Speakers' Contributions

LITIGATING EUROPEAN UNION LAW

SEMINAR FOR LAWYERS IN PRIVATE PRACTICE

422DT34 Trier, 9-11 November 2022

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Litigating European Union Law

Academy of European Law, Trier

9 November 2022

Composition, organisation and competences of the Court of Justice of the European Union – an introduction

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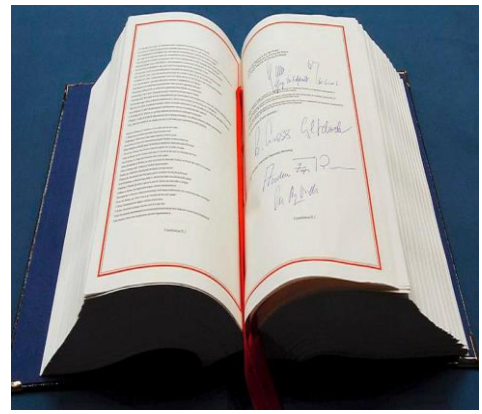
Content

- Brief historical overview
- Competences – a global perspective
- Composition
- Organisation
- Q&A



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Brief Historical Overview

Since the establishment of the Court of Justice of the European Union in 1952, its mission has been to ensure that the law is observed in the interpretation and application of the Treaties.

The CJEU contributed to establishing fundamental principles of EU law such as:

- **EU law is directly applicable in the courts of the Member States** - judgment of 5 February 1963, van Gend & Loos, 26/62
- **Primacy of EU law over domestic law** - judgment of 15 July 1964, Costa v E.N.E.L, 6/64; judgment of 17 December 1970, Internationale Handelsgesellschaft, 11/70, EU:C:1970:114…
- **Principles of horizontal and vertical effect of EU law** - judgments of 14 December 1971, Politi, 43/71; of 5 April 1979, Ratti, 148/78; of 19 January 1982, Becker, 8/81; of 14 July 1994, Faccini Dori, C-91/92; of 13 November 1990, Marleasing, C-106/89…
- **Liability of Member States for damages caused to individuals by a breach of EU law** - judgments of 19 November 1991, Francovich and Others, C-6/90 and C-9/90; of 5 March 1996, Brasserie du pêcheur and Factortame, C-46/93 and C-48/93, EU:C:1996:79…

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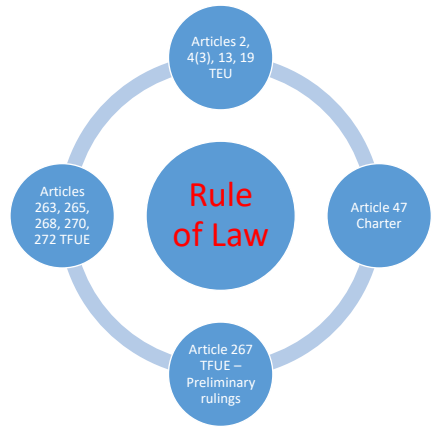
1. Competences

The European Union is a union based on the RULE OF LAW which has established a complete system of legal remedies and procedures designed to enable the Court of Justice of the European Union to review the legality of acts of the EU institutions.

judgments of 23 April 1986, Les Verts v Parliament, 294/83, paragraph 23, of 3 September 2008, Kadi and Al Barakaat International Foundation v Council and Commission, C-402/05 P and C-415/05 P, paragraph 281, of 5 November 2019, ECB and Others v Trasta Komercbanka and Others, C-663/17 P, C-665/17 P and C-669/17 P, paragraph 54…



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2. Competences

The **judicial institution of the European Union**

(Articles 13 TEU, 19 TEU, 281 TFEU,
Protocol 3 TFUE on the Statute of the CJEU)

Court of Justice

General Court

Seated in the Grand Duchy of Luxembourg

- reviews the legality of the acts of EU institutions
- ensures that the MS comply with obligations under the Treaties
- interprets EU law at the request of the national courts

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3. Competences – Court of Justice

- **References for preliminary rulings** *(article 267 TFEU)*
- **Actions for failure to fulfil obligations** (*articles 258 - 260 TFEU*)
- **Actions for annulment** (*article 263 TFEU*) **brought by EU institutions or by Member States in the cases specified in Article 51 of the Statute**
  ex. legislative acts, acts of the Parliament, the European Council or the Council or an act of the Commission under article 331 (1) TFEU
- **Actions for failure to act** *(article 265 TFEU)* **brought by EU institutions or by Member States in the cases specified in Article 51 of the Statute**
- **Appeals against judgments of the General Court** *(articles 256(1) TFEU and 56 of the Statue of the CJEU)*
- **Opinions on draft international agreements** *(article 218, paragraph 11 TFEU)*

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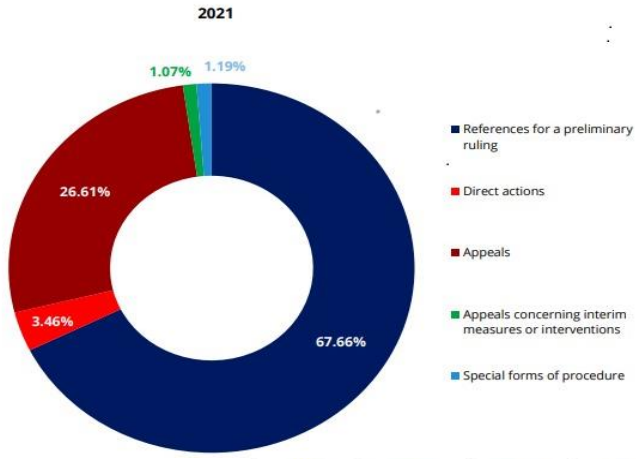
II. New cases – Nature of proceedings (2017-2021)



	2017	2018	2019	2020	2021
References for a preliminary ruling	533	568	641	557	567
Direct actions	46	63	41	38	29
Appeals	141	193	256	125	223
Appeals concerning interim measures or interventions	6	6	10	6	9
Requests for an opinion	1		1	1	
Special forms of procedure [1]	12	19	17	10	10
Total	**739**	**849**	**966**	**737**	**838**
Applications for interim measures	3	6	6	3	8

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4. Competences – General Court

- **Actions for annulment** *(article 263 TFEU)* **brought by natural or legal persons or by Member States** in the cases specified in Article 51 of the Statute (*including decisions of the Council under article 108 (2) TFUE concerning state aids, acts of the Council concerning measures to protects trade under article 207 TFUE and act of the Council adopting implementing measures in accordance with article 291 (2) TFUE*)
- Actions against decisions of the European Union Intellectual Property Office… *(article 58a of the Statute)*.
- **Actions for failure to act** *(article 265 TFEU)* **brought by natural or legal persons or by Member States** in the cases specified in Article 51 of the Statute;
- **Actions seeking compensation for damages** *(articles 268 and 340 TFEU)*
- **Disputes between the institutions of the European Union and their staff concerning employment relations and the social security system** *(article 270 TFEU)*
- **Actions based on contracts made by the European Union which expressly give jurisdiction to the General Court –** "arbitration clause" (*article 272 TFUE*)

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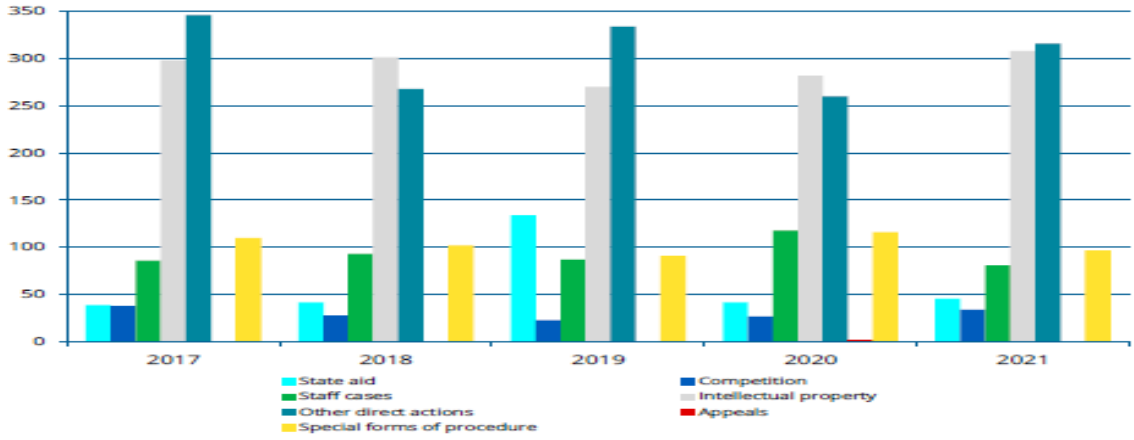
II. New cases – Nature of proceedings (2017 to 2021)



	2017	2018	2019	2020	2021
State aid	39	42	134	42	46
Competition	38	28	23	27	34
Staff cases	86	93	87	118	81
Intellectual property	298	301	270	282	308
Other direct actions	346	268	334	260	316
Appeals				2	
Special forms of procedure	110	102	91	116	97
Total	**917**	**834**	**939**	**847**	**882**

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1. Composition

Court of Justice:

- 27 Judges
- 11 Advocates-General
- 1 Registrar

General Court

- 54 Judges

(2 judges per MS as from 1/09/2019)

- 1 Registrar

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2. Composition

"Comité 255"

The panel's mission, pursuant to the provisions of Article 255 TFEU, is to 'give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments

	Year	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
	Number of meetings	8	3	6	8	3	5	11	4	8	7	4	8	1
	Number of opinions	18	3	22	24	3	24	37	9	23	27	11	32	10
Court of Justice	Renewal	0	0	14	0	2	12	0	6	8	0	3	7	0
	First term of office	2	1	4	4	1	6	1	1	6	3	5	10	1
General Court	Renewal	11	0	0	10	0	5	9	0	6	6	0	6	8
	First term of office	5	2	4	10	0	1	27	2	3	18	3	9	1

breakdown of the panel's activities per full calendar year and until 28 February 2022

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1. Organisation – decision panels - Court of Justice

- **Full Court (27 judges)**
- **Grand Chamber (15 judges)**
- **Chambers of 5 judges** (the Presidents are elected for a term of 3 years - Article 12(1) of the Rules of Procedure)
- **Chambers of 3 judges** (the Presidents are elected for a term of 1 years - Article 12(2) of the Rules of Procedure)

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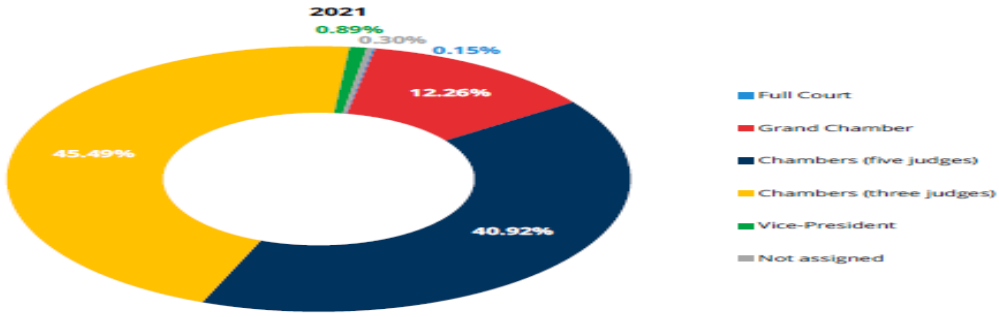
IX. Cases completed by judgments, by opinions or by orders involving a judicial determination – Bench hearing action (2017 to 2021) [1]



	2017			2018			2019			2020			2021		
	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total
Full Court	1		**1**	1		**1**	1		**1**				1		**1**
Grand Chamber	46		**46**	76		**76**	77		**77**	70		**70**	83		**83**
Chambers (five judges)	312	10	**322**	300	15	**315**	317	21	**338**	237	4	**241**	271	6	**277**
Chambers (three judges)	151	105	**256**	153	93	**246**	163	176	**339**	191	142	**333**	154	154	**308**
Vice-President		3	**3**		7	**7**		6	**6**		10	**10**		6	**6**
Not assigned								2	**2**		3	**3**		2	**2**
Total	**510**	**118**	**628**	**530**	**115**	**645**	**558**	**205**	**763**	**498**	**159**	**657**	**509**	**168**	**677**

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2. Organisation – decision panels - General Court

- **Grand Chamber (15 judges)** - article 15 of the Rules of Procedure
- **8 Chambers of 5 judges** (sitting with **5** Judges and with **3** Judges, attached to six formations)
- **2 chambers of 6 judges** (sitting with **5** Judges and with **3** Judges, attached to ten formations)
- **Single judge** (article 29 of the Rules of Procedure)

10 Presidents of chambers sitting with 3 Judges and with 5 Judges, elected for a terms of 3 years

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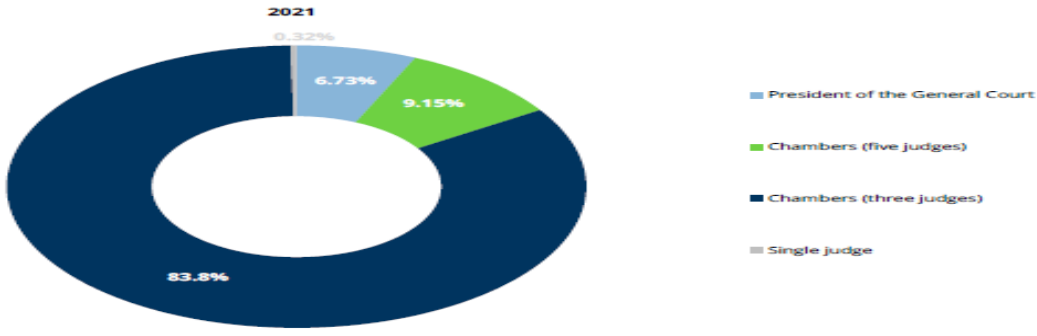
VIII. **Completed cases – Bench hearing action (2017 to 2021)**



	2017			2018			2019			2020			2021		
	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total
Grand Chamber								1	**1**						
Appeal Chamber	29	17	**46**	9	2	**11**		2	**2**						
President of the General Court		80	**80**		43	**43**		47	**47**		73	**73**		64	**64**
Chambers (five judges)	13	5	**18**	84	3	**87**	50	9	**59**	104	7	**111**	73	14	**87**
Chambers (three judges)	450	301	**751**	546	317	**863**	499	261	**760**	309	254	**563**	489	308	**797**
Single judge				5		**5**	5		**5**	1		**1**	3		**3**
Total	**492**	**403**	**895**	**644**	**365**	**1 009**	**554**	**320**	**874**	**414**	**334**	**748**	**565**	**386**	**951**

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3. Organisation - staff

- The staff according to the figures for 2021:
  - 2 247 posts - 1 355 women and 892 men (officials, temporary agents and contract staff)
  - 616 lawyer linguists + 71 interpreters (24 official Union languages and 552 possible language combinations, 1 257 000 pages produced by the legal translation service, 423 hearings and meetings with simultaneous interpretation).
- Three main groups of departments: the administrative support services, in the Directorate-General for Administration; the language services, in the Multilingualism Directorate-General; and the information services, in the Information Directorate-General.
- For several years, the Court has pursued an ambitious environmental policy, designed to meet the highest standards of sustainable development and environmental conservation.

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4. Organisation – outline of the procedure

Direct actions and appeals		References for a preliminary ruling
Written procedure		
Application **Service of the application on the defendant by the Registry** **Notice of the action in the Official Journal of the EU (C Series)** **[Interim measures]** **[Intervention]** **Defence/Response** **[Objection to admissibility]** **[Reply and Rejoinder]**	[Application for legal aid] Designation of Judge-Rapporteur and Advocate General	National court's decision to make a reference Translation into the other official languages of the European Union Notice of the questions referred for a preliminary ruling in the Official Journal of the EU (C Series) Notification to the parties to the proceedings, the Member States, the institutions of the European Union, the EEA States and the EFTA Surveillance Authority Written observations of the parties, the States and the institutions
The Judge-Rapporteur draws up the preliminary report **General meeting of the Judges and the Advocates General** **Assignment of the case to a formation** **[Measures of inquiry]**		
Oral stage		
[Opinion of the Advocate General] **Deliberation by the Judges** **Judgment**		

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Thank you very much for you attention!

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Baker McKenzie.

Litigating European Union Law

Direct actions before the General Court | Nina Niejahr, 9 November 2022

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In 45' "*en direct*" to the General Court

1. "What you want" determines the direct action to bring
2. Basics & practicalities: How to bring a direct action
3. Written Procedure – Avoiding the pitfalls
4. What to expect in Luxembourg – The oral hearing
5. Judgment & costs (appeal?)

2

1

"*What you want*" determines the direct action to bring

3

What do you want?

Direct actions

1. EU-level act to be found illegal?
   E.g., a decision of an EU institution, body or agency (ACER, ECHA, EASA, etc.)
   → Annulment action, Art. 263 TFEU
2. Illegality of inaction by EU institution or body to be confirmed?
   → Action for failure to act, Art. 265 TFEU
3. Damages for illegal EU-level act/action/inaction?
   → Action for non-contractual damages, Art. 268, 340(2), (3) TFEU
4. Urgent relief?
   → Interim measures, 278, 279 TFEU
   → Expedited procedure, 23a Statute
5. Support an applicant or defendant in a pending case?
   → Intervention Art. 40 Statute

[Additional direct actions and special forms of procedure]

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1. Annulment action (Art. 263 TFEU)

Direct actions

- Challengeable act?
  Measure intended to create legal effects regardless of its nature and form
- Standing of non-privileged applicants
  - Addressees (personal interest to bring action, vested and present)
  - Non-addressees:
    - Plaumann formula for direct & individual concern
      (*Plaumann* 25/62; *Infront* T-33/01 confirmed on appeal C-125/06 P)
    - Regulatory act of direct concern and does not entail implementing measures
      (*Telefonica* C-274/12 P; *Inuit* T-18/10 confirmed on appeal C-583/11 P; *Tate & Lyle* T-279/11 confirmed on appeal C-456/13 P, Tilly-Sabco *T-397/13*)
- Deadline – careful!
  If addressee 2 months (plus 10 days on account of distance) from notification
  (if not: calculation starts 14 days from OJEU publication; if not published: knowledge)

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2. Action for failure to act (Art. 265 TFEU)

Direct actions

- Inaction?
  Failure to address to the applicant any act other than a recommendation or an opinion
  (*Parliament v Council* 13/83)
- Standing
  "Would be"-addressee or direct and individual concern
  (*ENU* C-107/91)
- Request for action
  Call upon the institution/agency/etc. to act and, within 2 months of being so called upon ("deadline to act"), addressee has not defined its position
- Deadline
  2 months from the expiry of the deadline to act plus 10 days

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3. Action for non-contractual damages

Direct actions

- Art. 268, 340(2), (3) TFEU

  Non-contractual liability of the EU for damage caused by its institutions or servants in the performance of their duties

- Conditions (*Bergaderm* C-352/98 P)
  1. Sufficiently serious breach of a rule of EU law intended to confer rights on individuals
  2. Existence of damage
  3. Causal link between breach of law (conduct of the institution or servant) and damage

- Deadline

  5 years from the event giving rise to the damage (Art. 46 Statute)

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4. Urgent procedures (Art. 278, 279 TFEU, 23a Statute)

Direct actions

- Accessory to main action!
- Expedited procedure, Art. 151 et seq. RoP
  - Bring at the same time as main action
  - Demonstrate urgency
  - For simple cases, few pleas, no complex facts or legal questions

  → Priority treatment & shorter deadlines, one round of pleadings
- Suspension or other interim measures, Art. 156 et seq. RoP
  - Bring at the same time or after the main action
  - Must show
    - *Prima facie* case
    - Urgency (where most applications fail)
    - Balance of interest in favour of measure

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5. Intervention (Art. 40 Statute, Art. 142 et seq. RoP GC)

Direct actions

- Short deadline!
  6 weeks plus 10 days from publication of the application in the OJEU
- Non-privileged interveners
  Must support one of the main parties & show interest in the outcome of the case in request for leave to intervene (application to intervene)
- Statement in intervention (max. 20 pages)
  - Intervener receives non-confidential versions of the parties' submissions; can add new, additional, other arguments
  - Other parties have right to submit observations (max. 15 pages)
- Right to address the Court at the oral hearing
- On appeal: party to the appeal proceedings (≠ intervener)
  - No need to intervene in the appeal
  - Automatically invited to present observations (like successful party)

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Additional/special procedures …

Direct actions

- Additional direct actions and procedures
  - Staff cases, Art. 270 TFEU
  - Arbitration clauses of agreements concluded by or on behalf of the EU, Art. 272 TFEU
  - Intellectual property cases, Art. 171 et seq. RoP
- Special forms of procedure (pt. 17 Practice Rules)
  - Rectification or interpretation
  - Application for the Court to remedy a failure to adjudicate
  - Revision
  - Applications for the Court to set aside judgments by default or initiating third-party proceedings
  - Taxation of costs
  - Legal aid

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Basics & practicalities

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Sui generis system of legal recourse

Direct actions

- ≠ national systems of the EU Member States
- Note:
  - Language of the case (one of 24) & language of the court (French)
  - Composition of chambers
  - Own strict rules of procedure, including on evidence
  - Highly formalized
- Essentially written procedure
- Oral hearing relatively short, but can be decisive!
- Duration to judgment at first instance varies - 2021 on average: 20.3 months

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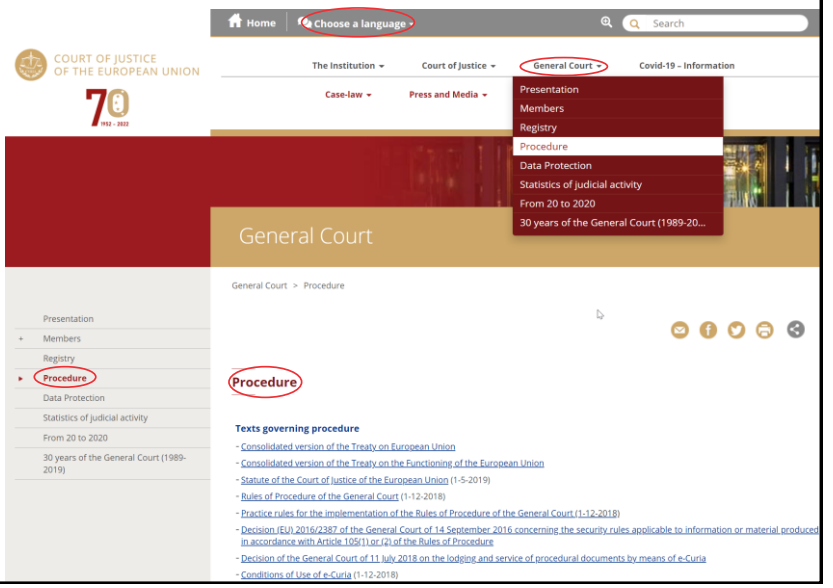
http://curia.europa.eu/jcms/jcms/Jo2_7040/en/

Direct actions

- Texts governing the procedure before the General Court, notices in the OJEU, other useful information
- A word of caution: Always check & confirm guidance against current versions of legal documents!
  They change frequently.



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Practicalities: need to know basics

Direct actions

- Deadlines
  - Calculate carefully! (Art. 58-62 RoP)
  - Only some may be extended on reasoned written request
- Obligation to be represented (Art. 19 Statute, Art. 51 RoP)
- Method of lodging and service: e-Curia (Art. 56a-57 RoP, pts. 77-79, 89-91 PR)
  - Advantages: quick, no need for paper copies/signatures, ease of access in all languages (all named lawyers can submit and receive procedural documents, files must be pdf and uploaded separately)
  - Disadvantages: need to register in good time, familiarize yourself with the system & train assistants (who can also receive but not lodge), deemed service seven days from e-mail notification
  - Alternatives: only if use of e-Curia technically impossible

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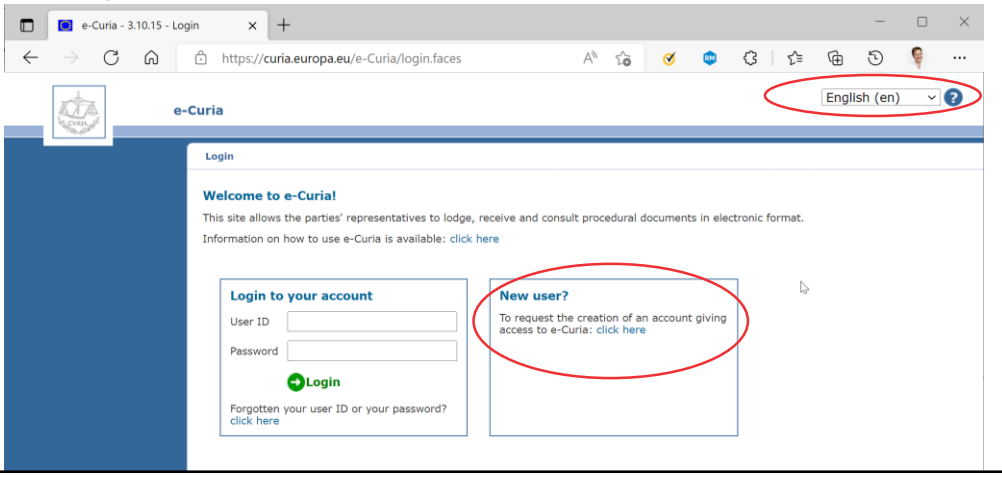
https://curia.europa.eu/e-Curia/login.faces

Direct actions

- e-Curia user login screen:



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e-Curia home screen view & functionalities

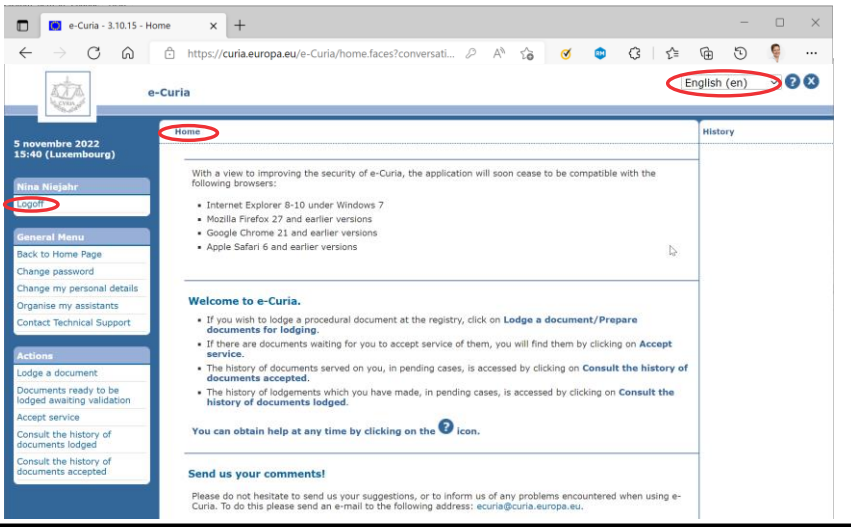
Direct actions

You will be notified by email and this message will show here :

"Documents served on you are awaiting acceptance.
To consult them click here"

All the things you can do here:

- Lodge a document/prepare document(s) for lodging
- Documents ready to be lodged awaiting validation
- Accept service
- Consult the history of documents lodged
- Consult the history of documents accepted



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Role of the registry

Direct actions

- Organizes written & prepares oral procedure
- Effects service of procedural documents
- Ensures compliance with the very formalistic procedural requirements
  - Examples: page limitations, formatting, schedules and annexes, summary of pleas, PoA, register excerpts, etc. (pts. 105-122 Practice Rules)
  - Generally, failure to comply may hold up service but can be remedied (pts. 101-104 Practice Rules)
  - Persistent failure to comply may lead to refusal of acceptance or inadmissibility (see Art. 21 Statute, Art. 78(6) RoP, pt. 101, 102 and Annex 1 & 2 Practice Rules)

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Basic procedural steps

Direct actions

- Written procedure (Art. 76-105 RoP)
  - Application, defence (max. 50 pages)
  - Reply, rejoinder (max. 25 pages) unless not necessary, but applicant can submit reasoned request
  - Maybe measures of inquiry and/or questions from the Court
  - Report for the hearing
- Oral procedure (Art. 106-115 RoP) on the Court's motion, on reasoned request or not at all (Art. 106 RoP)
  - Applicant, defendant (15 minutes)
  - Questions & answers
  - Closing statements (2-5 minutes)
- Judgment
  - Operative part delivered
  - Full version online same day (& on e-Curia)
- Appeal to the European Court of Justice
  - Limited to points of law
  - No suspensive effect
  - Deadline: 2 months (plus 10 days on account of distance)

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Written procedure – avoiding the pitfalls

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General tips – before you get started

Direct actions

- Carefully calculate deadline
- Plan timeline backwards from deadline, allow for slippage particularly in the run-up to submission
- Review procedural rules in detail
  - RoP, Practice Rules, consult guidance (aides mémoires, etc.)
  - Note all formal requirements and allocate responsibilities
- Request from the client
  - Mandatory documentation (PoA, proof of existence in law)
  - Any supporting evidence
- Remember: Majority of your judges
  - Will not share your national legal background
  - Will read the French version of your submissions

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Application (Art. 76-78 RoP, pts. 112-122 Practice Rules)

Direct actions

- Cover page
  (applicant's & representative's information, defendant, subject matter)
- Table of contents
- Introduction, summary
- Facts
- Admissibility
- Grounds of appeal (pleas in law and arguments) include all evidence, offers and requests for measures of organisation
- Form of order sought
- Date, signature (e-Curia proof of lodgement suffices)
- Annexes and schedule (challenged act = A.1, in language of the case)
- Submit at the same time but separately from the application:
  - Mandatory procedural documents (PoA, practicing certificate, etc.)
  - Summary of pleas

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Legal grounds and arguments

Direct actions

- Infringement of the EU-Treaties or of any rule of law relating to their application
- Lack of competence
- Misuse of power
- Violation of essential procedural requirements
  - Institutional procedures
  - Procedural rights

Note: *ex officio* the Court may raise:
- Lack of competence and
- Violation of essential procedural requirements

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Additional tips

Direct actions

1. Be complete, include relevant context
   - all legal pleas, consider alternative pleas as well
   - all available evidence
2. Be concise, clear, compelling and structured
   - no arguments in footnotes (may be overlooked) or annexes (will be ignored; note: annexes are not translated!)
   - avoid complex sentences, legal jargon, figures of speech, humour, get to the point quickly and make it simple
3. Consider the form of order you are seeking (include costs)
4. Avoid repetition, address defence arguments in required detail
5. Keep separate files from the start (procedural & precedent files)
6. Remember the defendant has the last word!

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4

What to expect in Luxembourg – The oral hearing

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Preparation

Direct actions

- Reserve hotel rooms early, communicate with registry
- Agree timeline with client
- Re-read substantive submissions and identify "lose-ends"
- Review report for the hearing, identify any incompleteness and inaccuracy
- Re-read key precedents again
- Update yourself on new legal developments (procedural & substantive) and review guidance for hearings: e-Curia!
- Identify and focus on key arguments/issues
- Prepare for tricky questions and closing statement
- Map out presentation and practice (keep to time, speak freely)
- Bring your gown & "mobile office" to Luxembourg

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On the day

Direct actions

- Get to the Court early
  (clear security, register, find room)
- Settle in the court room
  (applicant sits on the right, put on gown, adjust earpieces & stand, organize materials, etc., greet registrar and interpreter
- Greet judges behind closed doors
  (judges may have questions to be addressed or other instructions)
- Wait for the Court to be announced; then rise to receive the Court
- President opens oral hearing, delivery of judgments and opinions if any, then applicant is called on
- Applicant delivers opening arguments (followed by interveners), then defendant (followed by intervener)
- Questions from the bench and parties' answers/comments
- President invites brief closing statements (order = opening arguments)
- President closes hearing

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Remember…

Direct actions

1. Get there in good time
2. Calm down, address court (make & keep eye contact)
3. "Judges are human, too!" Make it as interesting as possible
4. Speak slowly (simultaneous interpretation!) and only when you have the word (microphone!) – do not interrupt, signal!
5. Keep to time limits (you may be cut off!), avoid repetition
6. Judges ask questions to inform their deliberation and your judgment!
7. Respond always, confer with colleagues/client if necessary, be brief and to the point & respectful of other parties' views
8. Judges go into deliberation straight after the hearing!

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5

Judgment & costs (appeal?)

28

Judgment/Order (Art. 264(2), 266 TFEU)

Direct actions

- Judgment, delivered in open Court, binding from date of delivery (Art. 117, 118, 121(1) RoP)
- Order, binding from date of service (Art. 119, 120, 121(2) RoP)
- Actions and issues determined by order: Art. 126-132 RoP
- Effect is declaratory, can be partial, *ex tunc* and *erga omnes* (exceptionally the Court may limit temporal effect)
- The institution whose act has been declared void (or whose failure to act has been declared to violate EU law) is required to take the necessary measures to comply with the judgment if any
- Can be appealed to the European Court of Justice (Art. 56, 57 Statute)

29

Costs (Art. 133-141 RoP)

Direct actions

- General principle: no procedural costs, parties pay their costs unless a request has been made for the Court to decide on costs
- Where costs have been applied for by the successful party the losing party pays own costs and bears the cost of the litigation necessarily incurred by the successful party (Art. 134, 140(b) RoP)
- But the Court can allocate costs particularly if there is more than one unsuccessful party or if parties have won on some and lost on other heads of claim (note: no appeal lies on costs only)
- Costs of interveners: (partly-)privileged interveners pay their own costs, others may be required to bear their own costs
- Note: only notional cost recovery from the institutions!
  See the very restrictive taxation precedents of the EU Courts (e.g., T-213/17 DEP and C-657/15 P-DEP)

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Appeal (Art. 56-61 Statute)

Direct actions

- To the European Court of Justice
- By any (partly-)unsuccessful party – including interveners!
- No suspensive effect
- On legal grounds only (no factual review):
  lack of competence, breach of procedure, infringement of EU law
- Deadline: Two months (plus ten days on account of distance)
- Only one round of written submissions
- Hearing at the discretion of the Court (less intense)
- Advocate General
- Some 2021 statistics:
  - 29% of GC judgments went on appeal (completed cases)
  - Average duration of appeal proceedings: 15.1 months

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Thank you!

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Baker McKenzie.

bakermckenzie.com

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Practical advice for lawyers on how to bring an action

Litigating European Union Law:
Seminar for Lawyers in Private Practice

Dr Vincent Power SC, Partner, A&L Goodbody

Academy of European Law, Trier
9 November 2022

P-15222821-3

1

Introduction

2

Introduction

- The purpose of this presentation is to provide a practical insight into taking an action before the Court of Justice of the European Union (**CJEU**) – in particular, direct actions before the General Court
- So, what do you need to know?

Know the…

- The plea / type of action being taken
- Administration
- Court
- Facts
- Law
- Judges
- Arguments and Counter-Arguments – Advocacy
- Practicalities…

Understand the Plea being made

5

Understand the Plea

- It is tempting to see a plea before the CJEU through the lens of one's own national jurisdiction (i.e., where one was first trained as a lawyer) but each plea in EU law has a special EU meaning and body of EU jurisprudence
- So understand the *EU* legal regime
- Understand the *EU* case law associated with the plea

6

Understand the Plea

- Know those cases relating to that plea in which the judges hearing your case were involved
- Familiarise oneself with the cases which are *pending* before the CJEU involving that plea because the decision in this case could impact others and the court could well be looking at several cases to see the impact
- And, ultimately, does this plea and the way that you have pleaded it, actually solve the client's problem?

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Administration

8

Administration

- Understand the court's administration, structure, functions and approach
- Read the court's publications and reports
- Familiarise yourself *thoroughly* with the court's procedures
- Know the court's personnel and structure
- Absorb as much hard and soft information about the court as possible

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Administration

- Understand the level of formality – and work with it
- Ask questions of everyone who could answer them
- The Court's Registry is phenomenally helpful – an excellent group of people
- The court's procedure is largely written down but not everything so do ask!
- Familiarise yourself thoroughly with www.curia.eu

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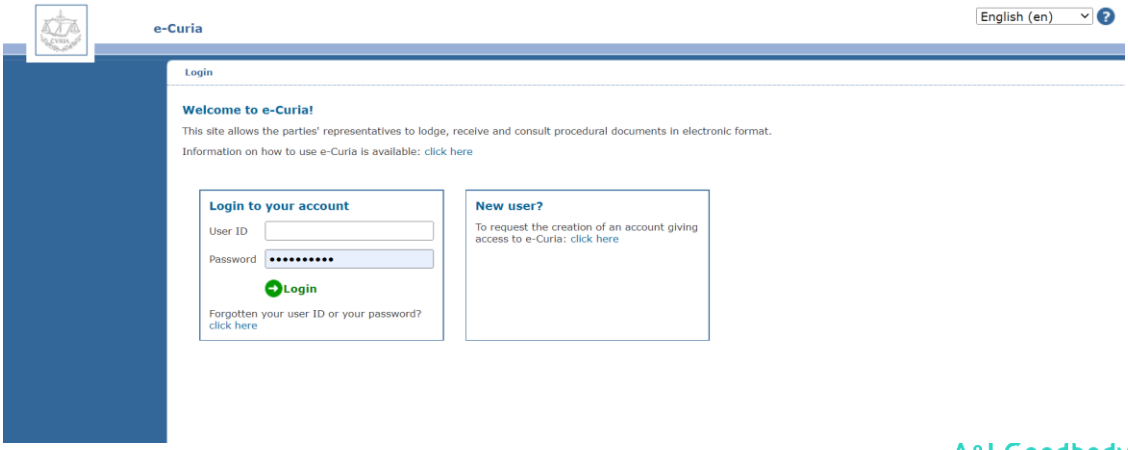
Administration

- Open an e-curia account



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Administration

- Open the account for yourself and for your assistants
- This is a wonderful e-file of the case
- Use the e-curia because it is more secure, convenient and accessible – otherwise, there is always a doubt in the back of your mind
- Think “Luxembourg time” in terms of submissions
- Ideally, file during the workday so as to be able to check with the Registry
- Think a day or two ahead
- Review e-curia alerts as soon as they arrive, note the timeline and, if needed, seek an extension but with a reasoned letter of request

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Written Submissions

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Written Submissions

- Draft the written submissions carefully and *precisely*
- Read relevant CJEU judgments before drafting
- Emulate the style and form of CJEU judgments: short, numbered paragraphs of a line or two
- Be precise
- Be concise
- Avoid repetition
- Let the arguments and evidence flow naturally
- Assume it will be your “last word”

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Written Submissions

- Is the language clear?
- Could anything be misinterpreted?
- Think of the words “conveyance”, “deed” even “court”
- Ask a non-native speaker to read it and tell you what is in it
- Would your next door neighbour or mother (neither a lawyer) understand it?
- Are you making points to convince your client or the court? (The latter matters at this stage!)
- Choice of language of the case

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Written Submissions

- Assume that an oral hearing may not be granted by the Court so include everything you need to say in the written pleadings
- Use annexes carefully but assume everything important is in the main body of the document
- Page layout, page length, citation of cases, languages need to be in accordance with the procedures – follow the rules strictly
- Use the new method of citation of cases (e.g., *van Gend en Loos* is ECLI:EU:C:1963:1 and not [1963] ECR 1 (Eng. Sp. ed.)
- Ask for your costs!

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Written Submissions

The new citation formula is the same in all languages – *van Gend en Loos* otherwise has different citations:

Judgment of the Court of 5 February 1963. - NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. - Reference for a preliminary ruling: Tariefcommissie - Pays-Bas. - Case 26-62.

European Court reports
French edition Page 00003
Dutch edition Page 00003
German edition Page 00003
Italian edition Page 00003
English special edition Page 00001
Danish special edition Page 00375
Greek special edition Page 00863
Portuguese special edition Page 00205
Spanish special edition Page 00333
Swedish special edition Page 00161
Finnish special edition Page 00161

Written Submissions

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- Ask for your costs!

Written Submissions

- Understand the Process
- The Application
- The Defence
- The Reply
- The Rejoinder
- The Statements in Intervention
- The Questions and Answers
- But at all times: the Facts, the Law, the Arguments – the Result

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Site Visit

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Site Visit

- Appearing in a case in the CJEU is a “big thing”
- Visit the Court and observe the Court before you plead there for the first time
- Do a site visit
- Know the court room in which one is appearing – the client will expect you do so
- Watch a comparable case being conducted
- Watch *everything* about the case – where they sit, when they speak, what they do, what they do not do, watch the judges, follow it through to the end – absorb everything

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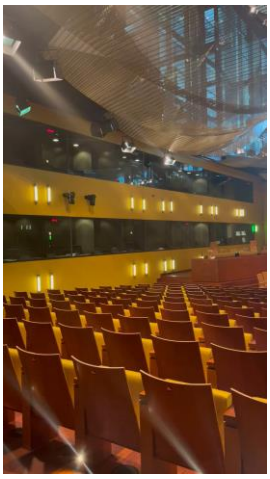
CJEU



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Site Visit

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Know the Procedure

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Know the Procedure

- Know the Procedure
- The General Court and the CJEU have different procedural rules
- Know the procedural rules intimately
- Print out the procedures, study them and bring them with you on the day
- Be ready to answer procedural questions on the day but have all the procedural angles covered off beforehand

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Know the Facts

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Know the Facts

- Know the facts of case intimately and in-depth
- Try to explain the facts of the case to a hypothetical child
- Keep the facts simple, comprehensible and brief
- Remember the limited role of witnesses in the CJEU
- Remember that the General Court is often very interested in the facts
- Keep the clients seated near you so that you can check facts with them
- Be open and honest about the facts – good, bad or indifferent
- Don’t assume the judges know the facts or have the same life experience
- Contextualise and explain what is needed

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Know the Law

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Know the Law

- EU law is dynamic and ever-changing – it is like painting a moving train
- Know the precedent
- But, moreover, know the way that the law is evolving
- Review the cases and arguments which could be put to you by the Court
- Devise the arguments which would be made against you
- Review the other cases which are pending before the CJEU which raise comparable issues
- Know the key arguments you wish to make – your three main “elevator” arguments

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Know the Judges

30

Know the Judges

Know Your Court

- Composition – Changes in composition do occur
- Life experience of the judges
- Legal experience of the judges
- Read their CVs: https://curia.europa.eu/jcms/jcms/Jo2_7035/en/
- Read their relevant legal literature

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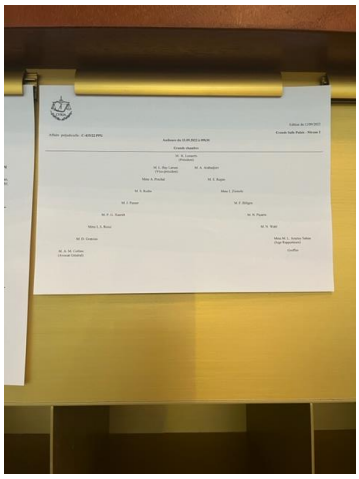
Know the Judges

Know the layout of the court and who is who



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Report for the Hearing

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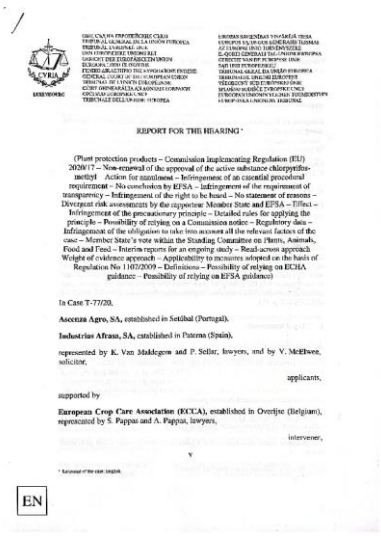
Report for the Hearing



REPORT FOR THE HEARING *

(Plant protection products – Commission implementing Regulation (EU) 2020/17 – Non-renewal of the approval of the active substance chlorpyrifos-methyl – Action for annulment – Infringement of an essential procedural requirement – No conclusion by EFSA – Infringement of the requirement of transparency – Infringement of the right to be heard – No statement of reasons – Divergent risk assessments by the rapporteur Member State and EFSA – Effect – Infringement of the precautionary principle – Detailed rules for applying the principle – Possibility of relying on a Commission notice – Regulatory data – Infringement of the obligation to take into account all the relevant factors of the case – Member State's vote within the Standing Committee on Plants, Animals, Food and Feed – Interim reports for an ongoing study – Read-across approach – Weight of evidence approach – Applicability to measures adopted on the basis of Regulation No 1107/2009 – Definitions – Possibility of relying on ECHA guidance – Possibility of relying on EFSA guidance)

In Case T-77/20,

Ascenza Agro, SA, established in Setúbal (Portugal),

Industrias Afrasa, SA, established in Paterna (Spain),

represented by K. Van Maldegem and P. Sellar, lawyers, and by V. McElwee, solicitor,

applicants,

supported by

European Crop Care Association (ECCA), established in Overijse (Belgium), represented by S. Pappas and A. Pappas, lawyers,

intervener,

v

* Language of the case: English.

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Report for the Hearing

- Pay close attention to the Report for the Hearing
- It is a summary of the case prepared by the *Juge Rapporteur*
- Check the accuracy and comprehensiveness of the:
  - > Facts
  - > Pleas
- Raise an issue if needed before the hearing
- In the preliminary meeting with the court, you may be asked about the Report

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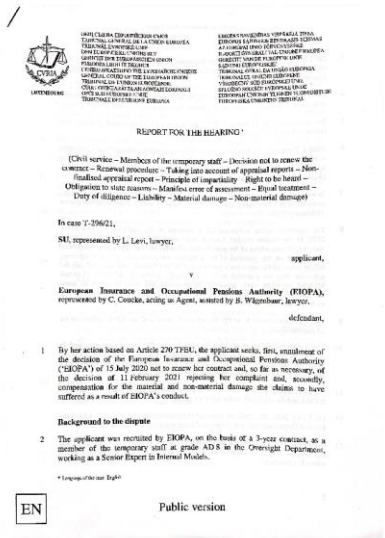
Report for the Hearing

Note “public” version v “private” version on occasion – anything you want redacted?



REPORT FOR THE HEARING

(Civil service – Members of the temporary staff – Decision not to renew the contract – Renewal procedure – Taking into account of appraisal reports – Non-finalised appraisal report – Principle of impartiality – Right to be heard – Obligation to state reasons – Manifest error of assessment – Equal treatment – Duty of diligence – Liability – Material damage – Non-material damage)

In case T-396/21,

SU, represented by L. Levi, lawyer,

applicant,

v

European Insurance and Occupational Pensions Authority (EIOPA), represented by C. Concke, acting as Agent, assisted by B. Wägenbaur, lawyer,

defendant,

1 By her action based on Article 270 TFEU, the applicant seeks, first, annulment of the decision of the European Insurance and Occupational Pensions Authority (‘EIOPA’) of 15 July 2020 not to renew her contract and, so far as necessary, of the decision of 11 February 2021 rejecting her complaint and, secondly, compensation for the material and non-material damage she claims to have suffered as a result of EIOPA’s conduct.

Background to the dispute

2 The applicant was recruited by EIOPA, on the basis of a 3-year contract, as a member of the temporary staff at grade AD 8 in the Oversight Department, working as a Senior Expert in Internal Models.

EN

Public version

Scanned with CamScanner

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Practicalities

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Written Questions from the Court

- Pay close attention to any written questions from the Court
- The questions are an insight into what is interesting / bothering the Court
- Think very carefully about the questions and your answers
- Do the Court's questions reveal that you haven't expressed yourself properly?
- Why is the Court asking *that* question?
- Follow the procedures outlined
- You may ask for more time but explain why in a reasoned letter

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Practicalities

- When do you arrive in Luxembourg?
- Where do you stay?
- When do you arrive in the Court?
- What do you bring with you?
- What do you wear?
- Turn off your phone completely or at least to silent
- Bring electrical adapters if needed
- Internet access

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Practicalities

- When do you arrive in Luxembourg? (Well in advance – not on the day)
- Where do you stay? Hotels nearby the court (e.g., Novotel and Sofitel)
- When do you arrive in the Court? (Very early)
- What do you bring with you? (Everything)
- What do you wear? (Your national legal attire / gowns)
- Turn off your phone completely or at least to silent (Yes)
- Bring electrical adapters if needed (Small ones)
- Internet access (Practise this, “forget everything” and connect)

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Practicalities

- Interpreters

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Practicalities

- Interpreters
- Role of Interpreters
- Challenges of pleading in an “interpretation” environment
- Send a copy of your proposed statement and any citations to the Interpreters in advance (e.g., a day or two in advance ideally). If you change the text then send them an update but do not be too afraid to improvise – these are very experienced interpreters
- Remember the language of the case
- Remember all the documents must be in the language of the case

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Practicalities

- Ask colleagues any questions or concerns
- Ask the Court's Registry
- Consult the General Court's Aide Memoire Practical Guide: Hearing of Oral Argument
- Consult the CJEU's Notes for the Guidance of Counsel
- Consult the CCBE's Practical Guidance for Advocates before the General Court in Direct Actions
- Practical Law has some useful guidance (e.g., "Litigation before the General Court by private parties: common procedural rules")
- Arrive at the Court room early (e.g., 8/8.15 for a 9.30 hearing)

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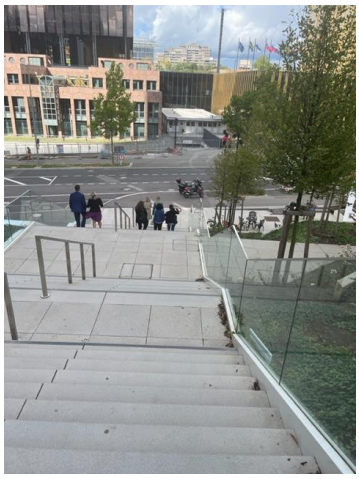
Practicalities



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Practicalities

Court's website has a map

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Practicalities

- Advise clients and your party to go through security early – it is like airport security – but with the Court's staff also arriving
- Bring your passport / identity card – advise the clients to do so too
- There is a shop in the Court but bring everything that you need

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Practicalities

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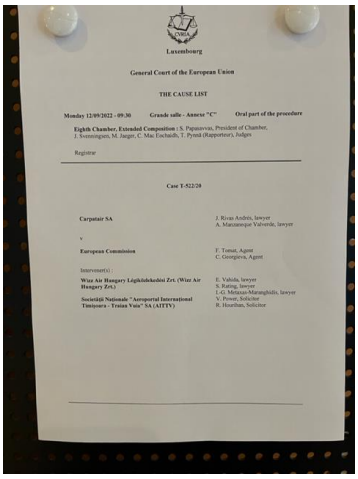
Practicalities



Luxembourg

General Court of the European Union

THE CAUSE LIST

Monday 12/09/2022 - 09:30 Grande salle - Annexe "C" Oral part of the procedure

Eighth Chamber, Extended Composition (S. Papasavvas, President of Chamber, J. Svenningsen, M. Jaeger, C. Mac Eochaidh, T. Pynnä (Rapporteur), Judges

Registrar

Case T-522/20

Carpatair SA — J. Rivas Andrés, lawyer; A. Manzanedo Valverde, lawyer

v

European Commission — T. Tomat, Agent; C. Georgieva, Agent

Intervener(s):

Wizz Air Hungary Légiközlekedési Zrt. (Wizz Air Hungary Zrt.) — E. Vahida, lawyer; S. Rating, lawyer

Société Nationale "Aeroportul Internațional Timișoara - Traian Vuia" SA (AITTV) — L-G. Metaxas-Maranghidis, lawyer; V. Power, Solicitor; R. Hourihan, Solicitor

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Practicalities

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Practicalities

- Where do you sit?

- The party moving the application sits on the right-hand side facing the judges
- The respondent sits on the left-hand side facing the judges
- The interveners sit behind the party that they are supporting
- What about the lectern?
- What about interpretation?
- What about interpretation at the lectern?
- Listen in your own language

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Practicalities

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Practicalities

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Practicalities

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Practicalities

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Practicalities

- Where do you stand?

- You go to the lectern on your side of the court
- In Covid-times, you pleaded from your seat but now one uses the lectern again
- The height of the lectern can be adjusted up or down
- Go and practise at the lectern beforehand

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Practicalities

- IT
- Wi-fi is available for free in the court room
- However, check the day before whether *your* set-up works
- If your set-up does not work then it may be best for your device to “forget” all networks and start afresh with the Court’s Wi-fi
- Then use “Guest”
- No password is needed

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Practicalities

- Meeting the Judges in the conference room behind the judges' bench
- It is for a few minutes at, say, 9.30
- This is a polite but also a practical event
- Any issue with the Report for the Hearing?
- Any issue with Witnesses?
- Anything else that you wish to raise with the Judges?
- It is like meeting the referee in a boxing bout but more civilized!

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Practicalities

- Listen attentively to everything being argued and said during the hearing
- Make notes for instant rebuttal points and for a summing up
- Link your submissions to the pleadings
- Don't depart from the pleadings in the case
- Prepare closing submissions – but don't wait for them
- Keep a running tab of key arguments/issues
- Don't raise anything new in the closing submissions
- Appear calm and in control
- Don't repeat points unnecessarily

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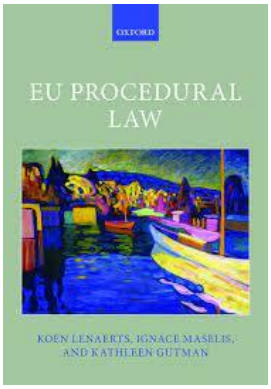
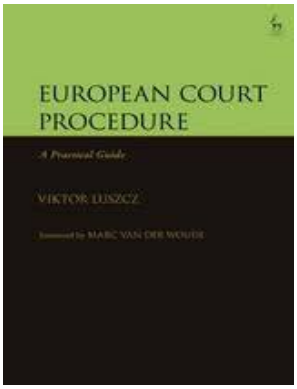
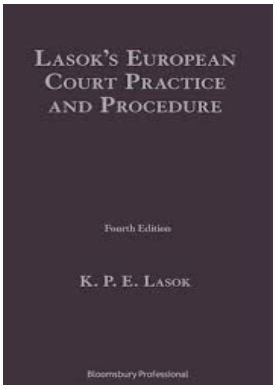
Practicalities

Read up on the law and procedure







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Oral Advocacy

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Oral Pleadings

- Advocacy
- Remember the role, function and limitations of the oral phase
- The written procedure is so important
- The role of oral pleadings in the Court's largely written procedure
- Engage the judges
- Be respectful

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Oral Pleadings

- Address the President and the Judge-Rapporteur
- Engage the judges in the case – this case *matters*
- Make the judges connect with the case
- Use imagery
- Avoid idioms or problematical language
- What will the judges take away from the hearing?

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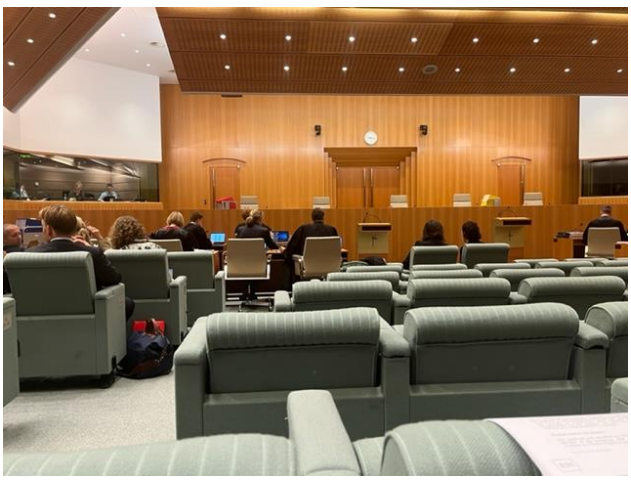
Oral Advocacy

Questions from the Bench should be seen as an opportunity – not a lonely, challenging and awful moment!

Oral Advocacy



Judgment

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Judgment

- Diary
- Notice
- Attendance?
- Getting the judgment?
- Preparation
- Implications

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Conclusions

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Conclusions

- Know the key elements
- Keep it short and simple
- Will the judges remember what you say?
- Have you made you point?
- Assume that the proceedings have closed – is there anything else?
- Lawyers have three great arguments: make this the best of all…
- Do justice, do right and do it right!

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Know the…

- The plea / type of action being taken
- Administration
- Court
- Facts
- Law
- Judges
- Arguments and Counter-Arguments – Advocacy
- Practicalities…

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Practical advice for lawyers on how to bring an action

Litigating European Union Law:
Seminar for Lawyers in Private Practice

Dr Vincent Power SC, Partner, A&L Goodbody

Academy of European Law, Trier
9 November 2022

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Case study

Litigating European Union Law

BASIC TRAINING FOR LAWYERS IN PRIVATE PRACTICE

By

Fabrice Picod

Professor at the University of Paris 2 Panthéon-Assas

Jean Monnet Chair

Director of the European Law Centre

The company Lever, established in Düsseldorf as a company under German law, is active in the fruit import business. The apples it imported from Chile were subject to a countervailing duty imposed by a European Commission regulation published in the Official Journal of the European Union on 2 July 2019.

The company Lever seeks on the one hand the **annulment of** the Commission's regulation and, on the other hand, **compensation for** the damage caused by the regulation due to several mistakes made by the Commission.

It argues that the conclusion, prior to the adoption of the Regulation, of a cooperation agreement between the Community and Chile had created a climate of confidence which made the adoption of unilateral restrictive measures by the EU institutions unlikely.

It also considers that the Commission's regulation did not respect the objectives set out in Article 39 TFEU, such as the respect of "reasonable prices" in supplies to consumers and the general principle of proportionality.

Finally, it argues that it is in a more unfavourable situation than importers of apples which are of the same quality but originate in other countries.

As a lawyer registered at the Milan Bar, you are required to advise the company on the following issues:

Questions:

1. Before which court should these two legal claims, i.e., the claim for annulment and the claim for compensation, be brought?
2. Is the assistance of a lawyer compulsory? Will you be entitled to bring the actions(s) and to plead before the competent court?
3. Will there be two separate actions for each of the claims or one action including both claims?
4. What will be the language of proceedings?
5. What is the deadline for lodging an action or actions?
6. Under what conditions will you be entitled to request the annulment of the Commission's Regulation?
7. What grounds of European Union law can you invoke?
8. What will be the conditions for obtaining compensation for the damage caused by the adoption of the European Commission's regulation?
9. If the court does not grant your claims, under what conditions can you challenge its decision?
10. Will you be able to request the suspension of the operation of the Commission’s Regulation?

Method:

Identify relevant legal issues.

Identify the provisions of the Treaties, the Protocol on the Statute of the Court of Justice of the European Union, and the Rules of Procedure of the competent court which are applicable to the legal issues raised.

Identify the relevant case law of the Court of Justice and the General Court of the European Union.

Propose legally sound and realistic solutions.

Model answers:

1. Insofar as the actions seek to challenge an act of an institution of the European Union, namely a regulation issued by the European Commission, it is the Court of Justice of the European Union which has jurisdiction by virtue of Article 19 TEU and, more specifically, Articles 263 and 268 TFEU, which refer respectively to actions for annulment of acts of the Commission and actions for damages caused by the institutions of the European Union.

   As the Court of Justice of the European Union is composed of several courts under Article 19 TEU, it is necessary to determine precisely which court has jurisdiction to hear these actions. The jurisdiction of the General Court is defined in Article 256 TFEU. The latter has jurisdiction to examine actions brought under Articles 263 and 268 TFEU, except for those actions which the Statute of the Court of Justice of the European Union reserves for the Court of Justice.

   Reference should be made to Article 51 of the Statute, which does not apply to actions under Article 268 TFEU, which means that only the General Court has jurisdiction at first instance for actions for damages. Article 51 of the Statute reserves to the Court of Justice jurisdiction over certain actions for annulment brought by the institutions of the Union and, in certain cases, by the Member States. Actions brought by companies, considered legal persons within the meaning of the TFEU, are never reserved for the Court of Justice, which means that they fall within the jurisdiction of the General Court at first instance. It follows that both actions for annulment and actions for damages fall within the jurisdiction of the General Court of the European Union.

2. The assistance of a lawyer is compulsory for all actions brought before the General Court and the Court of Justice by virtue of Article 19 of the Statute of the Court of Justice of the European Union. The third paragraph of that Article provides that "only a lawyer authorised to practise before a court of a Member State or of another State party to the Agreement on the European Economic Area may represent or assist a party before the Court of Justice", a provision which also applies to the General Court under Article 53 of the Statute. It is not necessary to be a member

of the Luxembourg Bar. As a lawyer registered at the Milan Bar, you are in principle, unless you are disbarred because of an ethics violation, entitled to plead before a court of a Member State and therefore entitled to bring the actions envisaged and to plead before the General Court of the European Union.

3. Since the action for annulment and the action for damages have different purposes, two separate actions should be brought. However, it is not impossible to make certain references in the action for damages to the action for annulment insofar as one of the substantive conditions imposed in the action for damages relates to the unlawfulness of the act which caused the damage. However, such a reference cannot fill a gap in the presentation of the pleas in law and arguments in the action for damages, otherwise the latter would be inadmissible.

4. The language of the case is defined by Articles 44 to 49 of the Rules of Procedure of the General Court. In direct actions, including actions for annulment and for damages, the language of the case shall, save where specifically defined and not applicable in the present case, be chosen by the applicant pursuant to Article 45 of the Rules of Procedure. The list of languages which may be chosen is set out in Article 44 of the Rules of Procedure. A lawyer registered at the Milan Bar may choose Italian, which is in principle his usual language, or German, which may be used as the firm was established in Düsseldorf, or any other language referred to in Article 44 of the Rules of Procedure.

5. Actions for annulment and actions for damages have distinct purposes and are subject to different conditions.

   Under Article 263(6) TFEU, actions for annulment must be brought within two months of the publication of the act, of its notification to the applicant or, failing that, of the day on which it came to the applicant's knowledge. As the Regulation in question was published in the OJEU, it is the publication which is decisive for the calculation of the time limit. Reference should be made to Articles 58 to 62 of the Rules of Procedure. Article 59 provides that where the contested act has been published in the OJEU, the time limit is to be calculated from the end of the

fourteenth day following the date of that publication. Since the date of publication is 2 July 2019, the period runs from the end of 16 July. To the period of two months must be added a flat-rate period for distance provided for in Article 60 of the Rules of Procedure, which makes a period of two months and ten days from 16 July. The end of the time limit for appeal, according to the method prescribed by Article 58 of the Rules of Procedure, is 26 September 2019. As this is not a Saturday, Sunday or public holiday, the expiry of the period will not be postponed to the end of the following day.

Actions for damages are not subject to such time limits. Articles 268 and 340(2) TFEU make no mention of time limits for actions. Reference should be made to Article 46 of the Statute of the Court of Justice of the European Union, which provides that actions against the European Union in matters of non-contractual liability shall be barred after five years from the occurrence of the event giving rise to them. It will then be necessary to determine precisely the event giving rise to the damage which could, in the case of damage attributable to a regulation, be the entry into force of the regulation. The limitation period may be interrupted either by the application made to the General Court or by an application that the victim may make to the competent institution, in this case the European Commission, in which case the application must be made within the two-month period provided for in Article 263 TFEU, plus the ten-day time limit for distance.

6. The conditions for admissibility of an action for annulment are laid down in Article 263 TFEU, the Statute of the Court of Justice of the European Union and the relevant articles of the Rules of Procedure of the General Court.

   In the case of an action brought by a company, the conditions laid down in the fourth paragraph of Article 263 TFEU must be complied with. Since the contested act is not addressed to the company, the company will have to establish a priori that it is directly and individually concerned by the regulation, unless the latter does not contain implementing measures, in which case it would be sufficient for it to establish that it is directly concerned by the regulation. A regulatory act is defined as any act of general application except for legislative acts (CJEU, Grand Chamber, 3 October 2013, Case C-583/11 P, *Inuit Tapiriit Kanatami and a. v European Parliament and Council*, para. 60).

To assess whether a regulatory act contains implementing measures, it is necessary to focus on the situation of the person invoking the right to bring an action under Article 263 TFEU *(*CJEU, Grand Chamber, 19 December 2013, Case C-274/12 P, *Telefónica v Commission*, para. 30*)*. It is therefore irrelevant to argue that the contested act involves enforcement measures in respect of other litigants *(*CJEU, Grand Chamber, 28 April 2015, Case C-456/13 P, *T & L Sugars and Sidul Açúcares v Commission*, para. 32). Furthermore, in the event of an application for partial annulment, only the implementing measures contained in the parts of the contested act must be taken into consideration (CJEU, 10 December 2015, Case C-553/14 P, *Kyocera Mita Europe v Commission*, para. 45).

It will thus be necessary to know whether the contested regulation contains implementing measures, which is decisive for the fulfilment of the admissibility requirements imposed, it being noted that the requirement of individuality is very difficult to meet.

It will also be necessary to ensure compliance with the conditions relating to the representation of a lawyer (see point 2 above), the time limit for bringing an action (see point 5 above), and the conditions relating to the content and form of the application (Articles 72 to 76 of the Rules of Procedure of the General Court), failing which the action may be declared inadmissible by the General Court by way of an order or a judgment.

7. The legal grounds are not listed in Article 263 TFEU, which merely refers in its second paragraph to lack of competence, infringement of essential procedural requirements, infringement of the Treaties or of any rule of law relating to their application and misuse of powers.

   The failure to comply with the objectives set out in Article 39 TFEU, such as the observance of "reasonable prices" in supplies to consumers, relates to a breach of the Treaties which can be invoked as such, insofar as regulations issued by the institutions of the European Union must comply with the obligations imposed by the EU and TFEU Treaties applicable to them. This is the case of a regulation concerning the import of apples, which, according to Annex I to the TFEU, which sets out the products that are subject to the provisions of Articles 39 to 44 of the TFEU relating to agriculture and fisheries, are referred to as 'fruit'.

Failure to comply with the general principle of proportionality is also a legal ground of appeal in an action for annulment insofar as the Union institutions, and in particular the Commission, are bound by this principle by virtue of established case law.

The principle of non-discrimination can also be invoked in an action for annulment insofar as the institutions of the Union must not treat identical or comparable situations differently.

The argument that the conclusion, prior to the adoption of the Regulation, of a cooperation agreement between the Community and Chile gave rise to a climate of confidence which made it unlikely that the institutions of the European Union would adopt unilateral restrictive measures relates to another general principle of law which protects the legitimate expectations of individuals. Such a general principle of law is, however, not likely to succeed in an action for annulment, which is an action of an objective nature. It may be invoked in an action of a subjective nature, such as an action for damages.

8. An action for damages caused by an EU institution is subject to a set of conditions defined by the case law of the Court of Justice of the European Union.

   In addition to the conditions of admissibility relating to the content and form of the application (Articles 72 to 76 of the Rules of Procedure of the General Court), the provision of legal representation (see No. 2 above) and the time-limit for lodging an appeal (see No. 5 above), the substantive conditions are very demanding.

   The substantive conditions correspond to the serious breach of Union law, the damage and the causal link, these three conditions being cumulative (CJEU, 18 April 2013, Case C-103/11 P, *Commission v Systran and Systran Luxembourg*, para. 60). If one of these conditions is missing, the action must be dismissed as a whole (Trib. EU, 18 September 2014, Case T-317/12, *Holcim (Romania) v Commission*, para. 86, confirmed by CJEU, 7 April 2016, Case C-556/14, *Holcim (Romania) v Commission*).

   Thus, it must be established that there has been a serious breach of a rule of law intended to confer rights on individuals (see e.g., CJEU, 19 April 2012, Case C-221/10 P, *Artegodan v. Commission*, para. 80). The principle of proportionality and

the principle of legitimate expectations meet these requirements according to established case law. The same applies to the principle of non-discrimination, which has been recognised as such in case law.

If the institution in question has only a considerably reduced or even non-existent margin of appreciation, the mere infringement of EU law may be sufficient to establish a sufficiently serious breach of EU law (ECJ, 4 July 2000, Case C-352/98 P, *Bergaderm and Goupil v. Commission*). If, on the other hand, it appears that the institution had a wide margin of discretion, it will be necessary to establish a clear and serious breach of the limits on its discretion *(ibid.)*, which can be established in certain cases (see e.g., General Court, 16 September 2013, Case T-333/10, *ATC et a. v Commission*, paras. 64-133). It would therefore be appropriate to study precisely the text of the adopted regulation and the texts on which its adoption was based in order to decide this question relating to the margin of appreciation within which the institution was operating.

The damage must be real and certain as well as assessable. It is up to the claimant to prove both the existence and the extent of the damage he invokes (ECJ, 16 July 2009, Case C-481/07 P, *SELEX Sistemi Integrati v Commission*, ECR 2009, p. I-127, para. 36).

Another condition for the Union to be liable is that the causal link between the harmful act and the damage claimed must be direct (ECJ, Grand Chamber, 16 July 2009, Case C-440/07 P, *Commission v Schneider Electric*, ECR 2009, p. I-6413, paras. 192 and 205). Where the institutions' contribution to the injury is too remote, the link must be considered insufficient (Trib. EU, 26 September 2014, Case T-91/12 and T-280/12, *Flying Holding and a. v Commission*, para. 118). It is up to the applicant to prove the existence of such a causal link *(*Trib. EU, 25 November 2014, Case T-384/11, *Safa Nicu Sepahan v Council*, para. 71, confirmed by CJEU, 30 May 2017, Case C-45/15, *Safa Nicu Sepahan v Council*).

The claimant must therefore satisfy these three conditions to succeed in his claim for compensation.

9. If the General Court does not grant your claims, a challenge to the judgments or orders of the General Court in both the action for annulment and the action for damages may be considered in the form of an appeal to the Court of Justice, pursuant to the second subparagraph of Article 266(1) TFEU.

   Article 56 of the Statute of the Court of Justice of the European Union provides that an appeal may be brought against decisions of the General Court which bring proceedings to an end, as well as against decisions disposing of the substance of the case in part and decisions disposing of a procedural issue concerning a plea of lack of competence or inadmissibility. Such an appeal may be brought by any party which has been unsuccessful

in whole or in part in its submissions, but also by interveners other than Member States and the institutions of the Union, provided that the decision directly affects them, it being noted that Member States and the institutions of the Union are not subject to this condition, which means that they may bring an appeal without restriction. Such an appeal may even be lodged, except for civil service cases, by Member States and institutions of the European Union which have not intervened in the dispute before the General Court, which in the latter case corresponds as it were to an appeal in the interests of the law.

Under Article 56(1) of the Statute of the Court of Justice of the European Union, an appeal must be lodged within two months of the notification of the contested decision of the General Court, to which must be added a flat-rate period of 10 days for distance.

The appeal is limited to questions of law (Statute of the Court of Justice, Art. 58(1)) and so excludes disputes concerning the assessment of facts by the General Court. The Court of Justice has no jurisdiction to examine the evidence that the General Court has accepted, except in cases of misrepresentation (ECJ, 19 March 2009, Case C-510/06 P, *Archer Daniels Midland v Commission*, ECR 2009, p. I-1843, para. 105. - CJEU, 4 June 2015, Case C-399/13 P, *Stichting Corporate Europe Observatory v Commission*, para. 26), which would have to be evident from the documents in the file to be examined on appeal (CJEU, 29 October 2015, Case C-78/14 P, *Commission v ANKO*, para. 54).

It will be necessary to put forward pleas in law which relate to one of the three categories of pleas in law provided for (Statute of the Court of Justice, Art. 58, para. 1), it being observed that the Court of Justice is not very formalistic as regards this classification: lack of jurisdiction of the General Court, procedural irregularities before the General Court which adversely affect the interests of the appellant, which includes the reasoning of the judgments of the General Court (CJEU, 19 Sept. 2019, Case C-358/18 P, *Poland v Commission*, paras. 74-77), and infringements of Union law.

10. Since appeals against acts of the institutions of the European Union do not have suspensive effect, it may be worthwhile for the applicant to request the suspension of the operation, as provided for in Article 278 TFEU. The granting of such a measure, which in principle falls within the competence of the president of the court handling the case, in this case the President of the General Court, is part of an interim procedure which is subject to precise and demanding conditions.

    The application for suspension is subject to the classic conditions of admissibility relating to the content and form of the application and the provision of legal representation. The application is only admissible if the applicant has challenged the regulation whose

suspension is sought before the General Court of the European Union (Art. 156 EU Court Regulation). The applicant may not, as a rule, formulate submissions in a broader manner than that in which it formulates submissions in the main case (Trib. EU, Order, 31 January 2020, Case T-627/19 R, *Schindler et a. v Commission*, para. 25). The application for interim measures will be declared inadmissible when it is grafted onto a main action which appears to be manifestly inadmissible (EU General Court, 12 February 2020, Case T-627/19 R, *Schindler et a. v. Commission*, para. 25). EU, Order, 12 February 2020, Case T-326/19 R, *Gerber v European Parliament and Council*, para. 38). The main application must have been lodged beforehand or at the same time, otherwise the application for interim measures, which remains ancillary to the main application, is inadmissible.

Several cumulative conditions are imposed for the granting of such interim measures. It must be established that there is a prima facie case for granting them in fact and in law (*fumus boni juris*); the measures must be urgent in the sense that it is necessary, to avoid serious and irreparable damage to the applicant's interests, that they be enacted and take effect before the main proceedings are decided. The court hearing the application for interim relief shall also, where appropriate, balance the interests at stake. The court hearing the application for interim relief has a broad discretion and is free to determine, in the light of the particular circumstances of the case, the manner in which these various conditions are to be verified and the order in which this examination is to be carried out (ECJ, order. 3 April 2007, Case C-459/06 P(R), *Vischim v Commission*, para. 25).

Under the *fumus boni juris,* it *must* be established that the pleas in law are not completely unfounded. This requirement is met if there is a significant legal controversy whose solution is not immediately obvious, so that the action is not prima facie unfounded (Trib. EU, Order, 15 October 2015, Case T-482/15 R, *Ahrend Furniture v Commission*, para. 29), which could be the case here.

For the purposes of urgency, it must be established that there is a risk of serious and irreparable damage to the applicant's interests, irrespective of other factors (ECJ, 13 January 2009, Order C-512/07 P(R) and C-15/08 P(R), *Occhetto and PE v Donnici*, ECR 2009, p. I-1, para. 58). It is up to the party claiming such damage to establish its existence. In the absence of absolute certainty that the damage will occur, the claimant remains obliged to prove the facts which are supposed to give rise to the prospect of such damage (ECJ, judgment of 20 June 2003, case C-156/03 P-R, *Laboratoires Servier v Commission*, ECR 2003, p. I-6575, para. 36). Purely pecuniary damage cannot, in principle, be regarded as irreparable or even difficult to repair, as long as it can be the subject of subsequent financial compensation (ECJ, Order of 24 March 2009, Case C-60/08 P(R), *Cheminova and others v Commission*, ECR 2009, p. I-43, para. 63).

All in all, the chances of obtaining a suspension of the operation of an EU regulation, which by its nature is applicable to multiple economic operators, are very low.

References for a preliminary ruling:

Practical advice for lawyers

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Agenda

- Introduction to the topic
- How to convince a national judge to make a preliminary reference to the CJEU?
- The urgent preliminary ruling procedure (PPU)
- The written observations
- The oral phase
- Admissibility issues

2

Introduction to the topic – Rules of the ECJ

1.	Provisions of the Treaties (in particular Article 267 TFEU)	
2.	Statute of the Court of Justice of the European Union, consolidated version	Online
3.	REGULATION (EU, Euratom) 2015/2422 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union	Online

3

Introduction to the topic – Rules of the ECJ

4.	Rules of Procedure of the Court of Justice	Online
5.	Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings	Online
6.	Report on the use of the urgent preliminary ruling procedure by the Court of Justice	Online
7.	Advice to counsel appearing before the Court	Online

4

Introduction to the topic –
Main proceedings of the ECJ – comparison

DIRECT ACTION: ACTION FOR ANNULMENT, ARTICLE 263(4) TFEU

- Complaint directly to the General Court
- Appeal to the ECJ

INDIRECT ACTION: REFERENCE FOR A PRELIMINARY RULING, ARTICLE 267 TFEU

- Bringing an action before a national court (i.e. challenging a national measure implementing an EU act)
- The national court must – in certain circumstances - refer the validity of the act to the Court of Justice if it has doubts as to the validity of the act
- If the Court of Justice declares the Union act invalid: the national court applies the decision to the facts

5

Introduction to the topic –
Main proceedings of the ECJ – comparison

DIRECT ACTION: ACTION FOR ANNULMENT, ARTICLE 263(4) TFEU

- Application for annulment of a legal act of a Union institution, body, office or agency, in particular:
  - Regulations
  - Directives
  - Decisions
- The General court is responsible for complaints from individuals

INDIRECT ACTION: REFERENCE FOR A PRELIMINARY RULING, ARTICLE 267 TFEU

- National judges can and sometimes have to turn to the Court of Justice:
  - To request the clarification of an interpretation point of Union law or
  - To check the validity of a Union act
- Ensures effective and consistent application of Union law

6

Introduction to the topic –
The reference for a preliminary ruling

§

Article 267 TFEU, §1:

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

(a) the interpretation of the Treaties;

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

Distinction between preliminary rulings regarding:

- Interpretation of the Treaties and secondary EU law
- Validity of secondary EU law

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Introduction to the topic –
The reference for a preliminary ruling

§

Article 267 TFEU, §§2-3:

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

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

If

8

Introduction to the topic –
The reference for a preliminary ruling

§

Courts of last instance must produce unless (C-283/81):

- The question asked is not relevant to the decision
- The relevant provision of Community law has already been the subject of an interpretation by the Court of Justice ("acte éclairé doctrine")
- The correct application of Community law is so obvious that there is no room for a reasonable doubt ("acte clair" doctrine)

9

How do you convince a national judge to request a preliminary ruling from the ECJ? - Introduction

The role of a lawyer before the national court:

- Obtaining a national court's decision to refer to the Court of Justice: persuading the judge of the necessity of the question referred
- Content and scope of a referral: providing the national judge with all the elements necessary to obtain a relevant referral to resolve the dispute

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How do you convince a national judge to request a preliminary ruling from the ECJ? - Arguments

The decision on a referral is made (alone) by the national judge

However, it is up to the lawyer to inform the national judge of the need for submission by informing the judge, inter alia, as to the:

- Scope of EU law
- Relevance of the referral to the case
- Necessity of the question referred
- Peculiarities and content of the referral (national judges often do not know much about it!)

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How do you convince a national judge to request a preliminary ruling from the ECJ? - Arguments

Other important arguments:

- No relevant case law
- The national judge is a "Supreme Court" and must therefore refer in principle
- The judge must justify a decision according to Article 6 ECHR, Article 267 TFEU and/or national law
- Any unlawful refusal of a referral request may a) lead to claims for damages against the Member State for violation of EU law (C-160/14); and/or to infringement proceedings (C-416/17)

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The urgent preliminary ruling procedure (PPU)

Legal basis: Article 107 Rules of Procedure of the European Court of Justice and Article 23(a) Statute of the Court of Justice of the European Union

Scope and relevance: Used under Title V of Part III of the TFEU where there is time pressure in the resolution of a case, e.g. where a child's welfare is affected by the decision

Who initiates? The national court must request an urgent procedure and clearly identify the reasons why it is necessary

Who decides? The ECJ decides whether the urgent procedure is warranted in a particular case

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The urgent preliminary ruling procedure (PPU)

What is the effect?

- Shorter time limit for the written submissions to the Court
- There may be restrictions as to the parties' and interested persons' written submissions
- In cases of extreme urgency, the written stage of the procedure may be omitted
- The case may be determined without a submission from the Advocate General

Be aware: The ECJ has been prepared to refuse applications for an urgent preliminary reference where the case for urgency is not demonstrated. The reasons for urgency must therefore be demonstrated clearly for an application by the national court to be successful

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The pleadings and written statements

Basis: Practice Directions to parties concerning cases brought before the Court

Who? Usually lawyers

In which language? Usually the language of the national proceedings (Art. 37 § 3 Rules of Procedure)

Until when? A period of two months (plus an additional period of ten days on account of absence) from the date on which the request for a preliminary ruling was served

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The pleadings and written statements

Anonymity? Article 95 RoP:

1) Where anonymity has been granted by the referring court, the Court of Justice shall maintain that anonymity in the proceedings before it
2) The Court of Justice may also, at the request of the referring court, at the request of a party to the main dispute or of its own motion, render anonymous one or more persons or entities involved in the proceedings

Content and format of the pleadings?

- No special form requirements as no contentious procedure
- But should not exceed 20 pages

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The oral hearing

Basis: Advice to counsel appearing before the Court

Purpose? Submissions are intended to enable the parties or interested parties to respond to any requests for concentration of oral submissions or to answer questions put to them by the Court before the hearing

Speaking time? Typically 15 minutes (can be extended)

Number of speakers? Usually one person per party

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Admissibility issues - Overview/Summary

1. Pending proceedings: The proceedings must (still) be pending. At the national judge's discretion to decide at what stage of the proceedings such a request should be made.

2. The court or tribunal: Pursuant to Article 267 (2) TFEU, only a "court or tribunal" of a Member State has the right to make a reference for preliminary ruling.

3. Reference for a ruling on interpretation or validity: the CJEU rules on:
   a) The interpretation of the Treaties: Article 267 (1) Sentence 1 (a) and
   b) TFEU the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union: Article 267 (1) Sentence 1 (b) TFEU.

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Admissibility issues - Overview/Summary

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

5. Relevance of the question raised for the reference: Must be relevant for the decision. A question is not relevant if the answer to that question can in no way affect the outcome of the case.

6. Discretion or duty to make a reference for a preliminary ruling: See previous slides.

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Admissibility issues - Overview/Summary

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

   a) Acte clair: A national court could avoid a disagreeable reference for a preliminary ruling by invoking that there were no reasonable doubts concerning the correct interpretation of the applicable Union law. In the "C.I.L.F.I.T." decision (C-283/81), the CJEU therefore introduced strict criteria.

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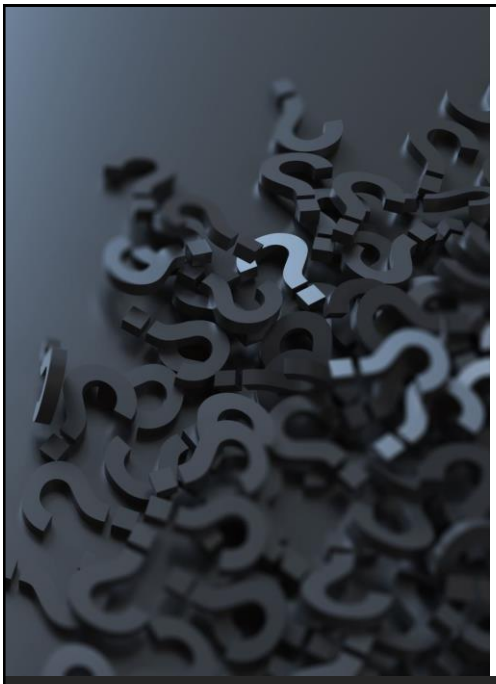

Questions?

THANK YOU FOR YOUR ATTENTION!

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ERA –CASE STUDY

In January 1999, Pharmatica, the manufacturer of an originator medicine, registered a patent for the active ingredient of a princeps product marketed in Mosia (fictional UE Member State).

In December 2000, the period of 'data exclusivity' in relation to that active ingredient expired. Pharmatica faced competition from manufacturers of generics, including Generica and Genpharma, who were seeking a marketing authorisation in Mosia for their generic version of that drug. Pharmatica entered into two pay-for-delay agreements with these generic manufacturers.

On 12 February 2016, the Market and Competition Commission ("MCC") issued a decision in which it imposed financial penalties of a total of EUR 44.99 million on these undertakings on the grounds that:

- Pharmatica held a dominant position in the market for that medicine and had abused that position, contrary to the prohibition in Chapter II of Part I of the Competition Act 1998 by entering into agreements;
- Pharmatica and Generica had infringed the prohibition in Chapter I of Part I of the Competition Act 1998 and, after 1 May 2004, Article 101 TFEU, by entering into the pay-for-delay agreements; and
- Pharmatica and Genpharma had infringed the prohibition in Chapter I of Part I of the Competition Act 1998 by entering into agreement.

The companies on which penalties were imposed brought an appeal against that decision before the competent Court of Appeal. The question arises as to whether a request for a preliminary reference could be submitted.

Questions:

1. A draft question to be referred was submitted to the MCC which refused to make a reference to the Court of Justice. On what grounds? If you were to represent these companies, would you recommend submitting the same question on appeal ?
2. Assuming the question then goes to the Supreme Court. Can you inform your client that you are very confident that the Court will refer the following question to the Court of Justice for a preliminary ruling?

   "For the purpose of Article 101(1) TFEU, are the holder of a patent for a pharmaceutical drug and a generic company seeking to enter the market with a generic version of the drug to be regarded as potential competitors when the parties are in bona fide dispute as to whether the patent is valid and/or the generic product infringes the patent?" The concept of "*potential competitors*" is the subject of established EU case-law, the constituent elements of the concept having been identified by the Court of Justice. However, the concept has never been applied to

the pharmaceutical sector by the Court of Justice, although it has been by national courts. The French and German courts have different interpretations in this respect.

3. Could the reference for a preliminary ruling include a question regarding the calculation of the penalties imposed on the basis of Chapter I of Part I of the national Competition Act?
4. Your client wants the matter to be quickly settled. Can you think of any way to expedite the proceedings?

Relevant applicable Law:

- *National Competition Act 1998*

Section 2, in Chapter I of Part I:

Agreements … preventing, restricting or distorting competition

(1) agreements between undertakings, decisions by associations of undertakings or concerted practices which:

(a) may affect trade within Mosia, and

(b) have as their object or effect the prevention, restriction or distortion of competition Mosia,

are prohibited unless they are exempt in accordance with the provisions of this part.

(2) Subsection 1 applies, in particular, to agreements, decisions or practices which: …

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply …

Section 18, in Chapter II of Part I:

Abuse of dominant position

(1) …, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within Mosia.

(2) Conduct may, in particular, constitute such an abuse if it consists in: …

(b) limiting production, markets or technical development to the prejudice of consumers;

Section 60 in Chapter V of Part I:

Principles to be applied in determining questions

(1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within Mosia are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law in relation to competition within the European Union.

(2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between:

(a) the principles applied, and decision reached, by the court in determining that question; and

(b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in EU law.

(3) The court must, in addition, have regard to any relevant decision or statement of the Commission.

- *Law 3/2013 establishing the Market and Competition Commission ("MCC") of 4 June 2013*

Article 1(2): The aim of the [MCC] is to guarantee, preserve and promote the proper functioning, transparency and existence of effective competition on all markets and in all production sectors for the benefit of consumers and users.

Article 2(1): The [MCC] shall have independent legal personality and full capacity to act in accordance with public and private law, and when carrying out its functions and performing its duties, it shall operate with organisational and functional autonomy and complete independence from the Government, public administrations and market stakeholders. In addition, it shall be subject to parliamentary and judicial scrutiny.

Article 3: 1. The [MCC], when carrying out its functions and performing its duties, shall act independently of any business or commercial interest.

2. When fulfilling its duties under the legislation, and without prejudice to collaboration with other bodies or the managerial powers of the Government's general policy exercised through its legislative powers, neither the staff nor the members of the bodies of the [MCC] shall seek or accept instructions from any public or private entity.

Article 15: 1. The members of the Board [of the MCC], including the President and the Vice-President, shall be appointed by the Government by decree on a proposal from the Minister for Economic Affairs and Competitiveness, from among individuals of recognised authority and professional expertise in the field of activity of the [MCC] following an examination of the person proposed for the post before the relevant committee of the Congress of Deputies. The Congress, through the relevant committee acting by an absolute majority, may veto the appointment of the proposed candidate within one calendar month from receipt of the relevant communication. In the absence of any express declaration from the Congress once that deadline has expired, the relevant appointments shall be deemed to be accepted.

2. The term of office of the members of the Board shall be six years without the possibility of renewal. The members of the Board shall be renewed on a partial basis every two years so that each member of the Board shall not remain in his or her post for more than six years.

Article 17(1): The plenary session of the Board shall be comprised of the all the members of the Board. It shall be chaired by the President of the [MCA]. If the President is absent or ill or the post is vacant, he or she shall be replaced by the Vice-President or, failing that, by the most senior board member or, where members have the same length of service, by the eldest.

Article 19(1):The role of the President of the [MCC] shall be to: … (f) promote the activities of the [MCA] and the fulfilment of the functions entrusted to it; in particular, to propose the annual or multi-annual action plans which will define its objectives and priorities;

(g) manage the staff of the [MCC] in accordance with the powers conferred on it by the specific legislation;

(h) manage, coordinate, evaluate and supervise the various units of the [MCC], without prejudice to the functions of the Board; in particular coordinate, with the assistance of the Secretary of the Board, the proper functioning of the units of the [MCC].

Article 20: The Board of the [MCC] shall be the decision-making body for the functions of adjudication, consultation and the promotion of competition and arbitration and of the resolution of conflicts provided for in the present law. In particular, it shall be the body responsible for: … 13. appointing and dismissing management staff on a proposal from the President of the Board.

Article 25, entitled 'Management bodies' provides in paragraph 1 that the MCA has four investigation directorates, including the Competition Directorate. That directorate is responsible for examining cases relating to the MCA's functions of preserving and promoting effective competition on all markets and in all sectors.

Article 29, relating to the power to impose penalties:

1. The [MCA] shall exercise the power to carry out inspections and to impose penalties in accordance with the provisions of Chapter II of Title IV of the Law on the protection of competition, Title VI of General Law 7/2010 on audiovisual communication of 31 March 2010, Title VIII of General Law 32/2003 on telecommunications of 3 November 2003, Title X of Law 54/1997 on the electric sector of 27 November 1997, Title VI of Law 34/1998 on the hydrocarbon sector of 7 October 1998, Title VII of Law 43/2010 on the universal postal service, users' rights and the postal market of 30 December 2010 and Title VII of Law 39/2003 on the railway sector of 17 November 2003.

2. For the purposes of exercising the power to impose penalties, there shall be the necessary operational separation between the investigation phase, which falls within the remit of the staff of the directorate responsible for the matter, and the decision-making phase, which falls within the remit of the Board.

3. The procedure for exercising the power to impose penalties shall be governed by the provisions of the present law, the laws referred to in paragraph 1 and, for any matter not covered by the above legislation, Law 30/1992 on the rules governing public authorities and the common administrative procedure of 26 November and its implementing legislation. In particular, the penalty proceedings in relation to the protection of competition shall be governed by the specific provisions of Law 15/2007 of 3 July 2007.

4. The decision shall put an end to the administrative procedure, and an action may be brought against it before the administrative courts.

Section 1, in Chapter I of Part II:

Article 1: Decisions taken by the MCC are subject to appeal before the competent Court of Appeal in accordance with the rules established in the Code of Civil Procedure.

- *Statute of the MCC of 30 August 2013*

Article 4 - Institutional coordination and cooperation: Where it is apparent from European Union or national legislation, the [MCC] shall be considered to be: (a) the national competition authority.

Article 15(2): The President of the [MCC], who is also President of the plenary session of its Board and of the Competition Division, shall exercise the functions of managing and representing [the MCC] in accordance with Article 19 of the [Law establishing the MCC]. When exercising those functions, the President shall be responsible for: … (b) proposing to the plenary session of the [MCC] the appointment and dismissal of the Secretary of the Board, the investigation directors and the other management staff of the [MCC].

- *Code of Civil Procedure*

Article 555: Decision of the Court of Appeal on appeal from decision of the MCC is subject to review by the Supreme Court, whose decision has final authority.

- *EU Law - Treaty on the Functioning of the European Union*

Article 101: 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102: Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

ERA – CASE STUDY – ANSWERS

1. A draft question to be referred was submitted to the MCC which refused to make a reference to the Court of Justice. On what grounds? If you were to represent these companies, would you recommend submitting the same question on appeal?

Answer: requests for a preliminary ruling from competition authorities are not admissible because a competition authority is not a court or a tribunal within the meaning of Article 267 TFEU.

- Article 267 TFEU : "*The Court of Justice of the European Union shall have jurisdiction to give preliminary […] where such a question is raised* before any court or tribunal of a Member State".
- Factors to consider to determine whether a body is a court or tribunal: whether the body was established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedures are *inter partes*, whether it applies rules of law, and whether it is independent (Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 8 November 2019, para. 4).
- Recent case-law concludes that a competition authority is not a court or tribunal within the meaning of Article 267 TFEU (CJEU, 16 September 2020, *Anesco*, C-462/19). Main reasons:
  1. A national court may refer a question only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. WHEREAS: decisions of competition authorities are administrative decisions, and not decisions of a judicial nature. (CJEU, *Anesco*, C-462/19, para. 41).
  2. Only an authority acting as a third party in relation to the authority which adopted the decision forming the subject matter of the proceedings can refer a question. WHEREAS: The President of the Competition Authority cannot be regarded as a "third party" as:

     "President of the CNMC [i.e., the Spanish Competition Authority] *chairs the Board of the CNMC which adopts decisions on behalf of the CNMC and that, in that respect, it exercises the functions of managing the staff of the CNMC and manages, coordinates, evaluates and supervises all the units of the CNMC, including the Competition Directorate which drew up the proposal for a decision that prompted the present request for a preliminary ruling. In addition, it is apparent from the first paragraph of Article 20, point 13, of the Law establishing the Competition Authority and Article 15(2)(b) of the Statute of the CNMC that the President of the Competition Authority is responsible for proposing to the Board of the Competition Authority the appointment and dismissal of management staff, which includes the management staff of the Competition Directorate […]"* (CJEU, *Anesco*, C-462/19, para. 38).
- Courts of Appeal will generally be considered as courts or tribunals under Article 267 TFEU.

2. Assuming the question then goes to the Supreme Court. Can you inform your client that you are very confident that the Court will refer the following question to the Court of Justice for a preliminary ruling? "*For the purpose of Article 101(1) TFEU, are the holder of a patent for a pharmaceutical drug and a generic company seeking to enter the market with a generic version of the drug to be regarded as potential competitors when the parties are in bona fide dispute as to whether the patent is valid and/or the generic product infringes the patent?*". The concept of "potential competitors" is the subject of established EU case law, the constituent elements of the concept having been identified by the Court of Justice. However, the concept has never been applied to the pharmaceutical sector by the Court of Justice, although it has been by national courts. The French and German courts have different interpretations in this respect.

Answer: Given the absence of judicial remedy against its decision, the Supreme Court has a duty to refer a question to the Court of Justice.

Various steps of the reasoning:

(1) Are we dealing with a reference on interpretation or on determination of validity of EU law?

- A request for a preliminary ruling must concern the interpretation or validity of EU law and not of national law or issues of fact (Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings of 8 November 2019, para. 8).

➔ In the case at hand, the question is on the interpretation of Article 101(1) TFEU.

(2) Under national law, is there a judicial remedy against the decisions adopted by the court or tribunal before which the question was raised?

(a) If a judicial remedy exists: reference is not compulsory

- Article 267 TFEU, para. 2: "*Where such a question is raised before any court or tribunal of a Member State, that court or tribunal* ***may****, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling".*
- Information note on references from national courts for a preliminary ruling of 28 May 2011, para. 13: *"[…] court or tribunal against whose decisions there is a judicial remedy* ***may****, in particular when it considers that sufficient guidance is given by the case-law of the Court of Justice,* ***itself decide*** *on the correct interpretation of European Union law and its application to the facts […]".*
- Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings of 8 November 2019, para. 12: "*[…]court or tribunal which is in fact in* ***the best position to decide*** *at what stage of the national proceedings such a request should be made*".

(b) In the absence of a judicial remedy: reference is mandatory

- Article 267 TFEU, para. 3: *"Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal* ***shall bring*** *the matter before the Court".*
- Information note on references from national courts for a preliminary ruling of 28 May 2011, para. 12: "*courts or tribunals against whose decisions there is no judicial remedy under national law* ***must, as a rule,*** *refer such a question to the Court […]*".

➔ Article 555 Code of the Civil Procedure provides that the Supreme Court has final authority. In the absence of judicial remedy, reference is therefore mandatory. On the contrary, a reference would not be compulsory had the question been raised before the Court of Appeal.

(3) In the absence of judicial remedy, do exceptions to the duty to refer apply?

- A*cte clair* doctrine: obvious legal provisions do not need to be interpreted. Exception interpreted very narrowly as it requires the correct application of EU law to be so obvious as to leave no scope for any reasonable doubt (CJEU, *Cilfit*, C-283/81, para. 16),
- *Acte éclairé* doctrine: the question raised is materially identical to a question which has already been the subject of a preliminary ruling in a similar case.

➔ Here, we are told that the concept of "potential competitor" has never been applied to the pharmaceutical sector by the Court of Justice and the French and German courts have different interpretations in this respect. Thus, none of the exceptions should apply.

(4) Are there additional elements the client should be aware of?

- The Court of Justice can refuse to rule on a question referred by a national court for instance because (1) it is general or hypothetical , (2) it bears no relation to the actual facts of the main action, or (3) the Court does not have before it the factual or legal materials necessary to give a useful answer to the questions submitted to it (CJEU, *Gauweiler and Others*, C-62/14, 16 June 2015 para. 25).
- The Court of Justice may as well in any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order if the question is identical to a question on which it has already ruled or if the answer may be clearly deduced from existing case-law (Rules of Procedure of the Court of Justice of 25 September 2012, Article 99).

3. Could the reference for a preliminary ruling include a question regarding the calculation of the penalties imposed on the basis of Chapter I of Part I of the National Competition Act?

Answer: a reference for a preliminary ruling could include a question regarding the calculation of penalties imposed on the basis of Chapter I of Part I of the National Competition Act.

- In principle, a reference must concern the interpretation of EU law, not national law nor issues of fact raised in the main proceedings (Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings of 8 November 2019, para. 8).
- However, where, in regulating purely internal situations, national legislation adopts the same solutions as those adopted in EU law in order, for example, to avoid any distortion of competition, or to ensure that a single procedure is applied in comparable situations, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted consistently, irrespective of the circumstances in which they are to be applied (CJEU, 30 january 2020, Case C-307/18, *Generics (UK) Ltd, GlaxoSmithKline plc, Xellia Pharmaceuticals ApS, Alpharma LLC, formerly Zoetis Products LLC, Actavis UK Ltd, Merck KGaA v. Competition and Markets Authority*, para 27).

➔ National Competition Act 1998, Section 60 in Chapter V of Part I requires that provisions of Part I must be applied in a way that is compatible with the corresponding provisions of EU law.

➔ The calculation of penalties are imposed on the basis of Chapter I of Part I of the National Competition Act. Therefore, calculation of penalties under national law should lead to same solutions as if they were determined under EU law.

➔ Consequently, a reference for a preliminary ruling could include a question regarding the calculation of penalties imposed on the basis of Chapter I of Part I of the National Competition Act.

4. Your client wants the matter to be quickly settled. Can you think of any way to expedite the proceedings?

Answer: it seems unlikely that the case at hand would benefit from the expedited procedure.

(1) Urgent procedure ?

- No. Urgent preliminary ruling procedure only concerns area of freedom security and justice (Rules of Procedure of the Court of Justice of 25 September 2012, Article 107; Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings of 8 November 2019, para 35).

(2) Expedited procedure?

- At the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure (Rules of Procedure of the Court of Justice of 25 September 2012, Article 105; Statute of the Court of Justice of the European Union, Article 23a).
- Reasons for the application of expedited procedures include (i) the nature and sensitivity of the area of interpretation covered by the reference for a preliminary ruling, (ii) the particular severity of the legal uncertainty to which the reference for a preliminary ruling relates, (iii) the risk of interference with fundamental rights, (iv) the risk of serious environmental damage (CJEU, Urgent preliminary ruling procedure and expedited procedure, Fact Sheets of April 2019).
- However, the fact that there may be important economic issues at stake or that the referring court or tribunal is obliged to rule expeditiously does not in itself constitute exceptional circumstances that would justify applying the expedited procedure (Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 8 November 2019, para 34).

➔ Those reasons should be discussed but it seems unlikely that the case at hand would benefit from the expedited procedure. Note that reference for a preliminary ruling suspends national proceedings until the Court of Justice has ruled on the case. Inform your client that the average length of proceedings before the Court of Justice exceeds 15 months.