6

PRELIMINARY RULINGS ON THE INTERPRETATION OF UNION LAW

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I. Subject-Matter

A. General overview

(1) Purpose

6.01 Under Art. 267 TFEU, the Court of Justice has been conferred jurisdiction to give preliminary rulings on the interpretation of Union law, as well as on the validity of acts adopted by the Union institutions, bodies, offices, and agencies.[1] In the system of judicial protection in the European Union, preliminary rulings on the interpretation of Union law constitute an indirect route for ensuring the compatibility of acts of the Member States with Union law, alongside the direct route of infringement actions under Arts 258–260 TFEU (see Ch. 5).[2]

(2) Topics to be discussed

6.02 The request for a preliminary ruling on the interpretation of Union law generally raises three main issues. The first relates to the subject-matter of the preliminary ruling on interpretation, namely, what provisions and principles may be interpreted by the Court of Justice (Part I, B). The second relates to special characteristics of the preliminary ruling on interpretation, namely, its content and the related limits placed on the jurisdiction of the Court of Justice (Part II). The third relates to the consequences of a preliminary ruling on interpretation (Part III). These three issues will be considered in turn in the main parts of this chapter.

B. Rules of which an interpretation can be sought

(1) Overview

6.03 According to Art. 267 TFEU, the jurisdiction of the Court of Justice to give preliminary rulings on interpretation extends to 'the Treaties' and 'acts of the institutions, bodies, offices or

[1] See also Art. 19(3)(b) TEU. At present, the Court of Justice has exclusive jurisdiction to deliver preliminary rulings. However, it is envisaged in the first subpara. of Art. 256(3) TFEU that the General Court may be conferred jurisdiction to give preliminary rulings in specific areas laid down by the Statute. See Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 [TFEU], with a view to amending Protocol (No. 3) on the Statute of the Court of Justice of the European Union, available on the Court's website (under 'Institution', 'Various documents'). See further para. 2.43.

[2] See generally K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) C.M.L.Rev. 1625. See further para. 6.23.

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agencies of the Union'. Under Art. 1 of the TEU and Art. 1 of the TFEU, the TEU and the TFEU are referred to as 'the Treaties'.[3] Art. 267 TFEU also applies to preliminary rulings in connection with the EAEC Treaty, as Art. 150 EAEC, the counterpart to the former Art. 234 EC, has been repealed and references to, *inter alia*, the 'Treaties' are taken as references to the EAEC Treaty in this regard.[4]

The upshot is that, as far as the subject-matter of a reference for a preliminary ruling is concerned, the Court of Justice has jurisdiction to give preliminary rulings on interpretation under the three Treaties (the TEU, the TFEU, and the EAEC Treaty).[5] This generally covers the following three main categories: (1) the Treaties themselves and other Union instruments and principles having the status of primary Union law; (2) acts of the Union institutions, bodies, offices, or agencies; and (3) international agreements concluded by the Union and acts of bodies set up by such agreements.

(2) The Treaties

(a) Notion of the Treaties

6.04 As successor to the former EC Treaty, the TFEU, together with the TEU, and the EAEC Treaty constitute the 'basic constitutional charter' of the Union.[6] They are the written constitution at the apex of the hierarchy of Union norms, that is, primary Union law, and consequently are the first instruments whose interpretation may form the subject-matter of preliminary rulings by the Court of Justice.

The notion of the Treaties generally encompasses the TEU, the TFEU, and the EAEC Treaty and all amendments thereto; the Treaties and Acts relating to the accession of new Member States;[7] 'complementary' Treaties, such as the former (1957) Convention on certain institutions common to the European Communities[8] and the former (1965) Treaty establishing a Single Council and a Single Commission of the European Communities (the Merger Treaty);[9] and all of the Annexes and Protocols to those Treaties and Acts of Accession, which are deemed to have the

[3] Art. 1, third para. TEU; Art. 1(2) TFEU.

[4] Art. 106a(1)–(2) EAEC.

[5] Moreover, the Court of Justice continues to have jurisdiction to answer questions referred for a preliminary ruling on the interpretation of the ECSC Treaty and of acts adopted under that Treaty even though such questions are referred to it after the expiry of the ECSC Treaty. The Court indeed considers that it would be contrary to the objectives and coherence of the Treaties and irreconcilable with the continuity of the Union legal order if the Court did not have jurisdiction to ensure the uniform interpretation of the rules deriving from the ECSC Treaty that continue to produce effects after the expiry of that Treaty: see C-221/88, *Busseni,* 1990, para. 16; C-119/05, *Lucchini*, 2007, para. 41.

[6] 294/83, *Les Verts v Parliament*, 1986, para. 23. See Art. 1, third para. TEU; Art. 1(2) TFEU, specifying that the TEU and the TFEU constitute the Treaties upon which the Union is founded.

[7] See C-267/16, *Buhagiar and Others*, 2018.

[8] OJ 1967 152/5.

[9] OJ 1967 152/2. This Treaty and the Convention cited in n. 8 have been repealed by Art. 9(1) of the Treaty of Amsterdam (OJ 1997 C340/76-77). Most of their provisions had been incorporated into the former Community Treaties. As for the remainder, Art. 9(2) to (7) of the Amsterdam Treaty set out to retain their essential elements. See further K. Lenaerts and P. Van Nuffel (T. Corthaut (ed.)), *EU Constitutional Law* (OUP, 2021) para. 1.017.

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same legal force as the Treaties themselves.[10] In contrast, the Declarations of intergovernmental conferences accompanying the Treaties do not have Treaty status, although their content may be taken into account in interpreting the Treaty provisions to which they relate.[11]

(b) Common Foreign and Security Policy

6.05 Under Art. 275 TFEU, the Court of Justice of the European Union does not have jurisdiction with respect to the provisions relating to the Common Foreign and Security Policy (CFSP) nor with respect to the acts adopted on the basis of those provisions, subject to two exceptions: (1) it has jurisdiction to monitor compliance with Art. 40 TEU; and (2) it has jurisdiction to rule on proceedings brought under the fourth paragraph of Art. 263 TFEU reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the TEU (concerning specific provisions on the CFSP).[12]

As regards the first exception, the Court has held that the Treaties do not prescribe any particular means by which the Court should carry out such judicial monitoring.[13] However, that monitoring falls undoubtedly within the general jurisdiction of the Court of Justice on the basis of Art. 19 TEU.[14] Therefore, since Art. 19(3)(b) TEU states that the Court is to give preliminary rulings, *inter alia*, on the interpretation of Union law, it follows from this that the Court has jurisdiction for answering preliminary questions regarding the application of Art. 40 TEU.[15] The Court's assessment pursuant to Art. 40 TEU as to whether the implementation of the CFSP affects the application of

[10] Art. 51 TEU; Art. 207 EAEC. The principal Protocols annexed to the TEU, the TFEU, and/or the EAEC Treaty can be found at OJ 2012 C326/201, and the Annexes at OJ 2016 C202/1. See C-147/95, *Evrenopoulos*, 1997 (interpretation of the Protocol on what is now Art. 134 TFEU); C-45/21, *Banka Slovenije*, 2022 (Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank (OJ 2016 C202/230); C-3/20, *AB and Others*, 2021 (Protocol (No. 7), annexed to the TEU, TFEU, and EAEC Treaty, on the Privileges and Immunities of the European Union (OJ 2012 C326/266). Similarly, conventions concluded between the Member States may become part of Union law by an explicit reference to it in primary or secondary Union law. In such instance, the Court has jurisdiction to interpret the instrument referred to. See C-949/19, *Konsul Rzeczypospolitej Polskiej*, 2021, paras 22–25 (interpretation of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L239/19), which is part of Union law by virtue of Protocol (No. 19) on the Schengen acquis integrated into the framework of the European Union, annexed to the Treaty of Lisbon (OJ 2010 C83/290)).

[11] See C-135/08, *Rottmann*, 2010, para. 40; C-193/17, *Cresco Investigation*, 2019, para. 32. This applies at least insofar as such declarations do not conflict with those provisions: see C-233/97, *KappAhl*, 1998, paras 22–23; see further K. Lenaerts and P. Van Nuffel (T. Corthaut (ed.)), *EU Constitutional Law* (OUP, 2021) para. 24.008. The set of Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Lisbon Treaty, Declarations concerning Protocols annexed to the Treaties, and Declarations by Member States can be found starting at OJ 2016 C202/335. Conversely, a declaration in the minutes of the Council or the Commission on a provision of secondary legislation cannot be used to interpret that provision where no reference is made to that declaration in the provision in question: see C-9/20, *Grundstücksgemeinschaft Kollaustraße 136*, 2022, para. 38.

[12] See also Art. 24(1), second subpara. TEU.

[13] See C-72/15, *Rosneft*, 2017, para. 62.

[14] See C-72/15, *Rosneft*, 2017, para. 62.

[15] See C-72/15, *Rosneft*, 2017, para. 62.

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the procedures and the extent of the powers of the institutions in the other policy fields of the Treaties, or vice versa, could arguably arise within the context of a preliminary ruling on interpretation, for instance, with respect to questions on the interpretation of the provisions of the Treaties concerning the CFSP or Treaty provisions falling outside the sphere of the CFSP but which raise issues relating thereto.

The second exception pertains, in view of the reference to the requirements of the fourth paragraph of Art. 263 TFEU, to actions for annulment. Therefore, the reasoning in relation to Art. 40 TEU cannot be applied unreservedly to this exception, as the jurisdiction *ratione materiae* of the Court has been expressly limited to questions of validity.[16] However, it could be argued that, since the Court has jurisdiction to answer preliminary questions regarding the validity of restrictive measures, it would not be logical to exclude jurisdiction for interpreting such measures, at least where a preliminary question regarding the interpretation of a restrictive measure is closely linked to the validity of such a measure. For example, a restrictive measure might be valid under one interpretation, but not under another. In addition, a preliminary question regarding the validity of a restrictive measure might be the consequence of a mistaken interpretation by the referring court, which the Court of Justice would need to correct when answering the question of the referring court.

In any event, the Court of Justice has jurisdiction to give preliminary rulings on the interpretation of international agreements concluded by the Union even where such agreements encompass CFSP matters.[17] The Court of Justice's preliminary ruling jurisdiction on interpretation vis-à-vis the CFSP thus remains limited, but not wholly excluded, and issues regarding the extent of such jurisdiction await further clarification in the case-law.

(c) Area of Freedom, Security and Justice

6.06 The restrictions placed on the Court's preliminary ruling jurisdiction in certain areas of the former EC and EU Treaties comprising the Area of Freedom, Security and Justice (AFSJ) by virtue of former Art. 68 EC (concerning former Title IV of the EC Treaty on visas, asylum, immigration, and other policies related to the free movement of persons) and former Art. 35 EU (concerning the former third pillar of Police and Judicial Cooperation in Criminal Matters (PJCCM) under Title VI of the EU Treaty), respectively, have been formally eliminated by the Lisbon Treaty.[18] That being said, one

[16] See C-72/15, *Rosneft*, 2017, para. 76. However, as indicated in that judgment, the Court has no jurisdiction to deliver preliminary rulings in respect of provisions of CFSP acts which do not constitute restrictive measures against natural or legal persons within the meaning of the second paragraph of Art. 275 TFEU, but rather are measures of general application. See C-72/15, *Rosneft*, 2017, paras 76, 81, 98, 99, 102, 103, 107; see also, in that regard, C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft*, 2013, para. 99; C-351/22, *Neves 77 Solutions*, pending.

[17] See P. Eeckhout, *EU External Relations Law* (OUP, 2011) 498. For the Court of Justice's jurisdiction over CFSP agreements in the context of Opinions delivered pursuant to Art. 218(11) TFEU, see para. 12.04.

[18] This was subject to a transitional period as stipulated in Art. 10 of Protocol (No. 36), annexed to the Lisbon Treaty, on Transitional Provisions (OJ 2016 C202/321). According to this Protocol, the regime of the former third pillar of PJCCM under Art. 35 EU remained in force for a five-year period from the entry into force of the Lisbon Treaty, subject to certain exceptions.

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exception to the Court's jurisdiction in the Area of Freedom, Security and Justice continues to exist to date. Art. 276 TFEU provides that

> [i]n exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

The provision has not yet given rise to any preliminary references and thus its scope remains unclear.[19]

(d) Charter of Fundamental Rights of the European Union

6.07 With the entry into force of the Lisbon Treaty, the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union (the Charter) of 7 December 2000, as adapted at Strasbourg on 12 December 2007 and published alongside the TEU and TFEU,[20] have 'the same legal value as the Treaties'.[21] Yet, while the Court of Justice's preliminary ruling jurisdiction covers the interpretation of the provisions of the Charter,[22] certain limits are placed on such jurisdiction in relation to action taken by the Member States that must fall within the scope of Union law.[23]

(e) Other Union instruments having Treaty status

6.08 Treaty status also has to be given to such provisions, adopted by the Council by means of a special procedure, which enter into force after their approval by the Member States 'in accordance with their respective constitutional requirements' (i.e. by act of parliament and/or after a referendum, depending upon the 'constitutional requirements' of

[19] Compare C-202/18 and C-238/18, *Rimšēvičs and ECB v Latvia*, 2019, para. 59, in which the Court held a decision by a Member State to relieve the governor of a national central bank from office did not fall within the scope of Art. 276 TFEU. See further C-18/19, *Stadt Frankfurt am Main*, 2020, paras 28–29.

[20] OJ 2012 C326/391.

[21] Art. 6(1) and (3) TEU. Although the Charter was given legally binding force with the entry into force of the Lisbon Treaty on 1 December 2009, it constituted an important instrument, alongside other sources, in connection with the protection of fundamental rights in the EU prior to this date, particularly where the Union act concerned contained express reference to it. See further K. Lenaerts and P. Van Nuffel (T. Corthaut (ed.), *EU Constitutional Law* (OUP, 2021) para. 25.007.

[22] See C-414/16, *Egenberger*, 2018, paras 76–82; C-769/19, *Spetsializirana prokuratura* (order), 2021, paras 57–58; C-55/19, *Fussl Modestraße Mayr*, 2021, paras 80–94; C-652/19, *Consulmarketing*, 2021, para. 36; C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, and C-397/19, *Asociația 'Forumul Judecătorilor din România'*, 2021, para. 110; C-645/19, *Facebook Ireland and Others*, 2021, paras 43–75; C-69/21, *Staatssecretaris van Justitie en Veiligheid*, 2022, paras 46–47; C-460/20, *Google*, 2022. For preliminary rulings dealing with the assessment of the validity of Union acts vis-à-vis the Charter, implying the interpretation of its provisions, see C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, 2010, paras 44–46; C-336/19, *Centraal Israëlitisch Consistorie van België and Others*, 2020, paras 82–95; C-37/20, *Luxembourg Business Registers*, 2022, paras 34–88; C-694/20, *Orde van Vlaamse Balies*, 2022.

[23] See C-399/11, *Melloni*, 2013, paras 55–64 and C-617/10, *Åkerberg Fransson*, 2013, paras 16–31; C-163/17, *Jawo*, 2019, 76–79; C-686/18, *Adusbef and Others*, 2020, paras 51–55; C-245/19 and C-246/19, *État luxembourgeois*, 2020, paras 44–46; C-393/19, *Okrazhna prokuratura—Haskovo en Apelativna prokuratura—Plovdiv*, 2021, paras 28–42; C-485/19, *Profi Credit Slovakia*, 2021, para. 37; C-83/20, *BPC Lux 2 and Others*, 2022, paras 25–32; C-570/20, *Direction départementale des finances publiques de la Haute-Savoie*, 2022, para. 26. See further para. 6.24. For acts adopted by the Union institutions, see C-403/09 PPU, *Detiček*, 2009; C-400/10 PPU, *McB.*, 2010.

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the Member State concerned).[24] Once they have been so adopted, they obtain the status of primary Union law.[25]

(f) General principles of Union law

6.09 The unwritten general principles of Union law, including fundamental rights, may also be the subject of a reference for a preliminary ruling on interpretation. Those principles form part of the 'law' which the Court of Justice of the European Union has to ensure is observed in the interpretation and application of the Treaties.[26] Examples include the principles of equal treatment, proportionality, *ne bis in idem*,[27] and the rights of the defence prior to the adoption of an individual act having adverse effect.[28] Naturally, a preliminary ruling on the interpretation of those principles may be sought only in connection with the application of substantive Union law, that is to say, in connection with main proceedings relating (at least to some extent) to Union law.[29]

(3) Acts of Union institutions, bodies, offices, or agencies

(a) All acts of Union institutions, bodies, offices, or agencies

6.10 Art. 267 TFEU explicitly envisages preliminary rulings to be sought on the interpretation of acts of Union institutions, bodies, offices, or agencies.[30] Subject to the limitations placed on the Court of Justice's preliminary ruling jurisdiction in the CFSP and AFSJ (see paras 6.05–6.06), all acts of Union institutions, bodies, offices, or agencies

[24] See Art. 223 TFEU (determining a uniform procedure for elections to the European Parliament); see the '1976 Act' concerning the election of the representatives of the Assembly by direct universal suffrage, annexed to the Council Decision of 20 September 1976 (OJ 1976 L278/1), as amended by Council Decision of 1 February 1993 (OJ 1993 L33/15) and by Council Decision of 25 June 2002 and 23 September 2002 (OJ 2002 L283/1); and Art. 311 TFEU (determining the system of the Union's own resources).

[25] This should be distinguished from those Treaty provisions authorizing the Council, acting unanimously in accordance with a special legislative procedure, to adopt provisions that enter into force only after their approval by the Member States in accordance with their respective constitutional requirements: see, e.g. Art. 25 TFEU (rights related to Union citizenship); Art. 262 TFEU (jurisdiction of the Court of Justice of the European Union in disputes relating to the application of acts creating European intellectual property rights). See further K. Lenaerts and P. Van Nuffel (T. Corthaut (ed.)), *EU Constitutional Law* (OUP, 2021) paras 3.007, 24.009.

[26] See Art. 19(1), first subpara. TEU (applicable to the EAEC Treaty with repeal of Art. 136 EAEC). See C-115/08, *ĈEZ*, 2009, paras 88–91 (extending the principle of prohibition of discrimination on grounds of nationality under Art. 18 TFEU to the EAEC Treaty). Under Art. 6(3) TEU, fundamental rights, as guaranteed by the ECHR and as they result from the 'constitutional traditions common to the Member States', constitute general principles of Union law.

[27] See C-537/16, *Garlsson Real Estate*, 2018, para. 64; C-617/17, *Powszechny Zakład Ubezpieczeń na Życie*, 2019; C-857/19, *Slovak Telekom*, 2021, paras 39–48; C-505/19, *Bundesrepublik Deutschland*, 2021; C-117/20, *bpost*, 2022; C-151/20, *Nordzucker and Others*, 2022; C-435/22 PPU, *Generalstaatsanwaltschaft München*, 2022.

[28] For a general survey, see K. Lenaerts and P. Van Nuffel (T. Corthaut (ed.)), *EU Constitutional Law* (OUP, 2021) paras 25.023–25.026. The 'interpretation' of the principle concerned is often concealed behind the appraisal of the 'validity' of a provision of secondary Union law: see C-308/08, *Intertanko and Others*, 2008, paras 69–71 (principles of legal certainty and of legality of criminal offences and penalties); C-127/07, *Arcelor Atlantique and Lorraine and Others*, 2008, paras 23, 25–26 (principle of equal treatment); C-58/08, *Vodafone and Others*, 2010, paras 51–71 (principle of proportionality); C-15/10, *Etimine*, 2011, paras 124–125 (principle of proportionality).

[29] See C-441/14, *Dansk Industri*, 2016, paras 21–27 (principle prohibiting discrimination on grounds of age); C-616/17, *Blaise*, 2019, paras 41–51 (precautionary principle); C-184/19, *Hecta Viticol* 2020, paras 32–33 (principle of legal certainty and principle of protection of legitimate expectations); C-818/19 and C-878/19, *Marvik-Pastrogor* (order), 2020, para. 54 (principle of non-discrimination, principle of legal certainty, and principle of protection of legitimate expectations). See further para. 6.24.

[30] Art. 267, first para., indent (b), TFEU. Art. 19(3)(b) TEU merely refers to preliminary rulings on the interpretation and validity of acts adopted by 'the institutions' in more abbreviated fashion.

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may be the subject of a request for a preliminary ruling on their interpretation,[31] irrespective of whether the act is specifically mentioned in the Treaties[32] or not,[33] whether it is binding or non-binding,[34] or whether or not it has direct effect.[35]

(i) Act must be attributable to Union institution, body, office, or agency

6.11 The key criterion is whether the act may be ascribed to a Union institution, body, office, or agency.[36] The test that a Union institution, body, office, or agency must have 'taken part' in the conclusion of the act in order for it to be amenable to interpretation by the Court of Justice in preliminary ruling proceedings is, in all likelihood, open to flexible application. There are many ways in which a Union institution, body, office, or agency might conceivably 'take part' in the conclusion of an act. Thus, the test is satisfied in the case of international agreements concluded by the Union and of (binding and non-binding) acts adopted by bodies set up by such agreements (since the Union participates in the operation of such bodies). Moreover, while acts of the governments of the Member States that do or do not have their legal basis in the Treaties—for example, acts adopted by the conference of the representatives of the governments of the Member States—probably would not fall within the Court of Justice's preliminary ruling jurisdiction,[37]

[31] See C-137/08, *VB Pénzügyi Lízing*, 2010, para. 38; C-258/14, *Florescu*, 2017, para. 30.

[32] In Arts 288–292 TFEU or elsewhere in the Treaties, such as the Rules of Procedure of the Union institutions (e.g. Arts 232, first para., 235(3), 240(3), 249(1), and 287(4), fifth subpara. TFEU), the Financial Regulation (Art. 322 TFEU), or the acts provided for in Art. 291(3) TFEU, i.e. the so-called 'Comitology Regulation' (Regulation No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and the general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L55/13)). Yet, to be clear, the conclusions of the 'comitology' committees arguably would not by themselves—that is to say, apart from the resulting act adopted through this process—be subject to a preliminary ruling on interpretation: see further para. 6.14.

[33] For example, a Council resolution: see 9/73, *Schlüter*, 1973, para. 40; see also C-80/06, *Carp*, 2007 (a Commission decision of general, as opposed to individual, scope of application which, before the entry into force of the Lisbon Treaty, was not explicitly mentioned in what was then Art. 249 EC). For a list of 'atypical' Union instruments, see K. Lenaerts and P. Van Nuffel (T. Corthaut (ed)), *EU Constitutional Law* (OUP, 2021) para. 27.044.

[34] For example, a recommendation (or opinion) within the meaning of Art. 288 TFEU: see 113/75, *Frecassetti*, 1976, paras 8–9; C-322/88, *Grimaldi*, 1989, paras 7–9; C-207/01, *Altair Chimica*, 2003, paras 41–43; C-24/21, *PH*, 2022, paras 31–32. Under established case-law, national courts are bound to take recommendations into consideration in order to decide disputes referred to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Union provisions: see C-55/06, *Arcor*, 2008, para. 94; C-317/08 to C-320/08, *Alassini and Others*, 2010, para. 40; C-410/13, *'Baltlanta'*, 2014, para. 64; C-24/21, *PH*, 2022, para. 51.

[35] See C-370/12, *Pringle*, 2012, para. 89; C-486/18, *Praxair MRC*, 2019, para. 35. Irrespective of whether the Union act has direct effect, its interpretation will be useful to the national court, which, as a public body, is required under Art. 4(3) TEU to apply its domestic legislation in conformity with the requirements of Union law: see C-649/18, *A*, 2020, paras 38–40; C-308/19, *Consiliul Concurenței*, 2021, para. 30. For detailed discussion, see K. Lenaerts and P. Van Nuffel (T. Corthaut (ed)), *EU Constitutional Law* (OUP, 2021) paras 23.031–23.035.

[36] See C-587/15, *Lietuvos Respublikos transporto priemonių draudikų biurasn*, 2017, paras 37–40; C-258/14, *Florescu*, 2017, paras 31–36 (a Memorandum of Understanding between the then European Community and Romania, regarding the grant of mutual assistance to a Member State whose currency is not the euro, considered to be an act of a Union institution, *inter alia*, because it had its legal basis in provisions of Union law and the Commission took part in the conclusion of the Memorandum); C-613/14, *James Elliott Construction*, 2016, paras 32–47 (the Court accepted jurisdiction to interpret a European harmonized standard drawn up by the European Committee for Standardization, a standardization body established by the national standardization bodies of the EU and EFTA Member States, because the harmonized standard was drawn up in accordance with a mandate given to it in accordance with Directive 83/189, along with the involvement of the Commission in the process which initiates, manages, and monitors the development process, and the fact that the legal effects of the standard are subject to prior publication in the 'C' series of the *Official Journal of the European Union*).

[37] See, in relation to Art. 263 TFEU, C-684/20 P, *Sharpston v Council and Conference of the Representatives of the Governments of the Member States* (order), 2021, paras 39–45; C-685/20 P, *Sharpston v Council and Representatives of the Governments of the Member States* (order), 2021, paras 45–51. See further para. 7.74.

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since they are acts of the Member States and not of the Council as a Union institution, arguably there could be exceptions to the extent that such acts are taken by the Council and the representatives of the governments of the Member States jointly when the matter concerned falls partly within the Union's jurisdiction and partly within the Member States' jurisdiction.[38]

New forms of regulatory activity within the Union have made it necessary to take a creative approach to this test. A prominent example can be found in the Title of the TFEU concerning social policy (Title X of Part Three). Under Art. 155 TFEU, management and labour may conclude agreements at Union level. The question is whether, in certain circumstances, such agreements may also be the subject of a reference for a preliminary ruling. Such agreements are intended to be an alternative to the Union legislation contemplated by Art. 153 TFEU. Before submitting proposals for legislation, the Commission has indeed to consult management and labour and, if they express a wish to that effect, must give them the opportunity to conclude an agreement on the content of the proposal (Art. 154 TFEU). Furthermore, '[a]greements concluded at Union level shall be implemented … in matters covered by Art. 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission' (Art. 155(2) TFEU). Although, strictly speaking, Union institutions, bodies, offices, or agencies do not play any part in drawing up the agreements to be concluded by management and labour at Union level, it must be considered that they 'take part' to a sufficient extent in the conferral of legal force on the agreements, as a result of the Council decisions implementing them, as to make them qualify for preliminary rulings by the Court of Justice.[39] The position will be different where the agreements are implemented not by Council decision, but 'in accordance with the procedures and practices specific to management and labour and the Member States' (the other alternative set out in Art. 155(2) TFEU). The main reason for this is that it is stated in Declaration No. 27 annexed to the Treaty of Amsterdam that 'the content of [such] agreements' is to be developed 'by collective bargaining according to the rules of each Member State' and that there is therefore 'no obligation on the Member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation'.[40] Precisely the opposite situation obtains where the agreements are implemented by Council decision, which means that the aim of the procedure of preliminary rulings on interpretation may be achieved in full in that case.

[38] For further discussion of such acts, see K. Lenaerts and P. Van Nuffel (T. Corthaut (ed)), *EU Constitutional Law* (OUP, 2021) para. 28.003; see also para. 12.08 regarding the power of the Court to deliver opinions pursuant to Art. 218(11) TFEU in relation to mixed agreements.

[39] See C-149/10, *Chatzi*, 2010, paras 25–26. On similar grounds, the Court has applied its case-law on the assessment of the direct effect of provisions of a directive to framework agreements: see C-98/09, *Sorge*, 2010, para. 51; C-444/09 and C-456/09, *Gavieiro Gavieiro and Iglesias Torres*, 2010, para. 77; C-486/08, *Tirols*, 2010, para. 23; C-268/06, *Impact*, 2008, para. 58; C-155/10, *Williams and Others*, 2011, para. 16. See further K. Lenaerts and P. Van Nuffel (T. Corthaut (ed.)), *EU Constitutional Law* (OUP, 2021) paras 17.044, 28.005.

[40] Declaration (No. 27), annexed by the Amsterdam Treaty, on Art. 118b (later Art. 139(2) EC, now Art. 155 TFEU) (OJ 1997 C340/136).

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(ii) Notion of Union institution, body, office, or agency

6.12 First, as regards the notion of Union 'institution', Art. 13 TEU lists the seven institutions of the Union, namely, the European Parliament, the European Council, the Council, the Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors.[41] Since Art. 267 TFEU confers jurisdiction upon the Court to give preliminary rulings on all acts of the Union institutions without exception,[42] save where the Treaties have explicitly excluded jurisdiction of the Court,[43] this means that all acts adopted by the European Council,[44] the Council, the Commission, the European Parliament,[45] the European Central Bank, or the European Parliament and the Council jointly may be the subject of a reference for a preliminary ruling on their interpretation. In the overwhelming majority of cases, Union decision-making results in such an act in one form or another (see Arts 288–292 TFEU). Certainly, acts of the Court of Auditors also come under the jurisdiction of the Court of Justice to give preliminary rulings on interpretation, albeit it is more exceptional for the interpretation of such acts to be relevant to the determination of main proceedings before a national court.

Second, as regards the notion of Union bodies, offices, or agencies, this language essentially covers any entity of the Union that is not an institution mentioned in Art. 13 TEU.[46] As was pointed out above (see para. 6.11), the Court of Justice requires a Union institution, body, office, or agency to have taken part in the adoption of an act for it to be capable of being the subject of an Art. 267 TFEU reference on its interpretation.[47] That requirement can certainly be fulfilled in the case of offices, agencies, foundations, centres, and other 'bodies' established by Union institutions.[48] Accordingly, subject to the limitations placed on the Court's preliminary ruling jurisdiction under the CFSP,[49] acts of bodies, offices, or agencies established by Union institutions in the exercise of their powers and given specific executive tasks (and the associated power to take decisions) can constitute the subject of a request for a preliminary ruling.

[41] Art. 13(1), second subpara. TEU.

[42] See C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, and C-397/19, *Asociația 'Forumul Judecătorilor din România'*, 2021, para. 148.

[43] See para 6.05 regarding the CFSP.

[44] See C-370/12, *Pringle*, 2012, paras 34–36. See para. 10.03.

[45] For example, with respect to the interpretation of the Rules of Procedure of the European Parliament, see C-200/07 and C-201/07, *Marra*, 2008.

[46] See also C-613/14, *James Elliott Construction*, 2016, paras 32–47.

[47] See 152/83, *Demouche and Others*, 1987, para. 19; C-587/15, *Lietuvos Respublikos transporto priemonių draudikų biurasn*, 2017, paras 37–40.

[48] Nowhere in the Treaties is the distinction between Union 'bodies', 'offices', and 'agencies' explained. It does not appear that the words 'Union bodies, offices, and agencies' are exhaustive; they can in principle cover acts of Union 'bodies' in the general sense of centres, foundations, supervisory authorities, and the like. In the European Convention documents and the subsequent provisions of the Draft Constitutional Treaty on the Court of Justice, reference was made to Union 'bodies and agencies' despite the widespread recognition of various kinds of bodies, offices, agencies, monitoring centres, foundations, etc.

[49] For example, a Union body, office, or agency created pursuant to the Treaty provisions on the CFSP, for which the Court of Justice's preliminary ruling jurisdiction is generally excluded save for certain exceptions (see para. 6.05), as illustrated by the European Defence Agency (see Council Decision (CFSP) 2015/1835 of 12 October 2015 defining the statute, seat, and operational rules of the European Defence Agency (recast) (OJ 2015 L266/55)). See further, in relation to the status of the Eulex Mission in Kosovo, C-439/13 P, *Elitaliana v Eulex Kosovo*, 2015, paras 54–59.

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(b) Judgments of the Court of Justice of the European Union

6.13 Preliminary rulings may also be sought on the interpretation of judgments of the Court of Justice of the European Union. For instance, an interpretation of a previous judgment may be sought in the event that the national court (including the same or other courts dealing with the case[50]) has difficulty in understanding or applying it.[51] Where a national court is not in agreement with a judgment given by the Court, it may invite the Court to reconsider the interpretation given in its previous judgment.[52] The judgment to be interpreted does not have to be a preliminary ruling; it may have been given in any sort of proceedings before the Union Courts.[53]Where national courts refer questions on the interpretation of previous judgments of the Court, in answering them the Court of Justice inevitably falls back on the provisions and principles of Union law underlying those judgments.[54] This is also true where national courts apply to the Court of Justice for an interpretation of a judgment of the General Court. The possibility of making such a reference is of great practical importance for national courts where they query whether a judgment of the General Court against which no appeal has been brought before the Court of Justice correctly interprets the principles and provisions of Union law with which it deals.

Further to this, judgments of the Court may also form indirectly the subject-matter of a reference for a preliminary ruling. For example, in the *Kolev II* case,[55] the Court was required to clarify the scope of the *Kolev* judgment[56] before answering the question of the referring court regarding the compatibility with Union law of the procedure by which the *Kolev* judgment was implemented in the national legal order.[57]

[50] See C-206/94, *Brennet*, 1996; C-35/11, *Test Claimants in the FII Group Litigation*, 2012; C-561/19, *Consorzio Italian Management*, 2021.

[51] See 69/85, *Wünsche* (order), 1986, para. 15 (albeit making clear that it would not be permissible to contest the validity of a previous judgment: see further para. 6.33); 14/86, *Pretore di Salò v X*, 1987, para. 12. For examples, see C-377/89, *Cotter and Others*, 1991; C-363/93 and C-407/93 to C-411/93, *Lancry and Others*, 1994; C-280/94, *Posthuma-van Damme and Oztürk*, 1996, para. 13; C-5/97, *Ballast Nedam Groep*, 1997, para. 1; C-219/98, *Anastasiou and Others*, 2000, paras 13–14; C-466/00, *Kaba*, 2003; C-224/01, *Köbler*, 2003; C-17/05, *Cadman*, 2006; 2/06, *Kempter*, 2008; C-430/09, *Euro Tyre Holding*, 2010, para. 21; C-237/21, *Generalstaatsanwaltschaft München*, 2022, para. 27. This does not necessarily mean only one judgment; a reference can be made in relation to a line of case-law related to the interpretation of a Union act: see C-400/09 and C-207/10, *Orifarm and Others*, 2011, para. 1. It is also possible that a referring court whose request for a preliminary ruling was suspended pending the delivery of a judgment in another case justifies its decision to maintain its request for a preliminary ruling by seeking a clarification of that judgment in connection to the questions it had referred: see C-793/19, *SpaceNet*, 2022, para. 46.

[52] See C-581/10 and C-629/10, *Nelson and Others*, 2012, para. 20; C-42/17, *M.A.S.*, 2017, paras 27–28; C-493/17, *Weiss*, 2018, para. 19.

[53] See 314/81 to 316/81 and 83/82, *Waterkeyn*, 1982 (concerning the interpretation of the scope and legal effects of a judgment given pursuant to what is now Art. 258 TFEU). It should, however, be stressed that according to Art. 104(1) of the CJ Rules of Procedure: 'Article 158 of these Rules relating to the interpretation of judgments and orders shall not apply to decisions given in reply to a request for a preliminary ruling.' Art. 104(2) of those Rules adds: 'It shall be for the national courts or tribunals to assess whether they consider that sufficient guidance is given by a preliminary ruling, or whether it appears to them that a further reference to the Court is required.' See also para. 6.33.

[54] See C-300/12, *Finanzamt Düsseldorf-Mitte*, 2014, paras 23–33. However, albeit drafted as a question of interpretation of provisions and principles of Union law, the reference in C-413/11, *Germanwing*s (order), 2013, directly challenged the Court's judgment in C-402/07 and C-423/07, *Sturgeon and Others*, 2009.

[55] C-704/18, *Kolev ('Kolev II')*, 2020.

[56] C-612/15, *Kolev*, 2018.

[57] See C-704/18, *Kolev II*, 2020, paras 38–50. See para. 3.17.

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(c) Acts of committees established under Union law

6.14 The European Economic and Social Committee and the Committee of the Regions, which assist the European Parliament, the Council, and the Commission in an advisory capacity (Art. 13(4) TEU), are not, formally speaking, Union institutions or bodies, offices, or agencies whose acts are amenable to interpretation by the Court of Justice pursuant to Art. 267 TFEU. The Opinions which they deliver as envisaged by the various Treaty provisions or on their own initiative form part of the decision-making process carried out between the Commission, the Council, and (generally) the European Parliament. They have no independent existence and could, at most, be used to help interpret Union acts where they contributed to the process of their adoption.[58] Similar remarks could be made for other committees established under Union law, for example, the various scientific, consultative, and advisory committees in the relevant field.[59]

(4) International agreements concluded by the Union and acts of bodies established by such agreements

(a) Agreements concluded by the Union

6.15 Not only acts adopted by Union institutions autonomously but also 'contractual' acts are covered by indent (b) of the first paragraph of Art. 267 TFEU. Thus, the Court of Justice has held that it has jurisdiction to give preliminary rulings on the interpretation of international agreements concluded by the Union with third countries or international organizations (see Arts 216–219 TFEU).[60] Under established case-law, international agreements concluded by the Union form an integral part of the Union legal order and can therefore be the subject of a request for a preliminary ruling on their interpretation.[61]

(b) Agreements concluded by the Union and the Member States

6.16 In a number of preliminary rulings, the Court of Justice determined that an international agreement fell within its jurisdiction without explaining the impact of the fact that the international agreement at issue was concluded by the Union and the Member States jointly with third countries, commonly referred to as a mixed agreement.[62] Yet, a

[58] K. Lenaerts and P. Van Nuffel (T. Corthaut (ed)), *EU Constitutional Law* (OUP, 2021) paras 13.030–13.035.

[59] For a survey, see K. Lenaerts and P. Van Nuffel (T. Corthaut (ed)), *EU Constitutional Law* (OUP, 2021) para. 13.036.

[60] See 181/73, *Haegeman*, 1974, paras 1–6; C-335/11 and C-337/11, *HK Danmark*, 2013; C-532/18, *GN*, 2019, para. 30; C-641/18, *Rina*, 2020, para. 46; C-679/20, *Administración General del Estado* (order), 2021, para. 19; C-500/20, *ÖBB-Infrastruktur Aktiengesellschaft*, 2022, paras 38–39. Sometimes, the Court of Justice's interpretation of international agreements concluded by the Union can implicate sensitive political issues in international relations: for example, as regards the Israel–Palestinian conflict, see C-386/08, *Brita*, 2010; C-363/18, *Organisation juive européenne and Vignoble Psagot*, 2019. Questions concerning the interpretation of such agreements have sometimes involved third countries which since acceded to the European Union: in addition to 181/73, *Haegeman* 1974, see C-432/92, *Anastasiou and Others*, 1994; C-23/04 to C-25/04, *Sfakianakis*, 2006; C-56/06, *Euro Tex*, 2007; C-101/10, *Pavlov and Famira*, 2011.

[61] See C-741/19, *Republic of Moldova*, 2021, para. 23.

[62] For example, as regards the EEA Agreement, see C-321/97, *Andersson and Wåkerås-Andersson*, 1999, paras 23–33. It is clear from this judgment that the Court of Justice has jurisdiction to interpret the EEA Agreement; however, the interpretation is binding only on the Union, and not on the EFTA States. The EFTA Court is empowered to give rulings on the interpretation of the EEA Agreement which are applicable in the EFTA States. See, more recently, C-157/07, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, 2008; C-589/20, *JR*, 2022. For

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key question has arisen in the case-law as to whether, in the case of a mixed agreement concluded by the Union and the Member States jointly with a third country, the jurisdiction of the Court of Justice extends to rulings interpreting provisions of the agreement by which the Member States enter into commitments vis-à-vis that country by virtue of their own competences.[63] The Court of Justice first left this question expressly open.[64] It was able to do so because it took the view that the provisions whose interpretation was sought fell partly within the Union's competence to guarantee commitments towards the non-member country concerned. The fact that the Member States had to carry out the commitments was irrelevant because in doing so they were simply fulfilling an obligation towards the Union and did not assume, vis-à-vis the non-member country, the Union's responsibility for the due performance of the agreement.[65]

In *Parfums Christian Dior*,[66] the Court held, however, that it had jurisdiction to interpret Art. 50 of TRIPs[67] (a procedural provision conferring on the judicial authorities of the Contracting Parties the authority to order prompt and effective provisional measures to prevent a threatened or suspected infringement of any intellectual property right from occurring) both in situations falling within the scope of the national law and in those coming under Union law. The Court inferred its interpretative jurisdiction from the finding that Art. 50 of TRIPs constitutes a procedural provision which should be applied in the same way in every situation falling within its scope (both situations covered by national law and situations covered by Union law) and that this obligation requires the judicial bodies of the Member States and the Union, to give it a uniform interpretation, for practical and legal reasons.[68]

Further to this, the Court of Justice seems to consider itself competent to interpret provisions of a mixed agreement if the agreement concerns a field in large measure covered

examples concerning other agreements, see C-213/03, *Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la région*, 2004 (see in the context of an infringement action concerning the same agreement: C-239/03, *Commission v France*, 2004, paras 22–31); C-97/05, *Gattoussi*, 2006; C-70/09, *Hengartner and Gasser*, 2010, paras 35–43. See further A. Rosas, 'Mixity Past, Present and Future: Some Observations' in M. Chamon and I. Govaere (eds), *EU External Relations Post-Lisbon. The Law and Practice of Facultative Mixity* (Brill, 2020) 8.

[63] See P. Koutrakos, 'Interpretation of Mixed Agreements' in C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited* (Hart, 2010) 116; C. Timmermans, 'The Court of Justice and Mixed Agreements' in A. Rosas, E. Levits, and Y. Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (Asser Press/Springer, 2013) 666.

[64] See 12/86, *Demirel*, 1987, para. 9; C-53/9,6 *Hermès International*, 1998, paras 24–33.

[65] Art. 4(3) TEU; 104/81, *Kupferberg*, 1982; see also C-439/01, *Cipra and Kvasnicka*, 2003, paras 23–24 (with respect to the AETR Agreement (European Agreement concerning the Work of Crews of Vehicles engaged in International Road Transport): the Court held, after having recalled that in ratifying or acceding to that agreement the Member States had acted in the interest and on behalf of the Union (then Community), that it forms part of Union law and hence that it has jurisdiction to interpret it.

[66] C-300/98 and C-392/98, *Parfums Christian Dior and Others*, 2000, paras 32–40; see also C-89/99, *Schieving-Nijstad and Others*, 2001, para. 30; C-245/02, *Anheuser-Busch*, 2004, paras 40–46.

[67] On the WTO and the competence of the Union and the Member States for matters falling within the scope of the WTO, see generally K. Lenaerts and P. Van Nuffel (T. Corthaut (ed.)), *EU Constitutional Law* (OUP, 2021) paras 10.010–10.011.

[68] See also C-470/16, *North East Pylon Pressure Campaign and Sheehy*, 2018, para. 50; C-741/19, *Republic of Moldova*, 2021, paras 28–29.

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by Union legislation.[69] In *Merck Genéricos*,[70] concerning questions on the interpretation of Art. 33 of TRIPs (a provision on the term of protection for patents), the Court of Justice held that it has jurisdiction under Art. 267 TFEU to interpret the provisions of the TRIPs Agreement in order to define the obligations that the Union has thereby assumed and to determine whether the relevant sphere covering the provision of the TRIPs Agreement at issue in the main proceedings is one in which the Union has or has not legislated.[71] This is because the answer to that question 'calls for a uniform reply at [Union] level that the Court alone is capable of supplying'.[72] In the case at hand, the sphere concerned (patent law) was not covered sufficiently by Union legislation to lead to the conclusion that it fell within the scope of Union law.[73]

It should be pointed out that while the Union's exclusive competence, following the entry into force of the Lisbon Treaty, now explicitly covers the common commercial policy—including 'the commercial aspects of intellectual property',[74] which refers to TRIPs[75]—it is not sufficient that an agreement is liable to have implications for trade with one or more third States for it to fall within the common commercial policy and thus the exclusive competence of the Union.[76] Consequently, only the components of agreements that display a specific link with trade between the European Union and the third State(s) concerned will fall within the field of the common commercial policy.[77] The aforementioned pre-Lisbon case-law regarding mixed agreements therefore remains valid for the components of agreements that do not fall within the common commercial policy.[78]

Moreover, the approach taken by the Court of Justice is relevant in assessing its jurisdiction to interpret the provisions of mixed agreements in other fields of Union law.[79] For

[69] See C-741/19, *Republic of Moldova*, 2021, paras 28–29; C-500/20, *ÖBB-Infrastruktur Aktiengesellschaft*, 2022, para. 41.

[70] C-431/05, *Merck Genéricos*, 2007, paras 31–37; compare C-431/05, *Merck Genéricos*, AG Ruiz-Jarabo Colomer Opinion, 2007, particularly points 54–61 (advocating that the Court of Justice should have unlimited jurisdiction to interpret the TRIPs Agreement, irrespective of whether the Union has legislated in the field concerned).

[71] See C-431/05, *Merck Genéricos*, 2007, paras 33–36.

[72] See C-431/05, *Merck Genéricos*, 2007, para. 37; see also C-500/20, *ÖBB-Infrastruktur Aktiengesellschaft*, 2022, para. 43.

[73] See C-431/05, *Merck Genéricos*, 2007, para. 46.

[74] Arts 3(1)(e) and 207(1) TFEU.

[75] See C-414/11, *Daiichi Sankyo*, 2013, paras 45–48.

[76] See Opinion 2/15, *Free Trade Agreement between the European Union and the Republic of Singapore*, 2017, para. 36; Opinion 3/15, *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled*, 2017, para. 61. In C-414/11, *Sanofi-Aventis Deutschland*, 2013, paras 53–32, the Court held that the rules in the TRIPs agreement have a specific link to international trade and fall within the concept of 'commercial aspects of intellectual property'. Conversely, the Court held that this is not the case for the rules of the Marrakesh Treaty, for which a link with international trade could only be indirect: see Opinion 3/15, *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled*, 2017, paras 81–101.

[77] See Opinion 2/15, *Free Trade Agreement between the European Union and the Republic of Singapore*, 2017, para. 37; Opinion 3/15, *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled*, 2017, para. 61.

[78] See Opinion 2/15, *Free Trade Agreement between the European Union and the Republic of Singapore*, 2017, para. 305.

[79] See C-470/16, *North East Pylon Pressure Campaign and Sheehy*, 2018, para. 50; C-500/20, *ÖBB-Infrastruktur Aktiengesellschaft*, 2022, paras 42–43; C-873/19, *Deutsche Umwelthilfe*, 2022, para. 48; see also C-411/17,

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example, in *Lesoochranárske zoskupenie*,[80] the Court declared that it has 'jurisdiction to define the obligations which the [Union] has assumed and those which remain the sole responsibility of the Member States in order to interpret the Aarhus Convention'. Specifically, the Court ruled that it has jurisdiction to interpret Art. 9(3) of the Aarhus Convention (concerning the right of access to procedures to challenge acts contravening national law provisions relating to the environment), emphasizing that where a provision can apply both to situations falling within the scope of national and of Union law, it is in the interests of Union law that the provision is interpreted uniformly, whatever the circumstances in which it is to apply.[81]

(c) Acts of bodies established by international agreements

6.17 Since the function of Art. 267 TFEU is to ensure the uniform application throughout the Union of all provisions forming part of the Union legal system and to ensure that their effects do not vary according to the interpretation accorded to them in the various Member States, the Court of Justice held that it is to have jurisdiction to give preliminary rulings on the interpretation not only of the agreement itself, but also of decisions of the body established by the agreement and entrusted with responsibility for its implementation.[82] This is so regardless of the binding nature of such decisions. [83] Thus, within the context of the EEC–Turkey Association Agreement, the Court has held that decisions of the Association Council form an integral part of Union law on account of their direct connection with the agreement itself.[84] Consequently, the Court has jurisdiction to interpret the decisions of the Association Council.[85]

(d) Agreements to which the Union is not a party

6.18 The Court of Justice does not, in principle, have jurisdiction to interpret in preliminary ruling proceedings international agreements concluded between Member States and

Inter-Environnement Wallonie, AG Kokott Opinion, 2018, points 69–74. Note that the Court does not always explicitly consider whether it has competence to interpret provisions of a mixed agreement. For example, it may dispose of that question where it finds that the provision of the mixed agreement of which an interpretation is sought is not applicable to the dispute in the main proceedings. See C-798/18 and C-799/18, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, 2021, paras 67–70 (in relation to Art. 10 of the Energy Charter); compare to C-741/19, *Republic of Moldova*, 2021, paras 22–27.

[80] C-240/09, *Lesoochranárske zoskupenie*, 2011, paras 30–34; see also C-240/09, *Lesoochranárske zoskupenie*, AG Sharpston Opinion, 2010, points 43–62 (providing a neat summary of the case-law regarding the Court's jurisdiction for interpreting mixed agreements).

[81] See C-240/09, *Lesoochranárske zoskupenie*, 2011, paras 40–43. Regarding the converse situation, it has been submitted that the Court does not have jurisdiction to interpret provisions of a mixed agreement that are not covered by the Union's competence and that are not indivisible from the parts of the agreement for which the Court has jurisdiction: see M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (3rd edn, OUP, 2021) 110–111.

[82] See 30/88, *Greece v Commission*, 1989, paras 12–13; C-192/89, *Sevince*, 1990, paras 9–11; C-188/91, *Deutsche Shell*, 1993, para. 17.

[83] See C-188/91, *Deutsche Shell*, 1993, paras 16–19.

[84] See 30/88, *Greece v Commission*, 1989, paras 12–13.

[85] See C-677/17, *Çoban*, 2019; C-70/18, *Staatssecretaris van Justitie en Veiligheid*, 2019; C-379/20, *Udlændingenævnet*, 2021.

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non-member countries outside the scope of Union law.[86] A number of exceptions exist, however. First, international agreements by which the Union is bound by way of substitution for the Member States are treated in the same way as international agreements concluded by the Union.[87] Second, where provisions of international agreements have been taken over by Union law and by national law, the Court has jurisdiction to interpret the provisions of that international agreement in order to forestall future differences of interpretation, irrespective of the circumstances in which they apply.[88] Third, the Court may interpret provisions of an international agreement to which Union law has made a reference (*renvoi*).[89] Fourth, on the basis of the customary international law principle of good faith and of the principle of sincere cooperation enshrined in Art. 4(3) TEU, the Court is required to take an international agreement binding all the Member States into account even though it does not bind the European Union, either because the Union is not a party to it or is not bound by it by way of substitution, where that international agreement is likely to have consequences for the interpretation of an international agreement by which the European Union is bound, as well as for rules of secondary Union law that come within the scope of that international agreement.[90] The same goes for an international agreement to which not all Member States are a party, but which is relevant for the interpretation of an international agreement to which the Union is a party.[91]

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[86] See 130/73, *Vandeweghe and Others*, 1973, para. 2; 44/84, *Hurd*, 1986, para. 20; C-481/13, *Ferooz Qurbani*, 2014, para. 22; C-219/20, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, 2022, para. 14. For example, as regards bilateral tax conventions, see C-128/08, *Damseaux*, 2009, paras 20–22. Likewise, the Court considers that it has no jurisdiction under Art. 267 TFEU to interpret a provision of an agreement concluded between a number of Member States, even if the agreement was concluded pursuant to a Union directive: C-162/98, *Hartmann* (order), 1998, paras 8–10.

[87] See C-533/08, *TNT Express Nederland*, 2010, paras 59–62; see also C-188/07, *Commune de Mesquer*, 2008, para. 85; C-301/08, *Bogiatzi*, 2009, paras 24–34, and C-366/10, *Air Transport Association of America and Others*, 2011, para. 62. As illustrated by the foregoing cases, the Court of Justice takes a strict approach with respect to the evaluation of the Union's functional succession to obligations entered into by the Member States. Yet, as noted by the Court (C-308/06, *Intertanko and Others*, 2008, para. 48), functional succession has been found in the context of the GATT. See also 267/81 to 269/81, *SPI and SAMI*, 1983, paras 14–19: the Court of Justice took quite an expansive approach, holding that it had jurisdiction to give preliminary rulings on the interpretation of the 1947 GATT (General Agreement on Tariffs and Trade) on the grounds that, since the Common Customs Tariff entered into effect, the then Community had been substituted for the Member States as regards the fulfilment of the commitments laid down in the GATT, thereby assuming jurisdiction to give preliminary rulings simply by referring to the aim of that jurisdiction, namely, 'to ensure the uniform interpretation of [Union] law'. This case is relied upon for establishing the rationale for requiring uniform application of international law that is an integral part of Union law in other contexts.

[88] See C-57/09 and C-101/09, *B and D*, 2010, para. 71; C-481/13, *Ferooz Qurbani*, 2014, para. 26.

[89] See C-481/13, *Ferooz Qurbani*, 2014, para. 28; C-443/14 and C-444/14, *Warendorf*, 2016, paras 28–29 (interpretation in conformity with the Geneva Convention relating to the Status of Refugees); C-14/21 and C-15/21, *Sea Watch*, 2022, paras 89–92 (interpretation in conformity with the SOLAS Convention). Where a Treaty provision refers to an international agreement to which the Union is not a contracting party, that international agreement may be taken into account to assess the validity of acts adopted on the basis of that Treaty provision: see C-391/16, C-77/17, and C-78/17, *M*, 2019, para. 74.

[90] See C-308/06, *Intertanko and Others*, 2008, para. 52; C-15/17, *Bosphorus Queen Shipping*, 2018, paras 44–45; C-14/21 and C-15/21, *Sea Watch*, 2022, para. 90.

[91] See C-15/17, *Bosphorus Queen Shipping*, 2018, paras 46–47.

II. Special Characteristics

A. Content of a preliminary ruling on interpretation

(1) Interpretation versus application

6.19 The Treaties do not define precisely what is meant by 'interpretation' of Union law in the context of the preliminary ruling procedure.[92] Initially, the Court of Justice strongly emphasized the distinction between interpretation and application, which was also to demarcate the respective functions of the Court of Justice and the national courts.[93] At the same time, however, the Court referred to 'the special field of judicial cooperation' under what is now Art. 267 TFEU, which requires that the national court and the Court of Justice, both keeping within their respective jurisdiction and with the aim of ensuring that Union law is applied in a unified manner, 'make direct and complementary contributions to the working out of a decision'.[94]

(2) Judicial cooperation

6.20 As the case-law has evolved, the idea of 'judicial cooperation' has gained the upper hand over the distinction between interpretation and application,[95] the aim being to ensure that the main proceedings are determined in a way which secures the uniform 'application' of Union law. This is not to discount the Court of Justice's repeated admonition that the application of Union law falls within the exclusive jurisdiction of the national court.[96] Nonetheless, the idea is that this does not preclude the Court from ensuring

[92] See 13/61, *Bosch and Others*, 1962 ECR 45, 50, where the Court of Justice held that since the question as to what is meant in what is now Art. 267 TFEU by 'the interpretation of Union law' may itself be a matter of interpretation, it is permissible for the national court to formulate its questions in a simple and direct way. See for a case in which the Court received such a question, holding that the enforceability against an individual of a Union regulation which is not published in the language of a Member State is a question of the interpretation, not validity, of Union law: see C-161/06, *Skoma-Lux*, 2007, paras 57–61. See further B. de Witte, 'The Preliminary Ruling Dialogue: Three Types of Questions Posed by National Courts' in B. de Witte, J.A. Mayoral, U. Jaremba, M. Wind, and K. Podstawa (eds), *National Courts and EU Law. New Issues, Theories and Methods* (Edward Elgar, 2018) 150.

[93] See 6/64, *Costa v ENEL* (order), 1964 ECR 614, 614–615; 20/64, *Albatros*, 1965 ECR 29, 34; 13/68, *Salgoil*, 1968 ECR 453, 459–460.

[94] See 16/65, *Schwarze*, 1965 ECR 878, 886; C-14/09, *Genc*, 2010, para. 30; C-344/19, *Radiotelevizija Slovenija*, 2021, para. 23.

[95] In C-162/06, *International Mail Spain*, 2007, para. 24, the Court held: 'It is one of the essential characteristics of the system of judicial cooperation established under Article 267 TFEU, that the Court replies in rather abstract and general terms to a question on the interpretation of Union law referred to it, while it is for the referring court to give a ruling in the dispute before it, taking into account the Court's reply.' Despite the sensitivities that this distinction continues to engender, there seems to be widespread recognition of the inherent tensions placed on the Court in terms of ensuring that the answer given by the Court is sufficiently concrete to be of service to the national court, on the one hand, and providing a general answer as part of ensuring the uniform interpretation of Union law in the various national legal systems, on the other.

[96] See C-451/03, *Servizi Ausiliari Dottori Commercialisti*, 2006, para. 69; C-32/11, *Allianz Hungária Biztosító*, 2013, para. 29; C-228/18, *Gazdasági Versenyhivatal*, 2020, para. 47; C-554/19, *Staatsanwaltschaft Offenburg* (order), 2020, para. 28; C-596/20, *DuoDecad*, 2022, paras 37–39. But see C-243/15, *Lesoochranárske zoskupenie*, 2016, para. 64, in which the Court held that there is nothing 'preventing a national court from asking the Court of Justice to rule on the application of those provisions in the case in point, provided, however, that the national court carries out the finding and assessment of the facts necessary for that purpose in the light of all the material in the file before it'. See also C-312/14, *Banif Plus Bank*, 2015, para. 52, regarding the legal classification by the Court of facts established by the national court. See further C-247/16, *Schottelius*, 2017, paras 44–45; C-330/17, *Verbraucherzentrale Baden-Württember*, 2018, paras 20, 39–40; C-604/17, *PM* (order), 2018, paras 29–34.

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that it can give an answer that will be of use to the national court to enable it to determine the case before it,[97] *inter alia*, by providing the referring court with 'the interpretative criteria needed to enable it to decide the case before it'.[98]

Further to this, the Court of Justice regularly refers to 'the need to afford a helpful interpretation of [Union] law'.[99] Such an interpretation can be confined specifically to the facts and points of national law underlying the national proceedings as they emerge from the 'documents before the Court'.[100] The idea of judicial cooperation is also reflected in the practice of the Court to provide a national court with some explanations when the questions referred to it are manifestly inadmissible, either for lack of jurisdiction, absence of a connecting factor to Union law, or deficiency of the reference order. For example, where a national court inquired about the validity of Art. 45(4) TFEU in the light of Art. 45(1) to (3) TFEU, the Court, while declaring the question manifestly inadmissible for lack of jurisdiction, nevertheless provided the national court with an explanation regarding the relationship between Art. 45(4) TFEU and Art. 45(1)–(3) TFEU, as well as the application of Art. 45(4) TFEU.[101]

B. Limits placed on the jurisdiction of the Court of Justice

6.21 As developed in the case-law, certain limits are placed on the jurisdiction of the Court of Justice to deliver preliminary rulings on the interpretation of Union law.[102] These limits are primarily aimed at precluding the Court from ruling on facts and points of national law and on the compatibility of national rules with Union law. Where the referring court's questions are framed in such a manner, however, there is the possibility for the Court of Justice to reformulate such questions. Consequently, attempts by interested parties within the meaning of Art. 23 of the Statute to challenge the admissibility

[97] See C-279/06, *CEPSA*, 2008, para. 31; C-756/18, *easyJet Airline* (order), 2019, paras 16–21; C-585/18, C-624/18 and C-625/18, *A.K.*, 2019, para. 132; C-519/20, *Landkreis Gifhorn*, 2022, para. 47; C-530/20, *EUROAPTIEKA*, 2022, paras 52–54.

[98] C-228/18, *Gazdasági Versenyhivatal*, 2020, para. 48. Regarding the determination whether a particular contractual term is unfair within the context of Directive 93/13/EEC, see C-609/19, *BNP Paribas Personal Finance*, 2021, para. 60; C-776/19 to C-782/19, *BNP Paribas Personal Finance*, 2021, para. 92.

[99] 244/78, *Union Laitière Normande*, 1979, para. 5.

[100] 311/85, *VVR*, 1987, para. 11. The documents in the case from which the Court derives the relevant facts and points of national law include not only the order for reference and the file submitted by the national court, but also the written and oral observations of the parties to the main proceedings, the Member States, the Commission, and the Union institution, body, office, or agency which adopted the act at issue in the proceedings under Art. 23 of the Statute: see C-702/20 and C-17/21, *DOBELES HES*, 2023, paras 40–42.

[101] See C-571/20, *Ministero dell'Istruzione, dell'Università e della Ricerca and Others* (order), 2021, paras 13–17. See further C-457/09, *Chartry* (order), 2011, paras 19–20; C-587/15, *Lietuvos Respublikos transporto priemonių draudikų biurasn*, 2017, para. 45; C-558/18 and C-563/18, *Miasto Łowicz*, 2020, paras 54–59; C-477/19, *Magistrat der Stadt Wien*, 2020, paras 37–45; C-643/19, *Resopre—Sociedade Revendedora de Aparelhos de Precisão* (order), 2020, paras 32–33.

[102] See C-268/15, *Ullens de Schooten*, 2016, para. 40; C-585/18, C-624/18, and C-625/18, *A.K. and Others*, 2019, para. 77: the Court of Justice may interpret Union law only within the limits and the powers conferred upon it. Note that such limits are in addition to those placed on the preliminary ruling jurisdiction of the Court of Justice generally in relation to the assessment of questions which implicate the material, personal, territorial, and temporal scope of Union law.

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of the questions submitted by the referring court on these grounds alone routinely fail.[103] Moreover, the Court of Justice in principle does not have jurisdiction to deliver preliminary rulings involving situations in the main proceedings which have no factor linking them to Union law, as illustrated by case-law concerning the free movement provisions and fundamental rights—although some exceptions have been carved out in the case-law, as discussed in the sections that follow.

(1) The Court of Justice does not rule on facts and points of national law

6.22 In the context of preliminary ruling proceedings, the Court of Justice is not entitled to rule on facts or points of national law, or to verify whether they are correct.[104] Likewise, it is not for the Court to identify the provisions of national law relevant to the dispute, to give a ruling on their interpretation, or to decide whether the referring court's interpretation is correct.[105] These matters fall within the exclusive jurisdiction of the national court.[106]

That said, there is nothing to prevent the Court from spelling out its understanding of the facts and points of national law as its starting point for its 'useful' (i.e. specific) interpretation of the applicable provisions and principles of Union law.[107] The Court

[103] See C-378/08, *ERG and Others*, 2010, paras 30–33; C-78/08 to C-80/08, *Paint Graphos and Others*, 2011, para. 36; C-188/21, *Megatherm-Csillaghegy* (order), 2022, paras 28–32.

[104] See 104/77, *Oehlschläger*, 1978, para. 4; C-799/19, *NI*, 2020, para. 45; C-693/18, *X*, 2020, para. 55; C-802/19, *Firma Z*, 2021, para. 37; C-19/20, *Bank BPH*, 2021, paras 37–38; C-596/20, *DuoDecad*, 2022, paras 37–39; C-652/20, *Allianz Elementar Versicherung*, 2022, para. 27; C-702/20 and C-17/21, *DOBELES HES*, 2023, para. 56; C-158/21, *Puig Gordi and Others*, 2023, para. 61. In particular, it is for the national court, and not for the Court of Justice, to ascertain the facts that have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver: see C-232/09, *Danosa*, 2010, paras 31–36; C-310/09, *Accor*, 2011, para. 37; C-23/12, *Zakaria*, 2013, para. 29; but see C-109/20, *PL Holdings*, 2021, paras 39–43.

[105] See C-574/16, *Grupo Norte Facility*, 2018, para. 32; C-3/19, *Asmel*, 2020, para. 39; C-503/19 and C-592/19, *Subdelegación del Gobierno en Barcelona*, 2020, para. 37; C-528/19, *Mitteldeutsche Hartstein-Industrie*, 2020, para. 56; C-233/19, *CPAS de Liège*, 2020, para. 23; C-303/20, *Ultimo Portfolio Investment*, 2021, para. 25; C-550/19, *Obras y Servicios Públicos en Acciona Agua*, 2021, para. 24; C-447/20 and C-448/20, *IFAP*, 2022, para. 100. But see C-24/19, *A and Others*, 2020, paras 59–60; C-470/20, *Veejaam and Espo*, 2022, para. 25.

[106] For this reason, the Court bases its consideration on the description given in the order for reference and disregards observations of interested parties within the meaning of Art. 23 of the Statute (including the 'defendant' government) which contradict information in the order for reference: see C-128/10 and C-129/10, *Thasou and Etairia*, 2011, paras 37–41; C-212/10, *Logstor ROR Polska*, 2011, paras 27–31; C-519/18, *Bevándorlási és Menekültügyi Hivatal*, 2019, para. 26.

[107] For a very explicit example, see C-188/10 and C-189/10, *Melki and Abdeli*, 2010, paras 46–50, involving a delicate situation in which the provisions of national law concerned could be considered to yield more than one interpretation, whereby the Court of Justice took as its starting point the alternative readings of the national provisions concerned, while adhering to the presentation of national law in the order for reference. In C-978/19, *FORMAT Urządzenia i Montaże Przemysłowe*, 2021, paras 22–25, 28, the Court first, based on the file submitted to it, made the factual determination that a person performed nearly all of their paid employment activity in the territory of a single Member State, and subsequently held that 'it cannot be accepted that a person who is employed under conditions such as those at issue in the main proceedings […] is covered by the concept of 'a person normally employed in the territory of two or more Member States' for the purposes of Article 14(2) of Regulation No 1408/71'. In C-168/19 and C-169/19, *HB*, 2020, para. 11, although the referring court had not specified whether the applicants in the main proceedings had transferred their residence from Italy to Portugal after having ceased all occupational activity, the Court found this was the case as the referring court considered that their situation was governed by Art. 21 TFEU. See further C-176/18, *Club de Variedades Vegetales Protegidas*, 2019, paras 20–21; C-749/18, *B and Others*, 2020, paras 16–19; C-923/19, *Van Ameyde España*, 2021, para. 33; C-617/20, *T.N. and N.N.*, 2022, paras 31–34; C-192/21, *Mr Clemente*, 2022, paras 35–39; C-696/20, *Dyrektor Izby Skarbowej w W.*, 2022, paras 21–26; C-134/20, *Volkswagen*, 2022, paras 33–37; C-177/20, *'Grossmania'*, 2022, paras 48–49; C-242/22 PPU, *TL*, 2022, para. 45; C-435/22 PPU, *Generalstaatsanwaltschaft München*, 2022, paras 128–136.

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of Justice may also ask the national court or the government concerned to clarify certain facts and/or points of national law and take account of them in the preliminary ruling.[108] A request to the national court will be based on Art. 101 of the CJ Rules of Procedure.[109] Generally, a request to the national government will be informal, in the form of a letter from the Registrar, but it may, if necessary, be made in the form of an order of the Court prescribing measures of inquiry within the meaning of Art. 64(2) of the CJ Rules of Procedure (request for information and production of documents).[110] Other measures of inquiry, such as taking oral testimony, commissioning an expert's report, and inspections of a place or thing, are not formally precluded in proceedings for a preliminary ruling on the interpretation of Union law, but probably go too far in practice because they are intrinsically intended to determine or verify contested facts and points of national law, and the Court of Justice has indeed no jurisdiction to do this.[111]

(2) No jurisdiction to rule on the compatibility of national rules with Union law

6.23 It occurs frequently that a national court asks the Court of Justice to rule on the compatibility of national law with relevant provisions of Union law. The Court has consistently held, however, that in the context of the preliminary ruling procedure, it has no jurisdiction to rule on the conformity of provisions of national law with Union law.[112] That being said, it is settled case-law that the Court may nevertheless provide the national court with an interpretation of Union law on all such points so as to enable that court to determine whether those national rules are compatible with Union law for the purposes of the case before it.[113] In view of this, the Court may reformulate the national court's questions in a concrete manner (see generally para. 3.20), such as whether the

[108] See C-343/90, *Lourenço Dias*, 1992, para. 52.

[109] See C-95/19, *Agenzia delle Dogane*, 2021, paras 38–39; C-546/19, *Westerwaldkreis,* 2021, paras 38–40.

[110] See 148/77, *Hansen*, 1978 ECR 1788, 1790, from which it appears that the Court decided 'to open the procedure without any preparatory inquiry', but requested the German and French Governments and the Commission 'to provide written answers to a certain number of questions before the opening of the oral procedure'. Germany had submitted observations to the Court pursuant to Art. 23 of the Statute but France had not, so that the questions were intended to involve the latter Member State in the proceedings, which is what happened: see 148/77, *Hansen*, 1978 ECR 1788, 1798–1799. See also C-6/05, *Medi-pac Kazantzidis*, 2007, para. 31 (on account of procedural reasons, the national court could not respond to the Court of Justice's request for clarification, so the Court decided to hold a hearing at which the 'defendant' government provided the requisite information which was taken up as part of the ruling); C-334/06 to C-336/06, *Zerche and Others*, 2008, paras 40–41 (submission of a series of written questions to the Member State government concerned); C-279/20, *Bundesrepublik Deutschland*, 2022, para. 26 (same).

[111] When ruling on the interpretation of Union law provisions, the Court of Justice is empowered to do so only on the basis of the facts which the national court puts before it: see C-378/08, *ERG and Others*, 2010, para. 42; C-379/08 and C-380/08, *ERA and Others*, 2010, para. 35; C-375/08, *Pontini and Others*, 2010, para. 48; C-259/18, *Sociedad Estatal Correos y Telégrafos*, 2019, para. 17.

[112] For the first of those cases, see 6/64 *Costa v ENEL*, 1964 ECR 585, 592–593. More recently, see C-172/11, *Erny*, 2012, para. 30; C-935/19, *Grupa Warzywna*, 2021, para. 20; C-724/21, *Staatsanwaltschaft Köln* (order), 2022, paras 17–19.

[113] See C-189/18, *Glencore Agriculture Hungary*, 2019, para. 31; C-634/18, *Prokuratura Rejonowa w Słupsku*, 2020, paras 16–20; C-661/18, *CTT—Correios de Portugal*, 2020, paras 28–29; C-448/19, *Subdelegación del Gobierno en Guadalajara*, 2020, para. 17; C-472/19, *Vert Marine*, 2020, para. 32; C-402/19, *CPAS de Seraing*, 2020, para. 25; C-463/19, *Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle*, 2020, paras 29–30; C-652/19, *Consulmarketing*, 2021, paras 32–33; C-817/19, *Ligue des droits humains*, 2022, para. 240; C-702/20 and C-17/21, *DOBELES HES*, 2023, para. 58.

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relevant rules or principles of Union law preclude national measures of the kind concerned,[114] or words to similar effect.[115] As a result, although the questions are primarily based on the interpretation of provisions or principles of Union law, the answers given will nevertheless at the same time be determinative of the outcome of the question of compatibility.[116]

(3) The issues raised must fall within the scope of Union law

(a) No jurisdiction for issues falling outside the scope of Union law

6.24 Where the question of interpretation referred by the national court is intended to test the compatibility of a national measure with provisions of secondary or primary Union law (including general principles of Union law, such as fundamental rights), the Court must verify whether the issues raised in the main proceedings are linked to a situation falling within the scope of Union law. This is because, as a general matter, the Court of Justice has no jurisdiction with regard to national provisions falling outside the scope of Union law and when the subject-matter of the dispute is not connected in any way with any of the situations contemplated by the Treaties.[117]

This finds specific expression in relation to questions concerning the interpretation of Union law in connection with free movement and fundamental rights.[118] In particular, where the question referred by the national court concerns the interpretation of the Treaty provisions on the free movement of persons, goods, services, and capital,[119] the Court ascertains that the issues raised in the main proceedings have some link to one of the situations envisaged by the Treaties in relation to the fundamental freedom concerned.[120] This is because if the issues raised in the main proceedings relate to activities which are confined in all respects within a single Member State (a so-called purely

[114] See C-385/09, *Nidera Handelscompagnie*, 2010, paras 32–33; C-2/10, *Azienda Agro-ZootechnicaFranchini and Eolica di Altamura*, 2011, paras 35–36; C-652/19, *Consulmarketing*, 2021, para. 36; C-935/19, *Grupa Warzywna*, 2021, para. 24. Sometimes, the Court does not explicitly reformulate the questions referred, but will do so implicitly in its answer to those questions: see C-30/19, *Braathens Regional Aviation*, 2021.

[115] See C-296/06, *Telecom Italia*, 2008, paras 16–17, 20; C-155/05, *Villa Maria Beatrice Hospital* (order), 2006, paras 22–25; C-156/07, *Aiello and Others* (order), 2008, paras 41–43.

[116] In the past, it sometimes occurred that the Court did not formulate the operative part neutrally and referred expressly to the provisions of national law as being compatible or incompatible with Union law: see C-130/92, *OTO*, 1994, para. 21; for a critical appraisal, see C-30/02, *Recheio*, AG Ruiz-Jarabo Colomer Opinion, 2004, points 23–36. Yet, this is more exceptional nowadays (see C-185/07, *Allianz*, 2009, para. 34).

[117] See C-462/11, *Cozman* (order), 2011, para. 12; C-550/19, *Obras y Servicios Públicos and Acciona Agua*, 2021, para. 26. See para. 3.34.

[118] As highlighted by C-439/08, *VEBIC*, AG Mengozzi Opinion, 2010, point 36, n. 5 (although not dealt with by the Court of Justice in its judgment), there are several lines of case-law that overlap or co-exist in this regard.

[119] While perhaps obvious, this should be distinguished from preliminary rulings concerning the interpretation of acts of secondary Union law, which need not have an actual link to free movement: for a few examples, see C-213/07, *Michaniki*, 2008, paras 28–29; C-304/08, *Plus Warenhandelsgesellschaft*, 2010, paras 27–28.

[120] Under the case-law, national legislation which applies without distinction to nationals of that Member State and to those of other Member States alike is generally capable of falling within the scope of the provisions on the fundamental freedoms only to the extent that it applies to situations related to intra-EU trade. Nevertheless, this appears to be fulfilled if it is possible (or not inconceivable) that entities from other Member States have been or would be interested in taking up the transactions at issue in the main proceedings: see C-380/05, *Centro Europa 7*, 2008, paras 65–67 (further noting that the finding of a link to intra-EU trade will be presumed if the market in question has a certain cross-border element); C-384/08, *Attanasio Group*, 2010, paras 23–24; C-570/07 and C-571/07, *Blanco Pérez and Chao Gómez*, 2010, paras 40–41; C-709/20, *The Department for Communities in Northern Ireland*, 2021, paras 56–59.

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internal situation), the Treaty provisions on free movement are not applicable to the main proceedings,[121] and the Court will in principle leave the preliminary question without a substantive answer,[122] or rule that it has no jurisdiction to answer the questions referred.[123]

Similarly, where the question concerns the interpretation of provisions of the Charter or other sources relating to the Union regime for the protection of fundamental rights (see Art. 6(3) TEU), the Court of Justice examines whether the subject-matter of the main proceedings is situated within the field of application of Union law. Specifically, with respect to the Charter, Art. 51 thereof states that the provisions of the Charter are addressed to the Member States 'only when they are implementing Union law',[124] that is to say, only when they are acting within the scope of Union law.[125] Therefore, the Court has ruled—often by way of reasoned order under Art. 53(2) of the CJ Rules of Procedure—that it has no jurisdiction to answer questions referred by the national court relating to situations that fall outside the scope of Union law.[126]

The scope of application of Art. 47 of the Charter has led to some discussion in the context of the Court's case-law relating to the rule of law.[127] Apart from the question when a Member State is implementing Union law for the purposes of Art. 51(1) of the Charter, other issues are also involved, such as the scope of application of the second subparagraph of Art. 19(1) TEU, as well as the necessity requirement following from Art. 267 TFEU.[128] The Court has held that it has jurisdiction to answer questions on the interpretation of Art. 47 of the Charter in connection to rules concerning the

[121] As emphasized by the Court of Justice, it is not possible to raise against this conclusion the Treaty provisions on Union citizenship (Arts 20–21 TFEU) because Union citizenship is not intended to expand the material scope of the Treaties to internal situations which have no link to Union law: see C-212/06, *Gouvernement de la Communauté française and Gouvernement wallon*, 2008, para. 39; see also C-535/08, *Pignataro* (order), 2009, paras 15–16. For the purposes of interpreting the Union citizenship provisions, the Treaty rules governing free movement of persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them to any of the situations governed by Union law and are confined in all relevant respects within a single Member State, provided, however, that the situation of the Union citizen concerned does not include national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of those rights: see C-434/09, *McCarthy*, 2011, paras 44–57. It should be pointed out, however, that not all Union law requires a cross-border element to be applicable to a dispute before a national court: see C-304/08, *Plus Warenhandelsgesellschaft*, 2010, paras 27–28; C-393/17, *Kirschstein*, 2019, para. 24.

[122] See C-134/95, *USSL No. 47 di Biella*, 1997, paras 19–23; C-108/98, *RI.SAN.*, 1999, paras 21–23; C-97/98, *Jägerskiöld*, 1999, paras 42–44. In relation to the Charter, see C-94/20, *Land Oberösterreich*, 2021, paras 60–64.

[123] See C-245/09, *Omalet*, 2010, paras 9–18. While such issues have been dealt with by the Court of Justice as part of the substance of the ruling on the question referred, the Court has emphasized that where a reference is sought on the interpretation of the free movement provisions in a situation where all the relevant facts of the dispute in the main proceedings are confined within a single Member State, the Court must assess whether it has jurisdiction to rule on the interpretation of those provisions: see C-380/05, *Centro Europa 7*, 2008, para. 64; C-384/08, *Attanasio Group*, 2010, para. 22; C-245/09, *Omalet*, 2010, paras 9–10.

[124] Charter, Art. 51(1). See also Art. 6(1), second para. TEU: 'The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.'

[125] See C-256/11, *Dereci*, 2011, paras 71–72; C-399/11, *Melloni*, 2013, paras 55–64; C-617/10, *Åkerberg Fransson*, 2013, paras 16–31; C-679/20, *Administración General del Estado* (order), 2021, paras 27–28; C-238/20, *'Sātiņi-S' SIA*, 2022, paras 21–29. For detailed discussion, see K. Lenaerts and P. Van Nuffel (T. Corthaut (ed.)), *EU Constitutional Law* (OUP, 2021) para. 25.009.

[126] See C-339/10, *Estov and Others* (order), 2010; C-457/09, *Chartry* (order), 2011; C-267/10 and C-268/10, *Rossius and Collard* (order), 2011; C-710/20, *AM*, 2022 (order), paras 35–36.

[127] See para. 2.03.

[128] See para. 3.29.

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organization of a national justice system,[129] in particular in relation to the requirements of judicial independence and impartiality, where such questions are referred to it by a national court before which a dispute is pending that concerns a situation falling within the scope of Union law, that is, where a Member State is implementing Union law.[130]

The Court's case-law regarding the rule of law is based not only on Art. 47 of the Charter, but also, perhaps even more prominently, on the second subparagraph of Art. 19(1) TEU.[131] Both provisions lay down an obligation for the Member States to provide effective judicial protection, including access to courts that are independent, impartial, and established by law. However, the scope of application of the second subparagraph of Art. 19(1) TEU is broader and extends to 'fields covered by Union law'.[132] In relation to national courts, this means that every national court that may be called upon to apply or interpret Union law must comply with the requirements flowing from the second subparagraph of Art. 19(1) TEU. Only in this way do the Member States comply with their obligation to guarantee effective judicial protection in the fields covered by Union law.[133]

Consequently, while both Art. 47 of the Charter and the second subparagraph of Art. 19(1) TEU establish an obligation for the Member States to provide effective judicial protection, their scope of application is different. This is aptly illustrated by the judgment in *Repubblika*,[134] in which the Court of Justice gave a preliminary ruling on the interpretation of the second subparagraph of Art. 19(1) TEU, but held that Art. 47 of the Charter was not applicable to the dispute in the main proceedings because the Member State concerned was not implementing Union law within the meaning of Art. 51(1) of the Charter. In that case, the national court sought a ruling on the conformity with Union law, in particular Art. 47 of the Charter and the second subparagraph of Art. 19(1) TEU, of national provisions governing the procedure for the appointment of members of the judiciary. The Court considered that it did not appear from the order for reference that the person invoking Art. 47 of the Charter was relying on a right conferred upon it by a provision of Union law. Therefore, as the case did not appear to involve a situation in which the Member State was implementing Union law for the purposes of Art. 51(1) of the Charter, Art. 47 of the Charter was not applicable, and

[129] C-585/18, C-624/18, and C-625/18, *A.K. and Others*, 2019, paras 76–86; C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, and C-397/19, *Asociația 'Forumul Judecătorilor din România'*, 2021, para. 111; C-748/19 to C-754/19, *Prokuratura Rejonowa Warszawa Wola w Warszawie*, 2021, paras 36–38; C-132/20, *Getin Noble Bank*, 2022, para. 88. Further to this, the question whether the Member States' competence for the organization of the justice system can be made subject to requirements flowing from Art. 47 of the Charter is a question about the interpretation of that provision and can thus be the subject-matter of a reference for a preliminary ruling: see C-824/18, *A.B. and Others*, 2021, para. 80; C-896/19, *Repubblika*, 2021, para. 33. Similar considerations apply in relation to Art. 19(1), second subpara. TEU: see C-508/19, *Prokurator Generalny*, 2022, paras 54–58.

[130] See C-522/18, *Zakład Ubezpieczeń Społecznych* (order), 2020, para. 32; C-272/19, *Land Hessen*, 2020, paras 46–50.

[131] See C-64/16, *Associação Sindical dos Juízes Portugueses*, 2018, paras 29–37. See further paras 2.03, 4.10.

[132] See C-558/18 and C-563/18, *Miasto Łowicz*, AG Tanchev Opinion, 2019, points 91–92, in which the Advocate General underscored that the Court's line of case-law on internal situations, in particular, its judgment in *Ullens de Schooten*, does not apply in relation to Art. 19(1), second subpara. TEU.

[133] See paras 2.03, 4.10.

[134] See C-896/19, *Repubblika*, 2021, paras 35–46.

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the Court could not interpret that provision. That being said, since the case concerned the conformity of national provisions governing the appointment of judges which could be called upon to apply Union law, the case fell within the scope of the second subparagraph of Art. 19(1) TEU, as that provision is 'intended to apply in the context of an action the purpose of which is thus to challenge the conformity with EU law of provisions of national law which it is alleged are liable to affect judicial independence'.[135]

The judgment in *Repubblika* does not mean, however, that a question referred on the interpretation of the second subparagraph of Art. 19(1) TEU will always be admissible. It is important to underscore that the dispute before the referring court in *Repubblika* concerned the compatibility of national rules governing the appointment of judges with Union law. The answer given the Court was necessary to enable the referring court to decide the case before it.[136] By contrast, the necessity criterion flowing from Art. 267 TFEU is not fulfilled where there is no connecting factor between the dispute before the referring court and the provisions of Union law whose interpretation is sought. In other words, an interpretation must be objectively required for the decision to be taken by the referring court.[137] Further to this, the Court will not answer questions regarding the second subparagraph of Article 19(1) TEU, where it is not apparent how the Court's answer may help the referring court in deciding the dispute pending before it.[138]

(b) Exceptions

6.25 In four situations, the Court of Justice accepts jurisdiction to interpret provisions of Union law, even though the issues raised in the main proceedings are not directly linked to a situation falling within the scope of Union law.[139]

(i) Potential effect of national rule on cross-border activities

6.26 The Court has referred to the potential effect the national rule at issue might have on cross-border activities to substantiate its jurisdiction to provide an interpretation of

[135] C-896/19, *Repubblika*, 2021, para. 39.

[136] See para. 3.29.

[137] See C-558/18 and C-563/18, *Miasto Łowicz*, 2020, paras 47–48; C-564/19, *IS*, 2021, para. 142. See further C-256/19, *S.A.D. Maler und Anstreicher* (order), 2020, paras 46–48; C-623/18, *Prokuratura Rejonowa w Słubicach*, 2020.

[138] C-564/19, *IS*, 2021, para. 144. See also C-564/19, *IS*, AG Pikamäe Opinion, 2021, points 88–92.

[139] See C-268/15, *Ullens de Schooten*, 2016, paras 47–55. In this judgment, the Court systematized its case-law on this point and provided an overview of the four situations in which the Court will accept jurisdiction despite all elements of the case pending before the referring court being internal to a single Member State; see also C-343/17, *Fremoluc*, 2018, paras 20–21; C-298/17, *France Télévisions*, 2018, para. 32; C-394/21, *Bursa Română de Mărfuri*, 2023, para. 49. While that case-law had been criticized for being too willing to accept preliminary questions relating to issues that fall outside of the scope of Union law (see J. Krommendijk, 'Wide Open and Unguarded Stand Our Gates: The CJEU and References for a Preliminary Ruling in Purely Internal Situations' (2007) G.L.J. 1392), it appears that the Court has recently turned to a stricter approach (S. Prechal, 'Interne situatie en prejudiciële vragen' (2015) S.E.W. 494), of which the *Ullens de Schooten* judgment is said to be its culmination, in particular, by specifying the necessary information an order for reference should contain when all elements of the case pending before the referring court are situated in a single Member State (see M. Fierstra, 'Fundamentele vrijheden en zuiver nationale situaties: de navigatie tussen Scylla en Charybdis' (2017) S.E.W. 220, 223–224; N. Wahl and L. Prete, 'The Gatekeepers of Article 267 TFEU: On Jurisdiction and Admissibility of References for Preliminary Rulings' (2018) C.M.L.Rev. 511, 534; S. Iglesias Sanchez, 'Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to Be Abandoned' (2018) E. Const. L. Rev. 7, 19–22). See C-532/15 and C-532/15, *Eurosaneamientos*, 2016, paras 43–50; C-343/17, *Fremoluc*, 2018, paras 18–33.

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provisions of the Treaties relating to the fundamental freedoms, despite the absence of a cross-border element in the main action. This is the case where nationals of other Member States have been or are interested in making use of those freedoms for carrying on activities in the territory of the Member State that has enacted the national legislation in question where that legislation applies without distinction to nationals of that State and those of other Member States.[140]

(ii) Reference made in the context of annulment proceedings

6.27 Where the referring court makes a request for a preliminary ruling in proceedings for the annulment of provisions which apply not only to its own nationals, but also to those of other Member States, the decision of the referring court that will be adopted following the Court's preliminary ruling will also have effects on the nationals of other Member States. The objective nature of the national proceedings therefore justifies the Court giving an answer to the questions put to it in relation to the provisions of the Treaties on the fundamental freedoms, even though the dispute in the main proceedings is confined in all respects within a single Member State.[141]

(iii) National law prohibiting reverse discrimination

6.28 The Court considers that a reply might be useful to the national court if its national law were to require that a citizen of the Member State concerned must be allowed to enjoy the same rights as those that a citizen of another Member State would derive from Union law in the same situation; in short, if the national law concerned were to prohibit reverse discrimination.[142] Consequently, if these circumstances are applicable, the Court finds that it has jurisdiction to answer the questions referred.[143]

[140] C-268/15, *Ullens de Schooten*, 2016, para. 50. See C-470/11, *Garkalns*, 2012, para. 21; C-159/12 to C-161/12, *Venturini*, 2013, paras 24–29; C-465/18, *Comune di Bernareggio*, 2019, paras 33–36. Such an effect cannot be inferred from the mere fact that Union citizens from other Member States could make use of the services offered in the Member State concerned: see C-665/18, *Pólus Vegas* (order), 2019, para. 24; C-311/19, *BONVER WIN*, 2020, para. 24. For further cases in which the application of this exception was rejected, see C-591/15, *The Gibraltar Betting and Gaming Association Limited*, 2017, para. 55; C-343/17, *Fremoluc*, 2018, paras 27–32; C-53/18, *Pasquale Mastromartino*, 2019, paras 36–37; C-24/18, *Bán* (order), 2018, para. 21; C-503/20, *Banco Santander* (order), 2021, paras 41–45; C-571/20, *Ministero dell'Istruzione, dell'Università e della Ricerca and Others* (order), 2021, paras 23–26; C-436/20, *ASADE*, 2022, paras 46–51.

[141] C-268/15, *Ullens de Schooten*, 2016, para. 51. See C-197/11 and C-203/11, *Libert*, 2013, paras 34–35; C-125/16, *Malta Dental Technologists Association and Reynaud*, 2017, para. 30; C-233/16, *Europamur Alimentación*, 2018, para. 22; C-407/19 and C-471/19, *Katoen Natie Bulk Terminals*, 2021, para. 53; C-391/20, *Cilevičs and Others*, 2022, paras 32–33.

[142] C-268/15, *Ullens de Schooten*, 2016, para. 52. See C-448/98, *Guimont*, 2000, para. 23; C-570/07 and C-571/07, *Blanco Pérez and Chao Gómez*, 2010, para. 36; C-245/09, *Omalet*, 2010, para. 15; C-342/17, *Memoria*, 2018, para. 23; C-234/19, *EOS Matrix* (order), 2019, para. 25; C-634/18, *Prokuratura Rejonowa w Słupsku*, 2020, para. 25. However, the Court is not competent to answer questions regarding a situation of alleged reverse discrimination where national law does not have such a specific aim and the alleged discrimination is the mere result of the interplay between Union law and national law: see C-657/18, *Hrvatska radiotelevizija*, 2019, paras 26–27.

[143] See C-300/01, *Salzmann*, 2003, paras 32–35; C-6/01, *Anomar and Others*, 2003, paras 39, 41; C-250/03, *Mauri* (order), 2005, para. 21; C-380/05, *Centro Europa 7*, 2008, paras 69–70. For cases in which this exception has been held not to apply, see C-245/09, *Omalet*, 2010, paras 15–17. There are other cases in which, as a matter of substance, the Court has stressed that its interpretation of the relevant Union law rules may be helpful to the national court under these conditions (i.e. whether national law requires nationals of that Member State to be accorded the same rights as nationals of other Member States in comparable situations), without providing a basis for the Court's preliminary rulings jurisdiction as such: see C-238/02, *Douwe Egberts*, 2004, para. 58; C-212/06, *Gouvernement de la Communauté française and Gouvernement wallon*, 2008, para. 40. As noted by commentators, there is some connection between this exception and the *Dzodzi* line of case-law: see C. Ritter, 'Purely Internal Situations, Reverse Discrimination, *Guimont*, *Dzodzi* and Article 234' (2006) E.L.Rev. 690. Indeed, the rationale

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(iv) National law refers to Union law

6.29 Where provisions of Union law have been made applicable by national law, the Court will accept jurisdiction even though the facts of the main proceedings are outside the direct scope of Union law.[144] On the basis of what has been referred to as the *Dzodzi* line of case-law,[145] the Court considers that it is 'manifestly in the interest of the [Union] legal order that, in order to forestall future differences of interpretation, every Union provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied'.[146] By recognizing its interpretative jurisdiction, the Court avoids the provisions of Union law in issue taking on a life of their own. Moreover, if the Court of Justice refused—in a case such as *Dzodzi*—to accede to a request from the national court to provide the correct interpretation of the provisions in question, a national court could, in a future case in which—by contrast to *Dzodzi*—Union law is applicable in its own right, be more easily inclined to come to the (possibly wrong) conclusion that the answer to the question of interpretation is obvious (or already in existence) and that it is therefore not necessary to seek a preliminary ruling. This would in turn put the uniform interpretation of Union law at risk.[147] The Court of Justice also accepts jurisdiction to give preliminary rulings on interpretation on the same terms where provisions of Union law are applicable for the resolution of a dispute by virtue of a contractual relationship between the parties.[148] Further to this, the fact that the Union

for this exception, as with the *Dzodzi* case-law, goes back to the emphasis placed on the system of judicial cooperation in the preliminary ruling procedure, in the sense that the preliminary ruling given by the Court of Justice can be of help to the national court in adjudicating the case before it under circumstances where it may be confronted with questions concerning the rights derived from Union law afforded to nationals of other Member States in order to grant the same rights to nationals of the Member State concerned, thereby justifying the approach in the case-law to extend the Court of Justice's preliminary ruling jurisdiction.

[144] C-268/15, *Ullens de Schooten*, 2016, para. 53; C-372/16, *Sayyouni*, 2017, para. 28; C-327/16 and C-421/16, *Jacob*, 2018, para. 33; C-380/17, *K and B*, 2018, para. 34; C-316/21, *Monument Vandekerckhove* (order), 2021, paras 28, 34; C-164/21 and C-318/21, *BALTIJAS STARPTAUTISKĀ AKADĒMIJA*, 2022, para. 35; C-691/21, *Cafpi and Aviva assurances*, 2022, paras 30–34.

[145] C-297/88 and C-197/89, *Dzodzi*, 1990. Although the Court of Justice has drawn attention to some earlier case-law in which it took a similar approach (namely, 166/84, *Thomasdünger*, 1985, paras 11–12), it has given the label '*Dzodzi* line of cases' to the established line of judgments in which the Court has held that it has jurisdiction to give preliminary rulings on questions concerning Union law provisions in situations where the facts of the cases being considered by the national courts are outside the scope of Union law, but where those provisions have been rendered applicable by domestic law: see C-28/95, *Leur-Bloem*, 1997, para. 27; C-130/95, *Giloy*, 1997, para. 23; C-48/07, *Les Vergers du Vieux Tauves*, 2008, para. 21.

[146] See C-297/88 and C-197/89, *Dzodzi*, 1990, para. 37; C-295/16, *Europamur Alimentación*, 2017, paras 29, 32; C-30/18, *Generics*, 2020, para. 27; C-394/18, *I.G.I.*, 2020, para. 46; C-430/19, *C.F.*, 2020, para. 25; C-620/19, *Land Nordrhein-Westfalen*, 2020, para. 34; C-306/20, *Visma Enterprise*, 2021, para. 45; C-195/21, *Smetna palata na Republika Bulgaria*, 2022, para. 43; C-64/21, *Rigall Arteria Management*, 2022, para. 25. See also C-267/99, *Adam*, 2001, paras 27–28 (stressing that this reasoning applies all the more when the national legislation which uses a concept of a provision of Union law has been adopted with a view to the transposition into internal law of a directive of which the said provision forms part); C-175/08, C-176/08, C-178/08, and C-179/08, *Abdulla and Others*, 2010, para. 48 (involving a situation where national law refers to the provisions of a directive in order to determine the rules applicable to a situation which is governed by that law). Reasoning by analogy with the latter judgment, the Court of Justice held that this also applies to the specific case where national law refers to the content of provisions of an international agreement which have been re-stated in a directive in order to determine the rules applicable to a situation that is governed by that law: see C-57/09 and C-101/09, *B and D*, 2010, para. 71.

[147] See K. Lenaerts, 'The Unity of European Law and the Overload of the ECJ: The System of Preliminary Rulings Revisited' in I. Pernice, J. Kokott, and C. Saunders (eds), *The Future of the European Judicial System in a Comparative Perspective* (Nomos, 2005) 212.

[148] See C-88/91, *Federconsorzi*, 1992, paras 6–9. Yet, in doing so, the Court emphasized that its jurisdiction concerned only the interpretation of Union law, not matters relating to the contract or provisions of national law

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legislature specifically limited the scope of application of a Union directive cannot call into question the jurisdiction of the Court to accept references for a preliminary ruling regarding provisions of that directive that have been made applicable by national law to situations which have been expressly excluded from the scope of that directive by the Union legislature.[149]

For the *Dzodzi* line of case-law to apply, the Court requires that identical treatment of national law and Union law is ensured. This means that the reference made by national law to Union law is direct and unconditional,[150] and that provisions of national law do not allow the interpretation of those rules by the Court to be departed from.[151] Thus, to take a well-known example, in *Kleinwort Benson*[152] the Court held that it had no jurisdiction to give a preliminary ruling on a provision of the Brussels Convention on the grounds that the dispute in the main proceedings was not concerned with the interpretation of this provision as such but with that of a provision of domestic law modelled on the Convention and partially reproducing its terms, and, moreover, that the domestic law provided for the national authorities to adopt modifications designed to produce divergence between the provisions of that law and the corresponding provisions of the Convention. The Court properly inferred from this that the provisions of the Convention could not be regarded as having been rendered applicable as such in cases outside the scope of the Convention by the law of the Contracting State concerned. The Court also emphasized that, in applying the provisions of national law modelled on the Brussels Convention, the national courts were not bound by its case-law, but were required only to have regard to it.

In subsequent cases, the Court of Justice has taken pains to distinguish, albeit loosely, the factors identified in *Kleinwort Benson* from those situations in which the *Dzodzi* line of case-law applies. For example, in *Les Vergers du Vieux Tauves*,[153]

which may determine the scope of the contractual obligations: see C-88/91, *Federconsorzi*, 1992, para. 10; see also C-73/89, *Fournier*, 1992, paras 22–24.

[149] See C-257/17, *C and A*, 2018, paras 36–40; C-381/18 and C-382/18, *G.S.*, 2019, paras 46–47.

[150] See C-394/18, *I.G.I.*, 2020, para. 46; C-469/18 and C-470/18, *Belgische Staat*, 2019, para. 23; C-634/18, *Prokuratura Rejonowa w Słupsku*, 2020, para. 26; C-367/19, *Tax-Fin-Lex*, 2020, para. 21; C-394/19, *CPAS d'Anderlecht* (order), 2020, para. 29; C-430/19, *C.F.*, 2020, para. 26. Such a reference is, in the words of the Court, 'hard to conceive' if Union law does not make provision for the rules to which national law would allegedly refer: see C-469/18 and C-470/18, *Belgische Staat*, 2019, para. 25. See also, in that regard, C-203/18 and C-374/18, *Deutsche Post*, AG Pikamae Opinion, 2019, points 43–62; C-620/19, *J & S Service*, AG Bobek Opinion, 2020, points 27–96; C-164/21 and C-318/21, *Baltijas Starptautiskā akadēmija*, AG Ćapeta Opinion, 2022, points 57–64.

[151] See C-313/12, *Romeo*, 2013, para. 33; C-203/18 and C-374/18, *Deutsche Post*, 2019, paras 35–44.

[152] C-346/93, *Kleinwort Benson*, 1995. Prior to this case, a somewhat laxer approach seemed to prevail: see C-73/89, *Fournier*, 1992, paras 22–23.

[153] C-48/07, *Les Vergers du Vieux Tauves*, 2008, paras 22–25. In C-371/11, *Punch Graphic Prepress Belgium*, 2012, para. 27, the Court held that 'where domestic legislation adopts for purely internal situations the same solutions as those adopted by European Union law, it is for the national court alone, in the context of the division of judicial functions between national courts and the Court of Justice under Art. 267 TFEU, to assess the precise scope of that reference to European Union law, the jurisdiction of the Court of Justice being confined to the examination of provisions of that law'. For some earlier examples, see C-28/95, *Leur-Bloem*, 1997, paras 28–31; C-130/95, *Giloy*, 1997, paras 24–28; C-1/99, *Kofisa Italia*, 2001, paras 29–32; C-306/99, *BIAO*, 2003, paras 91–93.

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the Court pointed out that the national legislation was expressly intended, as was clear from its title, to transpose a Union directive and, even though it was not stated explicitly, the fact that the referring court had referred a question for a preliminary ruling and that it established a connection between the national legislation and the directive concerned led to the conclusion that the judgment was binding on the national court. In another case, involving Union competition law, the Court ruled that, although the national legislation expressly referred to the Union regulation concerned only in order to determine the rules in domestic situations, the national legislature nonetheless decided to apply the same treatment to domestic and to Union law situations, which justified its providing a preliminary ruling in the instant case.[154] Conversely, the Court of Justice has not shied away from deeming inadmissible questions for a preliminary ruling when the provisions of Union law of which interpretation is sought clearly cannot be applied, either directly or indirectly, to the circumstances of the main proceedings and thus fall outside the scope of the *Dzodzi* line of case-law altogether.[155] Furthermore, as made clear starting in *Dzodzi*, the Court has jurisdiction only to interpret Union law; it cannot 'take account of the general scheme of the provisions of domestic law which, while referring to [Union] law, define the extent of that reference'.[156] The Court has therefore drawn the boundary between its own jurisdiction and that of the national court in the following terms: '[C]onsideration of the limits which the national legislature may have placed on the application of [Union] law to purely internal situations is a matter for domestic law and consequently falls within the exclusive jurisdiction of the courts of the Member States.'[157]

Lastly, national law should refer to a rule of Union law. It is, for example, not sufficient that national law should be applied in conformity with the principle of effectiveness to render the *Dzodzi* line of case-law applicable.[158]

[154] See C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio*, 2006, paras 21–22. For other examples which do not identify *Kleinwort Benson* explicitly, see C-3/04, *Poseidon Chartering*, 2006, paras 16–19; C-280/06, *ETI and Others*, 2007, paras 23–26.

[155] See C-2/97, *IP*, 1998, paras 59–62; C-310/10, *Agafiței and Others*, 2011, paras 38–48; C-583/10, *Nolan*, 2012, paras 47–52; C-482/10, *Cicala*, 2011, paras 17–30; C-313/12, *Romeo*, 2013, paras 32–35; C-620/19, *Land Nordrhein-Westfalen*, 2020, paras 39–52. Further to this, it must be apparent from the order for reference that the Court has jurisdiction on the basis of the *Dzodzi* line of case-law. A referring court must thus indicate the specific factors from which it can be inferred that provisions of Union law have been made directly and unconditionally applicable by national law. It is not sufficient to merely indicate that provisions of Union law apply outside of the direct scope of Union law on the basis of national law: see C-268/15, *Ullens de Schooten*, 2016, paras 54–55; C-465/18, *Comune di Bernareggio*, 2019, para. 34; C-430/19, *C.F.*, 2020, paras 47–49.

[156] C-297/88 and C-197/89, *Dzodzi*, 1990, para. 42.

[157] C-48/07, *Les Vergers du Vieux Tauves*, 2008, para. 27; see also C-439/07 and C-499/07, *KBC Bank and Others* (order), 2009, paras 58–60; C-620/19, *Land Nordrhein-Westfalen*, 2020, para. 35. In *Leur-Bloem* and *Giloy* the Court held, however, that in every case where it had held that it had jurisdiction to give preliminary rulings on questions concerning Union provisions in situations where the facts of the cases being considered by the national courts were outside the scope of Union law, the application of the provisions of Union law was manifestly not limited by provisions of domestic law or contractual provisions incorporating those Union provisions (C-28/95, *Leur-Bloem*, 1997, para. 27, and C-130/95, *Giloy*, 1997, para. 23).

[158] See C-469/18 and C-470/18, *Belgische Staat*, 2019, para. 25.

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C. Reference back to the national court

6.30 When the Court of Justice interprets Union law in a case where certain relevant facts or points of national law have not yet been established in the main proceedings, it will indicate precisely what findings the national court has to make in order to resolve the case in accordance with its interpretation.[159] However, the Court of Justice may not abuse this sort of reference back to the national court by evading its responsibility for making the necessary appraisals in interpreting Union law. The Court is under a duty to give the national court an answer which, in principle, will lead directly to the resolution of the case (at least as far as Union law is concerned). Only where, in the concrete context of the main proceedings, some specific facts or points of national law require clarification in order to make a 'useful interpretation' of Union law work will that clarification have to be made by the national court, after the Court of Justice has clearly identified which facts and points of national law must be elucidated.[160] Where, by contrast, the Court of Justice is itself apprised of the uncontested facts and points of national law which are necessary in order to reach a decision in the main proceedings, then it has to have regard to those facts and points of law as such in making the 'useful interpretation' of Union law expected by the national court.[161]

D. Jurisdiction of the national court

6.31 Naturally, it falls in any event to the national court to dispose of the case. In that sense, the judgment giving a ruling on interpretation, no matter to what extent it determines the outcome of the main proceedings, is always 'preliminary', that is to say, given before the national court gives final judgment in the main proceedings.[162] However, the Court of Justice does not shirk giving guidance based on the case-file and the written and oral observations which have been submitted to it, with a view to enabling the national court to give judgment on the application of Union law in the specific case which it has to adjudicate.[163] More cautiously, the Court may indicate a number of circumstances

[159] See C-142/09, *Lahousse and Lavichy*, 2010, para. 47; C-168/09, *Flos*, 2011, para. 31; C-385/12, *Hervis Sport- és Divatkereskedelm*, 2014, para. 45; C-469/17, *Funke Medien NRW*, 2019, paras 22–26; C-708/17 and C-725/17, *'EVN Bulgaria Toplofikatsia'*, 2019, paras 60–61; C-17/19, *Bouygues travaux publics*, 2020, paras 51–53; C-74/19, *Transportes Aéreos Portugueses*, 2020, para. 33; C-61/19, *Orange România*, 2020, para. 48; C-922/19, *Stichting Waternet*, 2021, para. 52; C-907/19, *Q-GmbH*, 2021, paras 24–27; C-652/20, *Allianz Elementar Versicherung*, 2022, paras 29–30; C-154/21, *Österreichische Post*, 2023, para. 50.

[160] However, the Court may, after hearing the Advocate General, request clarification from the national court (CJ Rules of Procedure, Art. 101). For an illustration, see C-54/03, *Austroplant-Arzneimittel* (order), 2004, para. 14; C-436/08 and C-437/08, *Haribo Lakritzen Hans Riegel*, 2011, para. 19; C-95/19, *Agenzia delle Dogane*, 2021, paras 38–39.

[161] See also K. Lenaerts, 'Form and Substance of the Preliminary Rulings Procedure' in D. Curtin and T. Heukels (eds), *Institutional Dynamics of European Integration. Essays in Honour of H.G. Schermers* (Vol. II, Martinus Nijhoff, 1994) 364.

[162] See 1/80, *Salmon*, 1980, para. 6.

[163] See C-559/13, *Finanzamt Dortmund-Unna*, 2015, para. 32; C-16/19, *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 2021, para. 38; C-580/19, *Stadt Offenbach am Main*, 2021, para. 25; C-344/19, *Radiotelevizija Slovenija*, 2021, paras 23–24; C-96/21, *CTS Eventim*, 2022, para. 20. See, for concrete examples, C-433/18, *Aktiva Finants*, 2019, paras 30–31; C-727/17, *Syndyk Masy Upadłości*

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which the national courts might or should take into account for the purposes of rendering their decision.[164]

In some cases, the Court of Justice has trodden a fine line with respect to leaving the case in the hands of the national court.[165] For example, in cases concerning free movement law or anti-discrimination law, the Court of Justice often indicates whether the national law at issue fails the proportionality test, but then adds that it is for the referring court to verify this.[166] In particular,[167] the Court has gone a step further when dealing with requests for preliminary rulings in certain cases on the principle of State liability for an alleged breach of Union law by a Member State.[168] While recognizing that it is in principle for the national courts to verify whether or not the conditions governing State liability for a breach of Union law are fulfilled, the Court has held that, in the case in question, it had all the necessary information to assess the conduct of the Member State concerned itself.[169] Given that these cases largely concern factually complex scenarios or particularly flagrant examples of violations of Union law by the Member State concerned, they appear to represent exceptional circumstances in which the Court seeks to ensure, as much as possible, judicial protection for individuals. Therefore, notwithstanding the division of tasks between the Court of Justice and the national courts in the preliminary ruling procedure, these cases illustrate that the Court is mindful to

ECO-WIND Construction, 2020, paras 80–82; C-84/19, C-222/19 and C-252/19, *Profi Credit Polska*, 2020, paras 81–86; C-59/19, *Winkingerhof*, 2020, paras 36–37; C-354/20 PPU and C-412/20 PPU, *Openbaar Ministerie*, 2020, para. 61; C-846/19, *Administration de l'Enregistrement, des Domaines and de la TVA*, 2021, paras 50–54; C-609/19, *BNP Paribas Personal Finance*, 2021, paras 45–57; C-776/19 to C-782/19, *BNP Paribas Personal Finance*, 2021, para. 66–78; C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim*, 2021, paras 75–87; C-485/20, *HR Rail*, 2022, paras 46–48; C-625/20, *INSS*, 2022, paras 58–66; C-36/21, *Sense Visuele Communicatie en Handel*, 2022, paras 41–43; C-242/22 PPU, *TL*, 2022, paras 81–88.

[164] See C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, 1996, para. 58; C-670/18, *Comune di Gesturi*, 2020, paras 48–51; C-826/19, *Austrian Airlines*, 2021, para. 56; C-344/19, *Radiotelevizija Slovenija,* 2021, para. 24; C-580/19, *Stadt Offenbach am Main*, 2021, para. 55; C-94/20, *Land Oberösterreich*, 2021, para. 43; C-742/19, *Ministrstvo za obrambo*, 2021, para. 85. In relation to tariff classification cases, the Court has held that 'its task is to provide the national court with guidance on the criteria which will enable the latter to classify the goods at issue correctly in the CN, rather than to effect that classification itself, a fortiori since the Court does not necessarily have available to it all the information which is essential in that regard': see C-941/19, *Samohýl group*, 2021, para. 28; C-62/20, *Vogel Import Export*, 2021, para. 28; C-822/19, *Direcția Generală Regională a Finanțelor Publice Brașov,* 2021, para. 33; C-72/21, *PRODEX*, 2022, para. 27; C-635/21, *LB*, 2023, para. 31.

[165] Regarding the concept of 'habitual residence', compare C-411/20, *Familienkasse Niedersachsen-Bremen*, 2022, para. 72, with C-289/20, *IB*, 2021, paras 57–61; C-501/20, *MPA*, 2022, para. 56. See further C-213/21 and C-214/21, *Italy Emergenza Cooperativa Sociale*, 2022, para. 39.

[166] See C-914/19, *Ministero della Giustizia*, 2021, para. 46; C-78/21, *PrivatBank and Others*, 2023, para 98.

[167] Conceivably, one could also contemplate as another example some previous case-law of the Court of Justice on the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L95/29, as amended by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (OJ 2011 L304/64)), in which the Court ruled that it had all the criteria before it to determine that a particular contract term was unfair (see in C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores*, 2000, paras 21–23), although it has essentially 'backed away' from this approach in subsequent case-law: see C-237/02, *Freiburger Kommunalbauten*, 2004, paras 22–24; C-243/08, *Pannon GSM*, 2009, paras 40–43; C-415/11, *Aziz*, 2013, para. 72.

[168] See C-319/96, *Brinkmann*, 1998, para. 29 (finding no causal link in those proceedings).

[169] See C-392/93, *British Telecommunications*, 1996, para. 41; C-283/94, C-291/94, and C-292/94, *Denkavit and Others*, 1996, para. 49; C-302/97, *Konle*, 1999, para. 59; C-140/97, *Rechberger and Others*, 1999, paras 72–73; C-452/06, *Synthon*, 2008, paras 36–46; C-429/09, *Fuß*, 2010, paras 53–58.

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ensure that the rights derived from Union law are upheld as the cases proceed to adjudication before the national court.[170]

III. Consequences

A. As regards the national court deciding the case at issue in the main proceedings

(1) Binding effect

6.32 A judgment given by the Court under Art. 267 TFEU is binding on the national court hearing the case in which the decision is given.[171] This is to be understood as meaning that all courts dealing with the case—also at a later stage of the proceedings, on appeal or upon an appeal on a point of law—are obliged to comply with the substance of the judgment giving the preliminary ruling.[172] The binding effect attaches to the whole of the operative part and main body of the judgment, since the operative part has to be understood in the light of the reasoning on which it is based.[173] Naturally, the fact that the judgment given by way of preliminary ruling is binding does not mean that the national court has invariably to apply the provisions or principles of Union law elucidated thereby in reaching its decision in the main proceedings. It may be that this judgment specifically indicates why those provisions or principles are not applicable.[174]

(2) New reference possible

6.33 The fact that a judgment given by way of a preliminary ruling is binding does not preclude the national court to which the judgment is addressed, or another court involved in deciding the case, from making a further reference for a preliminary ruling to the Court of Justice if it considers such a step to be necessary in order to give judgment in the main proceedings.[175] Such a request will be justified 'when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh

[170] See also C-242/22 PPU, *TL*, 2022, paras 68–70.

[171] For example, 29/68, *Milch-, Fett-, und Eierkontor*, 1969, para. 2; C-173/09, *Elchinov*, 2010, para. 29; C-62/14, *Gauweiler*, 2015, para. 16; C-493/17, *Weiss*, 2018, para. 19; C-824/18, *A.B. and Others*, 2021, para. 81. Conversely, the Court will declare itself without jurisdiction to give a ruling where a referring court is not bound by the Court's interpretation: see C-62/14, *Gauweiler*, 2015, para. 12.

[172] See 52/76, *Benedetti*, 1977, para. 26.

[173] See 135/77, *Bosch*, 1978, para. 4. Commentators have noted that issues concerning the binding effect of a preliminary ruling particularly arise with respect to rulings that have, in the referring court's view, gone beyond the questions submitted in the order for reference or have diverged from the facts presented therein: see M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (3rd edn, OUP, 2021) 434–438 (highlighting issues arising in national legal orders on account of the Court's different reading of the facts, which then makes binding effect problematic on account of national procedural rules).

[174] See 222/78, *ICAP*, 1979, paras 7–12. Further to this, the referring court is not precluded from amending the factual and legal context set out in the order for reference after the Court of Justice has given its preliminary ruling in the case, provided that the referring court gives full effect to the interpretation provided for in the Court's judgment: see C-80/20, *Wilo Salmson France*, 2021, para. 53.

[175] See 29/68, *Milch-, Fett-, und Eierkontor*, 1969, para. 3; C-35/11, *Test Claimants in the FII Group Litigation*, 2012, para. 2; C-706/20, *Amoena*, 2021, paras 21–24; C-561/19, *Consorzio Italian Management*, 2021, para. 38; C-655/20, *Marc Gómez del Moral Guasch* (order), 2021, paras 23–25. See further para. 6.13.

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question of law to the Court, or again when it submits new considerations which might lead the Court to give a different answer to a question submitted earlier'.[176]

The validity of the judgment delivered previously cannot be contested by means of a further reference for a preliminary ruling 'as this would call in question the allocation of jurisdiction as between national courts and the Court of Justice' under Art. 267 TFEU.[177] Furthermore, the initiative for making a fresh request for a preliminary ruling lies with the national court dealing with the main proceedings alone. The parties to those proceedings are not entitled to ask the Court of Justice to interpret an earlier preliminary ruling.[178] Moreover, the Court has held that Arts 41–44 of the Statute 'list exhaustively the exceptional review procedures available for challenging the authority of the Court's judgments; however, since there are no parties to such proceedings in which the Court gives judgment by way of a preliminary ruling, the aforementioned articles do not apply to such a judgment'.[179]

(3) Sanctions for non-compliance

6.34 In the event that the national court fails to comply with its obligation to follow the judgment giving the preliminary ruling, that court, as an institution of its Member State, will be in breach of Union law. This means that, in principle, infringement proceedings may be brought against that Member State under Arts 258–260 TFEU.[180] This may also result in domestic remedies being taken with a view to reversing the infringement of Union law, or at least its consequences (including potential recourse to State liability).[181]

B. As regards national courts generally

(1) Binding on all national courts

6.35 The binding effect of a judgment by way of preliminary ruling extends further than to merely what is necessary to determine the main proceedings. It also applies outside the specific dispute in respect of which it was given to all national courts and tribunals,[182] subject, of course, to their right to make a further reference on interpretation to the

[176] 14/86, *Pretore di Salò v X*, 1987, para. 12. See, e.g. C-42/17, *M.A.S. and M.B.*, 2017, in relation to C-105/14, *Taricco and Others*, 2015. For an analysis of this case, see A. Marciano, 'The Dialogue between Courts in the so-called *Tarrico* Saga' in K. Lenaerts, C. Farinhas, A. Marciano, and F. Rolin (eds), *Building the European Union: The Jurist's View of the European Union* (Hart, 2021) 237. A further reference cannot be made, however, solely for the purposes of verifying whether the national court has correctly applied to the case in the main proceedings the interpretation provided by the Court of Justice in a preliminary ruling made in the same case: see C-262/21, *F. Hoffmann-La Roche*, 2022, para. 55.

[177] 69/85, *Wünsche* (order), 1986, para. 15. See para. 6.13.

[178] See 13/67, *Becher* (order), 1968; 40/70, *Sirena* (order), 1979 ECR 3169, 3170–3171. See also Art. 104 of the CJ Rules of Procedure.

[179] 69/85, *Wünsche* (order), 1986, para. 14.

[180] See para. 5.38.

[181] As regards the obligations on a Member State stemming from a judgment given on an order for reference from which it is apparent that national legislation is incompatible with Union law, see C-231/06 to C-233/06, *Jonkman and Others*, 2007, paras 36–41; C-177/20, *'Grossmania'*, 2022, paras 63–69. See further para. 4.71.

[182] See C-321/20, *CDT* (order), 2021, para. 26.

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Court of Justice.[183] In other words, the preliminary ruling on interpretation (as well as on validity: see para. 10.18) is considered to have *erga omnes*, as opposed to merely *inter partes*, effect.[184]

There are at least two main arguments in favour of the generalization of the binding effect of the interpretation of Union law given by way of preliminary ruling: the first relates to the declaratory nature of the interpretation, and the second concerns the aim of ensuring uniformity in the application of Union law.

(2) Declaratory nature of the interpretation

6.36 First, there is the fact that the interpretation is declaratory; it does not lay down any new rule, but is incorporated into the body of provisions and principles of Union law on which it is based. Consequently, the binding effect of the interpretation coincides with the binding effect of the provisions and principles on which it is based and which all national courts must respect.[185] It is, moreover, precisely because the interpretation has, by its very nature, such *erga omnes* effect that there are no 'parties to proceedings',[186] but rather there is a system in which, alongside the parties to the main proceedings, all the Member States, the Commission, and the Union institution, body, office, or agency which adopted the contested act are entitled to submit observations pursuant to Art. 23 of the Statute (and to take part in the oral procedure before the Court). The compass of the legal discussion which takes place before the Court accordingly corresponds with the scope of the ruling to be given.[187] It would therefore be wrong to consider that a preliminary ruling has only *inter partes* effects on the ground that it is designed primarily to help the national court reach its decision in the main proceedings in which the question referred for a preliminary ruling arose. The *inter partes* aspect attaches only to the judicial decision in the main proceedings, including the way in which that decision deals with the preliminary ruling, but it does not extend to that ruling itself.

(3) Uniformity in the application of Union law

6.37 Second, the purpose for which the preliminary ruling procedure exists—which is to secure uniformity in the interpretation of Union law throughout the Member States—would be defeated if it were to be considered that a preliminary ruling under Art. 267

[183] For an example, see 68/74, *Alaimo*, 1975. The General Court is bound by a preliminary ruling of the Court of Justice, unless it appears that the latter court 'based its assessment on inaccurate or incomplete information' (T-43/98, *Emesa Sugar v Council*, 2001, para. 73).

[184] That being said, this is an area that has been the subject of a long-running academic debate, which has been complicated by the fact that some of the terms used, such as *erga omnes*, have varying connotations in the national legal orders: D. Anderson and M. Demetriou, *References to the European Court* (Sweet & Maxwell, 2002) 331–332. Moreover, the *erga omnes* effect may in certain instances only extend to cases in which the circumstances are similar or the same: S. Law and J. Nowak, 'Procedural Harmonisation by the European Court of Justice: Procedural Autonomy and the Member States' Perspective' in F. Gascón Inchausti and B. Hess (eds), *The Future of the European Law of Civil Procedure* (Intersentia, 2020) 17, 51–58.

[185] See C-177/20, *'Grossmania'*, 2022, paras 41–42.

[186] 69/85, *Wünsche* (order), 1986, para. 14.

[187] See, in that regard, 141/81 to 143/81, *Holdijk and Others*, 1982, para. 6.

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TFEU had 'no binding effect at all except in the case in which it was given'.[188] The Court of Justice assumes that, with the exception of any new feature necessitating a refinement or even a reversal of the existing case-law, the preliminary ruling provides all national courts and tribunals with an answer to the question of Union law which gave rise to the interpretation given.[189] This is underscored by Art. 99 of the CJ Rules of Procedure, which states: 'Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled ... the Court may at any time, on a proposal from the Judge Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.' That provision combines with the long-standing practice by which the Court informs the national court by letter from the Registrar that an earlier ruling appears to answer its question and requests that the national court inform the Court whether it still wishes to maintain its request for a preliminary ruling (often the national court will then withdraw its request).[190]

Moreover, the *erga omnes* effect of the judgment given by way of preliminary rulings on interpretation is reinforced by the approach taken in the case-law concerning the temporal effects of such preliminary rulings, namely, with respect to limiting such temporal effects as seen in the remainder of the chapter (see para. 6.39).

C. Temporal effects

(1) *Ex tunc* effect

6.38 In principle, the interpretation given in the preliminary ruling simply expresses what was contained *ab initio* in the provisions and principles of Union law to which it relates. Consequently, its temporal effects are the same as the effects of those provisions and principles; in other words, it is effective as from their entry into force (*ex tunc*). According to the case-law, the interpretation given by the Court to a rule of Union law, in the exercise of the jurisdiction conferred upon it by Art. 267 TFEU, clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. Consequently, the rule as thus interpreted is to be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions are satisfied which enable an action relating to the application of that rule to be brought before the courts having jurisdiction.[191]

[188] 112/76, *Manzoni*, AG Warner Opinion, 1977 ECR 1657, 1662–1663, where he went on to say as follows: 'This, it seems to me, is where the doctrine of *stare decisis* must come into play [...] It means that all Courts throughout the Community [now Union], with the exception of the Court itself, are bound by the ratio decidendi of a Judgment of this Court.' He then referred, *inter alia*, to German legislation, which confirm this binding effect.

[189] See 76/87, 86/87 to 89/87 and 149/87, *Seguela and Others*, 1988, paras 11–14. For some examples of an express reversal of the case-law prompted by a new reference for a preliminary ruling, see C-10/89, *CNL-SUCAL*, 1990, para. 10; C-267/91 and C-268/91, *Keck and Mithouard*, 1993, para. 14; C-127/08, *Metock and Others*, 2008, para. 58; C-930/19, *Belgian State*, 2021, para. 43.

[190] See C-630/20, *Deutsche Lufthansa* (order), 2021.

[191] See 61/79, *Denkavit Italiana*, 1980, para. 16; C-331/18, *Pohotovosť*, 2019, para. 53; C-401/18, *Herst*, 2020, para. 54; C-510/19, *Openbaar Ministerie*, 2020, para. 73; C-109/20, *PL Holdings*, 2021, para. 58; C-413/20, *État belge*, 2021, para. 53; C-430/21, *RS*, 2022, para. 77; C-140/20, *Commissioner of An Garda Síochána*, 2022, para. 125.

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The proviso set out in the last sentence refers to the national procedural rules which continue to govern the conditions in which such a dispute may be brought before the courts (for example, time-limits and other procedural requirements). Admittedly, these procedural rules must accord with Union law (see para. 4.02), but their relevance—and hence the fact that they may prevent the dispute from being brought back before the courts—is not necessarily defeated by the *ex tunc* effect of the preliminary ruling on interpretation.[192]

(2) Exceptional limitation of temporal effects

6.39 It is only exceptionally[193] that the Court may, in application of the general principle of legal certainty which is inherent in the Union legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith; however, two essential criteria must be fulfilled before such a limitation can be imposed, namely, that those concerned should have acted in good faith, and that there should be a risk of serious difficulties.[194] More specifically, the Court has taken that step only in quite specific circumstances: first, where there was a risk of serious economic consequences owing in particular to the large number of legal relationships entered into in good faith on the basis of the rules considered to be validly in force; and second, where it appeared that individuals and national authorities had been led to adopt practices which did not comply with Union legislation, to which the conduct of other Member States or the Commission may even have contributed.[195] In other words, taking into account the serious difficulties which the Court's judgment may create as regards events in the past, the Court limits the effects of its preliminary rulings in time, subject to compliance with strict requirements.[196] Accordingly, on the basis of these two main components or 'factors',[197] the Court determines whether limiting the temporal effects of its preliminary ruling is justified on a case-by-case basis.

It is settled case-law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal

[192] The fact that the Court has given a preliminary ruling interpreting a provision of Union law without limiting the temporal effects of its judgment does not affect the right of a Member State to impose a time-limit under national law within which, on penalty of being barred, proceedings for repayment of charges levied in breach of that provision must be commenced (C-88/99, *Roquette Frères*, 2000, para. 36).

[193] See, in that regard, D. Düsterhaus, '*Eppur si muove*! The Past, Present, and (Possible) Future of Temporal Limitations in the Preliminary Ruling Procedure' (2017) Y.E.L.238.

[194] See C-339/19, *SC Romenergo*, 2020, para. 48; C-287/19, *DenziBank*, 2020, para. 108; C-510/19, *Openbaar Ministerie*, 2020, para. 74; C-585/19, *Academia de Studii Economice din Bucureops ti*, 2021, para. 79; C-439/19, *Latvijas Republikas Saeima*, 2021, para. 132; C-109/20, *PL Holdings*, 2021, para. 59; C-413/20, *État belge*, 2021, para. 54.

[195] See C-73/08, *Bressol and Others*, 2010, paras 91, 93; C-242/09, *Albron Catering*, 2010, paras 36–37; C-338/11 to C-347/11, *Santander Asset Management SGIIC*, 2012, paras 59–60; C-321/19, *BY*, 2020, para. 56; C-585/19, *Academia de Studii Economice din Bucureops ti*, 2021, para. 80; C-109/20, *PL Holdings*, 2021, para. 60. Compare the approach taken with respect to limiting the temporal effects of preliminary rulings on validity: see para. 10.23.

[196] See, in that regard, C-267/06, *Maruko*, 2008, para. 77. See further F. Rosenkranz, 'Temporal Effects of CJEU Judgments' in K. Riesenhuber (ed.), *European Legal Methodology* (2nd edn, Intersentia, 2021) 435.

[197] See C-577/08, *Brouwer*, 2010, para. 36.

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effects of the ruling.[198] The Court reasons that, if it were otherwise, the most serious infringements would receive more lenient treatment insofar as it is those infringements that are likely to have the most significant financial implications for Member States.[199] Furthermore, as the Court has consistently held, such a limitation of the temporal effects of a preliminary ruling may be allowed only in the actual judgment ruling upon the interpretation sought.[200] In *Meilicke*,[201] the Court of Justice refused to grant a Member State's request to limit the temporal effects of its ruling on these grounds, emphasizing that there must necessarily be a single occasion when a decision is made on the temporal effects of the requested interpretation. The principle that a limitation of the temporal effects of a preliminary ruling containing an interpretation of Union law may be allowed only in the first ruling giving that interpretation guarantees the equal treatment of the Member States and other persons subject to Union law, while fulfilling at the same time the requirements arising from the principle of legal certainty. In those proceedings, as there were prior rulings which had clarified the Union provisions at issue for which no temporal limitation had been granted, the Court held that it was therefore not appropriate to limit the temporal effects of the preliminary ruling. In this way, the Court's approach taken to the temporal effects of preliminary rulings further underscores the *erga omnes* effect of preliminary rulings in terms of constituting an important 'precedential' value for courts in other Member States.

Notably, only the Court of Justice can limit the temporal effects of its preliminary rulings; the national legislature or the domestic courts have no power to restrict the effects *ratione temporis* of a preliminary ruling if the Court of Justice itself has not done so.[202]

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[198] See C-184/99, *Grzelczyk*, 2001, paras 52–53; C-209/03, *Bidar*, 2005, paras 68–69; C-73/08, *Bressol and Others*, 2010, para. 92; C-577/08, *Brouwer*, 2010, paras 34–35; C-338/11 to C-347/11, *Santander Asset Management SGIIC*, 2012, para. 62. The fact that the interpretative judgment could result in the re-examination of numerous files and give rise to administrative and practical difficulties did not suffice in order to limit the temporal effect of the interpretative judgment: see C-372/98, *Cooke*, 2000, para. 43.

[199] See C-294/99, *Athinaïki Zythoppoïia*, 2001, para. 39.

[200] See C-292/04, *Meilicke and Others*, 2007, para. 36; C-267/06, *Maruko*, 2008, para. 77; C-581/10 and C-629/10, *Nelson and Others*, 2012, paras 92–94; C-511/18, C-512/18, and C-520/18, *La Quadrature du Net*, 2020, para. 216; C-109/20, *PL Holdings*, 2021, para. 61; C-140/20, *Commissioner of An Garda Síochána*, 2022, para. 119; C-339/20, *VD*, 2022, para. 98.

[201] C-292/04, *Meilicke and Others*, 2007, paras 37–41; see also C-426/07, *Krawczyński*, 2008, paras 43–47; C-140/20, *Commissioner of An Garda Síochána*, 2022, para. 126.

[202] See 309/85, *Barra*, 1988, para. 13: 'The fundamental need for a general and uniform application of Union law implies that it is for the Court of Justice alone to decide upon the temporal restrictions to be placed on the interpretation which it lays down.' See also C-439/19, *Latvijas Republikas Saeima*, 2021, para. 134, in which the Court stated that the temporal effects of a preliminary ruling cannot depend on the date of delivery of the judgment by the referring court in the main action; C-41/11, *Inter-Environnement Wallonie and Terre wallonne*, 2012, para. 63, in which the Court allowed, under certain conditions, a national court to make use of a national provision empowering it to maintain certain effects of a national measure adopted in breach of a procedural obligation laid down in a Union environmental directive where that national measure constituted the correct substantive transposition of another Union environmental directive. See also C-411/17, *Inter-Environnement Wallonie*, 2019, paras 177–182. That case-law is thus limited to rather exceptional situations, in which a Member State has failed to comply with procedural obligations imposed by Union law when correctly transposing a substantive Union law obligation: see C-597/17, *Belgisch Syndicaat van Chiropraxie and Bart Vandendries*, 2019, paras 61–62; C-511/18, C-512/18, and C-520/18, *La Quadrature du Net*, 2020, paras 218–220; C-24/19, *A and Others*, 2020, paras 90–94; C-140/20, *Commissioner of An Garda Síochána*, 2022, paras 120–123; C-817/19, *Ligue des droits humains*, 2022, para. 295; C-339/20, *VD*, 2022, paras 99–100. That being said, in particular instances, for example, where evidence in criminal proceedings has been obtained on the basis of national rules of which the Court has decided by way of a preliminary ruling that they are contrary to Union law, the temporal effect of that judgment might indirectly be

The burden of proof is on the party requesting the limitation of the temporal effects of the Court's ruling to demonstrate with specific evidence that all of the requirements have been fulfilled; otherwise, the request is rejected.[203] As mentioned earlier, the Court takes account of the conduct of the Commission[204] and the other Member States in the period prior to the judgment, as well as the Court's earlier case-law;[205] any acts of other Union institutions, offices, bodies, or agencies;[206] and the acts or conduct of the Member State concerned.[207] Notwithstanding these considerations, the Court may be apt to reject a request where it is clear that the party concerned has not put forward sufficient evidence that all of the requirements have been satisfied.[208]

In practice, the Court of Justice weighs on a case-by-case basis the principle of legal certainty—which is applied to obviate the serious effects which its judgment might have, as regards the past, on legal relationships entered into in good faith—against the principle of the uniform application of Union law. Where the scales tip in favour of the

limited as it will be for the national courts to decide, on the basis of national procedural law, whether such evidence can still be relied upon in criminal proceedings, subject to the requirements of equivalence and effectiveness: see C-511/18, C-512/18, and C-520/18, *La Quadrature du Net*, 2020, paras 221–227; C-339/20, *VD*, 2022, para. 104. See also C-746/18, *Prokuratuur*, 2021, paras 41–44.

[203] See C-339/19, *SC Romenergo*, 2020, para. 50. For examples in which the standard of proof was not met, see C-76/14, *Manea*, 2015, paras 56–57; C-276/14, *Wrocław*, 2015, para. 46; C-287/19, *DenziBank*, 2020, para. 109; C-585/19, *Academia de Studii Economice din Bucureops ti*, 2021, para. 81. While typically it is the Member State whose national legislation is at issue in the main proceedings which requests the limitation of the temporal effects of the Court's preliminary ruling, such a request can also be made by other interested parties within the meaning of Art. 23 of the Statute, such as the Commission (see C-262/88, *Barber*, 1990, para. 40), other Member States submitting observations in the preliminary ruling proceedings (see C-209/03, *Bidar*, 2005, para. 65; C-290/05 and C-333/05, *Nádasdi*, 2006, para. 61), or a party to the main proceedings (see C-682/17, *ExxonMobil Production Deutschland*, 2019, para. 127; C-287/19, *DenziBank*, 2020, para. 107; C-585/19, *Academia de Studii Economice din Bucureops ti*, 2021, par. 75). In certain cases, the Court of Justice has entertained a request put forward by the 'defendant' Member State for the first time at the oral hearing, although it ultimately rejected the request concerned: see C-366/99, *Griesmar*, 2001, paras 70–78; C-446/04, *Test Claimants in the FII Group Litigation*, 2006, paras 221–225; C-524/04, *Test Claimants in the Thin Cap Litigation*, 2007, paras 129–133.

[204] See 43/75, *Defrenne*, 1976, paras 72–73; 24/86, *Blaizot*, 1988, paras 32–33; C-163/90, *Legros and Others*, 1992, paras 32–33; C-437/97, *EKW and Wein & Co.*, 2000, para. 58. Compare the following cases, in which the Court did not accept the argument that the Commission's conduct justified a limitation of temporal effects: see C-228/05, *Stradasfalti*, 2006, paras 71–77 (the fact that the Commission supported the national authorities during the years at issue in the main proceedings is not sufficient); C-577/08, *Brouwer*, 2010, para. 39 (the fact that the Commission had not initiated infringement proceedings against the Member State concerned cannot be interpreted as the Commission's tacit consent to the national rules concerned); C-321/19, *Bundesrepublik Deutschland*, 2020, para. 58 (Commission opinions allegedly contributing to uncertainty regarding Union rules was adopted subsequent to the period in which the national legislation at issue applied).

[205] Cited in favour of restricting the temporal effects of the preliminary ruling, see 24/86, *Blaizot*, 1988, para. 31, and C-262/96, *Sürül*, 1999, paras 106–113; against, see 61/79, *Denkavit Italiana*, 1980, paras 19–21; C-366/99, *Griesmar*, 2001, paras 70–78. The Court has not foreclosed the possibility of granting a request for limiting the temporal effects of a preliminary ruling under circumstances where the Court would depart from established case-law, albeit in those proceedings, the Court dismissed the request on the grounds that the judgment contained a clarification of the case-law in the field: see C-17/05, *Cadman*, 2006, paras 42–43.

[206] See C-262/88, *Barber*, 1990, para. 42; C-163/90, *Legros and Others*, 1992, para. 32; C-197/94 and C-252/94, *Société Bautiaa and Société Française Maritime*, 1996, paras 44–56; C-347/00, *Barreira Pérez*, 2002, paras 43–47.

[207] See C-184/04, *Uudenkaupungin kaupunki*, 2006, para. 57 (emphasizing that the very fact that the Member State seeking the limitation of temporal effects invoked a derogation in the measure concerned which was predicated on the adjustments being 'insignificant' casts doubt on the claim that the judgment would have any significant economic repercussions); C-423/04, *Richards*, 2006, para. 43 (placing emphasis on the adoption of legislation and the Member State's withdrawal of its request to limit the temporal effects of the Court's preliminary ruling).

[208] See C-138/07, *Cobelfret*, 2009, paras 67–70; C-210/18, *WESTbahn Management*, 2019, para. 47; C-321/19, *BY*, 2020, paras 57–60.

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principle of legal certainty, the Court declares that no reliance may be placed on the provision of Union law as interpreted in order to support claims concerning periods prior to the date of its judgment, except in the case of persons who have before that date initiated legal proceedings or raised an equivalent claim under national law.[209] Finally, it should be noted that the precise scope of the temporal limitation of the effects of a preliminary ruling may be the subject of a further request for an interpretation by way of preliminary ruling (see para. 6.13).[210]

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[209] See 43/75, *Defrenne*, 1976, paras 69–75; 24/86, *Blaizot*, 1988, para. 35; C-262/88, *Barber*, 1990, paras 44–45; C-163/90, *Legros and Others*, 1992, paras 34–35; C-485/93 and C-486/93, *Simitzi*, 1995, para. 34; C-126/94, *Société Cadi Surgelés and Others*, 1996, paras 32–34; C-72/03, *Carbonati Apuani*, 2004, paras 37–42.

[210] See C-109/91, *Ten Oever*, 1993; C-110/91, *Moroni*, 1993; C-171/18, *Safeway*, 2019 (these judgments interpret the limitation of the temporal effects of the judgment in *Barber* (C-262/88, *Barber*, 1990), which the Court of Justice associated with its interpretation of Art. 157 TFEU); see also C-363/93 and C-407/93 to C-411/93, *Lancry and Others*, 1994, paras 42–43.