countries or international organisations are binding on the EU's institutions and Member States, constituting an integral part of EU law from the moment they enter into force. General principles of law have been integrated into the EU legal order primarily through the case law of the CJEU. These principles encompass fundamental concepts of law and justice derived from the legal systems of the Member States and bind EU institutions in the exercise of their competences. Several of these principles, such as the principle of sincere cooperation, conferred competences, equality of Member States, subsidiarity, proportionality, and the protection of fundamental rights, are enshrined in the treaties or in the Charter, thereby acquiring the status of primary law. Decisions made by EU courts are considered an additional source of EU law. In interpreting and applying other sources of law, the Court of Justice has influenced amendments to them, significantly contributing to the development of EU law.⁸

3. THE COMPOSITION OF THE COURT OF JUSTICE

The Court of Justice is composed of 27 judges (one from each Member State) and 11 advocates general. The judges and advocates general are appointed by common accord of the governments of the Member States after consultation of a panel responsible for giving an opinion on

⁷ *Ibid.*

⁸ *Ibid.* p. 24.

prospective candidates' suitability to perform the duties concerned. They are appointed for a term of office of six years, which is renewable. They are chosen from among individuals whose independence is beyond doubt and who possess the qualifications required for appointment, in their respective countries, to the highest judicial offices, or who are of recognised competence. The judges of the Court elect from amongst themselves a president and a vice-president for a renewable term of three years. The president directs the work of the Court and presides at hearings and deliberations of the full court or the Grand Chamber. The vice-president assists the president in the exercise of his duties and takes his place when necessary. The advocates general assist the Court in rendering final decisions by presenting, with complete impartiality and independence, their "opinion" in the cases assigned to them before the final judgment is rendered. These opinions are not binding on the Court, but they hold significant influence as they typically provide detailed legal analyses of pertinent issues in specific cases. To expedite proceedings, the Treaty of Nice introduced an amendment stating that the opinion of the advocate general is not required in every case. Consequently, the Statute has been revised to stipulate that an opinion may be omitted if the Court determines that the case does not present a new question of law. After consulting with the lawyer, the Court may decide to proceed with the case without proposing a decision. The registrar is the institution's secretary general and manages its departments under the authority of the president of the Court.⁹

The Court of Justice may sit as a full court, in a Grand Chamber of 15 Judges or in Chambers of three or five Judges. It sits as a full court in the particular cases prescribed by the Statute of the Court (including proceedings to dismiss the European Ombudsman or a Member of the European Commission who has failed to fulfil his or her obligations) and where it considers that a case is of exceptional importance. It sits in a Grand Chamber when a Member State or an institution which is a party to

⁹ Arnulf, A. (2006). *The European Union and its Court of Justice* (2nd edition). Oxford: Oxford University Press

the proceedings so requests, and in particularly complex or important cases. Other cases are heard by Chambers of three or five Judges. The Presidents of the Chambers of five Judges are elected for three years, and those of the Chambers of three Judges for one year.

4. JURISDICTION OF THE CJEU

The Court of Justice of the European Union (CJEU) is comprised of the Court of Justice, General Court and specialised courts. In the remainder of this publication, we will discuss the jurisdiction and proceedings before the Court of Justice. To enable it properly to fulfil its task, the Court has been given clearly defined jurisdiction, which it exercises in connection with references for a preliminary ruling and various other categories of proceedings.

a. Preliminary ruling

The Court of Justice cooperates with all the courts of the Member States, which are the ordinary courts in matters of European Union law. To ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law. A request for a preliminary ruling may also seek the review of the validity of an act of EU law.¹⁰

The Court of Justice's reply is not merely an opinion, but takes the form of a judgment or reasoned order. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given. The Court's decision is similarly binding on other national courts before which the same issue is raised.

¹⁰ Dausies, M.A. (1986). Practical Considerations Regarding the Preliminary Ruling Procedure under Article 177 of the EEC Treaty. *Fordham International Law Journal*, 10(3): 538-577 Retrieved from: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1152&context=objective>.

It is thus through references for a preliminary ruling that any European citizen can seek clarification of the European Union rules which affect him. Although such a reference can be made only by a national court, all the parties to the proceedings before that court, as well as the Member States and the institutions of the European Union, may take part in the proceedings before the Court of Justice. In this way, several important principles of EU law have been laid down by preliminary rulings, sometimes in response to questions referred by national courts of first instance.

Since October 2024, the Court of Justice shares its jurisdiction over references for a preliminary ruling with the General Court. References for a preliminary ruling that come exclusively within the following areas are, in principle, transferred to the General Court: the common system of value added tax; excise duties; the Customs Code; the tariff classification of goods under the Combined Nomenclature; compensation and assistance to passengers in the event of denied boarding or delay or cancellation of transport services; the scheme for greenhouse gas emission allowance trading.

Nevertheless, the Court of Justice retains jurisdiction to hear and determine requests for a preliminary ruling that, although connected with the specific areas mentioned above, also concern other areas. It also retains jurisdiction over requests for a preliminary ruling that, although they come within one or more of those specific areas, raise independent questions relating to the interpretation of: primary law, including the Charter of Fundamental Rights of the European Union; public international law; or general principles of Union law.

All requests for a preliminary ruling are initially lodged with the Court of Justice, which determines whether the conditions are satisfied for their transfer to the General Court.

b. Action for failure to fulfil an obligation of a Member State

These actions enable the Court of Justice to determine whether a Member State has fulfilled its obligations under European Union law. Before

bringing the case before the Court of Justice, the Commission conducts a preliminary procedure in which the Member State concerned is given the opportunity to reply to the complaints addressed to it. If that procedure does not result in the Member State putting an end to the failure to fulfil obligations, an action for infringement of EU law may be brought before the Court of Justice. The action may be brought by the Commission – as, in practice, is usually the case – or by a Member State. If the Court finds that an obligation has not been fulfilled, the State must bring the failure to an end without delay. If, after a further action is brought by the Commission, the Court of Justice finds that the Member State concerned has not complied with its judgment, it may impose on it a fixed or periodic financial penalty. However, if measures transposing a directive have not been notified to the Commission, the Court may, acting on a proposal from the Commission, impose a pecuniary penalty on the Member State concerned, once the initial judgment establishing a failure to fulfil obligations has been delivered.¹¹

c. Action for annulment

The CJEU oversees the legality of legislative acts and actions taken by EU institutions, excluding the legality of recommendations and opinions. Applicants are divided into three categories of applicants: privileged, semi-privileged, and non-privileged. Privileged claimants do not need to demonstrate a legal interest in bringing proceedings, as they are presumed to have a direct interest in any act. This category includes the European Commission, the European Council, the European Parliament, and the Member States. Partially privileged claimants, which include the European Central Bank, the Court of Auditors and the Committee of the Regions, have a right to seek judicial review limited by the scope of their jurisdiction. must prove their legal interest in initiating proceedings. In this context, the claimant seeks the annulment of an act—specifically a regulation, directive, or decision—adopted by an institution, body, or

¹¹ Arnulf, A., *The European Union and its Court of Justice* (2nd edition). Oxford: Oxford University Press, 2006.

agency of the Union. If the CJEU finds that the action is well-founded, it will declare the contested act void and require the institution to take necessary measures to comply with the judgment. The Court of Justice holds exclusive jurisdiction over actions brought by Member States against the European Parliament and/or the Council, with the exception of the acts of the Council pertaining to state privileges, anti-dumping measures and implementing powers. In the first instance, the General Court has the authority to adjudicate similar cases, especially those initiated by individuals.¹²

d.Action for failure to act

If EU institutions, bodies, services, or agencies are required to act but fail to comply, thereby violating the Treaties, Member States and EU institutions may bring an action before the CJEU. Additionally, any natural or legal person may bring an action if an EU institution, body, service or agency has failed to address an act to them, with the exception of recommendations and opinions. It is required that the individual or entity has a direct legal interest, meaning they must have a direct and individual interest in an act that has not been adopted and should have been formally addressed to another party, such as a Member State. An action may only be brought after the institution has been urged to act. If a failure to act is determined to be unlawful, the responsible institution will implement appropriate measures to rectify the situation. Jurisdiction to adjudicate an action for failure to act is shared between the Court of Justice and the General Court, based on the same criteria used for actions for annulment.¹³

¹² K. Lenaerts, D. Arts, I. Maselis, *Procedural Law of the European Union*, Sweet & Maxwell, London, 2006.

¹³ K. Lenaerts, D. Arts, I. Maselis, *Procedural Law of the European Union*, Sweet & Maxwell, London, 2006.

e. Action for damages

In these actions, the CJEU may award compensation for damages caused by an unlawful act or inaction by the European Union. This means that the EU is responsible for illegal activities carried out by its institutions or officials while exercising their official functions. The action may be brought by either a Member State or an individual. The European Union's obligation to compensate for damages caused by its organs or officials was established early on through a general provision in the founding treaties and was later confirmed by the Charter of Fundamental Rights. In contrast, the obligation of a Member State to compensate for damages resulting from a breach of European Union law – previously communal law – by a Member State is not explicitly outlined in the founding treaties. Instead, it has been established through the case law of the CJEU. Notably, it was in the landmark judgment of the *Frankovič* case in 1992 that the CJEU first introduced the concept of non-contractual liability for Member States concerning damages resulting from violations of the Treaty on European Community (TEC), recognising it as an integral aspect of the treaty.¹⁴

When damage is caused by a Member State, in accordance with the principle of state liability for infringement of European Union law both natural and legal persons are authorised to bring proceedings exclusively before the courts of a Member State for compensation for damages resulting from such infringements. The obligation of Member States to provide legal remedies that ensure effective legal protection in areas governed by European Union law is explicitly regulated by the Treaty of Lisbon. This treaty stipulates, for the first time, that Member States, or their national courts, must offer legal remedies that guarantee effective legal protection in areas governed by *acquis communautaire*. This provision also extends to the responsibility of Member States to compensate individuals for damages suffered due to infringements of EU law, in line with the established principle of State liability. While this rule was previously derived from the case law of the Court, Article 19 of the

¹⁴ Judgment in Joined Cases Nos 6 and 9/90, *Andrea Francovich and Danila Bonifaci and Others v. Italian Republic*, of 19 November 1991, ECR I-05357, para. 35.

TEU has reinforced this obligation, further emphasising the primary role and responsibility of national courts in upholding European Union law. Moreover, this new provision has strengthened the principle of “judicial subsidiarity” within the legal order of the EU, enhancing the role of national courts in the protection of European Union law, which includes the safeguarding of the right to compensation. According to prevailing interpretations, the principle of judicial subsidiarity asserts that the application of European Union law is generally entrusted to national courts, while the CJEU retains the authority to interpret this law and determine its validity pursuant to Article 267 of the TFEU.¹⁵ Thus, the concept of primary responsibility of national courts for reviewing national measures that implement EU law does not preclude the involvement of the CJEU in the process of deciding on requests for preliminary rulings. The procedure before the CJEU regarding a preliminary ruling is considered a distinct stage within the proceedings of the national court of a Member State. During this time, the national court’s proceedings are suspended until the CJEU delivers its decision. Similarly, in cases where fundamental rights are violated due to measures or omissions by the authorities of a particular Member State, a specific legal remedy may be pursued against that Member State (as outlined in Articles 258 and 259 of the TFEU) for breaches of EU law. In such instances, the European Commission and other Member States possess the standing to initiate proceedings against the Member State for violation of EU law. However, it is important to note that damages cannot be awarded in this type of procedure.¹⁶

In the event of damage caused by the EU, an action for damages may be brought based on the contractual or non-contractual liability of the European Union. The different regimes applied in deciding on damages are conditioned on whether it is a matter of European Union’s contractual

¹⁵ G. de Búrca, The Principle of Subsidiarity and the Court of Justice as an Institutional Actor, *Journal of Common Market Studies* vol. 36, 1998, 217; E. T. Swaine, ‘Subsidiarity and SelfInterest: Federalism at the European Court of Justice’, *Harvard International Law Journal* vol. 41, no. 1, 2000, 22.

¹⁶ V. Čirić, *Naknada štete pred evropskim nadnacionalnim sudovima*, Institut za uporedno pravo, 2019, pp. 28-68.

or extra-contractual liability for damage caused by a violation of European Union law. National courts have jurisdiction to rule on the liability of the European Union for damage arising from a contract if no arbitration agreement has been concluded in favour of the CJEU under Article 272 of the TFEU. Contractual liability is governed by a law applicable to the contract in question. The national court determines its own jurisdiction and the law applicable to the contract by applying the norms of private international law applicable in its country. By contrast, the CJEU has exclusive jurisdiction to settle disputes concerning the European Union's non-contractual liability for damage under Article 340 of the TFEU. Although an equivalent provision to the current Article 340 of the TFEU has existed since the Treaty of Rome, the law on non-contractual liability of the organs of the European Union has since been amended in the case law of the CJEU. It is also important to bear in mind that, although Article 340 of the TFEU in particular has not been revised, other amendments introduced by the Treaty of Lisbon have resulted in the award of compensation for damage caused by acts adopted under the former third pillar.¹⁷ The establishment of non-contractual liability for damage necessitates the cumulative fulfillment of three substantive legal conditions: the illegality or unlawfulness of an act or conduct by a given institution, the existence of damage, and a direct causal link between the act and the resulting damage. The condition regarding the illegality of the act or conduct of a given institution has been reformulated in the case law of the CJEU to require a sufficiently serious breach of European Union law aimed at establishing a subjective right, thereby granting rights to individuals. Conversely, the basic procedural conditions for liability for damage pertain to the assessment of the admissibility of a claim for compensation. These procedural conditions include adherence to a five-year preclusive period for filing a claim, as well as other formal requirements concerning the content of the submission itself. These formal requirements often focus on substantiating the substantive legal elements:

¹⁷ *Ibid.*

the unlawfulness of the measure, the existence of causation and the presence of damage.¹⁸

f. Decisions on appeals

An appeal may be brought before the Court of Justice against a judgment or order of the General Court, which may relate only to points of law. If the appeal is admissible and well-founded, the Court of Justice may set aside the decision of the General Court. When the case has been sufficiently argued, the Court of Justice may render its own judgment on the dispute. If not, it must refer the case back to the General Court for a decision, which is obligated to adhere to the Court's ruling on the appeal. In certain categories of cases, the Court of Justice will only consider appeals against decisions of the General Court following a prior leave to appeal procedure. These cases involve appeals where a double examination has already taken place – first by an independent appeals board of one of the EU bodies, departments or agencies, and then by the General Court. In such instances, the appeal must be accompanied by a request for leave to appeal, outlining the significant issue or issues raised by the appeal that pertain to the unity, consistency or development of EU law.¹⁹

5. PROCEEDINGS BEFORE THE CJEU

Regardless of the type of case, the procedure typically involves both a written component and, where necessary, an oral component, both of which are public. It is important to differentiate between the preliminary procedures, on one hand, and other types of procedures, such as direct actions and appeals, on the other hand.

¹⁸ *Ibid.*

¹⁹ K. Lenaerts, D. Arts, I. Maselis, *Procedural Law of the European Union*, Sweet & Maxwell, London 2006

a. Procedure for a preliminary ruling and the adoption of a preliminary ruling

This procedure is initiated solely at the discretion of a national court that faces a dilemma regarding the interpretation or validity of specific EU acts, whose clarifying is essential for the national court to proceed with the case at hand. In this context, the CJEU does not act as a court of appeal, as it does not adjudicate the merits of the dispute presented to the national court but instead focuses on interpreting treaties and assessing the validity of acts issued by EU institutions, bodies, offices, or agencies. When the CJEU issues a decision on a preliminary ruling, that decision is binding on the national court that sought clarification. Through its case law, the CJEU has outlined the criteria to determine whether a national body qualifies as a court or tribunal. These criteria include whether the body is established by law, is permanent and independent, has compulsory jurisdiction, uses an adversarial procedure and applies the rule of law in its proceedings. Based on these criteria, the CJEU has allowed not only traditional courts but also a much broader range of bodies to make a request for a preliminary ruling.²⁰

In addition to interpreting EU law, the Court of Justice has jurisdiction to rule on the legality of acts issued by EU institutions, bodies, offices, and agencies. This includes assessing their compliance with the Treaties, the Charter, general principles of EU law, and international agreements that are directly applicable and binding on the EU. Furthermore, the Court has determined that it may also review the legality of non-binding legal acts.²¹

²⁰ See: *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*. - Reference for a preliminary ruling: Överklagandenämnden för Högskolan - Sweden. - Concept of "national court or tribunal" - Equal treatment for men and women - Positive action in favour of women - Compatibility with Community law. Case C-407/98; available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61998CJ0407>; and *C. Broekmeulen v Huisarts Registratie Commissie*. References for a preliminary ruling: *Commissie van Beroep Huisartsgeneeskunde's-Gravenhage* - Netherlands. Right of establishment: Doctors. Case 246/80; available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61980CJ0246>

²¹ See: Judgment of the Court (Sixth Chamber) of 21 January 1993. *Deutsche Shell AG v Hauptzollamt Hamburg-Harburg*. References for a preliminary ruling: Finanzgericht

A request for a preliminary ruling must pertain to the interpretation or legality of EU law, rather than the interpretation of national law, its compatibility with EU law, or the factual issues raised in the main proceedings. The Court can rule on a request for a preliminary ruling only if EU law is applicable to the case at hand. In its decision, the Court will provide the national court with guidance on interpreting EU law, thereby assisting it in determining the compatibility of EU law with the issues raised in the case.²²

In its case law, the CJEU has established additional grounds for refusing to issue a preliminary ruling. It has declined to rule on questions that are general, hypothetical, or not aimed at resolving a specific case before a national court. The questions referred to the Court must arise from an existing dispute before a body empowered to render a binding decision. The need to provide a clear background for the case is especially crucial in complex legal areas, such as competition law, which need detailed factual and legal information. Specifically, the national court must clarify why it requires the CJEU to interpret certain provisions of EU law and how those provisions relate to the national law that it must apply to resolve the case at hand.²³

National courts of lower instances have the discretion to decide whether the preliminary ruling of the CJEU is necessary to adjudicate a dispute pending before them. In contrast, for courts against whose decisions there is no legal remedy under national law, the preliminary ruling is mandatory.

Hamburg - Germany. Transit - International convention. Case C-188/91. ; available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61991CJ0188>

²² The only procedure in which the Court of Justice of the EU can determine the compatibility of national law with EU law is the procedure set out in Articles 258 and 259 of the Treaty on the Functioning of the EU.

²³ See: Judgment of the Court of 21 January 2003. Bacardi-Martini SAS and Cellier des Dauphins v Newcastle United Football Company Ltd. Case C-318/00; available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62000CJ0318> as well as the case: Pasquale Foglia v Mariella Novello.

References for a preliminary ruling: Pretura di Bra - Italy. Tax arrangements applying to liqueur substances. Case 244/80.; available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61980CJ0244>

In such cases, two interpretations apply. The CJEU has favoured an abstract theory, asserting that a national court must request a preliminary ruling if its decision in a particular case cannot be challenged by a legal remedy. This obligation was notably articulated by the CJEU in one of its most significant cases, *Costa v. ENEL*, which established the doctrine of supremacy.²⁴ If a national court required to make a reference for a preliminary ruling, fails to do so, it is considered to have infringed EU law. This infringement may result in the European Commission initiating proceedings against the Member State whose court did not make the request. Additionally, an individual who has suffered damage as a result of the failure to make a reference for a preliminary ruling, where such a referral was mandatory, may seek compensation from the responsible Member State.²⁵

However, in certain exceptional circumstances, the courts of last instance are not required to refer questions regarding the interpretation of EU law to the CJEU. The CJEU has outlined these exceptions in the *CILFIT* and *Da Costa* cases, which established the *acte clair* and *acte éclairé* doctrines in the context of preliminary ruling procedures. The doctrine of *acte clair* states that there is no need to interpret clear and obvious legal provisions. According to the doctrine of *acte éclairé*, a national court is not required to request a preliminary ruling from the CJEU if the question is identical to the one on which the Court has already issued a preliminary ruling. However, if the national court requests a preliminary ruling anyway, the Court will issue it.²⁶

²⁴ See: Judgment of the Court of 15 July 1964. *Flaminio Costa v E.N.E.L.*, Reference for a preliminary ruling: Giudice conciliatore di Milano - Italy, Case 6-64; available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61964CJ0006>

²⁵ Šago, D, Preliminary decision-making procedure before the European Court of Justice - problems and possible solutions, *Zbornik Pravnog fakulteta Sveučilišta u Zagrebu*, v 36, pp. 381-408, Zagreb, 2015.

²⁶ See: *CILFIT* — in bankruptcy — and 54 others, from Rome, against the Ministero della Sanità (Ministry of Health), represented by the Minister, from Rome, and the Lanificio di Gavardo SpA, from Milan; Subject to: <https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:61981CJ0283&qid=1597093924345&from=HR> and case: *Yes Costa en Schaafe NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands*

The form of the request for a preliminary ruling is dictated by national law. Since this request is the foundation for the proceedings before the CJEU and will be communicated to all interested parties – such as political parties, Member States, the Commission and EU institutions, bodies, or agencies that have adopted the act whose validity or interpretation is in dispute – it is advisable for the language used by the national court to be simple, clear and precise, avoiding any redundancy in writing. The content of the request for a preliminary ruling is outlined in the Rules of Procedure of the Court of Justice of the EU. According to the Rules of Procedure, a request for a preliminary ruling must contain: the name of the referring court or tribunal; the names of the parties to the main proceedings and their representatives appearing before the referring court or tribunal; a summary of the subject-matter of the dispute and the relevant findings of fact; relevant provisions of the national law and EU law applicable in the case; a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law; specific questions being referred for a preliminary ruling, and potential necessity for special handling of the request (e.g. the need to protect the identities of individuals involved in the dispute or the particularly expeditious way in which the request should be dealt with). In the absence of one or more of the above, the Court of Justice or the General Court may find it necessary to decline jurisdiction to give a preliminary ruling on the questions referred or dismiss the request for a preliminary ruling as inadmissible, by reasoned order. Additionally, a request for a preliminary ruling must be typed – handwritten submissions are not accepted – dated, signed and submitted to the Registry of the Court of Justice, preferably via electronic means using a specific e-Curia application. The request should be accompanied by all supporting documents that are relevant and useful for the handling of the case.²⁷

Inland Revenue Administration, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61962CJ0028>

²⁷ Declan O'Dempsey, *Litigating before the European Court of Justice: practical issues to consider*, Cloisters Chambers, London, 2009.

There is no specific rule regarding when a question should be referred for a preliminary ruling in the main proceedings. However, the Court recommends that national courts defer such questions until sufficient factual and legal material has been gathered in the main proceedings. This enables the courts to define the question precisely and ensures that the Court of Justice of the EU has enough information to issue a preliminary ruling.

The preliminary ruling procedure is governed by the Statute of the Court and the Rules of Procedure of the Court. This procedure consists of two stages: written part and oral part. A key feature of the proceedings is that, in addition to being initiated by a national court raising a question concerning the interpretation or legality of EU law, the question referred to the CJEU must be served to all Member States, in its original version and translated into the official language of the state to which it is addressed. It must also be shared with the parties to the main proceedings before the national court, the European Commission and the institution that adopted the act whose validity or interpretation is in question. All these parties are authorised to participate in the proceedings by submitting observations within a specified time frame. The fact that they did not participate in the written part of the procedure does not prevent them from participating in the oral part. When a preliminary ruling is requested, the court may decide to follow the expedited procedure, either at the request of the referring body or on its own motion, particularly when the nature of the dispute necessitates timely action. In such cases, the President of the Court will promptly set a date for the hearing and communicate this to the concerned parties along with the request for a preliminary ruling. These parties may submit statements of case or written observations within a period specified by the President, which cannot be less than 15 days. The President may also invite interested parties to focus their pleadings or written observations on the substantive legal points raised in the request for a preliminary ruling. In addition to the expedited procedure, there is also an urgent preliminary ruling procedure, which is applied if the preliminary question pertains to the area of freedom, security and justice. The urgent procedure may be invoked at the request of the referring court or on the

court's own motion. If the referring court proposes urgent procedure, it must include, alongside the request for a preliminary ruling, a statement detailing the legal and factual circumstances that necessitate urgency and justify this special procedure. Where the referring national court has not proposed that the question referred be decided under the urgent procedure, the President of the Court may, if it appears necessary *prima facie*, request the Chamber responsible for the urgent procedure to reassess the need for such a ruling. A notable aspect of the urgent procedure is that, in addition to the shorter time limits for actions and restrictions on individuals submitting written observations, the Chamber may decide to dispense with the written part of the procedure and instead rule based on an oral procedure, following the Advocate General's opinion. In practice, the urgent procedure has been used infrequently; the first request addressed in this manner was in Case C-195/08 PPU.²⁸

The CJEU gives its ruling on questions referred for a preliminary ruling in the form of a judgment, commonly known as a preliminary ruling. In certain circumstances, however, the Court may decide on a preliminary ruling without holding an oral proceeding or seeking written observations from the interested parties. This occurs when the question posed is identical to one previously adjudicated by the Court, when the answer can be clearly inferred from existing case law, or when the answer leaves no room for reasonable doubt. In such instances, the Court may issue a decision by way of order, upon the proposal of the judge-rapporteur and after consulting the advocate general. Once the judgment has been delivered or the order closing the proceedings has been signed, the Registry of the Court will send the decision to the national court that referred the question, requesting it to inform the Court of the actions taken in the main proceedings. The final decision of the national court must also be communicated to the Court. The preliminary ruling is binding on the referring court. A decision in a preliminary ruling is considered binding *erga omnes*, meaning it is legally binding not only on the referring court

²⁸ Request made by the Supreme Court of Lithuania, available at: <https://fra.europa.eu/si/caselaw-reference/cjeu-c-19508-ppu-judgment>

but also on all higher and lower courts adjudicating similar cases, as well as on all Member States in subsequent cases involving the same provisions of Union law. This effect is particularly evident when the Court rules on the validity of secondary legislation: if the Court finds a provision to be invalid, that finding is binding on all Member States.²⁹ The decision of the CJEU in a preliminary ruling is effective from the moment of its publication and, in principle, has retroactive effect (*ex tunc*), unless the Court explicitly specifies otherwise.³⁰

b.Direct actions

An action before the Court must be brought by application addressed to the Registry. The Registrar publishes a notice of the action in the Official Journal, setting out the applicant's claims and arguments. The application is served on the other parties, who have two months within which to lodge a defense or a response. If appropriate, the applicant may lodge a reply and the defendant a rejoinder. The time limits for lodging these documents must be complied with.

In both types of action, a Judge-Rapporteur and an Advocate General, responsible for monitoring the progress of the case, are appointed by the President and the First Advocate General, respectively.

In all proceedings, once the written procedure is closed, the parties may state, within three weeks, whether and why they wish a hearing to be held. The Court decides, after reading the proposal of the Judge-Rapporteur and hearing the views of the Advocate General, whether any preparatory inquiries are needed, what type of formation the case should be assigned

²⁹ See: *SpA International Chemical Corporation v Amministrazione delle finanze dello Stato*.

References for a preliminary ruling: Tribunale civile e penale di Roma - Italy. Judgment pronounced an act invalid - Effects - Recovery of payment not due due, Case 66/80; available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61980CJ0066>

³⁰ See: *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*.

References for a preliminary ruling: Cour du travail de Bruxelles - Belgium. The principle that men and women should receive equal pay for equal work. Case 43-75; available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61975CJ0043>

to, and whether a hearing should be held for oral argument, for which the President will fix the date.

When it has been decided that an oral hearing will be held, the case is argued at a public hearing, before the bench and the Advocate General. The Judges and the Advocate General may put to the parties any questions they consider appropriate. Some weeks later, the Advocate General delivers his or her Opinion before the Court of Justice, again in open court. He or she analyses in detail the legal aspects of the case and suggests completely independently to the Court of Justice the response which he or she considers should be given to the problem raised. This marks the end of the oral stage of the proceedings. If it is decided that the case raises no new question of law, the Court may decide, after hearing the Advocate General, to give judgment without an Opinion.

The Judges deliberate on the basis of a draft judgment drawn up by the Judge-Rapporteur. Each Judge of the formation concerned may propose changes. Decisions of the Court of Justice are taken by majority and no record is made public of any dissenting opinions. Only the Judges present during the oral deliberations in the course of which the judgment is adopted sign the judgment, without prejudice to the rule that the most junior judge in the formation does not sign the judgment if that formation is even in number. Judgments are pronounced in open court. Judgments and the Opinions of the Advocate General are available on the CURIA website³¹ on the day they are delivered. They are, in most cases, subsequently published in the European Court Reports.³²

There are no court fees for proceedings before the Court of Justice. On the other hand, the Court does not meet the fees and expenses of the lawyer entitled to practice before a court of a Member State by whom the parties must be represented. However, a party unable to meet all or part of the costs of the proceedings may, without having to instruct a lawyer, apply

³¹ Look at: https://curia.europa.eu/jcms/jcms/Jo1_6308/

³² Look at: <https://eur-lex.europa.eu/search.html?qid=1395932669976&name=collection%3Aeu-law-case-law&type=named&locale=en>

for legal aid. The application must be accompanied by all necessary evidence establishing the need for legal aid.

In direct actions, the language used in the application (which may be one of the 24 official languages of the European Union) will typically be the language of the case, i.e. the language in which the proceedings will be conducted. In appeals, the language of the case is that of the judgment or order of the General Court that is under appeal. With references for preliminary rulings, the language of the case is that of the national court which made the reference to the Court of Justice. Oral proceedings at hearings are interpreted simultaneously, as required, into various official languages of the European Union. The Judges deliberate, without interpreters, in a common language, which, traditionally, is French.

6. CROATIA BEFORE THE CJEU

a. Legal framework from the perspective of EU law and challenges 12 years later

With the accession of the Republic of Croatia to the EU, the systematic supervision of judicial reforms by the EU came to an end. As a new member, Croatia was required to ensure that its national judiciary operated independently and effectively. A significant challenge arose concerning the State School for Judicial Officers³³ as it needed to demonstrate, in practical terms, whether it provided a more transparent and objective method for selecting the most qualified candidates for the roles of judges and attorneys general. At the time of accession, linking access to the judicial profession with the completion of training at the State School did not necessarily guarantee the selection of the best and most capable candidates for these positions. This was particularly concerning given that the process of admitting candidates was often questioned for its adherence to the criteria of excellence, objectivity, and transparency. Moreover, maintaining an effective institutional system to combat corruption required

³³ <https://www.pak.hr/category/drzavna-skola/>

additional financial resources and concerted efforts upon accession. Addressing complex cases involving the detection, prosecution, and sanctioning of various forms of corruption and organised crime necessitated the establishment of expert teams that were sufficiently qualified to perform these tasks efficiently.³⁴

Almost 12 years after Croatia joined the European Union, the challenges that marked judicial reform during the accession process have persisted, and the situation has not fundamentally changed. The European Commission's reports on the state of the rule of law in Croatia over the past four years have identified two central issues concerning the Croatian judicial system. First, the Croatian judiciary is facing "serious challenges in terms of efficiency and quality." Second, the "level of perceived independence of the judiciary" in Croatia is alarmingly low, effectively the lowest in the EU.³⁵ Past legislative reforms have been complex and have failed to address the core problems related to the rule of law. Instead of implementing much-needed proactive and comprehensive reforms, recent changes have primarily been reactive. Moreover, these efforts have largely failed to achieve their limited objectives or bring about profound change. The Croatian legislation and overall legal culture have been marked by a status quo in the judiciary, marked by lethargy and self-sufficiency. Another significant issue concerns the workload of Croatian courts, which remain among the most burdened in the EU in terms of the number of incoming and pending cases per capita. This situation has not improved, even with advancements in electronic communication tools³⁶.

³⁴ Croatia and the European Union, Benefits and Challenges of Membership, Institute for International Relations – IMO, Zagreb in cooperation with the Delegation of the European Union to the Republic of Croatia, 2012, available at:

https://www.irmo.hr/wp-content/uploads/2013/11/hrvatska_i_eu_prednosti_izazovi_.pdf

³⁵ Bačić Selanec, N., Goldner Lang, I. and Petrić, D., Rule of law in the EU and The state of Croatia Judiciary, *Crisis Era European Integration: Economic, Political and Social Lessons from Croatia*, (Routledge 2024)

³⁶ European Commission, 2022b, EU Justice Scoreboard, Odeljak 3.1 "Effectiveness of justice systems"; European Commission, 2021, p.

One of the leading causes of weakness in the judicial system, as noted by Croatian judges, is the so-called Framework Criteria for the Work of Judges. Article 79(1) of the Courts Act authorises the Minister for Justice and Administration to establish these criteria and determine how many decisions judges are individually required to deliver during a calendar year.³⁷ Many judges have argued that the thresholds set annually by the Minister overburden them and contribute to excessively long court proceedings. They contend that judges who could previously meet the time-limit requirements now have no incentive to do so, as resolving cases within the stipulated time frame only risks them being assigned an additional caseload by the president of their court. Consequently, these framework criteria enable the executive branch to exert pressure on the judiciary, raising concerns regarding the integrity of the rule of law. If these criteria adversely affect the workload of the judiciary – and, by extension, the length of court proceedings – the result would be diminished judicial protection of individual rights, which is a core issue of the rule of law. The European Court of Human Rights determined that Croatia violated Articles 6 and 13 (the right to a fair trial and the right to an effective remedy) of the European Convention on Human Rights.³⁸

However, there was no solid evidence – perhaps only the testimonies of certain judges – to support the claim that the framework criteria have such a detrimental effect on the number of cases in the courts or the length of proceedings, even though a correlation appears evident. A more significant cause of the issues, beyond the volume of work and slow decision-making, relates to Croatian procedural law, particularly the possibility of annulments of judgments an unlimited number of times and the remittance of cases to lower courts for retrial. This practice prevents appellate courts from amending judgments and issuing substantive decisions that could

³⁷ Bodul, D., *New Framework Criteria for the Work of Judges. Objectively verifiable parameters or not?*, Informator: Instructive Information Sheet for Economic and Legal Affairs, 6717, pp. 1-4 Zagreb, 2022

³⁸ *Marić v. Croatia*, App. No. 9849/15; *Glavinić and Marković v. Croatia*, Petitions Nos. 11388/15 and 25605/15.

bring disputes to a conclusion.³⁹ The “ping-pong” between lower and appellate courts is exacerbated by the rules concerning evidence, which can be exploited to prolong proceedings indefinitely, along with the availability of all types of legal remedies that delay the enforcement of judgments. Additionally, the bureaucratised judiciary and rigid formalism pose further challenges. This tendency favours decisions based purely on formal or procedural grounds, thereby avoiding final substantive decisions that would require taking responsibility for making significant value-based and political judgments.⁴⁰

b.A selection of cases brought by Croatian national courts before the CJEU

Given that other branches of government cannot effectively challenge the position of the Croatian judiciary, the best opportunity to contest the *status quo* arises from within the judiciary itself. To facilitate this, some judges utilise mechanisms provided by EU law. A noteworthy example pertains to a question referred from Croatia, one of the latest cases addressed by the CJEU as relevant. In this instance, the Court of Justice ordered action concerning Croatian national courts. The question raised concerned judicial independence, not in relation to other branches of government, but internally, within the national judiciary. In the *Hann-Invest v. KHL Medveščak Zagreb* case, the High Commercial Court asked whether Article 40(2) of the Croatian Courts Act and Article 177(3) of the Croatian Rules of Procedure of the Courts complied with the required independence and impartiality of judges under Article 19 of the TEU and Article 47 of the Charter of Fundamental Rights of the European Union, as well as relevant case law of the CJEU. Article 40(2) of the Law on Courts stipulates that “legal positions” adopted in a meeting of a section of a higher court will be binding on all of the judges or chambers of that

³⁹ Uzelac, A., Accountability and Transparency in Civil Justice: Some General Remarks and a View from Croatia, *Kopaonica School of Natural Law Review: Journal of Legal Theory and Practice*, 2021, pp. 121-146.

⁴⁰ Bačić Selanec, N., Goldner Lang, I. and Petrić, D., Rule of law in the EU and The state of Croatia Judiciary, *Crisis Era European Integration: Economic, Political and Social Lessons from Croatia*, (Routledge 2024).

section in the specific proceedings they deal with. In contrast, Article 177(3) of the Rules of Court specifies that a decision rendered by a court at second instance is not final until it has been registered and served to the parties by the court. The registrations judge reviews the legal merits of each judgment to ensure consistency of case law. If the registrations judge believes that a judgment is based on an erroneous interpretation of the law or deviates from prior positions of the same court or section, he or she may refer the matter back to the deciding judge or judicial panel with comments on how the original judgment should be revised. Should the deciding judge or judicial panel disagree with the registrations judge, the latter may escalate the matter to a meeting of the relevant section of the court, which may then issue a binding “legal position” pursuant to Article 40(2) of the Courts Act.⁴¹

The court sections conduct their meetings behind closed doors, where national procedural rules do not apply. Consequently, the parties involved in the original proceedings lack access to and do not have voting rights in the plenary sessions and chamber meetings. The Croatian academic community has criticised the national provisions for being inconsistent with the principle of judicial independence guaranteed by the national constitution. The CJEU has expressed the view that these rules contravene EU law. It remains to be seen how the CJEU’s judgment will influence the relevant provisions or alter existing case law, as well as whether the standards of judicial independence in Croatia will improve thanks to the efforts of a few national judges who were aware of the procedural mechanisms provided for by the EU treaties and CJEU case law.⁴²

⁴¹ See : Hann-Invest / Association KHL Medveščak Zagreb (Joined Cases C-554/21, C-622/21 and C-727/21); available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=288142&pageIndex=0&doclang=HR&mode=lst&dir=&occ=first&part=1&cid=6889548>

⁴² Bačić Selanec, N., Goldner Lang, I. and Petrić, D., Rule of law in the EU and The state of Croatia Judiciary, *Crisis Era European Integration: Economic, Political and Social Lessons from Croatia*, (Routledge 2024)

Other recent examples demonstrate how domestic judges can invoke EU law to advocate for higher rule of law standards concerning judicial independence and the adequate protection of individual rights. For instance, the Municipal Court of Split cited the obligation to interpret national law in accordance with EU law, openly discrediting previous decisions of the Croatian Supreme Court as erroneous. This court adopted a different interpretation consistent with relevant CJEU case law.⁴³ Similarly, in a high-profile anti-corruption case, the Zagreb County Court lodged a request to the CJEU despite the Supreme Court having rejected its request for referral to CJEU twice and directed the County Court to continue the trial, asserting that the questions regarding EU law interpretation were irrelevant to the ongoing trial. The CJEU accepted and addressed the County Court's reference for preliminary ruling, indicating that the questions posed were pertinent, thereby demonstrating that the Supreme Court had committed an error.⁴⁴

In response to this controversy, the Croatian legislator intervened and amended national procedural rules (Article 18.a of the Criminal Procedure Code and Article 213 of the Civil Procedure Code), which now allow the court to stay the proceedings and submit a request for preliminary ruling to the CJEU.

In another instance, the Municipal Civil Court in Zagreb referred a question for preliminary ruling concerning the compatibility of national law, as interpreted by the Croatian Supreme Court, with EU law – specifically, Article 47 of the Charter, which guarantees the effectiveness of judicial protection. This dispute concerned a consumer loan expressed

⁴³ See: <https://www.jutarnji.hr/vijesti/hrvatska/profesorica-s-pravnog-fakulteta-u-čudu-odluka-vrhovnog-suda-u-slučaju-ina-mol-protivna-je-europskom-pravu-6619758>

⁴⁴ See: Request for a preliminary ruling from the Zagreb County Court
Reference for a preliminary ruling — Judicial cooperation in criminal matters — European arrest warrant — Framework Decision 2002/584/JHA — Article 1(2), Article 11(2) and Article 4(3) — Grounds for the refusal to execute — Closure of criminal proceedings — Principle ne bis in idem — Requested person who had the status of a witness in previous proceedings concerning the acts themselves — Issue of several European arrest warrants against the same person Case C-268/17; available at: <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-268/17>

in Swiss francs, and the Croatian Conversion Act, which permitted the conversion of these loans from francs to euros after the Supreme Court annulled unfair terms in the original contracts. This case is one of the most significant judicial matters in recent years. In a subsequent “modelled decision,” the Supreme Court offered an authoritative interpretation of the Conversion Act. However, it did not refer to the CJEU the relevant questions concerning the interpretation of Directive 93/13 on unfair terms in consumer contracts, nor did it explain why the preliminary question was deemed unnecessary. Given that “modelled decisions” are binding on lower courts, the Municipal Civil Court sought clarification from the CJEU as to whether this decision of the Supreme Court complied with EU law on consumer protection and the requirements of Article 47 of the Charter. In its response, the CJEU deemed the preliminary question was inadmissible due to lack of jurisdiction, noting that the contract in question in the main proceedings before the referring court did not fall within the material scope of Directive 93/13.⁴⁵

All these examples demonstrate the potential of EU law and, in particular, the significant effect of cooperation with the CJEU on lower courts in Croatia. These courts can employ the fundamental doctrines of EU law and the preliminary ruling procedure both as a “shield” – to protect themselves from decisions made by Croatian higher courts that may be inconsistent with EU law, and as a “sword” – to compel superior courts to show greater respect for EU law. By involving the CJEU, lower courts in Croatia have the opportunity to shift responsibility to Luxembourg, thereby facilitating their interactions with higher courts.⁴⁶

⁴⁵ See: A.H. v Zagrebačka banka d.d.

Request for a preliminary ruling from the Municipal Civil Court in Zagreb.

Case C-567/20; available at:

<https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-567/20&jur=C>

⁴⁶ Bačić Selanec, N., Goldner Lang, I. and Petrić, D., Rule of law in the EU and The state of Croatia Judiciary, *Crisis Era European Integration: Economic, Political and Social Lessons from Croatia*, (Routledge 2024)

One of the factors contributing to the problematic treatment of EU law and the ruling of the CJEU concerning preliminary questions by the Croatian courts – the ones that may raise important questions about judicial independence and the rule of law – is the lack of institutional capacity and knowledge. On one hand, Croatian courts still lack the necessary resources to keep up with the development of EU precedents. The Supreme Court has recently established a department in charge of monitoring and analysing the case law of both the CJEU and the European Court of Human Rights, which can communicate its findings to other Croatian courts (Article 44 of the Supreme Court's Rules of Procedure). However, the department remains understaffed, which raises questions about its effectiveness given the magnitude of its responsibilities.

On the other hand, many judges, particularly those with more seniority, require further training and education in EU law. Although university courses and lifelong learning programmes focusing on various aspects of EU law were introduced during the pre-accession period, initiatives in this area have stagnated since accession. For instance, the Judicial Academy initially offered several courses covering the basic principles and procedures of EU law. However, for several years, these courses have not been available, and EU law is now taught only in specialised courses that address issues interconnected with national law.⁴⁷

This approach taken by the state is problematic for two main reasons. First, it undermines the importance of the fundamental principles of EU law and EU legal reasoning, which has significant repercussions for the application of EU law in Croatia, as seen in the examples discussed above. Second, it promotes a formalistic approach rather than focusing on substantive legal understanding. The assumption appears to be that because the country has joined the EU, there is no longer any need for further investment in knowledge regarding EU matters. Consequently, this perspective aligns with Croatia's overall formalistic approach to EU law. Running some

⁴⁷ Uzelac, A. (2020) "Judiciary in Croatia 2020. Current situation, causes of crisis and possible reform measures". Available at: https://www.alanuzelac.from.hr/pubs/C04_Judiciary_in_Croatia_preprint.pdf

educational programmes for judges, regardless of the quality of instruction or the qualifications of the educators involved, is deemed sufficient. Establishing a research service to assist courts with EU law, irrespective of the number of personnel dedicated to the task and whether they are equipped with the necessary resources to perform their duties effectively, is deemed sufficient. Finally, covering a couple of laws and bylaws for the implementation of EU law without ensuring that there are enough personnel, institutions, procedures and patterns of behaviour in place to effectively implement them in accordance with their intended purposes, is also deemed sufficient.⁴⁸

7. ROMANIA BEFORE THE CJEU

a. Legal framework from the perspective of EU law and challenges 18 years after

Since joining the European Union, Romania has been evolving towards harmonisation with the fundamental principles advocated by the EU. The European Commission has supported this process through the Cooperation and Verification Mechanism (CVM) since Romania's accession in 2007. Initially intended as a short-term monitoring effort, the CVM has persisted for almost a decade and a half. Each year, the European Commission reports on the progress of Member States Bulgaria and Romania regarding the rule of law. Several cases related to the rule of law have been referred to the Court of Justice of the EU. The controversial judicial reforms in Romania from 2017 to 2019 and the inadequate fight against corruption are consequences of the transitional shift from the socialist system to a pro-democratic regime, reflecting the incomplete reforms stemming from EU accession. These consequences are still evident today.

Immediately after the fall of the Ceaușescu regime, a Judicial Council, with a historical predecessor, was established in Romania in 1991. However, the Council's powers were weak compared to those of the Minister for

⁴⁸ Bačić Selanec, N., Goldner Lang, I. and Petrić, D., Rule of Law in the EU and the State of Croatian Judiciary, Crisis Era European Integration: Economic, Political and Social Lessons from Croatia, (Routledge 2024).

Justice. Consequently, a key issue in the accession process to the European Union prior to 2007 was the extent to which the government had managed to relinquish control over the judiciary and enhance the Council's authority. This shift occurred alongside the establishment of institutional guarantees aimed at combating corruption, which remains a significant issue in Romania. Under pressure from the EU, a comprehensive reform was undertaken in 2003. Following extensive political debates, along with the implementation of various constitutional and legal provisions related to EU accession, a rather broad body emerged. This was the Superior Council of Magistracy, composed of 19 members out of which 9 judges and 5 prosecutors elected in the general assemblies of judges and prosecutors, two representatives of the civil society who are specialists in the field of law, elected by the Senate, the Minister for Justice, the President of the High Court of Cassation and Justice, and the Prosecutor General. The Council was granted full authority over nearly all matters affecting judges' careers. Judges and prosecutors are appointed by the President of the Republic based on the Council's recommendations. This reform fundamentally transformed the judiciary's status, effectively stripping the government of nearly all control over this branch of power. For example, despite becoming a member of the Council, the Minister for Justice cannot participate in resolving disciplinary matters. The Council was given full powers, not only in matters concerning judges, but also in those concerning prosecutors. This significant change was accompanied by typical "side effects." The full independence required by the European Commission led to a lack of external oversight and reinforced the corporatist nature of the system.⁴⁹ The judicial reform process between 2017 and 2019 can also be viewed through this lens, as it intensified conflicts between the government and the judiciary.⁵⁰ As a result of these

⁴⁹ B. Selejan-Gutan, *Failing to Struggle or Struggling to Fail? On the New Judiciary Legislation Changes in Romania*, Verfassungsblog, 2018, available at: <https://verfassungsblog.de/failing-to-struggle-or-struggling-to-fail-on-the-new-judiciary-legislation-changes-in-romania/>

⁵⁰ This will be discussed in more detail in the next chapter, where we will analyse a case concerning judicial independence brought before the Big Chamber of the Court of Justice <https://curia.europa.eu/juris/documents.jsf?num=C-430/21>

tensions, Romania was placed under a special Cooperation and Verification Mechanism (CVM) at the moment of its accession to the EU in 2017.⁵¹ The implementation of the CVM represented a mutual acknowledgment by both Romania and the EU that measures needed to be taken to ensure compliance with established benchmarks throughout the reform process. In 2017, the EU Commission assessed Romania's progress and concluded that significant steps had been made.⁵² By 2022, the EU Commission determined that it would stop monitoring the country as enough progress had been made in judicial reform and the fight against corruption.⁵³ However, Romania will continue to be monitored within the annual rule of law cycle. While the CVM cannot be used to withhold funding, it serves as a means of influencing Member States' anti-corruption policies. Although progress in Romania was gradual, the Commission has found that enough was accomplished to close the CVM, believing that any further necessary measures can be incorporated into the Recovery and Resilience Plan (RRP)⁵⁴. To unlock the next round of financial packages, Romania must implement laws that reform the judiciary, the status of minor offense judges, the organisation of the judiciary, and the High Council for Minor Offenses. By the end of 2026, Romania must demonstrate that it has taken steps to adopt a judicial reform plan that amends the criminal code and the criminal procedure law,

⁵¹ E. Maurice, "Rule of law: the uncertain gamble on conditionality." Foundation Robert Schuman The Research and Studies Centre on Europe, European Issue no 660 Policy Paper, 2023, available at: <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-660-en.pdf>

⁵² European Commission Press Release, Romania: Benchmarks under the Cooperation and Verification Mechanism are satisfactorily met, 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7029

⁵³ B. Neagu, Commission lifts CVM monitoring on Romania, 2022, *Euractiv*, available at: <https://www.euractiv.com/section/politics/news/commission-lifts-cvm-monitoring-on-romania/>

⁵⁴ E. Maurice, Rule of law: the uncertain gamble on conditionality, Fondation Robert Schuman The Research and Studies Centre on Europe, European Issue no 660 Policy Paper, 2023, available at: <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-660-en.pdf>

aligning the legislation with EU standards on integrity and government ethics.⁵⁵

b.A selection of cases brought before the Court of Justice of the EU in the context of independence of the Romanian judiciary

A case was brought before the Court of Justice of the EU to examine the allocation of jurisdiction between the Court and national constitutional courts. The Court, sitting in the Grand Chamber, determined that the Romanian judicial system was improperly organised. In its judgment dated 22 February 2022 (Case C-430/21)⁵⁶, the CJEU clarified its reasoning concerning the independence of the judiciary, as enshrined in the second subparagraph of Article 19(1) of the TEU, in conjunction with the primacy of EU law. Accordingly, EU law precludes a national rule that denies national courts the jurisdiction to review the compatibility of national legislation – deemed constitutional by a judgment of a constitutional court of a Member State – with EU law.

In the case at issue, a Romanian court considered it necessary to examine, in the context of an appeal procedure, whether the national legislation establishing a specialised section within the public prosecutor's office for the investigation of criminal offences committed within the judiciary was compatible with Union law. The CJEU already ruled in 202 (Cases C-83/19, C-127/19, et al.)⁵⁷ that the establishment of the specialised section was contrary to EU law if its establishment is not justified by objective and verifiable requirements relating to the sound administration of justice and is not accompanied by specific guarantees. Following this judgment, the Romanian Constitutional Court confirmed, however, its previous findings that provisions on the aforementioned establishment of the specialised section were constitutional. It argued that, whilst Article 148(2) of the Romanian Constitution provides for the primacy of EU law over contrary

⁵⁵ *Ibid.*

⁵⁶ See: <https://curia.europa.eu/juris/documents.jsf?num=C-430/21>

⁵⁷ See: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210082en.pdf>

provisions of national law, that principle cannot remove or negate national constitutional identity. Furthermore, the Romanian Constitutional Court stated that an ordinary court was not competent to examine the conformity with Union law of a national regulation that had been declared compatible with the constitutional provision requiring respect for the principle of the primacy of Union law. In light of these circumstances, the Romanian appeal court was in a conflict and therefore referred the matter to the CJEU asking whether it must comply with the case law of the Constitutional Court or has jurisdiction to examine the conformity with EU law of the legislation establishing the specialised section within the prosecution office. In addition, the referring court pointed out that, according to the current rules, national judges are put at risk of exposure to disciplinary proceedings and penalties, if they examine the conformity with EU law of a provision of national law that the Romanian constitutional court has found to be constitutional.⁵⁸

The judges in Luxembourg found such national rules and practices incompatible with EU law and emphasised *inter alia*:

- The necessity for national courts to fully apply any provision of EU law having direct effect ensures equality of Member States and expresses the principle of sincere cooperation (Article 4(3) of the TEU). This allows national courts to disapply contrary national provisions of their own motion;
- Preventing national courts from assessing the compatibility of national provisions with EU law and the requirement to comply with judgments of the constitutional court would preclude the full effectiveness of the rules of EU law;
- Such national rules or practice would undermine the system of cooperation between the CJEU and national courts since ordinary

⁵⁸ Călin, D., Ten requests for a preliminary ruling filed by the Romanian courts for maintaining the rule of law, a common value of all the European Union Member States, <http://www.forumuljudecatorilor.ro/index.php/archives/3896>

courts would be deterred from ruling on the dispute by submitting preliminary ruling requests.

In addition, the judges in Luxembourg argued that only the CJEU itself, as the highest EU court, is competent to interpret *acquis communautaire* in a binding manner. A national constitutional court cannot unilaterally determine that the Court of Justice of the European Union (CJEU) has exceeded its jurisdiction in a ruling, nor can it refuse to implement a prior judgment. Additionally, a national constitutional court does not have the authority to annul an EU provision, even if it believes that the national identity of a Member State is at stake. In such cases, it falls to the CJEU to make the final determination. Additionally, EU law (Articles 2 and 19(1) of the Treaty on European Union) prohibits the imposition of disciplinary sanctions on national judges who disregard a constitutional court's decision and choose to appeal to the CJEU.⁵⁹

Another important case arguing the primacy of EU law regarding the rule of law and judicial independence was brought before the CJEU against Romania through a preliminary ruling procedure. In the case of *Asociația Forumul Judecătorilor din România (Associations of Judges) v. Romania* (Case C-53/23)⁶⁰, the CJEU has ruled that EU law does not require professional associations of judges to be granted the right to challenge decisions related to the appointment of prosecutors. The case arose when a Romanian association of judges challenged the appointment of specific prosecutors tasked with investigating instances of corruption in Romania. The basis for the challenge was the claim that the national legislation governing these appointments was incompatible with EU law. The Court of Appeal of Pitești, Romania, sought clarification from the CJEU on the question of whether Romanian procedural rules, which essentially prevent judges' associations from challenging prosecutor appointments due to the requirement of demonstrating a legitimate private

⁵⁹ Wahl, T., CJEU again Finds Romanian Judicial System Flawed, Eucrim, 2022, available at: <https://eucrim.eu/news/cjeu-again-finds-romanian-judicial-system-flawed/>

⁶⁰ See: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=257995&pageIndex=0&doclang=HR&mode=req&dir=&occ=first&part=1&cid=7654745>

interest, were in compliance with EU law (Art. 2 and 19(1) of the TEU, read along with Arts. 12 and 47 of the Charter of Fundamental Rights of the European Union). In its judgment of 8 May 2024, the CJEU ruled that EU law does not preclude national legislation that effectively prevents professional associations of judges from challenging such appointments. It emphasised that while Member States have the discretion to decide who may bring actions before the courts, this discretion must not be exercised in a way that undermines the right to effective judicial protection. While EU law does on occasion require Member States to permit representative associations to initiate legal proceedings in specific domains, such as environmental protection or anti-discrimination, it does not require that professional associations of judges be granted the right to contest national measures pertaining to the status of judges. Furthermore, the Court held that the mere fact that national legislation does not permit these associations to contest appointments does not, in and of itself, give rise to legitimate concerns among the public regarding the independence of Romanian judges. In the light of the answer given to the judicial review, the CJEU did not answer the second question whether EU law precluded Romanian legislation which limits the competence of the national anti-corruption directorate by conferring exclusive competence to investigate corruption offences (in a broad sense) committed by judges and prosecutors upon specific prosecutors who are appointed for that purpose by the Prosecutor General, acting on a proposal of the general assembly of the Supreme Council of the Judiciary and the Public Prosecutor's Office attached to Romanian High Court of Cassation and Justice (PICCJ).⁶¹

⁶¹ Pingen, A., ECJ: No Right for Judicial Associations to Challenge Prosecutor Appointments, Eucrim, 2024, available at: <https://eucrim.eu/news/ecj-no-right-for-judicial-associations-to-challenge-prosecutor-appointments/>

8. BULGARIA BEFORE THE CJEU

a. Bulgaria's challenges since its accession to the EU

Bulgaria, like Romania, also faced obligations to implement judicial reforms and establish an effective anti-corruption mechanism upon its accession to the EU. The Cooperation and Verification Mechanism (CVM) was introduced in 2007 as a transitional measure to support Bulgaria's ongoing efforts to reform its judiciary and enhance the fight against corruption and organised crime. This mechanism represented a shared commitment between the Bulgarian state and the EU. In its 2019 report, the Commission finds that the progress made by Bulgaria under the CVM is sufficient to meet Bulgaria's commitments made at the time of its accession to the EU. Bulgaria will have to continue to work towards translating the obligations contained in this report into concrete legislation and continued implementation. Bulgaria will need to continue working consistently on translating the commitments reflected in this report into concrete legislation and on continued implementation. Bulgaria will need to monitor the continued implementation of the reform with a newly-established post-monitoring council, and that will feed into the future dialogue with the Commission in the framework of the comprehensive rule of law mechanism. Both the internal post-monitoring and the EU-wide mechanism should support sustainability and irreversibility of reforms, even after the CVM for Bulgaria ends. Although the CVM mechanism was closed without a formal decision, the Commission has ceased publishing its reports.⁶²

According to the European Commission's 2024 Rule of Law Report, it appears that, progress was still needed in certain areas in Bulgaria. Although the Commission speaks affirmatively of Bulgaria's constitutional reform efforts, according to legal experts there was a constitutional crisis that went under the radar of the European Commission, affecting the rule of law, the independence of judicial organs

⁶² European Commission 2019 report, available at:
https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6136

and the continued fight against corruption.⁶³ More specifically, the Constitutional Court declared the amendments to the Constitution unconstitutional. Despite the political turmoil, a careful reading of the actual text of the legal reasoning in Decision 13 of 26 July 2024 on Constitutional Case 1/2024 shows that The majority expressed serious concerns regarding the potential for political interference in the judicial system stemming from the proposed reform. They highlighted the removal of essential checks and balances designed to protect human rights and the risk of legal impunity. Furthermore, the majority subtly suggested modifications to the legislation that could achieve the desired outcomes while avoiding long-term constitutional harm. Overall, the situation in Bulgaria, particularly its timing, raises questions about why the EU Commission is acknowledging these half-hearted, poorly drafted constitutional reforms as progress without a thorough evaluation of their intrinsic value.⁶⁴

b.A selection of cases brought before the Court of Justice of the EU concerning Bulgaria

The CJEU issued a landmark ruling against Bulgaria's practice of collecting biometric data, stressing the necessity for the authorities to justify such data collection on a case-by-case basis.⁶⁵ The ruling asserts that the collection of biometric data must be regarded as absolutely necessary. This case originated from a complaint by a Bulgarian national accused of tax crimes, who alleged that her biometric data had been collected forcibly by the police. This led to Sofia City Court Judge Ivo Hinov referring the matter to the CJEU, challenging Bulgaria's law on biometric data collection. The ruling by the CJEU underlines several key points. Firstly, it establishes a "necessary requirement," obliging the

⁶³ Joy Cheesman, S., Badó, A., Judicial Reforms and Challenges in Central and Eastern Europe, International Journal for Court Administration, IACA, 2023, <https://iacajournal.org/articles/10.36745/ijca.532#xrn46>

⁶⁴ Vassileva, R., Bulgaria's Constitutional Drama and the EU Commission's Rose-Colored Glasses, 2024, available at: <https://verfassungsblog.de/bulgarias-constitutional-drama-and-the-eu-commissions-rose-colored-glasses/>

⁶⁵ Case C-118/22, Director at the Main Directorate 'Natsionalna politsia' of the MVR – Sofia

Bulgarian Ministry of the Interior to demonstrate the “absolute necessity” to collect biometric data in each instance. This sets a higher standard for the protection of human rights, requiring the police to justify every case of biometric data collection. Furthermore, the ruling confirms that Bulgaria’s law on biometric data collection is incompatible with EU law. However, this law remains in effect until the Bulgarian Parliament decides to comply with the decision of the Court of Justice. This decision reinforces a previous ruling by the CJEU of 26 January 2023,⁶⁶ which stated that the Bulgarian police could not systematically collect biometric and genetic data from every person accused of a premeditated crime of a general nature. The position of the CJEU aligns with its earlier decision prohibiting the unlimited storage of biometric data, emphasising the necessity for periodic assessments to justify the continued retention of such data.⁶⁷

The decision of the CJEU is part of a broader context of EU data protection. The European Data Protection Supervisor (EDPS) has highlighted the need for robust data protection frameworks, particularly in initiatives like the Treaty of Prüm, which involves the exchange of biometric data among Member States. The EDPS has also called for an outright ban on public facial recognition technology to safeguard civil liberties. Bulgaria continues to face persistent challenges concerning personal data protection and the right to private and family life, having been convicted twice by the European Court of Human Rights in

⁶⁶ Case C-205/21, REQUEST for a preliminary ruling under Article 267 TFEU from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria), made by decision of 31 March 2021, received at the Court on 31 March 2021, in the criminal proceedings against V.S., interested party: Ministerstvo na vatreshnite raboti, Glavna direktsia za borba s organisiranata prestapnost; available at:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=269704&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7063069>

⁶⁷ See: Judgment of the Court (Grand Chamber) of 30 January 2024 (request for a preliminary ruling from the Varhoven administrativen sad – Bulgaria) – NG v Direktor na Glavna direktsia ‘Natsionalna politسيا’ pri MVR – Sofia, available at:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=283939&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=7060542>

Strasbourg for insufficient oversight of secret police surveillance and the recording of telephone conversations.

The second case concerns Bulgaria's obligations to comply with EU law on clean air. The Court of Justice found that the Bulgarian government had systematically and continuously breached Directive 2008/50/EC (the Air Quality Directive) by exceeding the limit values for PM10 across its territory and by failing to prepare air quality plans aimed at minimising the duration of this breach. This case marks a fundamental step forward in the realisation of the right to clean air, as it enables the Commission to seek financial sanctions against Member States that violate the Air Quality Directive. In 2013, the Commission adopted a new approach to air quality infringement procedures. This approach allows the Commission to initiate two rounds of proceedings against a Member State for failing to comply with the limit values specified in Article 13 and for not adopting plans to achieve these limits as quickly as possible, as mandated by Article 23. The case against Bulgaria was particularly significant, as it was the first case under this new framework that resulted in a ruling from the CJEU. The decision of 5 April 2017 supports the Commission's strategy. Not only did the Court find that PM10 concentrations had been routinely and consistently exceeded between 2007 and 2014, but it explicitly identified a direct link between the violation of limit values and the development of air quality plans. Bulgaria failed to meet its obligations under Article 23(1) by not maintaining the duration of the infringement "as short as possible" from 11 June 2010 to 2014 by adopting appropriate measures within its air quality plan. Non-compliance with this judgment and, consequently, the necessary improvement of existing inadequate air quality plans, will expose Bulgaria to potential pecuniary penalties.⁶⁸

Most cases against Bulgaria before the Court of Justice of the EU pertain to issues such as taxes, citizens' loans, environmental protection, consumer rights and freedom of movement. This situation significantly sets Bulgaria

⁶⁸ See: C-174/21, European Commission v Bulgaria, available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=271331&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7056377>

apart from Romania, which continues to face a high level of violations of EU law concerning judicial independence and the fight against corruption.⁶⁹

9. CONCLUSIONS AND RECOMMENDATIONS

The preceding chapters summarise key lessons for the Republic of Serbia regarding EU accession, which can be grouped under two main topics. First, the future Member State must regulate specific areas with precision to avoid repeating the mistakes of its predecessors and to establish a robust framework for referring questions to the CJEU. Second, a strategy of recommendations should be developed, complete with a time frame and fields of action, measurable through defined indicators, prioritising measures to strengthen the capacity of the Serbian judiciary.

The experiences of recently acceded member states, such as Croatia, Romania and Bulgaria, demonstrate that the external imposition of legal and political standards by the EU has not fully achieved the desired outcomes. This shortcoming is partly attributable to the methodology employed during the accession negotiations, which focused more on quantitative and formal requirements rather than on genuine transformations in legal culture and the internal structure and functioning of national judicial systems. Furthermore, the limited success of reforms in these member states illustrates that without genuine commitment and political will to implement and sustain necessary changes, the desired results remain unattainable. The consequences of maintaining the *status quo* within the analysed judicial systems are evident. On one hand, there is a tendency towards inflexibility in integrating EU law precedents, resulting in a regression of the rule of law, as national courts often replicate the

⁶⁹ The list of cases brought before the Court of Justice against Bulgaria, available at: <https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&for=&ige=&dates=&language=en&pro=&etat=clot&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&oqp=&td=%3BALL&avg=&lgrec=en&parties=Bulgaria&lg=&page=2&cid=7056377>

errors of higher national courts, with proactive measures by individual judges being the exception rather than the norm. On the other hand, the absence of accountability continues to manifest as a deficiency in efficiency, quality, and public trust in the system marked predominantly by the way the judiciary works in the analysed member states. However, leveraging the mechanisms available under EU law could potentially yield positive outcomes. History has repeatedly shown that meaningful change can only emerge from within the system itself.

a.Key findings

Formalism will not do – The experiences of Croatia, Romania, and Bulgaria demonstrate that merely adhering to the formalistic “tick-the-box” approach in negotiations does not lead to long-term transformations in legal culture or the internal independence of the judiciary.

Without sustained political support, reforms cannot endure – The lack of ongoing backing from domestic political elites has resulted in the postponement or revision of previously adopted rule of law standards in the observed countries.

A lack of accountability fosters inefficiency and diminishes public trust – Issues such as slow case resolution, repeated remands in the appeals process (often referred to as “ping-pong”), and rigid formalism compromise the quality of legal protection and the perception of judicial independence.

Individual judges can be drivers of change – In the region, lower courts have played a pivotal role in initiating judgments from the CJEU that have compelled national legal systems to reform their practices.

b.Specific challenges for the Republic of Serbia:

Chapter 23 must be managed systematically, with clearly defined indicators of progress, including the punishment of high-level corruption, the average duration of proceedings, and the percentage of cases in which EU law is invoked.

The institutional culture surrounding the referral of preliminary questions is still in its infancy. It is essential to eliminate the fear of "overstepping authority" and to provide judges with protection from external pressure.

Access to the legal sources of the EU remains fragmented: translations are inconsistent, and databases are not always up-to-date or searchable.

Serbia faces the challenge of ensuring that existing harmonisation efforts are complemented by the establishment of a permanent coordination mechanism between the Supreme Court of Cassation, the Government, and the Permanent Mission to the EU. This mechanism should create, before Serbia accedes to the EU, an internal protocol for handling cases before the CJEU and maintain a comprehensive translation base of international case law. Another priority is the implementation of a comprehensive training programme for judges, prosecutors and attorneys general in EU procedural law. This programme should not comprise sporadic seminars but rather incorporate European procedural law into basic education and continuous training systems, thereby preventing the post-accession "freezing" of knowledge.

Finally, preserving the independence of the judiciary remains a condition sine qua non. Human resources policies should prioritise quality over quantity; the number of judges must correspond to the actual influx of cases, with promotions based on transparent measures of expertise and integrity, to avoid a situation in which quotas and "framework criteria" dictate the pace of trials leading to a "ping-pong" effect between instances, as was seen in Croatia.

c.Recommendation strategy

Time span	Normative framework	Institutions and capacities	Human resources and education	Transparency and digitalisation
Short-term (until the end of negotiations)	• Finalise the road map for full alignment with Chapter 23; • Incorporate <i>ex-ante</i> compliance check (EU-screening) for all draft laws;	• Establish a coordinating body within the government to facilitate collaboration between the Ministry of Justice, the Ministry of European Integration and the High Council of the Judiciary; • Implement “green budget lines” for expenses related to court translations, ICT and training in EU law;	• Include a mandatory subject “EU Law and the CJEU Case Law” in the Judicial Academy Road Map; • Launch a mentoring programme pairing judges from the region who have referred preliminary questions to CJEU with their counterparts in Serbia;	• Launch EU-Pravo.rs, a public portal featuring a single search engine for translated EU judgments and acts;

Medium-term (1-3 years of membership)	• Ensure that all amendments to procedural laws are subject to mandatory assessment of their impact on the fundamental rights within the EU;	• Create specialised “EU cells” within larger courts, including courts of appeal, administrative courts and commercial courts;	• Provide annual “EU Refresh” training for all judges, prosecutors and attorneys general; • Develop a scoring and promotion system that values the invocation of EU law in judicial decisions;	• Implement uniform electronic files featuring automatic linking to relevant EU case law;
Long-term (4-5+ years)	• Incorporate the legal principle of priority EU-conform interpretation into the Civil and Administrative Procedure Code;	• Establish a permanent EU Clinical Hub to provide legal opinions and support to courts prior to referring questions for preliminary rulings;	• Develop joint doctoral programmes with EU universities, focused on judicial cooperation; • Establish rotating secondment of judges in the CJEU;	• Create a public register detailing all preliminary questions from Serbia, including statistics on duration and outcomes.

d.Action List:

- Pilot project at the Belgrade Court of Appeal: Establish an internal “EU desk” that will monitor and analyse all new issues related to the application of EU law over a 12-month period.
- Create a comprehensive manual for judges, available in both digital and printed formats. The manual will include templates for submitting preliminary questions, examples of best practices and a checklist of procedural steps.
- Public Campaign “A Judge Asks – Europe Responds” to raise awareness of the importance of cooperation with the Court of Justice among legal professionals and the public.
- Quarterly progress reports: The Ministry of Justice, the Supreme Court of Cassation and professional associations collaborate to publish quarterly progress reports. The reports will include data on the number of transposed acts, procedural statistics, and the independence perception index.
- Strategic Litigation Support Fund: Establish a fund that awards grants to NGOs and lawyers who initiate important cases aimed at implementing EU law, particularly in the areas of environmental and consumer protection.

e.Concluding considerations

Lessons learned from the region clearly indicate that the future quality of the relationship between Serbia and the CJEU will hinge on political will, institutional maturity and a commitment to understanding EU law as a dynamic system rather than merely an “export” condition. It is crucial that all recommendations are woven into a cohesive rule of law strategy that features clear timelines and measurable indicators. Such an approach will help avoid the “novice mistakes” made by current EU Member States, and it will create the necessary conditions for a sustainable, transparent and efficient judicial system in Serbia.

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